

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 6, 2012

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2011-2229-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 116, Control of Air Pollution by Permits for New Construction or
Modification
New Source Review Reform Revision
Rule Project No. 2012-015-116-AI

Background and reason(s) for the rulemaking:

On June 10, 2005, the TCEQ submitted amendments to 30 TAC §116.12 to the United States Environmental Protection Agency (EPA) as revisions to the New Source Review (NSR) State Implementation Plan (SIP) and §116.150 as revisions to the Nonattainment New Source Review (NNSR) SIP, both adopted on May 25, 2005. On February 1, 2006, the TCEQ submitted amendments to §§116.12, 116.121, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, 116.601, and 116.617 to the EPA as revisions to the NSR SIP. On September 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas SIP (74 *Federal Register* 48467, September 23, 2009). The EPA's final disapproval notice was published September 15, 2010. On March 11, 2011, the TCEQ submitted a revised SIP package amending some of these rules to address the issues outlined in the EPA's disapproval. On September 30, 2011, the EPA expressed its intention to propose a conditional approval of the package and requested a dialog to resolve certain EPA concerns and facilitate a final approval. This rulemaking addresses those concerns.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

- Remove obsolete language referencing flexible permits in the definition of Plant-wide applicability limit (PAL) effective date (§116.12(23));
- Include text that provides that a reference to "facility" also refers to the federal rule term "emissions unit" where appropriate in §116.150 and § 116.151, both concerning NNSR permitting;
- Include a reference to the federal definition of major stationary source (40 Code of Federal Regulations §51.166(b)(1)) and correct a typographical error in a reference to a federal rule in §116.180(a)(5). Note that EPA offered an alternative which was to reference the definition of major stationary source in §116.12(17); however, staff believes that referencing the federal rule is adequate for SIP approval, will eliminate

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a need to change this cross reference when any changes are made in the future to §116.12, and will minimize potential confusion; and

- Include language in §116.186(b)(9) to indicate that the failure to use a monitoring system meeting requirements renders the PAL permit invalid.

B.) Scope required by federal regulations or state statutes:

Staff is recommending amendments to §116.12, Nonattainment Review Definitions; §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas; §116.151, New Major Source or Major Modification in Nonattainment Area Other Than Ozone; §116.180, Applicability; and §116.186, General and Special Conditions.

C.) Additional staff recommendations that are not required by federal rule or state statute: None.

Statutory authority:

Statutory authority includes Texas Water Code, §5.102, General Powers; §5.103, Rules; §5.105, General Policy; §7.02, Enforcement Authority; §7.107, Violation; §7.301 Definition; and §7.302, Grounds for Revocation or Suspension of Permit. Statutory Authority also includes Texas Health and Safety Code, §382.017, Rules; §382.002, Policy and Purpose; §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.016, Monitoring Requirements; Examination of Records; §382.021, Sampling Methods and Procedures; §382.040, Documents; Public Property; §382.051, Permitting Authority of the Commission; Rules, §382.0511, Permit Consolidation and Amendment; §382.0512, Modification of Existing Facility; §382.0513, Permit Conditions; §382.0514, Sampling, Monitoring, and Certification; §382.0515, Application for Permit; and §382.0518, Preconstruction Permit. The amendments are also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

Effect on the:

A.) Regulated community: Although the EPA has noted deviations from the federal rules for the major NSR SIP in state rules, the Air Permits Division (APD) has required applicants to comply with all applicable conditions of major NSR, and therefore, there should be no adverse impacts associated with the resolution of these deviations.

B.) Public: There will be no effect on the public since the APD is currently conducting reviews of sources subject to NSR that meet federal definitions and requirements.

C.) Agency programs: There will be no effect on agency programs since the APD is currently conducting reviews of sources subject to NSR that meet federal definitions and requirements.

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Stakeholder meetings: No stakeholder meetings were held. Standard notice of this action and an opportunity for comment was provided.

Public Comment: Only one comment letter was received. Texas Industry Project requests that the commission add language to §116.186(b)(9) that unambiguously forecloses the possibility that the TCEQ rule be interpreted that the malfunction of a monitoring device could lead to the invalidation of a PAL permit. Only the rule text is enforceable, and there is no assurance that future enforcement or interpretation will be made in deference to the commission's position, as expressed in the preamble, that "failure to use" a monitoring system refers to installation and does not include malfunctions.

The phrase "failure to use" in EPA's PAL rule means a failure to install or failure to operate the prescribed monitoring device or system to operate under a PAL permit, rather than an inadvertent malfunction or maintenance downtime of the monitoring device or system. The language §116.186(b)(9) is intentionally identical to that used by EPA in its PAL rules and was chosen to ensure the SIP approvability of this adoption. The executive director has no formal indication from EPA that it would find other language approvable and recommends adopting the language as proposed.

Significant Changes from Proposal: None.

Potential controversial concerns and legislative interest remaining after proposal and public comment: None anticipated.

Does this rulemaking affect any current policies or require development of new policies? No.

What are the consequences if this rulemaking does not go forward? If this rulemaking does not go forward, federal SIP approval of major NSR permitting will be jeopardized. The timing of this rulemaking coincides with EPA's statement to TCEQ staff that EPA will propose a conditional approval of all of the NSR Reform and NSR Nonattainment permitting SIP changes submitted by TCEQ, including those that are part of this current rulemaking. The condition to be satisfied is that TCEQ adopts the amendments within one year. Although the rule amendments adopted in 2011 are not the subject of litigation regarding EPA review of the rules, EPA has agreed with BCCA Appeal Group, et al, to take action on the TCEQ's 2011 rules (which includes some rules adopted or amended in 2005 and 2006) by summer 2012. TCEQ's proposal on February 22, 2012 will assist in that effort. In addition to this rulemaking, on May 4, 2012, the Executive Director provided a letter, at the request of EPA Region 6, which contained additional information regarding how the commission's rules implementing NSR Reform comply with FCAA § 110(l). The letter also addresses specific questions raised by EPA Region 6 regarding the practical enforceability of PAL permits, TCEQ's treatment of malfunction emissions with regard to PAL permits, and the judicial admissibility of monitoring data required by PAL

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permits. A copy of the letter is attached is provided in the backup materials for informational purposes.

Are there alternatives to rulemaking? The commission could decline to address the EPA's request and wait for further EPA action.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** March 9, 2012

Anticipated *Texas Register* publication date: August 10, 2012

Anticipated Effective Date: August 16, 2012

Six-month *Texas Register* filing Deadline: September 9, 2012

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