



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

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APR 11 2006

Mr. Steve Hagle  
Special Assistant  
Air Permits Division (MC-163)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087


RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State  
Implementation Plan (SIP) Revisions for Flexible Permits

Dear Mr. Hagle:

This letter is a follow-up to our meeting in Austin on October 12, 2005, and subsequent discussions concerning revisions to the Texas SIP related to Flexible Permits, Subchapter G of Chapter 116 of Title 30 of the Texas Administrative Code (30 TAC). We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements or identify changes you will make to address our concerns. We will review and take action on these rules prior to taking final action on your New Source Review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

  
David Neifeigh  
Chief  
Air Permits Section

Enclosure



## Comments on Texas SIP revisions, Subchapter G, Chapter 116, Flexible Permits

### 1. General Comment

We understand that the Flexible Permit rules apply to major and minor sources and that the rules are designed to provide an exemption from minor NSR requirements if sources do not exceed an allowable emissions cap. In general, the allowable emissions cap assumes Best Available Control Technology (BACT) emission rate plus up to 9% for all units under the permit. Partial Flexible Permits are allowed. We reviewed the Flexible Permit rule as it applies to major sources for consistency with Federal major NSR regulations and 40 CFR 51.160 and 51.161. Texas adopted the Flexible Permit rules prior to finalization of Federal NSR Reform regulations. The final Federal regulations measure emissions increases which result from a modification at existing major sources using the baseline actual-to-projected actual applicability test. The final rules also provide an exemption from the definition of major modification for sources with an actual Plantwide Applicability Limit (PAL). The Court in *New York v. EPA*, 413 F.3d 3, (D.C. Cir. June 24, 2005) struck down provisions of the regulations that provided for exemptions from major NSR applicability that were not based upon actual emissions. The Court held that the NSR modification requirement, which incorporates by reference Clean Air Act (Act) § 111(a)(4), “unambiguously defines ‘increases’ in terms of actual emissions.” Therefore, many of our comments relate to how Flexible Permits are consistent with Federal major NSR requirements.

We have reviewed the Flexible Permit rules as they apply to minor sources and minor modifications for consistency with 40 CFR 51.160 and 51.161.

### 2. Voiding of Existing SIP-approved Permits

The Texas Commission on Environmental Quality (TCEQ) has stated that all existing permits applicable to the permittee are voided upon issuance of a Flexible Permit. The Flexible Permit becomes the controlling authority for the site, as explained at 10 TexReg 7336:

The applicant for a flexible permit may combine existing permitted facilities, grandfathered facilities, and new facilities into the flexible permit. The flexible permit will then become the controlling authorization for all facilities included in the permit, replacing any existing permits that may have been applicable to all or part of these facilities.

The rules provide for initial issuance of a flexible permit “as an alternative to obtaining a new source review permit” where the source triggers major NSR requirements. We understand that the resulting BACT or Lowest Achievable Emission Rate limits are not enforceable at the new or modified source. Nonattainment NSR (NNSR), prevention of

significant deterioration (PSD) or air quality, minor NSR permits, and permit application representations incorporated by reference into the permits previously issued under the Texas SIP are voided upon issuance of the Flexible Permit. We also understand that these permits are voided without public participation in many cases.

Please explain the legal authority under which TCEQ voids existing federally enforceable NNSR, PSD, and minor NSR permits.

Title I of the Act requires permitting authorities to establish in permits source specific terms and conditions necessary for sources to comply with the requirements of the PSD and NSR programs of parts C and D of the Act. EPA's long-held position is that these permits must remain in effect because they are the legal mechanism through which the underlying PSD or NSR requirements become applicable, and remain applicable, to individual sources.<sup>1</sup> 40 CFR 70.1 requires that each title V source permit assures compliance with all applicable requirements, including any term or condition of any preconstruction permit issued pursuant to programs approved or promulgated under title I of the Act. Amendments to PSD or NSR or minor NSR permits must be made in accordance with the SIP and approved permitting programs. Terms and conditions of construction permits are permanent and remain effective unless changed using title I procedures or a new construction permit is issued. The Federal PAL rule provides a procedure, including public participation, for the elimination of permit limits that were taken to avoid applicability of major NSR applicability and are replaced by a PAL. Federal NSR regulations do not provide for a blanket elimination of emission limits at individual units. Operational flexibility under Federal regulations and policy can be obtained by preapproving future modifications or by setting an actual PAL in order to avoid major NSR netting.

The preamble to the final PAL rule provides:

Can a PAL Eliminate Existing Emission Limitations? An actuals PAL may eliminate enforceable permit limits that a source may have previously taken to avoid the applicability of major NSR to new or modified emissions units. Under the major NSR regulations at §§52.21(r)(4), 51.166(r)(2), and 51.165(a)(5)(ii), if you relax these limits, the units become subject to major NSR as if construction had not yet commenced on the source or modification. Should you request a PAL, today's revised regulations allow the PAL to eliminate annual emissions or operational limits that you previously took at your stationary source to avoid major NSR for the PAL pollutant. This means that you may relax or remove these limits without triggering major NSR when the PAL becomes effective. Before removing the limits, your reviewing authority should make sure that you are meeting all other regulatory requirements and that the removal of the limits does not adversely impact the National Ambient Air Quality Standards (NAAQS) or PSD

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<sup>1</sup>See EPA Memorandum from John Seitz, to Robert Hodanbosi, dated May 20, 1999.

increments. We are not taking a position on whether compliance with requirements contained in a PAL permit could serve to demonstrate compliance with certain pre-existing requirements on individual units. The reviewing authority may assess on a case-by-case basis whether any streamlining would be appropriate in the title V permit consistent with part 70 procedures and our existing policies and guidance on permit streamlining.

See also the Federal PAL rule:

40 CFR 52.21(aa)(1) - Applicability, "(iii) Except as provided under paragraph (aa)(1)(ii)(c) of this section, a major stationary source shall continue to comply with all applicable Federal or State requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL."

The same requirement is found in 40 CFR 51.165(f)(1)(iv) and 51.166(w)(1)(iii).

The EPA has also addressed supersession of existing NSR permit requirements by title V permits. See May 20, 1999, letter to Robert Hodanbosi:

It is the Agency's view that title V permits may not supersede, void, replace, or otherwise eliminate the independent enforceability of terms and conditions in SIP-approved permits. To assure compliance with "applicable requirements" such as SIP-approved permits and conditions, title V permits must record those requirements, but may not eliminate their independent existence and enforceability under title I of the Clean Air Act (i.e., may not supersede them).

See also White Paper for Streamlined Development of part 70 permit Applications, Lydia Wegman, July 1995, (White Paper #1) which recommends an efficient procedure for revising NSR permits during title V review to eliminate obsolete or environmentally insignificant terms in NSR permits. See also, Approval of Wisconsin Construction Permit Permanency SIP Revision 71 FR 9934, April 28, 2006, and Notice of Deficiency for Clean Air Act Operating Program in Wisconsin, 69 FR 10167, March 4, 2004.

Our review of the Flexible Permit rules indicates that the voided NSR permits are federally enforceable terms and conditions which may be revised only through approved SIP procedures.

### **3. Definition of Modification**

Please distinguish between the definition of "major modification" at 30 TAC 116.12(11) in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review

Definitions, and the definition of “modification of an existing facility” at 30 TAC 116.10(11) of Subchapter A, General Definitions. The definition of “modification of existing facility” states:

Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit;  
or

Under the current Texas SIP, a permit amendment is required in order to vary from any representation or permit condition if the change will cause: (A) a change in the method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in the emission rate of any air contaminant.

Please clarify whether the exemptions from the requirement to obtain a permit amendment in the submitted definition of “modification of an existing facility” apply to significant project emission increases or significant net emission increases at major sources or major modifications. Please explain how exemptions in the definition of “modification of an existing facility” relate to major modifications. We believe these definitions as written are vague and may be interpreted to provide an exemption to major NSR applicability.

#### **4. Consistency with Federal Major NSR Requirements**

Because Flexible Permits become the controlling authorization for major sources and authorize the source to make modifications without a permit amendment as required by the current SIP, the rules, as they are applicable to major sources, must be consistent with Federal NSR requirements and the PAL rule. We note that the rules eliminate permitting vehicles necessary to demonstrate netting for major sources. We have identified the following list which discusses some of the inconsistencies between the Flexible Permit rules and Federal regulations. Please provide information to explain how the following requirements are met under the Flexible Permit rules:

- A Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification ) is located or in a neighboring State.

- B. The Flexible Permit emission cap is based upon allowable emissions rather than actual emissions. There are no regulatory requirements that the cap be set below actual emissions. The rules do not ensure that the emissions cap will be set at a level that does not trigger major NSR applicability for major sources or major modifications based upon the baseline actual to projected actual calculation in the State's NSR rules. Please explain how the flexible permit rules are inconsistent with the Federal PAL rule at 40 CFR 52.21(aa)(6).
- C. The rule allows an implementation schedule to install required BACT controls which may last for many years. The rule also allows sources to increase the emission cap for sources that "fail to install the additional control equipment as provided by the implementation schedule." How does the rule ensure that the emission cap is set below actual emissions during these periods? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(6) and (11). Please explain whether a Flexible Permit always assumes current BACT in calculating the emission cap.
- D. The Flexible Permit authorizes modifications that do not exceed the emission cap. NSR compliance is required only upon initial issuance of the permit. Please explain how the rule ensures that modifications subject to major NSR and the public participation requirements of Part 51 are reviewed. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(5) and (11); and 51.161.
- E. For sources without a PAL, major NSR applicability must be determined by monitoring actual emissions on a unit by unit basis (rather than by compliance with the emissions cap) consistent with TCEQ's major NSR rules for baseline actual to projected actual emissions calculations. Please explain how the rule ensures that major sources determine major NSR applicability on a unit by unit basis. Our review indicates that the monitoring requirements from the Flexible Permit rule at §116.715(c)(6) requires "information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction." Please explain how the rule provides for monitoring, recordkeeping and reporting necessary to determine project emission increases and to enforce major NSR requirements on a unit by unit basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d), and (f); 52.21(aa)(12) through (14).
- F. Please explain how the public participation requirements of Part 51 and the PAL rule are met by the Flexible Permit rules. Under Chapter 39 of the TAC,

initial issuance of and amendments to flexible permits are exempt from public notice requirements unless the action involves new construction or a modification that results in emissions increases above Texas' permits by rule limits (250 tons per year (tpy) of carbon monoxide, 250 tpy of nitrogen oxides, 25 tpy of volatile organic compounds, sulfur dioxide, or particulate matter less than 10 micrometers, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen and oxygen). These provisions are inconsistent with Federal requirements which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP. Please explain how the Flexible Permit rules are consistent with 40 CFR 51.161 and 52.21(aa)(5) and (11).

- G. The Flexible Permit rules allows sources to exclude units at a facility from the permit. Federal rules do not allow for partial PALs. Note that the Federal PAL rule requires that all units at a facility must be subject to the plantwide limit. See 40 CFR 52.21(aa)(6)(i) through (ii). Emission increases and decreases at all units at the facility must be considered to determine major NSR applicability. How does the Flexible Permit provide that increases and decreases are quantified, determined to be contemporaneous, and made practically enforceable for sources that are not subject to a PAL? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d) and (f).
- H. There is no requirement in the Flexible Permit rules that startup, shutdown and malfunction emissions must be included in determining compliance with the emission cap. This is inconsistent with the Federal PAL rule. Please explain how the Flexible Permit rules can ensure that non-routine emissions are not masked by the emission cap. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(7)(iv).
- I. There is no requirement in the Flexible Permit rules that compliance with the emission cap is determined on a 12-month rolling average, as required by the Federal PAL rule and EPA policy. We have reviewed Flexible Permits that base compliance on a calendar basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a). Please explain how enforcement of Flexible Permits on a calendar year basis is enforceable as a practical matter.
- J. There is no requirement in the Flexible Permit rules that the owner or operator

must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average for each month. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a) and 52.21(aa)(7)(vi).

- K. There is no requirement in the Flexible Permit rules that monitoring to determine compliance with the cap must be based upon continuous emissions monitoring systems, continuous emissions rate monitoring systems, predictive emissions monitoring system, continuous parameter monitoring system, or emission factors, or an equivalent method as approved by the permitting authority, as is required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(12)(ii)(a) through (d).
- L. There are no requirements in the Flexible Permit rule for semi-annual reports or deviation reports as required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(14)(i) through (ii).
- M. The record retention requirement in the Flexible Permit rules is for two years. This is inconsistent with the Federal PAL rule and title V which require five year recordkeeping. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(13)(ii).
- N. Are short-term limits under the emission cap required by the Flexible Permit rules? Please explain how short-term limits are calculated and how they ensure attainment and maintenance of the NAAQS. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(1)(iii).
- O. The Flexible Permit emission cap may be increased by 9% of total emissions, called an Insignificant Emissions Factor. The Flexible Permit rule in § 116.718 states, "An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of state new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility." Please explain how this definition is distinguishable from the terms "significant" and "insignificant" used elsewhere in your rules. We believe these terms must be clearly distinguishable to facilitate compliance and enforcement of the rules. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(b)(23) and 52.21(aa)(6)(i).

## 5. Minor Sources

We have reviewed the Flexible Permit rules as they apply to minor sources for

consistency with 40 CFR 51.160 and 51.161.

- A. Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification ) is located or in a neighboring State.
  
- B. Please explain how the revisions meet the requirements of 40 CFR 51.161, which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP.