

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Submittal, Resubmittal and Withdrawal of Sections to the State
Implementation Plan

AGENDA REQUESTED: September 24, 2013

DATE OF REQUEST: September 5, 2013

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS
REQUEST, IF NEEDED:** Patricia Durón, (512) 239-6087

CAPTION: Docket No. 2013-1598-SIP. Consideration of the resubmittal to the United States Environmental Protection Agency (EPA) of the following sections in 30 Texas Administrative Code (TAC) as revisions to the State Implementation Plan (SIP):

Section 116.110(a)(3), adopted June 17, 1998; and

Sections 116.710 - 116.760, adopted or amended by the commission on November 16, 1994; June 17, 1998; September 2, 1999; August 9, 2000, March 7, 2001; August 21, 2002; September 25, 2002; and August 20, 2003, except as modified by the list of sections listed below to be either withdrawn or as amended by the commission on December 14, 2010.

Consideration of the withdrawal from the EPA of the following sections in 30 TAC adopted by the commission between 1994 and 2003 to the SIP:

Section 116.711(3) (last sentence only) and (11), as amended August 21, 2002, and all earlier versions;

Section 116.715(a), only with regard to the text "Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA §112(g), 40 CFR Part 63)", as amended August 21, 2002, and all earlier versions;

Section 116.715(c)(6), as amended August 20, 2003 and all earlier versions;

Section 116.716(a) and (d), as adopted October 11, 1994;

Section 116.730, adopted October 11, 1994, and repealed and readopted June 17, 1998;

Section 116.740(b), adopted June 17, 1998 and amended September 2, 1999;

Sections 116.793 - 116.802 and 116.804 - 116.807, adopted May 22, 2002, except Sections 116.794(11), 116.795(f) and 116.799(a), which were returned to the commission by letter from EPA dated June 29, 2011; and

Section 116.803, adopted August 21, 2002;

Consideration of the adoption as a revision to the SIP 30 TAC Section 116.765(b) and (c), and the submittal of the following sections in 30 TAC, adopted by the commission on December 14, 2010, as revisions to the SIP:

Section 116.13(1) and (3);

Section 116.711(2)(M) [introductory text], and paragraphs (iv) and (vii);

Section 116.715(c)(5)(A) and (B);

Section 116.715(c)(6)(A)(i) and (ii);

Section 116.715(d), except the text "The permit shall specify which of the monitoring options under paragraph (2)(A) - (E) of this subsection shall be used to determine compliance for facilities subject to monitoring under this subsection";

Section 116.715(d)(1);

Section 116.715(f);

Section 116.716(a), (c), (d) and (e); and

the repeal of Section 116.716(d)

This adoption would align the program with the court's opinion in *State of Texas, et al v. United States Environmental Protection Agency*, 690 F.3d 670 (5th Cir. 2013), and would provide the rules necessary for EPA to approve the commission's minor new source review flexible permit program as part of the Texas SIP. The sections to be withdrawn from EPA are those for which there is no requirement for inclusion in the SIP under the requirements of the Federal Clean Air Act. (Michael Wilhoit, Janis Hudson) (Project No. 2013-059-SIP-NR)

Jayne Sadlier for Steve Hagle, P.E.
Deputy Director

Mike Wilson, P.E.
Director

Patricia L. Durón
Agenda Coordinator

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 5, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-1598-SIP

Subject: Commission Approval for Submittal and Withdrawal of Rules for the Air Quality Flexible Permitting Program to the United States Environmental Protection Agency's (EPA) Consideration as a Revision to the State Implementation Plan (SIP)
Non-Rule Project No. 2013-059-SIP-NR

Background and reason(s) for the recommendation:

In November 1994, the Texas Commission on Environmental Quality (TCEQ) adopted rules that established the minor new source review (NSR) Flexible Permit Program. Many of the rules were repealed and readopted in 1998, and various amendments to the Flexible Permit Program rules were adopted in 1999-2003. All of these rules were submitted to EPA as revisions to the TCEQ's minor NSR SIP. EPA proposed disapproval of the rules on September 23, 2009 (74 *Federal Register* 48480), and took final action to disapprove the rules on July 15, 2010 (75 *Federal Register* 41311). Subsequently, the State of Texas, various Texas and national industry groups and the Chamber of Commerce of the United States challenged EPA's disapproval. On August 13, 2012, the United States Court of Appeals for the Fifth Circuit held that EPA's disapproval action did not withstand Federal Administrative Procedure Act review. The court granted the petition for review, vacated EPA's final rule, and remanded the matter for EPA's further consideration.

EPA did not appeal the court's decision, and has taken no further action since it was issued. Based on that opinion, the TCEQ requested, by letter dated September 21, 2012, that EPA re-consider the rules that EPA formally disapproved.

Since that time, discussions among representatives for the TCEQ, EPA, and the lead petitioners have taken place in order to resolve EPA's disapproval of the Flexible Permit Program given the Fifth Circuit's decision. EPA has indicated that it will approve a revision to the SIP that incorporates both the rules in effect prior to the amendments adopted on December 14, 2010 and specific portions of the 2010 amendments, with a condition that the commission subsequently submits amended rules that are properly structured within and according to the rulemaking requirements of the Texas Administrative Procedure Act. The condition is expected to have a compliance deadline of one year from EPA's proposed approval.

Scope of the recommendation:

The Executive Director recommends presenting to the commission for consideration a comprehensive, detailed document reflecting the TCEQ's requested SIP revision. The rules

Re: Docket No. 2013-1598-SIP

submitted that were adopted or amended between 1994 and 2003 are, generally, re-submitted in whole to EPA. The exceptions to that are portions of rules and three subsections that EPA has returned to TCEQ all regarding hazardous air pollutant permitting; a rule regarding compliance history, and the existing facility flexible permit (EFFP) rules. The EFFP rules were part of the suite of rules for grandfathered sources adopted in 2002 to give the flexible permitting option to grandfathered facilities; as of May 2013, all of the permits issued under the EFFP rules have been converted (“de-flexed”) to Chapter 116, Subchapter B permits. These are not being resubmitted because they are not requirements under the Federal Clean Air Act (FCAA).

In addition to most of the pre-2010 rules, the Executive Director proposes that the commission adopt as a SIP revision § 116.765(b) and (c), and submit this rule and other portions of the rule amendments adopted December 14, 2010, as listed in the caption.

In addition to the submittal that is for commission consideration under this docket number, the following sections that are part of the Flexible Permit Program are pending EPA review:

1. § 39.402(a)(4) and (5), regarding the applicability of the public participation rules in Chapter 39, adopted June 2, 2010; and
2. § 116.10(9)(E), adopted September 15, 2010 and effective October 7, 2010. This re-numbered part of a definition that was the subject of another rulemaking and for which earlier versions remain subject to SIP review by EPA.

There is no need to resubmit these for EPA to take action on them as part of its comprehensive action on the flexible permitting program rules because they were submitted after EPA proposed disapproval of the flexible permit rules.

As mentioned previously, in the next several months, the Executive Director expects to propose a rulemaking to address the conditional approval that is expected to result from this submittal. The future rulemaking will ensure that the text and organization of the Flexible Permit Program rules include only what is in this current submittal as well as some updated non-substantive rule text adopted in 2010. Based on the issues litigated, some of the rule amendments adopted on December 14, 2010 are not necessary for EPA approval of the Flexible Permit Program and thus would be proposed for repeal. That is expected to be a rulemaking which EPA can adopt in full as a SIP revision and finally resolve the outstanding issues with regard to this minor NSR program.

A.) Summary of what the recommendation will do: This will resolve the absence of SIP approval for the minor NSR Flexible Permit Program rules adopted between 1994 and 2003, and will ensure approval by submitting certain rule amendments adopted in 2010.

Re: Docket No. 2013-1598-SIP

B.) Scope required by federal regulations or state statutes: FCAA, Section 110(a)(2)(C) requires that states have a minor NSR permitting program, but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements. Owners and operators of facilities that operate under permits that have been issued under rules that have not been approved as part of the SIP risk potential enforcement.

C.) Additional staff recommendations that are not required by federal rule or state statute: None

Statutory authority:

The statutory authority is included in the adoption and amendment of the rules that are part of this submittal. In addition, the authority for this action includes Title I of the FCAA, 42 United States Code, §§ 7401 *et seq.*; the Texas Clean Air Act, Texas Health and Safety Code, Chapter 382, §§ 382.002, 382.011, 382.012, 382.016, 382.021, 382.023, 382.024, 382.036, 382.051, 382.0512 – 382.0518, 382.05183, 382.055, 382.056, 382.062, and 382.066; and Texas Water Code, § 5.013 and § 5.102.

Effect on the:

A.) Regulated community: Resolution of this long-standing matter will provide necessary certainty with regard to what is part of the approved SIP and will lead to full approval of the TCEQ's current Flexible Permit Program after the rulemaking is adopted and submitted in 2014.

B.) Public: Resolution of this long-standing matter will provide greater certainty with regard to what is part of the approved SIP.

C.) Agency programs: No effect on agency programs.

Stakeholder meetings:

Not applicable.

Potential controversial concerns and legislative interest:

The executive director is not aware of any controversy with regard to this agenda item.

Will this recommendation affect any current policies or require development of new policies?

No. Subsequent rulemaking will be required to reconcile the text and formatting of rules submitted as this SIP revision. This rulemaking is expected to be proposed in 2014, after EPA publishes its proposed conditional approval regarding this submittal.

What are the consequences if this recommendation does not go forward?

The outcome of the litigation discussed above would remain outstanding, resulting in the flexible permitting program rules remaining outside the Texas minor NSR SIP.

Commissioners
Page 4
September 5, 2013

Re: Docket No. 2013-1598-SIP

Agency contacts:

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Janis Hudson, Staff Attorney, Environmental Law Division, (512) 239-0466
Patricia Durón, Texas Register Coordinator, (512) 239-6087

Attachments

SIP narrative, consisting of rules

cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
Tucker Royall
Office of General Counsel
Michael Wilhoit
Janis Hudson
Patricia Durón

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

NOTES

The attached version of 30 Tex. Admin. Code (TAC) § 116.13 and Chapter 116, Subchapter G is the version of the rules in effect prior to amendments adopted by the TCEQ in December 2010, with the following edits:

1. Text regarding hazardous air pollutant permitting is not submitted to EPA as a SIP revision. Accordingly, TCEQ withdraws HAPs-related text shown in *[brackets]* in §§ 116.711(3) and (11); 116.715(a); and 116.740(b).
2. TCEQ withdraws § 116.730 (Compliance History), as shown in *[brackets]*.
3. Rule text from the 2010 amendments (shown in **yellow highlight**) is inserted into the pre-2010 rule structure to illustrate the integration of select 2010 rule provisions per discussions re: SIP approval of Texas' Flexible Permit Program with EPA. The insertions do not follow Texas Administrative Code / Texas Register formatting requirements.

Specifically, 2010 rule text is inserted in the following sections:

- a. § 116.13(1) and (3) Flexible Permit Definitions. The 2010 revised definitions delete references to insignificant emissions factor adjustments.
 - b. § 116.711(13) Flexible Permit Application
 - i. (D) - inclusion of Subchapter B conditions in Flexible Permit {text is currently designated as § 116.711(2)(M) introductory text and paragraph (iv)}
 - ii. (new paragraph vii) – inclusion of analysis of how the conditions and control requirements of a Subchapter B permit will be carried forward in the proposed flexible permit.
 - c. § 116.715(c)(5)(A) and (B) General and Special Conditions -- Monitoring, Calculations, and Equivalency of Methods
 - d. § 116.715(c)(6)(A)(i) and (ii) General and Special Conditions – Recordkeeping.
Note: TCEQ withdraws remainder of pre-2010 rule text and it is therefore shown in *[brackets and strikeout]*.
 - e. § 116.715(d)(1) General and Special Conditions – Cap/Monitoring
Note: second sentence of (d) is shown deleted to reflect submission of (d)(1) only.
 - f. § 116.716 Emissions Caps and Individual Emissions Limitations:
 - i. Pre-2010 (a) would be withdrawn and is shown in *[brackets and strikeout]*;
 - ii. Pre-2010 (b), (c) and (e) remain;
 - iii. (New a), (new c), (new d), and (new e) would be submitted; and
 - iv. Pre-2010 (d) would be withdrawn and is shown in *[brackets and strikeout]* *Note:* 2010 rulemaking repealed (d) insignificant emission factor.
4. § 116.765(b) and (c) Compliance Schedule, as adopted December 14, 2010, is submitted as adopted by the commission as a SIP revision.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

5. In addition, TCEQ withdraws from EPA consideration the Existing Facility Flexible Permit Rules in §§116.793 – 116.807, submitted to EPA in 2002, with the exception of §§ 116.794(11), 116.795(f) and 116.799(a), which were returned to the TCEQ by letter dated June 29, 2011.

6. Note: Other rules pending EPA review that concern flexible permitting include parts of §§ 39.402, 116.10, and 116.110.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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 from all facilities 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 for an individual facility.**

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

SUBCHAPTER G: FLEXIBLE PERMITS

**§§116.710, 116.711, 116.714 - 116.718, 116.720 - 116.722, 116.730, 116.740, 116.750,
116.760**

§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.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(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.

§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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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;

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(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 (including description, common name, and facility identification number) 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; and

(new vii) if the flexible permit application includes facilities currently authorized by a permit issued under Subchapter B of this chapter (relating to New Source Review Permits), the applicant shall identify any terms, conditions, and representations in the Subchapter B permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit.

(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.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

§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).

§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.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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) **Monitoring, Calculations, and** Equivalency of methods.

(A) Each flexible permit shall specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit.

(B) Each flexible permit shall specify methods for calculating annual and short term emissions for each pollutant for a given type of facility.

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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. The permit holder shall:

(A) maintain a copy of the flexible permit (and any permit applications associated with 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. This information and data shall include, but is not limited to:

(i) emission cap and individual emission limitation calculations based on a 12-month rolling basis; and

(ii) emission cap and individual emission limitation calculations corresponding to any short term emission limitation;

~~[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~~

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

~~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).

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(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.

(new d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. [The permit shall specify which of the monitoring options under paragraph (2)(A)–(E) of this subsection, shall be used to determine compliance for facilities subject to monitoring under this subsection.] These requirements do not apply to facilities that are not subject to an emission cap.

(1) The monitoring system must accurately determine all emissions of the pollutants in terms of mass per unit of time. Any monitoring system authorized for use in the

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

§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.]~~

(new a) Emission caps. To establish a cap for a pollutant, the executive director will develop an emission cap for:

(1) all facilities at an account; or

(2) a designated group of facilities at an account.

(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

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

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.

(new c) Emissions will be calculated for each facility within an emission cap as follows:

(1) Determination of control technology:

(A) if the permit is used to authorize any facility, group of facilities, or account, or any change to existing facilities, that constitutes a new major stationary source or major modification for the pollutant as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), emissions shall be based on control technology determined in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively) as applicable, at expected maximum capacity; or

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(B) based on application of best available control technology as defined in §116.10 of this title (relating to General Definitions), at expected maximum capacity.

(2) pollutants emitted from facilities subject to lowest achievable emission rate review in accordance with Subchapter B, Division 5 of this chapter must be included in a separate emissions cap or listed as individual emission limitations.

(3) the calculated emissions for all facilities within an emission cap will be summed.

(4) a lower emission cap than that determined by paragraph (3) of this subsection may be proposed by the permit applicant if technical information is provided to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

~~[(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.]~~

(new d) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not included in an emission cap for facilities authorized by the flexible permit. In addition, an individual emission limitation may be established for a pollutant included in an emission cap when the expected capacity of a facility is

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

less than the expected maximum capacity to prevent a facility from exceeding emission levels appropriate for the proposed controls.

(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.

(new e) The permit shall clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. A facility may be subject to both an emission cap and an individual emission limitation.

§116.717. Implementation Schedule for Additional Controls.

If a facility requires the installation of additional controls to meet an emission cap for a pollutant, the flexible permit shall specify an implementation schedule for such additional controls. The permit may also specify how the emission cap will be adjusted if such a facility is taken out of service or fails to install the additional control equipment as provided by the implementation schedule.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

§116.718. Significant Emission Increase.

An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of state new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

§116.720. Limitation on Physical and Operational Changes.

Neither operational nor physical changes authorized under this subchapter may result in an increase in actual emissions at facilities not covered by the flexible permit unless those affected facilities are authorized pursuant to §116.110 of this title (relating to Applicability).

§116.721. Amendments and Alterations.

(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit, as well as any general and special provisions attached, become conditions upon which the subsequent flexible permit is issued. It shall be unlawful for any person to vary from such representation or flexible permit provision if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in a significant increase in emissions, unless application is made

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

to the executive director to amend the flexible permit in that regard and such amendment is approved by the executive director or commission. Applications to amend a flexible permit shall be submitted with a completed Form PI-1 and are subject to the requirements of §116.711 of this title (relating to Flexible Permit Application).

(b) Flexible permit alterations.

(1) A flexible permit alteration is for any variation from a representation in a flexible permit application or a general or special provision of a flexible permit that does not require a flexible permit amendment.

(2) All flexible permit alterations which may involve a change in a general or special condition contained in the flexible permit, or affect control equipment performance must receive prior approval by the executive director. The executive director shall be notified in writing of all other flexible permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. The appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all flexible permit alteration documents.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(3) Flexible permit alterations shall not be subject to the requirements of Best Available Control Technology identified in §116.711(3) of this title.

(c) Changes not requiring an amendment or alteration. The following changes do not require an amendment or alteration, except that an amendment is required if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in a significant increase in emissions:

(1) a change in throughput; or

(2) a change in feedstock.

(d) Permit by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) Notwithstanding subsections (a) or (b) of this section, no permit amendment or alteration is required if the changes to the permitted facility qualify for a permit by rule under Chapter 106 of this title unless prohibited by permit provision as provided in §116.715 of this title (relating to General and Special Conditions). All such changes permitted by rule to a permitted facility shall be incorporated into that facility's permit at such time as the permit is amended or renewed.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(2) Emission increases authorized by Chapter 106 of this title at an existing facility covered by a flexible permit shall not cause an exceedance of the emissions cap or individual emission limitation.

§116.722. Distance Limitations.

No flexible permit may be issued unless the distance and location restrictions found in §116.112 of this title (relating to Distance Limitations) are met.

[§116.730. Compliance History.

As part of a flexible permit review, or the review of an amendment of a flexible permit, or renewal of an existing flexible permit, the provisions found in Chapter 60 of this title (relating to Compliance History) shall be applicable to the facility, group of facilities, or account being permitted, amended, or renewed.]

§116.740. Public Notice and Comment.

(a) Any person who applies for a flexible permit or an amendment to a flexible permit shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

[(b) Any person who applies for an amendment to a flexible permit regarding an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions))

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

subject to Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).]

§116.750. Flexible Permit Fee.

(a) Fees required. Any person who applies for a flexible permit or for an amendment to an existing flexible permit shall remit, at the time of application for such permit, a fee as set forth in subsection (b) of this section. Fees will not be charged for flexible permit alterations, changes of ownership, or changes of location of permitted facilities.

(b) Fee amounts. The fee to be remitted with a flexible permit application shall be based on the total annual allowable emissions from the permitted facility, group of facilities, or account for which the flexible permit is being sought. The fee shall be \$32 per ton with the minimum fee being \$900 and the maximum fee \$75,000. For flexible permit amendments, the fee shall be calculated based on \$32 per ton for the incremental emission increase with the minimum fee being \$900 and the maximum fee being \$75,000.

(c) Payment of fees. All permit fees for a flexible permit shall be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality and delivered with the application for flexible permit or flexible permit amendment to the commission's New Source Review Permits Division. Required fees must be received before the agency will begin examination of the application.

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

(d) Return of fees. Fees must be paid at the time an application for a flexible permit or flexible permit amendment is submitted. If the applicant withdraws the application prior to issuance of the flexible permit or flexible permit amendment, one-half of the fee will be refunded, except that the entire fee will be refunded for any such application for which a permit by rule under Chapter 106 of this title (relating to Permits by Rule) is allowed. No fees will be refunded after a deficient application has been voided, denied, or after a flexible permit or flexible permit amendment has been issued by the agency.

§116.760. Flexible Permit Renewal.

Flexible permits will be renewed in accordance with Subchapter D of this chapter (relating to Permit Renewals).

§116.765. Compliance Schedule.

(b) The compliance date is 60 days after publication in the Federal Register of the final approval by the United States Environmental Protection Agency of these sections as revisions to the Texas State Implementation Plan.

(c) Until the compliance date specified by subsection (b) of this section, applications for flexible permits are governed by §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title, as they existed immediately before January 5, 2011, and those

**STATE IMPLEMENTATION PLAN REVISION FOR FLEXIBLE PERMIT PROGRAM
RULES 30 TAC § 116.13 and Chapter 116, Subchapter G (in effect as of September 13, 2003)
WITH OVERLAY OF SELECT 2010 RULE AMENDMENTS (effective January 6, 2011)
ADOPTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON
SEPTEMBER 24, 2013**

rules are continued in effect for that purpose. All other sections in this subchapter remain applicable to applications for flexible permits.

Texas Commission on Environmental Quality



ORDER ADOPTING REVISIONS TO THE STATE IMPLEMENTATION PLAN

Docket No. 2013-1598-SIP
Project No. 2013-059-SIP-NR

On September 24, 2013, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered the resubmittal and withdrawal of previously submitted rules implementing the Commission's air quality flexible permitting program, and the adoption of certain rules adopted by the Commission on December 14, 2010, for the program, for submittal to the United States Environmental Protection Agency (EPA) for consideration as revisions to the state implementation plan (SIP). The Commission adopts the submittal, resubmittal and withdrawal of rules as revisions to the SIP. Under Tex. Health & Safety Code Ann. §§ 382.011, 382.012, and 382.023 (Vernon 2011), the Commission has the authority to control the quality of the state's air and to issue orders consistent with the policies and purposes of the Texas Clean Air Act, Chapter 382 of the Tex. Health & Safety Code.

The Commission resubmits for EPA consideration the following sections in 30 Texas Administrative Code (TAC): § 116.110(a)(3), adopted June 17, 1998; and § 116.710 - 116.760, adopted or amended by the commission on October 11, 1994; June 17, 1998; September 2, 1999; August 9, 2000; March 7, 2001; August 21, 2002; September 25, 2002; and August 20, 2003, except as modified by the list of sections to be withdrawn.

The Commission withdraws from EPA consideration as revisions to the SIP the following sections adopted by the commission between 1994 and 2003: § 116.711(3) (last sentence only) and (11), as amended August 21, 2002, and all earlier versions; § 116.715(a), only with regard to the text "Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA §112(g))", 40 CFR Part 63, as amended August 21, 2002, and all earlier versions; § 116.715(c)(6), as amended August 6, 2003, and all earlier versions; § 116.716(a) and (d), as adopted October 11, 1994; § 116.730, adopted October 11, 1994, and repealed and readopted June 17, 1998; § 116.740(b), adopted June 17, 1998 and amended September 2, 1999; §§ 116.793 - 116.802 and 116.804 - 116.807, adopted May 22, 2002, except §§ 116.794(11), 116.795(f) and 116.799(a), which were returned to the commission by letter from EPA dated June 29, 2011; and § 116.803, adopted August 21, 2002.

Docket No. 2013-1598-SIP
Project No. 2013-059-SIP-NR

The Commission adopts as a revision to the SIP § 116.765(b) and (c), and submits the following additional sections adopted by the commission on December 14, 2010, as revisions to the SIP: § 116.13(1) and (3); § 116.711(2)(M) [introductory text], and paragraphs (iv) and (vii); § 116.715(c)(5)(A) and (B); § 116.715(c)(6)(A)(i) and (ii); § 116.715(d), except the text “The permit shall specify which of the monitoring options under paragraph (2)(A) - (E) of this subsection shall be used to determine compliance for facilities subject to monitoring under this subsection”; § 116.715(d)(1); § 116.715(f); § 116.716(a), (c), (d) and (e); and the repeal of § 116.716(d).

Pursuant to 40 Code of Federal Regulations § 51.102 and after proper notice, the Commission conducted public hearings to consider the adoption and amendment of these rules and revisions to the SIP with each of the rulemaking actions of the commission, as documented in the hearing record books and orders of the commission. Proper notice included prominent advertisement in the areas affected at least 30 days prior to the dates of the hearings, and public hearings were held in various locations in Texas prior to the adoption of and amendments to these rules.

The Commission circulated hearing notices of its intended action to the public, including interested persons, the Regional Administrator of the EPA, and all applicable local air pollution control agencies. The public was invited to submit data, views, and recommendations on the proposed rules and SIP revisions, either orally or in writing, at the hearings or during the comment period. Prior to the scheduled hearings, copies of the proposed rules and SIP revisions were available for public inspection at the Commission’s central office, regional offices or on the Commission’s Web site.

Data, views, and recommendations of interested persons regarding the proposed rules and SIP revisions were submitted to the Commission during the comment period, and were considered by the Commission as reflected in the analysis of testimony incorporated by reference to this Order. The Commission finds that the analysis of testimony includes the names of all interested groups or associations offering comment on the proposed rules and the SIP revisions and their position concerning the same.

IT IS THEREFORE ORDERED BY THE COMMISSION that the rules in 30 TAC listed herein are submitted or resubmitted to, or withdrawn from, the EPA as revisions to the SIP. The rules and the revisions to the SIP are incorporated by reference in this Order as if set forth at length verbatim in this Order.

IT IS FURTHER ORDERED BY THE COMMISSION that on behalf of the Commission, the Chairman should transmit a copy of this Order, together with the rules and revisions to the SIP, to the Regional Administrator of EPA as a proposed revision to the Texas SIP pursuant to the Federal Clean Air Act, codified at 42 U.S. Code Ann. §§ 7401 - 7671q, as amended.

Docket No. 2013-1598-SIP
Project No. 2013-059-SIP-NR

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Date issued:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

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