

**Texas Commission on Environmental Quality Comments on
Approval and Promulgation of Implementation Plans; Texas;
Revisions to the New Source Review (NSR) State Implementation Plan (SIP);
Flexible Permits
Docket ID No. EPA-R06-OAR-2005-TX-0032**

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed disapproval of the Texas Flexible Permits Program (or Program). TCEQ's comments are detailed below.

I. TCEQ's Flexible Permit Program

A. Background

The TCEQ established the Flexible Permit Program in 1994 to provide operational flexibility for petroleum refineries, and to provide an authorization mechanism for the large number of grandfathered facilities that existed in the state at that time. The Flexible Permit Program contained in 30 Texas Administrative Code (Tex. Admin. Code) Chapter 116, Subchapter G is a voluntary authorization mechanism that an owner or operator may choose to utilize in lieu of obtaining a "traditional" permitting authorization under 30 Tex. Admin. Code Chapter 116, Subchapter B.¹ These Subchapter G permits differ from those issued under Chapter 116, Subchapter B primarily by adding flexibility features through the use of emission caps, certain control technology, and other operational flexibility to achieve emission reductions with the ultimate goal of having a well-controlled plant site after the final cap is implemented.

TCEQ has always considered the Flexible Permit Program to be a Minor NSR program, although this is not specifically stated in the rule. As part of the application review process, TCEQ has always determined whether federal new source review (FNSR), as well as state and other federal rules, apply.

B. How Texas Understood the Flexible Permit Program Met Federal NSR Requirements

TCEQ understands EPA's concerns regarding the lack of specificity in the rules regarding the Flexible Permit Program, and how the Program is applied and administered. However, TCEQ did not intend for the Program to, and the application review process does not, circumvent federal requirements.

Federal applicability determinations are conducted according to federal requirements. The review includes the determination of baseline actual emission rates, project emission increases, and the net emission increases. The review also includes best available control technology (BACT) analysis² to establish the

¹ 30 Tex. Admin. Code § 116.710 (a).

² TCEQ recognizes EPA's concerns regarding federal definition of BACT and plans to propose rulemaking

cap(s); National Ambient Air Quality Standards (NAAQS) and increment analysis if Prevention of Significant Deterioration (PSD) review is triggered; and lowest achievable emission rate (LAER) control technology and use of offsets if nonattainment review is triggered. The federal NSR review is conducted parallel to the Minor NSR review. TCEQ does not allow applicants to use flexible permits as a way to circumvent FNSR permitting requirements.

When an application for a new flexible permit is received, or an existing state permit is amended and converted into a flexible permit, all facilities in the flexible permit are considered to be modified, and federal applicability is determined for each emission cap(s) contained within the permit. So, if triggered, federal requirements are applied. Flexible permits may contain initial, interim, and final emission caps. Emission caps are developed for specific pollutant emission categories, most commonly for sulfur dioxide (SO₂), nitrogen oxides (NO_x), particulate matter (PM), carbon monoxide (CO), and volatile organic compounds (VOC).³ In addition, there may be subcaps within a pollutant emission category, such as speciated VOC. Likewise, there may be subcaps pertaining to a limited group of facilities covered by a flexible permit, and/or individual emission limits which are applied for a specific facility to place enforceable emission rates below emission caps. Such subcaps and/or individual emission limits are also evaluated to ensure that FNSR applicability and permitting requirements are not circumvented, and to ensure protection of public health and welfare (air toxics, NAAQS, and PSD increment analysis).

The initial emission cap is the starting point before any physical or operational change occurs, and is based on the controls in place at the time the flexible permit is first issued. The final emission cap applies after all control upgrades have been put into place, and is based on the application of BACT for all facilities contributing to an emission cap.⁴

Control technology flexibility is available under the Flexible Permit Program for existing facilities⁵ to the extent that permit holders may overcontrol a facility by exceeding BACT requirements at one facility in order to not add additional controls at another facility, provided that the net sum of control technologies is at least as stringent as BACT being applied to each existing facility. New facilities added to a flexible permit must meet current BACT (at a minimum); that is, an applicant cannot undercontrol a new facility.

to address its concerns at the TCEQ's January 13, 2010 Commission agenda. TCEQ's position is that its BACT applicability and analysis is equivalent to that of the federal definition as well as consistent with the existing state implementation plan.

³ 30 Tex. Admin. Code § 116.715 (b).

⁴ 30 Tex. Admin. Code § 116.716 (a).

⁵ See II.A Definition and Use of the Term "Facility"

Operational flexibility is available under the flexible permit to the extent that a permit holder may vary throughput rates, charge rates, firing rates, etc. as long as control requirements are met and compliance with emission caps and/or individual emission limits is maintained. Again, at the time of initial review of a flexible permit or flexible permit amendment, all facilities affected by a project are considered modified, and are subject to FNSR applicability procedures. New facilities authorized through the flexible permit process must meet BACT at initial issuance of the permit or at such time they are authorized by the flexible permit through subsequent amendments.⁶

The flexible permit rules require that the permit holder implement monitoring requirements and maintain documentation sufficient to demonstrate continuous compliance with the flexible permit emission caps and individual emission limits.⁷ Although not specified in the rules, flexible permits contain special conditions which require compliance stack testing, periodic stack testing, continuous emissions monitoring, and other parametric monitoring requirements, along with recordkeeping requirements to ensure that the permit holder is compliant with the flexible permit caps and BACT. Any one of the above mentioned compliance methods, or combination of methods, may be used for facilities contained in a flexible permit. There are a wide range of industrial source types which request a flexible permit such as petroleum refineries, large chemical plants, gasoline distribution terminals, and lime production operations. As discussed in the commission's adoption preamble, "[t]he commission believes that engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing are all appropriate methods to demonstrate compliance with the emission cap or individual emission limits. The commission intends to require appropriate methods and in some cases continuous emission monitoring systems may be required to ensure compliance with all caps and emission limitations."⁸ Considering the wide variety of industrial source types, specific and detailed monitoring, testing, and record keeping requirements are carefully drafted to ensure TCEQ's ability to adequately implement these requirements. This is particularly true for sources where different or additional requirements are necessary to ensure compliance with permitting limits and requirements.

In summary, under the Flexible Permit Program, TCEQ:

1. Determines federal NSR applicability after BACT and emissions limits are determined as a first step in processing a flexible permit application, and uses baseline actual emissions compared to planned emissions (either projected actual or potential to emit (PTE)). The TCEQ does not conduct an allowable

⁶ 30 Tex. Admin. Code § 116.711 (3).

⁷ 30 Tex. Admin. Code § 116.711(2) and (14).

⁸ 19 Tex. Reg 9362

emissions rate to allowable emission rate type analysis when determining federal NSR applicability. If netting is triggered, the netting analysis includes all facilities at the major stationary source.

2. Considers a project to be a “major modification” at an existing major source if emission increases equal or exceed the significance level for the pollutant being evaluated and contemporaneous netting results in a “net emission rate increase” that equals or exceeds the significance level for the pollutant being evaluated. If the project is determined to be a major modification, the appropriate FNSR review is triggered. For new major stationary sources at greenfield sites and existing minor sources, if a project is a major source in and of itself, the appropriate FNSR review is triggered.
3. Applies appropriate federal NSR requirements when triggered, which includes application of BACT; NAAQS/PSD increment analysis; and LAER/Offsets for nonattainment reviews.
4. Does not circumvent federal NSR requirements applicable to major stationary sources or major modifications.
5. Requires monitoring and recordkeeping sufficient to demonstrate continuous compliance with the flexible permit emission caps and individual emission limits.
6. Does not violate the approved SIP with regard to Major NSR or Minor NSR program requirements.

C. How Texas Air Quality Benefited from the Flexible Permit Program

At the time that the TCEQ established the Flexible Permit Program in 1994, Texas had a large number of grandfathered facilities.⁹ As EPA acknowledges, at the time, the TCEQ did not have the statutory authority to impose controls on, or require permits for, grandfathered facilities.

Significant emission reductions have been achieved through the Program, which have resulted in improved air quality based on air monitoring data. Two examples of these reductions, expressed in tons per year (tpy) are:

Coal and petroleum coke fired power plant
25,803 tpy sulfur dioxide
10,330 tpy nitrogen oxides

⁹ Grandfathered facilities are facilities that were once exempt from most State air permitting requirements because the facilities predated the 1971 Texas Clean Air Act that required preconstruction review.

795 tpy total particulate matter

Petroleum refinery

3.9 tpy sulfur dioxide

15,844 tpy nitrogen oxides

920 tpy volatile organic compounds

In summary, the Flexible Permit Program reinforced the TCEQ's duties under the Texas Clean Air Act to protect air quality and to control air contaminants by *practical and economically feasible methods*.¹⁰ Therefore, the environment benefited from the Program because emissions were controlled prior to the Texas legislature mandating shut down or obtaining authorization; air quality benefited as demonstrated by monitoring which measured continued improvement; regulated entities benefited because they were given flexibility; and the state benefited by reasonable regulation that encouraged responsible economic development.

II. Specific Comments

A. Definition and Use of the Term "Facility" (74 Federal Register 48489)

EPA specifically solicited TCEQ to comment on EPA's interpretation of Texas law and the Texas NSR SIP with respect to the term "facility" as this is critical to EPA's understanding of the Texas Permitting Program.¹¹ The definition of the term "facility" is one of the cornerstones of the Texas Permitting Program under the Texas Clean Air Act. TCEQ appreciates the opportunity to address this point as its interpretation of Texas law differs from that of EPA as discussed below. In addition, to provide clarity and consistency, TCEQ will provide similar comments here and in regard to Docket ID No. EPA-R06-OAR-2005-TX-0025 and Docket ID No. EPA-R06-OAR-2006-TX-0133.

As stated by EPA, it understands that the state uses a "dual definition for the term facility." Under the Texas Clean Air Act¹² and TCEQ rule,¹³ "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility." A facility may constitute or contain a stationary source -- a point of origin of a contaminant.¹⁴ As a discrete point, a facility can constitute but cannot contain a "major stationary source" as defined by federal law. A facility is

¹⁰ Tex. Health & Safety Code § 382.002, § 382.003(9)(e)

¹¹ Docket ID No. EPA-R06-OAR-2005-TX-0025

¹² Tex. Health & Safety Code § 382.003(6).

¹³ 30 Tex. Admin. Code § 116.10(6).

¹⁴ Tex. Health & Safety Code § 382.003(12).

subject to Major and Minor NSR requirements, depending on the facts of the specific application.

Under Major NSR, EPA uses the term “emissions unit” (generally) when referring to part of a “stationary source”; TCEQ translates “emissions unit” to mean “facility”¹⁵ which is at least as stringent as federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA’s stated understanding. Likewise, TCEQ does not interpret facility to include “every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC code).” The federal definition of “major stationary source”¹⁶ is not equivalent to the state definition of “source.”¹⁷ A “major stationary source” can include more than one “facility” as defined under Texas law – which is consistent with EPA’s interpretation of a “major stationary source” including more than one emissions unit.

The above interpretation of the term “facility” has been consistently applied by the TCEQ and its predecessor agencies for more than 30 years. The TCEQ’s interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.¹⁸

While Texas law does not directly refer to the two steps allowing deference enunciated by Justice Stevens writing for a unanimous Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁹ Texas law and judicial interpretation recognize *Chevron*²⁰ and follow similar analysis as discussed below.

¹⁵ 30 Tex. Admin. Code § 116.160 (c) (3) “The term “facility” shall replace the words “emissions unit” in the referenced sections of the CFR.”

¹⁶ 40 CFR 51.166 (b)(1)(i)(a).

¹⁷ Tex. Health & Safety Code § 382.003(12).

¹⁸ Tex. Gov’t Code § 311.011(b).

¹⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S 837, 842-43 (1984). “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

²⁰ *Phillips Petroleum Co. v. Tex. Comm’n on Env’tl. Quality*, 121 S.W.3d 502, 508 (Tex.App.–Austin 2003, no pet.), which cites *Chevron* to support the following. “Our task is to determine whether an agency’s decision is based on a permissible interpretation of its statutory scheme.”

The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area “be given a large degree of latitude in the methods it uses to accomplish its regulatory function.”²¹ Further, Texas courts construe the text of an administrative rule under the same principles as if it were a statute.²² Texas administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference.²³ The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent.²⁴ “When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”²⁵ This is particularly true when the rule involves complex subject matter.²⁶ Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area “be given a large degree of latitude in the methods it uses to accomplish its regulatory function.”²⁷

In summary, TCEQ translates “emissions unit” to mean “facility.” Just as an “emissions unit” under federal law is construed by EPA as part of a major stationary source, a “facility” under Texas law can be part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

B. Definition and Use of the Term “Account” (74 *Federal Register* 48489)

The TCEQ does not concur with EPA’s understanding of TCEQ’s term “account.”²⁸ Within the definition of “account,” TCEQ references the term “source” as defined in Texas law.²⁹ EPA erroneously interprets the term “source” as used in TCEQ rules. The TCEQ has integrated and translated the many federal definitions of “source” with an attempt to maintain consistent terminology between state and federal programs. In each of its permitting rule chapters and sections, the TCEQ has included appropriate definitions to meet state and federal

²¹ *Reliant Energy, Inc. v. Public Util. Comm'n*, 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n*, 883 S.W.2d 190, 197 (Tex.1994)).

²² *Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n*, 36 S.W.3d 635, 641 (Tex.App.-Austin 2000, no pet.).

²³ *Id.*

²⁴ *Id.*

²⁵ *Udall v. Tallman*, 380 U.S. 1, 17 (1965).

²⁶ *See Equitable Trust Co. v. Finance Comm'n*, 99 S.W.3d 384, 387 (Tex.App.-Austin 2003, no pet.).

²⁷ *Reliant Energy, Inc. v. Public Util. Comm'n*, 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n*, 883 S.W.2d 190, 197 (Tex.1994)).

²⁸ 30 Tex. Admin. Code § 101.1(1) Account-- For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

²⁹ Tex. Health & Safety Code § 382.003(12). "Source" means a point of origin of air contaminants, whether privately or publicly owned or operated.

requirements. As with EPA's rules, the TCEQ rules must be read with an understanding of the NSR program and all its unique nomenclature and requirements. An account can include multiple "sources,"³⁰ which for this rule, is equivalent to multiple "facilities" under Texas Minor NSR definitions (a discrete piece of equipment or source of air contaminants). A flexible permit cannot cover more than one major stationary source, as the term is used by the EPA and TCEQ for FNSR purposes.

C. Major NSR Applicability Determination (74 Federal Register 48488, 48489)

The TCEQ does not concur that the Flexible Permit Program "fails to require that the applicability of Major NSR requirements be evaluated prior to considering whether the construction of a new source or making a change can be authorized under a Flexible Permit." Any application for a flexible permit must address FNSR requirements.³¹ If a physical or operational change from facilities outside the emission cap causes physical or operational changes to facilities within an emission cap of a flexible permit, those facilities and changes are evaluated in the FNSR applicability process. The evaluation includes baseline actual to PTE or future actual demonstrations, if increases equal or exceed significance, netting is triggered. If the net difference equals or exceeds federal significance levels, FNSR is triggered. In addition, all flexible permits have a general condition that requires the permit holder to comply with state and federal rules, regulations and commission orders, and conditions as precedent to the granting of the permit.³²

D. Use of Actual Emissions (74 Federal Register 48489, 48490)

The submitted program requires the use of baseline actual emissions to PTE (or projected actuals) to determine if a project results in an increase equal to or greater than significance for FNSR applicability. The TCEQ will confirm this in the rulemaking and SIP revision that addresses EPA's concerns.

E. Enforceability (74 Federal Register 48490)

Flexible permits contain conditions to ensure recordkeeping, reporting, testing, and monitoring is conducted to assure compliance with the representations of the permit when the permit is issued. The TCEQ will confirm this in the rulemaking and SIP revision that addresses EPA's concerns.

F. Substitute Major NSR SIP Revision (74 Federal Register 48491)

³⁰ Tex. Health & Safety Code § 382.003(12)

³¹ 30 Tex. Admin. Code § 116.711 (8), (9).

³² 30 Tex. Admin. Code § 116.715 (c) (10).

The Flexible Permit Program is not a substitute Major NSR SIP revision. The Program requires a federal applicability demonstration and thereby prevents circumvention of the Major NSR SIP requirements. The TCEQ will confirm this in the rulemaking and SIP revision that addresses EPA's concerns.

G. Minor NSR SIP Revision (74 Federal Register 48491)

The Flexible Permit Program is a Minor NSR SIP revision. The Program requires a federal applicability demonstration and thereby prevents circumvention of the Major NSR SIP requirements. The TCEQ will confirm this in the rulemaking and SIP revision that addresses EPA's concerns.

III. TCEQ's Plans to Correct Deficiencies

Notwithstanding that the rules for the Flexible Permit Program were adopted 15 years ago, TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all of EPA's comments and propose changes to the Flexible Permits Program.

The TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- remove the insignificant emissions factor (i.e. 9 percent of total allowable emissions);
- ensure FNSR applicability requirements are included in flexible permit reviews, and that the requirements of the appropriate FNSR permitting program are met when triggered;
- apply the FNSR applicability concepts of modification, project, and contemporaneous netting during the technical review of a flexible permit;
- require that startup, shutdown, and maintenance emissions count against the Flexible Permit cap;
- ensure that terms and conditions of previously issued permits or more stringent terms and conditions (including additional testing, monitoring, recordkeeping and reporting requirements needed to ensure compliance with emission limitations) are added to the flexible permit;
- ensure rules contain legally enforceable and replicable procedures for establishing emission caps; and

- provide that emissions limitations are based on a 12-month rolling average instead of a calendar year average.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised program will ensure protection of the NAAQS, and demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.³³

In addition, as part of a separate action, TCEQ will address EPA's concerns regarding public participation with a proposed rulemaking at its December 9, 2009, Commission meeting.³⁴

³³ Federal Clean Air Act § 110(l)

³⁴ As discussed in 74 *Federal Register* 48480, in Section V.F., at 48490-91.