



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
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JUN 07 2010

Ms. Devon Ryan
Office of Legal Services (MC 205)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: EPA Comments on Rule Project Number 2010-006-116-PR

Ms. Ryan:

Thank you for providing us the opportunity to review and comment on the proposed revisions to the Qualified Facility Program at Texas Administrative Code (TAC) Title 30, Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, sections 116.10, 116.17, 116.111, 116.116, 116.117, and 116.118, and the proposed associated revisions to the Texas State Implementation Plan (SIP). This proposed rulemaking revises the existing Qualified Facility Program to address the concerns identified in our April 14, 2010, disapproval of the Program (75 FR 19468). We would also like to thank you for extending the comment period for this rulemaking to ensure adequate notice and comment was provided for the proposed associated revisions to the Texas SIP.

Please note that these comments do not constitute final determinations concerning approvability of the revisions to the Texas SIP. We are providing these comments to assist TCEQ in the development of regulatory language. Additionally, comments 4, 5, 7, 11, 12, 14, 15, 16, 17, 19, 24, 25, 26, and 27 must be addressed to our satisfaction before EPA can proceed with a proposed action on these potential revisions to the Texas SIP.

We look forward to working with the TCEQ as you move forward in responding to these comments and finalizing the revisions to the Texas SIP. If you have any questions, please call Ms. Adina Wiley of my staff at (214) 665-2115.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas H. Diggs".

Thomas H. Diggs
Associate Director for Air Programs
Multimedia Planning and
Permitting Division

Enclosures

Enclosure

1. The "Background and reason(s) for the rulemaking" section of the Executive Summary states that the Qualified Facility Program authorizes increases in actual emissions at facilities. This statement is inconsistent with our understanding that the Qualified Facility Program is designed to only allow increases in allowable emissions to net out against decreases in allowable emissions. Please revise this statement to accurately reflect the intent of the Qualified Facility Program.
2. EPA agrees with the statement in the 30 TAC Chapter 116 preamble that the revisions to 30 TAC sections 116.10(5)(F), 116.111(a)(2)(K), 116.116(b)(3), and 116.117(a)(4)(B) will not be submitted as SIP revisions. These sections all refer to section 112(g) of the CAA, which is not implemented through the SIP.
3. The 30 TAC Chapter 116 preamble at page 10, Notification of Changes at Qualified Facilities, states that the submission of PI-E forms has resulted in significant denials for changes under the Qualified Facility Program. The rule is unclear how TCEQ has the authority to deny Qualified Facility changes when there is no approval process required for the PI-E form. Does TCEQ have a set amount of time to review and respond to the PI-E form? If TCEQ does not respond within the appropriate time, does the facility have a default approval? Where do the rules contain such provisions?

Also, the preamble statement referenced above is inconsistent with the rule language requirements at 30 TAC sections 116.116(e)(2) and 116.117(b). New 30 TAC section 116.116(e)(2) requires owners or operators to submit Form PI-E prior to making any changes to qualified facilities. However, 30 TAC section 116.117(b) requires the submittal of Form PI-E as part of the annual report. Further, the 30 TAC Chapter 116 preamble at page 8, Netting and Double Counting, implies that pre-change notification is only required when the intraplant trade moves emissions from the interior of a site to a point closer to the property line. Please explain how the PI-E form is used; is this form submitted pre-change or post-change? TCEQ should revise the regulatory language to be consistent with the intent expressed in the preamble, by clearly identifying the requirements for submittal of the PI-E form, requiring pre-change notification for all qualified facilities changes, and including an express procedure for TCEQ review and respond.

4. TCEQ must provide explicit regulatory language to define the term "facility" as it applies to the Qualified Facility Program. We recognize that TCEQ interprets "facility," as it applies to the Qualified Facility Program, to preclude inclusion of more than one stationary source. However, the lack of rule language clarifying the meaning of the term "facility," as it applies to this Program, makes this definition overly vague; and therefore, unenforceable. As we stated in our final disapproval of the Qualified Facility Program, Texas's rules apply the term "facility" in different ways without providing clarification in the rule language.

75 FR 19468, at 19489 (April 14, 2010). Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," but the Qualified Facility rules fail to make such a limitation. Compare 30 TAC 116.10(6) to 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. However, TCEQ did not include sufficient information in its proposed revisions to demonstrate that the lack of this explicit limitation in the submitted Qualified Facility revisions is at least as stringent as the revised definition in the PSD non-PALs definition. We recommend that TCEQ resolve this deficiency by adding a specific definition of the term "facility" to the Qualified Facility Definitions at 30 TAC 116.17 or provide in its revised Qualified Facility Rule a description of what a "facility" is under the Qualified Facility Program.

5. The 30 TAC Chapter 116 preamble at page 6 clearly indicates that the TCEQ uses the term "account" synonymously with EPA's use of "source." While this preamble statement is a step towards addressing our concerns identified in the final disapproval of the Qualified Facility Program, the TCEQ must also revise the Qualified Facility rule language to include this statement to improve clarity and transparency of the rule and to entirely address our concerns. See 75 FR 19468, at 19489-19490.
6. The portion of the definition of "allowable emissions" at 30 TAC 116.10(2)(C) relating to "qualified grandfathered facility" is proposed for deletion under 30 TAC section 116.10. However, we note that there continue to be references to actual emissions throughout the Qualified Facility rule language, see 30 TAC sections 116.116(e)(4)(C), 116.116(e)(9)(A), 116.116(e)(9)(C), 116.116(e)(9)(D). It is our understanding of the Qualified Facility Program that actual emissions were only used for qualified grandfathered facilities. Please confirm that this interpretation is correct. If our understanding is correct and actual emissions were only used for qualified grandfathered facilities, please remove all references to actual emissions from the proposed language. However, if our understanding is incorrect please explain how actual emissions are to be used in a program that is designed for netting of allowable emissions.
7. The proposed definition of "Best Available Control Technology (BACT)" at 30 TAC section 116.10(1) must be revised to more clearly indicate this definition is for any air contaminant or facility not subject to federal permitting requirements, as indicated by the rule preamble on page 12. We recommend that TCEQ use the following language to promote rule clarity:

State (or alternately, Texas) Best available control technology (BACT) –
An air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emission reduction can be achieved through technology such

as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice. This definition applies to any air contaminant or facility not subject to federal permitting requirements under Title I, part C, of the Clean Air Act (CAA). For air contaminants or facilities subject to the Title I, part C, CAA requirements, the definition of BACT at section 116.111(a)(2)(C), which requires BACT as defined in 40 CFR 52.21(b)(12), will apply.

8. Please explain why the definition of "qualified facility" has been retained in 30 TAC section 116.10 rather than recodified into the new 30 TAC section 116.17, Qualified Facility Definitions.
9. New 30 TAC section 116.17(2) provides that the allowable emissions for a permitted facility at new 30 TAC section 116.17(2)(A) would include the emission limit established in the permit or maximum allowable emissions rate table (MAERT) *and* any emission limit contained in representations in the permit application that was relied upon in issuing the permit. This section may provide an opportunity for double-counting and over inflation of the allowable emissions for a permitted facility. Please verify that emissions limits are only cumulative if the emission limits in the permit, MAERT, and permit application are separate, entirely unrelated limits in order to prevent double-counting.
10. Please explain what is meant by a "Special Exemption Facility" at 30 TAC section 116.17(2)(D). Is a special exemption facility exempt from the requirements to have an underlying 30 TAC Chapter 116 permit or authorization under 30 TAC Chapter 106 at 30 TAC section 116.116(e)(1)(A)? If so, what is the basis for the exemption?
11. New 30 TAC section 116.116(e)(1)(B) cross-references the major NSR netting requirements at 30 TAC section 116.12(20). The SIP-approved major NSR netting provisions are located at 30 TAC section 116.12(13). EPA is evaluating pending revisions to 30 TAC section 116.12 that substantively revise and renumber this section. 30 TAC section 116.12(20) must be approved before EPA could proceed with a proposed action on the revised Qualified Facility Program. Our comments on the proposed revisions to 30 TAC section 116.116(e) do not reflect any intent or future action by the EPA to grant SIP approval to the revisions to 30 TAC section 116.12.
12. New 30 TAC section 116.116(e)(2)(A) requires owners or operators to submit an application for a permit alteration for each permit issued under 30 TAC section 116.111 involved in the qualified facility transaction. The SIP-approved alteration provisions at 30 TAC section 116.116(c)(B)(iii) state that a permit alteration is "any change from a representation in an application, general condition, or special condition in a permit that does not cause an increase in the emission rate of any air contaminant." Therefore, the SIP-approved alteration process cannot be used to revise the permit for the facilities involved in the

qualified facility transaction that has the increase in allowables. To use permit alterations for the facilities with emission increases, the TCEQ must propose a revision to the permit alterations provisions.

13. There appears to be a typographical error in new 30 TAC section 116.116(e)(2)(D). We believe the sentence should read:

No allowable emission rate ~~is~~ as defined in § 116.17 of this title (relating to Qualified Facilities Definitions) shall be exceeded.

14. Our final disapproval of the Qualified Facility Program determined that the program was deficient as a minor NSR program because it did not require participating facilities to have an underlying permit and an air quality impact analysis. See 75 FR 19468, at 19486-19487. New 30 TAC section 116.116(e)(2)(E) includes the following language: “. . . regardless of whether the facility has received a preconstruction permit or permit amendment. . . .” This section must be revised to accurately address this concern and to be consistent with the stated intent of the TCEQ, which is that a facility must have an authorization under 30 TAC Chapter 106 or 116 and air quality impact analysis in order to be “qualified” under the Program. See new 30 TAC section 116.116(e)(1)(A).
15. The interchange methodology at 30 TAC section 116.116(e)(5) is unapprovable for the sulfur dioxides and PM NAAQS. The term “sulfur compounds” used in the interchange methodology is broad enough to include hydrogen sulfide, which is a regulated NSR pollutant (see 40 CFR 52.21(b)(23)(i) and 52.21(i)(5)(i)), and requires a separate netting analysis from sulfur oxides. The interchange methodology also allows PM_{2.5} to be interchanged with PM₁₀, which are two separate pollutants. For additional information see our final disapproval of the Qualified Facility Program at 75 FR 19468, at 19474.
16. 30 TAC section 116.116(e)(5)(E) requires an owner or operator to demonstrate that the change will not adversely affect ambient air quality, but 30 TAC section 116.117(a)(4) only requires an owner or operator to maintain sufficient information to show that the project is not expected to adversely affect ambient air quality. We interpret 30 TAC section 116.117(a)(4) as requiring a lesser degree of stringency in the analysis. Therefore, the TCEQ must revise 30 TAC section 116.117(a)(4) to require a demonstration consistent with 30 TAC section 116.116(e)(5)(E). Please also explain the replicable procedure that TCEQ will employ to determine the change will not adversely impact ambient air quality.
17. 30 TAC section 116.116(e)(8)(A) provides that a facility may utilize control methods that are as effective as BACT required at the time the control methods are implemented. It is our understanding of the Texas Clean Air Act that only State BACT can apply to a minor NSR program, including the Qualified Facility Program. Please confirm this understanding. Also, 30 TAC section

- 116.116(e)(8)(A) must be revised to explicitly provide that State BACT at 30 TAC section 116.10(l) applies. Please explain the replicable procedure that TCEQ will employ to determine the control method is as effective as State BACT.
18. The Chapter 116 preamble at pages 8-9 states that new 30 TAC section 116.116(e)(10) contains anti-backsliding provisions such that the existing level of control may not be lessened for a Qualified Facility. The preamble further explains that this anti-backsliding provision will be implemented for intraplant trades through revisions to the maximum allowable emission rate table (MAERT) for the participating facilities. The rule language at 30 TAC section 116.116(e)(10) does not require a change to the MAERT, nor can we find this provision elsewhere in the proposed rules. The TCEQ should revise the rule language to require MAERT revisions as explained in the preamble.
 19. The annual report under 30 TAC section 116.117(b)(1) must be revised to address our concerns about the time lag between when the change is made and the TCEQ is notified. As noted in our final disapproval of the Qualified Facility Program, a six month report will better enable the TCEQ to monitor compliance with NAAQS, RFP or other control strategies. See 75 FR 19468, at 19482.
 20. 30 TAC section 116.117(b)(1) should be revised to require reporting for changes to Qualified Facilities with intraplant trading.
 21. TCEQ has deleted the provision for post-change notification (former 30 TAC section 116.117(b)(2)), but the revised regulations do not expressly require pre-change notification in all instances. As discussed above in Comment 3, we find that the proposed regulations governing notification requirements are vague. We strongly encourage TCEQ to expressly state that pre-change notification is required for all qualified changes. If TCEQ does not intend to require pre-change notification for all qualified changes, then we request that TCEQ further clarify timing and requirements for notification for all qualified changes contemplated under the Program.
 22. New 30 TAC section 116.117(b)(2) requires pre-change notification if a physical or operational change at a Qualified Facility will affect compliance with a permit special condition. Please explain what constitutes a permit special condition. Does this mean that a facility can change and/or remove federally required monitoring, reporting, and recordkeeping requirements without public notice? Is it possible that a facility could modify special conditions established under federal Consent Decrees or enforcement actions? We recommend that TCEQ revise this provision to clarify its applicability.
 23. We interpret 30 TAC section 116.118, Pre-change Qualification, as applying only to facilities that do not have an existing permit, i.e., qualified grandfathered facilities. Please explain the types of facilities that are covered under 30 TAC section 116.118. If these facilities are indeed qualified grandfathered facilities

please consider removing 30 TAC section 116.118. If these facilities are not qualified grandfathered facilities, we recommend clarifying 30 TAC sections 116.118(a)(1) and (a)(2) to improve clarity of the rule language.

24. The proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" identifies all of the Qualified Facilities in Texas. The TCEQ has created this supplemental document in an effort to show that these facilities will not adversely impact attainment or maintenance of the NAAQS, RFP, or any other applicable requirement of the Act. TCEQ makes the argument that Qualified Facilities net allowable emissions from existing permits that were issued under SIP-approved permit programs consistent with section 110(l) of the CAA. Therefore, the Qualified Facility Program by extension must demonstrate consistency with section 110(l) of the CAA. However, this analysis does not address the Qualified Grandfathered Facilities, which did not have underlying SIP-approved Chapter 116 permits or Chapter 106 authorizations. The proposed SIP supplement must be revised to identify which of these facilities were Qualified Grandfathered Facilities so that we can assess the impact of sources without permits on this Program. The TCEQ must also provide verification that each Qualified Grandfathered Facility is now covered under a SIP-approved Chapter 116 permit or Chapter 106 authorization.
25. The "Program Summary" portion of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to accurately reflect the requirements of new 30 TAC section 116.116(e)(1)(A), that a facility must have an authorization under 30 TAC Chapter 106 or 116 before it can become a qualified facility.
26. The "TCEQ Administration of the Qualified Facilities Program" portion of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to clearly indicate that the references to BACT are to State BACT. See comments numbers 7 and 17 above for additional information.
27. Appendix 4 – Senate Bill 1126 Guidance – of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126", must be reviewed and updated consistent with each of the concerns identified in our Qualified Facility disapproval notice and the proposed revisions to 30 TAC Chapter 116. EPA is unable to determine whether the revised Qualified Facility Program complies with section 110(l) of the CAA until TCEQ updates this guidance to correlate with the revised rules and submits the updated guidance to EPA.