



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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SEP 15 2006

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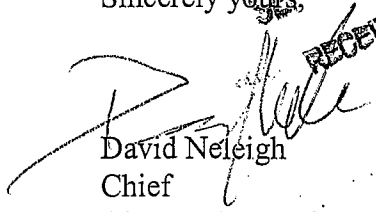
RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State Implementation Plan (SIP) Revisions for Modification of Existing Facilities and Qualified Facilities.

Dear Mr. Hagle:

This letter is a follow-up to our meeting on October 12, 2005, in Austin and subsequent discussions concerning your SIP revisions related to modification of existing facilities and qualified facilities. We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements for new and modified sources, or identify changes that you will make to address our concerns. We will review and take action on these rules prior to our final review of your new source review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,


David Neleigh
Chief
Air Permits Section

AIR PERMITS DIVISION
SEP 20 2006

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Enclosure

cc: David Neleigh (6PD-R)

Enclosure

Comments on Texas' Permit Regulations for Modification of Existing Facilities and Qualified Facilities

I. Revisions to 30 Texas Administrative Code (TAC) §§ 116.10, 116.116(e), 116.117 and 116.118.

- A. The provisions for modification of existing facilities and for qualified facilities were submitted to EPA as revisions to the Texas SIP on March 13, 1996; July 22, 1998; and September 11, 2000. The revisions relating to these types of facilities are in 30 TAC §§ 116.10(9)¹, 116.116(e), 116.117, and 116.118. We reviewed these rules for consistency with 40 Code of Federal Regulations (CFR) part 51 and § 110 of the Clean Air Act (CAA).
- B. These regulations provide that the following physical or operational changes at a facility are not modifications.
1. Under 30 TAC § 116.10(9)(A), a change at any facility that results in an insignificant increase in the amount of air contaminant emitted that is authorized by one or more Commission exemptions.
 2. Under 30 TAC § 116.10(9)(B), a change at any facility that results in an insignificant increase at a permitted facility.
 3. Under 30 TAC § 116.10(9)(E), a change at a qualified facility that does not result in a net increase in allowable emissions of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:
 - a. Has received a preconstruction permit or permit amendment or has been exempted under Texas Clean Air Act (TCAA), § 382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur.
 - b. Uses, regardless of whether the facility has received a

¹ The SIP revisions that we are discussing in this letter define the term "modification of existing facility" in 30 TAC § 116.10(9). In a later revision adopted by TCEQ on August 21, 2002, and submitted to EPA on September 4, 2002, this definition was redesignated to 30 TAC § 116.10(11). Because this term is designated 30 TAC § 116.10(9) in the SIP revisions discussed herein, we will refer to the definition as it formerly existed in 30 TAC § 116.10(9).

preconstruction permit or permit amendment or has been exempted under TCAA, § 382.057, an air pollution control method that is at least as effective as best available control technology that the Commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur.

4. Under 30 TAC § 116.116(e), a physical or operational change at a qualified facility is not a modification if it does not result in:
 - a. A net increase in allowable emissions of any air contaminant; and
 - b. The emission of any air contaminant not previously emitted.

II. General Comments

- A. We have reviewed the rules for modification of existing facilities and qualified facilities as they apply to major sources for consistency with § 110(l) of the CAA and 40 CFR part 51, including our current major NSR regulations which measure an emissions increase at an existing facility using the “actual-to-projected-actual” applicability test. As you know, our regulations no longer provide for an exemption from major NSR applicability for Clean Units or Pollution Control Projects. The Court in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005) vacated the Clean Unit and Pollution Control Project provisions of 40 CFR parts 51 and 52. The Court also held that the major NSR modification requirement, which incorporates by reference CAA § 111(a)(4), “unambiguously defines ‘increases’ in terms of actual emissions.” Therefore, many of our comments relate to how qualified facilities will determine NSR applicability consistent with the Federal requirements.

The qualified facility provisions allow some major sources to determine minor NSR applicability based upon allowable, rather than actual, emissions. This is a change from the current Texas SIP, which determines minor NSR applicability based upon actual emissions. While we understand that nonattainment new source review (NSR) and prevention of significant deterioration regulations of the Texas SIP have applicability statements for major modifications, we are concerned that the exemptions from the definition of “modification of an existing facility” may provide an alternative method to calculate an emission increase. Because we cannot approve a “Clean Units” type test which is based upon allowable emissions to determine NSR

applicability at major sources, we request further information below to clarify applicability of major NSR requirements at sources labeled as qualified facilities and to evaluate revisions to the definition of modification to allow minor modifications at major sources to be based upon allowable emissions.

Based on our initial review of the qualified facility rules, we believe, at a minimum, a minor modification at a major source which results in a significant actual project emission increase that would require a netting demonstration to avoid major NSR applicability cannot be authorized under the qualified facilities provisions. These modifications must be authorized through a permit amendment process consistent with 40 CFR part 51. In other words, any change subject to major NSR or any physical change or change in the method of operation of a major source associated with a project where the prospective actual emissions increases from such changes, considered by themselves, would be a significant increase of any NSR regulated pollutant, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and § 51.166(b)(23) and (39), must be authorized through a permit amendment. Also, any significant increase in actual emissions that results from a project that is authorized under the qualified facility provisions at a major stationary source must be subject to the netting requirements of 40 CFR § 51.165(a)(vi) and § 51.166(b)(3) in calculating a net emission increase. We will also evaluate changes to definition of modification of an existing facility that allow major sources to base minor NSR applicability on allowable, rather than actual, emissions as discussed in Section B below.

- B. We have reviewed the rules for modification of existing facilities and qualified facilities as they apply to minor sources for consistency with 40 CFR part 51 and how changes to the existing SIP meet the requirements of § 110(l) of the CAA. We recognize 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 national ambient air quality standards (NAAQS). We have approved SIPs where a State exempts categories of changes from minor NSR altogether on *de minimis* grounds that are consistent with the exemption criteria set forth in *Alabama Power Co. v. Costle*, 626 F. 2d 323 (D.C. Cir. 1980) or *Alabama Power* (i.e., the change is trivial in size and of no importance in safeguarding ambient standards).

The qualified facility provisions allow some minor sources to determine minor NSR applicability based upon allowable, rather than actual, emissions. This is a change from the current Texas SIP, which determines minor NSR applicability based upon actual emissions. Because the qualified facility rules provide exemptions from the permitting requirements of 40 CFR § 51.160 and

§ 51.161, we will review the provisions based upon the *de minimis* exemption criteria set forth in *Alabama Power*. Because the qualified facility rules also relax requirements in the current Texas SIP, we will review the provisions to ensure that they meet the requirements of § 110(l) of the CAA. We request further information below on the applicability of minor NSR requirements at sources labeled as qualified facilities.

- C. We also request further information on how the SIP distinguishes between the definition of “major modification” at 30 TAC § 116.12(11)² in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review Definitions, and the definition of “modification of an existing facility” at 30 TAC 116.10(9) of Subchapter A, General Definitions. Our initial review indicates the definition of “modification of an existing facility” must be revised to exclude modifications at major sources which result in a significant actual project increase which requires a netting demonstration.
- D. We have found no definition of “insignificant” as used in the qualified facility rule nor any demonstration that such insignificant increases are “de minimis” or “trivial” so as to satisfy the exemption criteria set forth in *Alabama Power*. We request further information on the application of this term to major and minor modifications.

III. Do 30 TAC §§ 116.10(9), 116.116(e), 116.117, and 116.118 meet the requirements of 40 CFR part 51, subpart I?

The State’s SIP revision excludes certain categories of emission increases from the definition of modifications which are subject to permit review. The EPA is concerned that these provisions relax the current SIP, which provides that these types of changes are modifications that require a permit.

- A. 30 TAC § 116.10(9)(A) - Insignificant increases authorized by Commission exemption.
 - 1. This provision differs from the current SIP (30 TAC

²The current SIP defines “major modification” in 30 TAC § 116.12(11). In a pending SIP revision that TCEQ adopted January 11, 2006, and submitted to EPA on February 1, 2006, this term was redesignated to 30 TAC § 116.12(18). Because EPA has not yet approved this submitted SIP revision, we will refer to the citation in the current SIP.

§ 116.116(b)(1)³), because it provides that insignificant increases at exempted sources are not modifications.

2. The Act and Federal regulations have no exception for insignificant increases or increases that are below an existing level of allowable or authorized emissions.
3. There is no demonstration that the insignificant increases will meet the requirements of 40 CFR § 51.160(a) and (b).⁴ Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.
4. The rule does not define “insignificant” increases, nor demonstrate that such increases are “de minimis” or “trivial” so as to satisfy the exemption criteria set forth in *Alabama Power*.
5. The rule does not provide a definition of the term “commission exemption.”
6. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

³ The current SIP at 30 TAC § 116.116(b) provides:

(b) Permit Amendments.

(1) ... the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

- (A) a change in the method of control of emissions;
- (B) a change in the character of the emissions; or
- (C) an increase in the emission rate of any air contaminant.

⁴ Under 40 CFR § 51.160(a) and (b), Texas must determine that such change will: (1) not result in a violation of applicable portions of the control strategy; or (2) not interfere with attainment or maintenance of a national standard; otherwise, the State must be able to prevent such construction or modification.

B. 30 TAC § 116.10(9)(B) - Insignificant increases at a permitted facility.

1. This provision differs from the current SIP (30 TAC § 116.116(b)(1)), because it provides that insignificant increases at a permitted facility are not modifications.
2. The Act and Federal regulations have no exception for insignificant increases at a permitted facility.
3. The rule allows an insignificant increase without a demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.
4. The rule does not define “insignificant” increases nor demonstrate that such increases are “de minimis” or “trivial” so as to satisfy the exemption criteria set forth in *Alabama Power*.
5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

C. 30 TAC § 116.10(9)(E) - Net increases in allowable emissions at qualified facilities.

1. This provision differs from the current SIP (30 TAC § 116.116(b)(1)), because it provides that a change at a facility that is permitted or exempted is not a modification if it does not result in:
 - a. A net increase in allowable emissions and
 - b. In the emission of any air contaminant not previously emitted.
2. The Federal regulations do not exempt an increase at a unit because a decrease at another unit results in no net increase in allowable emissions.
3. The rule allows an increase above existing actual emissions and/or above existing permit allowable emission limitations without a

demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. There is no definition of the term “net increase in emissions.” There must be criteria concerning:
 - a. The emissions that are to be included in determining the net increase in emissions;
 - b. How the individual increases and decreases will be determined; and
 - c. How TCEQ ensures that decreases that are used in the netting are enforceable as a practical matter, or otherwise assures that the decreases are achieved and met on a continual basis.
5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

D. 30 TAC § 116.116(e).

1. This provision provides that a physical or operational change may be made to a qualified facility if the change does not result in:
 - a. A net increase in allowable emissions of any air contaminant; and
 - b. The emission of any air contaminant not previously emitted.
2. The rule differs from the current SIP (30 TAC § 116.116(b)(1)), which does not provide these exclusions.
3. The rule allows increases above existing permit allowable without a demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). The State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. The rule has no definition of the term “net increase in emissions.” There must be criteria concerning:
 - a. The emissions that are to be included in determining the net increase in emissions;
 - b. How the individual increases will be determined; and
 - c. How TCEQ ensures that decreases that are used in the netting are enforceable as a practical matter or otherwise assures that the decreases are achieved and met on a continual basis.
5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

IV. Recommended revisions to these rules.

We have identified the following changes that would address many of the concerns raised in our initial review of the rules for modification of existing facilities and qualified facilities. We will complete our review of the SIP revision based upon your response to this letter. We recommend that you consider, at a minimum, the following:

- A. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the *de minimis* criteria established in *Alabama Power*.
- B. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the requirements of § 110 of the CAA.
- C. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the Federal requirements of Part 51 for major NSR applicability.
- D. 30 TAC § 116.10(9)(A) and (B) must clarify that emission increases above allowable emission limitations are not authorized by the rule.
- E. 30 TAC § 116.10(9)(A) and (B) must define “insignificant increase” in emissions, how the increase is calculated, and whether it is based upon allowable or actual emissions. These rules must further include a demonstration that such increases are “de minimis” or “trivial” so as to

satisfy the exemption criteria set forth in *Alabama Power*.

- F. 30 TAC § 116.10(9)(A) and (B) and § 116.116(e) must clarify that significant project actual emission increases at major sources, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and 51.166(b)(23) and (39), are not authorized by these provisions, but must be authorized through a permit amendment.
- G. 30 TAC § 116.10(9)(E) must clarify that significant project actual emission increases at major sources, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and § 51.166(b)(23) and (39), are not authorized by these provisions, but must be authorized through a permit amendment.
- H. 30 TAC § 116.10(9)(A) (B) and (E) and § 116.116(e) must clarify that significant increases in actual emissions that are authorized under these provisions at major sources are subject to the netting requirements of 40 CFR § 51.165(a)(vi) and 51.166(b)(3) in calculating a net emission increase and must be authorized through a permit amendment.
- I. 30 TAC § 116.10(9)(E) and § 116.116(e) must include provisions explaining how a “net increase in allowable emissions” is quantified.
- J. 30 TAC § 116.10(9)(E) and § 116.116(e) must include provisions to ensure that netting decreases are practically enforceable.
- K. Because these provisions provide exemptions from existing SIP rules, the State must demonstrate that the revisions:
 - 1. Will not violate applicable portions of the control strategy or interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change as required under 40 CFR § 51.160(a) and (b); and
 - 2. Will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Clean Air Act as required under § 110(l) of the CAA.