UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

June 6, 2023

Ms. Gwen Ricco
Office of Legal Services
Texas Commission on Environmental Quality (MC 205)
Post Office Box 13087
Austin, Texas 78711-3087

RE: Quadrennial Review Comments, Non Rule Project Number 2023-055-116-AI

Dear Ms. Ricco:

The United States Environmental Protection Agency (EPA) has prepared comments for consideration regarding the 30 Texas Administrative Code (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, open for public review as part of the Quadrennial review process under the Texas Government Code §2001.039. Please see EPA comments provided in the enclosure of this letter.

If you have any questions, please contact our Air Permits Section Manager, Cynthia Kaleri at (214) 665-6772, or Aimee Wilson at (214) 665-7596.

Sincerely,

JEFFERY ROBINSON
Digitally signed by JEFFERY ROBINSON
Date: 2023.06.06 16:02:54 -05'00'

Jeff Robinson
Branch Manager
Grants, Monitoring and Air Permits Branch

Enclosure

# ENCLOSURE

30 Texas Administrative Code Chapter 116
Quadrennial Review - EPA Comments

**What did EPA approve?**

EPA has approved the Texas Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR), and minor NSR programs as part of its State Implementation Plan (SIP). See 40 C.F.R. § 52.2270(c) (identifying EPA-approved regulations in the Texas SIP). The major and minor NSR provisions, as incorporated into the EPA-approved Texas SIP, are contained primarily in 30 TAC Chapters 106 and 116.

**De Minimis Facilities or Sources – 30 TAC § 116.119**

TCEQ should evaluate if 30 TAC 116.119 should be revised and whether to include thresholds or emissions levels below which an emission unit would not need to have an NSR permit nor be included in a title V permit. An approved title V operating permits program may include a list of insignificant activities and emissions levels which do not need to be included in the application for a title V permit under 40 CFR 70.5(c). TCEQ has established 30 TAC § 116.119 De Minimis Facilities or Sources and appears to rely on it as the basis for determining insignificant emission units that may be *excluded* from the title V permits it issues. However, this rule has not been approved into the federal Texas State Implementation Plan or the Part 70 program. TCEQ's rule does not include information on the permits by rule which the TCEQ considers to be for insignificant emission units.

**New Major Source or Major Modification in Ozone Nonattainment Areas and New Major Source or Major Modification in Nonattainment Area Other than Ozone - 30 TAC §§ 116.150 and 116.151**

We recommend that TCEQ revise 30 TAC 116.151 to be consistent with 116.150 so it is clear that nonattainment permit requirements are linked to the area's designation status for any air pollutant and apply at time of permit issuance. EPA approved the TCEQ rules for nonattainment NSR at 30 TAC §§ 116.150 and 116.151 on October 25, 2012. See 77 FR 65119.[1] EPA interprets its Major NSR SIP rules to require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the designation of the area in which the source is located on the date of issuance of the Major NSR permit. EPA also interprets the Clean Air Act (CAA or Act) and its rules to require that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be an NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable on the date of issuance of a Major NSR permit, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit. See sections 160, 165, 172(c)(5) and 173 of the Act; and 40 CFR §§ 51.165(a)(2)(i) and 51.166(a)(7)(i).[2] Further, if the nonattainment status of the area where the source is located changes between when the source applied, and when the permit is to be issued, then TCEQ must evaluate the application under the new attainment designation prior to permit issuance. TCEQ rules at 30 TAC § 116.150(a) state:

> "This section applies to all new source review authorizations for new construction or modification of facilities or emissions units that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 et seq. as of the date of issuance of the permit, unless the following apply on the date of issuance of the permit: . . ."

[1] *See,* https://www.govinfo.gov/content/pkg/FR-2012-10-25/pdf/2012-26094.pdf

[2] EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991 and titled ``New Source Review (NSR) Program Transitional Guidance," by John S. Seitz, Director, Office of Air Quality Planning and Standard (1991 Transitional Guidance). https://www.epa.gov/sites/default/files/2015-07/documents/trnsguid.pdf

TCEQ should revise § 116.151 to also include that the section applies in any area designated as nonattainment for any contaminant other than ozone as of the date of issuance of the permit and also consider if the additional requirements identified under § 116.150 would also be beneficial under § 116.151.

EPA also emphasizes that the de minimis threshold test (netting) specified at §§116.150(c) – (d) and 116.151(b) - (c) apply to any source that meets the definition of major source based on sitewide emissions and not just to those sources that hold a major source permit (PSD, Nonattainment NSR, or PAL).

**Changes to Facilities - 30 TAC § 116.116**

We recommend TCEQ review the scope and implementation of its rules at 30 TAC §116.116 to ensure changes through the use of a PBR are within the scope of the approved rule. 30 TAC § 116.116(d) allows previously permitted sources to use a PBR in lieu of a permit amendment or alteration to authorize changes to the source, so long as the PBRs are incorporated in the existing NSR permit the next time it is renewed or amended.

EPA has concerns that PBRs are not being appropriately incorporated into NSR permits as required by 30 TAC § 116.116(d)(2). TCEQ's 2005 interoffice memo titled "Permit by Rule and Standard Permit Incorporation Into Permits" states that it is *mandatory* for PBR's that directly modify or increase the emissions of a permitted facility to be "*rolled into*" the permit during any amendment or renewal. TCEQ uses the language "rolled into" in this context to describe TCEQ's current practice of "consolidation by incorporation" whereby PBR authorizations are voided and effectively reauthorized by the case-by-case NSR permit. Specially, the 2005 memo states that "PBR/SPs which are rolled into permits following §§116.116 and 116.615 will be voided and the facilities will become authorized by the permit, including limitations in permit conditions and maximum allowable emission rate table (MAERT), as appropriate."

Conversely, the current TCEQ interoffice memo issued on September 26, 2006, titled "REVISED Permit by Rule and Standard Permit Consolidation Into Permits" makes this previously mandatory "roll in" or "consolidation by incorporation" of PBR authorizations voluntary and instead allows for the use of "consolidation by reference" whereby the PBR remains active and is not reauthorized within the associated case-by-case NSR permit.

We recommend TCEQ review the scope and implementation of the 30 TAC § 116.116 rules, and their internal guidance, to ensure that when PBRs are used in lieu of a permit amendment, that the PBR is properly incorporated (consolidated by incorporation) into the controlling NSR permit and voided when the PBR directly modifies or increases the emissions of a previously permitted facility. The proper consolidation of PBRs into NSR permits is critical to clarify the controlling limits for units authorized or partially authorized by a PBR (thereby making the limits enforceable), to prevent circumvention of major NSR requirements that may be triggered by nonattainment NSR netting thresholds or by cumulative increases authorized by multiple PBRs, and to ensure that cumulative increases authorized by multiple PBRs do not significantly diminish air quality.

**General Definition for Best Available Control Technology (BACT) - 30 TAC § 116.10 and General Application Definition for BACT - 30 TAC § 116.111**

The Texas SIP at 30 TAC § 116.111(a)(2)(C) requires that BACT must be evaluated and applied to all facilities subject to the Texas Clean Air Act. Section 116.111(a)(2)(C) further clarifies that applications subject to PSD requirements under Title I Part C of the CAA must comply with the provisions of BACT

as defined in the Texas SIP at 30 TAC § 116.160(c)(1)(A).[3] State BACT (as defined at 30 TAC § 116.10(1)) applies to all permitting actions in Texas, but cannot trump the requirement to evaluate and apply as appropriate the SIP approved PSD BACT requirements at 30 TAC § 116.160(c)(1)(A).

EPA encourages TCEQ to consider if their rules and/or guidance should be revised to ensure that the appropriate definition of BACT is implemented for major sources and that the definition of BACT utilized to inform PSD BACT determinations is no less stringent than the Federal definition of BACT.

**Plant-Wide Applicability Limit Permits - Chapter 116, Subchapter C**

We recommend TCEQ review the scope and implementation of the Plantwide Applicability Limit (PAL) permit rules at Chapter 116 Subchapter C to ensure that the PAL limits are properly adjusted at renewal. In accordance with 40 CFR § 52.21(aa)(10)(i), when renewing a PAL permit, the proposed PAL level should be accompanied by a written rationale that is subject to public review and comment. The rationale should be provided by the permitting authority. TCEQ should include their rationale for setting the PAL at a reduced level or for keeping the PAL at the existing level. TCEQ has the authority under 40 CFR § 52.21(aa)(10)(iv)(b) to set the PAL at a level that they determine to be more representative of the source's baseline actual emissions. The permitting authority may also propose a renewed PAL level that it determines to be more appropriate considering air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the source's voluntary emissions reductions, or other factors as specifically identified in the written rationale. The permitting authority may, for example, determine that the renewed PAL level should be higher than baseline actual emission plus the significant level to avoid penalizing a source for making voluntary emissions reductions and/or to provide a reasonable operating margin. The permitting authority also has discretion under the PAL renewal provisions to consider measures necessary to prevent a violation of a NAAQS or PSD increment, and to prevent an adverse impact on an air quality related value in a Federal Class I area.[4]

TCEQ frequently renews PALs at the existing PAL even when the emissions calculated in accordance with 40 CFR § 52.21(aa)(6) are well below 80 percent of the current PAL (in some cases the actual emissions are closer to 50 percent of the existing PAL). In cases where baseline actual emissions plus the significant level are less than 80 percent of the PAL, EPA expects that PALs will at minimum be renewed at a level equal to baseline actual emissions plus a reasonable operating margin (generally equal to, but not limited to, the significant level) and could be renewed at a higher level, up to the level of the existing PAL, if the applicant provides a supporting justification to the satisfaction of the reviewing authority. Permitting authorities can also provide increased certainty by including conditions in PAL permits that specify additional criteria for renewal of the PAL at the same level or at another level.

[3] For sources subject to PSD, TCEQ's EPA-approved regulations incorporate by reference the federal definition of BACT. *See* 30 TAC § 116.160(c)(1)(A) ("In addition to those definitions in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA) in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference: (A) 40 CFR §52.21(b)(12) - (15), concerning best available control technology, baseline concentrations, dates, and areas; . . .")

[4] Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations https://www.epa.gov/sites/default/files/2020-08/documents/pal_2020.pdf

30 TAC § 116.196(e) states,

> "The proposed PAL level and a written rationale for the proposed PAL level are subject to the public notice requirements in § 116.194 of this title (relating to Public Notice and Comment). During such public review, any person may propose a PAL level for the source for consideration by the executive director."

This language mirrors that of 40 CFR § 52.21(aa)(10)(i). This required public review process provides the opportunity for the source (and the public) to comment on the proposed PAL level and, at its discretion, to propose a different PAL level with supporting rationale for consideration by the permitting authority.[5] The permitting authority must address all such material comments before taking action on the final renewal permit.

The PAL allows a source to add emission units without going through major NSR when the project "can be accommodated" by the PAL. If the PAL is set appropriately, with only the significance level for a buffer, then it becomes less problematic that multiple projects can be constructed at a site without undergoing major NSR review. When multiple projects can be authorized under the PAL, it prevents the public from being able to fully participate in the permitting process. This becomes more concerning in areas of nonattainment for Ozone. Many of the Ozone nonattainment counties were reclassified from moderate to serious nonattainment effective September 23, 2019, and again on November 7, 2022, from serious to severe nonattainment. To ensure public health and future attainment with the NAAQS, we strongly encourage TCEQ to work with companies when appropriate to make adjustments to PAL permit limits for NOx and VOC when the company's actual baseline emissions for the 10-year period are less than 80% of the current PAL for the specific pollutants covered by the PAL. We recommend TCEQ review the scope and implementation of the Plantwide Applicability Limit (PAL) permits rules at Chapter 116 Subchapter C to ensure that the PAL limits are adjusted at renewal.

**Retrospective PSD Review under Chapter 116**

TCEQ should evaluate the use of "retrospective review" when implementing Chapter 116 (and the intent of the NSR program) and whether the practice of retrospective review could result in the authorization of a project that may cause or contribute to a violation of the NAAQS. EPA understands that TCEQ bases its PSD retrospective review procedures on its own July 5, 2000, interoffice memorandum titled "Retrospective Federal Permit Analysis and Reviews."[6] TCEQ sometimes refers to the actions involving these reviews as a "correction amendment" or "as-built amendment" and has used this memo to define the process by which TCEQ staff are to review, for example, project emission increases that were inadvertently omitted from a previous permit authorization. Emissions identified in these permit reviews are sometimes referred to as "newly discovered, newly evaluated, or newly quantified" which are then attributed/combined with a past project emissions increase to determine if PSD or nonattainment review would have been required at the time of issuance, had the emissions not been inadvertently omitted previously (i.e., conducting a retrospective Federal New Source Review applicability analysis). The referenced memo states, in part, that "[t]he procedures that we use to determine if federal review is required for these sources are the same ones we use for proposed major sources/modifications (see EPA's 1990 NSR Workshop Manual and the TNRCC's PSD Guidance Document). The only difference is that when reviewing past activities, we use the rules that were in effect at the time the source was constructed / modified in determining federal applicability, that is, we are performing a retrospective review." The

[5] EPA sent a proposal for alternate PAL limits for a permit and TCEQ responded without providing a reasoned explanation why the proposed PAL limits were not considered when renewing the PAL permit.

[6] *See,* https://www.tceq.texas.gov/assets/public/permitting/air/memos/retrorevmemo.pdf

memo similarly states that "[The] process we use to determine federal applicability is the same as for proposed sources, but past major thresholds and significance levels are used."

The retrospective memo suggests that the previously unknown emissions and/or emission sources are "new" in the sense that they were not initially permitted correctly and need to be permitted to ensure compliance with 30 TAC § 116.110; which requires permit applicants to demonstrate that the facility is excluded from or meets the requirements of federal PSD and nonattainment rules. While the memo outlines the various steps of a retrospective review, the memo does not explicitly acknowledge the possibility that retrospective permitting may create a scenario where project emissions increases are occurring in an area that has been reclassified to a more stringent nonattainment status since the original permit authorization.[7] For example, EPA is aware of a TCEQ-issued project that underwent retrospective review on a previously permitted unit for emissions increases that were newly identified many years after the initial authorization. At the time the unit was originally permitted, the area was designated moderate nonattainment for the 8-hour ozone standard (100 TPY major source threshold). When conducting the retrospective FNSR analysis over 10 years later, as the memo directs, TCEQ staff compared the project emissions increases to the less stringent major source threshold that was in place at the time the unit was originally authorized and constructed; even though the area had since been reclassified to serious nonattainment, resulting in a more stringent major source threshold (50 TPY). As a result, a project that would have potentially been subject to NNSR if compared to the major source threshold at time of retrospective review, was not required to undergo NNSR due to TCEQ only considering the previous (less stringent) major source threshold in effect at the time of original unit authorization. *See* e.g., Permit No. 158860, Project 308199 Technical Review Document, WCC Content ID Number 4847644 (June, 22, 2020).

In scenarios such as the one described above, EPA is concerned that the practice of looking back in time and not reconsidering the attainment status that is effective at the time of retrospective review, could lead to a situation where a source could conceivably be permitted in such a way that it would cause or contribute to a violation of the NAAQS - the same standards the pre-construction NSR program is designed to protect. To ensure protection of the NAAQS, in retrospective review scenarios where the major source and SER thresholds have become more stringent, it would be logical to judge emission increases that were not accounted for prior to construction (e.g., newly discovered) against the major source thresholds and SERs applicable at the time those emissions are being permitted. According to the memo, this is not required as it allows for a distinction between "new" emissions and "newly discovered" emissions. TCEQ should evaluate the use of retrospective review when implementing Chapter 116 (and the intent of the NSR program) and whether the practice of retrospective review could result in the authorization of a project that may cause or contribute to a violation of the NAAQS.

**PSD Construction Deadline Extensions - 30 TAC § 116.120**

TCEQ should review the scope and implementation of the Chapter 116.120 rules concerning permit expiration and specifically how these rules apply to PSD permit construction deadline extensions. Under Texas's SIP-approved language at 30 TAC § 116.120(b), permit holders can be granted up to three 18-month extensions on the deadline to commence construction. The first 18-month extension may be granted solely at the request of the permit holder. The second request may be granted if the permit holder demonstrates that the facility will comply with all rules and regulations of the TCAA and the permit may be subject to revision based on best available control technology, lowest achievable emission rate, and netting or offsets as applicable. Additionally, for this second extension approval, the permit holder must also be either 1) a party to litigation not of the permit holder's initiation *See* 30 TAC § 116.120(b)(1), or

[7] EPA acknowledges the opposite could also be true, such that a source can be subject to more stringent requirements if the source was reclassified to a less stringent attainment designation.

2) the permit holder has spent or committed to spend at least 10% of the estimated total cost of the project up to a maximum of $5 million. *See* 30 TAC § 116.120(b)(2).

At the time of SIP approval, EPA's interpretation was that this rule provided that a permit or permit amendment under 30 TAC Chapter 116 is "*automatically void"* if the permit holder does one of the following: (1) Fails to begin construction within 18 months of the date of issuance; (2) discontinues construction for more than 18 consecutive months prior to completion of the project; or (3) fails to complete the project within a reasonable time (emphasis added).[8]

EPA has seen scenarios where TCEQ has received requests for the extension of the deadline to commence construction after either the original 18-month deadline has passed and even after a 1st extension deadline has passed (36 months). In addition, on at least one occasion, TCEQ has denied late extension requests as untimely due to receipt after the deadline to construct had passed; only to later rescind this determination due to § 116.120(b)'s silence on when an extension request must be submitted. *See* e.g., Permit No. 116072, Project 305639 Agency Review Document, WCC Content ID Number 4327772 (October 10, 2019) at 3-5.

30 TAC § 116.120(a), and TCEQ's previous implementation of these rules, imply that the permit is voided if no extension is requested or approved before the expiration date. TCEQ should review the scope and implementation of 116.120 to clarify the timing for requesting construction extensions, ensure that appropriate review of health impacts and review of the permits BACT/LAER/netting or offsets (as applicable) are reviewed prior to approving a second extension, and to limit the use of executive director discretion on construction deadline extension requests to ensure the rules are applied equitably across all projects.

**Environmental Justice:**

EPA is taking this opportunity to encourage that the TCEQ have consideration of environmental justice principles in all permitting actions. At a minimum, ensuring that environmental justice considerations are made in permitting decisions will provide a robust permitting program that helps to ensure active engagement with communities located near a facility. TCEQ should evaluate their rules and take into consideration what authorities they already have to consider environmental justice concerns in their permitting actions. TCEQ's rules provide discretion to consider other permitted facilities in the area of any new or amended permits, including whether these facilities are major or minor sources of pollution and contribute to community risk. TCEQ has the authority to require additional controls, void permits when needed (construction not commenced by the deadline), and require that permitting actions that are controversial or in EJ communities are required to go through a process that allows for full public participation even when the action may qualify for a process that does not require any public participation. TCEQ can take actions, such as reducing PAL limits at renewal to be at a minimum level above the sources actual emissions in areas that may be considered an environmental justice community based on an environmental justice screening.

Tools to address EJ concerns have been and continue to be developed by EPA to assist states and stakeholders in evaluating environmental justice. We encourage TCEQ to screen permitting actions for EJ concerns and to consider potential compliance issues related to civil rights of the communities potentially impacted early in the permitting process by utilizing EJScreen and knowledge of the impacted area. A sound screening practice will also provide important information as to whether there are residents of the affected community who could be disproportionately subjected to adverse health, environmental and/or quality of life impacts on the basis of income, national origin (including LEP status), or other

[8] *See,* https://www.govinfo.gov/content/pkg/FR-2010-04-02/pdf/2010-7214.pdf at 16673.

demographic factors. TCEQ should take into consideration other permitted facilities in the area, including whether these facilities are major or minor sources of pollution and contribute to community risk. An area with an above average number of sources, especially if those sources are large or in close proximity to residents, is a sign of concern.

**Summary:**

Consistent with its quadrennial review obligations, TCEQ should evaluate whether the initial factual, legal, and policy reasons for adopting each rule in Chapter 116 continue to exist and whether revisions to the Chapter 116 rules are warranted. EPA has provided recommendations where we believe rule revisions are merited and we impress upon TCEQ to review the current attainment status of counties in Texas when evaluating the appropriateness of NNSR applicability. EPA encourages TCEQ to use this opportunity to increase the effectiveness of the Chapter 116 rules and to clarify and strengthen the permitting program to contribute to an improvement in the quality of permits that are issued.