

rule would have an insignificant economic impact on a few small entities. The proposed rule would likely affect fewer than 100 of the 2,800 community residential care facilities approved for referral of veterans under the regulations. Also, the additional costs for compliance with the proposed rule would constitute an inconsequential amount of the operational costs of such facilities. Accordingly, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care.

### List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Incorporation by reference, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: September 19, 2008.

**James B. Peake,**  
*Secretary of Veterans Affairs.*

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 17 as set forth below:

### PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

**Authority:** 38 U.S.C. 501, 1721, and as stated in specific sections.

### § 17.62 [Amended]

2. Amend § 17.62 by removing paragraph (b) and redesignating paragraphs (c) through (g) as paragraphs (b) through (f), respectively.

3. Amend § 17.63 by:

a. In paragraph (a)(2), removing “Office of Regulations Management (02D), Room 1154,” and adding, in its place, “Office of Regulation Policy and Management (02REG), Room 1068,” and by revising the first sentence.

b. Revising paragraph (a)(3).

c. Removing and reserving paragraph (b).

d. In paragraph (g), removing “specified in the statement of needed care”.

e. In paragraph (i), removing paragraph (i)(2)(i) and redesignating paragraphs (i)(2)(ii) and (i)(2)(iii) as paragraphs (i)(2)(i) and (i)(2)(ii), respectively.

The revisions read as follows:

### § 17.63 Approval of community residential care facilities.

\* \* \* \* \*

(a) \* \* \*

(2) Meet the requirements of chapters 1–11, 32–33, and 43 and Appendix A of the NFPA 101, the National Fire Protection Association’s Life Safety Code (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). \* \* \*

(3) Have safe and functioning systems for heating and/or cooling, as needed (a heating or cooling system is deemed to be needed if VA determines that, in the county, parish, or similar jurisdiction where the facility is located, a majority of community residential care facilities or other extended care facilities have one), hot and cold water, electricity, plumbing, sewage, cooking, laundry, artificial and natural light, and ventilation.

\* \* \* \* \*

### § 17.64 [Removed]

4. Remove and reserve § 17.64.

5. Revise § 17.65 to read as follows:

### § 17.65 Approvals and provisional approvals of community residential care facilities.

(a) An approval of a facility meeting all of the standards in 38 CFR 17.63 based on the report of a VA inspection and any findings of necessary interim monitoring of the facility shall be for a 12-month period.

(b) The approving official, based on the report of a VA inspection and on any findings of necessary interim monitoring of the facility, may provide a community residential care facility with a provisional approval if that

facility does not meet one or more of the standards in 38 CFR 17.63, provided that the deficiencies do not jeopardize the health or safety of the residents, and that the facility management and VA agree to a plan of correcting the deficiencies in a specified amount of time. A provisional approval shall not be for more than 12 months and shall not be for more time than VA determines is reasonable for correcting the specific deficiencies.

(c) An approval may be changed to a provisional approval or terminated under the provisions of §§ 17.66 through 17.71 because of a subsequent failure to meet the standards of § 17.63 and a provisional approval may be terminated under the provisions of §§ 17.66 through 17.71 based on failure to meet the plan of correction or failure otherwise to meet the standards of § 17.63.

(Authority: 38 U.S.C. 1730.)

[FR Doc. E8–28122 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R06–OAR–2007–0209; FRL–8745–5]

### Approval and Promulgation of Implementation Plans; Texas; Revisions to Chapters 39, 55, and 116 Which Relate to Public Participation on Permits for New and Modified Sources

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation on air permits for new and modified sources. With noted exceptions, this proposed limited approval and limited disapproval affects portions of SIP revisions submitted by Texas on December 15, 1995; July 22, 1998; and the SIP revisions submitted October 25, 1999. EPA is taking comments on this proposal and plans to follow with a final action.

**DATES:** Any comments must arrive by January 26, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R06–OAR–2007–0209, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

• *U.S. EPA Region 6 "Contact Us" Web site:* <http://epa.gov/region6/r6coment.htm>. Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

• *E-mail:* Mr. Stanley M. Spruiell at [spruiell.stanley@epa.gov](mailto:spruiell.stanley@epa.gov).

• *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD-R), at fax number 214-665-7263.

• *Mail:* Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

• *Hand or Courier Delivery:* Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2007-0209. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is

not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals are also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7212; fax number 214-665-7263; e-mail address [spruiell.stanley@epa.gov](mailto:spruiell.stanley@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document, the following terms have the meanings described below:

- "We," "us," and "our" refer to EPA.
- "NSR" means new source review.
- "PSD" means prevention of significant deterioration of air quality, as established under 40 CFR 51.166.
- "NNSR" means nonattainment area new source review.
- "Act" and "CAA" mean the Clean Air Act.
- "SIP" means State Implementation Plan.
- "TSD" means Technical Support Document for this action.
- "PAL" means Plantwide Applicability Limitation, as established under 40 CFR 51.165(f) or 51.166(w).
- "NAAQS" means National Ambient Air Quality Standards, as established under 40 CFR part 50.

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**I. What regulations did Texas submit for inclusion into the SIP?**

On October 25, 1999, Texas submitted revisions to Chapters 39, 55, and 116 which include rules that relate to public participation on air permits for authorization of new and modified sources, including amendments and renewals. In addition, portions of the submittals dated December 15, 1995, and July 22, 1998, contain provisions relevant to this action. Hereafter, we refer to these submittals as the "revised rules." These SIP packages include the following rules:

A. The December 15, 1995, submittal includes Texas' submittal of section 116.312—Public Notification and Comment Procedures. Section II.A of this preamble contains additional information on the December 15, 1995, submittal.

B. The July 22, 1998, submittal includes Texas' submittal of repeal and readoption (with nonsubstantive revisions) of section 116.312—Public Notification and Comment Procedures. Section II.A of this preamble contains additional information on the July 22, 1998, submittal.

C. The October 25, 1999, submittal includes the following revisions related to this action. Section II.A of this preamble contains additional information on the October 25, 1999, submittal.

- New rules affecting Chapter 39—Public Notice<sup>1</sup>—are as follows: Section 39.201—Application for a Preconstruction Permit; section 39.401—Purpose; section 39.403—Applicability; section 39.405—General Notice Provisions; section 39.409—Deadline for Public Comment, Requests for Reconsideration, contested Case Hearing, or Notice and Comment Hearing; section 39.411—Text of Public Notice; section 39.413—Mailed Notice; section 39.418—Notice of Receipt of Application and Intent to Obtain Permit;

<sup>1</sup> Texas submitted subsequent revisions to Chapter 39 on July 31, 2002; and March 9, 2006. These changes are parts of separate SIP revisions which are currently under review. EPA will address these changes to Chapter 39 in separate actions.

section 39.419—Notice of Application and Preliminary Determination; section 39.420—Transmittal of the Executive Director's Response to Comments and Decision; section 39.423—Notice of Contested Case Hearing; section 39.601—Applicability; section 39.602—Mailed Notice; section 39.603—Newspaper Notice; section 39.604—Sign-Posting; and section 39.605—Notice to Affected Agencies.

- New rules affecting Chapter 55—Requests for Reconsideration and Contested Case Hearing—are as follows: Section 55.1—Applicability; section 55.21—Requests for Contested Case Hearing, Public Comment; section 55.101—Applicability; section 55.103—Definitions; section 55.150—Applicability; section 55.152—Public Comment Period; section 55.154—Public Meetings; section 55.156—Public Comment Processing; section 55.200—Applicability; section 55.201—Requests for Reconsideration and Contested Case Hearing; section 55.203—Determination of Affected Person; section 55.205—Request by Group or Association; section 55.209—Processing Requests for Reconsideration or Contested Case Hearing; and section 55.211—Commission Action or Requests for Reconsideration and Contested Case Hearing.

- Rules revisions affecting Chapter 116—Control of Air Pollution by Permits for New Construction and Modification are—as follows: Section 116.111—General Application; section 116.114—Application Review Schedule; section 116.116—Changes to Facilities; section 116.183—Public Notice Requirements; section 116.312—Public Notification and Comment Procedures; and section 116.740—Public Notice.

- Texas submitted repeal of the following regulation: section 116.124—Public Notice of Compliance History.

The existing SIP-approved regulations which relate to public participation for air quality permits are as follows: Sections 116.130—Applicability; 116.131—Public Notification Requirements; 116.132—Public Notice Format; 116.133—Sign Posting Requirements; 116.134—Notification of Affected Agencies; 116.136—Public Comment Procedures; and 116.137—Notification of Final Agency Action. These regulations will now apply to air quality permits declared administratively complete before September 1, 1999. EPA proposes to add a notation, in addition to the applicability statement at section 39.403 of the revised rule, to this effect to the existing SIP. In addition, section 116.312—Public Notification and Comment Procedures, which applies to

permit renewals, was amended to replace cross references to the public notification procedures in sections 116.130 through 116.137 with a cross reference to applicable procedure in Chapter 39.

The revised rules will replace the existing SIP rules for public participation for air quality permits declared administratively complete on or after September 1, 1999. The Texas public participation procedures were previously located in the subchapter of the SIP applicable to each type of permitting action. Chapter 39 of the Texas Administrative Code (TAC) consolidates public participation requirements for most air quality permitting actions (as well as permits issued under other environmental statutes). Applicability of the rules in Chapter 39 to different types of air permits is determined by the general applicability statement in subchapter H. Additional requirements that are specific to air quality permits are found in subchapter K. Section 39.403(b) lists the types of air quality permits subject to the public participation requirements in Chapter 39:

- Air quality permits under Texas Health and Safety Code (THSC), Section 382.0518 (preconstruction permit) and Section 382.055 (review and renewal of preconstruction permit).<sup>2</sup> See section 39.403(8).

- Applications for permit amendments to air quality permits under Section 116.116(b) (changes to facilities) that involve construction of a new facility; modification of an existing facility (as defined in Section 116.10)<sup>3</sup> that results in an increase in allowable emissions equal to or greater than 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO<sub>x</sub>); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO<sub>2</sub>) or inhalable particulate matter (PM<sub>10</sub>); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen; or other changes within the discretion of the Executive Director.<sup>4</sup> See section 39.403(8).

<sup>2</sup> Section 382.0518 and section 382.055 of the THSC currently apply to permit applications, modifications and renewals under Chapter 116 of the Texas SIP for minor and major new source review permits.

<sup>3</sup> Note that EPA has not acted on the definition of "modification of an existing facility" at section 116.10 and so it is not currently part of the approved SIP.

<sup>4</sup> Section 39.403(b)(8) refers to emission quantities defined in section 106.4(a)(1) of this title (relating to Requirements for Permitting by Rule) for sources defined in sections 106.4(a)(2) and (3). The defined emission quantities in Section 106.4 are emissions equal to or greater than 250 tpy of CO or

- Initial issuance of flexible permits under Chapter 116, Subchapter G, and amendments to flexible permits under Sections 116.710(a)(2) and (3) that involve construction of a new facility, modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director.<sup>5</sup> See section 39.403(8).

- Applications for construction or reconstruction subject to Chapter 116, Subchapter C for hazardous air pollutants.<sup>6</sup> See section 39.403(9).

- Concrete batch plants under Chapter 106 unless the facility is to be temporarily located in or contiguous to the right of way of a public works project. See section 39.403(10).<sup>7</sup>

- The Chapter 39 requirements also apply to PALs through a cross-reference at section 116.194.

## II. What are we proposing?

### A. Our Proposal

We have evaluated the revised rules for enforceability and consistency with the CAA, 40 CFR Part 51, and EPA policy and guidance. We have determined that the revised rules contain some provisions that meet or exceed federal requirements. We have also determined that some provisions are not consistent with federal requirements and therefore, are not fully approvable. The deficient provisions of the revised rule are not separable from the remainder of the rule. As authorized in sections 110(k)(3) and 301(a) of the Act, we are proposing simultaneous limited approval and limited disapproval of the revised rules. We are proposing limited approval because the rules, as a whole, strengthen the existing SIP and facilitate enforcement of the State's public participation requirements. We are simultaneously proposing limited disapproval because the provisions identified in section IV of

NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

<sup>5</sup> Note that this provision also refers to the emission quantities defined in Section 106.4 of the SIP.

<sup>6</sup> The provisions of Subchapter C were later recodified into Subchapter E in a separate SIP submittal. We will address this recodification in a separate action. Also see section VII.A of this document for further discussion on the provision for hazardous air pollutants.

<sup>7</sup> See discussion in section VI.G of this preamble for further information on public notice for concrete batch plants.

this preamble are not consistent with applicable federal requirements. Final limited approval will incorporate the revised rule in its entirety into the Texas SIP. We are not acting on the provisions of the submittal discussed in section VII of this notice. Note that some of the public participation rules we are considering today apply to other rules that have not yet been approved into the SIP. For example, we have not proposed

action on Texas' NSR PAL, flexible permit, qualified facility or NSR reform rules, however some of the rules we are considering today are applicable to them. These other rules will be reviewed in separate actions. Our action on any provision of this rule which refers to or implements a provision that EPA has not approved does not imply EPA proposed action on the pending rule. The Chapter 39 revised rules

consolidate public participation requirements applicable to the pending rules. Final action on the revised rule will facilitate review of the pending rules.<sup>8</sup>

Except where noted below, EPA proposes limited approval and limited disapproval (LALD) of the following regulations:

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
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**Chapter 39—Public Notice  
Subchapter D—Public Notice of Air Quality Permits**

Section 39.201 .....	Application for a Preconstruction Permit.	Not in existing SIP .....	10/25/99	New rule .....	LALD.
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**Subchapter H—Applicability and General Provisions**

Section 39.401 .....	Purpose .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 39.403 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule State did not submit paragraphs (b)(1) through (b)(7). No action on paragraph (b)(9). See section VII.	LALD. The SIP will not include paragraphs (b)(1) through (b)(7) and (b)(9).
Section 39.405 .....	General Notice Provisions.	Not in existing SIP .....	10/25/99	New rule. State did not submit subsections (a) through (e) and paragraph (f)(2).	LALD. The SIP will not include subsections (a) through (e) and paragraph (f)(2).
Section 39.409 .....	Deadline for Public Comment, Requests for Reconsideration, Contested Case Hearing, or Notice of Comment Hearing.	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 39.411 .....	Text of Public Notice ...	Not in existing SIP .....	10/25/99	New rule. State did not submit paragraph (b)(7). No action on paragraphs (b)(11), (b)(13), (b)(14), and (c)(7). See section VII.	LALD. The SIP will not include paragraphs (b)(7), (b)(11), (b)(13), (b)(14), and (c)(7).
Section 39.413 .....	Mailed Notice .....	Not in existing SIP .....	10/25/99	New rule. State did not submit paragraphs (1) through (8), (10), and (13).	LALD. The SIP will not include paragraphs (1) through (8), (10), and (13).
Section 39.418 .....	Notice of Receipt of Application and Intent to Obtain Permit.	Not in existing SIP .....	10/25/99	New rule. State did not submit paragraphs (b)(1) through (b)(2).	LALD. The SIP will not include paragraphs (b)(1) through (b)(2).
Section 39.419 .....	Notice of Application and Preliminary Determination.	Not in existing SIP .....	10/25/99	New rule. State did not submit subsection (c).	LALD. The SIP will not include subsection (c).
Section 39.420 .....	Transmittal of Executive Director's Response to Comments and Decision.	Not in existing SIP .....	10/25/99	New rule. State did not submit paragraph (c)(2) and subsection (e).	LALD. The SIP will not include paragraph (c)(2) and subsection (e).
Section 39.423 .....	Notice of Contested Case Hearing.	Not in existing SIP .....	10/25/99	New rule .....	LALD.

**Subpart K—Public Notice for Air Quality Permits**

Section 39.601 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 39.602 .....	Mailed Notice .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 39.603 .....	Newspaper Notice .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.

<sup>8</sup> See letter in the docket for this action from Glenn Shankle, Executive Director of TCEQ, to Larry Starfield, Deputy Regional Administrator for

EPA Region 6, dated June 13, 2008, noting that action on TCEQ's public participation rule was

necessary to resolve issues in another pending SIP submission.

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
Section 39.604 .....	Sign-Posting .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 39.605 .....	Notice to Affected Agencies.	Not in existing SIP .....	10/25/99	New rule .....	LALD.
<b>Chapter 55—Requests for Reconsideration and Contested Case Hearing</b>					
<b>Subchapter A—Applicability</b>					
Section 55.1 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
<b>Subchapter B—Requests, Public Comment</b>					
Section 55.21 .....	Requests for Contested Case Hearing, Public Comment.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
<b>Subchapter D—Applicability and Definitions</b>					
Section 55.101 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.103 .....	Definitions .....	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
<b>Subchapter E—Public Comment and Public Meetings</b>					
Section 55.150 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 55.152 .....	Public Comment Period.	Not in existing SIP .....	10/25/99	New rule. State did not submit paragraphs (a)(3) through (a)(5).	LALD. The SIP will not include paragraphs (a)(3) through (a)(5).
Section 55.154 .....	Public Meetings .....	Not in existing SIP .....	10/25/99	New rule .....	LALD.
Section 55.156 .....	Public Comment Processing.	Not in existing SIP .....	10/25/99	New rule .....	LALD.
<b>Subchapter F—Requests for Reconsideration and Contested Case Hearing; Public Comment</b>					
Section 55.200 .....	Applicability .....	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.201 .....	Requests for Reconsideration and Contested Case Hearing.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.203 .....	Determination of Affected Person.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.205 .....	Request by Group or Association.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.209 .....	Processing Requests for Reconsideration or Contested Case Hearing.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
Section 55.211 .....	Commission Action on Requests for Reconsideration and Contested Case Hearing.	Not in existing SIP .....	10/25/99	New rule .....	No action. See section VII.
<b>Chapter 116—Control of Air Pollution by Permits for New Construction or Modification</b>					
<b>Subchapter B—New Source Review Permits</b>					
<b>Division 1—Permit Application</b>					
Section 116.111 .....	General Application .....	In existing SIP as approved 8/28/07, 72 FR 41998. The existing SIP does not include paragraph (a)(2)(K) and subsection (b).	10/25/99	Redesignated pre-existing text as subsection (a). This change was approved 9/6/06, 71 FR 52664. Added new subsection (b).	LALD to add new subsection (b). The SIP will not include paragraph (a)(2)(K).
Section 116.114 .....	Application Review Schedule.	In existing SIP as approved 9/18/02, 67 FR 58709.	10/25/99	Revision to paragraphs (a)(2), (b)(1), and (b)(2); and the addition of new subsection (c).	LALD for all submitted SIP revisions.

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
Section 116.116 .....	Changes to Facilities ..	In existing SIP as approved 11/14/03, 68 FR 64548. The existing SIP does not include sections 116.116(b)(3), (b)(4), (e), and (f).	10/25/99	Revised subsection (d) and paragraphs (d)(1) and (d)(2). This change was approved 11/14/03, 68 FR 64548. Added new paragraph (b)(4).	LALD for addition of paragraph (b)(4). The SIP will not include paragraph (b)(3) and subsections (e) through (f).
<b>Division 2—Compliance History</b>					
Section 116.124 .....	Public Notice of Compliance History Section.	In existing SIP as approved 9/18/02, 67 FR 58709.	10/25/99	Section repealed .....	Removal of section 116.124 from the SIP.
<b>Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (CAA, § 112(g), 40 CFR Part 63)</b>					
Section 116.183 .....	Public Notice Requirements.	Not in existing SIP .....	7/22/98  10/25/99	EPA took no action on section 116.183 as submitted 7/22/98. See 67 FR 58699 (9/18/02).  Revision to change cross reference from sections 116.130 through 116.137 to applicable provisions in Chapter 39.	No action on revision to section 116.183 as submitted 10/25/99. See section VII.
<b>Subchapter D—Permit Renewals</b>					
Section 116.312 .....	Public Notification and Comment Procedures.	In existing SIP as approved 3/10/06, 71 FR 12285.	12/15/95 and 7/22/98  10/25/99	7/22/98 submittal repealed and revised pre-existing section. Changes were non-substantive house-keeping changes to include cross references to current rule.  Revised to change cross reference from Chapter 116 to Chapter 39.	LALD for changes submitted 12/15/95, 7/22/98, and 10/25/99.
<b>Subchapter G—Flexible Permits</b>					
Section 116.740 .....	Public Notice .....	Not in existing SIP .....	10/25/99	Revised to change cross reference from Chapter 116 to Chapter 39.	No action. See section VII.

*B. What is limited approval and limited disapproval?*

Under section 110(k)(3) of the CAA, EPA may fully approve or fully disapprove a State submittal. Where portions of the State submittal are separable, EPA may approve the portions of the submittal that meet the requirements of the CAA, and disapprove the portions of the submittal that do not meet the requirements of the CAA. When a submittal is not separable, EPA can adopt a limited approval and limited disapproval consistent with section 301(a) and 110(k)(3) of the Act.

A limited approval action applies to the entire rule because EPA finds that approval of the entire rule will strengthen the State's SIP. In proposing a limited approval, EPA simultaneously proposes a limited disapproval of the submittal because it contains deficiencies and, as such, does not fully meet all of the requirements of the Act. Under a final limited approval, the State's entire submittal is incorporated into the SIP and becomes fully federally enforceable. Where the submittal addresses a mandatory requirement of the Act, final limited disapproval starts a sanctions clock and a federal

implementation plan (FIP) clock. Under section 179(a), if EPA disapproves a submittal of a requirement under the CAA, based on the submittal's failure to meet one or more of the elements required by the Act, the sanctions set forth in section 179(b) become applicable, unless the deficiency has been corrected within 18 months of disapproval. Section 179(b) of the Act and 40 CFR 52.31 of our regulations provide two sanctions available to the Agency: increasing the offset requirements and withholding highway funding. Moreover, the final limited disapproval may trigger a 24-month

clock to adopt a FIP requirement under section 110(c). If the State submits an approvable rule revision during the sanction clock period, EPA may propose approval of the rule and take interim final action, effective upon publication, to stay the sanctions. Final approval of the rule revision correcting the deficiency terminates the FIP clock.

### III. How do the revised rules strengthen the existing SIP?

The SIP revisions submitted on December 15, 1995; July 22, 1998; and October 25, 1999, as a whole, strengthen the SIP compared to the corresponding provisions in the existing SIP. Below is a summary of some revisions that strengthen the SIP. The TSD includes detailed analyses of how the SIP is strengthened.

- The general requirement for publishing notice in section 116.130(a) was changed by section 39.418 to provide a uniform time for publication of the notice of the application (within 30 days of determination of administrative completeness).

- Previously, permit amendments were subject to notice at the discretion of the Executive Director of TCEQ, without specific criteria included in the rule (section 116.130(a)). This provision was removed, thus requiring notice of amendment applications (section 39.403(b)(8)).

- Previously, a copy of the application was required to be available for public inspection in Austin, TX, and the appropriate regional offices of the TCEQ (sections 116.131(b) and 116.132(7)). The revised rules also require a copy of the notice to be placed in a public place, available for inspection and copying, in the municipality in or nearest to the location of the facility that is the subject of the application. See section 39.405.

- The revised rules add the opportunity to request a public meeting and allow the Executive Director to determine whether significant public interest exists to hold a public meeting. If held, a written response is provided to oral comments made together with any timely written comments. In addition, this response to comments (RTC) is considered by the Commission if it considers any contested case hearing requests in a Commission Meeting. The RTC is provided to all commenters and persons who request to be on a mailing list related to the application. See sections 39.420, 55.152, 55.154, and 55.156.

- Notice of preliminary decision and draft permit was extended from applying only to NNSR and PSD permits (see section 116.132(a)(6)) to any minor

permit or permit amendment for which a contested case hearing is requested by an affected person in response to the Notice of Receipt of Application and Intent to Obtain a Permit. See section 39.419.

- Note also that the Texas rule contains some provisions that exceed federal requirements, such as sign posting (section 39.604), a “display type” newspaper notice (section 39.603(c)(2)), and alternate language notice in newspaper and sign posting (sections 39.405(h) and 39.604(e)).

### IV. What are the rule deficiencies?

Notwithstanding the fact that these rules strengthen the existing SIP, they do not meet all of the minimum applicable federal requirements that relate to public participation. Each notation below is discussed in detail in Section V.

#### A. New or Modified Minor NSR Sources

Generally, the minor NSR public participation rules identified below do not require *any* initial public participation for some permitting actions or do not require the TCEQ to provide the agency’s air quality analysis and proposal to approve or disapprove the permit in other permitting actions.

- Under section 39.419(e), for new or modified minor NSR sources or minor modifications at major sources, the rules do not require public notice and the opportunity for comment on the State’s analysis of the effect of construction or modification on ambient air quality, including the agency’s proposed approval or disapproval, as required by 40 CFR 51.161(a) and (b), unless a contested case hearing is requested and not withdrawn after notice of application and intent to obtain a permit is published.

- Under section 39.403(b)(8), for a minor NSR permit amendment or minor modification under section 116.116(b), (where there is a change in the method of control of emissions; a change in the character of the emissions; or an increase in the emission rate of any air contaminant) the existing SIP requires the permit holder to apply for and receive approval of a permit amendment. However, the revised rules do not require *any* public participation as required by 40 CFR 51.161(a) and (b) unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen

or other changes within the discretion of the Executive Director.

- Under section 39.419(e)(1)(C), for any amendment, modification, or renewal of a major or minor source which requires a permit application, the rules do not require public notice and the opportunity for comment on the State’s analysis of the effect of construction or modification on ambient air quality, including the agency’s proposed approval or disapproval, as required by 40 CFR 51.161(a) and (b), if the amendment, modification, or renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant’s compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

- Also, section 39.403(b)(8), Applicability, of the revised rule refers to two State statutory provisions, THSC section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit). For clarity and for approvability into the SIP, section 39.403(b) should be revised to refer to the corresponding sections of the Texas SIP.

#### B. Projects Subject to PSD

The revised rules do not contain the following requirements for projects subject to the regulations for PSD:

- For a new or modified source subject to PSD, the revised rules do not require the TCEQ to provide an opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations and to provide notice of the opportunity for a public hearing, as required by 40 CFR 51.166(q)(v) and section 165(a)(2) of the Act.

- For a new or modified source subject to PSD, the revised rules do not require that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification as required by 40 CFR 51.166(q)(iii) and CAA section 165(a)(2).

- For a new or modified source subject to PSD, the revised rules do not require a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief

executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv).

- For a new or modified source subject to PSD, the rules do not require that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii).

- For a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit. We request further information about how and when commenters are informed of the Agency's final decision, access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

#### C. Project for a PAL

The revised rules do not meet the following provisions for PALs:

- For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11).

- For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5).

- The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194.

#### D. Project for a Flexible Permit

The rules do not meet the following provisions for Flexible Permits:

- For initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, the rules do not require 30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR 51.161.

- Where PSD and NNSR terms and conditions are modified or eliminated when the permit is incorporated into a

flexible permit, the rules do not require public participation consistent with 40 CFR 51.161 and 51.166(q).

### V. Do Texas's public participation rules meet federal requirements?

#### A. Minor NSR Regulatory Requirements

1. What public participation requirements for minor NSR programs are necessary for approval of the SIP revision?

The CAA at section 110(a)(2)(C) requires states to include a minor NSR program in their SIP to regulate modifications and new construction of stationary sources within the area as necessary to assure the national ambient air quality standards (NAAQS) are achieved. EPA's implementing regulations at 40 CFR 51.160–51.164 are intended to ensure that new source growth is consistent with maintenance of the NAAQS. 40 CFR 51.160(e) requires states to identify types and sizes of facilities which will be subject to review under their minor NSR program. For sources identified under § 51.160(e), § 51.160(a) requires that the SIP include legally enforceable procedures that enable the State or local agency to determine whether construction or modification of a facility, building, structure or installation, or combination of these will result in a violation of applicable portions of the control strategy; or interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

Sources subject to the legally enforceable procedures under 40 CFR 51.160(a) are also subject to the minimum public participation requirements at 40 CFR 51.161, entitled Public Availability of Information. In particular, 40 CFR 51.161(a) requires a State to provide the opportunity for public comments on information submitted by owners and operators. 40 CFR 51.161(a) also requires the public information to include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval. 40 CFR 51.161(b) requires that the State ensure availability of the information submitted by the owner or operator and the State's analysis of the effect on air quality for public inspection in at least one location in the affected area, that the State provide a 30-day public comment period on that information and that notice of the public comment period should be by prominent advertisement in the area affected.

The minor NSR program is also important as a tool to implement changes related to major NSR, such as to adopt enforceable limitations on hours of operation and rates of production or the installation of pollution control equipment to limit potential to emit (PTE) to avoid major source applicability thresholds of NSR or title V permitting requirements. The minor NSR program also authorizes minor modifications at major sources, including netting demonstrations required by the PSD and NNSR major source program, or to establish a PAL to determine PSD or NNSR applicability.

EPA recognizes that, under the applicable Federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS. The State has significant discretion to tailor minor NSR requirements that are consistent with the requirements of Part 51. The State may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51. For further information, see recent SIP actions in other States concerning minor NSR approvals and disapprovals, such as 68 FR 2891 (January 22, 2003), where EPA approved Oregon's minor NSR program establishing categories of minor NSR permit actions. However, EPA disapproved or gave less than full approval to minor NSR public participation requirements that provided a blanket exemption from one or more public notice requirements of Part 51 to all minor NSR permitting actions. See 65 FR 2042 (January 13, 2000), disapproval of West Virginia minor NSR provisions providing 15-day public comment period for certain minor NSR permitting actions or 65 FR 2048 (January 13, 2000), limited approval of Delaware minor NSR public participation requirements because it strengthened the SIP, but limited disapproval of the rule due to less than 30-day comment period. See also the proposed approval of Review of New Sources and Modifications in Indian Country at 71 FR 48696 (August 21, 2006) and 72 FR 45378 (August 14, 2007), approval of Alaska minor NSR public participation provisions.

2. What are the Texas minor NSR program public participation requirements?

In general, the revised rules provide for two types of public notice and comment processes. These two public notices are Notice of Application and Intent to Obtain a Permit under section 39.418 (first notice) and Notice of

Application and Preliminary Decision (second notice) under section 39.419 and subchapter K. The first notice requires the permittee to publish notice of the permit application and provide a copy of the administratively complete application in the public record available for public comment. An administratively complete application may, but is not required to, contain the applicant's information on the air quality impacts from the facility. Under Section 39.419(e)(1)(B), no further notice is required for minor NSR permits unless a contested case hearing is requested and not withdrawn before the second notice is published. Under section 55.21, a contested case hearing may be requested by: (1) The Commission; (2) the Executive Director; (3) the applicant; (4) affected persons, when authorized by law; and (5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility. The request must identify the person's personal justiciable interest affected by the application, including the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public. Requirements for a group or association to request a contested case hearing are found in section 55.23.<sup>9</sup> A contested case hearing is an evidentiary hearing before an administrative law judge at the State Office of Administrative Hearings (SOAH). If a contested case hearing is requested, the permittee must publish notice of the opportunity to comment on the complete application and the State's analysis of air quality impacts and the State's proposal to approve or disapprove the permit.

Section 39.418 of the revised rule requires the applicant for a minor NSR permit new source or modification, amendments or renewal under Chapter 116 to publish Notice of Receipt of Application and Intent to Obtain Permit (first notice) within 30 days after the Executive Director determines the application to be administratively complete. (The rule does not provide a definition of administrative completeness.) Under sections 55.152(a)(1) and (2), 39.405(f)(1), and 39.603, the notice of 30-day public comment period (15 days for renewals) must be published in a newspaper of general circulation in the municipality

in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility and State the end date of the public comment period. Section 39.405(e) requires the applicant to provide a copy of the notice to the TCEQ within 10 business days from the last date of publication. The applicant must also post a sign at the site of the existing or proposed facility declaring the filing of an application for a permit under section 39.604. The TCEQ is required to mail a copy of the notice to the State senator and representative who represent the area in which the facility is or will be located, the applicant, persons on a relevant mailing list, and any other person the Executive Director or Chief Clerk may elect to include under sections 39.413 and 39.602. The applicant is required to mail a copy of the notice to EPA, all local air pollution control agencies with jurisdiction in the county in which the construction is to occur, and the air pollution control agency of any nearby State in which air quality may be adversely affected by the emissions from the new or modified facility under section 39.605. The applicant is also required to make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. The applicant must indicate when confidential business information is excluded from the public file. See section 39.405(g). The public record available during the comment period includes the administratively complete permit application and any other documents submitted by the applicant, as required by section 39.405(g).

If a contested case hearing is requested by persons identified in section 55.21 or 55.23 in response to the Notice of Receipt of Application and Intent to Obtain Permit, and the request is not withdrawn before the date the preliminary decision is issued, section 39.419 requires the applicant to publish Notice of Application and Preliminary Decision (second notice) of issuance or modification of a minor NSR action and provide a 30-day notice and comment period on the public record, which includes the draft permit and the State's analysis of its preliminary decision to approve or disapprove the permit.

For minor and major sources authorized under section 116.116(b) of the approved SIP, a permittee must apply for and receive a prior permit amendment which authorizes a permittee to vary from terms of a permit if the change involves a change in the method of control of emissions, a

change in the character of the emissions, or an increase in the emission rate of any air contaminant. Section 39.403(b)(8) requires public notice and the opportunity for comment only if the permit amendment involves construction of a new facility or modification of an existing facility that results in an increase in *allowable* emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director. Therefore, permit amendments authorized under section 116.116(b) are not subject to any public participation requirements unless the amendment involved an emission increase of allowable emission above the thresholds in section 39.403(b)(8).

Under section 39.419(e)(1)(C), any amendment, modification, or renewal for a major or minor source that requires a permit application and would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted, is not required to provide second notice (which includes public notice and the opportunity for comment on the State's second notice which includes analysis of the effect of construction or modification on ambient air quality and includes the agency's proposed approval or disapproval) unless the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations. Therefore, amendments, modifications or renewals for minor or major sources are not required to provide an air quality analysis or the State's proposal to approve or disapprove the permit unless there was an increase in allowable emissions or the release of a new air contaminant.

3. Does the Texas minor NSR public participation rule meet federal requirements for approval?

The revised rules meet or exceed federal requirements for minor NSR public participation with four exceptions as described below.

First, under section 39.419(e)(1)(B), the requirement at 40 CFR 51.161(a) to provide opportunity for public comment on the State's analysis of the effect of construction or modification on ambient air quality from new minor sources or

<sup>9</sup> Section 55.23, Request by Group or Association, was not submitted in this SIP revision.

minor modification identified under 40 CFR 51.160, including the State's proposed approval or disapproval, is not met. Sources regulated under 40 CFR 51.160 are subject to the public participation requirements of 40 CFR 51.161. Under the Texas rule, sources subject to minor NSR requirements must publish the first notice, Notice of Receipt of Application and Intent to Obtain Permit, and provide a 30-day notice and comment period on the administratively complete permit application only. The publically available information during the comment period does not include and, the public notice fails to inform the public how to obtain, the State's analysis of air quality impacts and proposal to approve or disapprove the application. The public record for the first notice is required to contain only a copy of the administratively complete permit application as required by section 39.405(g). As a result, the public does not have an opportunity to adequately review and comment upon the potential air quality effects from the source and on the State's proposed action on the application. In order to obtain the State's air quality analysis, an interested person must request a contested case hearing. However, sections 55.21(b) and 55.23 limit who may request a contested case hearing before SOAH and so some members of the public may not be able to review and comment on air quality impacts from the facility. The request for a contested case hearing must be filed within the first notice public comment period and must be based solely upon information in the administratively complete application. EPA has concluded that the burden of requesting an evidentiary administrative hearing based solely on the information in the permit application does not provide the public with the minimum public information required by 40 CFR 51.161(a) and (b).

Second, section 39.403(b)(8) excludes permit amendments authorized by section 116.116(b) from any public participation requirements of Chapter 39, including the requirement to publish the first notice, unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director. Changes that result in an

increase in emissions are subject to a permit amendment under sections 116.110 or 116.116(a) or (b) of the approved SIP. As stated, section 39.403(b)(8) provides an exemption from public participation for sources otherwise required to obtain a permit amendment. As discussed in more detail above, sources regulated under 40 CFR 51.160(a) are subject to the minimal public participation requirements in 40 CFR 51.160(a) and (b). We also have concerns that this provision does not exclude public participation requirements for major modifications subject to PSD or NNSR permitting requirements, which are based on actual rather than allowable emissions and may be interpreted to apply to those permitting actions.<sup>10</sup> EPA has concluded that 39.403(b)(8) fails to provide the minimum public participation requirements of 40 CFR 51.161.

Third, under section 39.419(e)(1)(c), for any amendment, modification, or renewal application for a minor or major source, the revised rules do not require second notice, which includes the State's air quality analysis, unless the change would result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The requirement at 40 CFR 51.161(a) to provide opportunity for public comment on the State's analysis of the effect of modification on ambient air quality from minor sources identified under 40 CFR 51.160, including State's proposed approval or disapproval, is not met. We recognize that States may tailor minor NSR programs to allow permit amendments for certain minor sources required to be based upon increases in allowable emissions. However, section 39.419(e)(1)(C) applies to major and minor sources required to obtain a permit amendment under Chapter 116 of the approved SIP. As described in the previous paragraph, sources required to obtain a permit under 40 CFR 51.160(a) are subject to the public participation requirements of 40 CFR 51.161. Under 40 CFR 51.161, a modification application for a major or minor source regulated under the SIP is subject to public notice and opportunity for public comment on the State's air quality analysis and proposal to approve or disapprove the permit. We also have concerns that this provision does not exclude public participation

requirements for major modifications subject to PSD or NNSR permitting requirements, which are based on actual rather than allowable emissions and may be interpreted to apply to those permitting actions. EPA has concluded that section 39.419(e)(1)(c) fails to provide the minimum public participation requirements of 40 CFR 51.161.

Fourth, section 39.403(b) (Applicability) of the revised rule refers to two State statutory provisions, THSC section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit). For clarity and for approvability into the SIP, we recommend that section 39.403(b) be revised to refer to the corresponding sections of the Texas SIP.

In summary, EPA has determined that the Texas minor NSR public participation rules do not require that the publicly available information include the State's analysis of air quality impacts or the State's decision to approve or disapprove the permit. EPA's review of section 39.419(e)(1)(A) and (B) indicates that public notice of the State's analysis of air quality impacts for minor new sources or minor modifications is not required unless a contested case hearing is requested. We are concerned that the rules at sections 55.21 and 55.23 limit who may request a contested case hearing. In other words, the first notice (Notice of Application and Intent to Obtain a Permit) does not contain the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR 51.161(b). The only way to obtain that information is by requesting a contested case hearing and the rules limit which members of the public can do so. Moreover, we believe that the State's requirement to submit a request for an evidentiary administrative hearing in order to obtain the air quality analysis is too large a burden for potential commenters, may exclude some interested persons, and is not consistent with the minimum requirements of 40 CFR 51.161(a) and (b). We note that Texas did not provide a demonstration of how the Chapter 39 and 55 rules for public participation for minor NSR sources regulated under the SIP meet the public participation requirements of 40 CFR Part 51 with this SIP submittal.<sup>11</sup>

<sup>10</sup> See NSR Reform ruling, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005). The court held that the major NSR modification requirement, which incorporates by reference CAA § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions."

<sup>11</sup> See also correspondence between EPA Region 6 and TCEQ in the docket for this action.

### B. PSD Regulatory Requirements

1. What public participation requirements for PSD programs are necessary for approval of the SIP revision?

The PSD provisions of the CAA emphasize the importance of public participation in permitting decisions. See section 160(5) of the CAA. The criteria for approval of a PSD program are set out in Section 165 of the CAA and 40 CFR 51.166. The requirements for public participation for an approved PSD program are found at 40 CFR 51.166(q). States may incorporate these requirements by reference or establish equivalent provisions. Section 307(b) of the CAA expressly provides an opportunity for judicial review of PSD permitting decisions when EPA is the permitting authority. In a federal PSD program, any member of the public who has participated in the public comment process and meets the threshold standing requirements of Article III of the U.S. Constitution may petition for administrative review of the permit within 30 days of issuance before the Environmental Appeals Board (EAB) and ultimately seek judicial review of the administrative disposition of the permit. We interpret the statute and regulations to require, at a minimum, an opportunity for State court judicial review of PSD permits under an approved PSD program. See 61 FR 1880, 1882 (Jan. 24, 1996) and 72 FR 72617, 72619 (December 21, 2007). The legislative history of the 1977 CAA amendments supports this interpretation.<sup>12</sup> Although permits issued under SIP approved programs are not subject to appeal to EPA's EAB, those actions are instead subject to the opportunities for review and appeal provided under State law.

40 CFR 51.166(q) requires, in part, that the permitting authority make available all the materials submitted by the applicant, a copy of the preliminary determination and a copy or summary of other materials considered in making the determination. The State must notify the public, by advertisement in a newspaper of general circulation, of the application, the preliminary determination, the degree of increment consumed, and of the opportunity to comment at a public hearing or in writing. The State must also provide a

copy of the notice to any other State or local air pollution control agencies, the chief executive of the city and county where the source would be located, any regional land use planning agency, any State or Federal Land Manager or Indian Governing body whose lands may be affected. The State must also provide an opportunity for public hearing for interested persons to appear and submit written or oral comments on the air quality impacts of the source, alternatives to it, the control technology required, and other appropriate considerations. See CAA section 165(a)(2). The State must also consider all written and oral comments in making a final permitting decision and make all comments available for public inspection.

2. What are the Texas PSD program public participation requirements?

Under section 39.419, for sources subject to PSD or nonattainment NSR review the applicant must publish notice of two 30-day public comment periods, Notice of Application and Intent to Obtain a Permit (first notice) and Notice of Application and Preliminary Decision (second notice). The applicant must also mail a copy of the notices to the EPA Regional Administrator in Dallas, all local air pollution control agencies with jurisdiction in the county in which the construction is to occur, the air pollution control agency of any nearby State in which air quality may be adversely affected by the emissions from the new or modified facility, the applicant, persons who filed comments or hearing requests before the deadline, persons on a mailing list under Section 39.407 and the State senator or representative from the region where the source will be located. Under section 55.154, TCEQ may provide a public meeting if the Executive Director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held.

Texas provides an opportunity for judicial review of PSD permitting decisions under THSC 382.032, which states that a person affected by a ruling, order, decision, or other act of the Commission or of the Executive Director, if an appeal to the Commission is not provided, may appeal the action by filing a petition in a district court of Travis County. The petition must be filed within 30 days after the date of the Commission's or the Executive Director's action or, in the case of a

ruling, order, or decision, within 30 days after the effective date of the ruling, order or decision. Note that Texas law requires exhaustion of administrative remedies, including requesting a contested case hearing, to appeal to State court.

3. Do the Texas PSD public participation requirements meet federal requirements for approval?

The Texas PSD program, including the public participation provisions, was approved in 1992. See 54 FR 52823, 826 (December 22, 1989 and 57 FR 28093 (June 24, 1992)). This SIP revision replaces the public participation rules adopted under the approved PSD program and therefore, we review the rules for consistency with federal PSD requirements of 40 CFR 51.166(q). Our review of Chapters 39 and 55 indicates that the Texas rules meet or exceed federal requirements with the following exceptions. We have not identified provisions to satisfy the following federal requirements:

- A requirement that the State provide an opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations, along with public notice of the public hearing as required by 40 CFR 51.166(q)(v) and section 165(a)(2) of the CAA. The provision in section 55.154 that provides the Executive Director with discretion to hold a public meeting if the Executive Director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements. Under the Texas rule, the decision to grant a public hearing is within the Executive Director's discretion and must be based upon substantial or significant public interest. In contrast, the CAA provides for the opportunity of interested persons to request a public hearing and public notice of that opportunity. Under section 55.154, the public is not guaranteed notice of such opportunity or that such an opportunity will be provided on request.

- A requirement that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification as required by 40 CFR 51.166(q)(iii).<sup>13</sup>

<sup>12</sup> See Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 (1977 Legislative History) 3892 (1977).

<sup>13</sup> EPA's final approval of the Texas PSD program (57 FR 28093, June 24, 1992) included a supplemental document that provided an enforceable commitment from Texas to implement the requirements of 40 CFR 51.166(q)(iii) (state the

- A requirement to provide a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv) and CAA 165(d).<sup>14</sup>

- A requirement that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii) and to facilitate the appeals process.

- For a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit. We request further information about how and when the commenters are informed of the Agency's final decision, access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

We request comments on an additional issue related to PSD permit public notice requirements. Under the approved SIP and under the revised rule, Texas requires the permit applicant to publish public notice for an air permit and to mail a copy of the notice to TCEQ and EPA. Although the federal PSD rules at 40 CFR 51.166(q)(2) State “\* \* \* the reviewing authority shall \* \* \* provide notice,” we believe Texas has authority to delegate responsibility to publish notice to the applicant. Under Section 39.405(e), TCEQ allows 10 business days for the applicant to notify TCEQ and EPA that the public notice has been published. A

degree of increment consumption in the public notice) and 51.166(q)(iv) (mail notice to affected agencies). The supplement remains a part of the Texas SIP. See 40 CFR 52.2270, EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP. We cite these requirements as missing from the Texas submittal because the adoption of Chapters 39 and 55 replaced all existing public participation requirements for PSD permits under the Texas PSD program as State law and seeks to repeal existing SIP PSD public participation requirements applicable to permit applications complete on or after September 1, 1999. Texas did not address the SIP supplement in its submittal. For several reasons, we believe these PSD requirements should be included as regulatory, rather than quasi-regulatory, requirements of the SIP. Given that the applicant rather than Texas publishes notice and sends the notice to affected agencies, we believe regulatory provisions in Chapter 39 would provide more clarity to the applicant and the public to ensure compliance with these requirements than a document that does not explicitly appear in the SIP. Also, we believe this approach will avoid confusion since section 39.605 of the revised rules lists some, but not all, agencies that must be notified under § 51.166(q)(iv).

<sup>14</sup> Ibid. at 13.

review of the TCEQ permitting database indicates TCEQ generally receives a copy of the public notice within two weeks after the date of publication.<sup>15</sup> EPA has experienced delays in receiving the PSD public notice and we have received complaints from citizens that it is often not possible to identify the start and end date of a public comment period until much of the comment period has passed. While we believe that TCEQ does have authority to delegate responsibility to publish notice of a PSD permit to the applicant, we request comments on how the public information can be made available to ensure that interested persons can fully participate in the public comment process in accordance with the intent of the Act.

### C. PAL Regulatory Requirements

1. What public participation requirements for PALs are necessary for approval?<sup>16</sup>

The Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11) require PALs for existing major stationary sources to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The State must address all material comments before taking final action on the permit.

2. What are the public participation requirements under the Texas PAL rule?

Texas PAL rules address public participation in section 116.194, which states:

Applications for initial issuance of plant-wide applicability limit permits under this division are subject only to §§ 39.401, 39.405, 39.407<sup>17</sup>, 39.409, 39.411, 39.419, 39.420, and 39.605 of this title (relating to Purpose; General Notice Provisions; Mailing Lists; Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice of Contested case Hearing; Text of Public Notice; Notice of Application and Preliminary Decision; Transmittal of the Executive Director's Response to Comments and Decision; Applicability; Mailed Notice; Newspaper Notice; Sign-Posting; and Notice to Affected Agencies, respectively), except that any requests for reconsideration or

<sup>15</sup> The TCEQ permitting database can be accessed at <http://www4.tceq.state.tx.us/cid/CCD/index.cfm?fuseaction=main.SearchPublicNotice>.

<sup>16</sup> Texas' regulations for PALs are not in the existing Texas SIP. EPA will address approvability of the entire PAL requirements in a separate action.

<sup>17</sup> Section 39.407 was not submitted as a SIP revision. See discussion of the cross references to non-SIP rules in section VII.A of this preamble.

contested case hearings in §§ 39.409 or 39.411 of this title shall not apply. Nothing in this section exempts an applicant for a new source review permit from the requirements of Subchapter B of this chapter (relating to New Source Review).

3. How does the Texas PAL rule meet Federal requirements for approval?

We are addressing public participation for PALs in this notice to facilitate our review of the Texas PAL rule SIP submittal that cross-references Chapter 39, even though the PAL rule was adopted after the revised rules.<sup>18</sup> We note that Texas did not make any revisions related to PALs to Chapter 39. The applicability section in Chapter 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194. Therefore, the two rules are not consistent. We believe Texas must revise the applicability section in Chapter 39.403 in order to make the Chapter 39 public participation requirements applicable to new permitting rules, such as the PAL rule.

Our review of the Chapter 39 requirements applicable to PALs indicates that public participation for initial issuance, renewal, or increase of a PAL is not consistent with the Federal requirements. Section 39.419(e)(3) does not require PAL permit applications to provide public notice and comment on the Agency's preliminary analysis and the draft permit unless a contested case hearing is requested. We have identified no provisions which address renewal or increase of a PAL. Furthermore, Texas provided no demonstration of how section 116.194, which cross references Chapter 39 requirements, is consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). We have not identified provisions in Chapter 39 to comply with the following requirements of 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11):

- Public participation requirements for PALs existing major stationary sources to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161.

- A requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment.

<sup>18</sup> See letter from Glenn Shankle, Executive Director of TCEQ, to Larry Starfield, Deputy Regional Administrator for EPA Region 6, dated June 13, 2008, noting that action on TCEQ's public participation rule was necessary to resolve issues in another pending SIP submission.

- A provision to require the State to address all material comments before taking final action on the PAL permit.
- An applicability provision in section 39.403 that subjects PALs to the requirements of Chapter 39.

#### D. Flexible Permits

1. What are the public participation requirements for Flexible Permits necessary for approval?<sup>19</sup>

EPA has recognized that States may provide a site-wide cap to determine minor NSR applicability, similar to the Federal PAL rule for major NSR applicability. See our proposed rule for Review of New Sources and Modifications in Indian Country, 71 FR 48696, 48705 or Evaluation of Implementation Experiences with Innovative Air Permits, Summary Report,<sup>20</sup> which discuss minor NSR applicability caps and public participation requirements at 40 CFR 51.160–51.164. 40 CFR 51.161(b) requires that the State ensure availability of the information submitted by the owner or operators and the State's analysis of the effect on air quality and proposal for approval or disapproval in at least one location in the affected area, that the State provide a 30-day public comment period on that information and that notice of the public comment period should be by prominent advertisement in the area affected.

2. What are the public participation requirements under the Texas Flexible Permit rule?

Section 39.403(b)(8)(A) and (B) states that initial issuance of a flexible permit is not required to comply with the public participation requirements of Chapter 39 unless the action involves new construction or an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC, SO<sub>2</sub>, PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

When a flexible permit is established under the Texas rules in Subchapter G of Chapter 116, PSD or NNSR terms may be revised or eliminated when they are incorporated into the flexible permit. The rule does not provide for public participation for initial issuance of a flexible permit unless the action

involves new construction or an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC, SO<sub>2</sub>, or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

3. Do the public participation requirements for Texas flexible permits meet the Federal requirements for approvability?

Sections 39.403(b)(8)(A) and (B), as they apply to the initial issuance of flexible permits do not meet the requirements in 40 CFR 51.161(a) and (b). Section 39.403 (Public Notice Applicability) fails to require 30-day public notice and comment on the State's analysis of the effects on ambient air quality and its proposed approval or disapproval. PSD and NNSR permit terms and conditions are not revised with public process required by sections 51.161(a) and (b) and 51.166(q).

#### VI. Other Public Participation Concerns

##### A. Cross References to Non-SIP Rules and Regulations

The following provisions cross reference to rules that are not in the federally approved SIP, nor submitted to EPA for SIP approval:

- Section 39.201(a)(1). Cross references to Chapter 30.
- Section 39.403(b)(8). Cross reference to State statutory provisions in THSC section 382.0518 and section 382.055 of the Texas Health and Safety Code.
- Section 39.403(b)(8). Cross references to Chapter 116, Subchapter G, sections 116.710(a)(2) and (3).
- Section 39.403(b)(8)(B). Cross reference to section 116.10(9).
- Section 39.409. Cross references to Chapter 50.
- Section 39.411(b)(10)—1st sentence. Cross references to § 39.403(b)(11).
- Section 39.413(11). Cross references to section 39.407.
- Section 39.419(e)(4). Cross references to § 90.30.

Approving a rule which cross references to a non-SIP provision is problematic because: (1) It could imply tacit approval of the non-SIP provision, without EPA's review of the cross referenced provision to verify whether it meets the requirements of the Act and of 40 CFR part 51; and (2) if the State later revises the cross referenced non-SIP provision, the revised cross referenced provision could be interpreted to be enforceable under the SIP even if such provision, as revised, does not meet the requirements of the

Act and of 40 CFR part 51. Furthermore, there is no demonstration whether these cross referenced provisions are separable from the rules that are submitted. Texas should either remove the cross references to the non-SIP provisions or submit the cross referenced provisions to EPA for SIP approval. Note that our action on any provision which refers to or implements a provision that EPA has not approved does not imply EPA proposed approval of such non-SIP requirement.

##### B. Use of Undefined Acronyms.

Several sections use the acronyms "APA" "SOAH" and "WQMP." However, we do not see where these terms are defined.

##### C. Cross References to Obsolete Provision for Permits by Rule for Concrete Batch Plants

The following provisions cross reference to public notice provision for permit by rule for concrete batch plants: section 39.403(a)(3) and (b)(10); section 39.411(a)(10)(iv)(C); section 39.601; and section 55.152(a)(2). TCEQ has repealed all permits by rule for concrete batch plants and replaced them with a Standard Permit for concrete batch plants. This change is discussed in EPA's approval of this action at 71 FR 13549 (March 16, 2006). Texas has not revised these provisions in Chapters 39 and 55 to reflect the change that EPA approved March 16, 2006.

##### D. Cross Reference to Section 116.10(9)

Section 39.303(b)(8)(B) cross references section 116.10(9) which is the definition of "modification of existing facility" (later recodified as section 116.10(11)). Texas submitted this definition in separate SIP submittals which are currently under review. EPA will address this definition in a separate action.

##### E. Alternative Publication Procedures for Small Businesses

Section 39.603(e) provides an alternative requirement to publish a notice under section 39.603(a)(2)<sup>21</sup> if the applicant and source meet the definition of a small business stationary source in section 382.0365 of the Texas Health and Safety Code including, but not

<sup>21</sup> Section 39.603(e)(1) refers to § 39.601(a)(2), which is not in the submitted rule. On July 31, 2002, Texas submitted a revision to Section 39.603 which revised subsection (e) to refer to paragraph (c)(2) rather than paragraph (a)(2). EPA is reviewing the July 31, 2002, SIP submittal and will address this change in a separate action. Paragraph (c)(2) refers to a different larger display notice that must be published in the same issue of the newspaper as the primary notice published under paragraph (c)(1).

<sup>19</sup> Texas' rules for Flexible Permits are not in the existing Texas SIP. EPA is reviewing the Texas' SIP submittal which relates to Flexible Permits and will address its concerns in a separate action.

<sup>20</sup> Report prepared by EPA Office of Air Quality Planning and Standards and OPEI at [http://www.epa.gov/ttn/oarpg/t5/memoranda/iap\\_eier.pdf](http://www.epa.gov/ttn/oarpg/t5/memoranda/iap_eier.pdf).

limited to, those which: are not a major stationary source for federal air quality permitting; do not emit 50 or more tpy of any regulated pollutant; do not emit 75 or more tpy of all regulated pollutants; are owned or operated by a person that employs 100 or fewer individuals; and if the applicant's site meets emission limits in section 106.4(a), it will be considered to not have an effect on air quality. If all of the above conditions are met, the Executive Director may post information pending permit applications on its Web site, such as the permit number, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

The existing SIP has no provision for alternative public notice for small businesses. As a relaxation of the existing SIP, we request that Texas provide a demonstration of how this provision is consistent with section 110(l) of the Act. Section 30.603(e)(1)(A) refers to a definition of "small business stationary source in section 382.0365 of the Texas Health and Safety Code. For clarity and approvability into the SIP, § 39.603(e) should be revised to refer to corresponding provisions of the Texas SIP.

#### *F. Relaxation of Sign Posting Requirements Under Section 39.604*

We have identified two provisions which relax the sign posting requirements of the existing SIP.

- Section 39.604(c) includes a provision that the section's sign posting requirements do not apply to properties under the same ownership which are noncontiguous and/or separated by intervening public highway, street, or road, unless directly involved by the permit application. This exclusion from the sign posting requirements is not in the existing SIP. As a relaxation of the existing SIP, we request that Texas provide a demonstration how this provision is consistent with section 110(l) of the Act.

- Section 116.133(f)(1) provides that if the nearest elementary or middle school has waived out of the requirements of 19 TAC section 89.1205(a) under 19 TAC section 89.1205(g), the alternate language signs shall be published in the alternate languages in which the bilingual education program would have been taught had the school not waived out of the bilingual education program. We do not see where this provision is included in the revised rules. Because omission of this provision is a relaxation of the existing SIP, we request that Texas

provide a demonstration how omission of this provision is consistent with section 110(l) of the Act.

### **VII. Why are we taking no action on some provisions of the submittal?**

#### *A. Provisions Which Implement Section 112(G) of the Act*

There are cross references to Chapter 116, Subchapter C<sup>22</sup> of this title relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 Code of Federal Regulations Part 63)) in the following provisions: sections 39.403(b)(9); 39.419(e)(3)(C); and 116.183. In an EPA SIP approval published September 18, 2002, we addressed the § 112(g) provisions (then located in Subchapter C of Chapter 116). We stated:

We are taking no action on Subchapter C of Chapter 116—Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA Section 112(g), 40 CFR part 63) as submitted in 1998. The program for reviewing and permitting constructed and reconstructed major sources of HAP is regulated under section 112 of the Act and under 40 CFR part 63, subpart B. Under these provisions, States establish case-by-case determinations of maximum achievable control technology for new and reconstructed sources of HAP. The process for these provisions is carried out separately from the SIP activities. For the reasons discussed above, we are not approving Subchapter C of [Chapter] 116 as submitted in 1998.

67 FR 58699 (September 18, 2002).

Section 112(g) of the Act applies to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under § 112 of the Act and 40 CFR part 63, subpart B. The process for implementing these provisions is carried out separately from the SIP. Because the requirements under section 112(g) are self-implementing under section 112 of the Act and under 40 CFR part 63, subpart B, EPA will take no action on sections 39.403(b)(9), 39.419(e)(3)(C), and 116.183.

#### *B. Provisions Which Do Not Relate to Air Quality Permits*

Texas submitted the following provisions to EPA for SIP approval which do not relate to air quality permits or to provisions that are not in the approved SIP:

- Section 39.411(b)(11)—Applies to radioactive material licenses under Chapter 336;

- Section 39.411(b)(13)—Applies to municipal solid waste applications;
- Section 39.411(b)(14)—Applies to class 3 modifications of hazardous industrial solid waste permits;
- Section 39.411(c)(7)—Applies to radioactive material licenses under Chapter 336

- Section 39.419(d)—Subsection (d) only relates to subsection (c), which was not submitted;

Because these provisions do not relate to air quality permitting or to any applicable requirement of the Clean Air Act, they are outside the scope of the SIP. The TCEQ should withdraw these provisions from this SIP submittal package. Consequently, EPA will take no action these provisions.

#### *C. Portions of Chapter 55*

The revised rules submitted to EPA include selected provisions from Chapter 55, Requests for Reconsideration and Contested Case Hearing. The existing SIP does not contain provisions which implement Texas' air permitting administrative appeal process. Note that PSD permits issued by EPA or States with a delegated PSD program provide appeal to the Environmental Appeals Board under 40 CFR Part 124. EPA interprets the CAA to require the opportunity for State court review under a State approved PSD program, as discussed in section V.B. of this notice, but the Act does not specifically require an administrative appeal process for an approved SIP PSD program. The requirements under 40 CFR part 124 are not applicable to State approved PSD programs. Therefore, we are taking no action today on the portions of this SIP submittal that relate to requests for reconsideration or contested case hearings. Specifically, we are taking no action today on section 55.1—Applicability; section 55.21—Requests for Contested Case Hearing, Public Comment; section 55.101—Applicability; section 55.103—Definitions; section 55.150—Applicability; section 55.201—Requests for Reconsideration and Contested Case Hearing; section 55.203—Determination of Affected Person; section 55.205—Request by Group or Association; section 55.209—Processing Requests for Reconsideration or Contested Case Hearing; and section 55.211—Commission Action or Requests for Reconsideration and Contested Case Hearing.

We propose to grant limited approval and limited disapproval to Subchapter E of Chapter 55 related to Public Comment and Public Meetings including sections 55.150—Applicability; section 55.152—Public

<sup>22</sup> These provisions were recodified from Subchapter C to Subchapter E of Chapter 116 in a SIP revision submitted February 1, 2006. EPA is currently reviewing the February 1, 2006, revisions and will address this provision in a separate action.

Comment Period; section 55.154—Public Meetings; section 55.156—Public Comment Processing.

*D. Revisions to Section 116.740—Public Notice*

The October 25, 1999, SIP submittal includes revisions to section 116.740—Public Notice in Chapter 116, Subchapter G which relates to Flexible Permits. This submittal revised earlier SIP submittals of this section as submitted November 29, 1994, and July 22, 1998. EPA is currently reviewing the November 29, 1994, and July 22, 1998, SIP submittals and will propose appropriate action on section 116.740 in a separate action. EPA will take no action on section 116.740 at this time.

**VIII. Public Comment and Proposed Action**

Under the CAA sections 110(k)(3) and 301(a) for the reasons stated above, EPA is proposing simultaneous limited approval and limited disapproval of portions of the SIP revisions identified in section II.A which Texas submitted on December 15, 1995; July 22, 1998; and October 25, 1999. EPA is taking no action on certain sections as identified in section VII because they are outside the scope of the SIP or because they revise a prior SIP submittal which is currently under review for approval or disapproval in a separate action. As discussed in this proposal, we have identified the following inconsistencies between the Texas revised rules and minimum Federal requirements for public participation. In summary, the provisions which preclude full approval of the revised rules include, but may not be limited to, the following:

*A. Provisions Relating to Public Participation for Projects Subject to Minor NSR*

- Section 39.419(e) fails to require the State's air quality analysis and proposed approval or disapproval in the publicly available information for new or modified minor NSR sources or minor modifications at major sources,

- Section 39.403(b)(8) fails to require any public participation for a minor NSR permit amendment or minor modification under section 116.116(b), unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director.

- Section 39.419(e)(1)(C) fails to require the State's air quality analysis and proposed approval or disapproval in the publicly available information, for any permit amendment, modification, or renewal application of a major or minor source, unless the action would result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

- Section 39.403(b)(8) (Applicability) references to two State statutory provisions, THSC Section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit) which are not part of the SIP.

*B. Provisions Relating to Public Participation for Projects Subject to PSD*

- The revised rules do not provide opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations and to provide notice of the opportunity for a public hearing for a PSD permit.

- Public notice of a PSD permit is not required by the revised rules to contain the degree of increment consumption that is expected from the source or modification.

- There is no requirement in the revised rules that a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification.

- There is no requirement in the revised rules that response to comments be available prior to final action on the PSD permit.

- There is no definition of a final appealable decision for a PSD permit in the revised rules. We request further information about how and when the commenters are informed of the Agency's final decision and how commenters are informed of access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

*C. Provisions Relating to Public Participation for Projects Subject to PALs*

- There is no requirement in the revised rules that PALs be established, renewed, or increased through a

procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.166(w)(5) and (11).

- There is no requirement in the revised rules that the State address all material comments before taking final action on the PAL permit, consistent with 40 CFR 51.166(w)(5).

- There is no reference to PALs in the applicability section in Chapter 39.403.

*D. Provisions Relating to Public Participation for Projects Subject to Flexible Permits*

- For initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, there is no requirement in the revised rules for 30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval.

- Where PSD and NNSR terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit, there is no requirement in the revised rules for public participation consistent with 40 CFR 51.161 and 51.166(q).

*E. Other Concerns*

- The issues identified in section VII of this preamble.

We are proposing simultaneous limited approval and limited disapproval of the revised rules because we have determined that the rules strengthen the existing SIP, but do not meet the minimum public participation requirements of the Act and our regulations. We request comments on this proposal. After review and response to public comment, EPA plans to take final action on the revised rules. Final limited approval would incorporate the revised rules identified in section II into the Texas SIP and the new public participation rules would become fully federally enforceable. Final limited disapproval would make a finding of how the revised rules fail to meet minimum criteria established by the Act and our regulations. If EPA determines that, for rules required by the CAA, the deficiencies forming the basis of final limited disapproval have not been corrected, the Agency may apply the sanctions listed in section 179(b) of the Act and 40 CFR 52.31 within 18 months of the finding. If the State submits an

approvable rule revision within 18 months of such a finding, EPA may take interim final action, effective upon publication, to stay the sanctions prior to proposing approval and taking comment on the submittal. Also, a FIP may be promulgated under section 110(c)(1) of the Act, if EPA finds that a SIP revision does not satisfy the minimum criteria established under section 110(k)(2) of the CAA. The FIP may be adopted at any time within 2 years of such a finding, unless the State corrects the deficiency and EPA approves the revision before the FIP is promulgated. Final approval of the revision correcting the identified deficiencies would terminate imposition of the FIP.

We will accept comments on this proposal for the next 60 days. After review of public comments, we intend to publish a rule to promulgate final limited approval and final limited disapproval of the provisions identified above into the Texas SIP.

#### IX. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: November 18, 2008.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

[FR Doc. E8-28162 Filed 11-25-08; 8:45 am]

**BILLING CODE 6560-50-P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 112

[EPA-HQ-OPA-2008-0546; FRL-8745-9]

RIN 2050-AG49

#### Oil Pollution Prevention; Non-Transportation Related Onshore Facilities

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to amend the dates by which facilities must prepare or amend Spill Prevention, Control, and Countermeasure (SPCC) Plans, and implement those Plans. The Agency is also proposing to establish dates for farms to prepare or amend their Spill Prevention, Control, and Countermeasure Plans (SPCC Plans), and implement those Plans. EPA had delayed establishing compliance dates for farms pending revisions to the SPCC rule that would specifically address this sector. Two different extension dates are proposed for farms and production facilities that meet the qualified

facilities criteria. Elsewhere in this **Federal Register**, the Agency is finalizing certain tailored and streamlined requirements for facilities subject to the SPCC requirements.

**DATES:** Written comments must be received by December 26, 2008.

**ADDRESSES:** Comments should be directed to Docket ID No. EPA-HQ-OPA-2008-0546. Comments may be submitted by one of the following methods:

(1) *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments;

(2) *E-mail:* Comments may be sent by electronic mail (e-mail) to: [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov), Attention Docket ID No. EPA-HQ-OPA-2008-0546.

(3) *Fax:* Comments may be faxed to 202-566-9744, Attention Docket ID No. EPA-HQ-OPA-2008-0546.

(4) *Mail:* The mailing address of the docket for this rulemaking is EPA Docket Center (EPA/DC), Docket ID No. EPA-HQ-OPA-2008-0546, mail code 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attention Docket ID No. EPA-HQ-OPA-2008-0546.

(5) *Hand Delivery:* EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington DC 20460. Attention Docket ID No. EPA-HQ-OPA-2008-0546. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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