



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 6

1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

**MAR 12 2008**

Mr. Dan Eden  
Deputy Director  
Office of Permitting, Remediation, and Registration (MC 122)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711

Dear Mr. Eden:

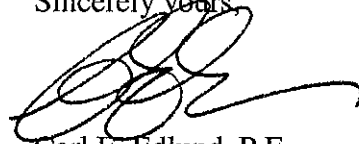
At the conclusion of our meeting on July 23, 2007, the U.S. Environmental Protection Agency (EPA) agreed to provide the State with a thorough listing of clarifications that would be needed for Federal approval of Texas' Flexible Permit rules. We appreciate your letter of August 30, 2007, providing information about the Flexible Permit program. The two purposes of this letter are to transmit EPA's comments on the measures necessary for Federal approval of the Flexible Permit rules and to request a response as to whether the Texas Commission on Environmental Quality (TCEQ) will recommend adoption of those measures. The EPA also notified all Flexible Permit holders of our concerns by letter dated September 25, 2007.

The enclosed analysis includes the comments from all EPA offices with review responsibilities. We would appreciate knowing whether all rule revisions and clarifications are acceptable by the end of March. If TCEQ commits to propose the necessary revisions to the Flexible Permit program, we request that TCEQ work with EPA in partnership to share draft revisions of the Flexible Permit rules during the rule development process. If the revised regulations address our concerns, we believe we could propose approval of the Texas Flexible Permit program.

We are willing to meet with you and members of your staff to discuss the necessary revisions and recommendations detailed in the enclosure. Should new facts or information become available during our discussions of the revisions, we will attempt to work with TCEQ to reach a mutual decision about whether the revisions, or any other additional revisions identified during our discussions, are necessary for the proposed

approval of the rules. If you have questions or need clarification of any of the revisions detailed in the enclosure, or if you would like to arrange a meeting to discuss the revisions we believe are necessary to propose approval of the Texas Flexible Permits program, please feel free to contact me at (214) 665-8014 or you may contact Jeff Robinson, Air Permits Section Chief, at (214) 665-6435.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'C. Edlund', with a long horizontal flourish extending to the right.

Carl E. Edlund, P.E.  
Director  
Multimedia Planning and  
Permitting Division

Enclosure

## ENCLOSURE

Introduction: The EPA has reviewed the Texas Flexible Permit Program State Implementation Plan (SIP) revision and many Flexible Permits issued under those rules. We understand that the aim of the Texas Flexible Permit Program is to establish an aggregated Best Available Control Technology emission limit for a group of individual facilities within a stationary source. This would enable an owner or operator of the source to operate those facilities with less technical and administrative effort than would be required under air permits which impose unit-specific mass emission limits. We have reviewed these provisions of your rule for consistency with 40 Code of Federal Regulations (CFR) Part 51. We have identified concerns related to public participation and air quality analysis for initial issuance and modifications which increase the site wide cap.

Unlike flexible permit programs in other States, the Texas Flexible Permit Program is not limited to minor sources. Because the program applies to major sources, we have reviewed these provisions for consistency with your approved Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR) rules. We identified concerns related to applicability of your major NSR program requirements and for ensuring that any project that would be a major new stationary source or major modification is reviewed to ensure compliance with the permitting requirements applicable for such project. We also identified problems with how major NSR netting will be accomplished under a Flexible Permit. We also believe changes are required to the State's preliminary analysis to incorporate existing major NSR permit requirements into the Flexible Permit.

Other major concerns identified below relate to practical enforceability of an emission limitation cap which applies to a very large number of emission sources. We believe changes are required for monitoring, recordkeeping, reporting and testing, as well as considerations for sub-caps or bubbles applied to smaller groups of units. We have also identified changes necessary to ensure that all Flexible Permit terms and conditions remain enforceable after modifications authorized under the permit are made. We believe changes that conflict with terms and conditions of the Flexible Permit require a permit amendment, rather than an alteration or Permit by Rule (PBR) authorization.

## RULE REVISIONS AND CLARIFICATIONS

### I. Establishing the Flexible Permit Emission Cap.

#### A. Addition of 9% of total emissions to the Flexible Permit emission cap

Delete Section 116.716(d)<sup>1</sup> from Subchapter G. As submitted, the rules are unclear as to whether adjustments to the emissions cap or individual emission limitation by an “insignificant emissions factor” could cause or contribute to a violation of a NAAQS or, perhaps, trigger major NSR requirements.

#### B. Best Available Control Technology (BACT) Determinations

1. Revise Section 116.711(3) to indicate that current BACT technology will be required, consistent with Section 116.716(a)(1). For example,

(3) Best available control technology (BACT). The proposed facility, group of facilities, or account will utilize current BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis.

2. Revise Section 116.716 to require that any BACT or lowest achievable emission rate (LAER) control technology and the related mass emission rates in major NSR permits which are incorporated into the Flexible Permit remain enforceable and shall be retained or appropriately streamlined through a SIP-approved NSR permit revision process as described below.
3. Are BACT determinations under Section 116.716 required to be based on the State or Federal definition? Please clarify the definition of BACT and which definition applies (i.e., when is a source required to use the State definition versus the Federal definition.....PSD, minor NSR, etc.).

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<sup>1</sup> Section 116.716 (d) states:

Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.

C. Emission Limitations

1. Add a provision to Subchapter G to state that a Flexible Permit will contain, at a minimum, an annual emission limitation in tons per year, based on a 12-month rolling average (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant regulated under the Flexible Permit. Revise Section 116.715(c)(6),<sup>2</sup> Recordkeeping, to clarify that emission cap and individual emission limitation calculations shall, be based, at a minimum, on a 12-month rolling basis (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant at the source. The rule should also be written broad enough to require more stringent limitation periods when necessary (e.g., during the ozone season).
2. Add a provision to Section 116.715(c)(6) to state that a Flexible Permit will include a short-term emission limitation cap (or other reasonable cap or reasonable time period with monitoring and recordkeeping that ensures practical enforceability) for each pollutant regulated under the Flexible Permit that is enforceable as a practical matter. See Number I under Implementation Issues for further information concerning practical enforceability.
3. Add a provision to Section 116.715 that emission calculations for purposes of compliance with emission caps include emissions resulting from maintenance, startup, and shutdown (MSS).<sup>3</sup>
4. Please explain how TCEQ will ensure that emission limitations adopted pursuant to 40 CFR 52.21(r)(4), incorporated into the Texas SIP at Section 116.160(a), will not be relaxed by the Flexible Permit process.

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<sup>2</sup> For example, Section 116.715(c)(6), the third sentence could be revised as follows: This information shall include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operation hours.

<sup>3</sup> For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: "... scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could have been avoided through better scheduling for maintenance or through better operation and maintenance practice."

II. Identification of modifications authorized by Section 116.718, Significant Emission Increase<sup>4</sup> and Major NSR applicability.

The rule is vague as to what modifications are authorized by Subchapter G. Section 116.710 states: 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). Section 116.718 grants an exemption from “state new source review” for operational or physical changes which result in an emission increase. “State new source review” is not defined. Section 116.711 requires sources to demonstrate compliance with major NSR requirements at the time of initial issuance or amendment. However, the rule does not require such a demonstration for modifications that are authorized by Subchapter G. The following changes are intended to ensure that a major new stationary source or a significant increase in emissions from a major stationary source is reviewed to ensure compliance with the permitting requirements applicable for such projects.

- A. Revise Section 116.718 or provide a definition of “state new source review.” Such definition must exclude authorization of modifications, or a series of modifications, which trigger major NSR applicability. The rule should note that the Flexible Permit does not authorize projects to be segregated into smaller projects which are physically or economically dependent on one another in order to avoid major NSR applicability.
- B. Include a provision in Section 116.710, Applicability, to clarify the scope of the rule, such as: Any facility or group of facilities, which constitutes a new major stationary source or a major modification as defined under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6 of this title (relating to Nonattainment Review and Prevention of Significant Deterioration Review) must meet the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.
- C. Revise Section 116.711 to provide that any application for an initial flexible permit or for an amendment to a flexible permit must include all information (including calculations) which demonstrates that the proposed project will not be a major stationary source or major modification as used

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<sup>4</sup> Section 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.

under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.

- D. Revise Section 116.711(13) to require the permittee to comply with any representations in the permit application of the underlying permits that are incorporated into the Flexible Permit (as required under §116.116(a)(1) in the approved SIP), unless those requirements are specifically amended by the permitting process as described below. Revise Subchapter G to clarify that authorization of future changes under the Flexible Permit may not include changes subject to major NSR unless the permit undergoes the major NSR process and is incorporated into the amended Flexible Permit.

III. Removal of terms and conditions of existing permits.

The permit application and the State's preliminary analysis, including the air quality analysis, must ensure that all terms and conditions of existing permits remain enforceable unless such terms and conditions are superseded or subsumed by the flexible permit conditions through proper streamlining procedures as described below. Texas should revise Section 116.711(13), Application content, to require the permittee to identify terms and conditions (including representations in permit applications) in existing permits which will be superseded or subsumed under the Flexible Permit. Furthermore, any such term or condition of an existing permit (including representations in the applications) which will be superseded or subsumed by the flexible permit must be accompanied with a demonstration that the revision will not violate applicable portions of the control strategy and will not interfere with attainment or maintenance of the ambient air quality standards as required under 40 CFR 51.160.

#### IV. Public Participation Requirements.

##### A. For initial issuance of a Flexible Permit or an Amendment to the Flexible Permit that increases the emission limitation(s)

Revise Chapter 39<sup>5</sup> and Sections 116.721 (Flexible Permit Amendments) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality

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<sup>5</sup> Section 39.403(b) states: As specified in those subchapters, Subchapters H - M of this chapter apply to notices for: . . .

(8) applications for air quality permits under THSC, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), *initial issuance of flexible permits under Chapter 116, Subchapter G of this title* (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10 of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10 of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Permitting by Rule) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

Note that emission quantities defined in §106.4(a)(1) are: (1) Total actual emissions authorized under PBR from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO<sub>x</sub>); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO<sub>2</sub>) or inhalable particulate matter (PM<sub>10</sub>); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

Note also that Region 6 has not approved Chapter 39 into the Texas SIP. We informed TCEQ in 2006 that certain provisions may not be approvable, but we have received no response to our letter. Our comments stated: We interpret §§39.403(b)(8) (A) and (B) to state an amendment of a flexible permit and/ or an NSR permit under §116.116(b), is not required to comply with public participation requirements of Chapter 39 unless the action involves an increase in allowable emissions equal to or greater than 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or inhalable PM<sub>10</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. Please provide a rationale for how exemptions from these requirements are consistent with 40 CFR 51.160 and 51.161 and address issues raised in previous comments.

and its proposed approval or disapproval.<sup>6</sup>

A. Amendment of a Flexible Permit

1. We recommend a revision to Section 39.403 (Public Notice Applicability) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality and its proposed approval or disapproval, for amendment of a Flexible Permit for the following types of changes:
  - a. Changes that result in a significant net increase in actual emissions resulting from a physical or operational change, (i.e., changes which trigger major NSR applicability),
  - b. Changes that require netting to avoid major NSR applicability,
  - c. Changes to the method of control,
  - d. Changes in the character of emissions authorized under the existing permit,
  - e. Changes to ambient air quality impacts,
  - f. Changes which decrease the frequency or stringency of monitoring, type of monitoring, recordkeeping, and/or reporting.
2. At a minimum, revise Section 116.721, Amendments and Alterations, as follows:
  - a. Revise Section 116.721 to require that amendments and alterations must comply with the existing Flexible Permit cap unless the permit is amended, subject to public participation requirements, including 30-day notice and comment period on the draft permit and the State's preliminary analysis, which includes the State's analysis of

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<sup>6</sup> See 40 CFR 51.161 for public participation requirements for minor and major new sources and modifications. Please note that other Federal actions have required similar minimum public participation requirements. See the Federal Plantwide Applicability Limit (PAL) rule, which establishes a sitewide emission limitation, requires public participation equivalent to Part 51.

the effects on ambient air quality and its proposed approval or disapproval.

- b. Revise Section 116.721(a) to change “will result in a significant increase in emissions” to “will result in a significant net increase in actual emissions” and define the term “significant” consistent with the definition of “significant” at 40 CFR 51.165(a)(1)(x) and 51.166(b)(23).
- c. Revise Section 116.721(c) to require a permit amendment for changes that vary from permit terms and conditions related to a change in throughput or a change in feedstock.
- d. Section 117.721(d) allows Flexible Permit holders to obtain a PBR in lieu of a permit amendment or alteration. We understand that PBRs are used in Texas to authorize narrow categories of emission sources, such as a storage tank. We recognize that these PBRs may be appropriate for Flexible Permit holders where the new emission source does not cause an exceedance of the emission cap(s). However, EPA has consistently expressed concerns about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit. Please acknowledge that a source cannot vary from a Flexible Permit term or condition or permit application representation under a PBR.
- e. The EPA also has concerns about how modifications authorized under a Flexible Permit at sources subject to Title V are incorporated into a Federal Operating Permit (FOP). Please explain how the FOP is amended to incorporate modifications authorized by a Flexible Permit and whether further public participation is required to amend the FOP.

V. Monitoring, Recordkeeping, Reporting and Testing (MRRT)

A. Monitoring

The monitoring requirements in the Subchapter G, Section 116.715(5) are vague. Revise this provision to require each flexible permit to contain specific requirements for monitoring compliance with the emission cap and with individual emission limits. Provide guidance on appropriate

monitoring for individual units under the Flexible Permit. See further discussion of minimum MRRT requirements on page 10-12.

B. Recordkeeping

Revise Section 116.715(a)(6) recordkeeping to require retention of compliance records for five years and to require a copy of the Flexible Permit application, amendments, and any permit application incorporated by reference into the Flexible Permit to be maintained at the site. See further discussion of minimum MRRT requirements on page 10-12.

VI. We recommend revision of Section 116.715 to state that an exceedance of the Flexible Permit cap is a violation of the permit, subject to enforcement action and, for major sources, reportable as an FOP deviation. To ensure practical enforceability of the permit and consistency with 40 CFR 51.211 and 51.212, we strongly recommend that the State require semi-annual reporting of exceedances of the Flexible Permit cap.

VII. Major NSR Netting.

Because all units at a site may not be subject to a Flexible Permit and because all units under the Flexible Permit may not have a unit specific emission limitation, the rule should contain provisions on how to conduct major NSR netting at the site for units in the Flexible Permit and for units outside the Flexible Permit. Revise the rule to provide requirements for major sources subject to major NSR netting to determine the net emissions increase under Subchapter B with the following minimum considerations for Flexible Permits:

- A. Emission increases and decreases must be considered on a site wide basis under a site wide or partial Flexible Permit.
- B. Emission increases resulting from a physical change or change in the method of operation of any emission unit which were authorized by the Flexible Permit must be considered where the unit's projected actual emissions exceed the baseline actual emission rate.
- C. A decrease in emissions at a unit under the Flexible Permit is creditable if the unit's baseline actual emissions exceed the unit's new level of emissions, meets all the criteria of 40 CFR 51.165(1)(1)(vi) and 51.166(b)(3), and the decrease is made practically enforceable by permanently removing the unit from the Flexible Permit cap and establishing a new enforceable unit specific emission limitation.

- D. The Flexible Permit cap must be adjusted downward by the amount of that unit's contribution to the cap.

VIII. Air Quality Analysis.

Revise Section 116.711(10) to require an air quality analysis for initial issuance of all Flexible Permits or amendments which increase the Flexible Permit cap to ensure that the proposed flexible permits will not violate the approved control strategy and will not interfere with attainment and maintenance of the NAAQS (as required under 40 CFR 51.160(a)) or the PSD increments (under 40 CFR 51.166(a)).

IX. Maintenance, Startup, and Shutdown (MSS) emissions.

The potential to emit should include emissions that occur during maintenance<sup>7</sup>, startups, and shutdowns (MSS). The MSS emissions should be subject to BACT, and reviewed in the air quality analysis for all emission units under the Flexible Permit. Revise Section 116.711, Flexible Permit Application, to require information related to startup, shutdown and maintenance emissions, including adequate monitoring and recordkeeping. We understand that Texas is incorporating these emissions into permits, including existing Flexible Permits. We recommend that new Flexible Permits include a review of MSS emissions and include appropriate monitoring, recordkeeping, and reporting.

X. Implementation Schedule for Additional Controls.

We understand that TCEQ provides an implementation schedule for Flexible Permit holders to install control technology required by the permit. The schedule may be up to 10 years. Section 116.717 states:

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

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<sup>7</sup> For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: "... scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation."

We recommend that TCEQ delete this italicized phrase and insert new regulatory language to require a permit amendment for sources that fail to install control equipment required by the permit. Please confirm that failure to install control equipment required by the Flexible Permit would be a violation of the permit. Please confirm that BACT/LAER control technology that is required under major NSR must be operational at start of operation and is not subject to this implementation schedule.

XI. Other Suggested Changes.

- A. §116.711(2) – provides for measuring the emissions of air contaminants “as determined by the director.” Texas should revise this provision to establish a replicable standard rather than granting discretion to the director – e.g., “measurement and frequency sufficient to demonstrate on-going compliance with specified emission limitations.”
- B. §116.716(a)(1) – Define the term “maximum expected capacity.”
- C. §116.715(b) – Define the term “multiple emissions cap.”
- D. §116.716(c) – The rule is vague concerning how the emission cap will be adjusted for the addition of new facilities. Texas should amend the permit to adjust the cap for new facilities. Texas’ rules should be clear on the process.
- E. §116.721(c)(1) – Texas needs to add an additional exception “or conflicts with an existing permit limit.” There may be permit limits expressed as throughput limits or feedstock requirements and this paragraph appears to authorize changes in a source’s obligations to comply with those terms without a permit amendment or alteration.

## IMPLEMENTATION ISSUES

### I. Practical Enforceability of Flexible Permit Emission Cap.

#### A. What is practical enforceability?

The TCEQ must consider whether a Flexible Permit emissions cap is truly and practically enforceable. The EPA guidance states that practical enforceability for an emission limitation which applies to a unit or small group of units is achieved if the permit's provisions specify:<sup>8</sup>

1. A limitation and the emissions unit(s) at the source subject to the limitation;
2. The time period for the limitation (e.g., hourly, daily, monthly, and/or annual limits such as rolling annual limits); and
3. The method to determine compliance, including appropriate monitoring, recordkeeping, reporting, and testing.

B. However, where EPA has established emission limitations for large groups of emissions sources subject to a site wide cap, additional requirements were considered to ensure practical enforceability. For example, the Federal PAL rule, which requires only long-term (ton per year) emission limitation(s), sets minimum requirements for MRRT in return for increased operational flexibility.<sup>9</sup> The EPA's proposed Flexible Air Permitting Rule requires MRRT equivalent to the PAL rule for groups of units.<sup>10</sup> The EPA also evaluated appropriate MRRT mechanisms where emission limits applied to a group of units or the permit allowed for increased operational flexibility to ensure that regulatory requirements were met in its study of flexible permits.<sup>11</sup>

C. The EPA has reviewed Texas Flexible Permits in which one short-term (lb/hr) emission limitation is applied to hundreds of dissimilar emission

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<sup>8</sup> See memorandum, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," signed by John Seitz and Robert Van Heuvelen, January 22, 1996, at 5-6 and Attachment 4, available on the Web as <http://www.epa.gov/rqytgrnj/programs/artd/air/title5/t5memos/pottoemi.pdf>. More detailed guidance on practical enforceability is contained in the memorandum.

<sup>9</sup> See 67 *Federal Register* (FR) 80186

<sup>10</sup> See 72 FR 52206 (September 2007) for the proposed Federal Flexible Air Permitting Rule

<sup>11</sup> See *Evaluation of Implementation Experiences with Innovative Air Permits, Summary Report*, prepared by Office of Air Quality Planning and Standards and OPEI, at [www.epa.gov/ttn/oarpg/t5/memoranda/iap\\_eier.pdf](http://www.epa.gov/ttn/oarpg/t5/memoranda/iap_eier.pdf).

units. Because emissions units can vary in size and type or operation as well as having widely different regulatory, monitoring, and compliance requirements, EPA has serious concerns that such a short-term limit can be practically enforced. An approvable Flexible Permit Program must:

1. Set minimum replicable standards for MRRT equivalent to the PAL rule or demonstrate how MRRT in the revised Flexible Permit rule is at least as stringent as those requirements.
2. Address how the number of units and the potential to emit (PTE) of units subject to a single emission limitation under a cap is reasonable and practically enforceable. The revised Flexible Permit rule (and guidance) should address how this determination is made. One approach would be to adopt emission limitation sub-caps for related groups of units that are vented to a common control device or where a group of similar emission units have common operations, monitoring, recordkeeping, reporting and testing. Another approach is to require more effective MRRT requirements for significant emission units that have the potential to emit pollutants in amounts in excess of threshold levels. For example, units with PTE greater than major source thresholds would require more stringent MRRT than sources with PTE greater than major NSR significant thresholds, but less than major source thresholds.
3. Demonstrate that required control technology achieves the level of emissions reductions required under the applicable BACT or LAER requirements. MRRT of pollution control equipment must be sufficient to determine compliance with the mass emission unit or work practice requirements adopted in conjunction with BACT or LAER. The MRRT should also demonstrate that the capacity range demonstrated to achieve BACT or LAER for the control device was not exceeded (absent a monitoring system demonstrating compliance with BACT or LAER at that level).

## II. Preliminary Analysis.

### A. Rationale for BACT determinations

The State's preliminary analysis must include a rationale for the BACT determination for each unit under the Flexible Permit, in addition to any analysis provided in the Flexible Permit application.

B. Tracking of major NSR terms of conditions in existing permits incorporated into the Flexible Permit

The State's preliminary analysis must provide a true crosswalk that identifies each term and condition in an existing permit that will not be incorporated into the Flexible Permit and a rationale for removing the term or condition. Also see item II.B above and item III under **RULE REVISIONS AND CLARIFICATIONS**.

C. Process for superseding or subsuming permit application representations in existing permits

Because Texas uses a streamlined approach to NSR permitting which incorporates permit application representations as enforceable terms and conditions of a permit, those representations must be carried forward in the Flexible Permit, or the permittee in its application and the State in its preliminary analysis must provide a rationale for why those representations may be eliminated. See White Paper #1, White Paper for Streamlined Development of Part 70 Permit Applications, 1995 for additional details. Any change of modification to any term or condition must be authorized as described in item III under **RULE REVISIONS AND CLARIFICATIONS**.

D. Identification of approved physical or operational changes authorized by the Flexible Permit

The Flexible Permit should identify the types of physical or operational changes that are authorized by the permit and the expected time of construction for pre-approved construction activities.

III. Re-issuance of Existing Flexible Permits under a SIP-approved Permit Rule.

We recommend that existing Flexible Permits be reissued under a SIP-approved rule to ensure the permits are federally enforceable and enforceable as a practical matter. If TCEQ revises a Federal Operating Permit (Title V) permit which contains a Flexible Permit which was not issued under a SIP-approved rule, those Flexible Permits are considered State-only requirements in the Federal Operating Permit and should be designated as such. The reissuance of permits should be further discussed by TCEQ and EPA, and a mutually agreed schedule should be developed to address how and when such permits can be reissued under federally approved SIP provisions. Until such time as Flexible Permits are issued under a SIP-approved program, the existing federally approved SIP requirements remain effective.

- IV. When Texas revises the Flexible Permit SIP submittal to address the revisions, we strongly recommend that TCEQ withdraw the earlier SIP submittals relating to Flexible Permits.