

# **BUILDING ON SHIFTING GROUND: TEXAS AIR PERMITTING, CONSTRUCTION TIMING, AND THE REVISED PM<sub>2.5</sub> STANDARD**

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## **I. Introduction**

By the time an air permit application reaches the Texas Commission on Environmental Quality (“TCEQ” or “Commission”), the project proponent may already have made decisions that narrow the available permitting options. Site selection places the project within a particular regulatory geography and ambient air quality setting, including the area’s pollutant-specific attainment status and the background concentrations relevant to air quality review. Equipment selection affects emission rates and available control options. Reliance on on-site power generation may add emissions that increase the proposed source’s potential to emit. Together, these choices shape whether a proposed facility qualifies for authorization under a permit by rule (“PBR”) or standard permit, must instead be authorized through a case-by-case new source review (“NSR”) permit, and whether a proposed stationary source or modification becomes subject to federal Prevention of Significant Deterioration (“PSD”) or nonattainment NSR program.<sup>1</sup> Construction sequencing raises a separate, but related, question: which on-site activities must await issuance of the required preconstruction authorization. Texas law generally requires authorization before work begins on the construction of a new facility or modification of an existing facility that may emit air contaminants,<sup>2</sup> while the U.S. Environmental Protection Agency (“EPA”) has proposed to revise the federal major NSR regulations to clarify which construction activities may occur before issuance of a PSD or nonattainment NSR permit.

Early site and design decisions are particularly significant because a TCEQ air permit is not a comprehensive siting approval. In acting on an application, the Commission determines only whether the applicant has satisfied the applicable state and federal air requirements, including the statutory requirements concerning best available control technology and the protection of public health, the environment, and property.<sup>3</sup> The administrative process may nevertheless be affected by concerns outside that inquiry. Public comments on an application often address traffic, zoning, noise, property values, and local economic effects, even though those matters ordinarily fall outside TCEQ’s authority.<sup>4</sup> Such concerns may prompt public meetings, require consideration in the response-to-comments process, and accompany requests for a contested case hearing, even though only disputed issues relevant and material to the air permit decision may be referred to the State Office of Administrative Hearings. Thus, although non-air concerns do not, standing alone, provide a basis for denying an air permit, opposition associated with the selected site may add time and complexity to the permitting process and affect the project schedule.

Texas law provides three principal forms of minor NSR preconstruction authorization: PBRs, standard permits, and case-by-case NSR permits. Federal major NSR is not a fourth alternative within that hierarchy. If a proposed project constitutes a new major stationary source

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<sup>1</sup> See 30 Tex. Admin. Code Ann. ch. 106; *id.* § 116.611; *id.* ch. 116, subch. B; 40 C.F.R. §§ 51.165 and 51.166.

<sup>2</sup> See Tex. Health & Safety Code Ann. §§ 382.0518, 382.05195, and 382.05196 and 30 Tex. Admin. Code § 116.110.

<sup>3</sup> See 30 Tex. Admin. Code § 116.111(a)(1) – (3).

<sup>4</sup> See Tex. Health & Safety Code Ann. § 382.056(l)–(n); 30 Tex. Admin. Code §§ 55.156, 55.201, 55.211.

or major modification for a regulated pollutant, federal PSD or nonattainment NSR requirements may apply and ordinarily will be addressed through TCEQ’s case-by-case permitting process. PSD applies in areas designated attainment or unclassifiable for the relevant pollutant, while nonattainment NSR applies in areas designated nonattainment. Texas implements both programs through its EPA-approved state implementation plan (“SIP”).<sup>5</sup>

Two recent federal developments illustrate the different ways federal law can affect project planning. First, in May 2026, EPA proposed to revise the definition of “begin actual construction” in the NSR preconstruction permitting program. The proposed definitions would allow an applicant, at its own risk, to undertake specified preparatory activities and construct certain components that do not emit or have the potential to emit a regulated NSR pollutant, including qualifying foundations and utility infrastructure, before obtaining a federal major NSR permit.<sup>6</sup> The proposal addresses when such construction may begin; it would not accelerate permit review or alter the substantive requirements for permit issuance. Even if finalized, the revised federal definitions would not displace the existing Texas SIP provisions. Texas would need to adopt corresponding changes and obtain EPA approval of a SIP revision before those changes would govern permits issued under Texas’ air program.

A separate federal development concerns a substantive air quality standard that permit applicants must satisfy. In 2024, EPA lowered the primary annual national ambient air quality standard (“NAAQS”) for fine particulate matter (“PM<sub>2.5</sub>”) from 12.0 to 9.0 micrograms per cubic meter (µg/m<sup>3</sup>).<sup>7</sup> In June 2026, the United States Court of Appeals for the District of Columbia Circuit denied the petitions challenging the rule and EPA’s request for vacatur, leaving the revised standard in effect.<sup>8</sup> For every PSD permit issued on or after May 6, 2024, the applicant must demonstrate that the proposed emissions will not cause or contribute to a violation of the revised standard. The lower standard reduces the available margin where existing PM<sub>2.5</sub> concentrations are already near 9.0 µg/m<sup>3</sup> and may require refined modeling, additional controls, design changes, or a different site. Future area designations will determine where nonattainment NSR applies under the revised standard. EPA’s proposed construction rule and the revised PM<sub>2.5</sub> standard therefore address different questions: the former concerns when specified construction may begin, while the latter affects whether and under what conditions the emitting facilities may be permitted.

This paper first surveys the principal preconstruction air authorization pathways available in Texas and the federal requirements that may also apply. It then examines EPA’s proposed re-interpretation of “begin actual construction” and the revised PM<sub>2.5</sub> NAAQS as examples of federal development that may, on the one hand, provide more flexibility in construction sequencing, and, on the other hand, constrain the ability to obtain a permit in the first instance. In the current regulatory environment, project proponents and their counsel must distinguish current legal

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<sup>5</sup> See 42 U.S.C. § 7410; 40 C.F.R. §§ 52.2270-52.2343.

<sup>6</sup> Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program, 91 Fed. Reg. 26,958 (May 13, 2026) [hereinafter BAC Proposed Rule].

<sup>7</sup> Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16,202 (Mar. 6, 2024) [hereinafter PM<sub>2.5</sub> Final Rule]; 40 C.F.R. § 50.20.

<sup>8</sup> *Kentucky v. EPA*, No. 24-1050, slip op. (D.C. Cir. June 26, 2026).

requirements from anticipated changes, identify decisions that cannot await greater regulatory certainty, and preserve the permitting and operational flexibility available under current law.

## **II. Texas's Preconstruction Air Authorization Framework**

### **A. How the Texas and Federal Programs Fit Together**

The federal Clean Air Act establishes a comprehensive regulatory scheme governing the emission of air pollutants from stationary sources.<sup>9</sup> Under the Texas Clean Air Act and Texas's EPA-approved SIP, TCEQ administers the State's preconstruction permitting program.<sup>10</sup> TCEQ also administers an EPA-approved Title V operating permit program and has received delegated authority to implement certain federal performance standards. Texas minor NSR generally authorizes the construction and operation of individual "facilities," while federal PSD, nonattainment NSR, and Title V apply to a "stationary source," which may consist of multiple facilities or emissions units.<sup>11</sup>

Texas law generally prohibits beginning construction of a new facility, or modifying an existing facility that may emit air contaminants, unless the facility has obtained the applicable preconstruction authorization, which may take the form of a permit or permit amendment, a standard permit, a PBR, or another authorization recognized by the Texas Clean Air Act.<sup>12</sup> Which type of authorization is required depends on the nature of the proposed construction or modification, the proposed allowable emissions rates and the potential to emit ("PTE"), and the pollutants emitted.

Texas provides three principal forms of preconstruction authorization: PBRs, standard permits, and case-by-case NSR permits. These are alternative forms of authorization rather than successive levels of review. Federal PSD or nonattainment NSR requirements may apply if the project constitutes a new major stationary source or a major modification. Federal New Source Performance Standards ("NSPS") and National Emission Standards for Hazardous Air Pollutants ("NESHAP") apply independently of the selected Texas authorization and do not provide the preconstruction authorization required under Texas law. A Title V operating permit likewise does not substitute for any required preconstruction authorization.

### **B. Texas Minor NSR Authorization Pathways**

#### **1. Permits by Rule**

A PBR is an authorization created by rule for a facility or type of facility that TCEQ has determined will not make a significant contribution of air contaminants to the atmosphere. To qualify, a facility must satisfy both the general requirements in 30 Texas Administrative Code section 106.4 and the conditions of the specific PBR.<sup>13</sup> Section 106.4(a)(1) provides that total

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<sup>9</sup> See generally 42 U.S.C. §§ 7401 et seq.

<sup>10</sup> See 42 U.S.C. § 7410(a); Tex. Health & Safety Code Ann. §§ 382.011, 382.0518; 30 Tex. Admin. Code ch. 116.

<sup>11</sup> Compare 30 Tex. Admin. Code § 106.2 (defining "facility" for minor NSR purposes), with 40 C.F.R. § 51.166(b)(5) (defining "stationary source" for PSD purposes).

<sup>12</sup> Tex. Health & Safety Code Ann. § 382.0518(a); see also 30 Tex. Admin. Code § 116.110(a).

<sup>13</sup> 30 Tex. Admin. Code § 106.4(a).

actual emissions authorized under a PBR from an individual facility may not exceed 250 tons per year (“tpy”) of carbon monoxide (“CO”) or nitrogen oxides (“NOx”); 25 tpy of volatile organic compounds (“VOCs”), sulfur dioxide (“SO<sub>2</sub>”), or particulate matter (“PM”); or 15 tpy of PM<sub>10</sub>; or 10 tpy of PM<sub>2.5</sub>; or 25 tpy of any other air contaminant, subject to the exclusions stated in the rule.<sup>14</sup> Unless at least one facility at an account has been subject to public notice and comment under Chapter 116, Subchapter B or D, section 106.4(a)(4) imposes the same limits on total actual emissions from all facilities permitted by rule at an account.<sup>15</sup>

A PBR may not be used to authorize a facility or group of facilities that constitutes a new major source or a major modification under the PSD or nonattainment NSR requirements.<sup>16</sup> Section 106.4(b) also prevents circumvention of the Chapter 116 permitting requirements through artificial limitations.<sup>17</sup> A facility authorized by a PBR must comply with applicable NSPS and NESHAP requirements and may not rely on a PBR if a permit issued under the same TCEQ account number contains a condition precluding its use.<sup>18</sup> The owner or operator must maintain records sufficient to demonstrate compliance with section 106.4, the specific PBR, and the representations on which the claimed authorization depends.<sup>19</sup> Where available, a PBR generally offers the shortest authorization timeline and lowest administrative burden, but its emissions limits may constrain future expansion or require the expansion to proceed under a different authorization.

## **2. Standard Permits**

A standard permit is an authorization intended for a defined class of similar facilities.<sup>20</sup> Before issuing a standard permit, TCEQ must determine that the permit is enforceable, that compliance can be adequately monitored, and that the covered facilities will use control technology as least as effective as the best available control technology (“BACT”) required under section 382.0518(b). Use of a standard permit generally requires registration under section 116.611, although the terms of the particular standard permit control.<sup>21</sup> Under the generally applicable rule, construction may begin upon receipt of written notice from the executive director that there are no objections or 45 days after the executive director receives the registration, whichever occurs first.<sup>22</sup> Standard permits may prescribe facility-specific eligibility criteria, emissions limits, equipment specifications, separation distances, testing, monitoring, operating, and recordkeeping requirements.

For a proponent weighing on-site power generation—one of the planning decisions identified in the Introduction—TCEQ’s Standard Permit for Natural Gas Electric Generating Units

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<sup>14</sup> *Id.* § 106.4(a)(1)(A)-(E). The exclusions from the 25-tpy limit for “any other air contaminant” include water, nitrogen, ethane, hydrogen, oxygen, and greenhouse gases as defined in 30 Tex. Admin. Code § 101.1.

<sup>15</sup> *Id.* § 106.4(a)(4).

<sup>16</sup> *Id.* § 106.4(a)(2).

<sup>17</sup> *Id.* § 106.4(b).

<sup>18</sup> *Id.* § 106.4(a)(6)-(7).

<sup>19</sup> *See id.* § 106.8.

<sup>20</sup> Tex. Health & Safety Code Ann. § 382.05195; 30 Tex. Admin. Code ch. 116, subch. F.

<sup>21</sup> *Id.* § 116.611.

<sup>22</sup> *Id.* § 116.617.

illustrates both the utility and the limits of the standard permit pathway.<sup>23</sup> The standard permit applies to natural gas-fired spark-ignition engines used to generate electricity, with specified emission limits, stack parameters, and 400 hours per engine during any rolling 12-month period. The standard permit may not be used for a project that constitutes a new major stationary source or major modification. Thus, for project planning, a standard permit occupies a middle ground: it imposes more conditions and a longer review period than a PBR but may avoid the full individualized technical review and public-notice process associated with a case-by-case permit, unless the specific standard permit or applicable rules require notice or approval.

### **3. Case-by-Case NSR Permits**

A case-by-case NSR permit is required when the proposed construction or modification does not qualify for an exemption, PBR, or standard permit. Before issuing a case-by-case permit, TCEQ must determine that the facility will use BACT and that there is no indication that its emissions will contravene the Texas Clean Air Act, including its protection of public health and physical property.<sup>24</sup> The permit holder must construct and operate the facility in accordance with the representations in the permit application. Changes to the represented method of operation, method of control, character of emissions, or emission rates may require notification, permit amendment, or another authorization.<sup>25</sup>

For certain categories, TCEQ's Readily Available Permit ("RAP") program uses standardized application workbooks, technical requirements, and draft special conditions to expedite case-by-case review.<sup>26</sup> A RAP remains a case-by-case NSR permit and remains subject to applicable BACT, air quality review, and public notice requirements. A case-by-case permit allows more individualized equipment and operating configuration but typically entails a longer timeline and more extensive technical review. It also generally requires public notice and an opportunity for comment.

### **C. Federal Requirements that Apply Independently**

PSD and nonattainment NSR apply on a pollutant-specific basis to the construction of a new major stationary source or a major modification of an existing major stationary source. PSD requires, among other things, application of BACT as defined under the federal PSD program, an air quality analysis addressing the NAAQS and applicable PSD increments, and the additional analyses and public participation required by the Clean Air Act and implementing regulations.<sup>27</sup>

Nonattainment NSR requires application of the lowest achievable emission rate ("LAER"), sufficient emission offsets, certification concerning compliance by the owner's or operator's other major sources in the state, and an analysis of alternative sites, sizes, production processes, and

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<sup>23</sup> TCEQ, Air Quality Standard Permit for Natural Gas Electric Generating Units (effective Jan. 30, 2025), <https://www.tceq.texas.gov/downloads/permitting/air/nsr/combustion/ngegu-standard-permit.pdf/@download/file/ngegu-standard-permit.pdf>.

<sup>24</sup> 30 Tex. Admin. Code § 116.111(a).

<sup>25</sup> *See id.* § 116.116.

<sup>26</sup> TCEQ, Readily Available Permits: Air New Source Review, <https://www.tceq.texas.gov/permitting/air/guidance/newsourcereview/rap> (last visited July 28, 2026).

<sup>27</sup> 42 U.S.C. §§ 7470–7479, 7491–7492; 40 C.F.R. § 51.166.

environmental-control techniques.<sup>28</sup> TCEQ implements both federal major NSR programs through Chapter 116 under the Texas SIP, but their applicability and minimum substantive requirements are determined by federal law.

Equipment may also be subject to an NSPS under section 111 of the Clean Air Act or a NESHAP under section 112. Those standards apply independently of the selected Texas preconstruction authorization. In addition, the Clean Air Act requires each major stationary source of air pollution to apply for and comply with the terms of a federal operating permit issued under Title V of the Act.<sup>29</sup> Title V compiles the applicable requirements for each major source in a single document but does not itself authorize construction or modification.<sup>30</sup> In the Fifth Circuit, major NSR applicability must be determined before construction; a later Title V proceeding is not the vehicle for reexamining the validity of the underlying preconstruction authorization.<sup>31</sup>

For project planning, the two federal developments discussed below operate differently. EPA's proposed revision to "begin actual construction" concerns projects subject to federal major NSR. The revised PM<sub>2.5</sub> NAAQS has broader implications. It applies directly in PSD permitting, also informs the NAAQS analysis conducted under Texas' minor source program, and will govern future area designations and SIP planning. Configuring a project to avoid major NSR may avoid PSD or nonattainment NSR requirements, but it does not necessarily insulate a case-by-case minor NSR permit from the lower ambient standard.

### **III. The Changing Meaning of "Begin Actual Construction"**

#### **A. The Existing Federal Rule and EPA Guidance**

The federal major NSR programs prohibit construction of a new major stationary source or major modification before the required PSD or nonattainment NSR permit has been issued.<sup>32</sup> The federal NSR regulations define "begin actual construction" as the initiation of physical, on-site construction activities on an emissions unit that are permanent in nature, including installation of building supports and foundations, laying underground pipework, and construction of permanent storage structures.<sup>33</sup> Texas's major NSR regulations contain substantially the same definition.<sup>34</sup>

For many years, EPA interpreted "begin actual construction" to prohibit a broad range of permanent, on-site construction before issuance of a required major NSR permit. In a 1986 memorandum, EPA construed an "emissions unit" to include installations necessary to accommodate the unit. If the emissions unit and its accommodating installations were integral to the proposed source or modification, EPA concluded that the permit must be obtained before

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<sup>28</sup> 42 U.S.C. § 7503(a); 40 C.F.R. § 51.165.

<sup>29</sup> 42 U.S.C. § 7661a(a).

<sup>30</sup> Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

<sup>31</sup> See *Env't Integrity Project v. EPA*, 960 F.3d 236, 244-48 (5th Cir. 2020).

<sup>32</sup> 42 U.S.C. §§ 7475(a), 7502(c)(5); 40 C.F.R. §§ 51.165(a)(2), 51.166(a)(7), 52.21(i)(1).

<sup>33</sup> 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11), 52.21(b)(11).

<sup>34</sup> 30 Tex. Admin. Code § 116.12(5).

construction began on the entire source.<sup>35</sup> Subsequent EPA guidance applied that interpretation to activities such as excavation, retaining walls, footings, and foundations when they were permanent and sufficiently connected to the proposed source or modification.

EPA reconsidered that approach in draft guidance issued in March 2020. Focusing on the plain language of the statute, the draft guidance reasoned that “begin actual construction” requires physical, on-site construction “on an emissions unit.” Under that narrower reading, an applicant could undertake even costly, permanent, or site-altering work before permit issuance, provided the work did not constitute construction on an emissions unit. However, EPA failed to finalize the draft guidance before the ensuing change in administration.

EPA returned to the issue in a September 2025 letter concerning a proposed semiconductor-manufacturing facility in Arizona. The agency stated that its 1986 memorandum had interpreted “emissions unit” too broadly by including installations merely necessary to accommodate an emissions unit. Applying the narrower reading to the project-specific facts, EPA concluded that the local permitting authority could allow construction of the facility’s core and shell before issuance of the NSR permit, provided that the work did not include an emissions unit or piping, foundations, or other components specifically configured for an emissions unit.

The letter was nevertheless limited in legal effect. EPA expressly stated that it was not a final agency action, did not create or alter any binding requirements, and rested on the particular facts presented. Construction would proceed solely at the applicant’s risk, without constraining the permitting authority’s later decision or creating “equity in the ground” that could influence the decision to ultimately approve or deny the permit. EPA also stated that pending rulemaking, it might continue to address disputed construction activities on a case-by-case basis.<sup>36</sup>

## **B. EPA’s 2026 Proposed Rule**

EPA subsequently proposed regulatory amendments in May 2026 intended to replace that uncertain corpus of guidance with a clearer rule. The proposed rule would redefine “begin actual construction” to focus on construction of “pollutant-emitting activities” and would expressly exclude specified non-emitting work, including engineering and design, clearing, grading, surveying, excavation, ordering and storing equipment, and paving.<sup>37</sup> It would also exclude office buildings, retail stores, certain storage buildings, utility wiring and piping, and qualifying concrete pads, foundations, walls, and roofs—unless the component contains piping, ductwork, wiring, anchor bolts, or other design elements specifically and uniquely configured to support pollutant-emitting equipment.<sup>38</sup>

The proposed rule would not authorize operation before permit issuance and would not alter the substantive requirements governing BACT, LAER, offsets, or protection of the NAAQS

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<sup>35</sup> See EPA, Construction Activities Prior to Issuance of a PSD Permit with Respect to “Begin Actual Construction” (Mar. 28, 1986); BAC Proposed Rule, 91 Fed. Reg. 26,958, 26,963-65 (May 13, 2026).

<sup>36</sup> EPA, TSMC Arizona Begin Actual Construction—EPA Response Letter 1-2, 8-10 (Sept. 2, 2025), <https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf>.

<sup>37</sup> BAC Proposed Rule, 91 Fed. Reg. at 26,970.

<sup>38</sup> *Id.* at 26,970-72.

and PSD increments. EPA’s description of construction “at risk” therefore refers to the applicant’s economic risk, not to any relaxation of requirements for obtaining the permit.<sup>39</sup> If the permit were denied or issued with unanticipated conditions, completed work might have to be modified, rebuilt, or left unused.

The proposal has not been finalized. Even if EPA adopts it, its effect in Texas will depend on the terms of the final rule, the scope of Texas’s EPA-approved program, and on any SIP revision required to give it effect in Texas. EPA explained that states could retain more stringent restrictions and requested comment concerning whether states should be required to submit SIP revisions incorporating the new definitions.<sup>40</sup> For project proponents, the proposal thus bears directly on construction sequencing and the timing of equipment procurement—two of the planning decisions identified in the Introduction—but until it is finalized and given effect in Texas, it cannot be used to anchor decisions about either.

### **C. Texas’s Separate Construction-at-Risk Provision**

Texas law provides a separate construction-at-risk mechanism for certain pending permit amendments. Texas Health and Safety Code § 382.004 authorizes a permit amendment applicant, at its own risk and to the extent permitted by federal law, to begin construction after TCEQ’s executive director has issued a draft permit incorporating the proposed amendment.<sup>41</sup> The statute also prohibits TCEQ from considering the applicant’s completed construction when deciding whether to grant the amendment and directs the Commission to adopt implementing rules.<sup>42</sup>

TCEQ implemented that authority through 30 Texas Administrative Code § 116.118. The rule clarifies that construction may begin only after the executive director has completed the technical review and issued the draft permit. It also excludes projects constituting a new major stationary source or major modification, as well as certain other permitting actions, and requires compliance with otherwise applicable requirements, including public notice and participation. A facility constructed or modified under the rule may not operate until TCEQ issues the final permit amendment.<sup>43</sup>

Texas’s construction-at-risk mechanism therefore differs materially from EPA’s 2026 proposal. Section 116.118 permits construction associated with an eligible, non-major permit amendment only after TCEQ has completed its technical review and issued a draft permit. EPA’s proposal, by contrast, addresses when construction constitutes “begin actual construction” for federal major-NSR purposes and would exclude specified non-emitting work even before issuance of a draft or final permit.<sup>44</sup> Both allow an applicant to accept economic risk to preserve its construction schedule, but each applies to different permitting actions and becomes available at different stages of review. Neither authorizes operation before issuance of the required permit,

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<sup>39</sup> *Id.* at 26,969, 26,973-74.

<sup>40</sup> *Id.* at 26,974.

<sup>41</sup> Tex. Health & Safety Code Ann. § 382.004.

<sup>42</sup> Tex. Health & Safety Code Ann. § 382.004(a)-(b), (d).

<sup>43</sup> 30 Tex. Admin. Code § 116.118(a)(1), (3)-(8), (b), (c)(1); 85 Fed. Reg. 64,966, 64,968-69 (Oct. 14, 2020) (approving § 116.118 into the Texas SIP).

<sup>44</sup> BAC Proposed Rule, 91 Fed. Reg. at 26,969-76.

relaxes the substantive standards governing permit issuance, or assures the applicant that the permit will ultimately be granted.

#### **IV. The Revised Primary Annual PM<sub>2.5</sub> Standard: A Substantive Constraint**

The construction-at-risk mechanisms discussed above may give some applicants additional scheduling flexibility, but they do not alter the substantive showing required for permit issuance. The revised annual PM<sub>2.5</sub> NAAQS illustrates that distinction. Even as EPA proposes to permit certain non-emitting construction to begin sooner, PSD applicants must now demonstrate compliance with a materially more stringent ambient air standard, and forthcoming area designations may change the major-NSR program applicable to a project.

##### **A. The 2024 Rule**

Section 109(b)(1) of the Clean Air Act requires EPA to establish primary NAAQS at levels requisite to protect public health with an adequate margin of safety.<sup>45</sup> In March 2024, EPA promulgated a final rule lowering the primary annual PM<sub>2.5</sub> standard from 12.0 to 9.0 micrograms per cubic meter (µg/m<sup>3</sup>). The standard is attained when the annual arithmetic mean PM<sub>2.5</sub> concentration, averaged over three years and determined in accordance with EPA's monitoring requirements, does not exceed 9.0 µg/m<sup>3</sup>. EPA retained the primary 24-hour PM<sub>2.5</sub> standard at 35 µg/m<sup>3</sup> and did not revise the existing secondary PM standards or the primary PM<sub>10</sub> standard.<sup>46</sup> The rule became effective on May 6, 2024.<sup>47</sup>

##### **B. *Kentucky v. EPA*: The Standard Remains in Effect**

Industry groups and a coalition of states petitioned for review of the rule in the D.C. Circuit. After initially defending the rule, EPA reversed position and moved for vacatur, agreeing with the petitioners that the prior Administrator lacked statutory authority to issue the rule and had acted unreasonably by failing to consider costs. The D.C. Circuit denied both the petitions for review and EPA's motion for vacatur.<sup>48</sup>

The court held that sections 109(b) and 109(d)(1), read together, authorize the Administrator to revise a NAAQS before completion of the next mandatory five-year review. Although section 109(d)(1) requires EPA to conduct a thorough review every five years, the court held that it expressly permits the Administrator to review and revise the criteria or standards more frequently. The court therefore rejected the contention that EPA was required to complete another thorough five-year review before revising the standard off the five-year review cycle.<sup>49</sup>

The court also rejected the states' contention that the revision rested on so-called "environmental justice" and climate policy considerations. The court did not decide broadly

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<sup>45</sup> 42 U.S.C. § 7409(b)(1).

<sup>46</sup> PM<sub>2.5</sub> Final Rule, 89 Fed. Reg. at 16,202. EPA also retained the secondary annual PM<sub>2.5</sub> standard at 15.0 µg/m<sup>3</sup> and the primary 24-hour PM<sub>10</sub> standard at 150 µg/m<sup>3</sup>.

<sup>47</sup> *Id.* at 16,202.

<sup>48</sup> *Kentucky v. EPA*, slip op. at 7, 37. The court's opinion was authored by Senior Circuit Judge Ginsburg, joined by Judges Millett and Childs.

<sup>49</sup> *Kentucky*, slip op. at 18-24.

whether every consideration associated with those policies would be impermissible. Instead, the court concluded that the administrative record showed that the Administrator based the revision on public health considerations, scientific evidence, the advice of the Clean Air Scientific Advisory Committee (“CASAC”), and public comment, rather than on a goal of advancing “environmental justice” or climate policy.<sup>50</sup> The court further held that EPA could not consider compliance costs or attainability either when deciding whether the revision was appropriate or when selecting the revised standard,<sup>51</sup> citing the Supreme Court’s 2001 decision in *Whitman v. American Trucking Associations*<sup>52</sup> and subsequent D.C. Circuit precedent.

### **C. Permitting Consequences and Area Designations**

The revised PM<sub>2.5</sub> standard already applies to PSD permits issued on or after May 6, 2024. Applicants must demonstrate that a proposed major source or major modification will not cause or contribute to a violation of the 9.0 µg/m<sup>3</sup> annual standard. Where existing PM<sub>2.5</sub> concentrations are already close to that level, obtaining a permit may require lower allowable emissions, additional controls or operating limits, or changes to the project’s equipment, stack configuration, or location.

The next major development will be EPA’s designation of attainment and nonattainment areas. A federal court has ordered EPA to issue final nationwide designations by February 6, 2027.<sup>53</sup> TCEQ staff previously identified Bowie, Dallas, Harris, and Tarrant Counties as potential nonattainment areas.<sup>54</sup> EPA will make the final decisions and may rely on more recent monitoring data or adopt boundaries different from those recommended by the State. Because a designation may change the applicable major NSR program area by area, the designation bears directly on site selection—one of the earliest and least reversible of the planning decisions identified in the Introduction.

Applicants planning projects in potentially affected areas should therefore evaluate permitting under both possible designations. If an area is designated nonattainment, qualifying new major sources and major modifications will be subject to nonattainment NSR—which generally requires LAER, emission offsets, and an alternatives analysis—instead of PSD for PM<sub>2.5</sub> and regulated precursors. For pending and planned permits, applicants should confirm the applicable modeling approach and background concentrations, preserve flexibility to reduce or reconfigure emissions, and monitor the designation process before making commitments that depend on a particular permitting pathway.

### **V. Conclusion: Plan under Current Law and Preserve Flexibility**

Texas’s three principal minor NSR pathways provide different forms of preconstruction authorization, but selecting among them is only part of the analysis. The threshold questions are

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<sup>50</sup> *Id.* at 25-28.

<sup>51</sup> *Kentucky*, slip op. at 28-33.

<sup>52</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 464-71 (2001).

<sup>53</sup> *Alliance of Nurses for Healthy Environments v. Zeldin*, No. 4:26-cv-03118-HSG, slip op. at 29-30 (N.D. Cal. July 17, 2026)

<sup>54</sup> TCEQ, *Commission Approval for the 2024 Primary Annual Fine Particulate Matter (PM<sub>2.5</sub>) NAAQS State Designations*, Docket No. 2024-1660-MIS, at 2 (Nov. 26, 2024).

which authorization covers each proposed facility and whether the project as a whole constitutes a new major stationary source or major modification for any regulated pollutant. A PBR or standard permit may reduce the time and administrative burden associated with authorization, but only if the project satisfies every applicable condition. A case-by-case permit may allow more individualized equipment and operating configuration but requires the corresponding technical review and, where applicable, public participation. None of these pathways displaces independently applicable federal requirements.

EPA's proposed revision to "begin actual construction" addresses only the timing of construction for projects subject to federal major NSR. If finalized substantially as proposed, it could allow specified work on non-emitting components to begin before issuance of a PSD or nonattainment NSR permit, at the applicant's risk. It would not authorize operation, alter BACT or LAER, eliminate applicable offset requirements, or excuse compliance with the NAAQS. Its effect in Texas will depend on the final rule and its implementation in Texas's SIP-approved program. Until those steps occur, applicants must proceed under the construction restrictions currently in effect.

The revised annual PM<sub>2.5</sub> standard presents a different circumstance because it is already effective. The D.C. Circuit's decision in *Kentucky v. EPA* left the 9.0 µg/m<sup>3</sup> standard in place, and PSD permits issued on or after May 6, 2024, must address it. Forthcoming area designations will determine where qualifying projects become subject to nonattainment NSR for PM<sub>2.5</sub> and its regulated precursors.

The prudent course for project proponents is therefore to determine the authorization required under current law, evaluate the site's current designation and relevant background concentrations, and identify the equipment, control, and scheduling options that remain available before making commitments that depend on a particular permitting outcome. A pending regulatory change may be considered as an alternative planning scenario, but it should not serve as the basis for construction or procurement decisions until it becomes effective under the program governing the project.