

US EPA ARCHIVE DOCUMENT

No. 10-60614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, ET AL.,

Petitioners,

v.

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and LISA P. JACKSON, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ENVIRONMENTAL DEFENSE and ENVIRONMENTAL INTEGRITY PROJECT,

Intervenor-Respondents.

EPA'S MERITS BRIEF

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REQUEST FOR ORAL ARGUMENT

EPA believes that oral argument is likely to assist the Court in the resolution of this matter. Accordingly, EPA requests that oral argument be scheduled.

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JURISDICTION

Jurisdiction exists under 42 U.S.C. § 7607(b)(1). The petitions were timely filed.

ISSUES PRESENTED

1. Whether EPA reasonably determined that the Texas Flexible Permits Program (“Program”) cannot be approved as a minor New Source Review State Implementation Plan Revision under the Clean Air Act because the Program can interfere with major New Source Review State Implementation Plan requirements.
2. Whether EPA reasonably determined that the monitoring, recordkeeping and reporting provisions of the Program are insufficient for a minor New Source Review program because the provisions lack replicable requirements and procedures to determine whether and to what extent monitoring is required.
3. Whether EPA reasonably determined that the Program fails to describe in sufficient detail the underlying methodologies and analyses used to determine the emissions caps developed under the Program.
4. Whether EPA was required to consider Texas’ implementation of the Program prior to the time that EPA disapproved the Program when the Clean Air Act clearly provides that State Implementation Plan Revisions are not effective until approved by EPA.

STATEMENT OF THE CASE

I. Nature of the Case

These cases involve the Texas “Flexible Permits Program,” which allows changes to occur at existing facilities under a Flexible Permit without further review by the State, as long as the change does not result in increased air pollutant emissions beyond those specified in a emissions cap for the entire site. After Texas submitted the Program to the United States Environmental Protection Agency (“EPA”) for approval into Texas’ federally-enforceable State clean air program, EPA determined that the Program did not satisfy the statutory and regulatory criteria for approval under the Clean Air Act, 42 U.S.C. §§ 7401-7671q. EPA disapproved the Program following notice-and-comment rulemaking procedures because it determined, among other things, that (i) when considered in the context of other approved Texas programs, the Program is ambiguous as to whether a major source of pollutants may use the Program to avoid major source requirements, (ii) the Program’s provisions for monitoring, recordkeeping and reporting are not sufficient because whether and to what extent monitoring will be required of a source is left entirely to the Executive Director’s discretion, and (iii) the Program rules do not describe in sufficient detail how the emissions caps are to be determined in all circumstances that are reasonably expected to arise.

Texas and various industry Petitioners challenge EPA's disapproval of the Program. We address Petitioners' arguments in a combined fashion below.

II. Statutory and Regulatory Background

A. Clean Air Act Overview

The Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. The central feature of that program is the National Ambient Air Quality Standards ("NAAQS"), which are nationally applicable standards set by EPA establishing permissible concentrations for six common (or "criteria") air pollutants, such as ozone. 42 U.S.C. §§ 7408-09. *See* 40 C.F.R. pt. 50.

The CAA requires each State to submit for EPA's approval a State Implementation Plan ("SIP") providing for the attainment and maintenance of the NAAQS and meeting the other requirements of the Act. 42 U.S.C. §§ 7410(a)(1), 7410(k). *See generally Train v. NRDC, Inc.*, 421 U.S. 60 (1975). Each SIP must contain, among other things, a "control strategy," which is a combination of measures designed to achieve the reduction of emissions necessary for attainment and maintenance of the NAAQS. 40 C.F.R. § 51.100(n). SIP provisions must be enforceable as a practical matter in order for EPA to approve them. 42 U.S.C. §

7410(a)(2)(A). State SIP provisions are only federally enforceable upon their approval by EPA. 42 U.S.C. § 7413. See *General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision”); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 468 n.12 (D.C. Cir. 1983) (“With certain enumerated exceptions, states do not have the power to take any action modifying any requirement of their SIPs, without approval from EPA”); *Sierra Club v. TVA*, 430 F.3d 1337, 1346 (11th Cir. 2005) (“If a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval”). Further, CAA section 116 forbids implementation of any emission limitation that is less stringent than the applicable, approved SIP. 42 U.S.C § 7416.

Any revision to a SIP must meet the requirements of CAA section 110(l), 42 U.S.C. § 7410(l). Under section 110(l), EPA cannot approve a SIP revision if the revision would interfere with any applicable requirement of the CAA regarding attainment, or reasonable further progress towards attainment, or any other applicable requirement of the Act. *Id.*

Under CAA section 107(d), 42 U.S.C. § 7407(d), for each criteria air pollutant, a State is required to designate areas within its boundaries as either

meeting or not meeting the NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is classified as an “attainment area;” one that does not is classified as a “non-attainment area.” Because the classification is pollutant-specific, an area may be designated as “attainment” for one pollutant and “non-attainment” for another.

B. New Source Review

The CAA also contains specific requirements for the permitting of new and modified sources of air pollution, which is generically referred to as “New Source Review,” or “NSR.” Generally speaking, these programs may be implemented by a State as part of an approved SIP, or by EPA in certain circumstances. There are three types of NSR, one or more of which can apply at a given source, depending upon whether the source is minor or major, whether the construction or modification causes an increase in emissions for a given pollutant above the significance threshold, and whether the source is located in an attainment area or a non-attainment area for the given pollutant.

1. NSR for major sources

For major sources in attainment areas, the Prevention of Significant Deterioration (“PSD”) program, 42 U.S.C. §§ 7470-7492, is intended to give “added protection to air quality in certain parts of the country notwithstanding

attainment and maintenance of the NAAQS.” *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 (5th Cir. 2008) (internal quotation marks and citations omitted). *See also Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (concerning PSD program). A PSD permit must be obtained prior to construction or modification^{1/} of large pollutant-emitting facilities^{2/} often referred to as “major sources,” and the applicant is required, among other things, to demonstrate that the proposed new or modified source will not cause a violation of the NAAQS or “PSD increments” (*i.e.*, limits on increases in ambient pollution concentrations over specified area-specific baseline concentrations), *see* 42 U.S.C. §§ 7473, 7475(a)(3) and 7476. The source must also implement the “best available control technology” (or “BACT”) to limit emissions of each pollutant regulated under the CAA. 42 U.S.C. § 7475(a)(4); *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 468 (2004).

^{1/} The Act defines “construction” to include “modification,” which “means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §§ 7411(a)(4), 7479(2)(C).

^{2/} The Act defines a “major emitting facility” for the PSD program as one that emits either 100 tons per year or 250 tons per year of any pollutant regulated under the Act, depending on the type of facility. *Id.* § 7479(1). *See also* 40 C.F.R. § 51.166(b)(49)(iv).

For non-attainment areas, major sources are subject to the more stringent non-attainment NSR program (“NNSR”), which applies to major new or modified sources of a pollutant for which the area is designated non-attainment. 42 U.S.C. §§ 7502, 7503. The purpose of the NNSR program is to improve air quality in areas where it does not meet the applicable NAAQS. *Id.* at §§ 7501-7515. For NNSR, a new or modified source must meet the Lowest Achievable Emission Rate and must obtain sufficient emission reductions from existing sources to offset its increased emissions. *Id.* §§ 7502(c)(5) and 7503.^{3/}

2. NSR for minor sources

There is also an NSR requirement for minor sources, which are sources that have the potential to emit a relevant pollutant below the major source thresholds of the PSD and NNSR programs. Under CAA section 110(a)(2)(C), a State’s SIP must provide for the regulation of the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. 42 U.S.C. § 7410(a)(2)(C). Thus, all SIPs must contain Minor NSR programs.

EPA has promulgated regulations specifying the requirements for Minor

^{3/} For NNSR, a major source is generally one that emits, or has the potential to emit, 100 tons per year or more of a pollutant for which the area in which it is located is designated non-attainment. 42 U.S.C. § 7602(j); 40 C.F.R. § 51.165(a)(1)(iv).

NSR programs, some of which are discussed below. 40 C.F.R. §§ 51.160-51.164. Each State's SIP must set forth legally enforceable procedures which will allow the State to determine whether the construction or modification of a minor source, or a "minor modification" of an existing major source, will (1) result in a violation of applicable portions of the State's control strategy, or (2) interfere with attainment or maintenance of any NAAQS in the State or in a neighboring State. *Id.* at § 51.160(a). Accordingly, SIPs must require that owners or operators of sources subject to Minor NSR submit applications to the State from which the State can determine whether the construction or modification of the source will result in a violation of the control strategy or interfere with attainment of maintenance of a NAAQS. *Id.* at § 51.160(b).

C. The Texas Flexible Permits Program

Under the current, federally-approved Texas SIP, all facilities are subject to NSR because the State's permitting requirements apply to any facility that "may emit air contaminants into the air of this state." 30 Tex. Admin. Code § 116.110(a); *See* 68 Fed. Reg. 64,543, 64,546 (Nov. 14, 2003) (approval of re-codified version of State's SIP). Anyone intending to engage in the construction of a new Texas facility, or the modification of an existing Texas facility that will increase the amount of any air contaminant emitted by the facility, or result in the

emission of an air contaminant not previously emitted, must use one of three options to obtain authorization to proceed with the construction or modification in accordance with the federally-approved SIP. 30 Tex. Admin. Code § 116.110. First, the person can obtain an NSR permit by filing a general application, which involves a case-by-case evaluation of the proposed construction or modification. *Id.* § 116.110(a)(1); *see id.* at § 116.111. Second, a standard permit may be available if the construction or modification falls within certain categories for which Texas has developed standardized permit terms (*e.g.*, sand and gravel operations). *Id.* § 116.110(a)(2). Third, the construction or modification may satisfy the conditions for facilities “permitted by rule” under Chapter 106, which covers over 100 categories of facilities, from auto body refinishing facilities to zoos, and for which Texas has authorized permits through a prior rulemaking process. *Id.* § 116.110(a)(4); *see, e.g. id.* at Chapter 106, §§ 106.436; 106.163.^{4/}

^{4/} Two additional options available under state law are not part of the State’s federally-approved SIP. First, the construction and modifications of *de minimis* facilities or sources do not require a permit by Texas. *Id.* § 116.110(a)(5). Second, in its qualified facilities program, Texas has exempted certain changes to existing facilities from the otherwise applicable definition of “modification” in the State’s rules. *Id.* at § 116.10(11)(E). EPA’s disapproval of the qualified facilities program is subject to a separate challenge in *Texas Oil and Gas Ass’n v. EPA*, No. 10-60459 (5th Cir.). In addition, under the approved Texas NSR SIP, insignificant emissions are required to be covered under what used to be an exemption or standard exemption and are now covered under permits by rule. These have
(continued...)

The Flexible Permits Program is a permitting mechanism under which modifications to existing facilities may be made without any further regulatory review as long as the resulting emissions increase does not exceed an upper, aggregate limit, or cap specified in the permit. 30 Tex. Admin. Code §§ 116.710, 116.711, 116.714, 116.715, 116.716. The Program is in lieu of obtaining or amending an NSR permit. *Id.* at 116.710(a). Under the Texas Program, a Flexible Permit may be issued for a facility, group of facilities or an account, and a Flexible Permit may contain a pollutant specific emissions cap, or multiple emissions caps and/or individual emissions limitations for each air contaminant for all facilities authorized under the Flexible Permit. *Id.* at §§ 116.710(a), 116.715.^{5/}

Under the Program, the emissions cap and individual emissions limitations

^{4/}(...continued)

always been permit-type authorizations with required conditions. *See* 74 Fed. Reg. 48,480, 48,464 - 465 (Sept. 23, 2009) (containing a detailed history of these authorizations).

^{5/} Texas defines “facility” as “[a] discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emissions control equipment. A mine, quarry, well test, or road is not a facility.” 30 Tex. Admin. Code § 116.10(6). Texas broadly defines “account,” in pertinent part, as “any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.” *Id.* at § 101.1(1). Texas defines “source” as “[a] point of origin of air contaminants, whether privately or publicly owned or operated.” *Id.* at § 116.10(17).

are to be established by calculating emissions for each covered facility based upon an application of the most stringent of either State Best Available Control Technology (“State BACT”), at the expected maximum operating capacity of each facility, or any more stringent applicable requirement. *Id.* at § 116.716(a).⁶⁷ The calculated emissions are summed to determine the cap. *Id.* Emissions caps and individual emissions limitations may also include an “insignificant emissions factor,” which does not exceed 9 percent of the total emission cap or individual emission limitation. *Id.* at §§ 116.13(1), 116.716(d). The Program rules do not

⁶⁷ State BACT is not the same as Federal BACT under PSD. State BACT is defined as:

an air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered to technically practical and economically reasonable for the facility. The emissions reductions can be achieved through technology such as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice.

Id. at § 116.10(1). Among other differences from State BACT, Federal BACT for PSD requires that the resulting emission limitation be based upon “the maximum degree of reduction of each pollutant subject to regulation” which the permitting authority determines is achievable for the major facility on a case-by-case basis after considering several factors. *See* 42 U.S.C. § 7479(3). In addition, it should be noted that this State BACT definition has not been approved by EPA into the SIP. EPA disapproved the State’s previous BACT definition. 75 Fed. Reg. 56,424 (Sept. 15, 2010).

include any procedures for determining an insignificant emissions factor in any particular case. *See id.*

The Program rules contain a general condition requiring the permit holder to keep a copy of the flexible permit at the plant site along with unspecified information and data sufficient to demonstrate continuous compliance with the emission cap and individual emissions limitations contained in the permit. *Id.* at § 116.715(c)(6). The Program rules do not provide how this information is to be obtained or in what form it is required to be maintained, but the information “may include” emission cap and individual emission limitations calculations based on a 12-month rolling basis and production records and operating hours. *Id.*

The Program rules provide that the application for a Flexible Permit must contain a statement that the “facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director.” *Id.* at § 116.711(2). The Rules do not specifically require the Executive Director to establish such conditions. *See id.* The rules also do not specify any particular methods for measuring emissions from which the Executive Director must chose if he or she determines to impose any methods at all. *See id.* Sampling may or may not be required. *Id.* at 116.715(c)(4).

An application for a Flexible Permit must also represent that if the proposed

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facility, group of facilities, or account is located in either a nonattainment area, or attainment area, then each facility shall comply with all applicable requirements concerning either nonattainment review, or PSD review, respectively. *Id.* at § 116.711. The program rules also provide that if the Executive Director makes a specific finding that an increase of a particular pollutant could result in the facility, group of facilities or account to become subject to NNSR or PSD, then the permit may include a special condition requiring the permit applicant to obtain written approval from the Executive Director before constructing the facility under a Standard Permit or a Permit by Rule. *Id.* at § 116.715.

There is no specific Flexible Permit Program rule requiring the application of NNSR or PSD with respect to modifications at the facility, group of facilities or account after the Flexible Permit has been issued and the proposed facilities, group of facilities or account has been constructed. *See id.* There is a general requirement that if more than one State or Federal rule or regulation or flexible permit conditions applies, then the most stringent limit or condition shall govern. *Id.* at § 116.715(c)(10).

EPA proposed to disapprove the Program and solicited public comments. 74 Fed. Reg. 48,480. After considering those comments, EPA took final action to disapprove the program. 75 Fed. Reg. 41,312 (July 15, 2010).

STANDARD OF REVIEW

In order to prevail on the merits, Petitioners must show that EPA's final action on the Program was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This highly deferential standard presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*). Although this Court must assure itself that the agency considered the relevant factors in making the decision, the Court cannot substitute its own judgment for that of the agency. *Texas Oil & Gas Ass'n*, 161 F.3d at 933-34.

Questions of statutory interpretation are governed by the familiar two-step test set forth in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984). See *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) ("We review the EPA's interpretation of the CAA under the standards set forth in *Chevron* . . ."). Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress' intent is clear from the statutory language, the Court must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If, however, the statute is "silent or ambiguous with respect to the

specific issue,” the Court must decide whether the Agency’s interpretation is based on a permissible construction of the statute. *Id.* To uphold EPA’s interpretation of the Act, the Court need not find that EPA’s interpretation is the only permissible construction that EPA might have adopted, but rather only that EPA’s interpretation is reasonable. *Chemical Mfrs. Ass’n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985).

EPA's interpretations of its own regulations are entitled to even greater deference. EPA's interpretation of its own regulations should be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Public Citizen, Inc. v. EPA*, 343 F.3d 449, 455-56 (5th Cir. 2003).

EPA’s factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). EPA’s factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could also be supported by the record. *Id.*

SUMMARY OF THE ARGUMENT

EPA reasonably disapproved the Program as a revision to the Texas SIP for a number of reasons, any one of which is sufficient to uphold EPA’s decision. First, as described above, Congress imposed significant NSR requirements for

major sources. Because other federally-approved Texas Minor NSR programs contain certain express language limiting those programs to minor sources, and that language is missing from Flexible Permit Program, EPA reasonably disapproved the Program in order to prevent facilities from circumventing the congressionally mandated Major NSR requirements.

Contrary to Texas' and Industry Petitioners' arguments, EPA reasonably determined to disapprove the program notwithstanding Texas' stated intention to apply the Program in a way that does not conflict with Major NSR requirements, and Texas' claimed past practice of having done so. EPA did not disregard Texas' interpretation of Texas law, nor has EPA somehow violated Texas' policy choices, as Petitioners assert. Rather, in light of the complexity of the Program, and the contrasting language in other Texas rules, EPA concluded that Texas' interpretation was not based on sufficient text within the regulatory language of the Program proposed by Texas and that this could lead to confusion and inconsistencies in the administration and enforcement of the Program. It could also lead to abuse of the Program by those regulated entities that would like to avoid Major NSR requirements.

Second, EPA reasonably disapproved the Program because the monitoring, recordkeeping and reporting requirements of the Program leave the decisions of

whether to require monitoring entirely to the Executive Director's discretion. Moreover, in those instances in which monitoring is required, there is no requirement that the monitoring systems chosen must be based upon sound scientific principles or lead to results that meet minimum requirements for admissibility in court. EPA therefore disapproved the Program because it does not meet the CAA's requirement that SIP measures must be enforceable.

Contrary to Petitioners' arguments, EPA's decision is not inconsistent with its approval of similar Texas monitoring requirements applicable to other Minor NSR programs. Unlike those other programs, the Flexible Permits Program establishes a complicated system of continuous emissions trading among many different sources at large sites for which adequate monitoring is essential, and cannot be left to the Executive Director's discretion.

Third, EPA reasonably determined that the Program does not contain sufficiently detailed criteria for determining the emissions caps in all circumstances. The Program allows for multiple emissions caps and covers an entire plant site, but it is entirely unclear under the Program rules how the cap, individual emissions limits, and multiple caps are to be established in situations where there are more than one plant on the site, major sources on the site, or a facility within a major source on the site.

Finally, the Court should not overturn EPA's final rule on the basis that EPA took longer than Congress provided for EPA's review of a SIP revision, or that EPA was required to consider Texas' implementation of the Program in the interim time period. Petitioners' contrary arguments are inconsistent with the CAA statutory scheme and binding Supreme Court precedent.

ARGUMENT

EPA determined that Texas' Flexible Permits Program could not be approved as a Substitute Major NSR SIP Revision or a Minor NSR SIP Revision. 75 Fed. Reg. at 41,312. Neither the State nor Industry Petitioners argues that the Program should be approved as a Major NSR SIP Revision, so EPA focuses its argument on its decision to disapprove the Program as a Minor NSR SIP revision.

I. The States Do Not Have Unfettered Discretion With Respect to Minor NSR SIPs, and EPA Applied Appropriate Statutory and Regulatory Criteria in Its Review of the Flexible Permits Program.

Throughout their briefs, Petitioners suggest that States have virtually unlimited discretion in the design and implementation of minor source programs and that EPA's role in its review of SIPs is so minimal as to be virtually meaningless. However, while the CAA grants the states considerable latitude in developing emissions limitations, *see Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975), it nonetheless subjects the states to strict minimum compliance requirements,

adherence with which must be determined by EPA. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976); *Michigan Dept. of Env'tl. Quality v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000).

In particular, EPA may not approve a SIP revision if the revision would interfere with any applicable requirement concerning attainment and subsequent maintenance of the NAAQS or any other applicable requirements of the Act. 42 U.S.C. § 7410(l). In addition, CAA Section 110(a)(2) requires that each SIP include enforceable emission limitations and other control measures as may be necessary or appropriate to meet applicable CAA requirements and a program to provide for the enforcement of those measures. 42 U.S.C. § 7410(a)(2). Under EPA's regulations, Minor NSR SIPs must include legally enforceable procedures enabling the State to determine whether a modification of a facility would violate a control strategy or interfere with attainment or maintenance of a NAAQS. 40 C.F.R. § 51.160(a)(2)(b).

EPA has also previously set forth its interpretation of some of the CAA SIP requirements as is relevant here. For example, in 1987, EPA published a memorandum entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." App. T (AR Doc. 43) ("1987 Enforceability Memorandum"). EPA there explained, among other things, that

“SIP revisions should be written clearly, with explicit language to implement their intent.” *Id.* at 4. With respect to recordkeeping, SIPs must identify explicitly those records that sources are required to keep to assess compliance, the records must be commensurate with regulatory requirements, and the SIP should specify the reporting formats. *Id.* at 9. With respect to test methods or monitoring, “[e]ach compliance provision [of the SIP] must list how compliance is to be determined and the appropriate test method to be used. *Id.* at 10. The test method must be sufficient to protect the relevant NAAQS. *Id.*

In 1992, EPA published its “State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,” 57 Fed. Reg. 13,498 (Apr. 16, 1992) (“General Preamble.”). Among other things, EPA set forth certain fundamental principles for SIPs and control strategies. *Id.* at 13,567-68. EPA there interpreted CAA section 110(a)(2), 42 U.S.C. 7410(a)(2), which requires that SIPs include enforceable emissions and other control measures as necessary or appropriate to meet the CAA’s requirements. EPA explained that measures are enforceable when they are “duly adopted, and specify clear, unambiguous, and measurable requirements.” 57 Fed. Reg. at 13,568. EPA further explained that in order to be enforceable, a SIP must contain “a legal means for ensuring that the sources are in compliance with the control measures[,] . . .

[and a] regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit.” *Id.* Another key principle is that the measure be replicable. “This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result.” *Id.* The control strategy must also be accountable. Among other things, this means that the SIP must contain means “to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan.” *Id.*

As is discussed below, EPA applied the appropriate statutory and regulatory criteria in its review of the Flexible Permits Program, and its final rule is completely consistent with its long-standing interpretation of the relevant provisions of the CAA. EPA’s final rule should therefore be upheld. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. at 842-45; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 512.

II. The Flexible Permits Program Cannot Be Approved As a Minor NSR SIP Revision Because It Can Interfere with Major NSR SIP Requirements.

EPA determined that the Flexible Permits Program cannot be approved as a

Minor NSR program because it potentially allows sources to circumvent Major NSR requirements. First, EPA reviewed the Program's rules in comparison to other Texas minor source programs. EPA determined that in light of the more specific requirements in the other Texas minor source programs that clearly limit those programs to Minor NSR, the Flexible Permits Program is unacceptably ambiguous as to whether it is limited to Minor NSR. It therefore disapproved the program due to its potential to interfere with Major NSR requirements. Second, EPA determined that the Program fails to require clearly that all existing requirements of Major NSR permits must be maintained if they are combined into a Flexible Permit. Third, EPA found that Texas' definition of "account" is overly broad in a way that could interfere with Major NSR requirements. All of these determinations are completely consistent with EPA's interpretation of the CAA as requiring that "SIP revisions should be written clearly, with explicit language to implement their intent," App. T at 4, and that SIPs are enforceable only when they "specify clear, unambiguous, and measurable requirements." 57 Fed. Reg. at 13,568. They should therefore be upheld.

A. The Flexible Permit Program Rules Do Not Clearly Limit the Program to Minor NSR.

As explained above, the construction or modification of facilities that exceed Major NSR thresholds must comply with the permitting and other requirements of

the Major NSR programs. The Flexible Permits Program, however, does not preclude its use for Major NSR in a sufficiently clear manner. *See* 75 Fed. Reg. at 41,313/1.

The Program creates a new type of permit establishing emission limitations for both new and existing facilities and allows for modifications at those facilities without further regulatory review. *See* 30 Tex. Admin Code 116.710(a). The Program rules specifically state that Flexible Permits are an alternative to NSR. *Id.* It is therefore imperative that the Program clearly be limited to Minor NSR as both the construction of new facilities and the modification of existing facilities must undergo extensive regulatory review for Major NSR when applicable.

The Program rules require that an applicant for a flexible permit submit information showing that if the proposed facility, group of facilities, or account is located in either a nonattainment area or attainment area, then each facility shall comply with all applicable requirements concerning either nonattainment review or PSD review, respectively. *Id.* at § 116.711 (8), (9). However, the Program rules do not provide how an applicant is supposed to make this showing. For example, there is no explicit requirement for a NNSR or PSD applicability determination. *See id.*⁷

⁷ The State's Flexible Permit Application Guidance addresses applicability determinations. However, it is a 2001 draft document that specifically states its
(continued...)

Nor is there any statement in the Program rules expressly limiting the Program's use to Minor NSR. *See id.*; 75 Fed. Reg. at 41,319/3 ("30 TAC 116.711(8) and (9) . . . do not contain any emission limitations, applicability statement, or regulatory provision restricting the construction or change to Minor NSR or clearly prohibiting circumvention of Major NSR . . ."). Indeed, the State conceded in its comments to EPA that while it has considered the Program to be a Minor NSR program, "this is not specifically stated in the rule." App. P at 2 (Docket No. 19, Letter from Mark R. Vickery, P.G., Executive Director, TCEQ, to Stanley Spruiell, EPA (Nov. 23, 2009)).

In addition, there is no specific Flexible Permit Program rule requiring the application of NNSR or PSD with respect to modifications at the facility, group of facilities or account after the Flexible Permit has been issued and the proposed facilities, group of facilities or account have been constructed. Rather, there is only a general requirement that if more than one State or Federal rule or regulation or flexible permit conditions applies, then the most stringent limit or condition shall govern. *Id.* at § 116.715 (c)(10). However, because the Program rules do not make clear that all applicable Major NSR requirements continue to apply in the first

²⁷(...continued)

content does not constitute the actual wording of the regulations. App. F at 1 (AR Doc. 34, Flexible Permit Application Guidance).

place, this language is not sufficient to prevent circumvention of Major NSR. This is particularly true under the Program because it is expressly intended to be a substitute for NSR, and it expressly contemplates that no regulatory review will be had of modifications resulting in emissions within the cap of a Flexible Permit. 30 Tex. Admin Code §§ 116.110(a)(3), 116.710(a). EPA long-ago made clear that States may have exemptions from Minor NSR requirements *only* if the State's regulations *expressly* prohibit the use of the exemptions to exempt any major source or major modifications from Major NSR requirements. 52 Fed. Reg. 45,044, 45,106/3 (Nov. 24, 1987).

The absence of sufficient regulatory language limiting the use of the Program stands in contrast with the provisions of the two federally-approved Texas Minor NSR programs designed to simplify permitting obligations. For example, the statute and regulations authorizing permits by rule expressly preclude their use for major modifications and require facilities to determine whether Major NSR requirements apply to the change in emissions. The relevant statute provides that the "Commission may not adopt a permit by rule authorizing any facility defined as 'major' under any applicable preconstruction permitting requirements of the federal [CAA] . . . or regulations adopted under that Act." Tex. Health & Safety Code § 382.05196. The Texas regulation addressing permits by rule similarly states that

“[a]ny facility or group of facilities, which constitutes a new major stationary source as defined in 40 [C.F.R.] § 52.21, or any change which constitutes a major modification, as defined in 40 C.F.R. § 52.21 must meet the permitting requirements of Chapter 116, Subchapter B [addressing NSR permits] of this title and cannot qualify for a permit by rule under this chapter.” 30 Tex. Admin. Code § 106.4(a)(3). *See also id.* at § 106.4(a)(2) (regarding NNSR). Because the applicable preconstruction permitting requirements of Chapter 116, Subchapter B of the Texas regulations require sources to determine if the requirements apply, the statute and regulations expressly preclude circumvention of that requirement. 30 Tex. Admin. Code §§ 116.111(a)(2)(H), (I).

The regulations governing standard permits also require a Major NSR applicability determination and expressly prohibit circumvention of Major NSR. Those regulations provide that any project that constitutes a major modification as defined by Texas regulations is subject to the requirements of § 116.110, relating to applicability of permits, rather than the subchapter relating to standard permits. 30 Tex. Admin. Code § 116.610(b).

In contrast, as discussed above, the Flexible Permit Program rules contain no analogous express prohibition on the use of the Program for major sources, and do not explicitly preclude owners or operators from circumventing the applicability

requirements of section 116.110, which addresses applications for NSR permits.

This lack of statutory or regulatory limitations on the Program creates unnecessary ambiguity, especially in light of the complexity of the program under which a Flexible Permit can cover hundreds of regulated units or emission points at very large sites.

While Texas and Industry Petitioners insist that the Flexible Permits Program cannot reasonably be read to evade Major NSR requirements, and while EPA agrees that the Program *should not* be read to evade Major NSR requirements, for the reasons set forth above, there is, at the very least, ambiguity on this point that is entirely avoidable. Given Congress' clear intention that the construction or modification of major sources be strictly regulated, it is therefore reasonable for EPA to insist that Texas amend the Program's rules to make it absolutely clear that the Program may never be used to evade applicable Major NSR requirements. This will avoid any potential confusion or misuse of the Program by the regulated community, and it should not be difficult for Texas to achieve because Texas and Industry Petitioners agree that the Program should not be used to evade Major NSR requirements.

B. The Flexible Permit Program's Rules Do Not Explicitly Require That the Holder of a Flexible Permit Must Comply With All of the Terms and Conditions of a Pre-existing Major NSR Permit.

Nothing in the Flexible Permit Program rules explicitly require that pre-existing permit terms and conditions for a source continue to apply once a Flexible Permit is issued for that source. *See generally*, Tex. Admin. Code Title 30, Pt. 1, Chapter 116, Subchapter G. Thus, the Program rules do not contain a requirement that a Flexible Permit holder must continue to comply with the terms and conditions of Major NSR permits when the major source is brought within a Flexible Permit. One significant purpose of the Major NSR program is to allow the relevant permitting authority to impose source-specific NSR terms and conditions in permits that are enforceable by States, EPA and citizens. 75 Fed. Reg. 41,321/1. For this reason, EPA has long interpreted the CAA to require that such terms and conditions must remain in effect because they are the legal mechanism through which the underlying Major NSR requirements are imposed upon major sources. *Id.* Therefore, the lack of such a requirement in the Flexible Permit Program is a fatal flaw because it could allow major sources to escape the requirements of their Major NSR permits, and EPA reasonably disapproved the Program for this reason. *Id.*^{8/}

^{8/} It is also a fatal flaw of the program with respect to pre-existing Minor NSR (continued...)

C. The Definition of “Account” Is Not Sufficiently Limited.

Texas broadly defines “account,” in pertinent part, as “any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.” 30 Tex. Admin. Code § 101.1(1). Thus, an account, for Texas NSR purposes, can include any combination of major and minor sources under common ownership or control and located on one or more contiguous properties. *Id.* A cap may apply to the entire account and therefore, emissions increases from any source within the account may be offset by emissions decreases from any other source within the account. *Id.* at § 116.710(a). This is in contrast to Major NSR requirements, which only allow emissions increases to be offset by emissions decreases from a stationary source within the same industrial grouping, *see* 40 C.F.R. §§ 51.165(a)(1)(i), (ii), 51.165(a)(1)(vi)(A), 51.166(b)(3), (5), (6). Therefore, the Program may interfere with Major NSR requirements by allowing emissions increases from one major stationary source to be offset by

^{8/}(...continued)

terms and conditions, the purpose of which is to ensure that the source does not violate a control strategy or interfere with attainment of the NAAQS. 75 Fed. Reg. at 41,332/2; 40 C.F.R. § 51.160(b). The Flexible Permit Program does not require that such pre-existing minor terms and conditions be carried over into a Flexible Permit. 75 Fed. Reg. at 41,332/1.

emissions decreases by another major stationary source in a different industrial grouping. EPA therefore reasonably disapproved the program in part due to its overly broad definition of account. 75 Fed. Reg. at 41,327 - 328.

D. Petitioners' Contrary Arguments Are Not Persuasive.

Petitioners both argue that the Flexible Permit Program Rules at 30 Tex. Admin. Code § 116.711 (8), (9), clearly establish that the Program is limited to minor sources. Texas Br. at 18; Industry Petitioners' Br. at 32. However, this is directly contrary to TCEQ's clear statement in its comments to EPA that while it has considered the Program to be a minor NSR program, "this is not specifically stated in the rule." App. P at 2. As shown above, the Program is unnecessarily ambiguous as to whether it is limited to Minor NSR, especially in light of the other Texas programs that contain more specific limiting statements in their rules.

Texas argues that the provisions for permits by rule and standard permits do not create any ambiguity because those two programs are authorizations claimed by an owner or operator through a registration process, where more strict language is necessitated, while the Flexible Permits Program results in authorizations issued individually by the State, where less strict language may suffice. Texas Br. at 22-23. This argument overlooks the fact that the Flexible Permit Program Rule which Texas claims establishes a clear limitation on the Program is contained in that

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portion of the Program Rules specifying the contents of an application for a Flexible Permit. See 30 Tex. Admin. Code §§ 116.711 (8), (9). The Flexible Permit Program Rules provide that a Flexible Permit *may* include a special, limiting condition only *if* the Executive Director makes a specific finding that Major NSR applies. *Id.* at § 116.715. Thus, the fact that the Flexible Permit Program results in individual authorizations by the State is of no moment because the Program rules do not clearly limit the State's authority to issue a Flexible Permit that circumvents Major NSR.

Industry Petitioners assert that neither the permits by rule program nor the standard permits program requires a Major NSR applicability determination. Industry Petitioners' Br. at 36 n.34. However, as discussed above, the standard permit regulations provide that any project that constitutes a major modification as defined by Texas regulations is subject to the requirements of § 116.110, relating to *applicability of permits*, rather than the subchapter relating to standard permits. 30 Tex. Admin. Code §116.610(b). The Texas regulation addressing permits by rule similarly requires that "[a]ny facility or group of facilities, which *constitutes a new major stationary source as defined*" in EPA's Major NSR Rules must comply with the Texas regulations relating to Major NSR. 30 Tex. Admin. Code § 106.4(a)(3). Thus, both provisions require that an applicability determination be made for Major

NSR, while the Flexible Permit Program rules do not. The Flexible Permit Program rules require only that a permit applicant demonstrate, in no particular fashion, that the relevant facility will comply with applicable requirements concerning nonattainment or PSD review. *Id.* at §§ 116.711 (8), (9).

Petitioners argue that the language EPA disapproved is inconsistent with EPA's approval of similar language in Texas' general Minor NSR regulations. Texas Br. at 21; Industry Petitioners' Br. at 35. However, the general Minor NSR regulations likewise apply to the permits by rule and standard permits programs, and, as shown above, Texas provided *additional* regulatory language limiting the use of those programs to Minor NSR which it did not include with respect to the Flexible Permits Program.

Petitioners also argue that EPA should have, but did not, defer to Texas' interpretation of the Flexible Permits Program.⁹ EPA recognizes that Texas currently interprets its Flexible Permits Program as applying only to Minor NSR, but EPA determined here, in light of the ambiguity created by the standard permits and permits by rule programs, discussed above, that the State's interpretation is not sufficient to support approval of the program. 75 Fed. Reg. at 41,329/2-3. SIPs and

⁹ Petitioners fail to recognize that EPA gets deference in interpreting state law provisions that are part of a SIP. *Sierra Club v. EPA*, 496 F.3d 1182, 1186 (11th Cir. 2007); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 498 (5th Cir. 1987).

their revisions must “be adopted as rules and regulations enforceable by the State agency.” 40 C.F.R. § 51.281. In light of the ambiguity created by the standard permits and permits by rule programs, Texas’ interpretation of the Flexible Permits Program is not based on sufficient text in an enforceable rule or regulation in the SIP revision at issue. EPA appropriately based its review on the revised SIP terms submitted by Texas and evaluated that submission against the federal statutory and regulatory requirements for a Minor NSR program. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981); 52 Fed. Reg. at 45,106/3 (explaining that States may have exemptions from Minor NSR requirements *only* if the State’s regulations *expressly* prohibit the use of the exemptions to exempt any major source or major modifications from Major NSR requirements.).^{10/}

Texas argues that the Flexible Permits Program ensures that all Major NSR permit terms and conditions carry over into a Flexible Permit. Texas Br. at 48-50. Texas appears to concede that facilities operating under Major NSR permits may be

^{10/} In *Florida Power*, EPA added a two-year limitation to a proposed Florida SIP revision that Florida did not submit to EPA as part of its proposed SIP revision. 650 F.2d at 584. The Court found that EPA abused its discretion by forcing Florida “to convert its state limitation on relief into a federally enforceable SIP provision.” *Id.* at 587. In the case of the Flexible Permits Program, EPA confined its review to the revised SIP terms submitted by Texas, consistent with *Florida Power*. EPA did not add language to the SIP revision based on its interpretation of the requirements of State law in order to make the SIP revision approvable.

brought within a Flexible Permit. *See id.* Texas argues that it lacks authority to eliminate any Major NSR permit provision and that the Program rules are otherwise sufficient to guard against this. *Id.* However, the entire purpose of the Flexible Permit Program is to allow sources to avoid *any* NSR review when they make changes to the otherwise applicable requirements of previous permits, such as, for example, for fuel types and hours of operation. Texas fails to explain how it maintains all terms and conditions of a Major NSR permit when it allows a source subject to a Major NSR permit to be brought within the Flexible Permits Program where the source may make *de facto* amendments to the terms and conditions of the pre-existing Major NSR permit without any further review by Texas. *See* 75 Fed. Reg. at 41,332/1. Moreover, as discussed in Argument II below, the monitoring, recordkeeping and reporting requirements of the Flexible Permits Program are insufficient to ensure that the Program is enforceable even with respect to wholly minor sources. Because it is not clear from the Program rules that the separate monitoring, recordkeeping and reporting requirement of Major NSR permits apply at all times after a major source becomes subject to a Flexible Permit, Texas cannot show that the Program ensures that *all* Major NSR requirements will continue to be met by Flexible Permit holders with major sources.

Industry Petitioners argue that EPA should have raised an issue with Texas'

definition of “account,” which EPA approved as part of Texas Title V program, when EPA approved Texas’ Major NSR rules. Industry Petitioners Br. at 53. However, a single Title V permit may be issued to the entire “account,” 75 Fed. Reg. at 41,328/1, and as Industry Petitioners point out, Texas’ Major NSR rules use the Federal term “major stationary source,” and not “account.” Thus, there was no reason for EPA to raise a concern with the definition of “account” in the Texas Title V program rules, or with the Texas’ Major NSR rules. Moreover, the fact that Texas’ Major NSR rules properly limit emissions trading between major stationary sources does not show that EPA’s determination in this case is arbitrary and capricious as Industry Petitioners assert. Industry Petitioners’ Br. at 54. The point is that a Flexible Permit holder might improperly disregard the Major NSR requirements, or wrongfully presume they do not apply, due to the overly broad definition of account within the Flexible Permit Program as it relates to major sources.

Nor is Texas’ intention that its broad definition of “account” should not be used by sources to interfere with Major NSR requirements sufficient. See Texas Br. at 56-58; Industry Petitioners’ Br. at 52, 55. Regardless of Texas’ intention, the Program rules do not contain sufficient regulatory text to make clear that sources may not use the broad definition of “account” to avoid Major NSR when

undertaking modifications under the Flexible Permit Program. 75 Fed. Reg. at 41,327/3.

Finally, EPA need not prove that the Program is actually used for major modifications. *See* Texas Br. at 31; Industry Petitioners' Br. at 40. Indeed, a State normally should not be implementing a SIP revision prior to its approval by EPA. *See General Motors Corp. v. United States*, 496 U.S. at 540 ("There can be little or no doubt that the existing SIP remains the 'applicable implementation plan' even after the State has submitted a proposed revision"). *See also* 75 Fed. Reg. at 41,325/2 ("Flexible Permits never should have been issued since the submitted Program is not part of the Texas NSR SIP."). Rather, EPA must review a SIP revision submission for its compliance with the CAA and its regulations. 42 U.S.C. § 7410(l); *American Cyanamid*, 810 F.2d at 495.^{11/} EPA properly disapproved the Flexible Permits Program because the Program is not expressly limited to Minor

^{11/} Industry Petitioners suggest that EPA has the authority to prevent a violation of Major NSR requirements, citing *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004). Among other things, the Supreme Court there held that EPA had the authority to guard against unreasonable federal BACT determinations in the context of EPA's review of a State-issued PSD permit. *Id.* at 489-90. The fact that EPA has the authority to guard against unreasonable federal BACT determinations is not relevant to EPA's independent authority and responsibility to review SIP submissions for their compliance with the CAA and its regulations.

NSR.^{12/}

III. EPA Reasonably Disapproved the Flexible Permit Program's Provisions for Monitoring, Recordkeeping and Reporting.

A. In Order to Be Enforceable, the Program Must Have Monitoring, Recordkeeping and Reporting Requirements that Are Commensurate With the Complexity of the Program.

As discussed, EPA has previously set forth its long-standing interpretation of the requirement in CAA section 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A), that SIPs contain enforceable measures. In its 1987 Enforceability Memorandum, EPA explained that SIPs must state explicitly those records sources are required to keep to assess compliance, that the records must be commensurate with regulatory requirements, and the SIP should specify the reporting formats. App. T at 9. With respect to monitoring, EPA explained that “[e]ach compliance provision [of the SIP] must list how compliance is to be determined and the appropriate test method to be used.” *Id.* at 10. EPA further explained that the test method must be sufficient to protect the relevant NAAQS. *Id.*

^{12/} Industry Petitioners assert that regulated sources agree with TCEQ that the Flexible Permit Program does not supplant Major NSR requirements. Industry Petitioners’ Br. at 40. However, neither Industry Petitioners nor the commenters they cite speak for the entire regulated community in Texas. Regardless, what regulated sources may or may not represent that the Program provides is irrelevant to EPA’s determination, which must be based upon the Programs’ rules, both on their face and in relation to other relevant SIP provisions.

EPA set forth fundamental principles for judging all SIP revisions' compliance with CAA section 110's requirements in its General Preamble. EPA explained that measures are enforceable when they are "duly adopted, and specify clear, unambiguous, and measurable requirements." 57 Fed. Reg. at 13,568. EPA further explained that in order to be enforceable, a SIP must contain "a legal means for ensuring that sources are in compliance with the control measures[,] . . . [and a] regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit." *Id.* Another key principle is that the measure be replicable. "This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." *Id.* The control strategy must also be accountable. Among other things, this means that the SIP must contain means "to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan." *Id.* While all control measures must be enforceable, the level of complexity of a particular program is relevant to the level of complexity of SIP components designed to ensure enforceability, such as monitoring, recordkeeping and reporting requirements.

As described in the Background Section above, the Flexible Permits Program

is completely different from general Minor NSR programs because its express purpose is to take the place of any further NSR review for unlimited changes at numerous facilities covered by an emissions cap under a Flexible Permit, as long as the net emissions do not exceed the cap. Thus, an inspector cannot determine compliance simply by looking at the compliance documentation of one emissions unit or facility. Rather, because hundreds, or even thousands of facilities may be covered under a cap, and because changes may occur on a frequent basis, there must be sufficiently detailed and strict monitoring, recordkeeping and reporting requirements to make the Program enforceable, and to ensure that changes under the Program will not violate a control strategy or interfere with attainment of the NAAQS consistent with CAA section 110(l), 42 U.S.C. § 7410(l), and 40 C.F.R. § 51.160(b). 75 Fed. Reg. at 41,331/1. *See also* 57 Fed. Reg. at 13,568 (SIP must contain “a legal means for ensuring that the sources are in compliance with the control measures[,] . . . [and] means “to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan.”).

B. The Program’s Monitoring, Recordkeeping and Reporting Requirements Are Not Sufficient to Ensure That Flexible Permits Contain Enforceable Limits.

The Flexible Permit Program’s monitoring, recordkeeping and reporting

requirements lack such detail. Rather, the Program rules contain only a general condition requiring the permit holder to keep a copy of the Flexible Permit at the plant site along with unspecified information and data sufficient to demonstrate continuous compliance with the emission cap and individual emissions limitations contained in the permit. 30 Tex. Admin. Code at § 116.715(c)(6). The rules do not specify how this information is to be obtained or in what form it is required to be maintained, but the information “may include” emission cap and individual emission limitations calculations based on a 12-month rolling basis and production records and operating hours. *Id.*

The Program rules provide that the application for a Flexible Permit must contain a statement that the “facility, group of facilities, or account will have provisions for measuring emission of air contaminants as determined by the executive director.” *Id.* at § 116.711(2). The rules do not specifically require the Executive Director to establish such conditions. Rather, the rules provide that the permit application must provide for it. *See id.* The rules also do not specify any particular methods for measuring emissions from which the Executive Director must chose if he or she determines to impose any methods at all. *See id.* Rather, the Executive Director has unfettered discretion as to whether any specific monitoring requirements will be imposed in a particular Flexible Permit and what

those monitoring requirements will be, with no menu from which to choose any particular monitoring requirements specifically designed to ensure compliance with this type of program. Nor are there even minimal criteria to guide the Executive Director's discretion. For example, there is no requirement that monitoring systems be based upon sound science and meet generally acceptable scientific procedures for data quality and manipulation, or that the information generated must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit. *See id.* Similarly, sampling may or may not be required. *Id.* at 116.715(c)(4).

EPA therefore reasonably disapproved the Flexible Permits Program as a Minor NSR program in part because the Program's monitoring, reporting, and recordkeeping requirements are insufficient to ensure that the Program is enforceable. 75 Fed. Reg. at 41,331. EPA determined that the Program fails to identify any specific monitoring approaches, let alone identify the technical specifications for any particular monitoring system, or provide replicable procedures for any alternative monitoring system. *Id.* EPA found that the Program lacks replicable procedures to ensure monitoring will be sufficient to determine that emissions are accurately measured, that monitoring will be based upon sound science and meet generally accepted procedures for data quality and manipulation,

and that the information generated through monitoring will meet minimum legal requirements for admissibility in a judicial proceeding to enforce a Flexible Permit. *Id.* Due to these deficiencies, EPA determined that the Program fails to prohibit a Flexible permit that could interfere with a NAAQS or violate a control strategy under 40 C.F.R. § 51.160(b).

All of these findings are supported by the Administrative Record because, as discussed above, the Program's plain language leaves it entirely up to the Executive Director's unfettered discretion as to whether monitoring will be required, and it requires no particular types of monitoring systems be employed in those circumstances when monitoring is required. 30 Tex. Admin. Code § 116.711(2). While the rules require that a permittee maintain sufficient information to demonstrate continuous compliance with the emission cap and individual emissions limitations contained in the permit, the rule leaves it entirely up to the permittee as to how the information will be generated, what form it will take and how it will be maintained. *id* § 116.715(c)(6). There is no requirement that the information be scientifically valid or meet minimum requirements for admissibility in court. Thus, a general requirement that a permittee maintain documents is not sufficient to ensure a Flexible Permit is enforceable. *Cf. Sierra Club v. TVA*, 430 F.3d at 1348 ("The Clean Air Act does not assume an accepted level of undetected non-

compliance; it provides that there is to be continuous compliance with pollution limitations.”).

EPA’s findings are also completely consistent with its long-standing interpretation of the CAA to require clear, replicable and accountable procedures to ensure that a SIP’s control measures are enforceable. 57 Fed. Reg. at 13,568; App. T at 9. The Program’s monitoring, recordkeeping and reporting requirements are not replicable or accountable. They are not replicable because they are not “sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result.” 57 Fed. Reg. at 13,568. They are not accountable because they do not require a means “to track emissions changes at sources and provide for corrective action” if emission exceed the cap. *Id.* Therefore, EPA’s determination should be upheld.

A comparison to the Plant-wide Applicability Limits (“PAL”) program demonstrates the reasonableness of EPA’s determination. While PAL relate to major sources, and while EPA recognized that the Flexible Permits Program is not a PAL program, EPA’s PAL regulations’ monitoring, recordkeeping and reporting requirements add context to EPA’s decision in this case because PAL programs establish a source-wide emissions limitation and allow for changes within that limitation. 40 C.F.R. § 51.165(f)(2)(v) (definition of PAL). Under the PAL

program, a change does not increase net emissions and thereby trigger NSR as long as the source-wide emissions are below the PAL emissions limit established in the PAL permit. *New York v. EPA*, 413 F.3d 3, 36 (D.C. Cir. 2005) (per curium) (upholding EPA's PAL regulations). It is therefore similar in concept to the Texas Flexible Permits program in that both establish an emissions limit, or cap, for numerous emissions points and allow for changes without NSR review as long as the overall emissions are below the limit or cap.

The PAL regulations set forth detailed requirements for monitoring systems, and require that one of four specific types of systems be used, such as, for example, continuous emissions monitoring systems ("CEMS"), which, as the name implies, simultaneously monitor all emissions units on a continuous basis. 40 C.F.R. § 51.165(f)(12)(i)(B). While the PAL regulations provide that alternative monitoring approaches may be used, such systems must be based upon sound science and meet generally acceptable scientific procedures for data quality and manipulation, and the information generated must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit. *Id.* at § 51.165(f)(12)(i)(C). PAL programs must also provide for extensive recordkeeping and reporting requirements. *Id.* at §§ 51.165(f)(13), (14).

In response to a comment by industry commenters, EPA compared the

Flexible Permits Program's monitoring provisions to those for a valid PAL program. 75 Fed. Reg. at 41,317/2-3. EPA found that the Flexible Permits Program's monitoring provisions fell far short of those that would be required by a valid PAL program because, as discussed above, the Flexible Permit program leaves every decision with respect to monitoring systems completely up to the Executive Director's discretion. *Id.* Indeed, in contrast to the flexibility for discretionary monitoring systems allowed under the PAL regulations, there is no requirement in the Flexible Permit Program that such systems must be based upon sound science and meet generally acceptable scientific procedures for data quality and manipulation, or that the information generated must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit. *Id.*

While the Flexible Permits Program is not a PAL, and need not meet all of the PAL's monitoring requirements in order to be approvable, it must require sources to employ monitoring systems that will ensure Flexible Permits are enforceable. 42 U.S.C. § 7410(a)(2)(A). However, there is no guarantee of that under the Texas Program because everything is left to the Executive Director's discretion, including whether to have a monitoring system at all. It is of no moment that the PAL regulations are for major sources because a Flexible Permit may cover

major sources and because even a minor source program must have enforceable requirements. *Id.* A fatal flaw in the Flexible Permits Program is its lack of any requirement that sources employ monitoring systems that will ensure a Flexible Permit's limits are enforceable, and EPA reasonably disapproved the Program as a minor NSR program for this reason.^{13/}

C. Petitioners Do Not Show That EPA's Final Rule Is Arbitrary and Capricious With Respect to the Monitoring, Recordkeeping and Reporting Requirements.

Petitioners attack EPA's determination with respect to the Program's monitoring, recordkeeping and reporting requirements on several grounds, none of which has merit. Petitioners repeatedly argue that EPA's determination must be arbitrary and capricious because EPA previously approved similar monitoring,

^{13/} Texas argues that EPA acted arbitrarily when it compared the Flexible Permits Program to the PAL program. Texas Br. at 54-55. However, as discussed above, the PAL program provides an excellent basis for comparison to the Flexible Permits Program because both programs establish a source-wide limit and allow the source flexibility to increase and decrease individual emissions units as long as they stay within the limit. The fact that Texas established the Flexible Permits Program before EPA established the PAL program regulations makes no difference. Texas Br. at 55. In 1994, EPA specifically told Texas that it may need to revise the Flexible Permit Program after EPA's NSR Reform Subcommittee issued recommendations to revise the various NSR programs. App. C (AR Doc. 72, Letter from Thomas H. Diggs, EPA, to Jodena N. Henneke, Texas Natural Resource Conservation Commission (Oct. 31, 1994)). Texas' other assertions, that the PAL program is for major sources and that it allows for flexibility in monitoring, are addressed above.

recordkeeping and reporting requirements in the States' general Minor NSR rules. Texas Br. at 36, 37-38, 40, 47; Industry Petitioners' Br. at 42-44. These arguments should be rejected for two reasons.

First, Petitioners failed to raise this argument to EPA during the public comment period on the final rule challenged here. Therefore, the Court should refuse to consider the arguments. *Louisiana Env'tl. Action Network v. EPA*, 382 F.3d at 584 (“[Petitioner] has waived this argument because it failed to raise the challenge before the EPA during the comment period on the final rule . . .”).

Second, the arguments are not valid, and EPA would have so explained if Petitioners had raised the argument during in their comments on this rule. The monitoring, recordkeeping and reporting requirements referred to by Petitioners were substantively approved into the Texas SIP prior to 1983. Since that time, EPA has determined that SIP requirements that are entirely left up to an executive director's discretion are generally not sufficiently enforceable to be approved into a SIP. *See* 71 Fed. Reg. 7,683, 7,686 (Feb. 14, 2006) (“Provisions allowing for a degree of . . . discretion may be considered appropriate if explicit and replicable procedures within the rule tightly define how the discretion will be exercised . . .”). Indeed, it is EPA's intention to take action in the future to address existing State regulations allowing for executive director discretion. *See* 42 U.S.C. § 7410(k)(6).

Moreover, the Flexible Permits Program is far different than a general Minor NSR permitting program. It is much easier to determine compliance with one source under a general Minor NSR permit than it is with multiple sources under the umbrella of one Flexible Permit. 75 Fed. Reg. at 41,323/1 (“Without the appropriate MRR requirements, it is generally impractical to determine if a covered unit is subject to the cap or an individual emission limitation, if a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies at what time.”). The Flexible Permit Program allows for changes at numerous sources on a frequent basis as long as the resulting emissions stay under the cap in the Flexible Permit. The inherent enforceability issues associated in tracking plant-wide emissions in the face of such changes under a Flexible Permit are much more akin to those of a PAL permit than a general NSR permit, and, as with the PAL program, more specific monitoring requirements are necessary to ensure Flexible Permits are enforceable. *See id.* at 41,317/2-3. *See also* 74 Fed. Reg. at 48,492-493 (providing an example of the difference between demonstrating compliance for one emissions point as opposed to an emissions cap with numerous emissions points).^{14/}

^{14/} Industry Petitioners cite EPA’s evaluation of 6 flexible type permits in other States to assert that inspecting flexible permits is comparable to inspecting conventional permits. Industry Petitioners’ Br. at 51. However, most of those permits required daily calculation of emissions and frequent reporting of
(continued...)

Therefore, even if the Court considers Petitioners' arguments regarding EPA's previous approval of the State's general Minor NSR monitoring, recordkeeping and reporting requirements, which it should not, it should reject those arguments.^{15/}

Texas and Industry Petitioners also argue that EPA has impermissibly attempted to impose particular monitoring, recordkeeping and reporting requirements upon Texas and that EPA is powerless to do so. Industry Petitioners' Br. at 45 ("There is no statutory authority or regulatory authority for EPA's insistence that Texas specify in its *regulations* particular methods of monitoring, reporting and recordkeeping."); Texas' Br. at 39 ("[T]here is no legal basis for EPA

^{14/}(...continued)

emissions. App. S at 51, Table 2.1. This is far more than the Flexible Permits Program, which *may* require emissions limitation calculations on a 12-month rolling average and which contains no reporting requirements at all. See Texas Admin Code § 116.715(c)(6).

^{15/} Texas argues that Flexible Permits are no more complex than case-by-case permits subject to its general Minor NSR monitoring, recordkeeping and reporting requirements because either type of permit may apply to hundreds of dissimilar emission points that vary in size and type of operation. Texas Br. at 38-39. Texas also argues that if one can track compliance with 20 individual emissions limitations under a general NSR permit, then by mere addition one can do so with a cap covering 20 emissions points. This argument misses the boat because tracking continuous changes back and forth under the Flexible Permits Program is not a matter of mere addition. Rather, it is a matter of constant addition and subtraction and comparison of emissions across potentially very large facilities containing hundreds of dissimilar emissions points that vary in size and type of operation. It is inherently more difficult to track compliance under the Flexible Permits Program than it is with an individual minor NSR permit, or even 20 such individual permits.

to demand specific and detailed monitoring, recordkeeping, and reporting requirements.”). Of course, EPA has not specified any particular monitoring, recordkeeping and reporting requirements that Texas must adopt in order for EPA to approve the Flexible Permits Program, and Petitioners’ arguments are therefore incorrect. Rather, under 42 U.S.C. § 7410(a)(2)(B), a State’s SIP must include enforceable measures, and EPA has appropriately exercised its oversight authority to disapprove the monitoring, recordkeeping and reporting requirements of the Flexible Permits Program because they fail to meet this statutory benchmark.

Petitioners’ argument that EPA has impermissibly intruded upon Texas’ policy choices in determining appropriate control measures fails for similar reasons. Texas Br. at 45; Industry Petitioners’ Br. at 45-46. While it is true that “the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements,” *BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003), Congress has entrusted EPA with an oversight role to ensure the statutory requirements are met. 42 U.S.C. § 7410(k)(3) (“[T]he Administrator shall approve such submittal . . . if it meets . . . the applicable requirements of this chapter.”); *Union Elec. Co. v. EPA*, 427 U.S. at 256-57 (1976); *Michigan Dept. of Env’tl. Quality v. Browner*, 230 F.3d at 185 (“Although the CAA grants states considerable latitude, it ‘nonetheless subjects the states to

strict minimum compliance requirements,’ adherence with which must be determined by the EPA.”) (quoting *Union Electric*, 427 U.S. at 256-57).

One of those requirements is that the control measures in the plan must be enforceable. 42 U.S.C. § 7410(a)(2)(A). As discussed above, EPA reasonably determined that the monitoring, recordkeeping and reporting provisions of the Flexible Permits Program are insufficient to ensure that the Program meets the minimum statutory requirement that Flexible Permits be enforceable. EPA therefore acted well within the authority provided by Congress when it disapproved those provisions of the Program.

Moreover, Petitioners’ arguments that the monitoring, recordkeeping and reporting requirements are enforceable when considered together with other provisions of the Flexible Permits Program lack merit. Texas Br. at 45-47; Industry Petitioners’ Br. at 47-48. Simply put, it makes no difference what a permit applicant represents in its application for a Flexible Permit, or what other special conditions Texas may (or may not) impose in a Flexible Permit if there are insufficient monitoring, recordkeeping and reporting requirements from which the State, EPA, or a citizen plaintiff can determine if compliance is being achieved and prove any violation.

Texas argues that EPA’s final rule is arbitrary because it is impractical for

Texas to develop more detailed monitoring, recordkeeping and reporting requirements for the Flexible Permits Program due to the diverse sources that may wish to use the Program. Texas Br. at 41. Texas also notes that EPA's PAL regulations allow for the exercise of discretion in the specification of alternative monitoring approaches than those specifically listed in the regulations. *Id.* at 42. However, the PAL regulations demonstrate that there are generally available monitoring systems that are appropriate for this type of program, such as CEMS. Indeed, in its comments to EPA, TCEQ stated that it often requires several specific types of monitoring systems, including CEMS. App. P at 3.

Given the list of acceptable monitoring systems in the PAL rule and Texas' claim that it often requires similar types of monitoring systems, Texas cannot reasonably claim that it is impractical for Texas to develop a rule limiting the Executive Director's discretion to require specific types of monitoring systems that are suitable for the Program. Texas could also allow for alternative approaches as the PAL regulations do. However, as discussed above, the PAL regulations require that alternative monitoring systems be based upon sound science, meet generally acceptable scientific procedures for data quality and manipulation, and that the information generated must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the underlying permit. While the Flexible Permits

Program fails to meet these minimal criteria, nowhere does Texas explain why these minimal criteria for a monitoring system are not reasonable ones to judge a permitting scheme's enforceability under CAA section 110(a)(2), or why it would be impractical to require that monitoring systems under the Flexible Permits Program meet these basic criteria for enforceability. Texas' arguments should therefore be rejected.

IV. EPA Reasonably Determined That the Flexible Permits Program Fails to Describe in Sufficient Detail the Calculation Methodologies and Underlying Analyses Used to Determine the Cap.

While it is clear from the Program rules that a Flexible Permit is to contain a cap based upon the emissions limitations from applying State BACT to the facilities covered under a Flexible Permit, EPA determined that the Program lacks sufficient detail as to how the summation is to be done. The Program allows the Permit applicant to determine what facilities are covered under a Flexible Permit, and it allows for multiple permutations with respect to how different facilities are covered. For example, a Flexible Permit may be issued for a facility, group of facilities or an account. 30 Tex. Admin. Code § 116.710(a). A Flexible Permit may contain a pollutant specific emissions cap, or multiple emissions caps and/or individual emissions limitations for each air contaminant for all facilities authorized under the Flexible Permit. *Id.* at § 116.715(b). The Program rules do not contain specific,

established, replicable procedures for determining independently, and for different scenarios, how the State will calculate a Flexible Permit's cap, especially in the case of "multiple emissions caps," a term which is not even defined under the Program. *See* 74 Fed. Reg. at 48,491-492. It is entirely unclear under the Program rules how the cap, individual emissions limits, and multiple caps are to be established in a situation where there is more than one plant on the site, major sources on the site, or a facility within a major source on the site. *Id.* at 48,491/3. Indeed, the State failed to clarify in its comment letter whether the cap includes the summation of not only the minor stationary sources and minor modifications, but also the Major sources and major modifications. *See* App. P; 75 Fed. Reg. at 41,322/2.

The State's brief further muddies the waters by stating "[a]lthough major new source review authorization is distinct from the Program's minor new source review authorization . . . TCEQ's practice is to include both authorizations within the same document." Texas Br. at 11 (emphasis in original).^{16/} This begs the question of how major source emissions limits are treated vis-a-vis the cap, and EPA therefore reasonably disapproved the Program because it lacks sufficient detail of how the cap is to be determined in all circumstances.

^{16/} Texas elsewhere argues that the cap includes the summation of all facilities under the cap, which also does not directly answer the question of how major sources are supposed to fit within, or outside of, the cap. Texas Br. at 53.

EPA has made clear that if a cap or “bubble” is to be used in circumstances such as for the Program, where no case-by-case EPA approval is required, then “specific objective and replicable criteria must be set forth for determining whether the new arrangement is truly equivalent in terms of emission rates and ambient impact.” App. T at 9. While Texas asserts that these criteria are satisfied because it applies State BACT, Texas Br. at 52, this does not answer the question of how a cap, individual emissions limits, and multiple caps are to be established in a situation where there is more than one plant on the site, major sources on the site, or a facility within a major source on the site. 74 Fed. Reg. at 48,491/3. Moreover, Texas wrongly asserts that there is no requirement that EPA or the public should be able to independently calculate an emissions cap and reach the same conclusion as Texas. Texas Br. at 53. However, this is precisely what EPA meant when it stated that “replicable” criteria must be established. App. T at 9; 57 Fed. Reg. at 13,568 (defining “replicable” to mean that “the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result.”). Thus, Texas is incorrect, and EPA reasonably disapproved the Program in part because it is not clear in all circumstances how the cap is to be established.

V. EPA's Failure to Meet the Statutory Deadline for Final Action On The SIP Revision Is Irrelevant to the Merits of These Cases.

All Petitioners argue that the Court should take into account EPA's delay in taking action on the Program, and that EPA has impermissibly ignored how the Program has actually been implemented along with what Petitioners claim are air quality improvements due to the Program. Texas' Br. at 58-61; Industry Petitioners' Br. at 55-57. Petitioners' arguments overlook the fact that the CAA anticipates that SIP revisions should not be implemented until they are approved by EPA. Moreover, Congress has provided an alternative remedy for those instances in which EPA fails to act on a SIP submission by the statutory deadline, and Petitioners fail to show that any air quality improvements are due to the Flexible Permits Program.

As the Supreme Court has made clear, "the approved SIP is the applicable [SIP] during the time a SIP revision proposal is pending." *General Motors Corp. v. United States*, 496 U.S. at 540. Moreover, under CAA section 116, a State may not implement any emission limitation that is less stringent than the applicable, approved SIP. 42 U.S.C. § 7416. CAA section 116 clearly applies to the Flexible Permits Program because its whole purpose is to exempt changes under the cap from otherwise applicable NSR. Therefore, Texas should never have implemented the Flexible Permits Program while EPA's review of the Program was

pending. See 75 Fed. Reg. at 41,325/2 (“Flexible Permits never should have been issued since the submitted Program is not part of the Texas NSR SIP.”).^{17/}

Accordingly, the fact that Texas jumped the gun under the statutory scheme is not a basis to overturn EPA’s disapproval of the Flexible Permits Program.^{18/} Likewise, given that Congress intended that SIP revisions not be implemented until approved by EPA, it was not arbitrary and capricious for EPA to limit its review to the Program rules, as opposed to how Texas may or may not have implemented the Program. See *General Motors*, 496 U.S. at 540. See also 42 U.S.C. § 7410(k)(3) (EPA is to approve or disapprove *the submittal*). Rather, Texas and the sources that have relied upon Program did so unreasonably because the Program has not

^{17/} As previously shown, in 1994, EPA warned Texas that it may need to revise the Flexible Permit Program before it could be approved, and indicated that Texas should wait for on-going analysis to conclude before adopting the Program. *Supra*, n. 13. Thus, contrary to Petitioners’ assertions, EPA has not encouraged Texas’ use of the Program. Nor did EPA impermissibly base its disapproval on programs that did not exist. *Industry Petitioners Br.* at 57-58. As discussed above, EPA based its disapproval on its long-standing interpretation of the CAA’s requirements, and it reasonably used other programs, such as the PAL program, as a basis for comparison of what approvable measures might provide for.

^{18/} Industry Petitioners’ argument that EPA has retroactively disapproved the Program is clearly wrong, because the Program should never have been implemented in the first place. *Industry Petitioners’ Br.* at 58-59.

been approved.^{19/}

In addition, Congress has established an alternative remedy for those instances in which EPA fails to take action on a SIP submission by the statutory deadline for doing so. In those instances, a party with standing may bring a mandatory duty suit in Federal district court under 42 U.S.C. § 7604(a)(2), which some of the Industry Petitioners availed themselves of with respect to EPA's delay in acting on the Program. *See BCCA Appeal Group v. EPA*, No. 3:08-cv-01491-G (N.D. Tex.).

In *General Motors*, the Court held that EPA could not be barred from enforcing an existing federally enforceable SIP even if EPA had unreasonably delayed action on a proposed SIP revision. *Id.* at 540-42. The Court reasoned that the existing SIP remains the applicable implementation plan even after the State submits a proposed revision, and it found nothing in the CAA to suggest that Congress intended to limit EPA's authority to enforce the currently applicable SIP

^{19/} Texas incorrectly argues that EPA attempts to have it both ways because EPA summarized a comment asserting that the Program is *not* properly implemented. Texas Br. at 59. EPA was merely responding to the comment and it made clear that implementation of the Program is irrelevant to its final action on the SIP submission. 75 Fed. Reg. at 41,327/1. EPA also fairly summarized Texas' comments regarding how it claims to have implemented the Program. *Id.* at 41,320 ("While it is commendable that TCEQ may implement the Program in a manner consistent with the Federal Major NSR requirements, we cannot approve the Program as submitted.").

when it has unreasonably delayed acting on a SIP revision. *Id.* at 540-41. The Court specifically noted that the statutory remedy for EPA inaction is a mandatory duty claim in federal district court under 42 U.S.C. § 7604(a)(2). *Id.* at 541-42 n.4.

Therefore, the mere fact that EPA missed the statutory deadline for taking action on the Flexible Permits Program is not a basis to overturn EPA's final rule because nothing in the CAA suggests EPA loses its authority to disapprove a SIP revision if it misses the statutory deadline, *see* 42 U.S.C. § 7410(k) (containing no such limitation), and Congress has provided an alternative remedy for that eventuality.

Finally, while Industry Petitioners claim that the Flexible Permits Program has resulted in improved air quality, they cite nothing in the Record which ties any significant improvements to the Program, and they provided no such information during the rulemaking. *See* Industry Petitioners' Br. at 56-58; 75 Fed. Reg. at 41,318/2 (noting that Industry commenters had failed to submit data showing that improvements to air quality were attributable to the Program as opposed to SIP approved control strategies). While Texas points to two facilities, which it claims to have made emissions reductions under the Program, these limited examples are not necessarily indicative of the Program in general. Texas' Br. at 60. Moreover, regardless of whether the Program has resulted in some emissions decreases in particular instances, EPA reasonably disapproved the Program for the reasons

discussed above, including its failure to contain sufficient monitoring, recordkeeping and reporting requirements and its overly broad definition of “account.” The Court should therefore uphold EPA’s disapproval of the Flexible Permits Program.

CONCLUSION

For all these reasons, the Court should deny the Petitions for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 22nd day of February, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

s/ David A. Carson

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 13,963 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ David A. Carson

ADDENDUM

Citation

75 Fed. Reg. 41,312

5 U.S.C. § 706

42 U.S.C. § 7410

42 U.S.C. § 7416

40 C.F.R. § 51.160

40 C.F.R. § 51.161

40 C.F.R. § 51.162

40 C.F.R. § 51.163

40 C.F.R. § 51.164

40 C.F.R. § 51.165

40 C.F.R. § 51.166

40 C.F.R. § 51.281

Tex. Health & Safety Code § 382.05196

30 Tex. Admin. Code § 101.1

30 Tex. Admin. Code § 106.4

30 Tex. Admin. Code § 106.163

30 Tex. Admin. Code § 106.436

30 Tex. Admin. Code § 116.10

30 Tex. Admin. Code § 116.13

30 Tex. Admin. Code § 116.110

30 Tex. Admin. Code § 116.111

30 Tex. Admin. Code §116.610

30 Tex. Admin Code § 116.710

30 Tex. Admin. Code § 116.711

30 Tex. Admin. Code § 116.714

30 Tex. Admin Code § 116.715

30 Tex. Admin Code § 116.716

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52****[EPA-R06-OAR-2005-TX-0032; FRL-9174-1]****Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: EPA is taking final action to disapprove revisions to the SIP submitted by the State of Texas that relate to the State's Flexible Permits Program (the Texas Flexible Permits Program or the Program). EPA is disapproving the Texas Flexible Permits Program because it does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision. We are taking this action under section 110, part C, and part D, of Title I of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on August 16, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2005-TX-0032. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air 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 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 record, are also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7212; fax number 214-665-7263; e-mail address spruiell.stanley@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, the following terms have the meanings described below:

- “we,” “us,” and “our” refer to EPA.
- “Act” and “CAA” mean the Federal Clean Air Act.
- “40 CFR” means Title 40 of the Code of Federal Regulations—Protection of the Environment.
- “SIP” means State Implementation Plan established under section 110 of the Act.
- “NSR” means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA Title I, section 110(a)(2)(C) and parts C and D, and 40 CFR 51.160 through 51.166.
- “Minor NSR” means NSR established under section 110 of the Act and 40 CFR 51.160.
- “NNSR” means nonattainment NSR established under Title I, section 110 and part D of the Act, and 40 CFR 51.165.
- “PSD” means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act, and 40 CFR 51.166.
- “Major NSR” means any new or modified source that is subject to NNSR and/or PSD.
- “Program” means the SIP revision submittals from the TCEQ concerning the Texas Flexible Permits State Program.
- “TSD” means the Technical Support Document for this action.
- “NAAQS” means any national ambient air quality standard established under 40 CFR part 50.
- “MRR” means monitoring, reporting, and recordkeeping requirements.

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EPA is taking final action to disapprove the Texas Flexible Permits State Program, as submitted by Texas on November 29, 1994, as revised by severable portions of the March 13, 1996, SIP revision submittal, and severable portions of the July 22, 1998 SIP revision submittal that repealed and replaced portions of, as well as revised, the 1994 submittal and repealed and replaced all of the 1996 submittal; and as revised by severable portions of the October 25, 1999; September 11, 2000; April 12, 2001; September 4, 2002; October 4, 2002; and September 25,

2003; SIP revision submittals. These submittals include revisions to Title 30 of the Texas Administrative Code (30 TAC) at 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. This includes the following regulations under Chapter 116: 30 TAC 116.110(a)(3), 30 TAC Subchapter G—Flexible Permits, the definitions in 30 TAC 116.13—Flexible Permit Definitions, and the definition in 30 TAC 116.10(11)(F) of “modification of existing facility.” These State regulations and definitions do not meet the requirements of the Act and EPA’s NSR regulations. EPA has concluded that none of these identified elements for the submitted Flexible Permits Program is severable from each other.

EPA proposed an action for the above SIP revision submittals on September 23, 2009 (74 FR 48480). We accepted comments from the public on this proposal from September 23, 2009, until November 23, 2009. A summary of the comments received and our evaluation thereof is discussed in section III below. In the proposal and in the Technical Support Document (TSD), we described our basis for the actions identified above. The reader should refer to the proposal, the TSD, section IV of this preamble, and the Response to Comments in section III of this preamble for additional information relating to our final action.

EPA is disapproving the submitted Texas Flexible Permits State Program as not meeting the requirements for a Minor NSR SIP revision. Our grounds for disapproval as a Minor NSR SIP revision include the following:

- The submitted Program has no express regulatory prohibition clearly limiting its use to Minor NSR and has no regulatory provision clearly prohibiting the use of this submitted Program from circumventing the Major NSR SIP requirements, thereby potentially exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;

- It is not an enforceable NSR permitting program. The submitted Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or by a holder of a Flexible Permit, and it cannot assure compliance with the Program or of the affected source;

- It lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements

required for this type of Minor NSR program, as selected by Texas, to ensure accountability and provide a means to determine compliance. The submitted Program is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit;

- It lacks replicable, specific, established implementation procedures for establishing the emissions cap in a Minor NSR Flexible Permit;

- It fails to ensure that the terms and conditions of Major NSR SIP permits are retained. Major stationary sources and major modifications can use this submitted Program to fundamentally change the way they comply with specific terms and conditions established in their Major NSR SIP permits. Holders of Major NSR SIP permits are not prohibited from using the submitted Program’s allowables-based emissions cap. The Act prohibits the use of an allowables-based cap for Major NSR SIP permittees;

- It fails to meet the statutory and regulatory requirements for a Minor NSR SIP revision and is not consistent with EPA policy and guidance on Minor NSR SIP revisions; and

- Based upon, among other things, the lack of any objective, replicable methodology for establishing the emission cap, the too broad director discretion provision regarding whether or not to include MRR conditions in a Flexible Permit, the lack of sufficient MRR requirements for this type of permit program, and the lack of enforceability, EPA lacks sufficient information to determine that the requested revision to add the new permit option to the Texas Minor NSR SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other requirement of the Act.

We are disapproving the submitted Texas Flexible Permits State Program as

not meeting the requirements for a substitute Major NSR SIP revision. EPA understands that the TCEQ intended for the submitted Program to be a Minor NSR program but we are required to review it as a substitute Major NSR SIP revision because the State should have included express language stating that, as it did in the two other Minor NSR SIP alternative permit options (Standard Permits and Permits by Rule), that the submitted Program is clearly limited to Minor NSR and prohibits circumvention of Major NSR. Our grounds for disapproval as a substitute Major NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby potentially exempting new major stationary sources to construct and major modifications to occur without a Major NSR permit;

- It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements, thereby allowing sources to use a Flexible Permit to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;

- It does not include a demonstration from the TCEQ, as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), showing how the use of “modification” is at least as stringent as the definition of “modification” in the EPA Major NSR SIP program and meets the Act;

- It does not include a demonstration from the TCEQ, as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), showing the submitted Program is at least as stringent as the EPA Major NSR SIP program;

- It does not include the requirement to make Major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source;

- To the extent that major stationary sources and major modifications are exempted from Major NSR, it fails to meet the statutory and regulatory requirements for a Major NSR SIP revision and is not consistent with EPA policy and guidance on Major NSR SIP revisions;

- Because it fails to include, among other things, the required demonstration from the State showing how the customized Major NSR SIP revision is in fact as stringent as EPA’s Major NSR revised program, any objective, replicable methodology for calculating the emissions cap, provides too broad director discretion regarding whether or not to include monitoring, recordkeeping, and reporting (MRR)

conditions in a Flexible Permit, lacks sufficient MRR requirements for this type of permit program, and is not enforceable, EPA lacks sufficient information to make a finding that the submitted Program will ensure protection of the national ambient air quality standards (NAAQS), and noninterference with the Texas SIP control strategies and RFP.

The provisions in these submittals relating to the Texas Flexible Permits State Program that include the Chapter 116 regulatory provisions and the nonseverable definitions in the Flexible Permits Definitions and the General Definitions were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to

disapprove the submitted Texas Flexible Permits State Program does not trigger a sanctions or Federal Implementation Plan clock. See CAA section 179(a).

II. What is the background?

A. Summary of Our Proposed Action

On September 23, 2009, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to the Flexible Permits Program. These affected provisions include regulatory provisions at 30 TAC 116.110(a)(3) and 30 TAC Subchapter G—Flexible Permits, definitions in 30 TAC 116.13, Flexible Permits Definitions, and a nonseverable portion of the definition at subparagraph 116.10(11)(F) of “modification of

existing facility” under Texas’s General Definitions in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions are not severable from each other.

B. Summary of the Submittals Addressed in This Final Action

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA’s evaluation of each section and the basis for this final action is discussed in sections III through V of this preamble. The TSD (which is in the docket) includes a detailed evaluation of the submittals.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

Title of SIP submittal	Date submitted to EPA	Date of State adoption	Regulations affected
Flexible Permits	11/29/1994	11/16/1994	- Revision to 30 TAC 116.110. - Adoption of New 30 TAC 116.13 and New Subchapter G, 30 TAC 116.710, 116.711, 116.714, 116.715, 116.716, 116.717, 116.718, 116.720, 116.721, 116.722, 116.730, 116.740, 116.750, and 116.760.
Qualified Facilities and Modifications to Existing Facilities.	3/13/1996	2/14/1996	Revision of 30 TAC 116.10 to add new definition of “modification of existing facility” at (F).
NSR Rule Revisions; section 112(g) Rule Review for Chapter 116.	7/22/1998	6/17/1998	- Repeal and new 30 TAC 116.10(9)(F), 116.13 and 116.110(a)(3) adopted. - Revisions to Subchapter G, 30 TAC 116.710, 116.711, 116.714, 116.715, 116.721, 116.730, and 116.750.
Public Participation (HB 801)	10/25/1999	9/2/1999	Revision to Subchapter G, 30 TAC 116.740.
Air Permits (SB-766)—Phase II	9/11/2000	8/9/2000	Revisions to Subchapter G, 30 TAC 116.710, 116.715, 116.721, 116.722, and 116.750.
Emissions Banking and Trading	4/12/2001	3/7/2001	Revisions to Subchapter G, 30 TAC 116.711 and 116.715.
House Bill 3040: Shipyard Facilities and NSR Maintenance Emissions.	9/4/2002	8/21/2002	- Revision to 30 TAC 116.10, redesignating 30 TAC 116.10(9)(F) to 116.10(11)(F). - Revisions to Subchapter G, 30 TAC 116.711 and 116.715.
Air Fees	10/4/2002	9/25/2002	Revisions to Subchapter G, 30 TAC 116.750.
Offset Certification, New Source Review Permitting Processes and Extensions for Construction.	9/25/2003	8/20/2003	Revision to Subchapter G, 30 TAC 116.715.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

Section	Title	Date sub- mitted	Date adopted by State	Comments
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
Section 116.10(11)(F)	General Definitions	3/13/1996	2/14/1996	• Revised to add new definition of “modification of existing facility” at (F).
		7/22/1998	6/17/1998	• Repealed and Adopted new 30 TAC 116.10(9)(F).
		9/4/2002	8/21/2002	• Redesignated 30 TAC 116.10(9)(F) to 30 TAC 116.10(11)(F).
Section 116.13	Flexible Permit Definitions ...	11/29/1994	11/16/1994	• Initial Adoption.
		7/22/1998	6/17/1998	• Repealed and Adopted new 30 TAC 116.13.
• Subchapter B—New Source Review Permits				
• Division 1—Permit Application				
Section 116.110	Applicability	11/29/1994	11/16/1994	• Revised (a) to add reference to Flexible Permits.
		7/22/1998	6/17/1998	• Repealed and adopted a new 30 TAC 116.110.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Date submitted	Date adopted by State	Comments
				• Included reference to Flexible Permits in new 30 TAC 116.110(a)(3).
• Subchapter G—Flexible Permits				
Section 116.710	Applicability	11/29/1994 7/22/1998	11/16/1994 6/17/1998	• Initial adoption. • Revised subsection (a). • Removed subsection (b) and • Redesignated existing subsections (c)–(e) to subsections (b)–(d). • Revised subsections (b)–(d) as redesignated. • Revised subsection (b).
Section 116.711	Flexible Permit Application ..	9/11/2000 11/29/1994 7/22/1998	8/9/2000 11/16/1994 6/17/1998	• Initial adoption. • Revised introductory paragraph and paragraphs (1)–(5); • Added new paragraphs (6) and (11); • Redesignated existing paragraphs (6)–(9) to paragraphs (7)–(10) and existing paragraphs (10)–(11) to paragraphs (12)–(13); and • Revised paragraphs (8)–(10) as redesignated. • Added new paragraph (12); and • Redesignated existing paragraphs (12)–(13) to paragraphs (13)–(14). • Designated existing as subsection (a); • Added new subsection (b); and • Revised paragraphs (a)(8)–(11) as redesignated.
		4/12/2001	3/7/2001	• Added new paragraph (12); and • Redesignated existing paragraphs (12)–(13) to paragraphs (13)–(14).
		9/4/2002	8/21/2002	• Designated existing as subsection (a); • Added new subsection (b); and • Revised paragraphs (a)(8)–(11) as redesignated.
Section 116.714	Application Review Schedule.	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Revised introductory paragraph.
Section 116.715	General and Special Conditions.	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Revised subsection (a), and paragraphs (c)(3)–(6), and (9)–(10).
		9/11/2000	8/9/2000	• Revised subsection (a).
		4/12/2001	3/7/2001	• Revised paragraph (c)(3).
		9/4/2002	8/21/2002	• Revised paragraph (c)(9).
		9/25/2003	8/20/2003	• Revised paragraphs (c)(1) and (c)(9).
Section 116.716	Emission Caps and Individual Limitations.	11/29/1994	11/16/1994	• Initial adoption.
Section 116.717	Implementation Schedule for Addition Controls.	11/29/1994	11/16/1994	• Initial adoption.
Section 116.718	Significant Emission Increase.	11/29/1994	11/16/1994	• Initial adoption.
Section 116.720	Limitation on Physical and Operational Changes.	11/29/1994	11/16/1994	• Initial adoption.
Section 116.721	Amendments and Alterations	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Revised paragraphs (b)(2) and (d)(1)–(2).
		9/11/2000	8/9/2000	• Revised subsection (d) and paragraph (d)(1).
Section 116.722	Distance Limitations	11/29/1994	11/16/1994	• Initial adoption.
		9/11/2000	8/9/2000	• Revised introductory paragraph.
Section 116.730	Compliance History	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Revised introductory paragraph.
Section 116.740	Public Notice and Comment	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Designated existing text as subsection (a); and • Added new subsection (b).
		10/25/1999	9/2/1999	• Revised subsections (a)–(b).
Section 116.750	Flexible Permit Fee	11/29/1994	11/16/1994	• Initial adoption.
		7/22/1998	6/17/1998	• Revised subsections (b)–(d).
		9/11/2000	8/9/2000	• Revised subsection (d).
		10/4/2002	9/25/2002	• Revised subsections (b)–(c).
Section 116.760	Flexible Permit Renewal	11/29/1994	11/16/1994	• Initial adoption.

C. Other Relevant Actions on the Texas Permitting SIP Revision Submittals

The Settlement Agreement in *BCCA Appeal Group v. EPA*, Case No. 3:08-cv-01491-N (N.D. Tex.), as amended, currently provides that EPA will take final action on the State's Public Participation SIP revision submittal by October 29, 2010. EPA intends to take final action on the submitted NSR SIP by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group v. EPA*, Case No. 3:08-cv-01491-N (N.D. Tex). EPA published its final action on the Texas Qualified Facilities Program and its associated General Definitions on April 14, 2010 (*See* 75 FR 19467) as provided in the Consent Decree.

Additionally, EPA acknowledges that TCEQ is developing a proposed rulemaking package to address EPA's concerns with the current Flexible Permits rules. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of the current Flexible Permits Program, and we have concluded that the current Program is not approvable for the reasons set out in this notice.

III. Response to Comments

In response to our September 23, 2009, proposal, we received comments from the following: Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Gulf Coast Lignite Coalition (GCLC); Office of the Mayor—City of Houston, Texas (City of Houston); Harris County Public Health and Environmental Services (HCPHES); Sierra Club—Houston Regional Group (Sierra Club); Sierra Club Membership Services (including 2,062 individual comment letters) (SCMS); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Members of the Texas House of Representatives; Texas Association of Business (TAB); Texas Oil and Gas Association (TxOGA); and University of Texas at Austin School of Law—Environmental Clinic on behalf of Environmental Integrity Project (the Clinic), Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development

Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition and Citizens Opposing Power Plants for Clean Air.

A. General Comments

Comment 1: The following commenters support EPA's decisions to disapprove the Flexible Permits State Program: HCPHES; several members of the Texas House of Representatives; the Sierra Club; the City of Houston, and the Clinic.

Response: Generally, these comments support EPA's analysis of Texas's Flexible Permits Program as discussed in detail at 74 FR 48480, at 48485–48494, and further support EPA's action to disapprove the Flexible Permits Program submission.

Comment 2: The SCMS sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters (sent via e-mail), which support EPA's proposed ruling that major portions of the TCEQ air permitting program do not adhere to the CAA and should be thrown out. While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions such as halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy; creating a moratorium on the operations of any new coal fired power plants; reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and putting stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

The commenters further state that Texas: (1) Has more proposed coal and petroleum coke fired power plants than any other State in the Nation; (2) Is number one in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years. Strong rules are needed to make sure the coal industry is held responsible and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments that Texas should

rely on wind power, solar energy, and natural gas as clean alternatives to coal. Other comments expressed general concerns related to: Impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns.

Response: To the extent that the SCMS letters comment on the proposed disapproval of the Flexible Permits Program, they support EPA's action to disapprove the Flexible Permits submission. The remaining comments are outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 3: The Clinic comments that EPA should issue an immediate SIP call for Texas' failure to enforce the current SIP and should require those facilities operating under a Flexible Permit to apply for a SIP-approved permit.

Response: This final rulemaking only addresses the approvability of the Texas Flexible Permits Program as a SIP revision submittal. Therefore, comments related to other EPA action are outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 4: The ERCC comments that to avoid negative economic consequences EPA should exercise enforcement discretion statewide for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority. EPA should not require any injunctive relief and should consider penalty only cases.

Response: EPA enforcement of the CAA in Texas is outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 5: TIP, BCCA, TAB, and TxOGA comment that the Federal NSR SIP regulations recognize the importance of providing operational flexibility. In 1990, Congress added Title V to the CAA and it specifies that State Title V programs must include provisions to allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of Title I of the Act and do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions). *See* section 502(b)(10) of the Act. In order to provide operational flexibility, EPA adopted 40 CFR 70.4(b)(12) which requires that States establish Title V programs that allow three specific avenues to establish

operational flexibility, including establishment of federally-enforceable emission caps in their Title V programs. See 40 CFR 70.4(b)(12)(iii). EPA emphasized the importance of enabling plant sites to maintain operational flexibility in the preamble of to 40 CFR part 70. See 57 FR 32250, at 32267 (July 21, 1992).

Response: EPA acknowledges that the Title V Federal program requirements allow a State to provide for operational flexibility using the establishment of federally enforceable emissions caps. EPA, however, must review the submitted Program as a SIP revision submittal under Title I of the Act, not Title V. We are not disapproving the submitted Program because it provides for the establishment of emissions caps. As discussed in the proposal and this final action, EPA is disapproving the submitted Program for inclusion in the Texas NSR SIP because it is not enforceable, does not include any replicable methodology for calculating the emissions caps, provides too broad director discretion regarding the monitoring, recordkeeping, and reporting (MRR) requirements, and lacks sufficient MRR requirements. The submitted Program fails to meet section 110 and parts C and D of the Act and the requirements of 40 CFR part 51. As stated elsewhere in the proposal and throughout this final action, we have identified areas in which the submitted Program does not meet these statutory requirements. See 74 FR 48480, at 48490, 48491–48492, and 48492–48493; and sections III.D.3 and IV.C, for further information.

Comment 6: BCCA, TIP, TAB, and TxOGA comment on several Federal Flexibility Permitting rules in which EPA promotes permit flexibility. These include the following:

- **Flexible Permit Pilot Study.** EPA focused on the importance of operational flexibility in a decade-long Flexible Permit pilot study that included flexible emission cap permits in six states and found that flexible permits worked well and could be used to further both environmental protection and administrative flexibility. Both States and EPA recognized the need to respond rapidly to market signals and demand in today's increasingly global markets while delivering products faster, at lower cost, and of equal or better quality than their competitors. EPA recognized that the flexible permits could reduce the administrative "friction" of time, costs, delay, uncertainty, and risk associated with certain types of operational changes.

- **Plantwide Applicability Limits (PALs).** EPA recognized the advantages

of emissions caps in permits in promulgating its NSR Reform in 1996 and 2002. These advantages include the ability to make changes an emissions cap that do not require a permit for each change so long as the plant's emissions do not exceed the cap rather than face piecemeal applicability decisions for each and every contemplated change. EPA further noted environmental benefits that could result from PALs because sources participating in a cap-based program strive to create enough headroom for future expansion by voluntarily controlling emissions.

- **EPA's Proposed Indian Country Rule.** In the 2006 proposed rule for Indian Country, EPA recognized the importance of flexibility in air permitting programs. EPA intended this rule to be a representative template of State NSR programs that serve to provide operational flexibility while leveling the regulatory playing field.

- **EPA's Flexible Air Permit Rule.** In October 2009, EPA promulgated the Federal Flexible Air Permit rule, which incorporated changes to the Title V rules that were intended to clarify and reaffirm opportunities for accessing operational flexibility under existing regulations. EPA recognized that State permitting authorities have discretion to pre-approve minor changes and re-affirms pre-existing authority for State to craft flexible air permits.

Response: EPA acknowledges that each of these cap-based permitting programs has resulted in, or has the potential to result in, increased operational flexibility and may enable the owner or operator to make certain changes without the need to apply for and receive a permit for each individual change whenever the change does not result in emissions that exceed the cap. However, of the four identified programs, one was a pilot study and one has not been finalized. The State did not submit the Flexible Permits Program for consideration by EPA as a PALs NSR SIP revision. Moreover, the submitted Flexible Permits Program does not meet the minimum requirements contained in the PALs NSR SIP regulations, which include procedures for establishing replicable emission caps, protecting the NAAQS and control strategies, and MRR requirements sufficient to ensure compliance with the terms and conditions of the permit that establishes the emissions cap. As we discussed in the proposal and now through this final action, the submitted Flexible Program does not meet the requirements for the establishment of replicable emissions caps and sufficient MRR requirements. The submitted Program has no specific, only general, requirements pertaining to

MRR. Paragraph (c)(6) of submitted 30 TAC 116.715 generally requires maintenance of data sufficient to demonstrate continuous compliance with emission caps and individual emission limits contained in the Flexible Permit. That is all. To contrast, the submitted Flexible Permit Program lacks the specific requirements of another cap-base program, the Federal PAL SIP rule. The Federal PAL SIP rule requires that the program require each PAL permit to contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time. The PAL SIP rule further provides that the monitoring system must be based upon sound science and meet generally acceptable scientific procedures for data quality and manipulation; and the information generated by such system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit. The SIP requirements for an approvable PAL monitoring system are the employment of one or more of the following approaches: Mass balance calculations for activities using coatings or solvents, continuous emission monitoring system, predictive emission monitoring system, continuous parameter monitoring system, and emission factors, if approved by the reviewing authority. The PAL SIP rule provides the technical specifications for each of the allowable monitoring systems and provides replicable procedures for the approval of any alternative monitoring system. See 40 CFR 51.165(f)(12) and 51.166(w)(12). The submitted Flexible Permit Program, in contrast, is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit.

The Federal Flexible Air Permit Rule, although it is not a NSR SIP program but

a Title V program that provides for an alternative NSR SIP approach, is a cap program but it too requires replicable methodologies and sufficient MRR requirements. The submitted Program does not contain a replicable methodology for establishing the emissions cap and sufficient MRR requirements. See 74 FR 48480, at 48490, 48491–48492, and 48492–48493; and sections III.D.3 and IV.C, for further information. Finally, see section III.D.3 (response to comment 4) concerning MRR for the proposed Indian Country Minor NSR rule.

Comment 7: GCLC, TIP, BCCA, and TCC comment that EPA ignores the fact that the Texas Flexible Permit Program has had a significant impact on improving air quality in Texas. TCEQ commented that significant emission reductions have been achieved by the submitted Program through the large number of participating grandfathered facilities, which resulted in improved air quality based upon the monitoring data.

BCCA, TAB, TxOGA, and ERCC comment that the legal standard for evaluating a SIP revision for approval is whether the submitted revision mitigates any efforts to attain compliance with a NAAQS. EPA's failure to assess the single most important factor in the submitted Program, the promotion of continued air quality improvement, is inconsistent with case law and the Act and is a deviation from the SIP consistency process and national policy. EPA should perform a detailed analysis of approved SIP programs through the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Response: We are disapproving the submitted Program because it is not enforceable, it lacks an objective, replicable methodology for establishment of the emissions caps, it provides broad director discretion concerning whether or not to include a MRR condition in a Flexible Permit, lacks sufficient MRR requirements, is ambiguous regarding circumvention of Major NSR, and there is not sufficient information to enable EPA to make a finding that the submitted Program will protect the NAAQS and control strategies. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); See also *BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). Also see section III.A (response to comment 6) for further information.

Even if the commenters' premises are to be accepted, they fail to substantiate their claim that the Texas Flexible Permit Program has had a significant impact on improving air quality in Texas by producing data showing that any such gains are directly attributable to the submitted Program, and are not attributable to the SIP-approved control strategies (both State and Federal programs) or other Federal and State programs. They provide no explanation or basis for how their numbers were derived. Moreover, since the submitted Program is not enforceable, claims of emission reductions are not assured on a continuous basis.

EPA is not required to initiate the SIP consistency process within EPA unless the pending SIP revision appears to meet all the requirements of the Act and EPA's regulations but raises a novel issue. EPA is disapproving the submitted Program because it fails to meet the Act and EPA's regulations. Because the submitted Program fails to meet the requirements for a SIP revision, the SIP consistency process is not relevant.

Furthermore, since the commenters thought EPA was acting inconsistently, they should have identified SIPs that are inconsistent with our actions and provided technical, factual information, not bare assertions.

Comment 8: BCCA and ERCC comment that the concepts embedded in the Program have been part of the Title V, NSR, and PAL programs for many years and were upheld as consistent with the Clean Air Act by the U.S. Supreme Court in *Chevron v. NRDC*, 467 S.Ct. 837 (June 25, 1984). Texas' Program is actually more stringent than EPA's interpretation of the NSR program upheld by the Supreme Court.

Response: The U.S. Supreme Court found, in the cited case, that the pertinent legislative history was silent on the precise issue of the bubble concept as it related to what constituted a major stationary source and found that EPA should have wide discretion in implementing the policies of the 1977 amendments. Id. at 862. This opinion is not relevant to EPA's grounds for disapproving the submitted Program. Not only is it not relevant but none of the concepts cited by the commenters was before the Court in *Chevron*. EPA's disapproval is not based on a per se finding that a preconstruction program based on emissions caps is unacceptable or more or less stringent than the SIP requirements. We are disapproving the submitted Program because it is not enforceable, it lacks a replicable methodology for establishment of the emissions caps, it provides broad

director discretion concerning whether or not to include a MRR condition in a Flexible Permit, lacks sufficient MRR requirements, and there is not sufficient information to enable EPA to make a finding that the submitted Program will protect the NAAQS and control strategies. See section III.A (response to comment 6) for further information.

B. Whether the Flexible Permits Program Is Clearly a Minor, not a Major, NSR SIP Revision

Comment 1: TCEQ comments that though it has always considered the Flexible Permit Program to be a Minor NSR program, this fact is not specifically stated in the rule. TCEQ, nevertheless, asserts that its implementation of the Program includes a review process that always determines the applicability of Federal Major NSR, as well as any other Federal and State requirements. The TCEQ states that it understands EPA's concerns regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance.

Response: We acknowledge TCEQ's description that it intends to implement the submitted Program in such a manner that the submitted Flexible Permit Program does not supersede the duty to comply with the Texas Major NSR SIP. In contrast to the submitted Program, however, in its Minor NSR SIP for Permits by Rule and Standard Permits, TCEQ included additional regulatory language that explicitly prohibits the use of the Permits by Rule alternative permit program and the Standard Permits alternative permit program from being used for major stationary sources and major modifications and explicitly prohibits circumvention of the Major NSR requirements.¹ Specifically, the Standard Permits and Permits by Rule NSR SIP rules explicitly require a Major NSR applicability determination at 30 TAC 116.610(b) and 30 TAC 106.4(a)(3). In each, the State specifically expressed its intention to require a Major NSR applicability determination. The Flexible Permits Program is also an alternative permit program. If the State wishes for it to be considered as solely a Minor NSR SIP revision submittal, the TCEQ should have included express language stating that it explicitly

¹ Although the Texas Minor NSR SIP rules for Permits by Rule and Standard Permits remain acceptable for a Minor NSR SIP revision, EPA is conducting a review of each individual Permit by Rule and/or Standard Permit. EPA is conducting this review to ensure that the TCEQ is implementing the SIP appropriately and that each such individual Minor NSR SIP permit protects the NAAQS and control strategies and is enforceable.

prohibits the use of the Flexible Permit Program from being used for major stationary sources and major modifications and explicitly prohibits circumvention of the Major NSR requirements, as it did in the two other Minor NSR alternative permit options. This submitted Program lacks such language. While the inclusion of such specific language is not ordinarily a minimum NSR SIP program element, we conclude that the inconsistent treatment between the similar types of NSR programs creates the potential for an unacceptable ambiguity about a permit holder's obligations to continue to comply with the Major NSR requirements.

EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). See also *BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore unapprovable. See 74 FR 48480, at 48485–48487 for further information.

Comment 2: TCC notes that 30 TAC 116.711 identifies the use of Flexible Permits as only a Minor NSR option and concludes that TCEQ's rules therefore do not intend for the Flexible Permits Program to be an equivalent to a Major NSR program.

Response: We disagree that 30 TAC 116.711 identifies the use of Flexible Permits as only a Minor NSR permitting option. Contrary to commenter's assertion, this rule merely replicates certain general permitting requirements that are also common to Subchapter B, that also apply to all Texas Major and Minor NSR SIP permits. There are no requirements or terms in 30 TAC 116.711 that expressly identify use of Flexible Permits as only a Minor NSR option. As noted above in section III.B (response to comment 1), the TCEQ should have included express additional regulatory language prohibiting the use of the submitted Program for Major NSR and explicitly prohibiting circumvention of the Major NSR requirements, as it did in the two other Minor NSR SIP alternative permit options.

C. Whether the Flexible Permits Program Meets the Requirements for a Substitute Major NSR SIP Revision

1. General Comment on Whether the Program Is a Substitute Major NSR SIP Revision

Comment: TCEQ comments that it did not view the Flexible Permit Program as a substitute Major NSR SIP revision when it adopted it nor does it wish for it to be considered as a SIP revision submittal for a substitute Major NSR SIP revision. It has always viewed the Program as a Minor NSR program. In its implementation of the Program, TCEQ comments that it requires a Federal applicability demonstration but acknowledges that the submitted Program's rules are not clear on this point. TCEQ states that it will confirm through upcoming rulemaking and SIP revision that the Program is not a substitute Major NSR SIP revision.

Response: EPA appreciates TCEQ's statement that it does not view its Flexible Permit Program as a substitute Major NSR SIP revision submittal. However, EPA must review the content of the Program as submitted for inclusion into the Texas SIP. The submitted Program is ambiguous when compared to the regulatory structure of existing similar Texas Minor NSR SIP programs, as it contains no express provision that clearly limits the Program to Minor NSR and no explicit provision that prohibits circumvention of the Major NSR SIP requirements. See 74 FR 48480, at 48488 and section III.B (response to comment 1) of this notice for further information.

2. Requirements for Major NSR Applicability Determinations

Comment 1: Although TCEQ comments that the Flexible Permit Program requires that the applicability of Major NSR requirements be evaluated prior to considering whether the new construction or modification can be authorized under a Flexible Permit, TCEQ also comments that it understands EPA's concerns with issues regarding Major NSR applicability vis a vis the submitted Program, based upon the application of today's legal requirements. TCEQ undertakes to consider rulemaking to ensure Major NSR applicability requirements are included in Flexible Permit reviews, and that the requirements of the appropriate Major NSR permitting program are met when triggered.

Response: EPA appreciates TCEQ's understanding that the Program lacks clarity on the issue of the applicability of Major NSR requirements and that the State plans to revise its rules to ensure

it is clear that the Major NSR applicability determination requirements are required before one can use the Program, and that the requirements of the appropriate Major NSR permitting program are met when triggered. Nonetheless, EPA must review the content of the Program as submitted for inclusion into the Texas SIP. The submitted Program's regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the construction or change to Minor NSR as was included in the SIP rules for Standard Permits and Permits by Rule. See section III.B (response to comment 1) for additional information.

Comment 2: TAB, TxOGA, TIP, and BCCA comment that there are safeguards in the Texas Flexible Permit rules at 30 TAC 116.711(1), (8), (9), 116.718, and 116.720 that constrain regulated community from making major changes without complying with Major NSR requirements.

Response: The regulations cited by the commenters do not explicitly require sources to comply with the Major NSR rules. 30 TAC 116.711(1) provides for protection of public health and welfare and does not address applicability of Major NSR. 30 TAC 116.711(8) and (9) generally require compliance with all applicable requirements for nonattainment and PSD review within that Chapter of the rules. Despite commenters contentions there are no express terms or requirements within the cited rules that compel a Major NSR applicability determination. The cited regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the construction or change to Minor NSR or clearly prohibiting circumvention of Major NSR, as was included in the SIP rules for Standard Permits and Permits by Rule. The absence of such provisions in the submitted Flexible Permit rules creates an unacceptable ambiguity. 30 TAC 116.718 and 116.720 do not address Major NSR. See section III.B (response to comment 1) for additional information.

Comment 3: ERCC comments that the concepts embedded in the Flexible Permit Program have been a part of the NSR program for many years and are well-settled law. The fact that the emission rates used in the calculation of the cap(s) are reflected in a "bubble" permit is of no consequence and is consistent with applicable statutory and regulatory requirements under the Clean Air Act.

The submitted Program explicitly requires any new source or major

modification that is applying for a Flexible Permit to go through Major NSR review and if necessary, have the Flexible Permit altered.

Response: EPA disagrees with these comments. First, the submitted Program has not been a part of the Texas NSR SIP “for many years.” Therefore, it is not “well-settled law.” Furthermore, any source operating under a Flexible Permit risks potential Federal enforcement action. Second, it is being disapproved today because of not meeting the Federal NSR SIP requirements, not because it embeds the concepts of a cap program. The commenter’s comments are also at odds with TCEQ’s comments. TCEQ comments that its Program is intended to be a Minor NSR SIP program only and not intended to address Major NSR SIP requirements. In contrast, the commenter describes the submitted Program as covering major modifications and having a Flexible Permit (not a Major NSR SIP permit) altered to reflect the Major NSR review. TCEQ disputes this concept in its comments. *See* our response to TCEQ’s comments section III.C.3 (response to comment 1).

3. Circumvention of Major NSR

Comment 1: TCEQ comments that it understands EPA concerns regarding the “the lack of specificity” in its rules but maintains that the Program does not circumvent Federal Rules. TCEQ maintains that its implementation of the submitted rules includes Federal applicability review that includes determination of actual rates, project emission increases, and net emission increases. It also includes BACT analysis to establish the cap, NAAQS and increment analysis if PSD is triggered; and LAER and offsets if Nonattainment Review is triggered. TCEQ states that its implementation also includes a Federal Major NSR Review which is conducted parallel with the Minor NSR Review and TCEQ does not allow applicant to use Flexible Permits to circumvent Major NSR. TCEQ plans to confirm EPA’s concerns in future rulemaking.

Response: EPA appreciates TCEQ’s understanding of its concerns regarding the “lack of specificity.” While it is commendable that TCEQ may implement the Program in a manner consistent with the Federal Major NSR requirements, we cannot approve the Program as submitted. *See* CAA 110(k)(3). *See also BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). Moreover, relying

upon an agency to continue to implement a program consistently with the Federal requirements even though not constrained to do so by its rules, makes EPA, the agency, industry, and the public vulnerable to the agency’s unfettered discretion to change how it implements its program.

In this instance, there is no express provision in the submitted Subchapter G similar to the Minor NSR SIP provisions for Minor NSR SIP Permits by Rule and Standard Permits that prohibit circumvention of the Major NSR requirements. Both the SIP-codified rules for Permits by Rule and the SIP-codified rules for Standard Permits contain clear regulatory provisions prohibiting the use of these Minor NSR permits from circumventing Major NSR. There are no regulatory provisions prohibiting circumvention of Major NSR in the submitted Chapter 116, Subchapter G, for Flexible Permits. *See* 74 FR 48480, at 48488 and section III.B (response to comment 1) for further information. The BACT analysis that TCEQ references for establishing the cap upon a plain reading of the rules and the associated Texas Registers means the Texas Minor NSR SIP BACT requirement, not the PSD Major NSR SIP BACT requirement. The failure to distinguish in the Program’s rules that it is Minor NSR SIP BACT that is used to create the cap contributes to the confusion of the reach of the Program.

Comment 2: TCC and ERCC comment that the Flexible Permit Program does not circumvent Major NSR review. The Program is explicit in that any new major stationary source or major modification must go through Major NSR and the Flexible Permit must be altered. *See* 30 TAC 116.805. Moreover, the Flexible Permits employ two emissions cap, an initial cap and a final cap, which combine to ensure that the Major NSR permitting requirements are not circumvented.

Response: EPA disagrees with commenters. Unlike the Texas Minor NSR SIP rules for Permits by Rule and Standard Permits, the submitted Program’s regulations do not contain any express regulatory provision that prohibits circumvention of the Major NSR requirements. This lack of such express provisions distinguishes the Flexible Permit Program and contributes to its nonapprovability. *See* 74 FR 48480, at 48488, and section III.B (response to comment 1) of this notice. Furthermore, the referenced 30 TAC 116.805 does not add an explicit requirement to the submitted Program. Rather, it applies to a separate class of Existing Facility Flexible Permits that is

severable from the Flexible Permits Program.

4. Use of Allowable Emissions in Major NSR

Comment: TCC, TAB, and TxOGA comment that when TCEQ is evaluating emissions increases on a project level, the Program requires the use of actual baseline emissions to determine whether a project will result in an increase that triggers Major NSR applicability. TCC further states that the application of BACT to facilities subject to the emission cap results in an allowable that is lower than the pre-change actual emissions.

Response: As noted above in the preceding response, EPA must evaluate the submitted Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. The commenters are not clear whether they are referring to PSD BACT or the Texas Minor NSR SIP BACT. This lack of specificity by industry contributes to EPA’s concerns about whether the submitted Program is clearly limited to Minor NSR. We recognize that the application of either type of BACT to facilities subject to the emission cap could result in allowable emissions that are lower than the pre-change actual emissions at the initial issuance of a Flexible Permit. However, the commenter provided no information to show a comparison of actual emission to potential to emit for changes that occur after the Flexible Permit is issued to evaluate that the net emission increase is based upon changes from baseline actual to either projected actual emissions or potential to emit. In such case, the baseline actual emissions resulting from such proposed change must be established as provided under applicable Federal requirements. *See* 40 CFR 51.165(a)(2)(ii) and (a)(1)(vi)(A)(2) and 51.166(a)(7)(iv)(c)–(d) and (b)(3)(i)(b). Accordingly, there are no provisions in the Program that require the use of actual baseline emissions to determine whether a project will result in an increase that triggers Major NSR applicability. *See* 74 FR 48480, at 48489–48490, for further information.

5. Retention of Major NSR Permit Terms and Conditions

Comment: TAB, ERCC, and TxOGA comment that the submitted Program requires that conditions of an existing PSD or Nonattainment permit be carried forward into a Flexible Permit. The submitted Program does not “void” the pre-existing Major NSR SIP permits.

Response: The submitted Program does not explicitly provide that the holder of a Flexible Permit still be required to continue to comply with all of the terms and conditions in the pre-existing Major NSR SIP permits. Federal NSR SIP regulations do not provide for a blanket elimination of emission limits at individual units. The submitted Program does not assure the retention of the pre-existing Major NSR SIP permits' terms and conditions.

EPA's long-held position is that permits issued under federally approved PSD, NNSR, and Minor NSR SIP programs must remain in effect because they are the legal mechanism through which the underlying NSR requirements (from the Act, Federal regulations, and federally approved SIP regulations) become applicable, and remain applicable, to individual sources. NSR programs enable the relevant permitting authority to impose source-specific NSR terms and conditions in legally enforceable permits, and provide states, EPA, and citizens with the authority to enforce these permits. SIP-approved permits impose continual operational requirements and restrictions upon a source's air pollution activities and, accordingly, may not expire so long as the source operates.²

The lack of enforceability and adequacy of the MRR requirements in the submitted Program contributes to EPA's concern that not all of the conditions of a PSD or NNSR SIP permit existing before the issuance of a Flexible Permit were carried forward into the Flexible Permit fully and completely. See section III.A (response to comment 6) for further information. The submitted Program does not meet the requirements of section 110(a)(2)(A)–(C) of the Act, which requires that SIP revision submittals be enforceable. Section 116.711(2) of the submitted Program provides that emissions will be measured "as determined by the executive director." This broad discretion lacks accountability, replicability and fails to provide for a full evaluation of the enforceability of permits issued under the Program. We are concerned with the broad director discretion whether to include MRR requirements in a Flexible Permit and the lack of adequacy of the MRR requirements in the submitted Program.³ EPA has interpreted the Act's

requirements for enforceability as specifying that SIP revision submittals must "specify clear, unambiguous, and measurable requirements." See 57 FR at 13567. There must be legal means in a SIP revision for ensuring compliance when conditions of an existing PSD or Nonattainment permit are carried forward in a Flexible Permit. The submitted Program does not contain sufficient enforceable means. This submitted Program is an intricate program, thus to be approved as a Major (as well as a Minor) NSR SIP revision, it requires detailed MRR requirements in order to ensure, among other things, that a project triggering the Major NSR SIP requirements is covered under Major NSR or there are adequate means for ensuring compliance of each affected entity.

Without clear, objective, requirements in the submitted Program for retaining and distinguishing the Flexible Permits terms and conditions from the Texas Major NSR SIP permits terms and conditions, the submitted Program lacks clear, unambiguous, and measurable requirements necessary for approval as a SIP revision. The submitted Program does not ensure the retention of the pre-existing Major NSR SIP permits' terms and conditions.

6. Protection of the NAAQS Attainment Under Major NSR

Comment: The Clinic comments that the Program represents a relaxation of the current SIP and is inadequate to assure protection of the NAAQS, increments, and control strategies.

Response: Without the required demonstration from the State showing how the customized Major NSR SIP revision is in fact as stringent as EPA's Major NSR revised program and without, among other things, an objective, replicable methodology for establishing the emission cap, the too broad director discretion provision for whether or not to include MRR conditions in a Flexible Permit, the lack of sufficient MRR requirements for this type of permit program, and the lack of enforceability of the submitted Program, EPA lacks sufficient information to make a finding that the submitted Program, as a substitute for a Major NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP, as required by section 110(l) of the Act. See section III.A (response to comment 6) for further information.

requirements up-front in a NSR program without requiring every director discretion decision to be adopted and submitted to EPA for approval as a source-specific SIP revision.

D. Whether the Flexible Permits Program Meets the Requirements for a Minor NSR SIP Revision

1. Applicability for a Minor NSR Program

Comment 1: The Clinic comments that the Flexible Permit rules do not include adequate provisions for ensuring that changes that should trigger Major NSR are subject to technology and air quality analysis requirements.

Response: EPA agrees with this comment. See section III.B (responses to comments 1 and 2), section III.C.1 (response to comment), and section III.C.2 (responses to comments 1, 2, and 3), and section III.C.3 (responses to comments 1 and 2) for further information.

Comment 2: TCC comments that the Flexible Permit authorization method used at a source does not exempt any facilities located at a source from Major NSR permitting requirements. If a source has a Flexible Permit that does not contain all the facilities located at that source and a project within the Flexible Permit triggers netting, all facilities (under the cap and outside the cap) at the source are evaluated to determine whether a net significant emissions increase at the source has occurred. If a resulting net emissions increase is significant, Major NSR is triggered.

Response: We disagree with this comment. See section III.D.1 (response to comment 1, above) for further information.

Comment 3: TIP, BCCA, and TCC comment that TCEQ rules provide two separate "modification" definitions. The first is at 30 TAC 116.12(18) for Major NSR applicability. The second is at 30 TAC 116.10(11) for Minor NSR sources and does not limit its scope to federally regulated pollutants. EPA applies the term "modification" differently in the Minor NSR context and the Major NSR context. Therefore, it also is within Texas's discretion to define the term differently for purposes of Minor NSR. Citing the EAB in *In re Tennessee Valley Authority*, 9 EAD 357,461 (EAB Sept. 15, 2000) commenters maintain that Texas has the discretion to define the term differently for purposes of Minor NSR.

Response: EPA acknowledges that that TCEQ defines the term "modification" differently for Major NSR and for Minor NSR. However, the submitted Program does not specifically state which definition of modification it uses the one for Major NSR or the one for Minor NSR. This contributes to making the submitted Program not clear

² See EPA Letter from John Seitz, Director, Office of Air Quality Planning and Standards, to Robert Hodanbosi and Charles Laggas, STAPPA/ALAPCO, dated May 20, 1999.

³ EPA's letter of March 12, 2008, on pages 12 to 13 of the Enclosure provides some examples of, and concepts on how to establish replicable recordkeeping, reporting, tracking, and monitoring

on its face that the Major NSR applicability requirements must be evaluated and met when triggered and that the State is required under its submitted Program to apply the Major NSR applicability concepts during the technical review of a Flexible Permit. Therefore based upon the ambiguities in the Program's rules, we disagree that the Flexible Permit Program is exclusively a Minor NSR program. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore do not adequately prohibit use under Major NSR. *See* section III.B (response to comment 1) for further information.

2. Establishment of the Emission Cap Under Minor NSR

Comment: TIP and BCCA comment that the submitted Program's rules do contain an established and replicable method for determining an emissions cap. TAB and TxOGA comment that EPA provides no example of any unsuccessful attempt to replicate an emission cap using the current TCEQ rules. TAB and TxOGA comment that the submitted Program requires that each Flexible Permit establish a cap by simple summation of BACT emission rates. Each Flexible Permit involves the summing of BACT emission rates. While BACT determinations may vary between specific types of sources, the use of Federal and State BACT guidance results in a replicable procedure for establishing caps. In addition, the authorization under a Flexible Permit has no effect on sources or pollutants not covered in the Flexible Permit for a particular site. Both sources and emissions that are not incorporated into a Flexible Permit are subject to whatever rules or authorizations are in effect or should be applied to those emissions. An applicant for a Flexible Permit is required to meet BACT standards as applicable to all facilities individually contributing to an emission cap. In addition to an emission cap, a Flexible Permit may also impose individual emission limits where necessary to ensure satisfaction of off site screening levels of hazardous air pollutants or NAAQS for criteria pollutants, or to prevent violation of any Federal permitting requirement.

Response: The proper scope of review for this SIP revision submittal does not include a review of the State's individually issued Flexible Permits to determine whether there are replicable caps in each permit. Instead, EPA's review is focused on the structure of the

submitted Program, ensuring that it includes legally sufficient objective and replicable criteria for establishment of the cap in each Flexible Permit and information submitted by the State to demonstrate that the program meets the requirements of the Act. Review based on the submittal, rather than improper implementation, is necessary to ensure that as structured the submitted Program does not interfere with NAAQS attainment, the Texas SIP control strategies, and RFP, and is enforceable pursuant to section 110(a) (2)(A)–(C) of the Act. The September 23, 1987, Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, and Thomas L. Adams Jr., Assistant Administrator for Enforcement and Compliance Monitoring, entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency" provides EPA's guidance for interpreting this provision in the Act. A copy of this document is in the docket at document ID EPA–R06–OAR–2005–TX–0032–0022.⁴ *See also* the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," (GP) 57 FR 13498 at page 13556 (April 10, 1992).

The submitted Program establishes a cap in a Flexible Permit that is a summation of BACT requirements (or a more stringent requirement if applicable). The submitted rules are not clear as to how the State does the summation. Even the State fails in its comment letter to clarify whether the cap includes the summation of not only the minor stationary sources and minor modifications but also the major stationary sources' and major modifications' emissions limitations. This failure to clarify the methodology for the establishment of the cap contributes to the ambiguity of the submitted Program. Specific, objective, and replicable criteria are to be set forth for determining the emissions cap.

The commenter states that if a source or emissions are not covered under a Flexible Permit, then they are subject to whatever rules or authorizations are in effect or should be applied to those emissions. EPA is however concerned that it is not clear which facilities are covered by a Flexible Permit. The submitted Program does not clearly delineate which emissions are covered by a Flexible Permit. EPA proposed disapproval because the submittal lacks specific, established, replicable procedures providing available means to

determine independently how the source or the State will calculate an emission cap; determine the coverage of a Flexible Permit; establish individual emissions limitations for each site, a facility on the site, a group of units on the site; or for one pollutant but not another. Without a clearly defined replicable process for determining what the process is, and how the emission cap is adjusted for the addition of new facilities, the public and EPA cannot independently calculate an emission cap and reach the same conclusions as the State. Therefore, the submitted Program is unapprovable. This conclusion was reached based on our review of the submitted Program pursuant to the CAA.

3. Enforceability of a Minor NSR Program

Comment 1: TCEQ comments that although the submitted rules do not specify special conditions that ensure recordkeeping, reporting, and testing to assure compliance with the Flexible Permit, the State issues Flexible Permits containing special conditions requiring periodic stack testing, continuous emissions monitoring, and other parametric monitoring requirements, along with recordkeeping requirements to ensure compliance with the Flexible Permit cap and BACT. Because of the wide variety of industrial source types, TCEQ has carefully drafted its rules to ensure it has the ability to adequately implement specific and detailed MRR requirements. TCEQ will address EPA concerns in a forthcoming rulemaking and SIP revision.

Response: Although TCEQ plans in a future rulemaking action to add specific conditions as part of the Program to address MRR requirements, the submitted Program lacks these requirements. *See* section III.A (response to comment 6) for further information. EPA must evaluate the Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. Any SIP revision must have adequate recordkeeping, reporting, testing, and monitoring requirements to assure there can be compliance with the submitted plan and ensure that the plan is enforceable, as well as ensure that each affected entity can be easily identified and that there are means to determine its compliance. *See New York I*, 413 F.3d at 33–36. There is further discussion in the General Preamble about EPA's interpretation of the Act's requirements for enforceability and that submitted rules must "specify clear, unambiguous,

⁴ You can access this document directly at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2bccd>.

and measurable requirements.” See the GP 57 FR 13498 at page 13567.

Comment 2: The City of Houston states that it has long opposed the use of Flexible Permits. Quoting its comments on TCEQ’s proposed renewal of the Flexible Permit issued to a refinery in Houston, it states that “[t]he permit terms violate Federal law and are not federally enforceable. This refinery (and others) could have sought other SIP-approved permitting.” The City of Houston also noted that the structure of the Flexible Permit Program fails to assure compliance with the Major NSR requirements and that these Flexible Permits are essentially unenforceable. The City of Houston strongly supports the EPA’s decision to seek the changes necessary in the Flexible Permit Program to make it federally enforceable, consistent with the CAA and ensure that emissions are controlled and reduced from the State’s largest sources of pollutants.

Response: EPA agrees with these comments. Texas has opted for a program that allows the permit holder to select which new facilities and/or new modifications to include under the umbrella of a Flexible Permit. The submitted Program fails to provide clear criteria for determining what type of MRR requirements are needed and furthermore leaves the choice to the director, including whether to include any MRR requirements in a Flexible Permit. See section III.A (response to comment 6) for further information. Without the appropriate specialized MRR requirements, it is generally impractical to determine for instance, which emission points are covered, which modifications of existing non-covered emission points are covered, etc. Texas also chose to allow both a cap and an individual emission limitation to apply to selected units, or just the cap, or just the individual emission limitation. Without the appropriate MRR requirements, it is generally impractical to determine if a covered unit is subject to the cap or an individual emission limitation, if a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies at what time. Further, there can be existing units on the site not covered under the Flexible Permit cap that may be modified, and use the provisions of the Flexible Permit Program for the modification. Without replicable implementation procedures for establishing the emission cap and sufficient MRR requirements, EPA cannot find that the submitted Program is enforceable, as required by section 110(a)(2)(A) and (C) of the Act. See 74 FR 48480, at 48492.

The submitted Program lacks provisions explicitly addressing the type of MRR requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, etc., still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable State or Federal requirement. In addition, there are no limits on the types of sources that can be included in the cap. It is also difficult to quantify emissions from some units, such as tanks, fugitive emissions from leaking valves, or wastewater emissions points that can be included in a Flexible Permit under this Program.

Without specialized MRR requirements, it is difficult for EPA or the public to determine which units are covered by a Flexible Permit, which modifications to non-covered units are covered by a Flexible Permit, whether a covered unit is subject to the emission cap or an individual emission limitation, whether a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies and at what time.

Comment 3: TIP, BCCA, TAB, and TxOGA comment that the submitted Program contains comprehensive and stringent provisions for monitoring, recordkeeping, and reporting. These are more than adequate to ensure compliance on the part of permit holders, enforceability by TCEQ, and protection of public health. See 30 TAC 116.715(c). They require the regulated community to monitor and submit information sufficient to safeguard environmental quality.

Response: EPA disagrees with commenters. The commenters failed to point to any such specific provisions. The submitted Program lacks adequate program requirements for the tracking of existing SIP permits’ major and minor NSR terms, limits and conditions, and whether such requirements are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. Minor and Major NSR permits, as well as Minor NSR SIP Permits by Rule and Standard Permits, can be incorporated into a Flexible Permit without any program requirement in place that ensures the SIP permits’ terms and conditions are included in the Flexible Permit. EPA finds that there are not sufficient provisions requiring the holder of a Flexible Permit to maintain recordkeeping sufficient to ensure that all terms and conditions of existing permits (including representations in the applications for such permits) that are incorporated into the Flexible

Permit continue to be met. Paragraph (c)(6) of submitted 30 TAC 116.715 generally requires maintenance of data sufficient to demonstrate continuous compliance with emission caps and individual emission limits contained in the Flexible Permit but lacks the necessary specificity and replicability needed to ensure the enforceability of the submitted Program and the protection of the NAAQS and control strategies. See section III.A (response to comment 6) for further information.

Comment 4: TIP, BCCA, TAB, and TxOGA note that TCEQ also may impose additional recordkeeping requirements appropriate for a specific source covered by a Flexible Permit. The submitted Program’s rules contemplate that additional recordkeeping requirements may be tailored to the type of source covered by a Flexible Permit. TIP comments that the submitted Flexible Permits rules are as stringent as EPA’s proposed Indian Country Minor NSR rules. This commenter claims that with respect to emission events and maintenance, startup, and shutdown emissions (SSM), the submitted rules go far beyond Federal benchmarks because they require compliance with 30 TAC 101.201 and 101.211. Section 101.201 includes record-keeping requirements to report all reportable and non-reportable emissions events within two weeks, which in the view of this commenter is more stringent than the “prompt” reporting requirement of the proposed Indian Country counterpart. Again citing Section 101.201, commenter claims the record retention requirements of the submitted Program for records of reportable and non-reportable emissions events are similar to their proposed Indian Country counterparts.

Response: EPA disagrees with this comment. Commenters’ reliance upon the Texas rules for malfunction emissions and maintenance, startup, and shutdown emissions is misplaced. Section 101.201 concerns Emissions Event Reporting and Recordkeeping Requirements; and Section 101.211 concerns Scheduled Maintenance, Startup, Shutdown Reporting and Recordkeeping Requirements. These two referenced sections concern emission events that are a subset of the universe of air emissions. Emission events are unauthorized emissions by nature. See 30 TAC 101.1(28). Malfunction related emissions are those unauthorized emissions that result from

a sudden and unavoidable breakdown of process or control equipment.⁵

EPA agrees that the submitted Program's rules contemplate that additional recordkeeping requirements may be required (at the discretion of the director). Yet as EPA noted in the proposal, the submitted Program is an intricate program and therefore, for approvability as a Major or Minor NSR SIP revision, there is a greater need for detailed MRR requirements to ensure, among other things, there are adequate means for ensuring compliance by each holder of a Flexible Permit. Without detailed MRR requirements, the program is unenforceable. The MRR requirements are needed additionally to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, violate the Texas control strategy, or violate any other CAA requirement. See 74 FR 48480, at 48490. The submitted Program lacks provisions explicitly addressing the type of MRR requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, *etc.*, still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable State or Federal requirement. In addition, there are no limits on the types of sources that can be included in the cap. It is also difficult to quantify emissions from some units, such as tanks, fugitive emissions from leaking valves, or wastewater emissions points that can be included in a Flexible Permit under this Program. The underpinnings of the submitted Program are so complex as to necessitate more detailed MRR requirements to ensure that the emission cap and/or individual emissions limitations in the issued Flexible Permits are enforceable.

Without the appropriate specialized MRR requirements, it is generally impractical to determine for instance, which emission points are covered, which modifications of existing non-covered emission points are covered, *etc.* See section III.D.3 (response to comment 2) for further information.

Commenter's comparison of the submitted Program to EPA's proposed Indian Country Minor NSR rules is misplaced in the context of this action. As an initial point, we clearly stated in the proposed rule that we did not intend for this regulation of national scope to

serve as a model or comparison for development of State Minor NSR programs. See 71 FR 48695, at 48700 (August 21, 2006). EPA regulations require that it review a Minor NSR SIP revision to determine if a plan includes "legally enforceable procedures" that enable the permitting agency to determine whether a minor source will cause or contribute to violations of applicable portions of the control strategy, 40 CFR 51.160(a)(1), or "interference with a national ambient air quality standard," 40 CFR 51.160(a)(2), and to prevent the source from doing so, 40 CFR 51.160(b).

We believe the reporting requirements we proposed for the Indian Country Minor NSR rules will ensure protection of the NAAQS and control strategy. Moreover, the standard of review in this instance is not a comparison between the MRR provisions in the submitted Program and any MRR provisions in the proposed Indian Country Minor NSR rules but a determination whether the submitted Program has sufficient legally enforceable procedures that enable the permitting agency to determine whether a minor source will cause or contribute to violations of applicable portions of the control strategy. As stated above, the submitted Program lacks provisions explicitly addressing the type of MRR requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, *etc.*, still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable State or Federal requirement.

Comment 5: TIP, BCCA, TAB, and TxOGA also point out that there is a wide array of additional Texas rules specifying monitoring, recordkeeping, and reporting requirements. For instance, the Texas Flexible Permit rules also require compliance with section 101.201, related to reporting and recordkeeping of malfunction emissions, and section 101.211, related to reporting of maintenance, startup, and shutdown emissions. Commenters claim that there are many detailed monitoring, recordkeeping and reporting requirements that Flexible Permit holders are subject to and there are indeed very explicit requirements that adequately document the operations of sources covered by Flexible Permits.

Response: EPA disagrees with this comment. The submitted Program does not have provisions explicitly specifying the monitoring requirements for this Program.

Without the appropriate specialized MRR requirements, it is generally

impractical to determine information such as which emission points are covered, and which modifications of existing non-covered emission points are covered. See section III.D.3 (response to comment 2) for further information. Without replicable implementation procedures for establishing the emission cap and sufficient and MRR requirements, EPA lacks sufficient information to make a finding that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP.

Further, commenters' reliance upon the Texas rules for malfunction emissions and maintenance, startup, and shutdown emissions is misplaced. Section 101.201 concerns Emissions Event Reporting and Recordkeeping Requirements; and Section 101.211 concerns Scheduled Maintenance, Startup, Shutdown Reporting and Recordkeeping Requirements. These two referenced sections concern emission events that are a subset of the universe of air emissions. Emission events are unauthorized emissions by nature. See 30 TAC 101.1(28). Malfunction related emissions are those unauthorized emissions that result from a sudden and unavoidable breakdown of process or control equipment.⁶ EPA's concern with the structure of the Program and its lack of specific MRR requirements is not with how malfunction and SSM emissions are treated concerning MRR but with the emissions that are normally emitted and how one can determine if the emitted emissions are meeting the Flexible Permit's emission limitations. See section III.A (response to comment 6) for further information.

As EPA noted in the proposal, the submitted Program is an intricate program and therefore, for approvability as a Major or Minor NSR SIP revision, there is a greater need for detailed MRR requirements whether to ensure, among other things, that a project triggering the Major NSR SIP requirements is covered under Major NSR or there are adequate means for ensuring compliance by each holder of a Flexible Permit. These are needed additionally to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, violate the Texas control strategy, or violate any other CAA

⁵ See Footnote 1 of the Attachment to the Memo entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 1999 Policy) from Steve Herman and Robert Perciasepe. You can access this document at: <http://epa.gov/ttn/oarpg/t5/memoranda/exemmpol092099.pdf>.

⁶ See Footnote 1 of the Attachment to the Memo entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 1999 Policy) from Steve Herman and Robert Perciasepe. You can access this document at: <http://epa.gov/ttn/oarpg/t5/memoranda/exemmpol092099.pdf>.

requirement. *See* 74 FR 48480, at 48490, and section III.D.3 (response to comment 4) for further information.

Comment 6: TAB and TxOGA comment that the submitted Flexible Permit rules provide for the enumeration of special conditions including requirements for monitoring, testing, recordkeeping, and reporting (MRR). Commenter also asserts that EPA does not include any analysis that might lead one to understand what additional specificity or detail is necessary, or how or why the many detailed requirements in TCEQ's rules (specifically 30 TAC 101.10, 115.116, 117.801 and 111.111) are inadequate.

Response: EPA disagrees with this comment that the Agency has not provided a reasonable basis for its findings. Appropriate MRR provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and control strategies are protected. There is further discussion in the General Preamble about EPA's interpretation of the Act's requirements for enforceability and that submitted rules must "specify clear, unambiguous, and measurable requirements." *See* 57 FR at 13567. The Program's rules do not contain specific enumerated requirements for MRR. It is not legally sufficient even if the State is issuing individual Flexible Permits with special conditions requiring MRR. In order for the Program to be approvable as a SIP revision, the Program itself must contain specific objective, replicable MRR requirements that ensure compliance with all terms and conditions of each Flexible Permit issued by the TCEQ. There are no provisions providing clear criteria for determining what type of MRR requirements are needed. The Program is too complex to leave the choice of MRR requirements up to the individual issuance of a Flexible Permit, and up to the discretion of the Executive Director of the TCEQ. EPA finds such director discretion provisions are not acceptable for inclusion in SIPs, unless each director decision is required under the plan to be submitted to EPA for approval as a single-source SIP revision. This Program does not contain specific, objective, and replicable criteria for determining whether the Executive Director's choice of MRR requirements will be effective in terms of enforceability, compliance assurance, and ambient impacts. *See* 74 FR 48480, at 48490, and section III.A (response to comment 6) for further information.

Comment 7: TAB and TxOGA comment that EPA does not provide any example of a permit or permits the review of which led to that conclusion

that absence of certain recordkeeping and reporting made it difficult to derive information from Flexible Permits. TCC notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, it is difficult for TCEQ to implement rulemaking for every type of recordkeeping, monitoring and tracking requirements that may apply. Attempting to incorporate these variable components into one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. BCCA comments that the Flexible Permit rules contemplate that additional recordkeeping requirements may be tailored to the type of source covered by a Flexible Permit making them as least as stringent as their Federal counterparts. BCCA highlights a comparison to the proposed Indian Country Minor NSR rules to make this point.

Response: The proper scope of review for this SIP revision submittal does not include a review of the State's individually issued Flexible Permits to determine whether there are adequate recordkeeping and reporting requirements in each permit. These Flexible Permits never should have been issued since the submitted Program is not part of the Texas NSR SIP. EPA's review is instead focused on the structure of the submitted Program, ensuring that it includes legally sufficient recordkeeping and reporting requirements. This is necessary to ensure that not only does the submitted Program not interfere with NAAQS attainment, the Texas SIP control strategies, and RFP, but the proposed revision is enforceable pursuant to section 110(a)(2)(A)–(C) of the Act. The September 23, 1987, Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, and Thomas L. Adams Jr., Assistant Administrator for Enforcement and Compliance Monitoring, entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency" provides EPA's guidance for interpreting this provision in the Act. *See* also the General Preamble at page 13566. Submitted rules that are clear as to who must comply, and explicit in their applicability to regulated sources are appropriate means for achieving the statutory enforcement requirement. Specific, objective, and replicable criteria are to be set forth for determining whether this new type of NSR permit will be truly equivalent to the other minor NSR SIP permits in terms of being consistent with the levels specified in the control strategies,

including air quality impacts, *etc.* Appropriate testing, recordkeeping, reporting, and monitoring provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and PSD increments are protected. *See* 74 FR 48480, at 48492. Furthermore, any permitting rule will apply to a variety of sources (unless it is a permit adopted specifically for a source category and limited to that affected source category).

The submitted Program allows a Flexible Permit holder to selectively include new facilities and/or new modifications under the umbrella of a Flexible Permit. Without the appropriate specialized MRR requirements, it is generally impractical to determine information such as which emission points are covered, and which modifications of existing non-covered emission points are covered. *See* section III.D.3 (response to comment 2) for further information. Submitted 116.711(7) is an illustration of our concerns. It states that initial compliance testing with ongoing compliance by engineering calculations "may be required." This means that under the Program, compliance testing may, or may not, be required and provides no guidance for when monitoring will be required. *See* section III.A (response to comment 6) for further information.

The submitted Flexible Permit Program does not compare favorably with the MRR requirements that are proposed in the proposed Indian Country Minor NSR rules. The proposed Indian Country Minor NSR Rules would require the permit to include monitoring sufficient to assure compliance with any control technology requirements contained in the permit. Monitoring approaches may include continuous emission monitoring systems, predictive emission monitoring systems, continuous parameter monitoring systems, periodic manual logging of monitor readings, equipment inspections, mass balances, periodic performance tests, and/or emission factors, as appropriate for the minor source. None of these monitoring approaches is addressed in the submitted Program. The proposed Indian Country Minor NSR Rules also would require the permit to include recordkeeping sufficient to assure compliance with enforceable emission limitations in the permit and require retention of the records for five years from the date of the record. The submitted Program lacks this specificity for the recordkeeping requirements. The proposed Indian Country Minor NSR Rules also would require annual

monitoring reports showing whether the permittee has complied with the permit emission limitations and prompt reports of deviations from permit requirements, including those attributable to upset conditions, probable cause of such deviations, and any corrective or preventative measures taken. *See* 71 FR 48695, at 48715–48716 and 48738 (August 21, 2006). Thus even assuming such a comparison represented the proper scope of review, the MRR provisions of the submitted Program do not compare favorably to those in the proposed Indian Country Minor NSR Program. The MRR provisions of the Texas Flexible Permit Program do not contain this level of MRR or otherwise sufficient MRR provisions given the features of the Program.

Comment 8: The Clinic comments that there are no provisions for ensuring that emission reductions are real, permanent, and enforceable.

Response: Specific, objective, and replicable criteria are required to be set forth for determining whether this new type of NSR permit program will be truly equivalent to the other Minor NSR SIP permit programs in terms of being consistent with the levels specified in the control strategies, including air quality impacts, *etc.* Appropriate MRR provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and Texas control strategies are protected. Without replicable procedures for establishing the emissions caps, the lack of enforceability, the director discretion regarding whether or not to require MRR and the lack of sufficient MRR requirements, EPA cannot be assured that the submitted Program does indeed produce permanent emission reductions. *See* section III.A (response to comment 6) for further information.

Comment 9: The Clinic comments that the Flexible Permit rules fail to assure that permits include enforceable limits, as required by the Clean Air Act. There is no required monitoring or reporting to assure compliance with the terms and conditions. Likewise, the Flexible Permit rules fail to require adequate monitoring and reporting for those emission limits and requirements that are included in the Flexible Permit. The rules require measurement of emissions “as determined by the executive director.” *See* submitted 30 TAC 116.711(2). They also require that unspecified “information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit” be kept at the plant site and made available for

TCEQ inspection. *See* submitted 30 TAC 116.715(c)(6). These requirements are clearly insufficient to demonstrate compliance with emission caps applicable to dozens of dissimilar emission units. For a program as complex as the Texas Program, stringent monitoring must not be left up to the discretion of the Executive Director. Instead, stringent monitoring and reporting requirements must be required by regulation for all units covered under a Flexible Permit. Because the Texas Flexible Permit is more complex than either the PAL or the Green Groups proposal, it should include monitoring at least as stringent as required by those rules.

Response: EPA generally agrees with these comments. The submitted Program does not meet the requirements of section 110(a)(2)(A)–(C) of the Act, which require that SIP revision submittals be enforceable.⁷ There are no specific up-front methodologies in the submitted Program to be able to determine compliance. There are no sufficient MRR provisions in the submitted Program. Accordingly, the Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or for an affected source, and it cannot assure compliance with the Program or by the holder of a Flexible Permit. *See* 74 FR 48480, at 48490, section III.A (response to comment 6) for further information.

Instead, MRR requirements appropriate for such a complex Program must be required by regulation for all units covered under a Flexible Permit. Whether or not to require MRR requirements in a Flexible Permit should not be left to director discretion. This complex and intricate Program, for enforceability purposes, requires sufficient MRR requirements for each Flexible Permit. In the proposal, we stated that we are concerned with the adequacy of the MRR requirements in the submitted Program.⁸ This submitted Program is an intricate program and

therefore, for approvability as a NSR SIP revision, there is a greater need for detailed MRR requirements whether to ensure that a project triggering the Major NSR SIP requirements is covered under Major NSR or to ensure that there are adequate means for ensuring compliance of each affected entity under both Major and Minor NSR. *See* section III.D.3 (response to comment 2) for further information.

Finally, the commenter stated that because the Texas Flexible Permit Program is more complex than either the Federal PAL SIP rule or the Federal Green Groups proposal, it should include monitoring at least as stringent as required by those rules. EPA is not requiring that the Program include the specific MRR as required or proposed for another program. As stated above, to be approvable as a SIP revision, the Program must contain specific, replicable MRR requirements that ensure compliance with all terms and conditions of each Flexible Permit issued by the TCEQ. *See* section III.C.6 (response to comment 2) for additional information.

Comment 10: The Clinic comments that the Program does not assure that permit terms of pre-existing NSR permits remain as part of the Flexible Permit and therefore enforceable. The Clinic provided information on a refinery that had a PSD permit and subsequently received a Flexible Permit from TCEQ. The PSD permit included emission limits for two fluid catalytic cracking units (FCCUs). When the Flexible Permit was issued, these emission limits in the PSD permit were not included as separate from the limits in the Flexible Permit; instead, the Flexible Permit included the FCCUs among the units subject to the emission caps. When the refinery subsequently reported emission events, it reported only the Flexible Permit and its associated caps as the applicable limits, rather than the limits from the pre-existing Major NSR SIP permits.

Response: The submitted Program lacks adequate program requirements for whether or not the terms and conditions of pre-existing Major and Minor SIP permits are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. While the comments on implementation of the submitted Program as related to a particular source are not relevant to this action, they do highlight EPA's concerns about why the submitted Program is not approvable. The submitted Flexible Permit Program also lacks sufficient recordkeeping provisions to ensure that all terms and conditions of pre-existing Major and

⁷ Section 116.711(2) of the submitted Program provides that emissions will be measured “as determined by the executive director.” This broad discretion lacks accountability, replicability and fails to provide for a full evaluation of the enforceability of permits issued under the Program.

⁸ EPA's letter of March 12, 2008, on pages 12 to 13 of the Enclosure provides some examples of, and concepts on how to establish replicable recordkeeping, reporting, tracking, and monitoring requirements up-front in a NSR program without requiring every director discretion decision to be adopted and submitted to EPA for approval as a source-specific SIP revision.

Minor NSR SIP permits (including representations in the applications for such permits) that are incorporated into the Flexible Permit continue to be met. These underlying Major and Minor NSR SIP permits remain legally enforceable but the lack of specificity in the submitted Program impacts practical enforceability. *See* 74 FR 48493, and section III.A (response to comment 6) and section III.D.3 (response to comment 11, below) for further information.

Comment 11: A member of the Sierra Club cites to references from the proposal that relate to the lack of appropriate MRR requirements in the Program. An individual commenter states that as an air quality investigator for the City of Houston Bureau of Air Quality Control, investigating documentation of compliance for a Flexible Permit was presented an entire roomful of binders, containing emissions information for different sources under one cap. The company representative said that this was the documentation of the company's compliance with the Flexible Permit. Confronted with these practical difficulties, the commenter was unable to determine the company's compliance with its Flexible Permit Cap.

Response: The EPA agrees with these comments. While the comments on implementation of the submitted Program are not relevant to this action, they do highlight EPA's concerns about why the submitted Program is not approvable. The submitted Program lacks provisions explicitly addressing the type of monitoring requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, *etc.*, still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable State or Federal requirement. In addition, there are no limits on the types of sources that can be included in the cap. It is also difficult to quantify emissions from some units, such as tanks, fugitive emissions from leaking valves, or wastewater emissions points that can be included in a Flexible Permit under this Program. This comment also highlights the lack of adequate program requirements for the tracking of existing SIP permits' major and minor NSR terms, limits and conditions, and whether such requirements are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. This further highlights the lack of MRR sufficient to establish how compliance will be determined and to ensure that NAAQS and Texas control strategies are

protected. *See* 74 FR 40480, at 40493, section III.D.3 (responses to comment 1, 2, 4, 5, 7, and 10, above), and section III.A (response to comment 6) for further information.

4. Revocation of Major NSR Permits Under a Minor NSR Program

Comment: The Clinic comments that Flexible Permits are used to eliminate or amend existing Nonattainment NSR and PSD permit terms without following SIP required procedures for permit amendments.

Response: We are disapproving the submitted Program because it is ambiguous and could be interpreted to allow holders of a Flexible Permit to make *de facto* amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of minor and major NSR permits, without a preconstruction review by Texas. While we have recognized that under certain circumstances changes to PSD permits may be appropriate, such changes are generally not allowed without a review of the new circumstances by the permitting authority. As EPA has explained, any time a change to a permit limit founded in BACT is being considered, a corresponding reevaluation (or reopening) of the original BACT determination may be necessary. *See*, "Request for Determination on Best Available Control Technology (BACT) Issues—Ogden Martin Tulsa Municipal Waste Incinerator Facility," from Gary McCutchen, Chief of OAQPS NSR Section (Nov. 19, 1987). *See* 74 FR 40480, at 48493 and a copy of the document is in the docket at document ID EPA-R06-OAR-2005-TX-0032-0025.⁹

5. Protection of the NAAQS Under a Minor NSR Program

Comment: The Clinic comments that the submitted Flexible Permits Program is inadequate to assure protection of the NAAQS, increments, and control strategy.

Response: Approval of the submitted Program as a Minor NSR SIP revision requires that it include legally enforceable procedures that enable the State to determine whether construction or modification by a holder of a Flexible Permit would violate a control strategy or interfere with attainment or maintenance of the NAAQS. *See* 40 CFR 51.160(a)–(b). Without a replicable

methodology for establishing the emissions caps, the lack of enforceability, the director discretion concerning whether or not to require MRR conditions in a Flexible Permit, and the lack of sufficient MRR requirements in the submitted Program, EPA lacks sufficient information to make a finding that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP. *See* 74 FR 48480, at 48490–48492, and section III.A (response to comment 6) for further information.

E. Definition of Account

Comment 1: TCEQ does not agree with EPA's understanding of the term "account" as applied by TCEQ. TCEQ maintains that it has included in each of its permitting rules appropriate definitions to meet State and Federal requirements. TCEQ interprets an "account" to include multiple "sources." Within this rule, it interprets "sources" as being equivalent to multiple "facilities" (a facility is a discrete piece of equipment or source of air contaminants) under Texas Minor Source definitions. A Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR purposes.

Response: We appreciate TCEQ's explanation of the terms "account," "facility" and "source" as it intends them to apply in the submitted Program. We are pleased to learn that the State does not intend to allow a Flexible Permit to cover multiple major stationary sources and that companies complying with a Flexible Permit understand the continued obligation to comply with the SIP-approved Major NSR program at all major stationary sources and major modifications. Nonetheless, we believe that the definitions are not sufficiently limiting to preclude issuance of a Flexible Permit to multiple major stationary sources. This is because the terms "source" and "account" rely on the term "site" which does not contain the SIC code limitation contained in the Federal definitions. Without this limitation, the broad terms can encompass more than one major stationary source. For example, a petroleum refiner (SIC code 2911) may be collocated with a Plastic Materials and Resins manufacturer (SIC code 2821) and be under common control and ownership, and neither source is a support facility to the other. But, under the Major NSR program, these two facilities would be considered separate major stationary sources by virtue of a

⁹ You can access this document directly at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2bd1d>.

difference in each facility's SIC irrespective of the fact that they are located at the same "site." Notably this is not the case for the Title V and Section 112 programs. A single Title V permit can be issued to the "site." TCEQ asserts that an account includes multiple sources and that the term "source" is limited to a discrete piece of equipment or source of air contaminants. There is nothing in the submitted Program's rules and definitions that limit the term "account" to one "major stationary source" much less to a discrete piece of equipment. This submitted Program establishes an emissions cap over a group of one or more emissions points located at an "account" site. 30 TAC 101.1(1). The Texas SIP defines an "account" to include an entire company site, which could include more than one plant and certainly more than one major stationary source. See the approved SIP rule 30 TAC 101.1(1), second sentence. On its plain face, the term "account" cannot be interpreted to be limited to a single major stationary source.

Comment 2: BCCA, TCC, TIP and TAB, and TxOGA comment that the definition of "account" is tied to the definition of "site" at 30 TAC 101.1(1) and (87). These commenters view this as limiting an account to a specific plant site. Commenters also point to the Title V rules as providing additional limitation. Citing 30 TAC 116.710(a)(1) and (4), the commenters point out that only one Flexible Permit may be issued at an account site and a Flexible Permit may not cover sources at more than one account site. In summary, commenters conclude that if these rules are read together they provide sufficient safeguards against a major stationary source netting a significant emissions increase against a decrease occurring outside a site using a Flexible Permit. TAB comments if a Flexible Permit could be obtained for more than one site, the only reasonable construction of the rule would be "* * * a facility, group of facilities, account or accounts * * *" but the rule is not so constructed because it does not extend a Flexible Permit to more than one site.

Response: EPA disagrees with the comment. Concerning the comment that an account is limited to a site and that the submitted Flexible Permit Program limits only one Flexible Permit at an account does not address our concern that an account may include more than one major stationary source. See the section III.D.1 (response to comment 1) and 74 FR 48480, at 48489 for further information. The commenter's reliance on the Title V rules does not identify a specific provision in the Texas Title V

program that supports the commenter's position.

Furthermore, the reliance on the Title V program as providing additional limitation for limiting an account to a major stationary source does not address this matter. The Title V program is an operating permit program that incorporates the applicable requirements of the CAA (including the requirements of the approved SIP) into the operating permit. See 40 CFR 70.2—definition of "applicable requirement" and 70.6(a)(1). The Title V Program generally does not create applicable requirements independently of the applicable requirements in the approved SIP and other requirements of the CAA. *Public Citizen v. EPA*, 343 F.3d 449, 453 (5th Cir. 2003) ("Title V permits do not impose additional requirements on sources but, to facilitate compliance, consolidate all applicable requirements in a single document. See 42 U.S.C. 7661a(a); see also *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir.1996) (Title V permit "is a source-specific bible for [CAA] compliance"), *cert. denied*, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997)."); *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006) (Title V "generally does not impose new substantive air quality control requirements.")

In summary, for the reasons stated above, the definition of "account" is not limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source.

F. Public Participation

Comment 1: TCC comments that any future changes in the public participation aspects of the Flexible Permit program should apply prospectively and have no effect on the existing permits.

Response: EPA cannot comment on what actions it will take regarding any future changes in the public participation aspects of the Flexible Permit Program and therefore defers responding because those changes are outside the scope of the present rulemaking. We wish to note, however, existing Flexible Permits were not issued under the Texas NSR SIP, and any future Flexible Permits also will not be issued under the Texas NSR SIP.

Comment 2: The Clinic comments that the CAA and its implementing regulations include minimal requirements for public participation in permitting. This includes, for Major and Minor NSR permits and modifications, the requirements under 40 CFR 51.161 and for PSD permits, additional

requirements as provided under 40 CFR 51.166(q). Texas public participation rules for Flexible Permits in 30 TAC Chapter 39 require 30-days public notice and comment on initial issuance of Flexible Permits and amendments to a Flexible Permit if the action involves construction of a new facility or meets certain criteria, including modifications resulting in allowable emissions increases of 250 tons per year of carbon monoxide and nitrogen oxides or 25 tons per year of other pollutants. See 30 TAC 39.403(b). This restriction is inconsistent with Federal requirements for both Major and Minor NSR. The commenters further object to the use of alterations and permits by rule to change Flexible Permit terms and conditions; such changes should be made through permit amendment with at least 30-days public notice and comment.

Response: In the proposal, EPA proposed to disapprove 30 TAC 116.740 because this submitted rule relates to the public participation requirements of the submitted Flexible Permit Program, and is not severable from the Program. Because we are disapproving the Flexible Permit Program, we are likewise disapproving the inseverable provisions in 30 TAC 116.740, Public Notice, for the Program. See 74 FR 40480, at 48491 and 48493.

The comments relating to the provisions in 30 TAC Chapter 39, the use of permit alterations and Permits by Rule in lieu of permit amendment with at least 30-days public notice and comment are outside the scope of this action.

Comment 3: GCLC provided comments on Texas's submitted public participation program that it is robust and fully compliant with Federal requirements and in fact exceeds Federal requirements. GCLC comments that even parties not residing in the State may comment on an air permit application and TCEQ is obligated to respond whereas under Federal requirements only affected persons are allowed to comment and trigger a response obligation. GCLC asserts that the "public meeting" component of the State program is equivalent to the "public hearing" component of the Federal program. GCLC comments that the trial-type contested hearing process in the Texas program goes well beyond the Federal requirements which permit only interested parties to participate during the notice and comment period.

Response: We recognize that our proposal included a brief discussion of how the submitted Flexible Permit Program requires compliance with provisions in Chapter 39 of the Texas

Administrative Code. On November 26, 2008, EPA proposed limited approval/limited disapproval of the Texas submittals relating to public participation for air permits of new and modified facilities (73 FR 72001). In our November 26, 2008, proposal of the Texas Public Participation rules, we proposed no action on 30 TAC 116.740 and stated that we would address that section in a separate action. *See* 73 FR 72001, at 72015. In our proposal of the Texas Flexible Permits Program, we proposed to disapprove 30 TAC 116.740 because this submitted rule relates to the public participation requirements of the submitted Flexible Permit Program, and is not severable from the Program. Because we are disapproving the Flexible Permit Program, we are likewise disapproving the inseparable provisions in 30 TAC 116.740, Public Notice, for the Program. *See* 74 FR 40480, at 48491 and 48493.

IV. What are the Grounds for This Disapproval Action of the Texas Flexible Permits State Program?

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Flexible Permits State Program, identified in the above Tables 1 and 2. Sources are reminded that they remain subject to the requirements of the federally approved Texas SIP and may be subject to enforcement actions for violations of the SIP. *See* EPA's Revised Guidance on Enforcement during Pending SIP Revisions, (March 1, 1991). You can access this document at: <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/enf-siprev-rpt.pdf>. However, this final disapproval action does not affect Federal enforceability of Major and Minor NSR SIP permits.

The provisions affected by this disapproval action include regulatory provisions at 30 TAC 116.110(a)(3), 116.710, 116.711, 116.714, 116.715, 116.716, 116.717, 116.718, 116.720, 116.721, 116.722, 116.730, 116.740, 116.750, and 116.760; and definitions at 30 TAC 116.10(11)(F), and 30 TAC 116.13 under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Flexible Permits State Program are not severable from each other. Specifically, EPA is making the following findings and taking the following actions as described below:

A. The Texas Flexible Permits Program is Unclear Whether It is for a Major or Minor NSR SIP Revision

Several commenters claim that the submitted Program is clear that every project for which a Flexible Permit is issued must also comply with Major NSR requirements, and therefore was not intended to be a Major NSR SIP revision. Other commenters disagree and say the rules are not clear on their face that the Program requires compliance with the Major NSR requirements. The latter commenters agree with EPA's analysis of the submitted Program in the proposal and comment that we correctly stated that we were required to review the submittal as a substitute for a Major NSR program because the submittal is not clearly limited to minor sources and minor modifications. TCEQ states that the Flexible Permit Program was not intended to be a substitute for the Major NSR permitting requirements but that it understands EPA's concerns with ambiguity regarding the applicability of the submitted Program, that this is not specifically stated in the submitted Program's regulations. Furthermore, the TCEQ commits to revise its rules to make it clear that the Program is limited to Minor NSR.

The submitted Program is analogous to two other Minor NSR programs (Standard Permits and Permits by Rule) in Texas's SIP because they too provide a different permit option for facilities. In particular, these programs exempt facilities from obtaining a source-specific (*i.e.*, case-by case) permit. Unlike the submitted Program, however, the SIP rules for Standard Permits and Permits by Rule include an applicability statement and a regulatory provision that expressly limits applicability to minor sources and minor modifications. The Standard Permits rules explicitly require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions explicitly require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b). In each, the State specifically expressed its intention to require a Major NSR applicability determination and prohibit circumvention of Major NSR. The absence of a similar Major NSR applicability determination requirement and a similar regulatory prohibition for circumvention of the Major NSR SIP permitting requirements in the submitted Flexible Permits Program creates unacceptable ambiguity. The

commenters opposing our proposed action fail to provide an explanation of why the TCEQ did not write the submitted Flexible Permit rules with the same provisions as the Texas Minor NSR Permits by Rule and Standard Permit SIP rules. A clear intention to limit the submitted Program to minor sources and minor modifications would have resulted in a similar structure to the Texas Minor NSR Permits by Rule and Standard Permit SIP rules. The State, however, did not include such provision in the submitted Flexible Permits Program. *See* 74 FR 48480, at 48487, and section III.B (response to comment 1) for further information.

B. The Texas Flexible Permits Program is Not Approvable as a Substitute Major NSR SIP Revision

Because of the State's disavowal of any intent to have this SIP revision submittal treated as a substitute for a Major NSR SIP program, it did not submit a demonstration as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv) to show that its Program was as stringent as the EPA Major NSR SIP program requirements. It also did not explain how the submitted Program is consistent with the Act's requirements for a Major NSR SIP revision. As discussed at 74 FR 38480, at 48487, and in section III.B (response to comments 1 and 2), section III.C.1 (responses to comments 1 and 2), and section III.C.3 (responses to comments 1 and 2) of this notice, the State did not structure the submitted Program in a similar fashion as the Texas Minor Standard Permits and Permits by Rule NSR SIP programs. This lack of a similar regulatory structure creates the ambiguities whether the submitted Program is truly limited to Minor NSR and whether it prohibits the circumvention of the Federal Major NSR SIP requirements. Without the required demonstration and with the ambiguities, EPA is disapproving the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met and that prevent circumvention of Major NSR. *See* 74 FR 48480, at 48488, section III.B (response to comment 1) and section III.C.1 of this notice for further information.

Some commenters assert that the submitted Program meets the netting criteria for a Major NSR SIP revision. Others argue differently. Under the submitted Program, not all emission points, units, facilities, major stationary sources, minor modifications to an existing major stationary source, and so forth, at a site are required to be included in the site's Flexible Permit.

The submitted Program allows an emission cap to be established under a Flexible Permit account to include multiple major stationary sources and allow a major stationary source to net a significant emissions increase against a decrease occurring outside the major stationary source, from facilities on the account's site, and, in other circumstances, allowing an evaluation of emissions of a subset of units at a major stationary source. As a result, the regulated community may apply these regulations inconsistently and in a way that fails to evaluate emissions changes at the entire major stationary source correctly as required by the Major NSR SIP regulations. See section III.E (responses to comments 1 and 2) for further information.

Therefore, the submitted Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power v. Costle*, 636 F.2d 323, 401–403 (D.C. Cir. 1980) and *Asarco v. EPA*, 578 F.2d 320 (D.C. Cir.1978). The submitted Program does not meet the Major NSR SIP requirements for netting. Second, the Program authorizes existing allowable emissions, rather than actual emissions, to be used as a baseline to determine applicability. Therefore, this use of allowables is inconsistent with the requirements of the Act for Major NSR and is contrary to *New York v. EPA*, 413 F.3d 3, 38–40 (D.C. Cir. 2005) ("New York I"). See 74 FR 48480, at 48489–48490, and section III.C.2 (response to comment 2) for further information.

Several commenters claim that the submitted Program requires the retention of the conditions of an existing PSD or Nonattainment NSR permit and that the TCEQ is required under the submitted Program to carry forward such terms and conditions in a Flexible Permit. On the other hand, there was a comment that the submitted Program contains no such requirement and that TCEQ regularly voids existing Nonattainment and PSD NSR permits when it issues a Flexible Permit. The submitted Flexible Permit Program is not clear and explicit that Flexible Permits cannot be used to eliminate or amend existing Nonattainment and PSD NSR SIP permit terms and conditions. There are not sufficient provisions in the submitted Program requiring the holder of a Flexible Permit to maintain recordkeeping sufficient to ensure that all terms and conditions of pre-existing permits (including representations in the applications for such permits) that are incorporated into the Flexible Permit continue to be met. The submitted Program lacks adequate

program requirements for the tracking of existing SIP permits' Major NSR terms, limits and conditions, and whether such requirements are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. The submitted Program is ambiguous and can be interpreted to allow holders of a Flexible Permit to make *de facto* amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of Major NSR permits, without a preconstruction review by Texas. See section III.C.5 for further information.

Therefore, the submitted Program does not require the retention of the conditions of Major NSR SIP permits upon the issuance of a Flexible Permit, as is required for a Major NSR SIP revision.

Pursuant to 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), where a State submits a revision to its Major NSR SIP that differs from the Federal Major NSR base program SIP requirements, the State has an affirmative obligation to explain how the submitted program satisfies the CAA and to demonstrate why the submitted program is in fact at least as stringent as the Major NSR SIP requirements of the Federal base program. It is not EPA's obligation to surmise how the submitted program might work and if it may under certain circumstances be more or less stringent than the Federal Major NSR SIP base program. The State did not submit such a demonstration because it did not view the submitted Program as a substitute for a Major NSR SIP revision.

Without the required customized Major NSR demonstration, the lack of a replicable methodology for the establishment of the emissions cap, the provision allowing director discretion in deciding whether or not to include a MRR condition in a Flexible Permit, the lack of sufficient MRR requirements, and the lack of enforceability, EPA lacks sufficient information to make a finding that the submitted Flexible Permits Program will prevent interference with NAAQS attainment and RFP or violations of any State control strategy that is required by the Texas NSR SIP, or any other applicable CAA requirement. See 74 FR 48480, at 48492, section III.D.3, and section III.A (response to comment 6) for further information.

Therefore, the Program does not meet the requirements of the Act and EPA regulations for a substitute Major NSR SIP.

In summary, EPA is disapproving the submitted Flexible Permits Program as

not meeting the Major NSR SIP requirements.

C. The Texas Flexible Permits Program Is Not Approvable as a Minor NSR SIP Revision

Several commenters claim the Texas Flexible Permit Program explicitly requires permit holders to comply with the Federal Major NSR rules. In contrast, another commenter says that the submitted Program does not include adequate provisions for ensuring that changes that should trigger Major NSR are subject to technology and air quality analysis requirements. Commenters assert that the submitted Program prohibits circumvention of Major NSR. Another commenter notes to the contrary. We evaluated the submitted Program under CAA section 110(a)(2)(C), which requires each State to include a Minor NSR program in its SIP. EPA regulations implementing the Act require that a plan include "legally enforceable procedures that enable" the permitting agency to determine whether a minor source will cause or contribute to violations of applicable portions of the control strategy (see 40 CFR 51.160(a)(1)), or "interference with a national ambient air quality standard," (see 40 CFR 51.160(a)(2)), and to prevent the source from doing so (see 40 CFR 51.160(b)). There is, however, no express provision in the submitted Flexible Permit Program rules that prohibits its use for Major NSR. There is no express regulatory provision in the submitted Program requiring that it cannot be used to circumvent the requirements of Major NSR. There are no regulatory provisions clearly prohibiting circumvention of Major NSR. See 74 FR 48480, at 48486, and section III.D.1 for further information.

Therefore, EPA is disapproving the submitted Program as a Minor NSR SIP revision because it is not clearly limited to Minor NSR and it does not prevent circumvention of the Major NSR SIP requirements.

Several commenters state that the submitted Program does contain comprehensive and stringent provisions for MRR or assert that there is a wide array of additional Texas rules specifying MRR requirements. A commenter notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, requiring one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. In contrast, another commenter notes that the submitted Program does not contain adequate MRR requirements to assure compliance with the emission limits in Flexible Permits.

On the other hand, TCEQ admits the submitted Program does not specify special conditions that ensure recordkeeping, reporting, testing, and reporting to assure compliance with the Flexible Permit.

The submitted Program is an intricate and complex program and therefore, for approvability as a Major NSR SIP revision, there is a greater need for detailed MRR requirements whether to ensure that a project triggering the Major NSR SIP requirements is covered under Major NSR or to ensure that there are adequate means for ensuring compliance of each affected source under both Major and Minor NSR. These are needed to make the submitted Program enforceable and to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, the Texas control strategy, or violate any other CAA requirement. The submitted Flexible Permit Program is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit.

The submitted Program therefore lacks provisions explicitly addressing the type of MRR requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, *etc.*, still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable State or Federal requirement. The commenters' assertion that there are additional MRR SIP requirements applicable to the submitted Program is incorrect; there are no such additional applicable MRR SIP requirements. Moreover, the submitted Program leaves it to the director's discretion to require a MRR condition in a Flexible Permit. See 74 FR 48480, at 48490, and section III.C.3 (response to comment), III.D.3 (response to comments 4, 5, and 9), and section III.A (response to comment 6) for further information.

Without specialized MRR requirements in the submitted Program, it is difficult for EPA or the public to determine which units are covered by a Flexible Permit, which modifications to non-covered units are covered by a Flexible Permit, whether a covered unit is subject to the emission cap or an individual emission limitation, whether a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies and at what time. See 74 FR 48480, at 48492, and section III.D.3 for further information. Accordingly, the submitted Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or by a holder of a Flexible Permit, and it cannot assure compliance with the Program or of the affected source.

Several commenters state that the submitted Program does contain comprehensive and stringent provisions for MRR or assert that there is a wide array of additional Texas rules specifying MRR requirements. A commenter notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, requiring one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. In contrast, another commenter notes that the submitted Program does not contain adequate MRR requirements to assure compliance with the emission limits in Flexible Permits.

First, the commenters point to no other specific SIP rules that apply to Flexible Permits and are detailed MRR requirements. Although the submitted Program requires the same MRR requirements at 30 TAC 116.711(2) and 116.715(c)(4)–(6), as do the SIP rules codified in Subchapter B of Chapter 116, the underpinnings of the submitted Program are so complex that even for a Minor NSR SIP program, there should be more detailed MRR requirements to ensure that the emission cap and/or individual emissions limitations in the issued Flexible Permits are enforceable. See 74 FR 48480, at 48492, and section III.D.3 for further information. Secondly, the submitted Flexible Permit Program is complex and intricate and therefore, for approvability as a NSR SIP revision, there is a greater need for detailed MRR requirements whether to ensure that a project triggering the Major NSR SIP requirements is covered under Major NSR or to ensure that there are adequate means for ensuring compliance of each affected entity under both Major and

Minor NSR. See 74 FR 48480, at 48490, section III.A (response to comment 6), and section III.D.3 (response to comment 2) for further information.

Moreover without specialized MRR requirements in the submitted Program, it is difficult for EPA or the public to determine which units are covered by a Flexible Permit, which modifications to non-covered units are covered by a Flexible Permit, whether a covered unit is subject to the emission cap or an individual emission limitation, whether a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies and when it applies. See 74 FR 48480, at 48492, and section III.D.3 of this notice for further information. Accordingly, the Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or for a holder of a Flexible Permit, and it cannot assure compliance with the Program or by the holder of a Flexible Permit.

Therefore, the submitted Program is not enforceable, as required by section 110(a)(2)(A)–(C) of the Act for a Minor NSR SIP revision, and it fails to prohibit the issuance of a Flexible Permit that could interfere with attainment of a NAAQS or violate a control strategy. Because of its lack of enforceability, EPA lacks sufficient information to make a finding that the Flexible Permits Program is adequate to ensure that no construction and changes authorized under the Program will prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. See 74 FR 48480, at 48492, and section III.D.3 for further information.

Several commenters claim that the submitted Program requires the retention of the conditions of an existing PSD or Nonattainment NSR permit and that the TCEQ is required under the submitted Program to carry forward such terms and conditions in a Flexible Permit. On the other hand, there was a comment that the submitted Program contains no such requirement and that TCEQ regularly voids existing Nonattainment and PSD NSR permits when it issues a Flexible Permit. The submitted Flexible Permit Program is not clear and explicit that Flexible Permits cannot be used to eliminate or amend existing Nonattainment and PSD NSR SIP permit terms and conditions. The regulatory structure of the submitted Program does not ensure that existing Major NSR SIP permits' terms

and conditions are retained. It lacks legally enforceable procedures to ensure that both the permit application and the State's permitting processes (*i.e.*, the State's review, supporting technical information, the public notice and comment process, the record, and most importantly the structuring of each Flexible Permit) clearly identify each covered point of emissions; which existing Minor NSR permits and their types (*e.g.*, Minor NSR SIP permit, Minor NSR SIP standard permit, Minor NSR SIP permit by rule); and which of their permitted terms, limits, conditions and representations in the permit application, are moved into the Flexible Permit. The regulatory structure of the submitted Program also is not clear which existing permits and their types and terms, limits, conditions and representations in the permit application, are not being moved into the Flexible Permit. Finally, there are not sufficient provisions in the submitted Program requiring the holder of a Flexible Permit to maintain recordkeeping sufficient to ensure that all terms and conditions of existing permits (including representations in the applications for such permits) that are incorporated into the Flexible Permit continue to be met. The submitted Program lacks adequate program requirements for the tracking of existing SIP permits' Major and Minor NSR terms, limits and conditions, and whether or not such requirements are incorporated into a Flexible Permit. Minor and Major NSR permits, as well as Minor NSR SIP Permits by Rule and Standard Permits, can be incorporated into a Flexible Permit without any program requirement in place that ensures the SIP permits' terms and conditions are included in the Flexible Permit. The submitted Program also allows holders of a Flexible Permit to make *de facto* amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of Minor and Major NSR permits, without a preconstruction review by Texas. See section III.C.5 and section III.D.3 (response to comment 10) for further information.

Therefore, the submitted Program does not require the retention of the conditions of Major NSR SIP permits upon the issuance of a Flexible Permit, as is required for a Minor NSR SIP revision and allows for revision of existing permits without adequate public notice and comment as required by 40 CFR 51.160–161.

Several commenters claim that the submitted Program does contain an established and replicable method for

determining an established emissions cap; others claim differently. The submitted Program does not describe in sufficient detail the calculation methodologies and underlying technical analyses used to determine a cap. It lacks specific, established, replicable procedures in the submitted regulations providing available means to determine independently, and for different scenarios, how the State will calculate a Flexible Permit's cap and/or individual emissions limitations for a company's site, plants on the site, major stationary sources on the site, a facility within a major stationary source on the site, facilities on the site, a group of units on the site, for one pollutant but not another, *etc.* The process also is not clear for how the emission cap is adjusted for the addition of new facilities. See 74 FR 48480, at 48491 and section III.D.2 for additional information.

Therefore, the submitted Program lacks replicable procedures for the establishment of the emissions cap, as is required for a Minor NSR SIP revision.

The submitted Program provides an alternative permit option but there is not sufficient information to determine whether this alternative is as stringent as the existing Texas Minor NSR SIP. Consequently, the submitted Program could create a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. Additionally, the legal test for whether an alternative Minor NSR permit approach can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)–(b). 74 FR 48480, at 48491. Therefore, we are disapproving the submitted Flexible Permits Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(1) of the Act and 40 CFR 51.160. Without a replicable methodology for establishing the emission caps, the provision allowing director discretion whether or not to include a MRR condition in a Flexible Permit, the lack of sufficient MRR requirements and the lack of enforceability of the submitted Program, EPA lacks sufficient information to make a finding that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP. See 74 FR 48480, at 48492, and section III.A (response to comment 6) for further information.

Based upon the above, overall, the submitted Program fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected. Therefore, EPA is disapproving the Program for not meeting the requirements for a Minor NSR SIP revision.

D. The Texas Flexible Permits Program Does Not Meet the NSR Public Participation Requirements

A commenter stated that any future changes in public participation aspects of the Flexible Permit Program should apply prospectively and should have no effect on existing permits. Another commenter stated that the submitted Program lacks the minimum public participation in 40 CFR 51.161 for a NSR SIP submittal and for a PSD SIP submittal, the public participation requirements in 40 CFR 51.166(q). Another commenter asserts that the submitted public participation program is robust and fully compliant with Federal requirements and in fact exceeds Federal requirements because of its broader scope and trial-type contested hearings process.

The submitted rule is not severable from the Program because it relates to the public participation requirements of the submitted Program. We are disapproving the Texas Flexible Permits State Program, and we are disapproving the submitted 30 TAC 116.740, because this submitted rule for public participation is not severable from the submitted Program. See 74 FR 48480, at 48490 and 48493 and section III.F for further information.

E. Definition of "Account"

TCEQ does not agree with EPA's understanding of the term "account" as applied by TCEQ. It further states that it has integrated and translated the many Federal definitions of the "source" in an attempt to maintain consistent terminology between State and Federal programs. TCEQ comments that its definition of an "account" references the term "source" as defined in Texas law. According to TCEQ, within this rule, it interprets "sources" as being equivalent to multiple "facilities" (a discrete piece of equipment or source of air contaminants) under Texas Minor Source definitions. TCEQ further commented that a Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR purposes. See comment 1 under section III.E. To be approvable, a Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR

purposes. Other commenters note that the definition of "account" is tied to the definition of "site" at 30 TAC 101.1(1) and (87). This, in their view limits an account to a specific plant site. These commenters also point to the Title V rules as providing additional limitation. Citing 30 TAC 116.710(a)(1) and (4), these commenters point out that only one Flexible Permit may be issued at an account site and a Flexible Permit may not cover sources at more than one account site. In summary, these commenters conclude that if these rules are read together they provide sufficient safeguards against a major stationary source netting a significant emissions increase against a decrease occurring outside a site using a Flexible Permit. Another commenter comments if a Flexible Permit could be obtained for more than one site, the only reasonable construction of the rule would be " * * * a facility, group of facilities, account or account * * *" but the rule is not so constructed because it does not extend a Flexible Permit to more than one site. After considering these comments EPA observes that that an account could include an entire company site, which could include multiple major stationary sources, the submitted SIP revisions may allow a major stationary source to net a significant emissions increase against a decrease occurring outside the stationary source from facilities on the account site that are covered under a Flexible Permit. An account may also allow an emission increase to be determined based on an evaluation of a subset of facilities within a major stationary source. See section III.E (response to comment 1) above and 74 FR 48480, at 48489 for further information. The commenter's reliance on the Title V rules does not identify a specific provision in the Texas Title V program that supports the commenter's position.

In summary, for the reasons stated above, the definition of "account" is not clearly limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source. The submitted Program is not approvable because it does not include legally enforceable procedures for ensuring that both the permit application and the State's permitting processes (*i.e.*, the State's review, supporting technical information, the public notice and comment process, the record, and most importantly the structuring of each Flexible Permit in such a manner as to be clear) will clearly inform the public,

other governmental agencies, or a court, which facilities are included under the permit and cap, and which are included under the permit but subject to individual limitations. See 74 FR 48480, at 48485 and section III.E for further information.

V. Final Action

EPA is disapproving the Texas Flexible Permits State Program submitted in a series of SIP revisions, identified in the Tables in section II of this preamble. These affected provisions are addressed in Texas' November 29, 1994 SIP revision submittal, as revised by severable portions in the March 13, 1996, SIP revision submittal, and severable portions of the July 22, 1998 SIP revision submittal that repealed and replaced portions of, as well as revised, the 1994 submittal and repealed and replaced all of the 1996 submittal; and as revised by severable portions in the October 25, 1999, September 11, 2000, April 12, 2001, September 4, 2002, October 4, 2002, and September 25, 2003, SIP revision submittals.

EPA is disapproving the submitted Texas Flexible Permits State Program as a Minor NSR SIP revision because it does not meet the Act and EPA's regulations and is not consistent with applicable statutory and regulatory requirements as interpreted in EPA guidance and policy. We also are disapproving the submitted Texas Flexible Permits State Program as a substitute Major NSR SIP revision, because it does not meet the Act and EPA's regulations and is not consistent with applicable statutory and regulatory requirements as interpreted in EPA guidance and policy.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

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 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).

Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

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. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

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 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 Federal action determines that pre-existing requirements under State or local law should not be approved as part of the Federally approved SIP. It 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 disapproving 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. This final rule does

not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. 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 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 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 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 the Office of Management and Budget, 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. Today’s action does not require the public to perform activities conducive to the use of VCS.

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

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

EPA lacks the discretionary authority to address environmental justice in this 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 disapproves 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.

K. Congressional Review Act

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

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of

this action must be filed in the United States Court of Appeals for the appropriate circuit by *September 13, 2010*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 30, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. Section 52.2273 is amended by adding a new paragraph (c) to read as follows:

§ 52.2273 Approval status.

* * * * *

(c) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification as follows:

(1) The following provisions under 30 TAC Chapter 116, Subchapter A—Definitions:

(i) Portion of the definition of “modification of existing facility” in 30 TAC 116.10(11)(F), submitted March 13,

1996; repealed and readopted June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; and revised August 21, 2002 and submitted September 4, 2002;

(ii) 30 TAC 116.13—Flexible Permit Definitions, adopted November 16, 1994 and submitted November 29, 1994; repealed and readopted June 17, 1998 and submitted July 22, 1998;

(2) The following provision in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 1—Permit Application: 30 TAC 116.110(a)(3)—Applicability, adopted November 16, 1994 and submitted November 29, 1994; repealed and readopted June 17, 1998 and submitted July 22, 1998;

(3) The following sections in 40 TAC Chapter 116, Subchapter G—Flexible Permits:

(i) 30 TAC 116.710—Applicability—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and adopted August 9, 2000 and submitted September 11, 2000;

(ii) 30 TAC 116.711—Flexible Permit Application—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; revised March 7, 2001 and submitted April 12, 2001; and revised August 21, 2002 and submitted September 4, 2002;

(iii) 30 TAC 116.714—Application Review Schedule—adopted November 16, 1994 and submitted November 29, 1994, and revised June 17, 1998 and submitted July 22, 1998;

(iv) 30 TAC 116.715—General and Special Conditions—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; revised March 7, 2001 and submitted April 12, 2001; revised August 21, 2002 and submitted September 4, 2002; and revised August 20, 2003 and submitted September 25, 2003;

(v) 30 TAC 116.716—Emission Caps and Individual Limitations—adopted November 16, 1994 and submitted November 29, 1994;

(vi) 30 TAC 116.717—Implementation Schedule for Additional Controls—adopted November 16, 1994 and submitted November 29, 1994;

(vii) 30 TAC 116.718—Significant Emission Increase—adopted November 16, 1994 and submitted November 29, 1994;

(viii) 30 TAC 116.720—Limitation on Physical and Operational Changes—adopted November 16, 1994 and submitted November 29, 1994;

(ix) 30 TAC 116.721—Amendments and Alterations—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and revision adopted August 9, 2000 and submitted September 11, 2000;

(x) 30 TAC 116.722—Distance Limitations—adopted November 16, 1994 and submitted November 29, 1994; and revision adopted August 9, 2000 and submitted September 11, 2000;

(xi) 30 TAC 116.730—Compliance History—adopted November 16, 1994 and submitted November 29, 1994; and revised June 17, 1998 and submitted July 22, 1998;

(xii) 30 TAC 116.740—Public Notice and Comment—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and revision adopted September 2, 1999 and submitted October 25, 1999;

(xiii) 30 TAC 116.750—Flexible Permit Fee—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; and revision adopted September 25, 2002 and submitted October 4, 2002;

(xiv) 30 TAC 116.760—Flexible Permit Renewal—adopted November 16, 1994 and submitted November 29, 1994.

[FR Doc. 2010-16776 Filed 7-14-10; 8:45 am]

BILLING CODE 6560-50-P

C

Effective:[See Text Amendments]United States Code Annotated [Currentness](#)Title 5. Government Organization and Employees ([Refs & Annos](#)) [Ⓜ] [Part I.](#) The Agencies Generally [Ⓜ] [Chapter 7.](#) Judicial Review ([Refs & Annos](#))

→ § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to [sections 556](#) and [557](#) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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END OF DOCUMENT

US EPA ARCHIVE DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated [Currentness](#)

Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control ([Refs & Annos](#))▢ [Subchapter I](#). Programs and Activities▢ [Part A](#). Air Quality and Emissions Limitations ([Refs & Annos](#))→ **§ 7410. State implementation plans for national primary and secondary ambient air quality standards**

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under [section 7409](#) of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of [sections 7426](#) and [7415](#) of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under [section 7428](#) of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in [section 7603](#) of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of [section 7421](#) of this title (relating to consultation), [section 7427](#) of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated

Except for a primary nonferrous smelter order under [section 7419](#) of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under [section 7418](#) of this title (relating to certain Federal facilities), an order under [section 7413\(d\)](#) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in [section 7506a](#) of this title or [section 7511c](#) of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination

and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [section 7501](#) of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in [section 7509\(b\)](#) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of [section 7509\(a\)](#) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in [section 7509\(a\)](#) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in [section 7509\(a\)](#) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of Novem-



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Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control (Refs & Annos)

▢ Subchapter I. Programs and Activities

▢ Part A. Air Quality and Emissions Limitations (Refs & Annos)

→ **§ 7416. Retention of State authority**

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 116, formerly § 109, as added Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 497, renumbered and amended Dec. 31, 1970, Pub.L. 91-604, § 4(a), (c), 84 Stat. 1678, 1689; June 22, 1974, Pub.L. 93-319, § 6(b), 88 Stat. 259; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(24), 91 Stat. 1400.)

Current through P.L. 111-312 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-296, and 111-309) approved 12-17-10

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- ▣ [Subpart I](#). Review of New Sources and Modifications ([Refs & Annos](#))

→ **§ 51.160 Legally enforceable procedures.**

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in--

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if--

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on--

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in [§ 51.102](#).

[[58 FR 38822](#), July 20, 1993; [60 FR 40468](#), Aug. 9, 1995; [61 FR 41840](#), Aug. 12, 1996]

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

40 C. F. R. § 51.160, 40 CFR § 51.160

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tion Plans ([Refs & Annos](#))

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and Modifications ([Refs & Annos](#))

→ **§ 51.161 Public availability of in-
formation.**

(a) The legally enforceable procedures in [§ 51.160](#) must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval.

(b) For purposes of paragraph (a) of this section, opportunity for public comment shall include, as a minimum--

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(2) A 30-day period for submittal of public comment; and

(3) A notice by prominent advertisement in the

area affected of the location of the source information and analysis specified in paragraph (b)(1) of this section.

(c) Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements.

(d) A copy of the notice required by paragraph (b) of this section must also be sent to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be sent to any other agency in the region having responsibility for implementing the procedures required under this subpart. For lead, a copy of the notice is required for all point sources. The definition of point for lead is given in [§ 51.100\(k\)\(2\)](#).

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

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tion Plans ([Refs & Annos](#))▢ [Subpart I](#). Review of New Sources
and Modifications ([Refs & Annos](#))**→ § 51.162 Identification of re-
sponsible agency.**

Each plan must identify the State or local agency which will be responsible for meeting the requirements of this subpart in each area of the State. Where such responsibility rests with an agency other than an air pollution control agency, such agency will consult with the appropriate State or local air pollution control agency in carrying out the provisions of this subpart.

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

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and Modifications ([Refs & Annos](#))

→ **§ 51.163 Administrative proced-
ures.**

The plan must include the administrative proced-
ures, which will be followed in making the determ-
ination specified in [paragraph \(a\) of § 51.160](#).

SOURCE: 36 FR 22398, Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

40 C. F. R. § 51.163, 40 CFR § 51.163

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[32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; [62 FR 8328](#), Feb. 24, 1997; [62 FR 43801](#), Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; [63 FR 24433](#), May 4, 1998; [64 FR 35763](#), July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

Code of Federal Regulations [Currentness](#)AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

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→ § 51.164 Stack height procedures.

Such procedures must provide that the degree of emission limitation required of any source for control of any air pollutant must not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in [§ 51.118\(b\)](#). Such procedures must provide that before a State issues a permit to a source based on a good engineering practice stack height that exceeds the height allowed by [§ 51.100\(ii\)](#) (1) or (2), the State must notify the public of the availability of the demonstration study and must provide opportunity for public hearing on it. This section does not require such procedures to restrict in any manner the actual stack height of any source.

SOURCE: [36 FR 22398](#), Nov. 25, 1971; [51 FR 40669](#), Nov. 7, 1986; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR](#)



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→ § 51.165 Permit requirements.

(a) State Implementation Plan and Tribal Implementation Plan provisions satisfying sections 172(c)(5) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

(ii) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0065 and 003-005-00176-0, respectively).

(iii) Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(iv)(A) Major stationary source means:

(1) Any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant, except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs (a)(1)(iv)(A)(1)(i) through (vi) of this section.

(i) 50 tons per year of volatile organic compounds in any serious ozone nonattainment

area.

(ii) 50 tons per year of volatile organic compounds in an area within an ozone transport region, except for any severe or extreme ozone nonattainment area.

(iii) 25 tons per year of volatile organic compounds in any severe ozone nonattainment area.

(iv) 10 tons per year of volatile organic compounds in any extreme ozone nonattainment area.

(v) 50 tons per year of carbon monoxide in any serious nonattainment area for carbon monoxide, where stationary sources contribute significantly to carbon monoxide levels in the area (as determined under rules issued by the Administrator).

(vi) 70 tons per year of PM-10 in any serious nonattainment area for PM-10;

(2) For the purposes of applying the requirements of paragraph (a)(8) of this section to stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, any stationary source which emits, or has the potential to emit, 100 tons per year or more of nitrogen oxides emissions, except that the emission thresholds in paragraphs (a)(1)(iv)(A)(2)(i) through (vi) of this section shall apply in areas subject to subpart 2 of part D, title I of the Act.

(i) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as marginal or moderate.

(ii) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when such area is located in an ozone transport region.

(iii) 100 tons per year or more of nitrogen oxides in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region.

(iv) 50 tons per year or more of nitrogen oxides in any serious nonattainment area for ozone.

(v) 25 tons per year or more of nitrogen oxides in any severe nonattainment area for ozone.

(vi) 10 tons per year or more of nitrogen oxides in any extreme nonattainment area for ozone; or

(3) Any physical change that would occur at a stationary source not qualifying under paragraphs (a)(1)(iv)(A)(1) or (2) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

(B) A major stationary source that is major for volatile organic compounds shall be considered major for ozone

(C) The fugitive emissions of a stationary source shall

not be included in determining for any of the purposes of this paragraph whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

- (1) Coal cleaning plants (with thermal dryers);
- (2) Kraft pulp mills;
- (3) Portland cement plants;
- (4) Primary zinc smelters;
- (5) Iron and steel mills;
- (6) Primary aluminum ore reduction plants;
- (7) Primary copper smelters;
- (8) Municipal incinerators capable of charging more than 250 tons of refuse per day;
- (9) Hydrofluoric, sulfuric, or nitric acid plants;
- (10) Petroleum refineries;
- (11) Lime plants;
- (12) Phosphate rock processing plants;
- (13) Coke oven batteries;
- (14) Sulfur recovery plants;
- (15) Carbon black plants (furnace process);
- (16) Primary lead smelters;
- (17) Fuel conversion plants;
- (18) Sintering plants;
- (19) Secondary metal production plants;
- (20) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;
- (21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
- (22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(23) Taconite ore processing plants;

(C) A physical change or change in the method of operation shall not include:

(24) Glass fiber processing plants;

(1) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (h) of this section;

(25) Charcoal production plants;

(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; and

Note to paragraph (a)(1)(v)(C)(1): On December 24, 2003, the second sentence of this paragraph (a)(1)(v)(C)(1) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(v)(A) Major modification means any physical change in or change in the method of operation of a major stationary source that would result in:

(2) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(1) A significant emissions increase of a regulated NSR pollutant (as defined in paragraph (a)(1)(xxxvii) of this section); and

(3) Use of an alternative fuel by reason of an order or rule section 125 of the Act;

(2) A significant net emissions increase of that pollutant from the major stationary source.

(4) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(B) Any significant emissions increase (as defined in paragraph (a)(1)(xxvii) of this section) from any emissions units or net emissions increase (as defined in paragraph (a)(1)(vi) of this section) at a major stationary source that is significant for volatile organic compounds shall be considered significant for ozone.

(5) Use of an alternative fuel or raw material by a stationary source which;

(i) The source was capable of accommodating before December 21, 1976, unless such change

would be prohibited under any federally enforceable permit condition which was established after December 12, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166, or

(ii) The source is approved to use under any permit issued under regulations approved pursuant to this section;

(6) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR part 51 subpart I or 40 CFR 51.166.

(7) Any change in ownership at a stationary source.

(8) [Reserved]

(9) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(i) The State Implementation Plan for the State in which the project is located, and

(ii) Other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated.

(D) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (f) of this section for a PAL for that pollutant. Instead, the definition at paragraph (f)(2)(viii) of this section shall apply.

(E) For the purpose of applying the requirements of (a)(8) of this section to modifications at major stationary sources of nitrogen oxides located in ozone nonattainment areas or in ozone transport regions, whether or not subject to subpart 2, part D, title I of the Act, any significant net emissions increase of nitrogen oxides is considered significant for ozone.

(F) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act.

<Text of subsection (a)(1)(v)(G) stayed effective April 1, 2010 until Oct. 3, 2011.>

(G) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

(vi)(A) Net emissions increase means, with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(1) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph (a)(2)(ii) of this section; and

(2) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. Baseline actual emissions for calculating increases and decreases under this paragraph (a)(1)(vi)(A)(2) shall be determined as provided in paragraph (a)(1)(xxxv) of this section, except that paragraphs (a)(1)(xxxv)(A)(3) and (a)(1)(xxxv)(B)(4) of this section shall not apply.

(B) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs before the date that the increase from the particular change occurs;

(C) An increase or decrease in actual emissions is creditable only if:

(1) It occurs within a reasonable period to be specified by the reviewing authority; and

(2) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs; and

(3) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category.

(D) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(E) A decrease in actual emissions is creditable only to the extent that:

(1) The old level of actual emission or the old level of allowable emissions whichever is lower, exceeds the new level of actual emissions;

(2) It is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and

(3) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the State has not relied on it in demonstrating attainment or reasonable further progress;

<Text of subsection (a)(1)(vi)(C)(3) stayed effective April 1, 2010 until Oct. 3, 2011.>

(4) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(5) [Reserved]

(F) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(G) Paragraph (a)(1)(xii)(B) of this section shall not apply for determining creditable increases and decreases or after a change.

(vii) Emissions unit means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric steam generating unit as defined in paragraph (a)(1)(xx) of this section. For purposes of this section, there are two types of emissions units as described in paragraphs (a)(1)(vii)(A) and (B) of this section.

(A) A new emissions unit is any emissions unit which is (or will be) newly constructed and which has existed for less than 2 years from the date such emissions unit first operated.

(B) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (a)(1)(vii)(A) of this section. A replacement unit, as defined in paragraph (a)(1)(xxi) of this section, is an existing emissions unit.

(viii) Secondary emissions means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

<Text of subsection (a)(1)(ix) stayed effective April 1, 2010 until Oct. 3, 2011.>

(ix) Fugitive emissions means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(A) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(iv)(C) and (a)(1)(v)(G) of this section.)

(B) For purposes of determining the net emissions

increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(vi)(C)(3) of this section.)

(C) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(xxviii)(B)(2) of this section.)

(D) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(xxxv)(A)(1), (a)(1)(xxxv)(B)(1), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(D) of this section.)

(E) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(2)(ii)(B) of this section.)

(F) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(6)(iii) and (iv) of this section.)

(G) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for offsets (see paragraph (a)(3) of this section) and for PALs (see paragraph (f)(4)(i)(D) of this section).

(x)(A) Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant Emission Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Ozone: 40 tpy of volatile organic compounds or nitrogen oxides

Lead: 0.6 tpy

PM₁₀: 15 tpy

PM_{2.5}: 10 tpy of direct PM_{2.5} emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a PM_{2.5} precursor under paragraph (a)(1)(xxxvii) of this section

(B) Notwithstanding the significant emissions rate for ozone in paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area that is subject to subpart 2, part D, title I of the Act, if such emissions increase of volatile organic compounds exceeds 25 tons per year.

(C) For the purposes of applying the requirements of

paragraph (a)(8) of this section to modifications at major stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, the significant emission rates and other requirements for volatile organic compounds in paragraphs (a)(1)(x)(A), (B), and (E) of this section shall apply to nitrogen oxides emissions.

(D) Notwithstanding the significant emissions rate for carbon monoxide under paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of carbon monoxide that would result from any physical change in, or change in the method of operation of, a major stationary source in a serious nonattainment area for carbon monoxide if such increase equals or exceeds 50 tons per year, provided the Administrator has determined that stationary sources contribute significantly to carbon monoxide levels in that area.

(E) Notwithstanding the significant emissions rates for ozone under paragraphs (a)(1)(x)(A) and (B) of this section, any increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act shall be considered a significant net emissions increase.

(xi) Allowable emissions means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(A) The applicable standards set forth in 40 CFR part 60 or 61;

(B) Any applicable State Implementation Plan emissions limitation including those with a future compliance date; or

(C) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(xii)(A) Actual emissions means the actual rate of emissions of a regulated NSR pollutant from an emissions unit, as determined in accordance with paragraphs (a)(1)(xii)(B) through (D) of this section, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a PAL under paragraph (f) of this section. Instead, paragraphs (a)(1)(xxviii) and (xxxv) of this section shall apply for those purposes.

(B) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(C) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(D) For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(xiii) Lowest achievable emission rate (LAER) means, for any source, the more stringent rate of emissions based on the following:

(A) The most stringent emissions limitation which is contained in the implementation plan of any State for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(B) The most stringent emissions limitation which is achieved in practice by such class or category of stationary sources. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within or stationary source. In no event shall the application of the term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

(xiv) Federally enforceable means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

(xv) Begin actual construction means in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the

change.

(xvi) Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(xvii) Necessary preconstruction approvals or permits means those Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(xviii) Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

(xix) Volatile organic compounds (VOC) is as defined in § 51.100(s) of this part.

(xx) Electric utility steam generating unit means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of

providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

(xxi) Replacement unit means an emissions unit for which all the criteria listed in paragraphs (a)(1)(xxi)(A) through (D) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(A) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(B) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(C) The replacement does not alter the basic design parameters (as discussed in paragraph (h)(2) of this section) of the process unit.

(D) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

(xxii) Temporary clean coal technology demonstration project means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State Implementation Plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(xxiii) Clean coal technology means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

(xxiv) Clean coal technology demonstration project means a project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of \$2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(xxv) [Reserved]

(xxvi) Pollution prevention means any activity that through process changes, product reformulation or redesign, or substitution of less polluting raw materials, eliminates or reduces the release of air pollutants (including fugitive emissions) and other pollutants to the environment prior to recycling, treatment, or disposal; it does not mean recycling (other than certain "in-process recycling" practices), energy recovery, treatment, or disposal.

(xxvii) Significant emissions increase means, for a regulated NSR pollutant, an increase in emissions that is significant (as defined in paragraph (a)(1)(x) of this section) for that pollutant.

(xxviii)(A) Projected actual emissions means, the maximum annual rate, in tons per year, at which an

existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years (12-month period) following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit of that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source.

(B) In determining the projected actual emissions under paragraph (a)(1)(xxviii)(A) of this section before beginning actual construction, the owner or operator of the major stationary source:

(1) Shall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved plan; and

<Text of subsection (a)(1)(xxviii)(B)(2) stayed effective April 1, 2010 until Oct. 3, 2011.>

(2) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

(3) Shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month

period used to establish the baseline actual emissions under paragraph (a)(1)(xxxv) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or,

<Text of subsection (a)(1)(xxviii)(B)(4) stayed effective April 1, 2010 until Oct. 3, 2011.>

(4) In lieu of using the method set out in paragraphs (a)(1)(xxviii)(B)(1) through (3) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (a)(1)(iii) of this section. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

(xxix) [Reserved]

(xxx) Nonattainment major new source review (NSR) program means a major source preconstruction permit program that has been approved by the Administrator and incorporated into the plan to implement the requirements of this section, or a program that implements part 51, appendix S, Sections I through VI of this chapter. Any permit issued under such a program is a major NSR permit.

(xxxi) Continuous emissions monitoring system (CEMS) means all of the equipment that may be required to meet the data acquisition and availability requirements of this section, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.

(xxxii) Predictive emissions monitoring system (PEMS) means all of the equipment necessary to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O₂ or CO₂ concentrations), and calculate and record the mass emissions rate (for example, lb/hr) on a continuous basis.

(xxxiii) Continuous parameter monitoring system (CPMS) means all of the equipment necessary to meet the data acquisition and availability requirements of this section, to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O₂ or CO₂ concentrations), and to record average operational parameter value(s) on a continuous basis.

(xxxiv) Continuous emissions rate monitoring system (CERMS) means the total equipment required for the determination and recording of the pollutant mass emissions rate (in terms of mass per unit of time).

(xxxv) Baseline actual emissions means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with paragraphs (a)(1)(xxxv)(A) through (D) of this section.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when the owner or operator begins actual construction of the project. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

<Text of subsection (a)(1)(xxxv)(A)(1) stayed effective

April 1, 2010 until Oct. 3, 2011.>

(1) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

(2) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period.

(3) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

(4) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by paragraph (a)(1)(xxxv)(A)(2) of this section.

(B) For an existing emissions unit (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 10-year period immediately preceding either the date the

owner or operator begins actual construction of the project, or the date a complete permit application is received by the reviewing authority for a permit required either under this section or under a plan approved by the Administrator, whichever is earlier, except that the 10-year period shall not include any period earlier than November 15, 1990.

<Text of subsection (a)(1)(xxxv)(B)(1) stayed effective April 1, 2010 until Oct. 3, 2011.>

(1) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

(2) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(3) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period. However, if an emission limitation is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of this chapter, the baseline actual emissions need only be adjusted if the State has taken credit for such emissions reductions in an attainment demonstration or maintenance plan consistent with the requirements of paragraph

(a)(3)(ii)(G) of this section.

(4) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used For each regulated NSR pollutant.

(5) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by paragraphs (a)(1)(xxxv)(B)(2) and (3) of this section.

<Text of subsection (a)(1)(xxxv)(C) stayed effective April 1, 2010 until Oct. 3, 2011.>

(C) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

<Text of subsection (a)(1)(xxxv)(D) stayed effective April 1, 2010 until Oct. 3, 2011.>

(D) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in

accordance with the procedures contained in paragraph (a)(1)(xxxv)(A) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(B) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (a)(1)(xxxv)(C) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

(xxxvi) [Reserved]

(xxxvii) Regulated NSR pollutant, for purposes of this section, means the following:

(A) Nitrogen oxides or any volatile organic compounds;

(B) Any pollutant for which a national ambient air quality standard has been promulgated;

(C) Any pollutant that is identified under this paragraph (a)(1)(xxxvii)(C) as a constituent or precursor of a general pollutant listed under paragraph (a)(1)(xxxvii)(A) or (B) of this section, provided that such constituent or precursor pollutant may only be regulated under NSR as part of regulation of the general pollutant. Precursors identified by the Administrator for purposes of NSR are the following:

(1) Volatile organic compounds and nitrogen oxides are precursors to ozone in all ozone nonattainment areas.

(2) Sulfur dioxide is a precursor to PM_{2.5} in all PM_{2.5} nonattainment areas.

(3) Nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all $PM_{2.5}$ nonattainment areas, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(4) Volatile organic compounds and ammonia are presumed not to be precursors to $PM_{2.5}$ in any $PM_{2.5}$ nonattainment area, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds or ammonia from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations; or

(D) $PM_{2.5}$ emissions and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures. On or after January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods), such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in nonattainment major NSR permits. Compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan. Applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of this section unless the applicable implementation plan required condensable particulate matter to be included.

(xxxviii) Reviewing authority means the State air pollution control agency, local agency, other State agency, Indian tribe, or other agency authorized by the Administrator to carry out a permit program under this section and § 51.166, or the Administrator in the case of

EPA-implemented permit programs under § 52.21.

(xxxix) Project means a physical change in, or change in the method of operation of, an existing major stationary source.

(xl) Best available control technology (BACT) means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR part 60 or 61. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(xli) Prevention of Significant Deterioration (PSD) permit means any permit that is issued under a major source preconstruction permit program that has been approved by the Administrator and incorporated into the plan to implement the requirements of § 51.166 of this chapter, or under the program in § 52.21 of this chapter.

(xlii) Federal Land Manager means, with respect to any

lands in the United States, the Secretary of the department with authority over such lands.

(xliii)(A) In general, process unit means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(B) Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.

(C) For replacement cost purposes, components shared between two or more process units are proportionately allocated based on capacity.

(D) The following list identifies the process units at specific categories of stationary sources.

(1) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(2) For a petroleum refinery, there are several categories of process units: those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(3) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

Note to paragraph (a)(1)(xliii): By a court order on December 24, 2003, this paragraph (a)(1)(xliii) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(xliv) Functionally equivalent component means a component that serves the same purpose as the replaced component.

Note to paragraph (a)(1)(xliv): By a court order on December 24, 2003, this paragraph (a)(1)(xliv) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(xlv) Fixed capital cost means the capital needed to provide all the depreciable components. "Depreciable components" refers to all components of fixed capital cost and is calculated by subtracting land and working capital from the total capital investment, as defined in paragraph (a)(1)(xlv) of this section.

Note to paragraph (a)(1)(xlv): By a court order on December 24, 2003, this paragraph (a)(1)(xlv) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(xlv) Total capital investment means the sum of the following: All costs required to purchase needed process equipment (purchased equipment costs); the costs of labor and materials for installing that equipment (direct installation costs); the costs of site preparation and buildings; other costs such as engineering, construction and field expenses, fees to contractors, startup and performance tests, and contingencies (indirect installation costs); land for the process equipment; and working capital for the process equipment.

Note to paragraph (a)(1)(xlvi): By a court order on December 24, 2003, this paragraph (a)(1)(xlvi) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(2) Applicability procedures.

(i) Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(c)(5) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard under subpart C of 40 CFR part 81. Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment under section 107(d)(1)(A)(i) of the Act, if the stationary source or modification would locate anywhere in the designated nonattainment area.

(ii) Each plan shall use the specific provisions of paragraphs (a)(2)(ii)(A) through (F) of this section. Deviations from these provisions will be approved only if

the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(2)(ii)(A) through (F) of this section.

(A) Except as otherwise provided in paragraphs (a)(2)(iii) and (iv) of this section, and consistent with the definition of major modification contained in paragraph (a)(1)(v)(A) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (a)(1)(xxvii) of this section), and a significant net emissions increase (as defined in paragraphs (a)(1)(vi) and (x) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

<Text of subsection (a)(2)(ii)(B) stayed effective April 1, 2010 until Oct. 3, 2011.>

(B) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(ii)(C) through (F) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in

paragraph (a)(1)(vi) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(C) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (a)(1)(xxviii) of this section) and the baseline actual emissions (as defined in paragraphs (a)(1)(xxxv)(A) and (B) of this section, as applicable), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (a)(1)(x) of this section).

(D) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (a)(1)(iii) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (a)(1)(xxxv)(C) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (a)(1)(x) of this section).

(E) [Reserved]

(F) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(ii)(C) through (D) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (a)(1)(x) of this section).

(iii) The plan shall require that for any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (f) of this section.

(iv) [Reserved]

(3)(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed, except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained where;

(A) The demonstration of reasonable further progress and attainment of ambient air quality standards is based upon the actual emissions of sources located within a designated nonattainment area for which the preconstruction review program was adopted; or

(B) The applicable State Implementation Plan does not contain an emissions limitation for that source or source category.

(ii) The plan shall further provide that:

(A) Where the emissions limit under the applicable State Implementation Plan allows greater emissions than the potential to emit of the source, emissions offset credit will be allowed only for control below this potential;

(B) For an existing fuel combustion source, credit shall be based on the allowable emissions under the applicable State Implementation Plan for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offset credit based on the allowable (or actual) emissions for the fuels involved is not acceptable, unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches,

(C)(1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(1)(i) through (ii) of this section.

(i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(ii) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

(2) Emissions reductions achieved by shutting down an existing emissions unit or curtailing production or operating hours and that do not

meet the requirements in paragraph (a)(3)(ii)(C)(1)(ii) of this section may be generally credited only if:

(i) The shutdown or curtailment occurred on or after the date the construction permit application is filed; or

(ii) The applicant can establish that the proposed new emissions unit is a replacement for the shutdown or curtailed emissions unit, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraph (a)(3)(ii)(C)(1)(i) of this section.

(D) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977; (This document is also available from Mr. Ted Creekmore, Office of Air Quality Planning and Standards, (MD-15) Research Triangle Park, NC 27711.))

(E) All emission reductions claimed as offset credit shall be federally enforceable;

(F) Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR part 51 appendix S section IV.D.

(G) Credit for an emissions reduction can be claimed to the extent that the reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the State has not relied on it in demonstration attainment or reasonable further progress.

(H), (I) [Reserved]

(vi) Primary aluminum ore reduction plants;

(J) The total tonnage of increased emissions, in tons per year, resulting from a major modification that must be offset in accordance with section 173 of the Act shall be determined by summing the difference between the allowable emissions after the modification (as defined by paragraph (a)(1)(xi) of this section) and the actual emissions before the modification (as defined in paragraph (a)(1)(xii) of this section) for each emissions unit.

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or citric acid plants;

<Text of subsection (a)(4) added by 75 FR 16015, effective April 1, 2010 through Oct. 3, 2011.>

(x) Petroleum refineries;

(4) Each plan may provide that the provisions of this paragraph do not apply to a source or modification that would be a major stationary source or major modification only if fugitive emission to the extent quantifiable are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(i) Coal cleaning plants (with thermal dryers);

(xiv) Sulfur recovery plants;

(ii) Kraft pulp mills;

(xv) Carbon black plants (furnace process);

(iii) Portland cement plants;

(xvi) Primary lead smelters;

(iv) Primary zinc smelters;

(xvii) Fuel conversion plants;

(v) Iron and steel mills;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(5) Each plan shall include enforceable procedures to provide that:

(i) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provision of the plan and any other requirements under local, State or Federal law.

(ii) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforcement limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of regulations approved pursuant to this section shall apply to the source or modification as though construction had not yet commenced on the source or modification;

(6) Each plan shall provide that, except as otherwise provided in paragraph (a)(6)(vi) of this section, the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (a)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (a)(1)(xxviii)(B)(1) through (3) of this section for calculating projected actual emissions. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(6)(i) through (vi) of this section.

(i) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(A) A description of the project;

emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(B) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

<Text of subsection (a)(6)(iv) stayed effective April 1, 2010 until Oct. 3, 2011.>

(C) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (a)(1)(xxviii)(B)(3) of this section and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (a)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (a)(6)(iii) of this section, during the year that preceded submission of the report.

(ii) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (a)(6)(i) of this section to the reviewing authority. Nothing in this paragraph (a)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the reviewing authority before beginning actual construction.

(v) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority if the annual emissions, in tons per year, from the project identified in paragraph (a)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (a)(6)(i)(C) of this section, by a significant amount (as defined in paragraph (a)(1)(x) of this section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (a)(6)(i)(C) of this section. Such report shall be submitted to the reviewing authority within 60 days after the end of such year. The report shall contain the following:

<Text of subsection (a)(6)(iii) stayed effective April 1, 2010 until Oct. 3, 2011.>

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph (a)(6)(i)(B) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (a)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the

(A) The name, address and telephone number of the major stationary source;

(B) The annual emissions as calculated pursuant to paragraph (a)(6)(iii) of this section; and

(C) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction

projection).

(vi) A “reasonable possibility” under paragraph (a)(6) of this section occurs when the owner or operator calculates the project to result in either:

(A) A projected actual emissions increase of at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (a)(1)(xxvii) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(B) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (a)(1)(xxviii)(B)(3), sums to at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (a)(1)(xxvii) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (a)(6)(vi)(B) of this section, and not also within the meaning of paragraph (a)(6)(vi)(A) of this section, then provisions (a)(6)(ii) through (v) do not apply to the project.

(7) Each plan shall provide that the owner or operator of the source shall make the information required to be documented and maintained pursuant to paragraph (a)(6) of this section available for review upon a request for inspection by the reviewing authority or the general public pursuant to the requirements contained in § 70.4(b)(3)(viii) of this chapter.

(8) The plan shall provide that the requirements of this section applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area,

except in ozone nonattainment areas or in portions of an ozone transport region where the Administrator has granted a NO_x waiver applying the standards set forth under section 182(f) of the Act and the waiver continues to apply.

(9)(i) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section, the ratio of total actual emissions reductions to the emissions increase shall be at least 1:1 unless an alternative ratio is provided for the applicable nonattainment area in paragraphs (a)(9)(ii) through (a)(9)(iv) of this section.

(ii) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section for ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be as follows:

(A) In any marginal nonattainment area for ozone--at least 1.1:1;

(B) In any moderate nonattainment area for ozone--at least 1.15:1;

(C) In any serious nonattainment area for ozone--at least 1.2:1;

(D) In any severe nonattainment area for ozone--at least 1.3:1 (except that the ratio may be at least 1.2:1 if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(E) In any extreme nonattainment area for ozone--at least 1.5:1 (except that the ratio may be at least 1.2:1

if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

comply with the interprecursor trading hierarchy and ratio established in the approved plan for a particular nonattainment area.

(iii) Notwithstanding the requirements of paragraph (a)(9)(ii) of this section for meeting the requirements of paragraph (a)(3) of this section, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1.15:1 for all areas within an ozone transport region that is subject to subpart 2, part D, title I of the Act, except for serious, severe, and extreme ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act.

(b)(1) Each plan shall include a preconstruction review permit program or its equivalent to satisfy the requirements of section 110(a)(2)(D)(i) of the Act for any new major stationary source or major modification as defined in paragraphs (a)(1) (iv) and (v) of this section. Such a program shall apply to any such source or modification that would locate in any area designated as attainment or unclassifiable for any national ambient air quality standard pursuant to section 107 of the Act, when it would cause or contribute to a violation of any national ambient air quality standard.

(iv) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section for ozone nonattainment areas that are subject to subpart 1, part D, title I of the Act (but are not subject to subpart 2, part D, title I of the Act, including 8-hour ozone nonattainment areas subject to 40 CFR 51.902(b)), the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1:1.

(2) A major source or major modification will be considered to cause or contribute to a violation of a national ambient air quality standard when such source or modification would, at a minimum, exceed the following significance levels at any locality that does not or would not meet the applicable national standard:

(10) The plan shall require that the requirements of this section applicable to major stationary sources and major modifications of PM-10 shall also apply to major stationary sources and major modifications of PM-10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM-10 levels that exceed the PM-10 ambient standards in the area.

(11) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section, the emissions offsets obtained shall be for the same regulated NSR pollutant unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph. The plan may allow the offset requirements in paragraph (a)(3) of this section for direct PM_{2.5} emissions or emissions of precursors of PM_{2.5} to be satisfied by offsetting reductions in direct PM_{2.5} emissions or emissions of any PM_{2.5} precursor identified under paragraph (a)(1)(xxxvii)(C) of this section if such offsets

Pollutant	Annual	Averaging time (hours)	
24	8	3	1
SO ₂	1.0 <<mu>>g/m ³	5 <<mu>>g/m ³	25 <<mu>>g/m ³
PM ₁₀	1.0 <<mu>>g/m ³	5 <<mu>>g/m ³	
PM _{2.5}	0.3 <<mu>>g/m ³	1.2 <<mu>>g/m ³	
NO ₂	1.0 <<mu>>g/m ³		
CO		0.5 mg/m ³	2 mg/m ³

(3) Such a program may include a provision which allows a proposed major source or major modification subject to paragraph (b) of this section to reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to, at a minimum, compensate for its adverse ambient impact where the major source or major modification would otherwise cause or contribute to a violation of any national ambient air quality standard. The plan shall require that, in the absence of such emission reductions, the State or local agency shall deny the proposed construction.

(4) The requirements of paragraph (b) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment pursuant to section 107 of the Act.

(c) to (e) [Reserved]

(f) Actuals PALs. The plan shall provide for PALs according to the provisions in paragraphs (f)(1) through (15) of this section.

(1) Applicability.

(i) The reviewing authority may approve the use of an actuals PAL for any existing major stationary source (except as provided in paragraph (f)(1)(ii) of this section) if the PAL meets the requirements in paragraphs (f)(1) through (15) of this section. The term "PAL" shall mean "actuals PAL" throughout paragraph (f) of this section.

(ii) The reviewing authority shall not allow an actuals PAL for VOC or NO_x for any major stationary source located in an extreme ozone nonattainment area.

(iii) Any physical change in or change in the method of operation of a major stationary source that maintains its total source-wide emissions below the PAL level, meets the requirements in paragraphs (f)(1) through (15) of this section, and complies with the PAL permit:

(A) Is not a major modification for the PAL pollutant;

(B) Does not have to be approved through the plan's nonattainment major NSR program; and

(C) Is not subject to the provisions in paragraph (a)(5)(ii) of this section (restrictions on relaxing enforceable emission limitations that the major stationary source used to avoid applicability of the

nonattainment major NSR program).

(iv) Except as provided under paragraph (f)(1)(iii)(C) of this section, a major stationary source shall continue to comply with all applicable Federal or State requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL.

(2) Definitions. The plan shall use the definitions in paragraphs (f)(2)(i) through (xi) of this section for the purpose of developing and implementing regulations that authorize the use of actuals PALs consistent with paragraphs (f)(1) through (15) of this section. When a term is not defined in these paragraphs, it shall have the meaning given in paragraph (a)(1) of this section or in the Act.

(i) Actuals PAL for a major stationary source means a PAL based on the baseline actual emissions (as defined in paragraph (a)(1)(xxxv) of this section) of all emissions units (as defined in paragraph (a)(1)(vii) of this section) at the source, that emit or have the potential to emit the PAL pollutant.

(ii) Allowable emissions means “allowable emissions” as defined in paragraph (a)(1)(xi) of this section, except as this definition is modified according to paragraphs (f)(2)(ii)(A) through (B) of this section.

(A) The allowable emissions for any emissions unit shall be calculated considering any emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit.

(B) An emissions unit's potential to emit shall be determined using the definition in paragraph (a)(1)(iii) of this section, except that the words “or enforceable as a practical matter” should be added after “federally enforceable.”

(iii) Small emissions unit means an emissions unit that emits or has the potential to emit the PAL pollutant in an amount less than the significant level for that PAL pollutant, as defined in paragraph (a)(1)(x) of this section or in the Act, whichever is lower.

(iv) Major emissions unit means:

(A) Any emissions unit that emits or has the potential to emit 100 tons per year or more of the PAL pollutant in an attainment area; or

(B) Any emissions unit that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant as defined by the Act for nonattainment areas. For example, in accordance with the definition of major stationary source in section 182(c) of the Act, an emissions unit would be a major emissions unit for VOC if the emissions unit is located in a serious ozone nonattainment area and it emits or has the potential to emit 50 or more tons of VOC per year.

(v) Plantwide applicability limitation (PAL) means an emission limitation expressed in tons per year, for a pollutant at a major stationary source, that is enforceable as a practical matter and established source-wide in accordance with paragraphs (f)(1) through (f)(15) of this section.

(vi) PAL effective date generally means the date of issuance of the PAL permit. However, the PAL effective date for an increased PAL is the date any emissions unit which is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(vii) PAL effective period means the period beginning with the PAL effective date and ending 10 years later.

(viii) PAL major modification means, notwithstanding paragraphs (a)(1)(v) and (vi) of this section (the definitions for major modification and net emissions increase), any physical change in or change in the method of operation of the PAL source that causes it to emit the PAL pollutant at a level equal to or greater than the PAL.

(ix) PAL permit means the major NSR permit, the minor NSR permit, or the State operating permit under a program that is approved into the plan, or the title V permit issued by the reviewing authority that establishes a PAL for a major stationary source.

(x) PAL pollutant means the pollutant for which a PAL is established at a major stationary source.

(xi) Significant emissions unit means an emissions unit that emits or has the potential to emit a PAL pollutant in an amount that is equal to or greater than the significant level (as defined in paragraph (a)(1)(x) of this section or in the Act, whichever is lower) for that PAL pollutant, but less than the amount that would qualify the unit as a major emissions unit as defined in paragraph (f)(2)(iv) of this section.

(3) Permit application requirements. As part of a permit application requesting a PAL, the owner or operator of a major stationary source shall submit the following information to the reviewing authority for approval:

(i) A list of all emissions units at the source designated as small, significant or major based on their potential to emit. In addition, the owner or operator of the source shall indicate which, if any, Federal or State applicable requirements, emission limitations or work practices apply to each unit.

(ii) Calculations of the baseline actual emissions (with supporting documentation). Baseline actual emissions are to include emissions associated not only with operation of the unit, but also emissions associated with startup, shutdown and malfunction.

(iii) The calculation procedures that the major stationary source owner or operator proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by paragraph (f)(13)(i) of this section.

(4) General requirements for establishing PALs.

(i) The plan allows the reviewing authority to establish a PAL at a major stationary source, provided that at a minimum, the requirements in paragraphs (f)(4)(i)(A) through (G) of this section are met.

(A) The PAL shall impose an annual emission limitation in tons per year, that is enforceable as a practical matter, for the entire major stationary source. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall show that the sum of the monthly emissions from each emissions unit under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source owner or operator shall show that the sum of the preceding monthly emissions from the PAL effective date for each emissions unit under the PAL is less than the PAL.

(B) The PAL shall be established in a PAL permit that meets the public participation requirements in paragraph (f)(5) of this section.

(C) The PAL permit shall contain all the requirements of paragraph (f)(7) of this section.

<Text of subsection (f)(4)(i)(D) stayed effective April 1, 2010 until Oct. 3, 2011.>

(D) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

(E) Each PAL shall regulate emissions of only one pollutant.

(F) Each PAL shall have a PAL effective period of 10 years.

(G) The owner or operator of the major stationary source with a PAL shall comply with the monitoring, recordkeeping, and reporting requirements provided in paragraphs (f)(12) through (14) of this section for each emissions unit under the PAL through the PAL effective period.

(ii) At no time (during or after the PAL effective period) are emissions reductions of a PAL pollutant, which occur during the PAL effective period, creditable as decreases for purposes of offsets under paragraph (a)(3)(ii) of this section unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

(5) Public participation requirement for PALs. PALs for existing major stationary sources shall be established, renewed, or increased through a procedure that is consistent with §§ 51.160 and 51.161 of this chapter. This includes the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The reviewing authority must address all material comments before taking final action on the permit.

(6) Setting the 10-year actuals PAL level.

(i) Except as provided in paragraph (f)(6)(ii) of this section, the plan shall provide that the actuals PAL level for a major stationary source shall be established as the sum of the baseline actual emissions (as defined in paragraph (a)(1)(xxxv) of this section) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under paragraph (a)(1)(x) of this section or under the Act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level. The reviewing authority shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm NO_x to a new rule limit of 30 ppm, then the permit shall contain a future effective PAL level that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(ii) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of

adding the baseline actual emissions as specified in paragraph (f)(6)(i) of this section, the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.

(7) Contents of the PAL permit. The plan shall require that the PAL permit contain, at a minimum, the information in paragraphs (f)(7)(i) through (x) of this section.

(i) The PAL pollutant and the applicable source-wide emission limitation in tons per year.

(ii) The PAL permit effective date and the expiration date of the PAL (PAL effective period).

(iii) Specification in the PAL permit that if a major stationary source owner or operator applies to renew a PAL in accordance with paragraph (f)(10) of this section before the end of the PAL effective period, then the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a revised PAL permit is issued by the reviewing authority.

(iv) A requirement that emission calculations for compliance purposes include emissions from startups, shutdowns and malfunctions.

(v) A requirement that, once the PAL expires, the major stationary source is subject to the requirements of paragraph (f)(9) of this section.

(vi) The calculation procedures that the major stationary source owner or operator shall use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by paragraph (f)(13)(i) of this section.

(vii) A requirement that the major stationary source owner or operator monitor all emissions units in accordance with the provisions under paragraph (f)(12) of this section.

(viii) A requirement to retain the records required under paragraph (f)(13) of this section on site. Such records may be retained in an electronic format.

(ix) A requirement to submit the reports required under paragraph (f)(14) of this section by the required deadlines.

(x) Any other requirements that the reviewing authority deems necessary to implement and enforce the PAL.

(8) PAL effective period and reopening of the PAL permit. The plan shall require the information in paragraphs (f)(8)(i) and (ii) of this section.

(i) PAL effective period. The reviewing authority shall specify a PAL effective period of 10 years.

(ii) Reopening of the PAL permit.

(A) During the PAL effective period, the plan shall require the reviewing authority to reopen the PAL permit to:

(1) Correct typographical/calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL.

(2) Reduce the PAL if the owner or operator of the major stationary source creates creditable emissions reductions for use as offsets under paragraph (a)(3)(ii) of this section.

(3) Revise the PAL to reflect an increase in the PAL as provided under paragraph (f)(11) of this section.

(B) The plan shall provide the reviewing authority discretion to reopen the PAL permit for the following:

(1) Reduce the PAL to reflect newly applicable Federal requirements (for example, NSPS) with compliance dates after the PAL effective date.

(2) Reduce the PAL consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the plan.

(3) Reduce the PAL if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager and for which information is available to the general public.

(C) Except for the permit reopening in paragraph (f)(8)(ii)(A)(1) of this section for the correction of typographical/calculation errors that do not increase the PAL level, all other reopenings shall be carried out in accordance with the public participation requirements of paragraph (f)(5) of this section.

(9) Expiration of a PAL. Any PAL which is not renewed in accordance with the procedures in paragraph (f)(10) of this section shall expire at the end of the PAL effective period, and the requirements in paragraphs (f)(9)(i) through (v) of this section shall apply.

(i) Each emissions unit (or each group of emissions units) that existed under the PAL shall comply with an allowable emission limitation under a revised permit established according to the procedures in paragraphs (f)(9)(i)(A) through (B) of this section.

(A) Within the time frame specified for PAL renewals in paragraph (f)(10)(ii) of this section, the major stationary source shall submit a proposed allowable emission limitation for each emissions unit (or each group of emissions units, if such a distribution is more appropriate as decided by the reviewing authority) by distributing the PAL allowable emissions for the major stationary source among each of the emissions units that existed under the PAL. If the PAL had not yet been adjusted for an applicable requirement that became effective during the PAL effective period, as required under paragraph (f)(10)(v) of this section, such distribution shall be made as if the PAL had been adjusted.

(B) The reviewing authority shall decide whether and how the PAL allowable emissions will be distributed and issue a revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as the reviewing authority determines is appropriate.

(ii) Each emissions unit(s) shall comply with the allowable emission limitation on a 12-month rolling basis. The reviewing authority may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS or CPMS to demonstrate compliance with the allowable emission limitation.

(iii) Until the reviewing authority issues the revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as required under paragraph (f)(9)(i)(A) of this section, the source shall continue to comply with a source-wide, multi-unit emissions cap equivalent to the level of the PAL emission limitation.

(iv) Any physical change or change in the method of operation at the major stationary source will be subject to the nonattainment major NSR requirements if such change meets the definition of major modification in paragraph (a)(1)(v) of this section.

(v) The major stationary source owner or operator shall continue to comply with any State or Federal applicable requirements (BACT, RACT, NSPS, etc.) that may have applied either during the PAL effective period or prior to the PAL effective period except for those emission limitations that had been established pursuant to paragraph (a)(5)(ii) of this section, but were eliminated by the PAL in accordance with the provisions in paragraph (f)(1)(iii)(C) of this section.

(10) Renewal of a PAL.

(i) The reviewing authority shall follow the procedures specified in paragraph (f)(5) of this section in approving any request to renew a PAL for a major stationary source, and shall provide both the proposed PAL level and a written rationale for the proposed PAL level to the public for review and comment. During such public review, any person may propose a PAL level for the source for consideration by the reviewing authority.

(ii) Application deadline. The plan shall require that a major stationary source owner or operator shall submit a timely application to the reviewing authority to request renewal of a PAL. A timely application is one that is submitted at least 6 months prior to, but not earlier than 18 months from, the date of permit expiration. This deadline for application submittal is to ensure that the permit will

not expire before the permit is renewed. If the owner or operator of a major stationary source submits a complete application to renew the PAL within this time period, then the PAL shall continue to be effective until the revised permit with the renewed PAL is issued.

(iii) Application requirements. The application to renew a PAL permit shall contain the information required in paragraphs (f)(10)(iii)(A) through (D) of this section.

(A) The information required in paragraphs (f)(3)(i) through (iii) of this section.

(B) A proposed PAL level.

(C) The sum of the potential to emit of all emissions units under the PAL (with supporting documentation).

(D) Any other information the owner or operator wishes the reviewing authority to consider in determining the appropriate level for renewing the PAL.

(iv) PAL adjustment. In determining whether and how to adjust the PAL, the reviewing authority shall consider the options outlined in paragraphs (f)(10)(iv)(A) and (B) of this section. However, in no case may any such adjustment fail to comply with paragraph (f)(10)(iv)(C) of this section.

(A) If the emissions level calculated in accordance with paragraph (f)(6) of this section is equal to or greater than 80 percent of the PAL level, the reviewing authority may renew the PAL at the same level without considering the factors set forth in paragraph (f)(10)(iv)(B) of this section; or

stationary source complies with the provisions in paragraphs (f)(11)(i)(A) through (D) of this section.

(B) The reviewing authority may set the PAL at a level that it determines to be more representative of the source's baseline actual emissions, or that it determines to be 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 by the reviewing authority in its written rationale.

(A) The owner or operator of the major stationary source shall submit a complete application to request an increase in the PAL limit for a PAL major modification. Such application shall identify the emissions unit(s) contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL.

(C) Notwithstanding paragraphs (f)(10)(iv)(A) and (B) of this section,

(B) As part of this application, the major stationary source owner or operator shall demonstrate that the sum of the baseline actual emissions of the small emissions units, plus the sum of the baseline actual emissions of the significant and major emissions units assuming application of BACT equivalent controls, plus the sum of the allowable emissions of the new or modified emissions unit(s) exceeds the PAL. The level of control that would result from BACT equivalent controls on each significant or major emissions unit shall be determined by conducting a new BACT analysis at the time the application is submitted, unless the emissions unit is currently required to comply with a BACT or LAER requirement that was established within the preceding 10 years. In such a case, the assumed control level for that emissions unit shall be equal to the level of BACT or LAER with which that emissions unit must currently comply.

(1) If the potential to emit of the major stationary source is less than the PAL, the reviewing authority shall adjust the PAL to a level no greater than the potential to emit of the source; and

(2) The reviewing authority shall not approve a renewed PAL level higher than the current PAL, unless the major stationary source has complied with the provisions of paragraph (f)(11) of this section (increasing a PAL).

(v) If the compliance date for a State or Federal requirement that applies to the PAL source occurs during the PAL effective period, and if the reviewing authority has not already adjusted for such requirement, the PAL shall be adjusted at the time of PAL permit renewal or title V permit renewal, whichever occurs first.

(C) The owner or operator obtains a major NSR permit for all emissions unit(s) identified in paragraph (f)(11)(i)(A) of this section, regardless of the magnitude of the emissions increase resulting from them (that is, no significant levels apply). These emissions unit(s) shall comply with any emissions requirements resulting from the nonattainment major NSR program process (for example, LAER), even though they have also become subject to the PAL or continue to be subject to the PAL.

(11) Increasing a PAL during the PAL effective period.

(i) The plan shall require that the reviewing authority may increase a PAL emission limitation only if the major

(D) The PAL permit shall require that the increased

PAL level shall be effective on the day any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(ii) The reviewing authority shall calculate the new PAL as the sum of the allowable emissions for each modified or new emissions unit, plus the sum of the baseline actual emissions of the significant and major emissions units (assuming application of BACT equivalent controls as determined in accordance with paragraph (f)(11)(i)(B)), plus the sum of the baseline actual emissions of the small emissions units.

(iii) The PAL permit shall be revised to reflect the increased PAL level pursuant to the public notice requirements of paragraph (f)(5) of this section.

(12) Monitoring requirements for PALs--

(i) General requirements.

(A) Each PAL permit must contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. Additionally, the information generated by such system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.

(B) The PAL monitoring system must employ one or more of the four general monitoring approaches meeting the minimum requirements set forth in paragraphs (f)(12)(ii)(A) through (D) of this section and must be approved by the reviewing authority.

(C) Notwithstanding paragraph (f)(12)(i)(B) of this section, you may also employ an alternative monitoring approach that meets paragraph (f)(12)(i)(A) of this section if approved by the reviewing authority.

(D) Failure to use a monitoring system that meets the requirements of this section renders the PAL invalid.

(ii) Minimum Performance Requirements for Approved Monitoring Approaches. The following are acceptable general monitoring approaches when conducted in accordance with the minimum requirements in paragraphs (f)(12)(iii) through (ix) of this section:

(A) Mass balance calculations for activities using coatings or solvents;

(B) CEMS;

(C) CPMS or PEMS; and

(D) Emission Factors.

(iii) Mass Balance Calculations. An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(A) Provide a demonstrated means of validating the published content of the PAL pollutant that is contained in or created by all materials used in or at

the emissions unit;

the emissions unit; and

(B) Assume that the emissions unit emits all of the PAL pollutant that is contained in or created by any raw material or fuel used in or at the emissions unit, if it cannot otherwise be accounted for in the process; and

(B) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes, or at another less frequent interval approved by the reviewing authority, while the emissions unit is operating.

(C) Where the vendor of a material or fuel, which is used in or at the emissions unit, publishes a range of pollutant content from such material, the owner or operator must use the highest value of the range to calculate the PAL pollutant emissions unless the reviewing authority determines there is site-specific data or a site-specific monitoring program to support another content within the range.

(vi) Emission factors. An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements:

(A) All emission factors shall be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(iv) CEMS. An owner or operator using CEMS to monitor PAL pollutant emissions shall meet the following requirements:

(B) The emissions unit shall operate within the designated range of use for the emission factor, if applicable; and

(A) CEMS must comply with applicable Performance Specifications found in 40 CFR part 60, appendix B; and

(C) If technically practicable, the owner or operator of a significant emissions unit that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within 6 months of PAL permit issuance, unless the reviewing authority determines that testing is not required.

(B) CEMS must sample, analyze and record data at least every 15 minutes while the emissions unit is operating.

(v) CPMS or PEMS. An owner or operator using CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements:

(vii) A source owner or operator must record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for an emissions unit during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit.

(A) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of

(viii) Notwithstanding the requirements in paragraphs (f)(12)(iii) through (vii) of this section, where an owner or

operator of an emissions unit cannot demonstrate a correlation between the monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the emissions unit, the reviewing authority shall, at the time of permit issuance:

(A) Establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) Determine that operation of the emissions unit during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

(ix) Re-validation. All data used to establish the PAL pollutant must be re-validated through performance testing or other scientifically valid means approved by the reviewing authority. Such testing must occur at least once every 5 years after issuance of the PAL.

(13) Recordkeeping requirements.

(i) The PAL permit shall require an owner or operator to retain a copy of all records necessary to determine compliance with any requirement of paragraph (f) of this section and of the PAL, including a determination of each emissions unit's 12-month rolling total emissions, for 5 years from the date of such record.

(ii) The PAL permit shall require an owner or operator to retain a copy of the following records for the duration of the PAL effective period plus 5 years:

(A) A copy of the PAL permit application and any applications for revisions to the PAL; and

(B) Each annual certification of compliance pursuant to title V and the data relied on in certifying the compliance.

(14) Reporting and notification requirements. The owner or operator shall submit semi-annual monitoring reports and prompt deviation reports to the reviewing authority in accordance with the applicable title V operating permit program. The reports shall meet the requirements in paragraphs (f)(14)(i) through (iii).

(i) Semi-Annual Report. The semi-annual report shall be submitted to the reviewing authority within 30 days of the end of each reporting period. This report shall contain the information required in paragraphs (f)(14)(i)(A) through (G) of this section.

(A) The identification of owner and operator and the permit number.

(B) Total annual emissions (tons/year) based on a 12-month rolling total for each month in the reporting period recorded pursuant to paragraph (f)(13)(i) of this section.

(C) All data relied upon, including, but not limited to, any Quality Assurance or Quality Control data, in calculating the monthly and annual PAL pollutant emissions.

(D) A list of any emissions units modified or added to the major stationary source during the preceding 6-month period.

(E) The number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken.

(F) A notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit, as provided by paragraph (f)(12)(vii) of this section.

(G) A signed statement by the responsible official (as defined by the applicable title V operating permit program) certifying the truth, accuracy, and completeness of the information provided in the report.

(ii) Deviation report. The major stationary source owner or operator shall promptly submit reports of any deviations or exceedance of the PAL requirements, including periods where no monitoring is available. A report submitted pursuant to § 70.6(a)(3)(iii)(B) of this chapter shall satisfy this reporting requirement. The deviation reports shall be submitted within the time limits prescribed by the applicable program implementing § 70.6(a)(3)(iii)(B) of this chapter. The reports shall contain the following information:

(A) The identification of owner and operator and the permit number;

(B) The PAL requirement that experienced the deviation or that was exceeded;

(C) Emissions resulting from the deviation or the exceedance; and

(D) A signed statement by the responsible official (as defined by the applicable title V operating permit program) certifying the truth, accuracy, and completeness of the information provided in the report.

(iii) Re-validation results. The owner or operator shall submit to the reviewing authority the results of any re-validation test or method within 3 months after completion of such test or method.

(15) Transition requirements.

(i) No reviewing authority may issue a PAL that does not comply with the requirements in paragraphs (f)(1) through (15) of this section after the Administrator has approved regulations incorporating these requirements into a plan.

(ii) The reviewing authority may supersede any PAL which was established prior to the date of approval of the plan by the Administrator with a PAL that complies with the requirements of paragraphs (f)(1) through (15) of this section.

(g) If any provision of this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

(h) Equipment replacement provision. Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally

equivalent component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (h)(1) through (3) of this section are met.

(1) Capital Cost threshold for Equipment Replacement.

(i) For an electric utility steam generating unit, as defined in § 51.165(a)(1)(xx), the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced. For a process unit that is not an electric utility steam generating unit the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.

(ii) In determining the replacement value of the process unit; and, except as otherwise allowed under paragraph (h)(1)(iii) of this section, the owner or operator shall determine the replacement value of the process unit on an estimate of the fixed capital cost of constructing a new process unit, or on the current appraised value of the process unit.

(iii) As an alternative to paragraph (h)(1)(ii) of this section for determining the replacement value of a process unit, an owner or operator may choose to use insurance value (where the insurance value covers only complete replacement), investment value adjusted for inflation, or another accounting procedure if such procedure is based on Generally Accepted Accounting Principles, provided that the owner or operator sends a notice to the reviewing authority. The first time that an owner or operator submits such a notice for a particular process unit, the notice may be submitted at any time, but any subsequent notice for that process unit may be submitted only at the beginning of the process unit's fiscal year. Unless the owner or operator submits a notice to the reviewing authority, then

paragraph (h)(1)(ii) of this section will be used to establish the replacement value of the process unit. Once the owner or operator submits a notice to use an alternative accounting procedure, the owner or operator must continue to use that procedure for the entire fiscal year for that process unit. In subsequent fiscal years, the owner or operator must continue to use this selected procedure unless and until the owner or operator sends another notice to the reviewing authority selecting another procedure consistent with this paragraph or paragraph (h)(1)(ii) of this section at the beginning of such fiscal year.

(2) Basic design parameters. The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(i) Except as provided in paragraph (h)(2)(iii) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(ii) Except as provided in paragraph (h)(2)(iii) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(iii) If the owner or operator believes the basic design parameter(s) in paragraphs (h)(2)(i) and (ii) of this section is not appropriate for a specific industry or type of process

unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(iv) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (h)(2)(i) and (ii) of this section.

(v) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(vi) Efficiency of a process unit is not a basic design parameter.

(3) The replacement activity shall not cause the process unit to exceed any emission limitation, or operational limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

Note to paragraph (h): By a court order on December 24, 2003, this paragraph (h) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

[52 FR 24713, July 1, 1987; 52 FR 29386, Aug. 7, 1987; 54 FR 27285, 27299, June 28, 1989; 57 FR 3946, Feb. 3, 1992; 57 FR 32334, July 21, 1992; 67 FR 80244, Dec. 31, 2002; 68 FR 61276, Oct. 27, 2003; 68 FR 63027, Nov. 7, 2003; 69 FR 40275, July 1, 2004; 70 FR 71698, Nov. 29, 2005; 72 FR 24077, May 1, 2007; 72 FR 32528, June 13, 2007; 72 FR 72616, Dec. 21, 2007; 73 FR 28347, May 16, 2008; 73 FR 77895, Dec. 19, 2008; 74 FR 50116, Sept. 30, 2009; 74 FR 65694, Dec. 11, 2009; 75 FR 16015, March 31, 2010; 75 FR 64902, Oct. 20, 2010]

SOURCE: 36 FR 22398, Nov. 25, 1971; 51 FR 40669, Nov. 7, 1986; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 72 FR 28613, May 22, 2007, unless otherwise noted.

AUTHORITY: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

40 C. F. R. § 51.165, 40 CFR § 51.165

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Title 40. Protection of Environment

Chapter I. Environmental Protection Agency ([Refs & Annos](#))

Subchapter C. Air Programs

↗ [Part 51](#). Requirements for Preparation, Adoption, and Submittal of Implementation Plans ([Refs & Annos](#))

↗ [Subpart I](#). Review of New Sources and Modifications ([Refs & Annos](#))

→ **§ 51.166 Prevention of significant deterioration of air quality.**

(a)(1) Plan requirements. In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Ad-

ministrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in [§ 51.102](#).

(6) Amendments.

<Text of subsection (a)(6)(i) effective until Dec. 20, 2010.>

(i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register.

<Text of subsection (a)(6)(i) effective Dec. 20, 2010.>

(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of the Act, shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the Federal Register. With re-

gard to a revision to an implementation plan by reason of an amendment to paragraph (c) of this section to add maximum allowable increases or other measures, the State shall submit such plan revision to the Administrator for approval within 21 months after such amendment is published in the Federal Register.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(7) Applicability. Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

(iv) Each plan shall use the specific provisions of paragraphs (a)(7)(iv)(a) through (f) of this section. Deviations from these provisions will be approved only if the State specifically demonstrates that the

submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(7)(iv)(a) through (f) of this section.

(a) Except as otherwise provided in paragraphs (a)(7)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

<Text of subsection (a)(7)(iv)(b) stayed effective April 1, 2010 until Oct. 3, 2011.>

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(c) through (f) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether

a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(40) of this section) and the baseline actual emissions (as defined in paragraphs (b)(47)(i) and (ii) of this section) for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(47)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(7)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of

emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) The plan shall require that for any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

(vi) [Reserved]

(b) Definitions. All State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum

storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NO_x shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

- (a) Coal cleaning plants (with thermal dryers);
- (b) Kraft pulp mills;
- (c) Portland cement plants;
- (d) Primary zinc smelters;
- (e) Iron and steel mills;
- (f) Primary aluminum ore reduction plants;
- (g) Primary copper smelters;
- (h) Municipal incinerators capable of charging more than 250 tons of refuse per day;
- (i) Hydrofluoric, sulfuric, or nitric acid plants;
- (j) Petroleum refineries;
- (k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(2)(i) Major modification means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(39) of this section) of a regulated NSR pollutant

(as defined in paragraph (b)(49) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

(ii) Any significant emissions increase (as defined at paragraph (b)(39) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (y) of this section;

Note to paragraph (b)(2)(iii)(a): On December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely by court order. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(b) Use of an alternative fuel or raw material by reason of any order under [sections 2](#) (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source which:

(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to [40 CFR 52.21](#) or under regulations approved pursuant to 40 CFR subpart I or § 51.166; or

(2) The source is approved to use under any permit issued under [40 CFR 52.21](#) or under regulations approved pursuant to 40 CFR 51.166;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to [40 CFR 52.21](#) or under regulations approved pursuant to 40 CFR subpart I or § 51.166.

(g) Any change in ownership at a stationary source.

(h) [Reserved]

(i) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(1) The State implementation plan for the State in which the project is located; and

(2) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(j) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(k) The reactivation of a very clean coal-fired electric utility steam generating unit.

(iv) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (w) of this section for a PAL for that pollutant. Instead, the definition at paragraph (w)(2)(viii) of this section shall apply.

<Text of subsection (b)(2)(v) stayed effective April 1, 2010 until Oct. 3, 2011.>

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3)(i) Net emissions increase means, with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(a) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph (a)(7)(iv) of this section; and

(b) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. Baseline actual emissions for calculating increases and decreases under this paragraph (b)(3)(i)(b) shall be determined as provided in paragraph (b)(47), except that paragraphs (b)(47)(i)(c) and (b)(47)(ii)(d) of this section shall not apply.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs within a reasonable

period (to be specified by the State) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if:

(a) It occurs within a reasonable period (to be specified by the reviewing authority); and

(b) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs; and

<Text of subsection (b)(3)(iii)(c) stayed effective April 1, 2010 until Oct. 3, 2011.>

(c) The increase or decrease in emissions did not occur at a Clean Unit, except as provided in paragraphs (t)(8) and (u)(10) of this section; and

<Text of subsection (b)(3)(iii)(d) stayed effective April 1, 2010 until Oct. 3, 2011.>

(d) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category.

(iv) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source

baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(a) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) It is enforceable as a practical matter at and after the time that actual construction on the particular change begins;

(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(d) [Reserved]

(vii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(viii) Paragraph (b)(21)(ii) of this section shall not apply for determining creditable increases and decreases.

(4) Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its

design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

(6) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(7) Emissions unit means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric utility steam generating unit as defined in paragraph (b)(30) of this section. For purposes of this section, there are two types of emissions units as described in paragraphs (b)(7)(i) and (ii) of this section.

(i) A new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph (b)(7)(i) of this section. A replacement unit, as defined in paragraph (b)(32) of this section, is an existing emissions unit.

(8) Construction means any physical change or change in the method of operation (including fab-

C

Effective:[See Text Amendments]Code of Federal Regulations [Currentness](#)

Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
([Refs & Annos](#))

Subchapter C. Air Programs

☞ [Part 51](#). Requirements for Preparation, Adoption, and Submittal of Implementation Plans ([Refs & Annos](#))

☞ [Subpart O](#). Miscellaneous Plan Content Requirements

→ **§ 51.281 Copies of rules and regulations.**

Emission limitations and other measures necessary for attainment and maintenance of any national standard, including any measures necessary to implement the requirements of Subpart L must be adopted as rules and regulations enforceable by the State agency. Copies of all such rules and regulations must be submitted with the plan. Submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal.

[[51 FR 40674](#), Nov. 7, 1986]

SOURCE: 36 FR 22398, Nov. 25, 1971; [52 FR 24712](#), July 1, 1987; [55 FR 14249](#), April 17, 1990; [56 FR 42219](#), Aug. 26, 1991; [57 FR 32334](#), July 21, 1992; [57 FR 52987](#), Nov. 5, 1992; [58 FR 38821](#), July 20, 1993; [60 FR 40100](#), Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; [62 FR 44903](#), Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; [65 FR 45532](#), July 24, 2000; [72 FR 28613](#), May 22, 2007, unless otherwise noted.

AUTHORITY: [23 U.S.C. 101](#); [42 U.S.C. 7401-7671q](#).

40 C. F. R. § 51.281, 40 CFR § 51.281

Current through December 9, 2010; 75 FR 76892

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HEALTH AND SAFETY CODE
TITLE 5. SANITATION AND ENVIRONMENTAL QUALITY
SUBTITLE C. AIR QUALITY
CHAPTER 382. CLEAN AIR ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 382.05196.

PERMITS BY RULE. (a) Consistent with Section 382.051, the commission may adopt permits by rule for certain types of facilities if it is found on investigation that the types of facilities will not make a significant contribution of air contaminants to the atmosphere. The commission may not adopt a permit by rule authorizing any facility defined as "major" under any applicable preconstruction permitting requirements of the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) or regulations adopted under that Act. Nothing in this subsection shall be construed to limit the commission's general power to control the state's air quality under Section 382.011(a).

(b) The commission by rule shall specifically define the terms and conditions for a permit by rule under this section.

Added by Acts 1999, 76th Leg., ch. 406, Sec. 5, eff. Aug. 30, 1999.

30 TAC § 101.1

Tex. Admin. Code tit. 30, § 101. 1

Effective:

TAX

TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 101. GENERAL AIR QUALITY RULES
SUBCHAPTER A. GENERAL RULES

§ 101. 1. Definitions

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account—For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare—A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number—For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of § 101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air—That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background—Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler—Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system—All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility—A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber—An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system—A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating—A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning—A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit—Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine—Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility—Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator—An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator—A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component—A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate—Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste—Waste resulting from construction or demolition projects.

(21) Control system or control device—Any part, chemical, machine, equipment, contrivance, or combination of

same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing—A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard—Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer—The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) De minimis impact—A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.

Figure: 30 TAC §101.1(25)

AIR CONTAMINANT	ANNUAL	24-HOUR	8-HOUR	3-HOUR	1-HOUR
Inhalable Particulate Matter (PM ₁₀)	1.0 µg/m ³	5 µg/m ³			
Sulfur Dioxide	1.0 µg/m ³	5 µg/m ³		25 µg/m ³	
Nitrogen Dioxide	1.0 µg/m ³				
Carbon Monoxide			0.5 mg/m ³		2 mg/m ³

(26) Domestic wastes—The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking—A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event—Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit—Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate—The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit—Any part of a stationary source that emits, or would have the potential to emit, any pollut-

ant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event—When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent—Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof—A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation—Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable—All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under [40 CFR § 52.21](#) or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare—An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil—Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission—Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage—Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline—Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes—Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, [42 United States Code, §§ 6901 et seq.](#), as amended.

(43) Heatset (used in offset lithographic printing)—Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings—Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns—Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator—An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler—A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace—Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste—Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in § 335.1 and § 335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in § 335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in § 335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover—A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak—A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel—A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal—A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area—A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under [42 United States Code, § 7505a](#). The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area 60 (Federal Register (FR) 12453)— Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421)—Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(55) Maintenance plan—A revision to the applicable state implementation plan, meeting the requirements of [42 United States Code, § 7505a](#).

(56) Marine vessel—Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal—A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste—Waste materials identified by the Department of State Health Services as “special waste from health care-related facilities” and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization—That organization designated as being responsible, together with the

state, for conducting the continuing, cooperative, and comprehensive planning process under [23 United States Code \(USC\), § 134](#) and 49 USC, § 1607.

(60) Mobile emissions reduction credit—The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle—A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility—Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) Municipal solid waste—Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(64) Municipal solid waste facility—All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill—A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under [40 Code of Federal Regulations § 257.2](#). A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, non-hazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard—Those standards established under [42 United States Code, § 7409](#), including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration—The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source—Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NO_x)—The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area—A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard for a pollutant for which

a standard exists. The EPA will designate the area as nonattainment under the provisions of [42 United States Code, § 7407\(d\)](#). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent Federal Register (FR) notices. The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.

(A) Carbon monoxide (CO). El Paso CO nonattainment area ([56 FR 56694](#))—Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM₁₀). El Paso PM₁₀ nonattainment area ([56 FR 56694](#))—Classified as a Moderate PM₁₀ nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone (one-hour).

(i) Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area ([56 FR 56694](#))—Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso one-hour ozone nonattainment area ([56 FR 56694](#))—Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) [Beaumont-Port Arthur \(BPA\) one-hour ozone nonattainment area \(69 FR 16483\)](#)—Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) [Dallas-Fort Worth one-hour ozone nonattainment area \(63 FR 8128\)](#)—Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Ozone (eight-hour).

(i) HGB eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) BPA eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iii) Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936)—Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(iv) San Antonio eight-hour ozone nonattainment area (69 FR 23936)—Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 ([42 United States Code, § 7502](#)), nonattainment deferred to September 30, 2005, or as extended by EPA.

(G) Sulfur dioxide. No designated nonattainment areas.

(71) Non-reportable emissions event—Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity—The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing—A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning—Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter—Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(76) Particulate matter emissions—All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(77) Petroleum refinery—Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) PM₁₀—Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on [40 Code of Federal Regulations \(CFR\) Part 50, Appendix J](#), and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(79) PM₁₀ emissions—Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound—A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes—Any action, operation, or treatment embracing chemical, commercial, industrial, or

manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour—"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property—All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress—Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity—All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning—Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event—Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)—Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in [40 CFR Part 355, Appendix A](#), the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde—1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where

the RQ must be 100 pounds;

(-b-) butanes (any isomer)—5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene)—5,000 pounds, except in the HGB and BPA ozone non-attainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide—5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b)—5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22)—5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a)—5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31)—5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115)—5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124)—5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a)—5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee)—5,000 pounds;

(-m-) decanes (any isomer)—5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b)—5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca)—5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb)—5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114)—5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a)—5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a)—5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a)—5,000 pounds;

(-u-) difluoromethane (HFC-32)—5,000 pounds;

(-v-) ethanol—5,000 pounds;

(-w-) ethylene—5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161)—5,000 pounds;

- (-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea);
- (-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa)—5,000 pounds;
- (-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea)—5,000 pounds;
- (-bb-) hexanes (any isomer)—5,000 pounds;
- (-cc-) isopropyl alcohol—5,000 pounds;
- (-dd-) mineral spirits—5,000 pounds;
- (-ee-) octanes (any isomer)—5,000 pounds;
- (-ff-) oxides of nitrogen—200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column “final RQ”;
- (-gg-) pentachlorofluoroethane (CFR-111)—5,000 pounds;
- (-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc)—5,000 pounds;
- (-ii-) pentafluoroethane (HFC-125)—5,000 pounds;
- (-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca)—5,000 pounds;
- (-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea)—5,000 pounds;
- (-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb)—5,000 pounds;
- (-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa)—5,000 pounds;
- (-nn-) pentanes (any isomer)—5,000 pounds;
- (-oo-) propane—5,000 pounds;
- (-pp-) propylene—5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;
- (-qq-) 1,1,2,2-terachlorodifluoroethane (CFR-112)—5,000 pounds;
- (-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a)—5,000 pounds;
- (-ss-) 1,1,2,2-tetrafluoroethane (HFC-134)—5,000 pounds;
- (-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a)—5,000 pounds;
- (-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113)—5,000 pounds;
- (-vv-) 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a)—5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123)—5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a)—5,000 pounds;

(-yy-) trifluoromethane (HFC-23)—5,000 pounds; or

(-zz-) toluene—1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish—Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials.

Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity—For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by § 101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in § 101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by § 101.211 of this title. Expected excess opacity events as described in § 101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by § 101.211 of this title.

(91) Sludge—Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke—Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste—Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under [Natural Resources Code, § 91.101](#), unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended ([42 United States Code, §§ 6901 et seq.](#)).

(94) Sour crude—A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas—Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more

than 30 grains of total sulfur per 100 cubic feet.

(96) Source—A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities—A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions—A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area—An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe—A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds—All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid—Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H_2SO_4 and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas—Those crude petroleum hydrocarbons that are not “sour” as defined in this section.

(104) Total suspended particulate—Particulate matter as measured by the method described in [40 Code of Federal Regulations Part 50, Appendix B](#).

(105) Transfer efficiency—The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure—The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions—Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by [Texas Clean Air Act, § 382.0518\(g\)](#).

(108) Unplanned maintenance, startup, or shutdown activity—For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event—An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under § 101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler—A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor—A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal—A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent—Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions—Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound—As defined in [40 Code of Federal Regulations § 51.100\(s\)](#), except [§ 51.100\(s\)\(2\)–\(4\)](#), as amended on November 29, 2004 ([69 FR 69290](#)).

(116) Volatile organic compound (VOC) water separator—Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

Source: The provisions of this § 101.1 adopted to be effective January 1, 1976; amended to be effective May 7, 1979, 4 TexReg 1358; amended to be effective August 22, 1980, 5 TexReg 3241; amended to be effective April 16, 1981, 6 TexReg 1240; amended to be effective March 17, 1982, 7 TexReg 901; amended to be effective December 30, 1982, 7 TexReg 4388; amended to be effective July 14, 1983, 8 TexReg 2402; amended to be effective October 25, 1985, 10 TexReg 3896; amended to be effective January 27, 1988, 13 TexReg 295; amended to be effective April 14, 1988, 13 TexReg 1539; amended to be effective December 21, 1988, 13 TexReg 6081; amended to be effective July 18, 1989, 14 TexReg 3285; amended to be effective February 7, 1990, 15 TexReg 434; amended to be effective June 8, 1990, 15 TexReg 2913; amended to be effective November 14, 1990, 15 TexReg 6300; amended to be effective October 22, 1991, 16 TexReg 5596; amended to be effective December

26, 1991, 16 TexReg 7205; amended to be effective February 19, 1992, 17 TexReg 1125; amended to be effective July 13, 1992, 17 TexReg 4608; amended to be effective November 15, 1992, 17 TexReg 4777; amended to be effective November 16, 1992, 17 TexReg 7781; amended to be effective March 15, 1993, 18 TexReg 1411; amended to be effective September 13, 1993, 18 TexReg 5746; amended to be effective December 3, 1993, 18 TexReg 8535; amended to be effective May 27, 1994, 19 TexReg 3701; amended to be effective August 16, 1994, 19 TexReg 5953; amended to be effective November 14, 1994, 19 TexReg 8674; amended to be effective March 7, 1996, 21 TexReg 1544; amended to be effective May 22, 1997, 22 TexReg 4211; amended to be effective July 16, 1997, 22 TexReg 6446; amended to be effective August 5, 1997, 22 TexReg 7040; amended to be effective October 22, 1997, 22 TexReg 10319; amended to be effective December 23, 1999, 24 TexReg 11494; amended to be effective July 23, 2000, 25 TexReg 6727; amended to be effective October 18, 2001, 26 TexReg 8073; amended to be effective September 12, 2002, 27 TexReg 8499; amended to be effective June 15, 2005, 30 TexReg 3408; amended to be effective January 5, 2006, 30 TexReg 8884; amended to be effective August 16, 2007, 32 TexReg 4985.

Current through December 31, 2009

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30 TAC § 101.1, 30 TX ADC § 101.1

30 TX ADC § 101.1

END OF DOCUMENT

30 TAC § 106.4

Tex. Admin. Code tit. 30, § **106. 4**

Effective:

TAX

TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 106. PERMITS BY RULE
SUBCHAPTER A. GENERAL REQUIREMENTS

§ **106. 4.** Requirements for Permitting by Rule

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO₂) or inhalable particulate matter (PM₁₀); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in § 116.12 of this title (relating to Nonattainment Review Definitions), or any modification which constitutes a major modification, as defined in § 116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of § 116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in [40 Code of Federal Regulations \(CFR\) § 52.21](#), or any change which constitutes a major modification, as defined in [40 CFR § 52.21](#), under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_x; or 25 tpy of VOC or SO₂ or PM₁₀; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, § 111 (Federal New Source Performance Standards) and § 112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_x if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of § 116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with TCAA, § 382.113 and any other applicable law.

Source: The provisions of this § 106. 4 adopted to be effective November 15, 1996, 21 TexReg 10881; amended to be effective April 7, 1998, 23 TexReg 3502; amended to be effective September 4, 2000, 25 TexReg 8653; amended to be effective March 29, 2001, 26 TexReg 2396.

Current through December 31, 2009

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30 TAC § 106.4, 30 TX ADC § 106.4

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30 TAC § 106. 163

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Texas Administrative Code Currentness

Title 30. Environmental Quality

Part 1. Texas Commission on Environmental
Quality

Chapter 106. Permits by Rule

▢ Subchapter F. Animal Confinement

→ **§ 106. 163. Race Tracks, Zoos, and
Animal Shelters**

All animal racing facilities, domestic animal shelters, zoos, and their associated confinement areas, stables, feeding areas, and waste collection and treatment facilities are permitted by rule. Incineration units are not authorized under this section.

Source: The provisions of this § **106. 163** adopted to be effective March 14, 1997, 22 TexReg 2439; amended to be effective September 4, 2000, 25 TexReg 8653.

30 TAC § **106. 163**, 30 TX ADC § **106. 163**

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30 TAC § 106. 436

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C

Texas Administrative Code Currentness

Title 30. Environmental Quality

Part 1. Texas Commission on Environmental Quality

Chapter 106. Permits by Rule

Subchapter S. Surface Coating

→ § 106. 436. Auto Body Refinishing Facility

Body repair and refinishing of motorcycle, passenger car, van, light truck and heavy truck and other vehicle body parts, bodies, and cabs is permitted by rule, provided that all the following conditions of this section are met.

(1) Before construction begins, the facility shall be registered with the commission's Office of Permitting, Remediation, and Registration in Austin using Form PI-7-124.

(2) Facilities which satisfy one of the following conditions.

(A) Spray operations that use less than 1/2 pint of coatings and solvents per hour are exempt from all of the requirements of this section except for paragraphs (3), (4), (16), and (17) of this section.

(B) Spray operations that use less than two gallons of coatings and solvents per week are exempt from all of the requirements of this section except for paragraphs (3), (4), (8), (11), (12), (14), (16), and (17) of this section unless additional controls are specified in § 115.421 of this title (relating to Emission Specifications). Additionally, all overspray emissions must be vented through a filter system that meets the requirements of paragraph (7) of this section.

(3) Good housekeeping is practiced: spills are cleaned up as soon as possible, equipment is maintained according to manufacturers' instructions, and property is kept clean. In addition, all waste coatings, solvents, and spent automotive fluids including, but not limited to, engine oil, gear oil, transmission fluid, brake fluid, anti-freeze, fresh or waste fuels, and spray booth filters or water wash sludge are disposed of properly. Prior to disposal, all liquid waste shall be stored in covered containers.

(4) There are no visible emissions leaving the property.

(5) All spray coating operations which coat more than nine square feet (one panel) shall be performed in a totally enclosed filtered spray booth or totally enclosed filtered spray area with an air intake area of less than 100 square feet. All spray areas shall be equipped with a fan that achieves one of the following requirements:

(A) a flow capacity of at least 10,000 cubic feet per minute;

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(B) a face velocity of at least 100 feet per minute.

(6) All spray coating operations which coat less than nine square feet (one panel) and are not in a totally enclosed booth shall be performed on or in a dedicated preparation area which meets the following requirements.

(A) The preparation area ventilation system shall be operating during spraying, and the exhaust air shall either be vented through a stack to the atmosphere or the air shall be recirculated back into the shop through a carbon adsorption system.

(B) If the preparation area is equipped with a carbon adsorption system, the carbon shall be replaced at the manufacturer's recommended intervals to minimize solvent emissions.

(C) The preparation area ventilation system shall be equipped with a filter or filter system to control paint overspray.

(7) All paint booth, spray area, and preparation area overspray (exhaust) filters or filter systems shall have a particulate control efficiency of at least 90%.

(8) High transfer efficiency coating application equipment shall be used, such as high volume low pressure spray guns. Electrostatic spray guns or other methods, if demonstrated to provide equivalent or better transfer efficiency are acceptable.

(9) Cleanup emissions shall be minimized by implementing the following procedures:

(A) spray and other equipment cleanup is totally enclosed during washing, rinsing, and draining. Non-enclosed cleaners may be used if the vapor pressure of the cleaning solvent is less than 100 millimeters of mercury at 68 degrees Fahrenheit and the solvent is directed toward a drain that leads directly to a remote reservoir;

(B) all wash solvents are kept in an enclosed reservoir that is covered at all times, except when being refilled with fresh solvents;

(C) all waste solvents and other cleaning materials are kept in closed containers.

(10) All spray booth spray area, preparation area, and shop heaters that are not electrically heated must use pipeline quality natural gas or liquified petroleum gas only and the heaters are five million British thermal units per hour or smaller. No firing of waste coatings, solvents, oils, or other automotive fluids shall be permitted on-site.

(11) All spray booth, spray area, and preparation area stack heights shall meet the following requirements.

(A) If the stack is located within 200 feet of a building that is taller than the body shop building, the stack height shall be at least 1.2 times the height of the tallest building or higher as measured from ground level.

(B) If the stack is located greater than 200 feet from a building taller than the body shop building, the

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stack height shall be at least 1.2 times the height of the body shop building as measured from ground level.

(C) precoat--50;

(C) If any ground level elevation within 250 feet of the spray booth stack is greater than the stack height required in subparagraphs (A) and (B) of this paragraph, this section cannot be used.

(D) pretreatment--50;

(E) sealers--50;

(12) Spray booth, spray area, and preparation area stacks shall be located at least 50 feet away from any residence, recreation area, church, school, child care facility, or medical or dental facility.

(F) primers/primer surfacer--175;

(G) top coats--320;

(13) Rain caps, goose neck exhaust, or other stack heads that would restrict or obstruct vertical discharge of air contaminants shall not be allowed.

(H) specialty coatings--50.

(14) The volatile organic compound (VOC) content limits specified in § 115.421 of this title, concerning automobile and light-duty truck coatings, shall apply to the facility regardless of its location.

(16) The following records and reports shall be maintained at the shop site for a consecutive 24-month period and be made immediately available upon request of personnel from the commission or any other air pollution control agency with jurisdiction:

(15) Definitions of the coating types specified in subparagraphs (A)-(H) of this paragraph are based on § 115.10 of this title (relating to Definitions), and the VOC content limits shall be those listed in § 115.421 of this title. Shop use of the coating categories listed in subparagraphs (A)-(H) of this paragraph in gallons per month shall not be exceeded:

(A) material safety data sheet (MSDS) or other coating data sheets on paint and solvent systems used during the previous 24-month period or currently in use at the shop. The MSDS or coating data sheets should clearly indicate the VOC content of the product and the VOC content of multiple component coatings when mixed according to manufacturers instructions;

(A) cleanup solvents--50 gallons per month;

(B) records of monthly coating and solvent purchases (invoices from suppliers are acceptable);

(B) wipe solvents--50;

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(C) records of monthly paint and solvent use if purchase volumes are above the levels specified for any category in paragraph (15) of this section;

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(D) additional records are kept in sufficient detail, if necessary, to allow an annual emission inventory to be submitted according to the requirements in § 101.10 of this title (relating to Emissions Inventory Requirements);

END OF DOCUMENT

(E) records of the United States Environmental Protection Agency and the commission's Office of Permitting, Remediation, and Registration registration or identification numbers for each waste generator.

(17) Compliance with the requirements of this section does not eliminate the requirement to comply with all rules of the commission, including § 101.4 of this title (relating to Nuisance). The commission may require a facility to cease operation until the matter is resolved.

(18) After December 31, 1994, the conditions of this permit by rule are effective as to facilities in existence prior to the adoption of this section.

Source: The provisions of this § **106. 436** adopted to be effective March 14, 1997, 22 TexReg 2439; amended to be effective September 4, 2000, 25 TexReg 8653.

30 TAC § **106. 436**, 30 TX ADC § **106. 436**

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30 TAC § 116.10

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TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODI-
FICATION
SUBCHAPTER A. DEFINITIONS

§ **116. 10.** General Definitions

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, and in § 101.1 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions—The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to the change. This rate cannot exceed any applicable federal or state emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under § 116.116(e) of this title (relating to Changes to Facilities).

(2) Allowable emissions—The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this section. This rate cannot exceed any applicable state or federal emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under § 116.116(e) of this title.

(A) Permitted facility—For a facility with a permit under this chapter, the allowable emissions shall be any emission limit established in the permit on a maximum allowable emissions rate table and any emission limit contained in representations in the permit application which was relied upon in issuing the permit, plus any allowable emissions authorized under Chapter 106 of this title (relating to Permits by Rule).

(B) Facility permitted by rule—For a facility operating under Chapter 106 of this title, the allowable emissions shall be the least of the emissions rate allowed in Chapter 106, Subchapter A of this title (relating to General Requirements), the emissions rate specified in the applicable permit by rule, or the federally enforceable emission rate established on a PI-8 form.

(C) Qualified grandfathered facility—For a qualified grandfathered facility, the allowable emissions shall be the maximum annual emissions rate after the implementation of any air pollution control methods to become a

qualified facility, plus 10% of the maximum annual emissions rate prior to the implementation of such control methods, but in no case shall the allowable emissions be greater than the maximum annual emissions rate prior to the implementation of such control methods. The maximum annual emissions rate is the emissions rate at the maximum annual capacity according to the physical or operational design of the facility, data from actual operations over a period of no more than 12 months that demonstrates the maximum annual capacity, or other information that demonstrates the maximum annual capacity. Except where a grandfathered facility has been modified, the allowable emissions for the modification shall be determined as a permitted facility.

(D) Standard permit facility—For a facility authorized by standard permit, other than § 116.617(2) of this title (relating to Standard Permits for Pollution Control Projects), the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.

(E) Special exemption facility—For a facility operating under a special exemption, the allowable emissions shall be the emissions rate represented in the original special exemption request.

(F) The allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls.

(3) Best available control technology (BACT)—BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.

(4) Dockside vessel—Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(5) Dockside vessel emissions—Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

- (A) loading and unloading of liquid bulk materials;
- (B) loading and unloading of liquified gaseous materials;
- (C) loading and unloading of solid bulk materials;
- (D) cleaning and degassing of liquid vessel compartments; and
- (E) abrasive blasting and painting.

(6) Facility—A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

(7) Federally enforceable—All limitations and conditions which are enforceable by the EPA, including:

- (A) those requirements developed under Title 40 of the Code of Federal Regulations (CFR) Parts 60 and 61 (40 CFR 60 and 61);
- (B) Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, § 112, 40 CFR 63));

(C) requirements within any applicable state implementation plan (SIP);

(D) any permit requirements established under [40 CFR § 52.21](#);

(E) any permit requirements established under regulations approved under 40 CFR Part 51, Subpart I, including permits issued under the EPA-approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program; or

(F) any permit requirements established under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)).

(8) Grandfathered facility—Any facility that is not a new facility and has not been modified since August 30, 1971.

(9) Lead smelting plant—Any facility which produces purified lead by melting and separating lead from metal and nonmetallic contaminants and/or by reducing oxides into elemental lead. Raw materials consist of lead concentrates, lead-bearing ores or lead scrap, drosses, or other lead-bearing residues. Additional processing may include refining and alloying. A facility which only remelts lead bars or ingots for casting into lead products is not a lead smelting plant.

(10) Maximum allowable emissions rate table (MAERT)—A table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility.

(11) Modification of existing facility—Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more commission exemptions;

(B) insignificant increases at a permitted facility;

(C) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(D) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, under the TCAA, § 382.057, from preconstruction permit requirements;

(E) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, § 382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has received a preconstruction permit or permit amendment or

has been exempted under the TCAA, § 382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(F) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(G) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, § 382.060, as that section existed prior to September 1, 1991.

(12) New facility—A facility for which construction is commenced after August 30, 1971, and no contract for construction was executed on or before August 30, 1971, and that contract specified a beginning construction date on or before February 29, 1972.

(13) New source—Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(14) Nonattainment area—A defined region within the state which is designated by the EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, § 107(d).

(15) Public notice—The public notice of application for a permit as required in this chapter.

(16) Qualified facility—An existing facility that satisfies the criteria of either paragraph (9)(E)(i) or (ii) of this section.

(17) Source—A point of origin of air contaminants, whether privately or publicly owned or operated.

Source: The provisions of this § 116. 10 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be effective June 12, 2002, 27 TexReg 4954; amended to be effective September 12, 2002, 27 TexReg 8546.

Current through December 31, 2009

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30 TAC § 116.10, 30 TX ADC § 116.10

30 TX ADC § 116.10

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30 TAC § 116.13

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TAX

TEXAS ADMINISTRATIVE CODE

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR
MODIFICATION

SUBCHAPTER A. DEFINITIONS

§ 116. 13. Flexible Permit Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Emission cap—Emission limit for a specific air contaminant based on total emissions of that pollutant adjusted by an insignificant emissions factor from all sources that are included in a flexible permit.

(2) Expected maximum capacity—The maximum capacity of a facility according to its physical and operational design and planned operation.

(3) Individual emission limitation—Emission limit for a specific air contaminant not covered by an emission cap for an individual facility adjusted by an insignificant emissions factor.

Source: The provisions of this § 116. 13 adopted to be effective July 8, 1998, 23 TexReg 6973.

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30 TAC § 116 .13 , 30 TX ADC § 116 .13

30 TX ADC § 116 .13

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30 TAC § 116.110

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TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODI-
FICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 110.** Applicability

(a) Permit to construct. Before any actual work is begun on the facility, any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1) obtain a permit under § 116.111 of this title (relating to General Application);

(2) satisfy the conditions for a standard permit under the requirements in:

(A) Subchapter F of this chapter (relating to Standard Permits);

(B) Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(C) Chapter 332 of this title (relating to Composting); or

(D) Chapter 330, Subchapter N of this title (relating to Landfill Mining);

(3) satisfy the conditions for a flexible permit under the requirements in Subchapter G of this chapter (relating to Flexible Permits);

(4) satisfy the conditions for facilities permitted by rule under Chapter 106 of this title (relating to Permits by Rule); or

(5) satisfy the criteria for a de minimis facility or source under § 116.119 of this title (relating to De Minimis Facilities or Sources).

(b) Modifications to existing permitted facilities. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or § 116.116 of this title (relating to Changes to Facilities), compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 Code of Federal Regulations Part 63)) are not authorized to use:

(1) a permit by rule under Chapter 106 of this title;

(2) standard permits under Subchapter F of this chapter that do not meet the requirements of Subchapter C of this chapter; or

(3) § 116.116(e) of this title (relating to Changes to Facilities).

(e) Change in ownership.

(1) Within 30 days after the change of ownership of a facility permitted under this chapter, the new owner shall notify the commission and certify the following:

(A) the date of the ownership change;

(B) the name, address, phone number, and contact person for the new owner;

(C) an agreement by the new owner to be bound by all permit conditions and all representations made in the permit application and any amendments and alterations;

(D) there will be no change in the type of pollutants emitted; and

(E) there will be no increase in the quantity of pollutants emitted.

(2) The new owner shall comply with all permit conditions and all representations made in the permit application and any amendments and alterations.

(f) Submittal under seal of Texas licensed professional engineer. Applications for permit or permit amendment with an estimated capital cost of the project above \$2 million, and not subject to any exemption contained in the Texas Engineering Practice Act (TEPA), shall be submitted under seal of a Texas licensed professional engineer. However, nothing in this subsection shall limit or affect any requirement which may apply to the practice of engineering under the TEPA or the actions of the Texas Board of Professional Engineers. The estimated capital cost is defined in § 116.141 of this title (relating to Determination of Fees).

(g) Responsibility for permit application. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for complying with this section.

Source: The provisions of this § 116. 110 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be effective August 29, 2002, 27 TexReg 7910.

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30 TAC § 116.110, 30 TX ADC § 116.110

30 TX ADC § 116.110

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30 TAC § 116.111

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TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 1. PERMIT APPLICATION

§ **116. 111.** General Application

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual."

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the re-

quirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, § 111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, § 112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, § 112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA § 112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the require-

ments of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

Source: The provisions of this § 116. 111 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 23, 1999, 24 TexReg 8296; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546.

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30 TAC § 116.111, 30 TX ADC § 116.111

30 TX ADC § 116.111

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30 TAC § 116.610

Tex. Admin. Code tit. 30, § **116. 610**

Effective:

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TEXAS ADMINISTRATIVE CODE
TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION
SUBCHAPTER F. STANDARD PERMITS

§ **116. 610.** Applicability

(a) Under the [Texas Clean Air Act, § 382.051](#), a project that meets the requirements for a standard permit listed in this subchapter or issued by the commission is hereby entitled to the standard permit, provided the following conditions listed in this section are met. For the purposes of this subchapter, project means the construction or modification of a facility or a group of facilities submitted under the same registration.

(1) Any project that results in a net increase in emissions of air contaminants from the project other than carbon dioxide, water, nitrogen, methane, ethane, hydrogen, oxygen, or those for which a national ambient air quality standard has been established must meet the emission limitations of § 106.261 of this title (relating to Facilities (Emission Limitations), unless otherwise specified by a particular standard permit.

(2) Construction or operation of the project must be commenced prior to the effective date of a revision to this subchapter under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project must comply with the applicable provisions of the Federal Clean Air Act (FCAA), § 111 (concerning New Source Performance Standards) as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA).

(4) The proposed project must comply with the applicable provisions of FCAA, § 112 (concerning Hazardous Air Pollutants) as listed under 40 CFR Part 61, promulgated by the EPA.

(5) The proposed project must comply with the applicable maximum achievable control technology standards as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, § 112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, § 112, 40 CFR Part 63)).

(6) If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(b) Any project that constitutes a new major stationary source or major modification as defined in § 116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) is subject to the requirements of § 116.110 of this title (relating to Applicability) rather than this subchapter.

(c) Persons may not circumvent by artificial limitations the requirements of § 116.110 of this title.

(d) Any project involving a proposed affected source (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)). Affected sources subject to Subchapter E of this chapter may use a standard permit under this subchapter only if the terms and conditions of the specific standard permit meet the requirements of Subchapter E of this chapter.

Source: The provisions of this § 116. 610 adopted to be effective May 4, 1994, 19 TexReg 3055; amended to be effective September 1, 1995, 20 TexReg 6324; amended to be effective April 19, 1996, 21 TexReg 3192; amended to be effective May 22, 1997, 22 TexReg 4242; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective January 11, 2000, 25 TexReg 150; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective February 1, 2006, 31 TexReg 515.

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30 TAC § 116.610, 30 TX ADC § 116.610

30 TX ADC § 116.610

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30 TAC § 116.710

Tex. Admin. Code tit. 30, § 116. 710

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SUBCHAPTER G. FLEXIBLE PERMITS

§ 116. 710. Applicability

(a) Flexible permit. A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under § 116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under § 116.116 of this title (relating to Amendments and Alterations). A person may obtain a flexible permit under § 116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account before any actual work is begun, provided however:

(1) only one flexible permit may be issued at an account site;

(2) modifications to existing facilities covered by a flexible permit may be handled through the amendment of an existing flexible permit;

(3) permitting of a new facility may be handled through the amendment of a flexible permit; and

(4) a flexible permit may not cover sources at more than one account site.

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with § 116.110(d) of this title, provided however, that all facilities covered by a flexible permit must change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a permit alteration allocating the emission caps or individual emission limitation prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original permit holder remains responsible for ensuring compliance with the existing flexible permit and all rules and regulations of the commission.

(c) Submittal under seal of Texas licensed professional engineer. All applications for a flexible permit or flexible permit amendment shall comply with § 116.110(e) of this title.

(d) Responsibility for flexible permit application. The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account who is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

Source: The provisions of this § **116. 710** adopted to be effective December 8, 1994, 19 TexReg 9360; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668

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30 TAC § **116 .710** , 30 TX ADC § **116 .710**

30 TX ADC § **116 .710**

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30 TAC § 116.711

Tex. Admin. Code tit. 30, § 116. 711

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§ 116. 711. Flexible Permit Application

Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. The Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete. In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit information to the commission which demonstrates that all of the following are met.

(1) Protection of public health and welfare. The emissions from the proposed facility, group of facilities, or account as determined under § 116.716 of this title (relating to Emission Caps and Individual Emission Limitations), will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and physical property of the people. In considering the issuance of a flexible permit for construction or modification of any facility, group of facilities, or account within 3,000 feet or less of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility, group of facilities, or account may have on the individuals attending these school facilities.

(2) Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual."

(3) Best available control technology (BACT). The proposed facility, group of facilities, or account will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis. Control technology beyond BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of facilities or account basis, provided however, that the existing level of control may not be lessened for any facility. For new facilities and proposed affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.

(4) New Source Performance Standards (NSPS). The emissions from each affected facility as defined in 40 Code of Federal Regulations (CFR), Part 60 will meet at least the requirements of any applicable NSPS as listed under Title 40 CFR Part 60, promulgated by the EPA under authority granted under the FCAA, § 111, as amended.

(5) National Emission Standards for Hazardous Air Pollutants (NESHAPS). The emissions from each facility as defined in 40 CFR Part 61 will meet at least the requirements of any applicable NESHAPS, as listed under 40 CFR Part 61, promulgated by EPA under authority granted under the FCAA, § 112, as amended.

(6) NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable MACT standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, § 112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, § 112, 40 CFR 63)).

(7) Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application. The applicant may be required to submit additional engineering data after a flexible permit has been issued in order to demonstrate further that the proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit. In addition, initial compliance testing with ongoing compliance determined through engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing may be required.

(8) Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter.

(9) Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review.

(10) Air dispersion modeling or ambient monitoring. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's New Source Review Permits Division to determine the air quality impacts from the facility, group of facilities, or account. In conducting a review of a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(11) Federal standards of review for constructed or reconstructed major sources of hazardous air pollutants. If the proposed source is an affected source (as defined in § 116.15(1) of this title), it shall comply with all applicable requirements under Subchapter C of this chapter.

(12) Mass cap and trade allocations. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(13) Application content. In addition to any other requirements of this chapter, the applicant shall:

(A) identify each air contaminant for which an emission cap is desired;

(B) identify each facility to be included in the flexible permit;

(C) identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted;

(D) for each emission cap, identify all associated EPNs and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(E) for each individual emission limitation, identify the EPN and provide emission rate calculations based on the expected maximum capacity and the proposed control technology.

(14) Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each unit to meet the emission cap and demonstrate compliance with all emission caps at expected maximum production capacity.

Source: The provisions of this § **116. 711** adopted to be effective December 8, 1994, 19 TexReg 9360; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546.

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30 TAC § **116 .711** , 30 TX ADC § **116 .711**

30 TX ADC § **116 .711**

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30 TAC § 116.714

Tex. Admin. Code tit. 30, § 116. 714

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§ 116. 714. Application Review Schedule

The flexible permit application will be reviewed by the commission in accordance with § 116.114 of this title (relating to Application Review Schedule).

Source: The provisions of this § 116. 714 adopted to be effective December 8, 1994, 19 TexReg 9360; amended to be effective July 8, 1998, 23 TexReg 6973.

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30 TAC § 116 .714 , 30 TX ADC § 116 .714

30 TX ADC § **116 .714**

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30 TAC § 116.715

Tex. Admin. Code tit. 30, § 116. 715

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§ 116. 715. General and Special Conditions

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions. Upon a specific finding by the executive director that an increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to review under § 116.150 and § 116.151 and §§ 116.160–116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).

(b) A pollutant specific emission cap or multiple emission caps and/or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Applicability. This section does not apply to physical or operational changes allowed without an amendment under § 116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The start of construction, construction interruptions exceeding 45 days, and completion of construction shall be reported to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The appropriate regional office of the commission and any local program having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements. If sampling of stacks or process vents is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Equivalency of methods. It shall be the responsibility of the flexible permit holder to demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. A copy of the flexible permit along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" attached to the flexible permit. Flexible permitted sources are limited to the emission limits and other conditions specified in the table attached to the flexible permit.

(8) Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the unit is out of service to a level as if no schedule had been established. Unless a special provision specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(9) Maintenance of emission control. The facilities covered by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with § 101.201 and § 101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(10) Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all Rules, Regulations, and Orders of the commission issued in conformity with the TCAA and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(d) There may be additional special conditions attached to a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

Source: The provisions of this § 116. 715 adopted to be effective December 8, 1994, 19 TexReg 9360; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 4, 2000, 25 TexReg 8668; amended to be

effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546; amended to be effective September 14, 2003, 28 TexReg 7763.

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30 TAC § **116 .715** , 30 TX ADC § **116 .715**

30 TX ADC § **116 .715**

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30 TAC § 116.716

Tex. Admin. Code tit. 30, § 116. 716

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§ 116. 716. Emission Caps and Individual Emission Limitations

(a) Emission caps. Each emission cap for a specific pollutant will be established as follows:

(1) emissions will be calculated for each facility based on application of current Best Available Control Technology at expected maximum capacity;

(2) the calculated emissions will be summed.

(b) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not covered by an emission cap for facilities covered by the flexible permit. In addition, an individual emission limitation may be established for a pollutant covered by an emission cap when the expected capacity of a facility is less than the expected maximum capacity to prevent a facility from exceeding emission levels appropriate for the proposed controls.

(c) Readjustment of emission cap. If a facility subject to an emission cap is shut down for a period longer than 12 months, the emission cap shall be readjusted by lowering the emission cap by an amount that the shut down facility contributed to the original calculation of the emission cap. If a new facility is brought into the flexible permit, an emission cap shall be adjusted by modifying the emissions cap accordingly.

(d) Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.

(e) An emission cap will be readjusted downward for any facility covered by a flexible permit if that facility becomes subject to any new state or federal regulation which would lower emissions or require an emission reduction. The adjustment will be made at the time the flexible permit is amended or altered. If an amendment to a flexible permit is not required to meet the new regulation, then within 60 days of making the change, the permittee must submit a request to alter the permit and include information describing how compliance with the new requirement will be demonstrated.

Source: The provisions of this § **116. 716** adopted to be effective December 8, 1994, 19 TexReg 9360.

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30 TAC § **116 .716** , 30 TX ADC § **116 .716**

30 TX ADC § **116 .716**

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