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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2008-0638; FRL – 9613-7]

Approval and Disapproval and Promulgation of Implementation Plans; Texas; Infrastructure and Interstate Transport Requirements for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is partially approving and partially disapproving submittals from the state of Texas pursuant to the Clean Air Act (CAA or Act) that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone and 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standards). We are determining that the current Texas State Implementation Plan (SIP) meets the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2)(A), (B), (E), (F), (G), (H), (K), (L), (M), and portions of (C), (D)(ii) and (J). We are determining that the current Texas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii) and (J). The EPA is also partially approving and partially disapproving SIP revisions submitted by the state of Texas for the purpose of addressing the provisions of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS and the 1997 and

2006 $PM_{2.5}$ NAAQS. These SIP revisions address the requirement that the Texas SIP have adequate provisions to prohibit air emissions from adversely affecting another state's air quality through interstate transport. The EPA is partially approving and partially disapproving the provisions of these SIP submissions that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, with regard to the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS. The partial disapprovals herein are because Texas has stated it cannot issue permits for and does not intend to regulate greenhouse gas (GHG) emissions. The EPA is also approving SIP revisions that modify the Texas SIP for Prevention of Significant Deterioration (PSD) to include nitrogen oxides (NOx) as an ozone precursor. This action is being taken under section 110 and part C of the Act.

DATES: This rule is effective on **[Insert date 30 days from date of publication in the Federal Register]**.

ADDRESSES: The EPA established a docket for this action under Docket ID No. EPA-R06-OAR-2008-0638. All documents in the docket are listed at *www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD-L), 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 Freedom of Information Act (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 or Mr. Bill Deese at 214-665-7253 to make an appointment. Please make the appointment at least two working days in advance of your visit. There is a fee of 15 cents per page 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.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Paige, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733; telephone (214) 665-6521; fax number 214-665-7263; e-mail address *paige.carrie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" means the EPA.

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I. Background

The background for today's action is discussed in detail in our September 22, 2011 proposal to partially approve and partially disapprove revisions[1] to the Texas SIP (76 FR 58748). In that action, we proposed to partially approve and partially disapprove the current Texas SIP for meeting the provisions of the CAA sections 110(a)(1) and 110(a)(2) (i.e., 110(a)(2)(A)-(C), (D)(ii), (E)-(H), and (J)-(M)) for the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS. We also

1 The specific submittals and our actions are detailed in Section II of this rulemaking.

proposed to approve severable[2] portions of revisions to the Texas PSD SIP that address NOx as a precursor to ozone, submitted by the TCEQ to the EPA on March 11, 2011 and May 26, 2011.

Our September 22, 2011 proposal provides a detailed description of the revisions and the rationale for the EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for these actions closed on October 24, 2011. See the Technical Support Document (TSD) and our proposed rulemaking at 76 FR 58748 for more information.

II. What Action is the EPA Taking?

The EPA is partially approving and partially disapproving submittals from the state of Texas pursuant to the CAA that address the infrastructure elements specified in section 110(a)(2) of the Act, necessary to implement, maintain, and enforce the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ standards.

A. What is the EPA Approving in this Action?

The EPA is approving portions of the December 12, 2007; March 11, 2008; April 4, 2008; and November 23, 2009 submissions from Texas, determining that the following section 110(a)(2) elements are contained in the current Texas SIP and provide the infrastructure for implementing the 1997 ozone and 1997 and 2006 $PM_{2.5}$ standards: emission limits and other control measures (section 110(a)(2)(A)); ambient air quality monitoring/data system (section 110(a)(2)(B)); the program for enforcement of control measures, except for the portion that

2 By severable, we mean that the portions of the SIP revision that address NOx as a precursor can be implemented independently of the remaining portions of the submittal, without affecting the stringency of the submitted rules. In addition, the remaining portions of the submittal are not necessary for approval of the provisions addressing NOx as a precursor.

addresses GHGs (section 110(a)(2)(C)); international and interstate pollution abatement, except for the portion that addresses GHGs (section 110(a)(2)(D)(ii)); adequate resources (section 110(a)(2)(E)); stationary source monitoring system (section 110(a)(2)(F)); emergency power (section 110(a)(2)(G)); future SIP revisions (section 110(a)(2)(H)); consultation with government officials (section 110(a)(2)(J)); public notification (section 110(a)(2)(J)); PSD and visibility protection, except for the PSD portion that addresses GHGs (section 110(a)(2)(J)); air quality modeling/data (section 110(a)(2)(K)); permitting fees (section 110(a)(2)(L)); and consultation/participation by affected local entities (section 110(a)(2)(M)).

We are also approving portions of the May 1, 2008 (Texas Interstate Transport SIP) and the November 23, 2009 submissions from Texas, demonstrating that Texas has adequately addressed one of the four required elements (or prongs) of the CAA section 110(a)(2)(D)(i), the element that requires that the SIP prohibit air emissions from sources within a state from interfering with measures required to prevent significant deterioration of air quality in any other state.[3] We are determining that emissions from sources in Texas do not interfere with measures to prevent significant deterioration of air quality in any other state for the 1997 8-hour ozone NAAQS or the 1997 and 2006 $PM_{2.5}$ NAAQS (CAA section 110(a)(2)(D)(i)(II)), except for the portions that address GHGs. We are not addressing the three remaining prongs of section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS, that pertain to prohibiting air emissions within Texas from: (1) significantly contributing to nonattainment in any other state, (2) interfering with maintenance of the relevant NAAQS in any other state and

3 As noted in the proposed rulemaking for this action, the May 1, 2008 submittal addresses the 1997 ozone and $PM_{2.5}$ standards; it does not address the 2006 $PM_{2.5}$ standard. The November 23, 2009 submittal addresses the 110(a)(2) infrastructure and interstate transport elements for the 2006 $PM_{2.5}$ NAAQS.

(3) interfering with measures required to protect visibility in any other state. We will take action on the three remaining prongs of section 110(a)(2)(D)(i) for these three NAAQS, which addresses interstate transport, in separate rulemakings.

In conjunction with our finding that the Texas SIP meets the section 110(a)(1) and (2) infrastructure and interstate transport SIP elements listed above for the three NAAQS, we are also approving severable portions of the SIP revisions submitted by the TCEQ to the EPA on March 11, 2011 and a correction submitted on May 26, 2011. These portions address revisions to 30 TAC sections 101.1 and 116.12. The revisions to 116.12 add PSD to the title of the section, such that the section will address Nonattainment *and Prevention of Significant Deterioration* Review Definitions and thus provide that NOx is an ozone precursor for the PSD program; and add the definition of *Federally Regulated NSR Pollutant*, which identifies volatile organic compounds (VOCs) and NOx as precursors in all attainment and unclassifiable areas. Thus, the definitions for *Major stationary source*, *Major modification*, and the table identifying the *Significant Level* for emission thresholds for major sources and major modifications apply under PSD. These revisions addressing PSD also specify that a major source that is major for VOCs or NOx shall be considered major for ozone and provide that the significant emission threshold for ozone (identified as VOC, NOx) is 40 tons per year (tpy). The EPA intends to act on the remaining Texas New Source Review (NSR) SIP revisions at a later date. The inclusion of these requirements in the SIP means that Texas has met the requirement to treat NOx as a precursor for ozone as necessary to implement the 1997 ozone standard.

B. What is the EPA Disapproving in this Action?

We are determining that portions of three section 110(a)(2) elements are not contained in the current Texas SIP and thus do not provide the infrastructure for implementing the 1997 ozone and 1997 and 2006 $PM_{2.5}$ standards. We are therefore disapproving portions of the December 12, 2007; March 11, 2008; April 4, 2008; and November 23, 2009 submissions from Texas, and determining that the current Texas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii) and (J) because Texas has stated it cannot issue permits for and does not intend to regulate greenhouse gas (GHG) emissions.

We are also disapproving the portion of the Texas Interstate Transport SIP element that prohibits GHG emissions from sources within Texas from interfering with measures required to prevent significant deterioration of air quality in any other state (section 110(a)(2)(D)(i)).

For the disapproved infrastructure elements (the portions of section 110(a)(2)(C), section 110(a)(2)(D)(ii), and section 110(a)(2)(J) described in this section), the EPA remains obligated to implement a FIP at the same time the disapproval is finalized. The EPA's disapproval here, however, does not engender an additional statutory obligation, because the EPA has already promulgated a FIP for the Texas PSD program to address permitting GHGs at or above the Tailoring Rule thresholds (76 FR 25178). As noted earlier, we will take action on the remaining three prongs of section 110(a)(2)(D)(i), which addresses interstate transport, in a separate rulemaking.

III. Comments

A. What Comments did the EPA Receive on the September 22, 2011 Action for Texas?

We received five comment letters on the proposed rulemaking. These comments are available for review in the docket for this rulemaking. The comment letters came from the following sources:

1. October 24, 2011 letter from Gabriel Clark-Leach, for Environmental Integrity Project and on behalf of Public Citizen and the Sustainable Energy and Economic Development (SEED) Coalition.
2. October 24, 2011 letter from Tangela Niemann, Texas Commission on Environmental Quality.
3. October 24, 2011 letter from Matthew G. Paulson, Baker Botts for the BCCA Appeal Group.
4. October 24, 2011 letter from Matthew G. Paulson, Baker Botts for the Texas Industry Project.
5. October 24, 2011 letter from Elena Saxonhouse, for Sierra Club and on behalf of its members in Texas and states downwind of Texas, such as Arkansas, Louisiana and Oklahoma.

B. General Format

Our responses to comments (RTCs) received follow a general format of summarizing the comment or group of similar comments, and then providing our response to that particular summary of comments. Thus the general format provided herein is "Comment" and then "Response." The RTCs in Sections III-C and D however, do not follow the general format, but still provide a summary of the comments with our responses.

C. Comments that Address the Consideration of Existing SIP Provisions

Two commenters objected generally to the EPA's statements in the proposal concerning substantive issues the Agency considers outside the scope of actions on infrastructure SIP submissions. In the proposal, the EPA explained that in the context of acting upon the infrastructure SIP submissions required by section 110(a)(1) and (2), the Agency must determine what substantive issues states and the EPA need to address in this specific type of SIP

submission. In particular, the EPA noted four substantive issues that may exist in the previously existing SIPs that the Agency wanted to be clear were not among the issues that states and the EPA are addressing in actions on infrastructure SIPs: (i) start-up, shut-down, malfunction (SSM) provisions; (ii) director's discretion provisions; (iii) minor source NSR provisions; and (iv) NSR Reform related provisions.[4]

One commenter expressed that it was "not sympathetic" to the EPA's assertion that an action on an infrastructure SIP is "not the appropriate time and place to address all potential existing SIP problems." Instead, the commenter argued that the EPA's position that it could act on "deficient" portions of the existing SIP at another time through more appropriate statutory mechanisms is inconsistent with the requirements of section 110(a)(2), and with section 110(k)(3). The commenter noted that the latter provision of the CAA only contemplates a partial EPA approval of a state's SIP submission if that part "meets all the applicable requirements."

The EPA disagrees with the premise of the commenter that the Agency must address all possible substantive issues in existing SIPs in the context of acting on an infrastructure SIP submission, whether in a full or partial approval. As explained in the proposal, the EPA considers action on the infrastructure SIP submissions required by section 110(a)(1) and (2) to be an exercise to assure that a state's SIP meets the basic structural requirements for the new or revised NAAQS, not a time to address all potential defects in existing SIP provisions. The EPA believes this approach is permissible under the statute because the individual provisions of section 110(a)(2) are worded in ways that require interpretation and do not explicitly require that the EPA address certain issues in existing SIPs that the EPA identified in the proposal.

4 See 76 FR 58750 – 53.

Moreover, the commenter's reference to section 110(k)(3) as permitting a partial approval only when the part approved "meets all applicable requirements" suggests that the commenter believes either that the EPA is deferring action on issues that are integral to action on an infrastructure SIP, or alternatively that the EPA is approving the infrastructure SIP with respect to the substantive issues in the existing SIP that the EPA explicitly indicated it was not acting upon. In either case, the EPA believes that the commenter is mistaken on this point. As explained in more detail in the proposal, the EPA specifically noted certain issues that it considers outside the scope of an action on an infrastructure SIP as required by section 110(a)(1) and (2), and explained the statutory basis for this position. Therefore, the EPA does not agree that it is deferring action on substantive issues that are integral to acting on an infrastructure SIP, e.g., the EPA does not agree that it is necessary to address existing SSM provisions already in the SIP in the context of acting on an infrastructure SIP submission. As the EPA also explained in the proposal, the agency intentionally highlighted specific substantive issues that it considers outside the scope of an action on an infrastructure SIP because it did "not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state." 76 FR 58750. In other words, the EPA's approval of the state's infrastructure SIP should not be viewed as approving an existing deficient provision in the state's SIP, such as an exemption for excess emissions during SSM events that does not meet CAA requirements. To the contrary, the EPA explicitly noted that if there were problematic provisions in the state's existing SIP with respect to the four issues identified as outside the scope of action on an infrastructure SIP, the EPA may

elect to deal with those issues separately in another action.

The other commenter likewise objected in general to the EPA's view that certain substantive issues are beyond the scope of an action on an infrastructure SIP, but also critiqued the specific explanations and rationale provided by the EPA for its position in the proposal. The commenter raised four specific arguments in response to the EPA's reasoning: (1) the existence of other tools to rectify SIP deficiencies does not make an infrastructure SIP approvable; (2) a SIP cannot meet "basic structure" requirements if it contains known deficiencies; (3) it may not be possible to review every provision of a SIP in acting on an infrastructure SIP, but the EPA has to consider any issues that commenters bring to the EPA's attention; and (4) the EPA action on a state SIP submission that relies on existing SIP provisions combined with the Agency's decision not to examine certain types of deficiencies in the existing SIP provisions "deprives the public of any opportunity to comment upon or challenge the submissions." We will address these concerns in turn.

First, the commenter argued that the mere existence of other statutory tools, such as a section 110(k)(5) SIP call, to address SIP deficiencies "has no bearing" on the fundamental question of whether the EPA should approve a state's infrastructure SIP submission if the underlying SIP contains any deficiencies. The commenter reasoned that the ability of the EPA to use section 110(k)(5) to rectify a problem does not mean that the EPA should not address the problem when acting on an infrastructure SIP for a new or revised NAAQS. Indeed, the commenter asserts that if the existing provisions in a SIP could be the basis for a section 110(k)(5) SIP call, then those issues "should be addressed during the SIP approval process for the new NAAQS."

The EPA agrees that the mere existence of other statutory tools to address SIP deficiencies, such as a section 110(k)(5) SIP call, does not per se answer the question of whether the EPA must address all potential existing SIP deficiencies in the context of acting on a state's infrastructure SIP submission. However, the EPA did not make such an argument in the proposal. The EPA's point in noting the existence of other statutory tools to address existing SIP deficiencies was merely that the availability of these tools supported the EPA's reasonable reading of section 110(a)(2) as not requiring that any and all possible issues in the existing SIP be addressed in the context of acting on an infrastructure SIP submittal, when those issues are not explicitly among those that must be addressed in this context. As explained in more detail in the proposal, the EPA believes that the provisions of section 110(a)(2) are in some cases ambiguous and it is necessary to interpret what they require in the specific context of the infrastructure SIP as contemplated in section 110(a)(1). The EPA pointed to other statutory tools such as a section 110(k)(5) SIP call as support for its reading of the statute that permits the EPA to address existing SIP deficiencies outside of an action on an infrastructure SIP, because Congress provided other mechanisms for the EPA to use as appropriate for such problems. To reiterate, the EPA believes that even though it is not necessary to address a particular issue while acting on an infrastructure SIP submission, it should not be viewed as precluding the EPA from separately exercising other authority such as section 110(k)(5) to address any existing deficiency in the SIP. Thus the EPA indicated that it may take steps to address such problems via a SIP call or other means.

Second, the commenter disagreed with the EPA's view that a state could meet basic structural requirements for a SIP even if there may be potential deficiencies in the existing SIP.

The commenter focused in particular on the description of the deficiencies as merely "potential" deficiencies and asserted that the EPA cannot acknowledge deficiencies and nevertheless approve the infrastructure SIP submission as meeting the requirements of section 110(a). According to the commenter, there is "no 'basic structure' requirement in Section 110(a)" and that if there were such a requirement the EPA must evaluate the basic structure of the state's SIP "as it actually exists."

With respect to this point, the EPA disagrees with the commenter's view that the specific SIP submission required in section 110(a)(1) and (2) within three years after the promulgation of a new or revised NAAQS is not intended to be a submission directed at basic structural requirements for a SIP. The commenter can take issue with the EPA's characterization or terminology when the agency refers to "basic structure" requirements, but the fact remains that the agency has to evaluate whether the SIP submission in question meets the various requirements of section 110(a)(2), as applicable, in this specific type of SIP submission.

As the EPA articulated in the proposal, the various elements of section 110(a)(2) address a host of different issues, some of which entail legal authority requirements, some of which entail substantive requirements, and some of which entail both. Many of the elements of section 110(a)(2) are ambiguous with respect to what they require in the context of an infrastructure SIP. In order to act on the infrastructure SIP, the EPA has to interpret the provisions of section 110(a)(2) to ascertain which of those provisions apply to this specific type of SIP submission, and how they apply. The commenter objected to the EPA's approach, but did not support its contentions with specific arguments based upon the actual wording of section 110(a)(2), nor did the commenter explain how or why it disagreed with the interpretation of the statutory language

provided by the EPA in the proposal. Having had to determine which issues are properly within the scope of an action on an infrastructure SIP, for informational purposes the EPA sought to make clear that its action should not be construed as reapproving existing provisions of certain types because the EPA considers those issues that may be dealt with separately. The EPA did not, therefore, determine definitively whether the state's existing SIP contained any of these types of provisions that may be deficiencies, hence the agency referred to any such provisions as "potential" deficiencies. Contrary to the commenter's view, the EPA believes it is appropriate to refer to any such provisions as potential deficiencies, until such time that the EPA can undertake the requisite analysis and undergo the proper procedures to establish that any such provisions are in fact inconsistent with the requirements of the CAA.

Third, the commenter objected to the EPA's statement that it is reasonable to defer action on a deficient provision in an existing SIP because it is not possible "for [the] EPA to consider whether every provision of every SIP in every state meets the current requirements of the federal Clean Air Act." The commenter asserted that it was not asking the EPA "to evaluate every word of the Texas SIP," but rather that it believes that the EPA must evaluate the SIP for the four substantive issues that the Agency concluded were outside the scope of infrastructure SIP actions as well as any other substantive issue that the commenter brings to the EPA's attention in this rulemaking context.

With respect to this point, the EPA believes that the commenter misunderstood the reason that the Agency stated that it is not required to review SIPs for all possible existing deficiencies when evaluating an infrastructure SIP submission, including any related to the four issues specifically identified in the proposal. The EPA noted this practical point as part of explaining its

view that where the specific requirements of the provisions of section 110(a)(2) are ambiguous, it is appropriate for the EPA to interpret the statute in a way that makes logical and feasible sense. Thus, for example, because the provisions of section 110(a)(2) do not explicitly provide that the SIP submission required by section 110(a)(1) after the promulgation of a new or revised NAAQS must rectify any and all potential substantive issues concerning any pre-existing SSM provisions in the state's SIP, the EPA concluded that it was reasonable to interpret the statute as not requiring the EPA to address that issue in this specific action on an infrastructure SIP submission. The SSM issue in and of itself is complex and could take substantial time and resources by both the state and EPA to identify, evaluate, and address as necessary any such provisions.

Rather than a basic structural SIP requirement for a new or revised NAAQS, such as having state law authority to carry out the SIP, an overarching permitting program in place, or a monitoring network deployed, such an SSM issue might arise in the context of an individual existing emission limit that might apply only to a small number of sources of a certain type as part of the nonattainment area plan for a particular geographic area within the state. The EPA does not disagree that such a provision might be problematic in and of itself and that once examined through the appropriate mechanisms could prove to be inconsistent with the CAA and EPA's policy guidance on excess emissions. However, such a provision could be but one substantive issue among many in the existing SIP for which in depth analysis as part of the action on an infrastructure SIP is not practicable. To attempt to do such an analysis in this action would detract from the larger exercise to assure that the state SIP meets basic structural requirements for a new or revised NAAQS.

The EPA agrees that where the specific provisions of section 110(a)(2) clearly indicate that the EPA should evaluate a state's infrastructure SIP submission with respect to a given issue, the EPA must do so. Thus, the EPA has evaluated the state's submission on an element by element basis in the proposal, and explained why the agency believes that the state has or has not met the various individual requirements of section 110(a)(2), as applicable and as the EPA interprets them. For example, the EPA explained in detail why the agency believes that the state has adequately complied with section 110(a)(2)(A) concerning enforceable emissions limits and other control measures; section 110(a)(2)(B) concerning air quality monitoring. By contrast, the EPA explained in detail why the agency believes that the state has not met the requirements of a component of section 110(a)(2)(C) with respect to permitting new or modified sources for all federally regulated pollutants including GHGs. It does not follow, however, that the specific provisions of section 110(a)(2) require the EPA to address any and all issues within the existing SIP in the context of acting on an infrastructure SIP submission, and the EPA has noted four such substantive issues that it believes are outside the scope of this exercise as explained in more detail in the proposal.

Where commenters raise concerns with a state's compliance with an element of section 110(a)(2) that the EPA agrees is germane to the infrastructure SIP, the EPA is responding to those comments separately in this action.

Fourth, the commenter opposed the EPA's view that some substantive issues should be addressed separately from action on the infrastructure SIP on the grounds that this approach would deprive the public from any opportunity to comment upon or challenge the state's submission. The commenter evidently believes that because the state's infrastructure SIP

submission did not include new provisions and merely confirmed how the existing SIP meets the applicable requirements of section 110(a)(2) that this precluded any comment on the merits of the state's submission.

The EPA shares the commenter's concern with adequate public process and opportunity to comment on a state's infrastructure SIP submission. In this context, however, the EPA disagrees with the commenter's implication that the EPA should address any and all possible issues relating to the existing SIP in any action on a pending SIP submittal. First, the mere fact that the state's infrastructure SIP submission does not include actual revisions to the existing EPA-approved SIP does not alter the fact that it is a SIP submission and therefore its contents are subject to notice and comment, to the extent that the issues raised are germane to the action in question. To the extent that an issue is applicable in the context of the infrastructure SIP submission, the EPA itself is scrutinizing the content of the submission for compliance with the CAA, and when the Agency proposes action on the submission it is providing notice and inviting public comment on its proposed action. This does not automatically mean, however, that it is appropriate for the EPA to address, and for the public to comment upon, all possible substantive issues relating to the existing SIP beyond those that the EPA interprets as applicable for evaluation in the context of this specific type of SIP submission. The same principle, applied more precisely to the actual submission at hand, suggests that it is reasonable for the EPA to determine that certain substantive issues are outside the scope of the infrastructure SIP process and may be assessed separately in another context. This decision does not foreclose public comment on such issues, it merely indicates that public comment on such issues should occur at the point when the EPA is taking an action that more appropriately addresses the specific issue.

Additionally, the EPA notes that although the Texas infrastructure SIP submission was comprised of the state's explanations of why the state believes its existing SIP meets the applicable requirements of section 110(a)(2), that approach has not precluded public comment on the relevant issues. The commenter's own comments illustrate that this process affords the public an opportunity to comment on the EPA's proposed action on the infrastructure SIP submission. Where those comments raise concerns about issues properly within the scope of an action on an infrastructure SIP, the EPA is evaluating those comments as part of this action.

Finally, one commenter more specifically objects to the EPA's evaluation of the state's infrastructure SIP submissions with respect to the minor NSR permitting program in Texas. The commenter expresses concern that the state has "failed to implement its minor source NSR program in a way that complies with federal requirements" and claims that "because Texas's failures undermine its ability to implement, maintain, and enforce the new NAAQS, [the] EPA's action on Texas's submissions fails to comply with the clear and unambiguous requirements of section 110(a)(2)(C)." As further explanation of its concerns, the commenter contends in more detailed comments that the "Permit by Rule" (PBR) provisions in the Texas SIP must be limited to narrowly defined source categories and include a mechanism for pre-construction application and agency review. Another commenter echoes these statements, and additionally contends the PBR provisions do not allow for adequate public participation. According to the commenters, these concerns preclude the EPA approving the state's infrastructure SIP submissions. Additionally, the commenters contend another component of Texas's SIP-approved minor NSR program, permit "alterations," fails to meet the requirements of section 110(a)(2). One commenter states the alterations rules interfere with NAAQS attainment strategies, fail to

prevent circumvention of NSR permitting requirements for major stationary sources, and undermine public participation in the permitting process. Another commenter also states the alteration provisions violate 40 CFR part 51 notice requirements, fail to provide adequate mechanisms for denial for cause, and fail to protect the NAAQS.

The EPA disagrees with the commenter's view that concerns with certain components of the minor NSR program in the Texas SIP preclude approval of the state's infrastructure SIP submissions for the ozone and $PM_{2.5}$ NAAQS. In the case of the minor NSR permitting requirements for a SIP, the EPA agrees that section 110(a)(2)(C) provides the general statutory basis for this program and for the agency's regulations that govern such programs. However, in the proposal and in this response, the EPA explains that the EPA considers action on the infrastructure SIP submissions required by section 110(a)(1) and (2) to be an exercise to assure that a state's SIP meets the basic structural requirements for the new or revised NAAQS, not a time to address all potential substantive defects, or alleged defects, in existing SIP provisions Therefore, EPA considers an evaluation of any component of a state's existing minor NSR program to be outside the scope of an infrastructure SIP review rather than an unambiguous requirement of the EPA's action on an infrastructure SIP with regard to section 110(a)(2)(C). The specific concerns the commenters raise are over the PBR and alterations rules, which were approved into the Texas SIP as components of the minor NSR program.[5] Because an action upon an infrastructure SIP is not the correct place to evaluate the commenter's specific substantive concerns about existing components of the state's minor NSR program that the commenters consider defective, the EPA will not address those concerns at this time. As with the other

5 The PBR rules were approved into the Texas SIP at 68 FR 64543, November 14, 2003. The alterations rules were approved into the Texas SIP at 67 FR 58697, September 18, 2002.

substantive issues that the EPA determined to be outside the scope of infrastructure SIP actions, the EPA notes that the CAA provides other mechanisms to address existing substantive deficiencies in SIPs, including potential deficiencies with a state's minor NSR program.

D. Comments that Address Implementation Issues

Comment: One commenter states that if provisions in Texas's existing SIP are facially deficient, or if the EPA is aware of the state's inadequate implementation of facially sufficient SIP-approved provisions, then the submitted infrastructure SIP is also deficient with respect to section 110(a)(2) requirements for the relevant NAAQS. The commenter states the EPA is aware of Texas's inadequate implementation of the SIP, and posits the EPA does not have discretion to approve Texas's infrastructure SIP if there is improper implementation of the existing SIP or deficiencies in the existing SIP.

Response: The EPA agrees with the commenter that facial deficiencies in SIP provisions could preclude the EPA from approving an infrastructure SIP submittal that relies on those provisions. The commenter's statements highlight an important issue concerning the distinction between a state's SIP meeting the requirements of the CAA on its face (i.e., facial sufficiency of the SIP) and a state's actual compliance with those SIP requirements (i.e., adequacy of implementation of the SIP), and the question of when implementation concerns should be considered an issue in the context of acting on a state's infrastructure SIP.

However, it is important to note as explained in our previous response to comment under B, the EPA is not evaluating potential deficiencies for substantive issues it has determined to be outside the scope of action on an infrastructure SIP. Because the EPA has determined certain substantive issues to be outside the scope of action on an infrastructure SIP, the EPA accordingly

is not evaluating those provisions for facial sufficiency. For the EPA's action on submitted provisions it has determined to appropriately be within the scope of an infrastructure SIP, the EPA has evaluated whether the SIP provisions identified or submitted by the state as part of that submission are facially sufficient to meet the applicable requirements of section 110(a)(2) of the CAA. In its analysis of the state's infrastructure SIP submission, the EPA evaluated the provisions submitted within the scope of the infrastructure SIP for facial sufficiency against the relevant elements of section 110(a)(2). In the proposal, the EPA explicitly evaluated the state's submission on a requirement by requirement basis and explained its views on the adequacy of the state's SIP for purposes of meeting the infrastructure SIP requirements. Where the EPA had concerns about the facial adequacy of the state's infrastructure SIP submission, the Agency proposed disapproval of the submission (e.g., deficiencies concerning adequate regulation of GHGs in the PSD permitting program that are inconsistent with the requirements of section 110(a)(2)(C)). Aside from the GHG component of the PSD element of section 110(a)(2)(C), the EPA believes that the other portions of the infrastructure SIP submission facially meet the applicable requirements of section 110(a)(2).

The commenter also contends that a state's failure to implement an otherwise facially sufficient SIP, in contravention of statutory requirements, could also preclude the EPA's approval of a state's infrastructure SIP. First, the EPA does not believe that any concerns whatsoever regarding adequate implementation of the SIP should be the basis for a disapproval of an infrastructure SIP.

The EPA acknowledges, as commenter asserts, there have been instances regarding particular components of the Texas Major NSR PSD SIP permitting program where the EPA

itself has raised concerns with the state about implementation issues. The EPA is continuing to evaluate its review of the implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval in the absence of a final EPA determination pursuant to 110(m) and 179(a)(4) that the SIP is not being implemented adequately. EPA has not finalized such a determination. EPA believes that such a determination would undermine the approvability of SIP language that is otherwise facially sufficient.

The EPA is not determining in this action that the implementation concerns that have arisen do not exist, but that the EPA will continue to examine and analyze the implementation concerns we are currently aware of and have already communicated to the state, as well as any others we become aware of in the future. It is important to note that EPA has already taken a number of actions to attempt to correct some issues with SIP implementation, including disapproval of certain proposed SIP packages and objections to individual Title V permits that did not include all applicable SIP requirements. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight. Which action would be appropriate would depend on the nature and extent of the particular implementation problems at issue. The commenters raise additional specific contentions regarding problems with implementation of particular components of the PSD NSR SIP program. The EPA will respond to those comments in the following relevant subsections.

E. Comments that Address Greenhouse Gases (GHGs)

Comment: The EPA received identically phrased comments from two industry groups on

this proposal. These commenters support the EPA's proposal to the extent of the proposed partial approval of Texas's infrastructure SIP, but oppose the proposal to the extent of the proposed partial disapproval of the SIP. The commenters make two objections as the basis of their opposition to the partial disapproval.

The commenters' first objection is that the EPA's proposed disapproval is based on grounds that are outside this rulemaking. They explain that, in their view, this rulemaking relates to the requirements of CAA section 110 for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS, and that the GHG permitting requirements – which were the subject of the EPA's proposed disapproval – are not related to those NAAQS requirements.

Response: We disagree with these comments. The premise of these comments seems to be that CAA PSD permitting requirements apply on a pollutant-by-pollutant basis, but that premise is incorrect. Those requirements apply on a source-by-source basis for all pollutants emitted by that source that meet the PSD applicability thresholds. For example, a new source that triggers PSD because of its emissions of ozone precursors or $PM_{2.5}$ is also subject to PSD for any other conventional pollutants that it emits above the applicable significance levels and for GHGs, if it emits those above the Tailoring Rule thresholds. Accordingly, for the ozone and $PM_{2.5}$ NAAQS Texas infrastructure SIP to be fully approvable, that SIP must include the appropriate PSD requirements for all other pollutants, including GHGs. Thus, contrary to the commenters' objections, those PSD requirements are related to – and, in fact, are part and parcel of -- the ozone and $PM_{2.5}$ infrastructure SIP. Because the infrastructure SIP fails to include some of those requirements, the EPA must disapprove that SIP to that extent.[6]

6 As discussed below, the Error Correction Rule identified, and issued a partial disapproval for, flaws in the Texas

Comment: The commenters' second objection is that disapproval of the infrastructure SIP is "redundant" in light of what we call the GHG PSD SIP Call or, simply, the SIP Call,[7] and what we call the Texas GHG PSD Error Correction Rule, or, simply, the Error Correction Rule.[8] The commenters add that they have "serious concerns about, among other things, the extent to which the GHG SIP Call and [Error Correction Rule] have a sound basis in the CAA …. In light of the highly questionable basis for these past actions, … there is no reason for [the] EPA to introduce the legal uncertainty associated with the federal program for GHG permitting at Texas sources to the straightforward and unrelated action" concerning the infrastructure SIP. The commenters incorporate by reference their comments on the SIP Call and the Error Correction Rule, in which they argue that those rules are not authorized under the CAA.

Response: We disagree with these comments. The infrastructure SIP action is not unrelated to or redundant in light of the EPA's past actions regarding GHG permitting. As explained in the proposal for this infrastructure SIP action, the Texas infrastructure SIP submittals do not include revisions to the SIP, but document how the current Texas SIP already includes the required infrastructure elements. Our proposed determination evaluated how section 110(a)(2) elements, including the PSD element of section 110(a)(2)(C), are contained in the current Texas SIP. In the two recent actions cited by commenters, the EPA identified substantial deficiencies in the Texas PSD SIP provisions. In the SIP Call, promulgated under CAA section

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SIP PSD program that were broader than the lack of application to GHGs.

7 "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (December 13, 2010).

8 "Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program," Interim Final Rule, 75 FR 82430 (December 30, 2010) (Interim Final Error Correction Rule); "Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program," Final Rule, 76 FR 25187 (May 3, 2011) (Error Correction Rule).

110(k)(5) on December 13, 2010, the EPA determined that the Texas PSD SIP is substantially inadequate to meet CAA requirements because it does not apply PSD requirements to GHG-emitting sources. Accordingly, the EPA issued a "SIP call" for Texas, which required the state to revise its SIP as necessary to correct the inadequacy. The EPA also established the deadline of December 1, 2011 for Texas to submit the corrective SIP revision. See 75 FR 77698.

In the Error Correction Rule, we stated that Texas's PSD SIP was flawed because it "failed to address or to include assurances of adequate legal authority … for the application of PSD to each newly regulated pollutant, including non-NAAQS pollutants, under the CAA," among them GHGs (see 76 FR 25178, 25192). Accordingly, we stated that our approval of the SIP with those flaws was in error. Although our approval took place in 1992, and concerned SIP submittals in the late 1980s, we made clear that Texas had never corrected those flaws and, in fact, in the context of participating in the EPA's CAA rulemakings concerning GHGs in 2010, had made statements that highlighted those flaws. As a result, under CAA section 110(k)(6), we revised our previous approval of the SIP to be a partial approval and partial disapproval. Further, we promulgated a FIP, the scope of which was commensurate with the error that we were correcting. We explained that we were promulgating a FIP to apply appropriate measures to assure that the EPA's PSD regulatory requirements will apply to non-NAAQS pollutants that are newly subject to regulation under the CAA that the Texas PSD program does not already cover. At present, the only pollutant is GHGs. Therefore, the EPA's FIP will apply the EPA regulatory PSD program for the GHG portion of PSD permits for GHG-emitting sources in Texas, and the EPA commits to take whatever steps are appropriate if, in the future, Texas fails to apply PSD to another newly regulated non-NAAQS pollutant. Id.

Therefore the SIP Call and the Error Correction Rule are not only inextricable from, but are also important for today's rulemaking. As described in those prior actions, the EPA determined that the Texas PSD SIP provisions have deficiencies. Texas's infrastructure SIP includes those same PSD provisions. Accordingly, the EPA is fully justified in disapproving the Texas infrastructure SIP to the extent those PSD provisions are deficient.

Contrary to the commenters' statements, the fact that the EPA determined the deficiencies in the SIP Call and Error Correction Rule also does not make the current rulemaking "redundant." As we explain in the proposal for this rulemaking, Texas is required to have an infrastructure SIP that meets the applicable requirements of CAA section 110(a)(2). That obligation is not changed by the fact that the EPA conducted previous rulemakings – the SIP Call and Error Correction Rule – that determined that Texas's SIP PSD program has deficiencies.

As noted above, the industry commenters on this infrastructure rulemaking commented on the SIP call and the Error Correction Rule, and we responded to those comments, during the course of those rulemakings. See 75 FR 77698, 77705-77716 (SIP Call); Response to Comment on Proposed Rule, "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," December 2010; 76 FR 25178, 25192-25205 (Error Correction Rule); "Determinations Concerning Need for Error Correction, Partial Approval and partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program; Proposed Rule – Response to Comments (April 2011) (response to comments for Error Correction Rule). As of the date of the current rulemaking, Texas has not submitted the corrective SIP revision required by the SIP Call, and has taken no

action to remedy the flaws that were the basis for the Error Correction Rule. Texas has challenged both rulemakings in the U.S. Court of Appeals for the D.C. Circuit.

In addition, contrary to the commenters' statements, their objections to the SIP Call and Error Correction Rule are not relevant in the current rulemaking. As noted above, those rulemakings made determinations that the Texas SIP PSD program has deficiencies. Commenters had the opportunity to, and did, comment on those rulemakings, and have brought challenges to those rulemakings in court. The EPA is not re-opening those determinations in this rulemaking. These determinations apply in this rulemaking to the extent the SIP PSD provisions at issue in the SIP Call and Error Correction rules are the same as the SIP provisions at issue in the current rulemaking. In the alternative, if the comments are relevant, then we respond to them by incorporating by reference our responses to comments in the SIP Call and Error Correction Rule, cited above.

As we noted in the proposal for this rulemaking, Texas did not submit additional SIP provisions to assure that its 1997 $PM_{2.5}$ and ozone, and 2006 $PM_{2.5}$, infrastructure SIPs met the substantive requirements of CAA section 110(a)(2). See 76 FR 58748, 58750. Rather, in 2008 and 2009, Texas took the position that its existing SIP provisions meet the infrastructure SIP requirements, including CAA section 110(a)(2)(C) and (D)(i)(II). Id. Among its existing SIP provisions are the PSD provisions that the EPA subsequently, in the 2010 SIP Call and the 2011 Error Correction Rule, determined to have deficiencies. Accordingly, the EPA's determination in the SIP Call that Texas's SIP PSD program is deficient because it does not apply PSD to GHGs, and the EPA's determination in the Error Correction Rule that Texas's SIP PSD program is deficient because it does not address, or provide assurances of adequate legal authority to

address, pollutants newly subject to regulation -- including non-NAAQS pollutants, among them GHGs -- apply as well for purposes of the current rulemaking. In this manner, the SIP Call and Error Correction Rule provide the basis for our disapproval in the current rulemaking of the Texas SIP for failing to meet the infrastructure requirements for the 1997 ozone and $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS with respect to the PSD requirements of CAA section 110(a)(2)(C) that concern GHGs and that concern the applicability of PSD to pollutants newly subject to regulation.

The same determinations in the SIP Call and the Error Correction Rule that the Texas SIP PSD program has deficiencies provide a basis for our disapproval in the current rulemaking of the Texas SIP for failing to met the infrastructure requirements under CAA section 110(a)(2)(D)(i)(II),[9] under which Texas's SIP must contain adequate provisions prohibiting emissions that interfere with any other state's required PSD program; and under CAA section 110(a)(2)(D)(ii), under which Texas's SIP must require new or modified sources to notify neighboring states of potential impacts from such sources. As discussed in the proposal for this rulemaking, Texas's PSD program is the primary measure that must be included to meet the requirements of section 110(a)(2)(D)(i)(II). See 76 FR 58748, 58760. The EPA's determinations in the SIP Call and the Error Correction Rule that the Texas SIP does not meet PSD requirements because it has the deficiencies of failing to apply to GHGs or to address pollutants newly subject to regulation means that the infrastructure SIP fails to meet the requirements of (i) section 110(a)(2)(D)(i)(II) because the PSD program has the same deficiencies, and (ii) section 110(a)(2)(D)(ii) because, by not addressing pollutants newly subject to regulation, the

9 As noted above, the EPA is not reopening those determinations in this rulemaking.

infrastructure SIP does not require new or modifying sources that emit those pollutants to notify neighboring states of potential impacts.

F. Comments that Address Section 110(a)(2)(E)

Comment 1: The commenter states that Texas does not have adequate authority to enforce the SIP pursuant to section 110(a)(2)(E) specifically because of Article 6 of Senate Bill 12, Texas state legislation passed in 2007. The commenter states the EPA's position is Senate Bill 12 does not disallow the EPA's approval of the infrastructure SIP for section 110(a)(2)(E) in part because the legislation does not alter the enforcement authority ascribed to the EPA, citizens, and other parties other than the TCEQ by the CAA. According to the commenter's assertion, under section 110(a)(2)(E) the TCEQ may not cede its authority to other parties and must have authority to enforce all infractions and not just repeat infractions, and because Senate Bill 12 partially undermines the state's enforcement authority the Texas infrastructure SIP does not meet section 110(a)(2)(E). The commenter also states that the EPA's separate evaluation of Senate Bill 12 under the Agency's Title V authority does not make the infrastructure SIP any more compliant with section 110 requirements.

Response: Regarding the commenter's assertion that under section 110(a)(2)(E) the TCEQ must have authority to enforce all infractions and cannot cede this authority to others, Senate Bill 12 (SB 12) does not preclude the TCEQ from taking certain types of enforcement actions against sources covered under SB12. The TCEQ has authority to impose injunctive relief with respect to all violations from the sources including those for which the legislation altered the TCEQ's enforcement authority (76 FR 58748). Senate Bill 12, codified at TWC Section 7.00251, by its own statutory terms alters the TCEQ's enforcement authority for "violations

based on information [the TCEQ] receives as required by Title V of the Clean Air Act" upon first infraction. In particular, Senate Bill 12 alters the TCEQ's enforcement authority with respect to particular self-certified[10] violations, further classified as "Category B" violations, documented in a Title V deviation report. Under the Title V regulations states must specifically have the authority to collect civil penalties for the violation of **any** applicable requirement; **any** permit condition; **any** fee or filing requirement; **any** duty to allow or carry out inspection, entry or monitoring activities or, **any** regulation or orders issued by the permitting authority. This provision is in contrast to the more general requirements for the states to have an enforcement program under Title I. The EPA reads SB 12 to not legislatively impede the TCEQ's enforcement authority to seek injunctive relief for any violations, and as described in the proposal, also does not impede the TCEQ from collecting penalties for repeat infractions. Therefore, the state has the authority to subject all infractions to some level of enforcement. Because the TCEQ has generic enforcement authorities evinced by various state statute provisions described in the proposal, the authority to seek injunctive relief for all violations and authority to seek penalties and injunctive relief for repeat infractions, and SB 12 did not alter the CAA enforcement authority of the EPA or other parties, the EPA determined this state legislation did not bar the EPA's approval and these facts conjunctively supported the EPA's proposal for approval of the infrastructure SIP as meeting section 110(a)(2)(E), as discussed in our proposal.

The EPA's approval is based on the specific facts described in this rulemaking regarding the effects of SB 12. As discussed in our proposal, the EPA is evaluating SB 12 pursuant to its

10 A self-certified violation is a violation certified by the source. Category B violations are identified in the TCEQ Enforcement Initiation Criteria (EIC); the EIC is in the docket for this rulemaking.

Title V authority as the legislation, by the face of its own terms, alters the TCEQ's enforcement authority with respect to violations based on information the TCEQ receives as required by Title V of the CAA upon first infraction. The EPA reiterates that for the bases described in this response to comment and the proposal for this action, such as generic enforcement authority under state statutory provisions, the EPA finds the Texas SIP meets the infrastructure SIP requirements for section 110(a)(2)(E). As described in the proposal, Title V is subject to statutory and regulatory mechanisms outside the scope of section 110(a), and the scope of this SIP action is limited to determining whether the existing SIP meets certain infrastructure and interstate transport SIP requirements of section 110(a)(2) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. The reasons for the EPA's proposed determination of approvability under section 110(a)(2)(E) are discussed in this response and in the proposal, and are separate and adequate bases that do not preclude the agency's evaluation of this legislation under Title V.

Comment 2: The TCEQ agrees with the EPA's proposed finding for this action that the SIP meets the infrastructure SIP requirements for adequate enforcement authority and resources pursuant to section 110(a)(2)(E). However, the commenter considers the EPA's discussion of Senate Bill 12 as inappropriate for inclusion in the proposal for this rulemaking because the commenter contends the EPA's stated awareness regarding Senate Bill 12, a Title V program, has no bearing on the evaluation of the Texas SIP which is solely a Title I program. The commenter concludes it fails to see the purpose served by the EPA's discussion of Senate Bill 12 in the proposed action.

Response: The EPA appreciates the commenter's support for the proposed finding pursuant to section 110(a)(2)(E). Though the EPA's evaluation of SB 12 under Title V ultimately does not factor into the EPA's proposed approval of the infrastructure SIP for reasons explained in the proposal and in our response to Comment 1 under this subsection, the EPA believes it was not inappropriate in this particular matter that involved an overlapping concern – the adequacy of the state's enforcement authority - to put interested parties and the public on notice that the agency is evaluating this matter, albeit under another part of the Act.

G. Comments that Address Sections 110(a)(2)(B) and 110(a)(2)(J).

Comment: One commenter states that the Texas SIP does not provide for appropriate monitoring of ambient air quality, particularly for ozone. The commenter also states that the EPA's prior approvals of the Texas Statewide Air Quality Surveillance network and the 2010 Annual Air Monitoring Network Plan (AAMNP) do not nullify the EPA's need to evaluate Texas's monitoring program in this rulemaking. The commenter additionally cites to the EPA's raising concerns regarding the 2010 AAMNP with the TCEQ in a separate communication without discussion of those concerns in this rulemaking as negating a basis for approval of the Texas SIP for meeting the requirements of 110(a)(2)(B). The commenter also states that the AAMNP does not discuss ozone monitoring. The commenter also states that many gaps remain in the State's air monitoring network in the Houston area and only a few Houston ozone monitoring stations are equipped with Automated Gas Chromatographs, which measure highly reactive volatile organic compounds (HRVOCs).

Response: As the comment indicates, the EPA has approved the Texas Statewide Air Quality Surveillance Network and its 2010 Annual Air Monitoring Network Plan. The EPA

conducts a comprehensive annual review to ensure that the state has a monitoring network in place that meets the technical requirements of 40 CFR Part 58 and its appendices. Part 58 minimally provides a 30-day public inspection opportunity for every annual monitoring network plan presented by the States and local agencies that develop the plans; moreover, whenever a plan proposes network modifications, a public comment opportunity is furnished by either the State or EPA.[11] We invite future public participation from this commenter and others when these opportunities are provided. Consistent with the findings of our most recent review, Texas has a monitoring network in place and has no deficiencies in that network that warrant disapproval of the state's monitoring network plan. For the reasons discussed below, we do not agree with the commenter that more is needed to satisfy the requirements of 110(a)(2)(B).

Several of the assertions brought forward by this comment are misplaced or inaccurate. The current air monitoring network for Texas includes, but is not limited to monitoring $PM_{2.5}$, ozone and ozone precursors. The network design criteria for ambient air quality monitoring is found at 40 CFR 58, Appendix D (hereafter referred to as Part 58)[12] and includes the minimum monitoring requirements for state and local air monitoring stations (SLAMS), which measure ozone; Photochemical Assessment Monitoring Stations (PAMS), which measure ozone precursors, including HRVOCs; and $PM_{2.5}$. The minimum number of PAMS required in the Houston area is two and the Texas Commission on Environmental Quality (TCEQ) operates three PAMS in Houston. In addition however, there are seven privately owned PAMS in the

11 The TCEQ provides a 30-day comment period for their AAMNP, but did not receive any comments during the public comment period for their 2010 AAMNP.

12 The Network Design Criteria for Ambient Air Quality Monitoring was promulgated at 71 FR 61236 (October 17, 2006) and codified at 40 CFR 58, Appendix D. The ozone specific monitoring network design criteria are at part 58, Appendix D, section 4.1

Houston area and the TCEQ posts data from these monitors on their website (www.tceq.texas.gov/agency/data/ozone_data.html). The minimum number of SLAMS for ozone required under Part 58 in the Houston area is four and the TCEQ operates 12 such monitors in Houston.[13] The current TCEQ air monitoring network meets the minimum federal regulatory requirements in Part 58 for SLAMS and PAMS in the Houston area. The air monitoring networks in the Austin, Beaumont, Corpus Christi, Dallas-Fort Worth (DFW), El Paso, Lower Rio Grande Valley, San Antonio, Tyler-Longview, and Waco areas also meet the minimum requirements for number of ozone monitors, pursuant to Part 58.[14] In addition, pursuant to Part 58, in a metropolitan statistical area (MSA) having a population over 350,000, a minimum of one ozone monitoring site is required in areas that have never monitored for ozone. In Texas this has resulted in one new site in the Killeen-Temple-Fort Hood area. A second ozone monitoring site will be added when the 3-year ozone design value is at least 85% of the 2008 ozone NAAQS (64 ppb).[15]

Texas established a State-wide monitoring system in their initial SIP (37 FR 10842, 10895) and while SIP revisions to the monitoring system have not been made since 1978 (43 FR 9275), the TCEQ has made many revisions to the monitoring network. For example, in 1997, there were 23 regulatory ozone monitoring sites in six MSAs[16] and today, there are

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13 See the TCEQ website air monitoring pages at www.tceq.texas.gov/agency/data/ozone_data.html.
14 Pursuant to Table D-2 of Appendix D to Part 58 (SLAMS Minimum Ozone Monitoring Requirements), the Longview, Tyler and Waco areas each must have a minimum of one SLAMS; the Austin, Beaumont, Corpus Christi, El Paso, the Lower Rio Grande Valley, and San Antonio areas each must have a minimum of two SLAMS and DFW must have a minimum of three SLAMS. These areas have at least the minimum number of required SLAMS. See 71 FR 61236, 61318. See also the TCEQ website for a listing of the current SLAMS in these cities: www.tceq.texas.gov/agency/data/ozone_data.html.
15 The Killeen monitor was activated in June 2009, several months after the start of the ozone season. Thus, the first, complete 3-year ozone design value for this site is anticipated with the completion of the 2012 ozone season.
16 Texas cities with regulatory ozone monitoring sites in 1997: Dallas-Fort Worth, Tyler-Longview-Marshall,

approximately 72 regulatory ozone monitoring sites in 10 MSAs.[17] The locations of these regulatory monitors have been chosen following the requirements of Part 58, to support the basic monitoring objectives of public data reporting, air quality mapping, compliance, and understanding ozone-related atmospheric processes. To meet these goals the monitoring network includes more sites than the minimum numbers required in Part 58, as we see in the Beaumont, DFW, El Paso, and Houston areas. Data from the State's air quality monitors are collected, evaluated for quality and the quality-assured data are submitted to the EPA's Air Quality System[18] on a quarterly basis. The TCEQ website provides the ozone and $PM_{2.5}$ monitor locations and data from as far back as 1999[19] through today. In general, the TCEQ currently operates one of the most extensive and up-to-date air monitoring systems in the United States. Thus, for the Texas air monitoring network, the lack of recent SIP revisions does not support a finding that the SIP does not meet the requirements of section 110(a)(2)(B).

The State's 2010 AAMNP did not address ozone monitoring in its narrative section, but it included for our review an appendix listing all of the air monitors, including those for ozone and PM. The narrative or text portion of the AAMNP addresses proposed changes to the network. The TCEQ did not propose changes to the ozone network, thus the text did not reference ozone. We did not have concerns with the lack of proposed changes to the State's ozone network.

We expressed concerns in our December 23, 2010 letter to the TCEQ regarding their

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Beaumont-Port Arthur, Austin, and Houston-Galveston-Brazoria, and San Antonio.

17 The TCEQ added regulatory ozone monitoring sites in the following cities: El Paso-Juarez, Corpus Christi-Victoria, Lower Rio Grande Valley (which includes the McAllen-Edinburg-Mission area and Brownsville), and Waco.

18 The Air Quality System (AQS) is the EPA's repository of ambient air quality data. AQS stores data from over 10,000 monitors, 5,000 of which are currently active.

19 The TCEQ website provides data from as far back as 1997 for 8-hour ozone.

2010 AAMNP.[20] The TCEQ has addressed all but one of the concerns expressed in our December 23, 2010 letter[21] and is working to resolve our final request to ensure that regulatory ozone monitoring in an identified gap in the eastern Houston area (the Wallisville monitor, which currently is not run by the TCEQ) is completed by July 1, 2012.[22] A monitor at the Wallisville location is not required by Part 58, but has been requested by the Regional Administrator of the EPA's Region 6 office, as it has consistently recorded some of the highest 8-hour ozone concentrations in the Houston area (see footnote 22).[23] See 40 CFR 58, Appendix D, 4.1(a); 40 CFR 58, Appendix D, 1.1.1 et. seq. Furthermore, because Texas has been responsive to and is taking steps to address the EPA's concerns regarding the air monitoring network there is no basis to determine that the Texas SIP fails to meet section 110(a)(2)(B) of the Act.

The commenter also references an article in the Houston Chronicle dated March 2, 2005, which mentions 20 gaps in the Houston air monitoring network. The outdated article did not list where the 20 gaps were located, but provided names of several cities within the Houston area that, at the time, lacked ozone monitors. Currently, at least two of those cities have ozone monitors. Neither the commenter nor the article provided any documentation showing where any current gaps might be located.

Our record on the current State-wide air quality network shows that Texas meets the requirements in Part 58. As stated, the air monitoring network review occurs annually, and the

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20 The December 27, 2010 letter and the TCEQ AAMNP for 2010 are in the docket for this rulemaking.
21 See letter from David W. Bower to Maria L. Martinez, dated January 31, 2011 and letter from Mark R. Vickery to Al Armendariz, dated March 31, 2011, in the docket for this rulemaking.
22 See letter from Al Armendariz to Mark R. Vickery, dated June 2, 2011, in the docket for this rulemaking.
23 The Wallisville site would not qualify as a maximum concentration monitor because it does not record the highest 8-hour ozone concentrations in the area. For the last several years, the ozone monitor at the Manvel site has recorded the highest 8-hour ozone concentrations in the Houston area.

state has worked to address the EPA-identified concerns and avoid potential deficiencies in a timely manner. Furthermore, the State and EPA work together to ensure that the air monitoring network meets federal regulatory requirements whether through the demonstration of meeting minimum requirements or by exercising and implementing the Regional Administrator's authority for obtaining any additional information. Id. For the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS, the Texas SIP provides for establishment and operation of appropriate devices, methods, systems, and procedures necessary to - (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

Comment: One commenter posits that the lack of ozone monitors in nearly all of the counties that include coal-fired power plants precludes the State from successfully notifying the public if the NAAQS are exceeded and accordingly, the SIP does not meet the notification requirements of section 110(a)(2)(J).

Response: As an initial matter, we do not agree that there is a "lack of ozone monitors in nearly all of the counties that include coal-fired power plants" because, as described more fully below, a number of counties with coal-fired power plants have ozone monitoring sites and the monitoring network meets the requirements of part 58, Appendix D. We also do not agree that Texas's satisfaction of the requirements of section 110(a)(2)(J) regarding adequacy of public notification measures is in question. Texas has measures in its plan, as required by section 127 of the Act, as well as measures that it implements in practice that are effective to notify the public of instances or areas in which any primary NAAQS is or was exceeded. When the forecast indicates that ozone levels will be above the 8-hour ozone standard, the State notifies the National Weather Service (NWS), who then broadcasts the information across its weather wire.

In addition, county residents can subscribe to the State's electronic notification system for ozone forecasts and ozone warnings.[24] Finally, monitored ozone values are posted on the TCEQ website and are updated hourly. Thus the State has use of its own website, the electronic notification system and the NWS to successfully notify Texas residents when the ozone NAAQS are forecast to be or actually are above the 8-hour standard.

As noted above, we do not agree with this comment's technical assertion regarding a "lack of ozone monitors." The placement of air quality monitors is provided by Part 58, which requires an ozone monitor when the MSA has a population of at least 350,000. In addition however, Part 58 addresses the need to locate monitoring sites to determine the impact of significant sources or source categories on air quality. Ozone is an unstable and highly reactive molecule and it is well known that by increasing the concentration of NOx, the concentration of ozone can be depressed, causing chemical loss of ozone or "NOx scavenging." Therefore, the TCEQ and EPA have located air quality monitors downwind of significant sources, as monitors placed in closer proximity to NOx sources can show lower ozone levels. As indicated in Table 1, two of the counties with power plants have a monitor in the same county and eight of the counties with power plants (actual and proposed) have at least one ozone monitor in an adjacent and/or downwind county. The two counties in west Texas (Lamb and Potter) will soon have a monitor in the Palo Duro area of Randall County, which is adjacent to Potter County. Most (10 out of 12) of the counties listed in Table 1 are within or very close to the State's established ozone forecast areas.

Table 1: Ozone Monitoring Near Coal-Fired Power Plants

Facility Name and Location	Closest Monitor (County)	Forecast Areas

24 The ozone warning areas: Austin, DFW, Houston-Galveston-Brazoria, and San Antonio.

(County)		
Parish (Fort Bend)	(Fort Bend, Brazoria, Harris)	Houston-Galveston-Brazoria (HGB)
Big Brown (Freestone)	Corsicana (Navarro), adjacent to Freestone	Dallas-Fort Worth (DFW)
Monticello, Welsh (Titus)	Greenville (Hunt), downwind (east) of Titus county	DFW
Martin Lake (Rusk)	Longview (Gregg), Tyler (Smith), both adjacent to Rusk	Tyler-Longview
Pirkey (Harrison)	Karnack (Harrison), Longview (Gregg), Tyler (Smith), Gregg and Smith are downwind	Tyler-Longview
Gibbons Creek (Grimes)	Conroe (Montgomery), adjacent to Grimes	HGB
Twin Oaks (Robertson)	Corsicana (Navarro), downwind from Robertson	DFW
White Stallion (Matagorda) Facility is proposed.	Danciger and Lake Jackson (Brazoria), adjacent to Matagorda	HGB
Coleto Creek (Goliad)	Seguin and New Braunfels Airport (Guadalupe), downwind	Forecast: Victoria, HGB and San Antonio
San Miguel (Atascosa)	San Antonio (Bexar), adjacent to Atascosa	San Antonio
Tolk (Lamb)	Palo Duro (Randall)[25]	
Harrington (Potter)	Palo Duro (Randall), adjacent to Potter	

H. Comments that Address Best Available Control Technology (BACT)

Comment 1: The commenter states that the Texas Commission on Environmental Quality (TCEQ) fails to properly implement Best Available Control Technology (BACT) requirements. The commenter also states that the TCEQ does not require new and modified sources to meet the BACT standard consistent with the federal definition of BACT. The commenter also states that the TCEQ BACT guidance incorporates a three-tier approach, which is at odds with the federal

25 This is a Clean Air Status and Trends Network (CASTNET) monitor that includes a continuous ozone monitor. CASTNET is a regional long-term environmental monitoring program administered and operated by the EPA. This monitor will meet Part 58 and data will be submitted into AQS by early 2012. Additional information on CASTNET is in the docket for this rulemaking.

BACT definition. The commenter also states that the TCEQ routinely disregards and misapplies its own BACT guidance and the Commission's implementation of BACT is not guided by any written BACT methodology.

Response: Texas's approved SIP is facially sufficient to meet the federal PSD SIP requirements with respect to BACT. Under Texas's approved Prevention of Significant Deterioration (PSD) SIP that EPA approved on September 15, 2010 (75 FR 55978),[26] a source must determine applicable BACT for each PSD permit as required under 40 CFR 52.21(b)(12) and (j). See 30 TAC 116.160(c)(1)(A) and (c)(2)(A).[27] The EPA approved initial revisions to the Texas SIP for its PSD program and BACT provisions on June 24, 1992. See 57 FR 28093. In that action, EPA did not specifically require TCEQ to incorporate EPA's Top-Down BACT review approach into the SIP. Instead, Texas was allowed to use, although not incorporated into the SIP, the State's Spring 1987 BACT guidance document that used a three-tier BACT Analysis approach. After public comment in 2011, TCEQ issued a Reference Guide,[28] that brings forward and updates the Spring 1987 BACT guidance document. It continues to include the three-tier BACT Analysis approach.

While we appreciate commenter's concerns regarding BACT implementation issues,

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26 As background, the State's February 1, 2006 SIP submittal of revisions to its state rules removed the reference to the definition of federal PSD BACT in 40 CFR 52.21(b)(12). On September 23, 2009, EPA proposed to disapprove the 2006 submittal due in part to its removal of this definition. See 74 FR 48467. On July 16, 2010, Texas submitted a revision to its state rules that reinstated the federal PSD BACT definition to 52.21(b)(12). See 30 Texas Administrative Code (TAC) 116.160(c)(1)(A). The revision also included a reference to 52.21(j) which implements the BACT definition. See 30 TAC 116.160(c)(2)(A). We found that the adoption of the reference to the federal definition of PSD BACT in 40 CFR 52.21(b)(12) corrected the deficiency in the 2006 submittal because it reinstated the federal BACT definition. See the final rule at 75 FR 55978 for a detailed discussion.

27 The cross-references to the federal PSD requirements relating to BACT in its State PSD Program serves to distinguish the federal BACT requirements for PSD from the State's requirement to apply State BACT under its Minor NSR Program. See 30 TAC 116.111(a)(2)(C). See the discussion at 75 FR 55978, at 55979-55980 and 55981-55986, for detailed information on the basis for the 2010 SIP approval action.

28 See http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf.

EPA is continuing to evaluate those issues. EPA has not yet made any final determinations regarding BACT implementation issues in this action. Therefore, we believe that we may move forward with finalizing this action and will continue to evaluate the implementation issues raised.

Comment 2: The commenter states that the TCEQ guidance and policy regarding BACT demonstrations for PSD permits fail to require compliance with the federal standards and thus, Texas's PSD program fails to ensure the NAAQS will be properly implemented, maintained, and enforced, per sections 110(A)(2)(A) and (C). The commenter also states that the TCEQ refuses to require applicants for PSD permits to consider alternative processes and fuels as expressly required by the federal definition of BACT, which is incorporated by reference into the TCEQ's PSD rules. The commenter also states that EPA letters to TCEQ dated January 24, 2011 and September 29, 2010, regarding permits for White Stallion and Las Brisas, respectively, and EPA's comments dated March 1, 2010, on the proposed revisions to Title 30 of the Texas Administrative Code (TAC), Section 116.160 to the Texas PSD SIP all expressed concern over TCEQ's implementation of BACT requirements.

Response: See our response to Comment 1 under this subsection. While we agree that the EPA has expressed concern with the TCEQ's implementation of the BACT analysis requirements in the above-cited comment letters (e.g., integrated gasification combined cycle (IGCC) and alternative fuels), the EPA has not yet made any final determinations regarding BACT implementation issues in this action. Therefore, we believe that we may move forward with finalizing this action and will continue to evaluate the implementation issues raised. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance

of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight. Which action would be appropriate would depend on the nature and extent of the particular implementation problems at issue.

I. Comments that Address Regulation of $PM_{2.5}$

One commenter objected to the EPA's proposed approval of the state's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS on the grounds that the state "has not yet incorporated the minimum requirements for controlling and regulating $PM_{2.5}$ through its PSD program." The commenter argued that as part of acting on the infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS, the EPA "must verify that the state has in place enforceable $PM_{2.5}$ significant emissions rates for NOx and SO_2, precursors to $PM_{2.5}$, as well as for direct $PM_{2.5}$" and that the state has in place the $PM_{2.5}$ increments required by the EPA in another separate rulemaking. In support of this latter point, the commenter referred to the separate rulemaking action by the EPA in October 2010 applicable to the NSR/PSD requirements for the $PM_{2.5}$ NAAQS (the 2010 $PM_{2.5}$ NSR/PSD Rule).[29] In addition, the commenter questioned the adequacy of the separate SIP submission made by the state in May 2011 to meet the requirements of another separate rulemaking action by the EPA in May 2008 (the 2008 $PM_{2.5}$ NSR/PSD Rule).[30]

The commenter's concerns highlight an important overarching question that the EPA had

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29 See, "Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)," 75 FR 64864 (Oct. 20, 2010). This rulemaking concerned various issues relevant to $PM_{2.5}$ and PSD, including increments, significant impact levels, and a significant monitoring concentration.

30 See, "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)," 73 FR 28321 (May 16, 2008). This rulemaking concerned various issues relevant to $PM_{2.5}$ and PSD, including how to address $PM_{2.5}$ precursors, significant emissions rates, and ambient air quality analysis requirements.

to confront when assessing the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS: how to proceed when the timing and sequencing of multiple related SIP submissions impact the ability of the state and the agency to address certain substantive issues in the infrastructure SIP submission in a reasonable fashion. In this instance, the state's infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS was, per the explicit terms of the statute, due in the year 2000. Because of protracted litigation over the 1997 $PM_{2.5}$ NAAQS, however, the EPA and states were significantly delayed in the implementation of the 1997 $PM_{2.5}$ NAAQS, including the infrastructure SIPs required under section 110(a)(1) and (2). The EPA did not issue guidance to states concerning these infrastructure SIP submissions until October 2, 2007.[31] The state submitted its infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS soon thereafter on April 4, 2008. For the 2006 $PM_{2.5}$ NAAQS, section 110(a)(1) required the submission of an infrastructure SIP for that NAAQS by November 23, 2009. For this NAAQS, the state submitted its infrastructure SIP on November 29, 2009. In the proposal notice, for purposes of efficiency the EPA proposed action on both of these $PM_{2.5}$ infrastructure SIP submissions, in addition to the state's submission for the 1997 8-hour ozone NAAQS. Significantly, the EPA is required, under the terms of a Consent Decree, to act on the state's infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS by no later than December 16, 2011.

In the process of acting on the infrastructure SIP submissions for the 1997 $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS, the EPA necessarily had to consider how to approach the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule. The EPA

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31 See, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ National Ambient Air Quality Standards," Memorandum from William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards (OAQPS).

acknowledges that section 110(a)(2)(C) directs the EPA to assess the state's infrastructure SIP submission with respect to the PSD permitting program, and the EPA has taken actions accordingly.[32] In both the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule, the EPA directed states to make specific SIP submissions relevant to the PSD permitting programs for $PM_{2.5}$.[33] A core question is thus whether the EPA should take into account these other collateral SIP submissions in evaluating the state's infrastructure SIP submissions for the $PM_{2.5}$ NAAQS.

Unfortunately, the sequence and timing of the various SIP submissions renders consideration of the other SIP submissions required by the 2008 $PM_{2.5}$ NSR/PSD Rule and the 2010 $PM_{2.5}$ NSR/PSD Rule impracticable or impossible as part of the EPA's action on these infrastructure SIPs. The 2008 $PM_{2.5}$ NSR/PSD Rule itself was delayed by litigation over the NAAQS and other intervening events, and thus the EPA did not promulgate it until May 16, 2008. Within that rule, the EPA directed states to make a SIP submission that would accomplish certain changes to the PSD permitting program to address $PM_{2.5}$ by May 16, 2011. The state in fact made a SIP submission intended to address this requirement on May 19, 2011.[34] Similarly, in the 2010 $PM_{2.5}$ NSR/PSD Rule, the EPA required states to make certain PSD program revisions, but in that case the SIP submissions to address those requirements are not even due until July of 2012, and the State has not yet made any SIP submission to address those

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32 For example, as part of this action, the EPA is approving a portion of another SIP submission from the state necessary to make explicit that NOx is a precursor to ozone formation in the state's PSD permitting program.
33 The EPA notes that in the context of acting on infrastructure SIPs, only provisions related to PSD permitting would be relevant, because the requirements of section 110(a)(2)(I) pertaining to nonattainment plan requirements are outside the scope of the infrastructure SIPs.
34 As noted in the proposal, on April 20, 2011, the state adopted revisions to its SIP to amend its PSD and nonattainment NSR programs to implement the $PM_{2.5}$ NAAQS. These revisions became effective and enforceable by the state on May 12, 2011. The state submitted these changes to the EPA as a SIP revision on May 19, 2011.

requirements.

Given that the state submitted its infrastructure SIP for the 1997 $PM_{2.5}$ NAAQS on April 4, 2008, nearly three years in advance of the SIP submission required by the 2008 $PM_{2.5}$ NSR/PSD Rule, that necessarily means that the state's infrastructure SIP submission for the 1997 $PM_{2.5}$ NAAQS could not have included or anticipated those later requirements. Likewise, the state's infrastructure SIP submission for the 2006 $PM_{2.5}$ NAAQS on November 29, 2009, was significantly in advance of that other required PSD SIP revision. The EPA believes that it is not reasonable to expect that the state's April 2008 and November 2009 infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS should have addressed the specific PSD program requirements that EPA had not requested the state to make SIP submissions to address until May of 2011. For the same reason, the EPA does not consider it reasonable to expect the state to have anticipated and addressed the SIP revision requirements of the 2010 $PM_{2.5}$ NSR/PSD Rule in these infrastructure submissions, when by the terms of that rule states have until July 2012 to make the necessary SIP revisions.

In theory, the EPA could have elected to act on the PSD portion of the state's May 2011 submission to meet the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule as part of acting at this time on the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS. In other words, the EPA could have sought to accelerate action on the May 2011 submission in order to try to address the more recent SIP submission requirements relevant to the PSD program for $PM_{2.5}$. However, the EPA determined that this would not be the most appropriate course for two primary reasons: (1) the EPA's current logistical situation makes it difficult to accelerate action on a SIP submission; and (2) the EPA believes that the state is currently addressing $PM_{2.5}$ in its

PSD permitting program pursuant to state law requirements and will continue to do so in the interim until the EPA is able to act on the May 2011 submission.

First, the EPA notes that the state made the SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule only relatively recently. Because the state made the submission on May 19, 2011, it is now considered complete by operation of law as of November 23, 2011. Pursuant to section 110(k)(2), Congress provided the EPA with up to one year to act on the submission from this date. Under other logistical circumstances, the EPA might consider accelerating action upon this particular SIP submission and acting on the PSD portions of it as part of taking action on the state's infrastructure SIPs for $PM_{2.5}$ because that would allow the EPA to address the PSD requirements for $PM_{2.5}$ more comprehensively and efficiently in one consolidated action. However, the EPA is currently working on a large number of rulemaking matters, many under Consent Decree deadlines including this specific rulemaking, and this makes it difficult for the EPA to act on a SIP submission on an accelerated basis, unless such accelerated action is necessary. As noted in the proposal, the EPA intends to act on the May 2011 SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule separately, on a schedule that will allow the agency to evaluate and take action on that submission, as appropriate.

Second, the EPA believes that action on the May 2011 SIP submission is not necessary at this time and as part of acting on the infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS because the PSD program revisions contained within that submission are already effective and enforceable as a matter of state law, as of May 12, 2011. Although the EPA acknowledges that it is important that these revisions be evaluated and approved into the state's SIP, the EPA does not believe that it is inappropriate to approve the state's infrastructure SIP

submissions at this time. The state made the SIP submission required by the 2008 $PM_{2.5}$ NSR/PSD Rule. Until such time as the EPA has the opportunity to evaluate that submission and take the necessary administrative actions to propose and finalize appropriate action upon it, the agency concludes that it is acceptable to rely on the fact that the revisions have been made and are currently enforceable for purposes of state law. The state made the submission to reflect that its PSD permitting program now includes evaluation of $PM_{2.5}$ and does not continue to rely on the use of PM_{10} as surrogate for $PM_{2.5}$ as of May 2011.

Under these circumstances, the EPA does not consider it reasonable to interpret section 110(a)(2)(C) to require the EPA to disapprove the state's infrastructure SIP submissions for the 1997 $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS simply because the agency has not yet acted on the May 2011 SIP submission for the 2008 $PM_{2.5}$ NSR/PSD Rule, or has not required the state to make other PSD program revisions in advance of the date required in the 2010 $PM_{2.5}$ NSR/PSD Rule. Instead, the EPA believes that it is appropriate for the EPA to take into consideration the timing and sequence of related SIP submissions as part of determining what it is reasonable to expect a state to have addressed in an infrastructure SIP for a NAAQS at the time when the EPA acts on such submission. Such an approach is reasonable, and to adopt a different approach by which the EPA could not act on an infrastructure SIP, or at least could not approve an infrastructure SIP, whenever there was any impending revision to the SIP required by another collateral rulemaking action would result in regulatory gridlock. The EPA believes that such an outcome would be an unreasonable reading of the statutory process for the infrastructure SIPs contemplated in section 110(a)(1) and (2).

The commenter also specifically expressed concern that the state's May 2011 SIP

submission to meet the requirements of the 2008 $PM_{2.5}$ NSR/PSD Rule did not "fully implement the federally required program to address the $PM_{2.5}$ NAAQS" for two specific reasons: (1) the submission does not establish significant emissions rates for precursors that would trigger further analysis of $PM_{2.5}$ impacts; and (2) the submission does not include the $PM_{2.5}$ increments established by the EPA.

With respect to the first point, the EPA has not yet had the opportunity to analyze and take action upon the May 2011 submission, so the agency considers it premature to determine whether or not the state has correctly address the issue of significant emissions rates for precursors in the submission. The EPA will evaluate the submission for this and other issues when it takes action on this submission in a separate rulemaking. The commenter should participate in that action and resubmit its comments at that time.

With respect to the second point, the EPA has also not evaluated the submission yet, but notes that the May 2011 SIP submission would not be likely to include any $PM_{2.5}$ increments, nor would EPA have required it to. The EPA only established the $PM_{2.5}$ increments in the 2010 $PM_{2.5}$ NSR/PSD Rule, and did not require states to make submissions to address $PM_{2.5}$ increments until July 2012. Again, however, the EPA will evaluate the May 2011 SIP submission at a later date and the commenter should participate in that action and resubmit its comments on this issue at that time, or in the later action that will eventually occur on the SIP submission from the state to meet the requirements of the 2010 $PM_{2.5}$ NSR/PSD Rule.

Finally, one commenter suggested that, rather than approving the state's infrastructure SIP with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS, the EPA should instead "condition any approval of the infrastructure SIP" on later revisions to the state's SIP to incorporate the

NSR/PSD requirements that were in the May 2011 submission. The commenter asserted that the infrastructure SIP submission could not be "complete" until it addresses each applicable element of section 110(a)(2) and that the EPA "cannot approve the SIP when some elements are missing."

The EPA interprets the commenter's suggestion that it "condition" approval of the state's infrastructure SIP submission on later actions to be a reference to the concept of conditional approval under section 110(k)(4). The EPA considered the commenter's suggestion as a means of addressing the SIP submission timing issue, but the agency is constrained by the provisions of the statute. Section 110(k)(4), under the rubric of "conditional approval," explicitly authorizes EPA to approve a SIP submission "based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision." Courts have confirmed that conditional approvals are an available course of action under section 110(k), but only if the statutory conditions for such a conditional approval have been met.

Based on the specific language of section 110(k)(4), the EPA concluded that it would not be appropriate to use the mechanism of a conditional approval in this action on the state's infrastructure SIP submission. The statute clearly contemplates use of this approach when the state has made a commitment to make a submission in the future that meets the statutory criteria. In this instance, however, the state has already made the substantive SIP submission for the NSR/PSD requirements for the 1997 $PM_{2.5}$ NAAQS in May of 2011. In other words, the state would not need to make a commitment to make a future submission to adopt specific measures by a date certain to meet this requirement for the 1997 $PM_{2.5}$ NAAQS because the state has

already made a submission intended to meet the requirement.

Given that the state has already made the submission in question, and that the EPA has not yet been able to evaluate it and take the necessary procedural steps to act upon it, the EPA does not believe that it is appropriate to use the mechanism of a conditional approval in these circumstances. Had the EPA already been able to evaluate the NSR/PSD submission substantively, in theory the agency could have requested the state to make a commitment to make revisions to that submission as part of a conditional approval. As previously discussed, however, the EPA has not yet been able to evaluate that submission fully. Thus, the EPA concluded that a conditional approval of the infrastructure SIP for this element would not be a viable option in this case. It should be noted, however, that the EPA will consider the commenter's suggestion and may utilize the mechanism of a conditional approval when it acts on the NSR/PSD submission, should that be appropriate.

With respect to the commenter's concern that the 2006 $PM_{2.5}$ NAAQS infrastructure SIP submission from the state was not "complete" because it did not address the NSR/PSD submission, the EPA believes that this reflects a misunderstanding of the concept of "completeness" as it applies in this situation. In section 110(k)(1)(B), under the rubric of "completeness finding," the statute directs the EPA to make a finding whether a SIP submission meets minimum criteria within 60 days. If, however, the EPA does not make such a completeness finding within 60 days, then the submission is deemed complete by operation of law, no matter what its content, six months after submission. Whether by an actual finding, or by operation of law, the completeness starts the clock for action by the EPA on the submission under section 110(k)(2). In this instance, the state's 2006 $PM_{2.5}$ NAAQS infrastructure SIP

submission was deemed complete by operation of law on May 27, 2010.[35] Thus, regardless of what that submission said with respect to section 110(a)(2)(C) in general, or with respect to the NSR/PSD submission in particular, the state's 2006 $PM_{2.5}$ NAAQS infrastructure SIP submission was "complete" under the express terms of the statute for purposes of further actions. Likewise, the commenter's observation that the EPA's guidance for these SIP submissions stated that a submission must contain material relevant to each of the elements of section 110(a)(2) in order to be considered "complete" is not germane in this case, because that is superseded where the statute requires that a submission be deemed complete by operation of law.

Finally, the commenter's concern that the EPA should not approve an infrastructure SIP "when some elements are missing" raises an important question about the practical considerations of the EPA's evaluation of infrastructure SIPs. In general, the EPA of course agrees that the agency should not approve an infrastructure SIP submission for a particular element of section 110(a)(2) if the state's submission does not adequately address that element, whether by establishing that the state's existing SIP already contains the necessary basic structural requirements, by submitting revisions to the existing SIP to meet those requirements, or by some combination thereof. However, the determination of whether "some elements are missing" necessarily includes consideration of the sequence and timing of SIP submissions, and as in the situation at issue, there can be complications when a SIP submission that is collateral to, but also relevant to, the infrastructure SIP is required to be submitted on a schedule that does not mesh with the schedule on which the EPA must act on the infrastructure SIP itself. In short, evaluating whether an element "is missing" depends upon considerations such as when a SIP

35 The State's submittal, dated November 23, 2009, was received by EPA on November 27, 2009.

submission relevant to that element was or is due to be submitted, whether the EPA has yet had the opportunity to evaluate that other SIP submission, and other considerations discussed in more detail earlier in this response with respect to the commenter's other concerns.

J. Comments that Address Single Source Ozone Modeling

1. Comments that Address the Adequacy of Ozone Modeling Procedures

Comment: Two commenters assert the TCEQ has incorrectly concluded that modeling demonstrations evaluating the ozone contributions of proposed sources to existing nonattainment areas are unnecessary as summarized in the comments that address SILs,[36] and that the TCEQ has consequently issued PSD permits to sources in close proximity to those areas and also areas that are in near-nonattainment for ozone without requiring adequate modeling of each source's impact on ozone levels. Referencing the TCEQ's Air Quality Modeling Guidelines and "Draft Ozone Procedures" document,[37] the commenters maintain that TCEQ routinely issues PSD permits based on outdated and inadequate ozone modeling procedures. One commenter adds that the ozone screening procedure authorized by the TCEQ's modeling guidance document is partly based on, or equivalent to, inappropriate "Scheffe Tables." Additionally, the commenter states the ozone screening method involves ratios of NOx to VOC without considering the impact of biogenic emissions. Two commenters state that the EPA has on multiple occasions informed the TCEQ that the ozone screening procedures authorized by the TCEQ are outdated and unreliable to evaluate a single source's ozone modeling impact on an air quality control region. One

36 See Section III-J.3 of this rulemaking for the comments that address SILs.
37 When we say 'modeling guidance' in this response in reference to the TCEQ's modeling guidance, we are including guidance based on the TCEQ's "Air Quality Modeling Guidelines" prepared by the TCEQ's New Source Review Permits Division, RG-25 (Revised) and "Draft Ozone Procedures" included in the docket for this action as "TCEQ's Draft Ozone Procedures" and other guidance the TCEQ has given applicants in the past.

commenter states that the Texas SIP is insufficient to comport with section 110(a)(2)(C) of the Act unless it is revised to expressly require case-by-case ozone impact analyses to be conducted for major sources of ozone precursors based on sufficient modeling techniques. The commenters also stated that the TCEQ has indicated that for some situations TCEQ views the SIP process as the appropriate vehicle for evaluating ozone impacts on a nearby nonattainment area, and this is not acceptable.

Response: As further discussed in this response, the appropriate time to evaluate ozone impacts for major sources of ozone precursors on attainment and nearby non attainment areas is in the permitting process. As we noted in our proposal, the TCEQ has adopted EPA's Guideline on Air Quality Models as part of its adopted-by-reference regulations.[38] Therefore, we have concluded that the TCEQ has adopted the necessary requirements and provisions for implementing a PSD program as it relates to the 1997 ozone standard infrastructure elements, including 40 CFR Part 51, Appendix W: Guideline on Air Quality Models (GAQM).

The commenter has raised a number of concerns with individual permitting actions. In our proposal, we pointed out that the EPA has commented to the TCEQ on individual PSD permits regarding concerns with technical inadequacies in ozone impact analyses. We also pointed out that the EPA may address implementation of the SIP through separate action and

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38 TAC §116.160(d). Prevention of Significant Deterioration Requirements. 6-77, TXd118, TX110. As adopted by the TCEQ June 2, 2010, effective June 24, 2010 (6-77). Approved by the EPA September 15, 2010 (75 FR 55978) effective November 15, 2010 (TXd118). Regulations.gov docket EPA-R06-OAR-2010-0620. "TAC §116.160(d). All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA."

such separate action is not precluded by approval of the infrastructure SIP. We continue to believe that specific concerns about individual permits are best addressed separately from any action taken specifically with regard to the approvability of this infrastructure SIP.

In the event there is not progress in addressing our technical concerns based on these clarifications, the EPA will consider the other regulatory tools available.

While we remain very concerned about the appropriateness of ambient impacts analyses of ozone for some past permitting actions, herein we are explaining our technical and scientific expectations for ozone impacts analysis for the state permitting authorities and the public. The EPA agrees with the commenter that Texas state permitting authority should not be using inappropriate or outdated analytical tools including models or other ambient analyses techniques based on model outputs. The commenter is correct that the use of: (1) "Scheffe Tables," (2) screening techniques which involve ratios of NOx to VOCs that do not consider the impact of biogenic emissions, or (3) screening techniques that use other outdated or irrelevant modeling, is inappropriate, except in limited circumstances, to evaluate a single source's ozone impacts on an air quality control region.[39] In our proposal, we note that these three types of procedures lack the appropriate levels of biogenic emissions, appropriate consideration of background pollutant levels, and the resulting chemistry conclusions as to whether the air shed is NOx limited or that a NOx source would result in an ozone neutral impact. NOx limited means that the air shed has plenty of VOCs from biogenics and anthropogenic sources such that the production of ozone is

39 With the exception of limited circumstances, these techniques would not be acceptable to use. Such a limited circumstance may arise in an area where biogenic emissions are not present in significant quantities, such that the overall airshed being evaluated is actually VOC limited (VOC emissions limit the formation of ozone). In this unique situation, through consultation with the EPA Regional Office, the EPA Regional Office and the state permitting agency may determine a screening approach could be technically appropriate using these tools.

limited by the amount of NOx available in the atmosphere to react with VOCs. Addition of NOx emissions in an airshed that is "NOx limited" will result in the generation of more ozone within the local airshed. NOx plumes that have a high concentration of NOx can result in some initial ozone destruction, but as the plume further disperses the NOx reactions that create ozone overtake the destruction cycles and the overall net effect is more ozone molecules within the air shed. To be clear, using techniques that compare a proposed source's VOC to NOx ratio without consideration of the overall airshed can lead to scientifically inappropriate conclusions.[40]

We note the TCEQ's "draft ozone procedures" document relies upon outdated EKMA diagrams that conclude most situations are VOC limited and not NOx limited and that increases in NOx are assessed as being ozone neutral.[41] This is an inaccurate conclusion because it does not appropriately consider the total pollutant concentration in the local airshed. The procedures discussed in this response and in the proposal, and as found in the TCEQ Draft Ozone Procedures guidance, are fundamentally flawed with the exception of usage in certain limited circumstances (see footnote 39). The EPA will continue to monitor implementation of the PSD program as it relates to ozone impacts analysis and remain in communication with the state.

More scientifically appropriate screening and refined analytical tools are available; they

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40 Sillman, S., (1995), "The Use of NOy, H2O2, and HNO3 as Indicators for O3-NOx-ROG Sensitivity in Urban Locations," J. Geophys. Res. 100, 14,175-14,188; Sillman, S., D. He, C. Cardelino, and R.E. Imhoff, (1997), "The Use of Photochemical Indicators to Evaluate Ozone-NOx-Hydrocarbon Sensitivity: Case Studies from Atlanta, New York and Los Angeles," J. Air and Waste Mgmt. Assoc., 47 (10), 1030-1040. (Oct. 1997); Sillman, S., (1998), "Evaluating the Relation Between Ozone, NOx and Hydrocarbons: The Method of Photochemical Indicators," EPA/600R-98/022, http://www-personal.engin.umich.edu/~sillman/publications.htm; Sillman, S., and D. He, (2002), "Some theoretical results concerning O3-NOx-VOC chemistry and NOx-VOC indicators," J. Geophys. Res., 107, D22, 4659, doi:10.1029/2001JD001123, 2002, http://www-personal.engin.umich.edu/~sillman/publications.htm; Ryerson et al,(2003) "Effect of petrochemical industrial emissions of reactive alkenes and NOx on tropospheric ozone formation in Houston, Texas," Journal of Geophysical Research, Vol. 108, No. D8, 4249, doi:10.1029/2002JD003070, 2003; Ryerson et al., (2001), "Observations of Ozone Formation in Power Plant Plumes and Implications for Ozone Control Strategies," Science, April 27, 2001.

41 A copy of the TCEQ Draft Ozone Procedures guidance relying upon outdated EKMA diagrams is included in the docket for this rulemaking.

should be considered for use in conducting ambient impact analyses for ozone. As discussed in a separate comment and as called for in the GAQM, the approach for an ozone impact analysis should be determined in consultation with the EPA Regional Office on a case-by-case basis. The TCEQ has adopted the GAQM and therefore should be following the guidance and principles outlined in GAQM to properly implement the TCEQ's PSD program.[42] We raised our fundamental concerns with TCEQ's conclusions that NOx-dominated sources result in ozone neutral impacts in our proposal. The TCEQ did not provide comments on our proposal, nor did it offer supporting reasons to disagree with the EPA's position that these techniques should no longer be used. Therefore, we anticipate that the TCEQ will not use these techniques.

The current Texas SIP facially meets the requirements of 40 CFR 51.166(l)(1) and (2). We disagree with one commenter's statement that the Texas SIP is insufficient unless it is revised to explicitly require case-by-case ozone impact analyses for major sources of ozone precursors based on sufficient modeling techniques. We note that the GAQM and the Texas SIP indicates the state permitting authority should consult with the Regional Office to determine the appropriate analysis techniques, but allows flexibility through the consultation process to determine either modeling based or other analysis techniques may be acceptable. We note that not all sources have utilized the TCEQ's draft ozone procedures. Nevertheless, if the TCEQ continues to utilize inappropriate techniques, we will consider the other regulatory tools available to the EPA. The EPA's authority to take action, which may include a SIP call, a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case-by-case permitting oversight, is not precluded by its approval of this infrastructure SIP.

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42 Id.

2. Comments that Address Consultation

Comment: In conjunction with the proposition summarized in the comment regarding the adequacy of ozone modeling procedures for proposed PSD permits in Texas,[43] the commenters both indicated that the TCEQ routinely does not consult, nor does it require permit applicants to consult, with the EPA before approving a PSD permit application based upon those modeling procedures the commenters state to be inadequate. The commenters both cite to a specific PSD permit application approved by the TCEQ for the White Stallion Energy Center as illustrating the TCEQ's position that an applicant may rely on TCEQ ozone modeling procedures other than those approved by the EPA without consulting with the EPA. The commenter concludes that the TCEQ routinely issues PSD permits based upon ozone impacts analyses alleged to be inadequate (see the comment regarding the adequacy of ozone modeling procedures and footnote 43) without consulting with the EPA and therefore the Texas PSD program is insufficient to assure the NAAQS are achieved. The commenter contends the EPA should require the TCEQ to amend its SIP-approved rules to explicitly include a consultation requirement for ozone. Two commenters state that the EPA should require the TCEQ to amend its SIP to expressly include an approval requirement for ozone requiring all applicants to submit a proposed modeling procedure to the EPA regional office and receive written approval from the EPA regarding that procedure before a PSD permit may be issued.

Response: The current Texas SIP facially meets the requirements of 40 CFR 51.166(l)(1) and (2). Specifically, the Texas SIP states "all estimates of ambient concentrations required under PSD shall be based on applicable air quality models and procedures specified in the

43 See Section III-J.1 of this rulemaking for the comments that address the adequacy of ozone modeling procedures.

GAQM, or other models and modeling procedures currently approved by the EPA for use in the state program." Therefore the Texas SIP requires that PSD permit applications contain an adequate analysis of ozone impacts from the proposed project.[44] As indicated by the GAQM, the methods used for the ozone impacts analysis for individual PSD permit actions are determined on a case-by-case basis. 40 C.F.R. Part 51, Appendix W, § 5.2.1.c.

The TCEQ has adopted and incorporated the EPA's PSD permitting regulations found at 40 CFR 51.166 and 52.21 into its SIP. The language of the GAQM clearly applies to permits issued in Texas. Other than the merging of the requirements from 40 CFR 52.21(l)(1) and (l)(2) and 51.166(l)(1) and (l)(2) into one requirement (30 TAC 116.160(d)), the requirements of the Texas rules do not vary from the EPA's GAQM. Section 5.2.1.c. of the GAQM provides that "model users should consult with the Regional Office to determine the most suitable approach on a case-by-case basis (subsection 3.2.2.)." Since this provision is incorporated into the Texas SIP, the infrastructure SIP is approvable as facially sufficient with respect to the analysis of impacts of proposed facilities on ozone concentrations in PSD permit reviews.

The commenters assert, and the EPA acknowledges, that EPA has indicated to the TCEQ on multiple occasions the state should consult with the EPA to determine the most appropriate method to analyze ozone impacts on a case-by-case basis. Pursuant to EPA's authority under the Act, EPA Region 6 has submitted formal comment letters in response to the TCEQ draft PSD permits indicating the Agency's position that PSD permit applications and draft permits did not contain an adequate analysis of ozone impacts from the proposed projects, nor was the EPA

44 As discussed further in another response to comment, the TCEQ has adopted the EPA's GAQM as part of its adopted-by-reference regulations. Thus, Texas has the appropriate rules in place to require an ambient analysis of ozone impacts from a proposed project.

consulted about the appropriateness, or lack thereof, of an ozone impacts analyses for the facilities. The EPA is concerned that the TCEQ's consultation to date, including the development of a protocol, has not always met the EPA's expectations. The TCEQ should consult with EPA Region 6 on a case-by-case basis for determining the appropriate techniques in developing an adequate ozone impact analysis. Furthermore, a modeling protocol should be developed and agreed upon by EPA Region 6, the TCEQ, and the applicant to ensure that the analysis conducted will conform to the recommendations, requirements, and principles of the GAQM.

As indicated in Section D, the EPA is continuing to evaluate its review of implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval in the absence of a final EPA determination regarding the implementation issues. The EPA believes that such a determination would undermine the approvability of SIP language that is otherwise facially sufficient. The EPA is not determining in this action that the implementation concerns that have arisen no longer exist. If the EPA determines that outstanding implementation issues are sufficiently serious it will take appropriate action, which could include the use of other regulatory tools, including the issuance of a SIP call, making a finding of failure to implement, or taking measures to address specific permits pursuant to the EPA's case by case permitting oversight, depending on the nature and extent of the particular implementation problems at issue.

3. Comments that Address Significant Impact Levels (SILs)

Comment: Two commenters state that the TCEQ claims it cannot determine whether ozone impacts from a proposed major stationary source upon a nonattainment region are significant or de minimis because the EPA has not established a significant level for ozone. In

the absence of a SIL and perceived time and monetary costs of modeling procedures, the commenters further state that the TCEQ has concluded that modeling demonstrations evaluating the contribution of proposed sources upon existing nonattainment areas are unnecessary. The commenters also state that the TCEQ has also adopted ad-hoc de minimis level of 5ppb through TCEQ permitting orders without undergoing rulemaking processes to, in part find modeling, or detailed modeling, is not necessary for a number of new coal-fired power units.

Response: The EPA has defined significant impact levels (commonly referred to as "SILs"), expressed as ambient pollutant concentrations (e.g., micrograms per cubic meter or parts per million) for certain pollutants for the purpose of determining when a new or modified source's modeled impact of that pollutant are "significant" for purposes of analyzing whether the Source45 causes or contributes to a violation of the NAAQS predicted to exist after the Source commences operation. 40 CFR 51.165(b), 40 CFR 52.21(l).

The purpose of a SIL in general is to compare against the ambient air quality impacts of the proposed emissions increase from a proposed Source that have been estimated using modeling or other analytical techniques. There are generally two ways a SIL may be used as part of an ambient impact analyses for PSD review. First, if an abbreviated analysis of just the impact of the proposed Source's emissions, without the inclusion of any surrounding sources, on ambient concentrations is below the SIL in all ambient air areas, then the proposed Source may be regarded as "de minimis" and considered not to cause or contribute to any violation of the NAAQS for that particular pollutant. Secondly, when ambient analysis/modeling of a proposed Source's emissions are included with other surrounding sources within the airshed in a

45 In this Response to Comment, the term 'Source' represents a new or modified source that has an increase in emissions that is undergoing a permit review.

"cumulative analysis," a SIL can be utilized to compare the proposed Source's impacts on any exceedances/violations of ambient standards. If violations/exceedances are projected, the Source can still receive a permit if a conclusion is reached that the Source's contribution is not significant (de minimis) for all projected violations/exceedances of that standard. As we discuss further below, a SIL can aid in making a de minimis determination, but is not necessary to conduct an ambient impact analysis.

Therefore, when a SIL exists it is sometimes used in the First situation as an initial screening tool, in that when a proposed Source's impact of a particular pollutant is below the SIL at all locations and, therefore, not "significant," there is no need to require a "cumulative analysis." The "cumulative analysis" entails completing a more thorough ambient impact analysis to consider whether the proposed Source's impact along with the impact of other existing and surrounding sources in the area of concern will result in any violations/exceedances of the NAAQS after the proposed Source commences operation. The use of a SIL in this First situation as a screening procedure is acceptable in the context of most pollutants regulated by PSD. Ozone is a unique pollutant in that it is not directly emitted by sources in most circumstances but is a result of chemical reactions in the atmosphere and is generated from emissions of precursors of ozone (VOC and NOx) that react with other pollutants that are already present in the local atmosphere. The amount of ozone that may be created from a proposed Source of ozone precursors is dependent on a number of variables including the existing concentrations of VOC and NOx in the airshed the proposed Source would impact. Because of this chemical interaction of the Source's pollutants with other airshed pollutants it would be technically inappropriate to attempt to model impacts on ozone levels from a proposed Source

without also considering the pollutant loading in the local airshed. This technical issue is one of the reasons that development of a SIL and performing ambient impact analyses for ozone is more complicated than for other pollutants. The commenter asserts that TCEQ has concluded the lack of a SIL makes it unnecessary for TCEQ to conduct an ambient analysis for impacts on ozone levels for a proposed Source. We are discussing the two ways that SILs are commonly used to explain and conclude that the lack of a specific SIL for ozone does not limit TCEQ (or permit applicants) from conducting an ambient impact analysis for impacts on ozone levels from a proposed Source. We further discuss in this response and other responses in this notice the regulatory requirements and EPA's expectations pertaining to completing ozone impact analyses for proposed Sources.

EPA has not yet established a significant impact level (SIL) for ozone in its regulations (40 C.F.R. 51.165(b), 51.166(k)(2), 52.21(k)(2)) or identified a specific SIL for ozone in any guidance.[46] There are other ambient standards for which we have not formally promulgated SILs at the time of the drafting of this Response, such as the 1-hour NO2 and SO2 standards. In those cases, we have issued guidance that includes interim SILs that can be used by states. In our recent guidance for SO2 (and also NO2) modeling, we indicated "The application of any SIL that is not reflected in a promulgated regulation should be supported by a record in each instance that shows the value represents a de minimis impact on the 1-hour SO2 standard" (NO2 guidance is the same quote with NO2 replacing SO2).[47] In the same SO2 and NO2 guidance documents, the

46 This does not preclude EPA from developing a SIL in the future. If we were to do so, however, we note that there are some technical issues specific to ozone that would need to be considered.

47 Guidance Memorandums: "Guidance Concerning the Implementation of the 1-hour S02 NAAQS for the Prevention of Significant Deterioration Program" From Stephen D. Page, Director OAQPS, August 23, 2010 and "Guidance Concerning the Implementation of the 1-hour N02 NAAQS for the Prevention of Significant Deterioration Program" From Stephen D. Page, Director OAQPS, June 29, 2010.

EPA also indicated that states do not have to use the EPA's recommended interim SILs and can use different values if supportable by a record in each instance.

Even if a generally applicable SIL has not been defined, the permitting authority may choose to define the de minimis or SIL level through rulemaking, development of guidance or on a case-by-case basis, but the permitting authority must provide an adequate record to support the de minimis/SIL level decision. This is the current situation with the 1997 and 2008 8-hour ozone standards. The lack of a SIL (formal or interim) does not create an exemption from conducting the analysis required by the PSD provisions at 40 CFR 52.21 (k) and (m). Texas has adopted by reference provisions at 40 CFR 52.21(k) and (m) into their SIP, which require that an ambient impact analysis be conducted for the allowable emissions increase from each proposed new or modified Source, in conjunction with all other applicable emission increases or reductions (including secondary and precursor emissions). PSD regulations require an ambient impact analysis for ozone when precursor emissions of VOC and/or NOx are projected to equal or exceed the 40 tpy threshold levels. We note that 52.21(i) and 51.166(i) are potentially applicable in this context. Footnote 1 to sections 51.166(i)(5)(i) and 52.21(i)(5)(i) of EPA's regulations says the following: "No de minimis air quality level is provided for ozone. However, any net emission increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of air quality data." EPA previously included a similar note in a guidance listing Significant Impact Levels. In the 1990 NSR Workshop Manual (Draft, October 1990), page C.28, footnote b on this page says the following with respect to then applicable one-hour ozone NAAQS: "No significant ambient impact concentration has been established. Instead, any net emissions increase of 100

tons per year of VOC subject to PSD would be required to perform an ambient impact analysis." Based on these statements, this 100 tpy value has been used by some permitting authorities in a manner similar to a SIL to assess whether a detailed air quality analysis should be conducted for ozone in a similar fashion to the "First" method of using a SIL discussed above. While these statements suggest a less rigorous analysis may be appropriate for sources emitting less than 100 tpy of these precursors (and greater than or equal to 40 tpy), they have not been revisited by EPA since the promulgation of the 8-hour ozone NAAQS (which included revisions to include NOx as an ozone precursor). EPA is not categorically concluding that every source emitting less than 100 tpy of NOx or 100 tpy of VOCs will not cause or contribute to a violation of the current ozone NAAQS. EPA believes it unlikely a source emitting below these levels would contribute to such a violation of the 1997 8-hour ozone NAAQS, but consultation with an EPA regional office should still be conducted in accordance with section 5.2.1.c. of Appendix W when reviewing an application for sources with emissions of these ozone precursors below 100 tpy.

For ozone, a proposed Source's emission impacts are dependent upon the ozone and ozone precursor levels present in the surrounding airshed. In addition, meteorological parameters such as wind speed and direction, temperature, solar radiation influx, and atmospheric stability are also important factors. Therefore determination of a SIL/de minimis level and conducting an ambient impact analysis is dependent on consideration of a number of issues and as previously noted, the permitting authority must support a SIL/de minimis determination with an adequate record. As discussed in other Responses in this notice 40 CFR 51, Appendix W – Guideline on Air Quality Models includes discussion on selection of appropriate models or analysis tools, the procedures, process and methods for conducting analyses, the guiding principles in completing

ambient impact analyses and the applicant and the permitting authority working with EPA specifically in the case of completing an acceptable ambient impact analysis for ozone.48 Given the variable factors related to ambient impact analyses for ozone we note that 40 CFR 51, Appendix W 1.0(e) indicates that in all cases, however, the analysis applied to a given situation should be the one that provides the most accurate representation of atmospheric transport, dispersion, and chemical transformations in the area of interest. Once an analysis of the potential change in ozone levels is completed in accordance with 40 CFR 40 Appendix W, the state or permitting authority may still have to determine if the change in ozone levels is to be considered "de minimis," as opposed to "significant." If no exceedances/violations or near exceedances/violations, then the permitting authority may choose to not define a SIL/de minimis level if they determine it is not necessary for the review of the permit application. If exceedances/violations were projected by the ambient impact analysis, the state or permitting authority will need to make a determination of a SIL or de minimis level in order to conclude that the permit for the proposed emission increases would/would not cause or contribute to ozone exceedances. We do note that a SIL (regulatorily developed, interim, or case-by-case) does aid in the review process and can provide context for the public and stakeholders of the level of the impacts in addition to when it is necessary for reaching a conclusion of whether the proposed emission increases would/would not cause or significantly contribute to ozone exceedances. Without a SIL developed by the EPA or the permitting authority, it is difficult to determine whether the Source's contribution to a violation (exceedance) is de minimis or significant, and any increases could contribute to an estimated violation. To address the commenter's statement,

48 40 CFR 51 Appendix W – Guideline on Air Quality Models including (1.0-3.3), (5.2.1.c), and (10).

a SIL is not necessary for conducting an ambient impact analysis for a proposed Source's impact on ozone levels and lack of a SIL is not a reason for not requiring an ambient impact analysis when required by PSD regulations. Moreover, the state has the authority to develop a SIL for ozone if it determines a SIL is necessary or beneficial in analyzing ambient impact analyses for ozone.

As explained earlier in this response and this rulemaking and in prior EPA rulemakings,[49] a SIL is not a prerequisite to conducting an air quality analysis for criteria pollutants, and the EPA maintains this position with respect to ozone. The EPA has also stated the absence of an EPA-promulgated SIL does not justify an exemption from the air quality analysis. In summary, the absence of a SIL for the 8-hour ozone standard does not change the regulatory requirement to conduct an ambient analysis of impacts on ozone levels when required by 40 CFR 52.21.

Furthermore, states are not precluded from developing and applying their own SILs for ozone in the absence of one established by EPA and demonstrating that a proposed Source would impact ozone levels by only a de minimis amount and thus that the proposed emissions increase would not be considered to cause or contribute to an exceedance or violation of the ozone NAAQS. When applying a threshold value like a SIL to conclude an impact is de minimis, the permitting agency must follow a rational approach to determine what level of emission is a de minimis impact.[50] The EPA affirms this principle in this rulemaking, and maintains that to the extent a state utilizes and/or develops a SIL in the absence of an established one by the EPA for

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49 See PM2.5 NSR final rule RTC at 75 FR 64864, 64891, October 20, 2010.
50 *Alabama Power v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979); Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (PM2.5) - Increments, Significant Impact Levels (SILs), and Significant Monitoring Concentration (SMC) Final Rule, 75 FR 64899 (October 20, 2010); *In Re Mississippi Lime Company*, U.S. EPA Environmental Appeals Board, PSD Appeal No. 11-01, August 9, 2011.

determining the significance of an ozone impact, the state's SIL must be rooted in a rational basis addressing the specific situation for which it is being used. For a state-developed SIL level used in a permitting action, the administrative record must include sufficient rationale to demonstrate that an air quality impact at or below the SIL is de minimis in nature and would not cause a violation of the NAAQS. Accordingly, it should contain an explanation of how the state or permitting agency applying the SIL derived the value to support the SIL as a threshold for de minimis determinations. Additionally, the administrative record should substantiate the reasoning for employing a particular SIL. Thus, when a state or permitting agency applies an alternate SIL in the absence of an EPA-established SIL, the administrative record should elucidate both the reasoning and the methodology used to derive the SIL, and also explain the rationale for concluding the SIL is reasonable for that specific analysis.[51] Since this is a case-by-case determination that the EPA will review as part of our oversight of state permitting actions and analyses conducted in accordance with Appendix W,[52] the EPA would like to work with the state in the development of case a specific and/or interim SIL as the state deems necessary in determining if the proposed Source's impact is significant, and if such impact would contribute to an exceedance and/or violation of the standard.

The commenters state that the TCEQ has also adopted an ad-hoc de minimis level of 5 ppb through TCEQ permitting orders without undergoing rulemaking processes to in part find modeling, or detailed modeling, is not necessary for a number of new coal-fired power units. As we discuss in our response above, an ad hoc or interim SIL may be developed and applied, but

51 *In Re Mississippi Lime Company*, U.S. EPA Environmental Appeals Board, PSD Appeal No. 11-01, August 9, 2011

52 40 CFR Appendix W Parts 1, 2, 3 including 3.0(c), 3.2.2(a), 3.3(a & b), 10.

we are clear that development of an interim/ad hoc de minimis level (or other de minimis/SIL determinations) would need to be fully supported by a record (administrative and technical) that would support the use of the de minimis level in a specific circumstance. We have not received an administrative record from TCEQ or any supporting technical analyses that would suggest the use of an ad hoc/interim de minimis level of 5 ppb in a PSD permitting action for a coal fired power plant in Texas. The TCEQ has also clarified that they have never used the 5 ppb as a de minimis level.[53] We note that monitored ozone levels vary widely throughout the large state of Texas, and depending on the location of a source, this may impact the level of concern with a particular source in selection of a de minimis value in a case-specific situation. If the TCEQ were to utilize an ad hoc/interim de minimis level as part of a PSD permitting action, we would review the administrative and technical record supporting the de minimis level at that time. As we expressed above, we would like to work with the TCEQ if they choose to develop a SIL/de minimis level.

K. Comments that Address Cumulative Air Quality Impacts

Comment: The commenter acknowledges that the Texas SIP incorporates federal requirements for permit applicants to perform a cumulative impacts analysis, the commenter continues though by citing statements made by the TCEQ staff through communications and depositions regarding particular permit processes for proposed coal-fired power plants as reflective of TCEQ stating it does not adhere to the requirements. The commenter indicates that as a result of TCEQ's allegedly stated position it is impossible to determine the extent of cumulative air quality impacts from the proposed facilities.

53 See e-mail from Daniel Menendez, Supervisor of the Air Quality Modeling Group for New Source Review TCEQ, to Erik Snyder, EPA Region 6 dated November 19, 2011, in the docket for this rulemaking.

Response: The commenter acknowledges and EPA confirms the facial sufficiency of the Texas SIP requiring permit applicants to perform a cumulative impacts analysis by incorporating federal requirements. As we note in this response and in our responses to comments that address consultation[54] in this action, the TCEQ has adopted the EPA's Guideline on Air Quality Models. The EPA expects modeling analyses conducted for PSD permits are conducted in accordance with the recommendations, requirements, and principles of the GAQM, including conducting a cumulative analysis of ozone impacts. As discussed in other responses to comments regarding conducting ozone modeling[55] or analysis of ozone impacts,[56] the unique nature of ozone chemistry and the interaction between a proposed or modified source's emissions necessitates consideration of local airshed pollutant loading of ozone precursors and ozone levels to conduct an appropriate technical analysis. Therefore a 'cumulative analysis' approach of inclusion of other surrounding sources and background concentrations is necessary to achieve an ambient impact analysis of a proposed increase in emissions from a proposed or modified source.

As indicated in Section D, the EPA is continuing to evaluate its review of implementation issues that have arisen at this time but believes that it may move forward with finalizing its proposed approval of a facially sufficient SIP in the absence of a final EPA determination regarding the implementation issues.

54 See Section III-J.2 of this rulemaking for our responses to the comments that address consultation.
55 See Section III-J.1 of this rulemaking for our RTCs that address the adequacy of ozone modeling procedures.
56 See Section III-J.3 of this rulemaking for our RTCs that address SILs.

IV. Final Action

We are partially approving and partially disapproving the submittals provided by the State of Texas to demonstrate that the Texas SIP meets the requirements of Section 110(a)(1) and (2) of the Act for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

We are determining that the current Texas SIP meets the infrastructure elements for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Program for enforcement of control measures (110(a)(2)(C) of the Act), except for the portion that addresses GHGs;

Interstate transport, pursuant to section (110(a)(2)(D)(ii) of the Act), except for the portion that addresses GHGs;

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Prevention of significant deterioration (110(a)(2)(J) of the Act), except for the portion that addresses GHGs;

Visibility protection (110(a)(2)(J) of the Act);

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

We are determining that the current Texas SIP does not meet the infrastructure elements for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS listed below:

Program for enforcement of control measures (110(a)(2)(C) of the Act), only as it relates to GHGs;

Interstate transport, pursuant to section 110(a)(2)(D)(ii) of the Act, only as it relates to GHGs; and

Prevention of significant deterioration (110(a)(2)(J) of the Act), only as it relates to GHGs.

We are also approving the Texas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, except as they relate to GHGs for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

We are disapproving the portion of the Texas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II), as it relates to GHGs, that emissions from sources in Texas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. We will act on the remaining three SIP elements regarding interstate transport, per section 110(a)(2)(D)(i) of the Act in separate rulemakings.

We are also approving the following revisions to 30 TAC 101.1 and 30 TAC 116.12,

submitted by the TCEQ on March 8, 2011, as part of the Texas NSR SIP:

1. The substantive revisions to the definition of Maintenance area at 30 TAC 101.1.

2. The substantive revisions to the definition of Nonattainment area at 30 TAC 101.1.

3. The substantive revisions to the definition of Reportable quantity at 30 TAC 101.1.

4. The non-substantive revisions to the definition of Volatile organic compound at 30 TAC 101.1.

5. The non-substantive revision to the title of 30 TAC 116.12 from Nonattainment Review Definitions to Nonattainment *and Prevention of Significant Deterioration* Review Definitions.

6. The non-substantive revisions to the introductory paragraph at 30 TAC 116.12.

7. The substantive revisions that add *Federally Regulated NSR pollutant* to the definitions at 30 TAC 116.12.

8. The non-substantive changes to rename the definition of Major facility/stationary source at 30 TAC 116.12 to *Major stationary source* and the substantive changes making the definition consistent with 40 CFR 51.166(b)(1).

9. The non-substantive changes to the definition of Major modification at 30 TAC 116.12 that provide editorial revisions, and the substantive changes making the definition consistent with 40 CFR 51.165(a)(1) and 40 CFR 51.166(b)(1) and (2), and which address the grounds for the September 15, 2010 disapproval of this definition.

The EPA is taking these actions in accordance with section 110 and part C of the Act and the EPA's regulations and consistent with EPA guidance.

V. Statutory and Executive Order Reviews

Under the CAA, 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, the EPA's role is to act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law**.**

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This final action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This final action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq, because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply acknowledges that a required program is not included in the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-

profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of the September 22, 2011 proposed rule on small entities, small entity was defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the September 22, 2011 (76 FR 58748) proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply acknowledges that a required program is not included in the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector." The EPA has determined that the disapproval action does not

include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action acknowledges that certain pre-existing requirements are not in the SIP and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely acknowledges that a required program is not included in the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65

FR 67249, November 9, 2000), because this action neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, the EPA nonetheless offered consultation to Tribes regarding this rulemaking action. No comments were received from the Tribes concerning this rulemaking action.

G. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new regulations but simply acknowledges that a required program is not included in the SIP.

H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use

voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, the EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely acknowledges that a required program is not included in the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide the 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.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days from date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

M. Statutory Authority

The statutory authority for this action is provided by section 110 of the CAA, as amended

(42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 16, 2011.

Al Armendariz,
Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for part 52 continues to read as follows:

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

Subpart SS — Texas

2. In Section 52.2270:

a. The table in paragraph (c) entitled "EPA Approved Regulations in the Texas SIP" is amended as follows:

i. Revising the entry under "Chapter 101 – General Air Quality Rules" for Section 101.1.

ii. Revising the entry under "Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification" for Section 116.12.

b. Paragraph (e) is amended by adding a new entry for "Infrastructure and Interstate Transport for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS" at the end of the second table in paragraph (e) entitled "EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP."

The amendments read as follows:

§ 52.2270 Identification of plan.

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(c) * * *

EPA Approved Regulations in the Texas SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
* * * * * * *				

Chapter 101—General Air Quality Rules				
Subchapter A—General Rules				
Section 101.1	Definitions	1/23/2006; 2/9/2011 5/26/2011	11/10/2010 75 FR 68989**; [Insert date of FR publication] [Insert FR page number where document begins]**	Except for the definitions listed immediately below, the SIP retains the Section 101.1 Definitions, adopted 1/23/2006 and approved 11/10/2010 (75 FR 68989); the following revised definitions adopted 2/9/2011 and 5/26/2011 are approved: maintenance area; nonattainment area; reportable quantity; and volatile organic compound.
* * * * * * *				
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
* * * * * * *				
Section 116.12	Nonattainment Review Definitions; Nonattainment and Prevention of Significant Deterioration Review Definitions	8/20/2003; 2/9/2011	3/20/2009 74 FR 11851; **[Insert date of FR publication] [Insert FR page number where document begins]**	Except for the definitions listed immediately below, the SIP retains the Section 116.12 Nonattainment Review Definitions, adopted 8/20/2003 and approved 3/20/2009 (74 FR 11851); the following revisions adopted 2/9/2011 are approved: the revised title and the introductory paragraph at 116.12, and the definitions for Federally Regulated NSR pollutant, Major stationary source, and Major modification.
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(e) * * *

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EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
* * * * * * *				
Infrastructure and Interstate Transport for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS	Statewide	12/12/2007, 3/11/2008, 4/4/2008, 11/23/2009	**[Insert date of FR publication] [Insert FR page number where document begins]**	Approval for CAA elements 110(a)(2)(A), (B), (E), (F), (G), (H), (K), (L), and (M). Approval for CAA elements 110(a)(2)(C), (D)(ii) and (J), except for the portions that address Greenhouse Gas (GHG) emissions. Approval for revisions to prohibit interference with PSD in any other state (CAA element 110(a)(2)(D)(i)(II)), except for the portion that addresses GHG emissions.

[FR Doc. 2011-33253 Filed 12/27/2011 at 8:45 am; Publication Date: 12/28/2011]