



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2006-0600; FRL-9776-4]

Approval and Promulgation of Implementation Plans; Texas; Revisions to New Source Review (NSR) State Implementation Plan (SIP); Emergency Orders.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing disapproval of revisions to the SIP for the State of Texas that relate to Emergency Orders. This includes portions of SIP revisions that relate to Emergency Orders that were submitted by Texas on August 31, 1993; December 10, 1998; February 1, 2006; and July 17, 2006. EPA is proposing disapproval of these revisions because these regulations do not meet the requirement of the Clean Air Act (the “Act” or “CAA”), EPA regulations, and applicable policy and guidance. EPA is proposing this action under section 110 and parts C and D of Title I of the Act. EPA is returning the non-air portions of the aforementioned SIP submittals to the State because these provisions cannot be included in the SIP.

DATES: Comments must be received on or before **[Insert date 30 days from the date of publication in the Federal Register]**.

ADDRESSES: Submit your comments identified by Docket ID No. EPA-R06-OAR-2006-0600 by one of the following methods:

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

(2) *E-mail:* Ms. Ashley Mohr at mohr.ashley@epa.gov.

(3) *Fax:* Ms. Ashley Mohr, Air Permits Section (6PD-R), at fax number 214-665-6762.

(4) *Mail:* Ms. Ashley Mohr, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

(5) *Hand or Courier Delivery:* Ms. Ashley Mohr, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2006-0600. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> web site is an

“anonymous access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act 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. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day

of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals, which are part of the EPA docket, are also available for public inspection at the State Air Agency during official business hours by appointment: Texas Commission on Environmental Quality (TCEQ), Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Mohr, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733; telephone (214) 665-7289; fax number (214) 665-6762; e-mail address mohr.ashley@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever any reference to “we,” “us,” or “our” is used, we mean EPA.

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I. Background

On August 31, 1993, TCEQ submitted its regulations for Emergency Orders. Revisions to these regulations were submitted on December 10, 1998; February 1, 2006; and July 17, 2006. The pending SIP revisions are summarized in Tables 1 and 2 below. Additional information is included in the Technical Support Document (TSD) for this action, which is in the docket.

Table 1. Summary of Pending SIP Submittals Addressed in this Action

Description of SIP Submittal	Date Submitted to EPA	Date Adopted by State	Date Effective as State Rule	Sections Related to Emergency Orders
Original Recodification of Chapter 116	8/31/1993	8/16/1993	9/13/1993	<u>Chapter 116</u> : Submittal of sections 116.410 through 116.418
Emergency and Temporary Orders	12/10/1998	11/18/1998	12/10/1998	<u>Chapter 35</u> : Submittal of sections 35.1-35.3, 35.11-35.13, 35.21-35.30, and 35.801-35.809 <u>Chapter 116</u> : Revisions to section 116.410; Repeal of sections 116.411-116.418, which were replaced by sections 35.802-35.809
Federal New Source Review Permits Rules	2/1/2006	1/11/2006	2/1/2006	<u>Chapter 116</u> : Recodification of §116.410 to §116.1200
Revision to Provisions for Emergency Orders	7/17/2006	6/28/2006	7/19/2006	<u>Chapter 35</u> : Revisions to sections 35.801, 35.802, 35.804, 35.805, 35.807, and 35.808

Table 2. Summary of the Individual Revisions to Each Section Evaluated

Section – Title	Date Submitted to EPA	Adopted by State	Effective as State Rule	Comments

30 TAC Chapter 35 – Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permits Conditions				
Subchapter A – Purpose, Applicability, and Definitions				
Section 35.1 – Purpose	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.2 – Applicability	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.3 – Definitions	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter B – Authority of the Executive Director				
Section 35.11 – Purpose and Applicability	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.12 – Authority of the Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.13 – Eligibility of the Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter C – General Provisions				
Section 35.21 – Action by the Commission or Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.22 – Term and Renewal of Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
§35.23 – Effect of Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.24 – Application for Emergency or Temporary Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.25 – Notice and Opportunity for Hearing	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.26 – Contents of Emergency or Temporary Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.27 – Hearing Required	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.28 – Hearing Requests	12/10/1998	11/18/1998	12/10/1998	Initial adoption
§35.29 – Procedures for a Hearing	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.30 – Application Fees	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter K – Air Orders¹				
Section 35.801 – Emergency Orders Because of Catastrophe	12/10/1998	11/18/1998	12/10/1998	Initial adoption
	7/17/2006	6/28/2006	7/19/2006	Revisions to section 35.801

¹ On August 18, 1993, sections 116.411 through 116.418 were adopted under Chapter 116, Subchapter E – Emergency Orders. On November 18, 1998, these regulations were replaced with sections 35.802 through 35.809 and placed in Chapter 35, Subchapter K.

§§35.802 – Application for an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.411
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.802; • Revisions to introductory paragraph; • Revisions to paragraphs (1) – (8); • New paragraph (9); and • Redesignate former paragraph (9) to paragraph (10) with revisions
	7/17/2006	6/28/2006	7/19/2006	Revisions to introductory paragraph (1) and paragraph (5).
Section 35.803 – Public Notification	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.412
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.803; and • Revisions to introductory paragraph
Section 35.804 – Issuance of an Emergency Order	12/10/1998	11/18/1998	12/10/1998	Initial adoption
	7/17/2006	6/28/2006	7/19/2006	Revision to paragraphs (1) and (1)(C)
Section 35.805 – Contents of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.415
	12/10/1998	11/18/1998	12/10/1998	Redesignated to section 35.805; and Revision to introductory paragraph and paragraphs (1) – (4)
	7/17/2006	6/28/2006	7/19/2006	• Reorganization of paragraph (3) to paragraphs (3), (3)(A), and (3)(B); • New paragraph 3)(C); • New paragraph (4); and • Redesignation of existing paragraph (4) to paragraph (5) with revisions
Section 35.806 – Requirement to Apply for a Permit or Modification	8/31/1993	8/16/1993	9/13/1993	Initial adoption as §116.416
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.806; and • Revisions to introductory paragraph

Section 35.807 – Affirmation of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.414
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.807; and • Revisions to the introductory paragraph, paragraphs (1)-(3); • New paragraph (4); • Redesignation of former (4)-(5) to paragraphs (5)-(6) with revisions
	7/17/2006	6/28/2006	7/19/2006	• Revisions to paragraph (1) • Reorganization of paragraph (5) into paragraphs (5), (5)(A), and (5)(B); and • New paragraph (5)(C)
Section 35.808 – Modification of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.417
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.808; and • Revisions to paragraphs (1)-(3)
	7/17/2006	6/28/2006	7/19/2006	Revision to paragraph (1)
Section 35.809 – Setting Aside an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Adopted as §116.418
	12/10/1998	11/18/1998	12/10/1998	• Redesignated to section 35.809; and • Revision to introductory paragraph
30 TAC Chapter 116 – Control of Air Pollution by Permits for New Construction or Modification				
Subchapter K– Emergency Orders				
Section 116.1200 – Applicability	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.410
	12/10/1998	11/18/1998	12/10/1998	Revised introductory paragraph
	2/1/2006	1/11/2006	2/1/2006	Redesignated to section 116.1200

In general, the regulations governing Emergency Orders are found in 30 TAC Chapter 35 – Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. These regulations provide the process by which the Texas Commission on Environmental Quality (TCEQ) may issue a Temporary Order, Emergency Order, Mandatory Order, Permissive Order, and Prohibitory Order and include provisions that apply to both air orders and non-air orders. As part of this action, we are reviewing only those portions that are

applicable to the issuance of air Emergency Orders. Under the CAA, SIPs can only include provisions addressing criteria pollutants and their precursors, so the portions of the Texas submittals related to non-air orders cannot be included in the SIP. Therefore, EPA is returning the non-air portions of the aforementioned submittals to the State.

Under the provisions in 30 TAC Chapter 35, the TCEQ may issue an Emergency Order under its air quality program which authorizes immediate action for the addition, replacement, or repair of facilities, control equipment, or the repair or replacement of roads, bridges, and other infrastructure whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act. See 30 TAC 35.801. Additional information on these regulations, and the specific provisions included in the regulations, is provided in TSD for this action.

Today, EPA proposes to disapprove the regulations identified in Table 2 above, except for provisions that do not relate to the air quality requirements of the Act. EPA is returning the following non-air portions of the submitted rules to the State: 30 TAC 35.13; 35.24(b) and (e)(6)-(7); and 35.25(e)(1)-(8) and (11)-(15). While we are proposing disapproval of the Emergency Orders Program, EPA does recognize the merits of such a state-only Program that allows for application review and order issuance to authorize proposed actions following catastrophes that often necessitate immediate action by owners and operators to minimize additional downstream impacts resulting from the catastrophe. Texas's Emergency Orders Program does allow for coordination between the source and the TCEQ to facilitate expedited review while maintaining a review process, as described in the June 17, 2006 SIP submittal. Other State and local agencies operate programs similar to the Emergency Orders program. In these cases, the regulations containing the provisions related to those programs are located within

the states' air quality permitting regulations, not in the SIP. EPA may exercise its enforcement discretion on a case-by-case basis to evaluate the owner or operator's proposed action in response to a catastrophe and utilizes enforcement discretion to allow for appropriate immediate actions to minimize impacts and restore the sources to full operation.

II. What is EPA's Evaluation of the Texas Emergency Orders Program?

A. Does the Emergency Orders Program meet the requirements for projects that are subject to New Source Review (NSR)?

The Emergency Orders Program could be used to authorize construction via the issuance of an Order prior to a source submitting an application for a NSR preconstruction permit. The issued Emergency Order is an interim authorization for the emissions of air contaminants that are associated with the construction or modification of any source or facility in response to a catastrophe, as defined in 30 TAC 35.801. Under the Emergency Orders Program, an owner or operator can apply for an Emergency Order that would "authorize immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants." See 30 TAC 35.801.

1. Summary of the Federal Program for Major NSR

The requirements for Major NSR are in Title I, Parts C and D of the CAA and in 40 CFR 51.165 and 51.166 and apply to the construction and modification of major stationary sources. The Major NSR requirements apply to projects that would be new major stationary sources and

projects that would be major modifications under the requirements for Prevention of Significant Deterioration (PSD) under 40 CFR 51.166 and the requirements for Nonattainment Area New Source Review (NNSR) under 40 CFR 51.165.

The requirements for Major NSR apply to the construction or modification of stationary sources which emit, or have the potential to emit a regulated NSR pollutant at greater than 100 tons per year for most stationary sources. See CAA §302(j).² Major NSR is required under two programs as described below:

Prevention of Significant Deterioration (PSD). The requirements for PSD are under the CAA Title I, Part C and under 40 CFR 51.166. PSD applies to the construction and modification of major stationary sources for the emissions of any pollutant for which the region (or portion thereof) is designated attainment or unclassifiable. See CAA at §161 and 40 CFR 51.166(a)(7)(i). Requirements of the PSD Permitting Program include the following:

- The PSD permit must be issued prior to commencement of construction and set forth emission limitations which conform to the CAA. CAA §165(a)(1) and 40 CFR 51.166(a)(7).
- The proposed permit has been subject to review in accordance with CAA requirements and the regulations promulgated under CAA, and the permit has been subject to public hearing and opportunity for interested persons to submit comments. CAA §165(a)(2) and 40 CFR 51.166(a)(7) & (q).

² In certain nonattainment areas, the CAA specifies lower thresholds based upon the degree of nonattainment. See CAA at §§182(c), (d), and (d); 187(c)(1); and 189(b)(3). See 40 CFR 51.165(a)(1)(iv). Also, in a PSD area, under the CAA §169(1), a major stationary source is either 100 tons per year or more if the source belongs to a category identified in the definition, otherwise it is major if it emits or has the potential to emit 250 tons per year or more. See 40 CFR 51.166(b)(1).

- The emissions from the construction or operation of the source will not cause, or contribute to, air pollution in excess of the following: (1) Maximum allowable increase or maximum allowable concentration for any pollutant in any area in which PSD applies; (2) National Ambient Air Quality Standard; and (3) Any other applicable emission standard or standard of performance under the Act. CAA §165(a)(3) and 40 CFR 51.166(c).
- The source is subject to best available control technology and the permitted emissions represent that technology. CAA §165(a)(4) and 51.166(j).
- The requirements for protection of Class I areas have been met by the source. CAA §165(a)(5) and 40 CFR 51.166(p).
- There has been an analysis of the air quality impacts projected to occur as the result of growth associated with the source. CAA §165(a)(6) and 40 CFR 51.166(o).
- Monitoring has been conducted, as necessary, to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source. CAA §165(a)(7) and 40 CFR 51.166(m).
- Specific requirements applicable to source proposed to be located in Class III areas have been met by the source. CAA §165(a)(8).

Nonattainment New Source Review (NNSR). The requirements for NNSR are under the CAA Title I, Part D and under 40 CFR 51.165. NNSR applies to the construction and modification of major stationary sources for the emissions of any pollutant for which the region (or portion thereof) is designated nonattainment. See CAA at §172(c)(5) and 40 CFR 51.165(a)(2)(i). Requirements of the NNSR Program include the following:

- Emission increases must be offset by reductions that are greater than the increase. CAA §173(a)(1).
- The proposed source is required to comply with lowest achievable emission rate. CAA §173(a)(2).
- The owner or operator must demonstrate that all major stationary sources owned by such person (or entity) are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the Act. CAA §173(a)(3).
- EPA has not determined that the State is not adequately implementing the SIP for the nonattainment area in which the proposed source is to be constructed or modified. CAA §173(a)(4).
- An analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. CAA §173(a)(5).

The PSD and NNSR Programs each require a new major stationary source or major modification to obtain a preconstruction permit prior to commencing construction. For PSD see CAA at §165(a)(1) and 40 CFR 51.166(a)(7)(iii). For NNSR see CAA §172(c)(5) and 40 CFR 51.165(a)(2)(i)-(iii). Accordingly, a new or modified major stationary source or major modification may not be constructed without a permit that meets the requirements of the applicable Major NSR Program.

2. What is EPA's Evaluation?

As discussed in detail in the TSD for this action, in the July 17, 2006 SIP submittal TCEQ characterizes its Emergency Orders Program as a program which “contemplate(s) and call(s) for a comprehensive technical review.” However, notwithstanding the fact that TCEQ states that the “comprehensive review” for an Emergency Order is at least as comprehensive as the TCEQ’s review of permit applications, the Emergency Orders Program does not meet all the requirements applicable to NSR. Specifically, the issuance of Emergency Orders to projects that are subject to Major NSR fail to meet the requirements of the Clean Air Act and the implementing regulations as follows:

- *The Emergency Orders Program does not satisfy the public participation required for NSR at the time the Emergency Order is issued.* Public participation requirements that are applicable to projects that are subject to Major NSR are not met prior to the issuance of the Emergency Order, which would authorize the construction of such projects. Instead, the applicable public participation for Major NSR projects will take place after the issuance of the Emergency Order when the applicant submits their application for a Major NSR permit. The source has 60 days following the issuance of the Emergency Order to submit the permit application. See 30 TAC 35.806. Meanwhile, the applicant is authorized by the Emergency Order to begin construction of the Major NSR project prior to permit application submission and permit issuance.

Consequently, the public is not afforded an opportunity to review and comment on the proposed project (as required under the CAA and implementing regulations) until after construction has begun; thus the public has not been provided meaningful opportunity to participate prior to commencement of construction of the Major NSR project. See 40 CFR 51.161 and 51.166(q). It is important to note, that while we are evaluating the Emergency Orders Program against the

Major NSR requirements, the Minor NSR Program also requires public participation as part of the construction permitting process.³

- *The Emergency Orders Program does not meet the requirement that a NSR permit be issued prior to the commencement of construction of a Major Source.* The CAA contemplates a Major NSR permit that is issued as a final authorization that certifies that the Major NSR permit meets all the requirements of PSD and NNSR. See CAA at section 165(a) and 173(a) and 40 CFR 51.165(a)(2)(i) through (ii), and 51.166(a)(7)(i) through (v). In contrast, the Emergency Order is an interim authorization for immediate action, including construction, following a catastrophe and is not a final issued Major NSR permit. Notwithstanding the fact that the TCEQ conducts a review of Emergency Order applications, which TCEQ characterized as being equivalent to the technical review of a permit, as discussed above, the technical review does not include all required preconstruction review elements and the issued order is an interim authorization and not a final issued Major NSR permit. The Emergency Orders Program does require that a source submit an application for any necessary air permits, including Major NSR permits, within 60 days following the issuance of an Emergency Order. See 30 TAC 35.806. These permits are required to be applied for and issued in accordance with the applicable New Source Review requirements. However, the New Source Review permitting would occur following the commencement of construction at the source. Therefore, the Emergency Orders Program does not meet the CAA requirement that the Major NSR permit be issued prior to a source

³ The Minor NSR requirements for public participation are found at 40 CFR 51.161, and require prior to construction or modification the availability for public inspection of information regarding the construction (including the State's analysis of the effect on air quality), a 30-day period for submittal of public comment, and a notice by prominent advertisement in the area affected. EPA recognizes a state's ability to tailor the scope of its Minor NSR program as necessary to achieve and maintain the NAAQS. See 77 FR 74140.

commencing construction. For PSD see CAA at §165(a)(1) and 40 CFR 51.166(a)(7)(iii). For NNSR see CAA §172(c)(5) and 40 CFR 51.165(a)(2)(i)-(iii).

Based on our review of the Emergency Orders Program, which includes authorizations of NSR actions, and comparison with the applicable requirements for Major NSR, we are proposing to disapprove the Program on the basis that it does not meet all applicable requirements. While we are proposing disapproval of the Emergency Orders Program, EPA would like to recognize the merits of having a state-only Program that allows for application review and order issuance to authorize proposed actions following catastrophes that often necessitate immediate action by owners and operators to minimize additional downstream impacts resulting from the catastrophe. Texas's Emergency Orders Program does allow for coordination between the source and the TCEQ to facilitate expedited review while maintaining a review process, as described in the June 17, 2006 SIP submittal.

Other State and local agencies operate programs similar to the Emergency Orders Program to allow for the authorization of owners and operators to take immediate actions, including construction, following catastrophes that include natural disasters, such as hurricanes, floods, and earthquakes, and plant fires or explosions. In these cases, the regulations containing the provisions related to the program operated by the State or local agency are located within the states' air quality permitting regulations, not in the SIP, and EPA may exercise enforcement discretion on a case-by-case basis to evaluate the owner or operators' proposed actions in response to catastrophe. For example, in 2005, the EPA Region 6 office utilized enforcement discretion to allow facilities impacted by Hurricane Rita to take appropriate immediate actions to bring the sources back up to full operation and minimize additional impacts resulting from the catastrophe. In this case, EPA issued Administrative Compliance Orders after conducting case-

by-case review of the proposed actions at a particular facility.^{4,5} More recently, EPA has exercised enforcement discretion in response to the impacts caused by Hurricane Sandy in both Regions 1 and 2. Following this natural disaster, EPA issued a No Action Assurance to allow loading and unloading of fuel at bulk gasoline and marine loading terminals and associated truck loading racks in New York and New Jersey without the required vapor recovery/combustion if the facility was not equipped with this control equipment or the equipment had been damaged by Sandy.⁶ EPA exercised its enforcement discretion by issuing a No Action Assurance to address severe fuel shortages resulting from Hurricane Sandy's impacts. In each of the examples here, and in fact in any disaster situation, EPA has acted very quickly to gather facts and take appropriate action, so that critical systems are not impeded from operating as a result of the catastrophe.

While we are proposing disapproval of the Emergency Orders Program on the basis that the Program does not meet the necessary federal requirements for approval into the Texas SIP, this proposed action will not impact how the TCEQ has been operating the Program in response to catastrophes since the Program's original adoption into the State's regulations in August 1993. EPA will continue to exercise enforcement discretion on a case-by-case basis for actions proposed by sources in Texas in response to catastrophes, while the TCEQ continues to rely upon the technical review process provided by the Emergency Orders Program to ensure that the proposed actions are consistent with the applicable State requirements and will not interfere with

⁴ Administrative Compliance Order dated September 28, 2005 issued by the EPA Region 6 Compliance Assurance and Enforcement Division to Georgia Pacific for the Port Hudson facility.

⁵ Administrative Compliance Order dated November 17, 2005 issued by the EPA Region 6 Compliance Assurance and Enforcement Division to the Municipality of Chambers County.

⁶ No Action Assurance dated November 2, 2012 issued by the EPA Assistant Administrator to the states of New York and New Jersey. Available at: <http://www.epa.gov/enforcement/air/documents/policies/mobile/naa-vaporrecovery.pdf>

the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy.

III. Proposed Action

Under section 110(k)(3) of the Act, and for the reasons stated above, EPA proposes to disapprove the following revisions to the Texas SIP.

- New 30 TAC 35.1 – Purpose – submitted December 10, 1998.
- New 30 TAC 35.2 – Applicability – submitted December 10, 1998.
- New 30 TAC 35.3 – Definitions – submitted December 10, 1998.
- New 30 TAC 35.11 – Purpose and Applicability – submitted December 10, 1998.
- New 30 TAC 35.12 – Authority of the Executive Director – submitted December 10, 1998.
- New 30 TAC 35.21 – Action by the Commission or Executive Director – submitted December 10, 1998.
- New 30 TAC 35.22 – Term and Renewal of Orders – submitted December 10, 1998.
- New 30 TAC 35.23 – Effect of Orders – submitted December 10, 1998.

- New 30 TAC 35.24 – Application for Emergency or Temporary Orders – submitted December 10, 1998. No action is proposed on subsection (b) and paragraphs (e)(6)-(7) which are outside the scope of the SIP.
- New 30 TAC 35.25 – Notice and Opportunity for Hearing – submitted December 10, 1998. No action is proposed on paragraphs (e)(1)-(8) and (11)-(15) which are outside the scope of the SIP.
- New 30 TAC 35.26 – Contents of Emergency or Temporary Order – submitted December 10, 1998.
- New 30 TAC 35.27 – Hearing Required – submitted December 10, 1998.
- New 30 TAC 35.28 – Hearing Requests – submitted December 10, 1998.
- New 30 TAC 35.29 – Procedures for a Hearing – submitted December 10, 1998.
- New 30 TAC 35.30 – Application Fees – submitted December 10, 1998.
- New 30 TAC 35.801 – Emergency Orders Because of a Catastrophe – submitted December 10, 1998; revision submitted July 17, 2006.
- New 30 TAC 35.802 – Applications for an Emergency Order – submitted August 31, 1993 (as 30 TAC 116.411); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.802); revision submitted July 17, 2006.
- New 30 TAC 35.803 – Public Notification – submitted August 31, 1993 (as 30 TAC 116.412); and revision submitted December 10, 1998 (as redesignated to 30 TAC 35.803).

- New 30 TAC 35.804 – Issuance of an Emergency Order – submitted December 10, 1998; revision submitted July 17, 2006.
- New 30 TAC 35.805 – Contents of an Emergency Order – submitted August 31, 1993 (as 30 TAC 116.415); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.805); revision submitted July 17, 2006.
- New 30 TAC 35.806 – Requirement to Apply for a Permit or Modification – submitted August 31, 1993 (as 30 TAC 116.416); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.806).
- New 30 TAC 35.807 – Affirmation of an Emergency Order – submitted August 31, 1993 (as 30 TAC 116.414); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.807); revision submitted July 17, 2006.
- New 30 TAC 35.808 – Modification of an Emergency Order – submitted August 31, 1993 (as 30 TAC 116.417); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.808); revision submitted July 17, 2006.
- New 30 TAC 35.809 – Setting Aside an Emergency Order – submitted August 31, 1993 (as 30 TAC 116.418); revision submitted December 10, 1998 (as redesignated to 30 TAC 35.809).
- New 30 TAC 116.1200 – Applicability – submitted August 31, 1993 (as 30 TAC 116.411); revisions submitted December 10, 1998; revision submitted February 1, 2006 (as redesignated to 30 TAC 116.1200)

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This 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 the Executive Order.

B. Paperwork Reduction Act

This 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 proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into 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 today's rule on small entities, small entity is 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 today's 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 Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into 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 Clean Air Act 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. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

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.” EPA has determined that the proposed 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 proposes to disapprove pre-existing requirements under State or local law, 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 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 disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. 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 (59 FR 22951, November 9, 2000), because the SIP EPA is proposing to disapprove would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

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 proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

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

This proposed rule 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 No. 104-113, section 12(d) (15 U.S.C. 272 note) directs 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 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 Clean Air Act.

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

Executive Order 12898 (59 FR 7629 (Feb. 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.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D

of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

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

Dated: January 28, 2013.

Ron Curry,
Regional Administrator, Region 6.