The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§116.13, 116.710, 116.711, 116.715, 116.716, 116.717, 116.718, 116.721, and 116.765.

Sections 116.13; 116.710; 116.711(1), (2)(A), (B) and (C)(i) and (ii), (D) - (J), and (L) - (N); 116.715(a) - (e) and (f)(1) and (2)(B);116.716; 116.717; 116.718; 116.721; and 116.765 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The Texas Flexible Permit Program (FPP) rules (Chapter 116, §116.13 and Subchapter G, Flexible Permits) first became effective on December 8, 1994. The FPP was developed in response to direction from the commission at the January 21, 1994, policy agenda meeting. The FPP rules were developed after considering the positional papers presented by industry, environmental groups, and local government environmental programs under the supervision of Task Force 21, a regulatory negotiation committee of the Texas Water Commission and the Texas Natural Resource Conservation Commission (predecessor agencies of the TCEQ), which was comprised of representatives of legal and engineering professions, public utilities, business associations, local chambers of commerce, city and county government, consumer and environmental groups, and community organizations for the purpose of advising the agency on industrial air quality, water quality, and waste

management issues. The rules created a new type of minor New Source Review (NSR) permit called a flexible permit, which functions as an alternative to the traditional preconstruction permits that are authorized in Chapter 116, Subchapter B, New Source Review Permits. Flexible permits were designed to exchange flexibility for emission reductions with the final goal being a well-controlled facility, without relaxation of any control requirements. At the time the FPP was developed, the commission lacked the authority to require an air quality permit for grandfathered facilities. The FPP was intended to provide grandfathered facilities with a voluntary authorization mechanism that would reduce emissions, and significant reductions were achieved that were otherwise not required by either state or federal law. Although that feature was environmentally beneficial, the program was not limited to use by grandfathered facilities. Many of the FPP rules were repealed and readopted in 1998, and various amendments to the FPP rules were adopted during the period 1999 - 2003.

Only one flexible permit can be issued for a particular plant or active account. However, multiple emission caps, multiple individual emission limits, or any combination thereof can be included in a flexible permit. The applicant for a flexible permit can combine existing facilities and new facilities into the flexible permit. The flexible permit then becomes the controlling authorization for some or all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to some or all of the facilities. The flexible permit is not and has never been a substitute for or in lieu of

major NSR permitting if major NSR review is triggered. Nor can the flexible permit be used to circumvent or ignore compliance with other federal requirements, such as a national emission standard for hazardous air pollutants. The FPP is intended to eliminate the need for owners or operators of participating facilities to submit an amendment application each time certain operational or physical changes are made at a permitted facility. This type of flexibility without backsliding from various requirements and without environmental harm provides owners and operators options for their operations. The environmental benefits of the FPP have included the permitting of grandfathered facilities, substantial emission reductions from the installation of controls, and a comprehensive evaluation of emission impacts.

On September 23, 2009, the EPA published notice in the *Federal Register* (74 *FR* 48480) (hereafter "Notice") of its intent to disapprove the TCEQ FPP rules that were first submitted to the EPA as a proposed SIP revision in 1994 as well as subsequent rule amendments that were submitted several times between 1998 and 2003. Although the Federal Clean Air Act (FCAA) requires that proposed revisions to the SIP be reviewed within 18 months after submittal (*See* 42 United States Code (USC), §7410(k)(1)(B) and (2)), more than 15 years passed from the initial submittal before the EPA took any formal action, and EPA did so only in response to litigation brought by holders of flexible permits (s*ee BCCA Appeal Group, et al v. United States EPA et al*, No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited several assertions as the basis for disapproval of the

FPP as a minor NSR revision. The EPA published final notice of disapproval of the FPP in the *Federal Register* on July 15, 2010 (75 *FR* 41311), hereafter "Disapproval Notice."

While maintaining that its FPP rules, as adopted and implemented prior to this rulemaking, are fully approvable as revisions to the SIP, the commission adopted, on December 14, 2010, rule amendments to address the deficiencies alleged in the EPA's proposed disapproval notice and to provide even greater clarity that the FPP rules operate as a minor NSR program in the state of Texas. The commission also adopted new §116.765. This new section provided that the FPP rules as amended would be applicable 60 days after final approval by the EPA, and that the rules as they existed prior to January 5, 2011 would continue in effect until the EPA's approval.

Subsequently, the State of Texas, various Texas and national industry groups and the Chamber of Commerce of the United States challenged the EPA's disapproval. On August 13, 2012, the United States Court of Appeals for the Fifth Circuit held that the EPA's disapproval action did not withstand Federal Administrative Procedure Act review. The court granted the petition for review, vacated the EPA's final rule, and remanded the matter for EPA's further consideration. EPA did not appeal the court's decision. Based on that opinion, the TCEQ requested, by letter dated September 21, 2012, that the EPA re-consider the rules that the EPA formally disapproved.

On September 24, 2013, the commission adopted a SIP revision consisting of resubmittal of the FPP rules adopted 1994 - 2003, which were, generally, resubmitted in whole. The exceptions to that were portions of rules and three subsections that the EPA has returned to TCEQ, all regarding hazardous air pollutant permitting and a rule regarding compliance history. In addition, the commission withdrew from EPA consideration the existing facility flexible permit (EFFP) rules, which 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 rules were withdrawn from SIP consideration, or not resubmitted for SIP consideration, because they are not requirements under the FCAA. Finally, the commission submitted portions of the rule amendments adopted in 2010. This submittal was transmitted to EPA on October 21, 2013. On January 29, 2013, EPA signed a notice for publication in the *Federal Register* which proposes~~, and EPA has verbally indicated that it will propose a~~ conditional approval of the submittal.

As the EPA recognizes, under the applicable federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the National Ambient Air Quality Standards (NAAQS). The development of NSR requirements and procedures tailored for the air quality needs of each state is not only consistent with the FCAA, it is encouraged under the law and the EPA's implementing regulations (See 42 USC, §7407(a) and 40 Code of Federal Regulations (CFR) §51.101(e)

and (g); See also *Safe Air for Everyone v. United States EPA*, 488 F.3d 1088, 1092 (9th Cir. 2007)). States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the 40 CFR Part 51 requirements where the revisions are different from 40 CFR Part 51. The commission continues to maintain that the FPP rules as adopted and implemented prior to this rulemaking are approvable as a minor NSR permit program revision to the Texas SIP. Based on the opinion of the Fifth Circuit, the commission now proposes amendments to several rules in Subchapter G to ensure that the rules can be approved as part of the Texas SIP. Specifically, these amendments would remove text that is not necessary for EPA approval, restore rule text removed in 2010, make non-substantive changes, and ensure that the rules conform to requirements of the Texas Administrative Code (TAC).

Sections 116.720, 116.740(a), and 116.750 were amended by the commission and adopted as revisions to the SIP in 2010, but have not been formally submitted to the EPA. Those will be submitted to the EPA together with the rule amendments that are part of this rulemaking.

The versions of the remainder of the rules in Subchapter G have also been proposed to be conditionally approved by the EPA. These rules were not amended in 2010 nor are

proposed for amendment in this rulemaking. Specifically, those rules are §§116.714, 116.722, and 116.760. Section 116.730 remains an FPP rule, but is not required for the SIP.

Section by Section Discussion

§116.13, Flexible Permit Definitions

The commission proposes to delete the definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS) under §116.13(1), (2), and (6), respectively. These definitions were added in 2010 to support more detailed monitoring requirements that were also added at that time, in response to the EPA's Disapproval Notice. The 2010 monitoring language which referred to CEMS, CPMS, and PEMS is proposed to be removed, so it is no longer necessary to maintain these definitions in §116.13. The remaining definitions in §116.13 are proposed to be renumbered accordingly.

§116.710, Applicability

The commission proposes to delete §116.710(a)(5), which contains language stipulating that applications and permits under Subchapter G must comply with applicable requirements of Subchapter B, Division 5 or 6 of Chapter 116 (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively), and stipulating that no person shall use Subchapter G to circumvent applicable requirements of Prevention of Significant Deterioration (PSD) or Nonattainment NSR permitting. This

language was added to this section in 2010 in response to the EPA's Disapproval Notice, which alleged that the existing rules did not sufficiently address PSD and Nonattainment NSR applicability and did not clearly prohibit circumvention of those requirements. However, the applicability of PSD and Nonattainment NSR are clearly spelled out elsewhere in Chapter 116 and in federal regulations, and it is redundant and unnecessary to maintain this language in §116.710, so TCEQ is proposing that this language be removed.

§116.711, Flexible Permit Application

The commission proposes to delete language in §116.711(2)(H) and (I), which specifies that before Subchapter G can be used, a project analysis to determine the applicability of federal Nonattainment NSR or PSD review is required. This language was added in 2010 in response to comments made by the EPA in the Disapproval Notice, which stated that Texas' rules must require this analysis before an applicant could proceed with an application for a flexible permit. However, the commission maintained and continues to take the position that this additional language is not required under the FCAA for SIP approval of the FPP rules. In addition, other portions of Chapter 116 and federal regulations already sufficiently address the applicability of federal NSR requirements. Therefore, the commission is proposing to remove this requirement.

The commission also proposes to delete language in §116.711(2)(J), which specifies that any flexible permit application or permit amendment shall include an air quality analysis

to demonstrate that the proposed action will not interfere with attainment and maintenance of the NAAQS. This language was added in 2010 to address comments in the EPA's Disapproval Notice which alleged that the FPP did not sufficiently protect the NAAQS. However, the commission maintained and continues to take the position that this additional language is not required under the FCAA for SIP approval of the FPP rules. In addition, other portions of Chapter 116 and federal regulations already sufficiently address the applicability of federal NSR requirements. Therefore, the commission is proposing to remove this requirement.

The commission proposes to delete existing §116.711(2)(M)(vi), which specifies that a permit application for a new flexible permit must include calculations used to determine the controlled emission rates from each facility, in accordance with TCEQ Air Permits Division guidance. The language proposed for deletion is not necessary because other portions of §116.711 already specify that the applicant must provide emission calculations based on the proposed control technology.

The commission also proposes minor revisions throughout this section, to correct and update various references.

§116.715, General and Special Conditions

The commission proposes to delete §116.715(c)(6)(A)(iv), which requires the permit holder

to maintain records of any air quality analysis required under §116.718(c). This recordkeeping requirement was added in 2010, in support of other 2010 rule changes which required the permit holder to conduct an air quality analysis for any changes conducted under §116.718(c). This language is no longer necessary because the commission is also proposing to eliminate the air quality analysis requirement in §116.718(c).

The commission proposes to amend §116.715(c)(6)(E) such that permit records will be required to be maintained for only two years after the date the information or data is obtained, rather than five years. This recordkeeping period was increased from two years to five years in 2010, in response to comments in the EPA's March 12, 2008, correspondence. However, a five-year retention period for minor NSR is not a requirement of the FCAA, so the commission is proposing to restore the two-year recordkeeping period that was in the rule prior to the 2010 amendments. However, flexible permit holders who are subject to the requirements of the Federal Operating Permit (Title V) Program are required to maintain records for five years under the requirements of that program.

The commission proposes to remove the last sentence of §116.715(c)(8), relating to flexible permit representations. This sentence was added in 2010 in response to EPA's comments in its disapproval of the TCEQ's FPP. This text is not necessary in this rule for the

commission to effectively enforce permits. As stated in the TCEQ's interpretative letter to EPA dated December 9, 2013, which accompanies the flexible permit SIP revision discussed earlier in this preamble, the commission's rule §116.715(c)(11) provides that acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all applicable rules and orders of the commission issued in conformity with the Texas Clean Air Act (TCAA) and the conditions precedent to the granting of the permit, which necessarily includes representations in applications submitted to the commission. Specifically, addition, §116.721(a) provides that all representations with regard to construction plans and operation procedures in an application for a flexible permit become conditions upon which the permit is issued. TCEQ has the authority to enforce all permit conditions, including all representations. Therefore, even with deletion of this language, the TCEQ's position is that noncompliance with the representations is noncompliance with the permit and may pursue enforcement.

The commission proposes to delete §116.715(c)(12), which contains detailed monitoring and reporting requirements associated with facilities which are under an emissions cap. These provisions were added to the rule in 2010, in response to comments in the EPA's Disapproval Notice, and the EPA's March 12, 2008 correspondence, which alleged that the FPP rules did not provide sufficient monitoring, recordkeeping, and reporting mechanisms to ensure accountability and to allow TCEQ to determine compliance. With the deletion of these requirements, TCEQ will continue to specify appropriate monitoring and

recordkeeping requirements through permit conditions, on a case-by-case basis, as was done prior to the 2010 amendments.

The commission proposes to amend §116.715(d) by relocating the text of existing §116.715(d)(1) to within §116.715(d). The text being relocated requires that monitoring systems accurately determine all emissions in terms of mass per unit of time, and that monitoring systems authorized for use in a permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. After the text is relocated, §116.715(d)(1) would be deleted.

The commission proposes to delete §116.715(d)(2) and (3), which contain detailed requirements for monitoring systems and monitoring procedures used to determine compliance with flexible permit emission caps. These requirements were added in 2010 in response to the EPA's Disapproval Notice, which alleged that the FPP rules did not provide sufficient mechanisms for monitoring and compliance determinations. However, as the FPP is a minor NSR program, these detailed monitoring requirements are not required by the FCAA or by implementing regulations. This proposed change will allow TCEQ to specify appropriate monitoring provisions and compliance provisions within each permit on a case-by-case basis.

§116.716, Emission Caps and Individual Emission Limitations

The commission proposes to amend §116.716(f) by removing unnecessary language referring to practical enforceability. The commission proposes to amend §116.716(f)(1) by replacing the term "lowering" with the more appropriate term, "decreasing." The commission also proposes to relocate a portion of current §116.716(f)(3), relating to the requirement to file an amendment application to authorize an increase in an emission cap, into §116.716(f)(2). The remaining portion of current §116.716(f)(3), relating to major NSR applicability and the adjustment of emission caps, is proposed to be deleted. Existing §116.716(f)(4), relating to the adjustment of an emission cap as a result of new state or federal regulations, is proposed to be renumbered as §116.716(f)(3).

The commission proposes to delete §116.716(g), which requires that each emission cap or individual emission limitation in a flexible permit shall specify an annual emission limitation and a practically enforceable short-term emission limitation. This language was added in 2010, in response to statements in the EPA's March 12, 2008, letter concerning alleged deficiencies in the FPP with regard to practical enforceability of permits. The commission is proposing to delete this requirement because flexible permits contain appropriate and enforceable annual limitations or short-term limitations, established on a case-by-case basis.

The commission proposes to delete §116.716(h), which specifies that when an emission cap

is established or adjusted, major NSR requirements must be met for the new or modified sources prior to issuance, amendment, or alteration of the flexible permit. This language was added in 2010 in response to the EPA's Disapproval Notice, which alleged that the FPP rules did not sufficiently address major NSR applicability, and did not provide specific, replicable procedures for the adjustment of an emission cap. However, other portions of Chapter 116 and applicable federal regulations already require compliance with major NSR requirements, so the commission proposes to eliminate this unnecessary language.

§116.717, Implementation Schedule for Additional Controls

The commission proposes to amend §116.717 by deleting language added in 2010 in response to the EPA's March 12, 2008, letter, and restoring the rule language that was in place prior to the 2010 amendments. The language proposed for deletion specifies that control technology required by federal major NSR requirements must be operational at start of operation and is not eligible for an implementation schedule under this section. This language is unnecessary because other state and federal regulations concerning major NSR already require that federally-required control equipment be in place prior to the operation of the facility. In addition, the commission is proposing to delete language adopted in 2010 which requires that the permit holder obtain a permit amendment or alteration to modify a control implementation schedule. This change would provide improved flexibility for the permit holder and for the commission in making revisions to a control implementation schedule.

§116.718, Significant Emission Increase

The commission proposes to delete §116.718(b) and (c), and to renumber §116.718(a) as §116.718. Section 116.718(b) relates to determining if a significant emission increase has occurred at a facility or project that is subject to major NSR. Section 116.718(c) requires the completion of an air quality analysis to demonstrate that a proposed action will not interfere with attainment and maintenance of the NAAQS. These subsections were adopted in 2010 in response to alleged deficiencies identified in the EPA's Disapproval Notice and in the EPA's March 12, 2008, letter. The commission is proposing to delete these subsections because other regulations already address major NSR requirements, and because it is not necessary to specifically require an air quality analysis for every change at minor NSR facilities covered by a flexible permit. If these subsections are deleted as proposed, §116.718 will effectively be restored to the rule language that was in place prior to the 2010 amendments. The commission also proposes a minor grammatical revision to §116.718 that would replace the word "nor" with the word "or."

§116.721, Amendments and Alterations

The commission proposes to delete language in §116.721(a) and (c), which requires a permit amendment prior to the addition of a new facility or facilities, or any change that constitutes a major modification as defined by §116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions. The language proposed for deletion was

adopted in 2010, in response to the EPA's Disapproval Notice and the EPA's March 12, 2008, letter. The language proposed for deletion is not necessary because other rules in Subchapter G and Chapter 116 already require a permit amendment to add a new facility, and require compliance with applicable major NSR requirements.

The commission also proposes to correct a cross reference in §116.721(b)(3), which should refer to the best available control technology requirements of §116.711(2), not paragraph (3).

§116.765, Compliance Schedule

The commission proposes to delete the text of existing §116.765(a), which contains language adopted in 2010 to clarify the compliance date of these rule sections. The commission proposes to reletter existing §116.765(b) as §116.765(a) and update the text to reflect the sections being submitted to the EPA for approval as a SIP revision. The proposed compliance date is 60 days after publication in the *Federal Register* of the final approval by the EPA of all or portions of the sections submitted for approval.

The commission also proposes to reletter existing §116.765(c) as §116.765(b). This rule specifies that until the EPA approves the sections submitted for SIP approval, the rules as they existed immediately before January 5, 2011, are continued in effect.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

Because the EPA formally disapproved the TCEQ's longstanding FPP rules in 2010, the TCEQ adopted amendments for the program in that year to address the deficiencies alleged by the EPA. Those amendments contained a stipulation that compliance with the rule would not be required until the EPA approved the amendments as a SIP revision. The amendments adopted in 2010 were not approved by the EPA, and therefore, compliance with the more stringent analysis, monitoring, and recordkeeping requirements contained in those amendments was never required by the TCEQ. A decision by the Fifth Circuit of the United States Court of Appeals in August, 2012 required the EPA to further consider the TCEQ FPP, and the agency, industry representatives, and the EPA have worked to determine which FPP rules would be acceptable and approvable as SIP revisions. The proposed rules are a result of those negotiations and would delete certain requirements of the 2010 amendments in Chapter 116 that are no longer necessary for EPA approval of the FPP.

Specifically, the proposed rules would amend the 2010 Chapter 116 amendments to: delete definitions related to monitoring that are no longer needed; delete a requirement to perform an air quality analysis for every flexible permit application, amendment, or other change; delete the more detailed 2010 monitoring, recordkeeping, and reporting requirements; delete longer record retention requirements; delete requirements for a control schedule; delete language which requires annual emission limits and enforceable short term emission limits for each emission cap; and delete other redundant language.

Once these proposed rules are adopted and approved by the EPA, the methodology adopted in 2010 for calculating FPP fees will be applied. Agency revenue in Account 151 – Clean Air Account could increase or decrease depending on the complexity and the number of projects submitted for permitting. However, as explained in the fiscal note for the 2010 rule amendments, the change in calculating fee revenue is not expected to have a significant impact. At the time of the 2010 rulemaking, a new flexible permit fee was estimated to range from $900 to $75,000, and an estimated decrease of $48,000 per year was given as the revenue impact based on an average of six initial flexible permits and 30 flexible permit amendments per year.

Local governments that apply for a new flexible permit or that modify facilities that require an amendment to an existing flexible permit would not experience increased costs under the proposed rules since they do not require more costly compliance measures than what

existed prior to 2010. Permit fees paid by a local government could increase or decrease depending on the complexity of the project. In the 2010 rule amendments, a new flexible permit fee was estimated to range from $900 to $75,000 depending on the type of project. Once the EPA approves this proposed rulemaking, the methodology adopted in 2010 for calculating permit fees based on the capital cost of a project instead of on annual emissions would apply.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater clarity regarding the approved SIP and continued operational flexibility for regulated parties as they implement appropriate emissions controls that are protective of human health and the environment.

The proposed rules would not have a significant fiscal impact on individuals since they do not typically engage in the types of activities that require flexible permits. The proposed rules are expected to apply to activities such as those conducted by chemical plants, refineries, pipeline companies, oil and gas companies, and power plants. Flexible permits issued after the effective date of these rules may still require monitoring or other control measures that would result in compliance costs, but these proposed rules alone would not increase compliance costs. This is because the EPA never formally approved the 2010

amendments as part of the SIP which meant the TCEQ was never required to impose the more stringent compliance requirements of those rules. Permitting fees could increase or decrease once the EPA formally adopts the proposed rules as part of the SIP since the 2010 methodology of calculating permit fees (based on the capital cost of a project instead of on annual emissions) would become effective at that time. A permit fee will depend on the complexity of a project submitted for review. In the fiscal note for the 2010 rule amendments, a new flexible permit fee was estimated to range from $900 to $75,000 depending on the type of project.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. There would be no change to compliance costs under the proposed rules. Once the EPA approves of the proposed rules as a part of the SIP, a small business would pay a permit fee based on the 2010 requirements (based on capital cost, instead of annual emissions) if it applies for a new flexible permit or a change to a flexible permit. The amount of the permit fee would depend on the complexity of the project.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the

proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rules is to amend various sections of Chapter 116, Subchapters A and G to address the opinion issued by the United States Court

of Appeals for the Fifth Circuit on August 13, 2012, and to ensure that the rules can be a federally approved part of the Texas SIP. Specifically, these amendments remove text that is not necessary for EPA approval, restore rule text removed in 2010, make non-substantive changes, and ensure that the rules conform to requirements of the TAC.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." The specific intent of the proposed rules is to amend various sections of Chapter 116, Subchapters A and G to address the opinion issued by the United States Court of Appeals for the Fifth Circuit on August 13, 2012, and to ensure that the rules can be a federally approved part of the Texas SIP. Specifically, these amendments remove text that is not necessary for EPA approval, restore rule text removed in 2010, make non-substantive changes, and ensure that the rules conform to requirements of the TAC. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the

agency, but was specifically developed to meet the requirements of the Texas SIP, and the requirements of the FCAA and its associated regulations, and is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the

owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits in order to obtain federal approval of the rules into the Texas SIP. The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal

Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and commission rules in 30 TAC Chapter 281, Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments will benefit the environment by ensuring that the rules meet applicable federal and state requirements, and is adequately enforceable so that air quality is protected. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 18, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2014-001-116-AI. The comment period closes March 24, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222 or Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER A: DEFINITIONS

§116.13

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish

and enforce permit conditions; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; and Title I of the Federal Clean Air Act, 42 United States Code, §§7401 *et seq*.

This proposed amendment implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, and 382.0513.

§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) Continuous emission monitoring system (CEMS)--All of the equipment that may be required to meet the data acquisition and availability requirements of Subchapter G of this chapter, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.]

[(2) Continuous parameter monitoring system (CPMS)--All of the equipment necessary to meet the data acquisition and availability requirements of Subchapter G of this chapter, 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.]

(1) [(3)] 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) [(4)] Expected maximum capacity--The maximum capacity of a facility according to its physical and operational design and planned operation.

(3) [(5)] Individual emission limitation--Emission limit for a specific air contaminant for an individual facility.

[(6) Predictive emissions monitoring system (PEMS)--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, pounds per hour) on a continuous basis.]

SUBCHAPTER G: FLEXIBLE PERMITS

§§116.710, 116.711, 116.715 - 116.718, 116.721, 116.765

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §7.101, concerning Violation, which provides that a person may not violate a statute or rule under the commission's jurisdiction; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly

contribute air contaminants to the atmosphere; THSC, §381.0511, concerning Permit Consolidation and Amendment; THSC, §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification; THSC, §382.0515, concerning Application for Permit; THSC, §382.0517, concerning Determination of Administrative Completion of Application; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; and Title I of the Federal Clean Air Act, 42 United States Code, §§7401 *et seq*.

This proposed rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 381.0511, 382.0512; 382.0513, 382.0514, 382.0515, 382.0517, and 382.0518.

§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 for an account;

(2) modifications to existing facilities included in a flexible permit may be authorized by the amendment of an existing flexible permit;

(3) a new facility may be authorized by the amendment of a flexible permit; and

(4) a flexible permit may not cover facilities at more than one account. [; and]

[(5) a flexible permit application, review, and issued permit used to authorize any facility, group of facilities, or any change to existing facilities at an account that constitutes a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), shall be completed in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively), including retention of established limits where there

has been no subsequent modification. No person shall use this subchapter to circumvent applicable requirements of Subchapter B, Division 5 or 6 of this chapter.]

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with §116.110(e) of this title, provided however, that all facilities authorized 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(f) 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.

In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit a permit application which 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, 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 applicable rules of the commission and with the intent of the Texas Clean Air Act [TCAA], including protection of the health and physical property of the people.

(ii) 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.

(B) 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 on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT).

(i) All facilities authorized by the flexible permit shall utilize BACT consistent with the following:

(I) All new facilities must utilize BACT.

(II) Existing facilities must utilize BACT with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions. Control technology that is more stringent than BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of existing facilities, provided however, that the existing level of control may not be lessened for any facility from its current authorization.

(ii) For pollutants from new or modified facilities that constitute a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), control technology shall be demonstrated as required by §§116.150, 116.151, or 116.160 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas; New Major Source or Major Modification in Nonattainment Area Other Than Ozone; and Prevention of Significant Deterioration Requirements, respectively), as applicable, for each new or modified facility.

(iii) 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 E 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.

(D) 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 United States Environmental Protection Agency [EPA] under authority granted under the Federal Clean Air Act [FCAA], §111, as amended.

(E) 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.

(F) NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable maximum achievable control technology (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 Part 63)).

(G) 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 shall be required as specified in each flexible permit.

(H) 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. [Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; an analysis shall be made for the project to determine the applicability or nonapplicability of federal Nonattainment New Source Review requirements.]

(I) 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. [Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; an analysis

shall be made for the project to determine the applicability or nonapplicability of federal PSD review.]

(J) Air dispersion modeling or ambient monitoring. [Any permit application for a new flexible permit, or permit amendment to increase a flexible permit emission cap or individual emission limitation, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards.] Computerized air dispersion modeling [and/] or ambient monitoring may be required by the commission's Air 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.

(K) 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 E of this chapter.

(L) 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.

(M) Application content. In addition to other requirements of this chapter, the applicant shall:

(i) identify each air contaminant for which an emission cap is desired;

(ii) identify each facility to be included in the flexible permit;

(iii) 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;

(iv) for each emission cap, identify all associated EPNs and facilities (including description, common name, and facility identification number) and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(v) 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

[(vi) include calculations used to determine the controlled emission rates from each facility performed in accordance with TCEQ Air Permits Division guidance; and]

(vi) [(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.

(N) Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each facility and demonstrate compliance with all emission caps at expected maximum production capacity.

§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.

(b) A pollutant specific emission cap or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit. A flexible permit may contain more than one emission cap for a specific air contaminant. The holder of a flexible permit shall comply with all flexible permit emission cap(s) and individual emission limitations. An exceedance of the flexible permit emission cap(s) or individual emission limitations is a violation of the 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 permit holder shall report the start of construction, construction interruptions exceeding 45 days, and completion of construction 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 permit holder shall notify the appropriate regional office of the commission and any local program having jurisdiction 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) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of facilities commencing operations at different times.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Air Permits Division 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.

(A) If sampling is required, the flexible permit holder shall contact the commission's appropriate regional office prior to sampling to obtain the proper data forms and procedures.

(B) All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission.

(C) 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.

(C) The flexible permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring or calculation methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Requests for alternative emission control, sampling, monitoring, or calculation methods must be submitted in writing for review and approval 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;

(ii) emission cap and individual emission limitation calculations corresponding to any short term emission limitation; <u>and</u>

(iii) Production records and operating hours. [; and]

[(iv) Records of any air quality analysis required under §116.718(c) of this title (relating to Significant Emission Increase). These records shall be maintained for at least five years following the date that the analysis was performed.]

(B) keep all required records in a file at the plant site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(C) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site, which, upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(D) comply with any additional recordkeeping requirements specified in special conditions in the permit; and

(E) retain information in the file for at least two [five] years following the date 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" in the flexible permit. Each flexible permitted facility, group of facilities, or account is limited to the emission limits and other conditions specified in the table in the flexible permit.

(8) Representations. The representations with regard to construction plans and operation procedures in an application for a permit or permit amendment are the conditions upon which a flexible permit or permit amendment is issued. [Noncompliance with these representations constitutes noncompliance with the permit.]

(9) 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 facility is out of service to a level as if no schedule had been established. Unless a special condition specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(10) Maintenance of emission control. Each facility, group of facilities, or account authorized 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).

(11) Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all applicable Rules and Orders of the commission issued in conformity with the Texas Clean Air Act 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 of the permit 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.

[(12) Emissions Caps. The following requirements apply to facilities with emissions subject to emission caps.]

[(A) Recordkeeping and reporting.]

[(i) A semiannual report shall be submitted to the appropriate regional office within 30 days of the end of each reporting period that contains:]

[(I) the identification of the owner and operator and the permit number;]

[(II) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;]

[(III) the identification of any exceedances of a short-term emission cap during the reporting period;]

[(IV) any data relied upon, including, but not limited to, quality assurance or quality control data, in calculating the monthly and annual emission cap pollutant emissions, and short-term emission cap pollutant emissions, to the extent necessary to demonstrate compliance;]

[(V) a list of any facility modified as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review

Definitions) during the preceding six-month period and the documentation required by §116.718(b) of this title;]

[(VI) 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. For facilities that are subject to the federal operating permits program in Chapter 122 of this title (relating to Federal Operating Permits Program) this may be satisfied by referencing the flexible permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);]

[(VII) a notification of a shutdown of any monitoring system used in determining compliance with the emission cap or any individual emission limit of the permit, 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, whether the facility monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the emissions determined by method included in the permit;]

[(VIII) the readjusted emission cap for each pollutant if a facility subject to an emission cap is shut down for a period longer than six months as

required by §116.716(f)(1) of this title (relating to Emission Caps and Individual Emission Limitations); and]

[(IX) a signed statement by the owner or operator certifying the truth, accuracy, and completeness of the information provided in the report.]

[(ii) The reporting period for the semiannual report required under this section shall begin on the earliest date any facilities in an emission cap commence operation under the cap.]

[(iii) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.]

[(B) Absence of monitoring data. A facility owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the flexible permit special conditions.]

[(C) Revalidation. Any site generated test data used to determine the emission rates for facilities under the cap must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after the facility has been added to an emission cap. Emission rate factors shall be adjusted through a permit alteration or amendment if the revalidation test results determine that the emission rate factor has increased.]

(d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. <u>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 permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.</u> [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 permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.]

[(2) The monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.]

[(A) An owner or operator using mass balance calculations to monitor pollutant emissions from activities using coating or solvents shall meet the following requirements:]

[(i) provide a demonstrated means of validating the published content of the pollutant that is contained in, or created by, all materials used in or at the facility;]

[(ii) assume that the facility emits all of the pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and]

[(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the pollutant emissions unless

the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.]

[(B) An owner or operator using a continuous emission monitoring system (CEMS) to monitor pollutant emissions shall meet the following requirements.]

[(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.]

[(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.]

[(C) An owner or operator using a continuous parameter monitoring system (CPMS) or a predictive emission monitoring system (PEMS) to monitor pollutant emissions shall meet the following requirements:]

[(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the pollutant emissions across the range of operation of the facility; and]

[(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.]

[(D) An owner or operator using emission factors to monitor pollutant emissions shall meet the following requirements:]

[(i) All emission factors must be adjusted as specified by the permit, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;]

[(ii) The facility must operate within the designated range of use for the emission factor, if applicable; and]

[(iii) The owner or operator of a facility which emits or has the potential to emit the pollutant in an amount equal to or greater than the prevention of significant deterioration or nonattainment as applicable, significant level for that pollutant, provided in Table I of §116.12(18)(A) of this title for nonattainment pollutants and in 40 Code of Federal Regulations §51.166(b)(23) for those subject to prevention of significant deterioration review, and which relies on an emission factor to calculate pollutant emissions, shall conduct validation testing to determine a site-specific emission factor

within six months of permit issuance or start of operation of the facility, whichever is later, unless the executive director determines that testing is not required.]

[(E) An alternative monitoring system must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.]

[(3) Where an owner or operator of a facility cannot demonstrate a correlation between monitored parameter(s) and the pollutant emissions rate at all operating points of the facility, the executive director shall:]

[(A) establish default value(s) for determining compliance with the emission cap based on the highest potential emissions reasonably estimated at such operating point(s); or]

[(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the pollutant emissions is a violation of the emission cap.]

(e) There may be additional special conditions included in 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.

(f) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under a standard permit under Subchapter F of this chapter (relating to Standard Permits) or a permit by rule under Chapter 106 of this title. Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(1) result in a significant impact on the air environment, or

(2) cause the facility, group of facilities, or account to become subject to review under:

(A) Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(B) the provisions in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).

§116.716. Emission Caps and Individual Emission Limitations.

(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) Notwithstanding subsection (a) of this section, the executive director reserves the right to exclude any facility from an emissions cap if necessary to ensure compliance with the permit or to ensure the protection of human health and the environment.

(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

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

(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.

(f) Adjustment of emission cap. [To ensure caps are practically enforceable, the] The executive director will use the following criteria and procedures for adjustment of a cap.

(1) If a facility subject to an emission cap is shut down for a period longer than six months, the emission cap shall be adjusted by decreasing [lowering] the emission cap by an amount that the shut down facility contributed to the original calculation of the emission cap. If a shut down facility is returned to operation, the emission cap shall be adjusted by increasing the emission cap by the amount that the facility contributed to the original calculation of the emission cap; however, the emission cap cannot be increased beyond the original emission cap amount.

(2) If a facility is to be added to the flexible permit, a permit amendment is required to establish a revised emission cap. <u>If an existing emission cap is to be increased as a result of adding a new facility or the modification of a facility within the emission cap, an amendment application is required.</u>

[(3) If an existing emission cap is to be increased as a result of adding a new facility or the modification of a facility within the emission cap, an amendment application is required. In considering the application, the commission shall:]

[(A) Determine whether an increase in the emission cap constitutes a major modification for the pollutant as defined by §116.12 of this title. For purposes of this determination, all facilities under that cap shall be included in the evaluation; and]

[(B) for facilities that are not major modifications as determined by the analysis in paragraph (3)(A) of this subsection, increase the emission cap by the sum of the emissions from each of the new or modified facilities determined in accordance with subsection (c) of this section and decrease the emission cap by the sum of the previous emission cap contributions from the facilities to be modified.]

(3) [(4)] An emission cap will be decreased [adjusted downward] for any facility, group of facilities, or account authorized by a flexible permit if that facility becomes subject to any new state or federal rule or regulation which would lower emissions or require an emission reduction. The adjustment will be made the next time the flexible permit is amended or altered. If an amendment to a flexible permit is not required to meet the new requirement, 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.

[(g) Each emission cap or individual emission limitation shall specify an annual emission limitation in tons per year, based on a rolling 12-month period. Each emission cap or individual emission limitation shall also specify a practically enforceable short term emission limitation.]

[(h) When a cap is established or adjusted, major new source review requirements as referenced in §116.711(2)(H) or (I) of this title (relating to Flexible Permit Application) must be met for the new or modified sources prior to issuance, amendment, or alteration of the permit.]

§116.717. Implementation Schedule for Additional Controls.

If a facility requires the installation of additional control or 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 <u>or fails to install the additional control equipment as provided by the implementation schedule</u>. [In the event that the controls and implementation schedule specified by a flexible permit cannot be met, a permit amendment or alteration to modify the controls and implementation schedule must be approved by the executive director before the applicable control schedule deadline. Control technology that is required by federal major new source review requirements must be operational at start of operation and is not eligible for an implementation schedule under this section.]

§116.718. Significant Emission Increase.

[(a)] An increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit is insignificant, for the purposes of minor 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 <u>or</u> [nor] to the emission of an air contaminant not previously emitted by an existing facility.

[(b) For purposes of major new source review, determination of a significant increase in emissions that does not result in an increase to the emission cap includes evaluation of the following:]

[(1) An increase in emissions from operational or physical changes or series of related changes that would constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) must comply with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).]

[(2) Unless a plant-wide applicability limit has been established for the pollutant under Subchapter C of this chapter (relating to Plant-wide Applicability Limits), the permit holder shall document that the change is not a major modification as defined in §116.12 of this title, and maintain the documentation required by Subchapter B, Division 1 of this chapter (relating to New Source Review Permits) concerning actual to projected actual emission increases.]

[(3) When determining whether a change is a major modification as defined in §116.12 of this title, the project emissions increase and the project net shall be

determined as specified as defined in §116.12 of this title, regardless of how the existing facilities are authorized.]

[(4) For new facilities, or modified facilities under an emission cap for the pollutant where the permit holder elects to use potential to emit rather than projected actual emissions from the facility to determine the project emissions increase, the potential to emit shall be considered as the proposed emissions cap unless an alternate method is demonstrated.]

[(5) A separate permit limit or physical constraint may be established to limit the facility's potential to emit for facilities that are under a cap or have individual emission limits.]

[(6) If the project emission increase is such that a de minimis threshold test (netting) is required for a pollutant, the analysis shall be submitted to the commission for review and approval prior to making the change. If netting is not required, the information shall be submitted with the next permit amendment or renewal application.]

[(c) The permit holder shall complete an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards if there may be an increase in emissions from operational

or physical changes at any existing facility, group of facilities, or account authorized by a flexible permit and the area is not designated as nonattainment for the pollutant. If the emission increase may result in ambient concentrations greater than de minimis for that pollutant, the air quality analysis shall be submitted to the executive director for review and approval prior to making the change.]

§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 or flexible permit amendment, as well as any general and special conditions, 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 or the character of the emissions, will relax emission controls, <u>or</u> [will add a new facility or facilities,] will result in a significant increase in emissions [, or will constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions)] unless application is made 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.

(3) Flexible permit alterations shall not be subject to the requirements of Best Available Control Technology identified in §116.711(2) [§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 or the character of the emissions, will relax emission controls, [will add a new facility,] will result in a significant increase in emissions as determined under §116.718 of this title (relating to Significant Emission Increase), [constitutes a major modification as defined by §116.12 of this title,] or conflicts with an existing permit condition:

(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.

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

§116.765. Compliance Schedule.

[(a) Any application for a permit or permit amendment under this subchapter submitted on or after the compliance date specified by subsection (b) of this section shall comply with the amendments to §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title (relating to Applicability, Flexible Permit Application, General and Special Conditions, Emission Caps and Individual Emission Limitations, Implementation Schedule for Additional Controls, Significant Emission Increase, Limitation on Physical and Operational Changes, Amendments and Alterations, Compliance History, Public Notice and Comment, and Flexible Permit Fee; respectively) adopted by the commission on December 14, 2010.]

(a) [(b)] The compliance date is 60 days after publication in the Federal Register of the final approval by the United States Environmental Protection Agency (EPA) of all or ~~the~~ portions of §§116.13, 116.710, 116.711, 116.714 - ~~, 116.715, 116.716, 116.717,~~ 116.718, 116.720 - ~~, 116.721;~~ 116.722,~~;~~ 116.740, 116.750, 116.760, and 116.765 of this title (relating to Flexible Permit Definitions; Applicability; Flexible Permit Application; Application Review Schedule; General and Special Conditions; Emission Caps and Individual Emission Limitations; Implementation Schedule for Additional Controls; Significant Emission Increase; Limitation on Physical and Operational Changes; Amendments and Alterations; Distance Limitations; Public Notice and Comment; Flexible Permit Fee; Flexible Permit Renewal; and Compliance Schedule) submitted to the EPA [of these sections] as revisions to the Texas State Implementation Plan.

(b) [(c)] Until the compliance date specified by subsection (a) [(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 rules are continued in effect for that purpose. All other sections in this subchapter remain applicable to applications for flexible permits.