

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.765 and the amendments to §§116.13, 116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, and 116.750.

Sections 116.710, 116.711, 116.715, 116.716, 116.718, and 116.765 are adopted *with changes* to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5729). Sections 116.13, 116.717, 116.720, 116.721, 116.730, 116.740, and 116.750 are adopted *without changes* and will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP) with the exception of §§116.711(2)(C)(iii), 116.715(f)(2)(A), 116.730, 116.740(b), and 116.765.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Texas flexible permit program rules (Chapter 116, Subchapter G, Flexible Permits) first became effective on December 8, 1994. The flexible permit program was developed in response to direction from the commission at the January 21, 1994, policy agenda meeting. The flexible permit 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 flexible permit program was developed, the commission lacked the authority to require an air quality permit for grandfathered facilities. The flexible permit program 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.

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 (NESHAP). The flexible permitting program 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 of various requirements and without environmental harm provides owners and operators options for their operations. The environmental benefits of the flexible permit program 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 flexible permit program 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 (k)(2)), more than 15 years passed from the initial submittal before the EPA took any formal action, and did so only in response to litigation brought by holders of flexible permits (see *BCCA Appeal Group, et al v. United States EPA et al*, No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited the following assertions as the basis for disapproval of the flexible permit program as a minor NSR revision: 1) The program is not clearly limited to use in minor NSR and does not clearly prevent circumvention of major NSR requirements; 2) The program does not require that an applicability determination for major NSR be made first for construction or modification that could potentially be subject to major NSR; 3) The program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions;

4) The program lacks replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit; 5) The program is not an enforceable minor NSR permitting program; 6) The program allows the issuance of flexible permits that do not incorporate emission limitations and other requirements of the Texas SIP; and 7) The program lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements required for this type of minor NSR program, to ensure accountability and provide a means to determine compliance. The EPA also identified a number of related concerns with the Texas flexible permit program in correspondence to the commission dated March 12, 2008.

The commission maintains that its flexible permit program rules, as adopted and implemented prior to this rulemaking, are fully approvable as revisions to the SIP. In fact, the Texas flexible permit program is a minor NSR permit program which requires the application of best available control technology (BACT) to minor sources even though not required to do so under the FCAA. Texas law requires application of BACT to all permitted facilities for all air contaminants, and this is a part of Texas' SIP. The commission's executive director provided detailed comments in response to the Notice addressing each of the EPA assertions discussed earlier and demonstrating that, as written and administered by the commission, the flexible permit program rules are in full conformity with all applicable federal requirements (*see* Letter from M. Vickery, Executive Director, TCEQ to S. Spruiell, Air Permits Section (EPA Region 6), November 23, 2009, included in EPA's docket No. EPA-R06-OAR-2005-TX-0032). Additionally, permits issued under the flexible permit rules are consistent with the FCAA and EPA rules implementing NSR.

The EPA published final notice of disapproval of the flexible permits program in the *Federal Register* on July 15, 2010 (75 *FR* 41311), hereafter "Disapproval Notice." In the Disapproval Notice, the EPA disapproved the flexible permit program as both a minor NSR program and a major NSR program. The EPA's grounds for disapproval as a minor NSR program were: 1) The program has no express regulatory prohibition clearly limiting its use to minor NSR and has no regulatory provision clearly prohibiting circumvention of major NSR; 2) The program is not an enforceable NSR permitting program because it lacks requirements necessary for enforcement and assurance of compliance, including specific up front methodologies to be able to determine compliance; 3) The program lacks the necessary more specialized MRR requirements, including the necessary applicable replicable procedures and adequate executive director discretion, required for this type of minor NSR program to ensure accountability and provide a means to determine compliance; 4) The program lacks replicable procedures for establishing an emissions cap; 5) The program fails to ensure that the terms and conditions of major NSR SIP permits are retained; 6) The program fails to meet the statutory and regulatory requirements for a minor NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions; and 7) Due to these bases for disapproval, the EPA lacks sufficient information to determine that this new permitting program will not interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the FCAA.

The EPA's grounds for disapproval of the program as a major NSR program were: 1) The rules do not include express language stating that the program is clearly limited to minor NSR and prohibits circumvention of major NSR; 2) The program does not include a demonstration that

shows how the program as a whole and how the use of "modification" is at least as stringent as the definition of "modification" in the EPA major NSR SIP program and meets the FCAA; 3) The program does not include a demonstration that shows how the program as a whole is at least as stringent as the EPA major NSR SIP program and meets the FCAA; 4) The program does not include the requirement to make major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source; 5) The program fails to meet the statutory and regulatory requirements for a major NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions; and 6) Due to these bases for disapproval, as well as some bases for disapproval as a minor NSR SIP revision, the EPA lacks sufficient information to determine that this new permitting program will not interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the FCAA.

Again, the commission maintains that the flexible permit rules as adopted and implemented are approvable as a minor NSR permit program revision to the Texas SIP. The commission now adopts amendments to the rules to provide even greater clarity that they operate as a minor NSR program in the state of Texas. In the Disapproval Notice, the EPA states that it acknowledges that the commission has undertaken this rulemaking, and will consider any rule changes if and when they are submitted to the EPA. EPA Region 6 timely submitted comments on some of the subsections of four of the proposed rules to be amended. And, although those comments were submitted after the publication of the Disapproval Notice, the EPA did not expressly comment on all of the issues which form the basis for its disapproval.

The EPA's comments for this rulemaking primarily concern the following issues: 1) the EPA's position that a major source cannot be subject to an emissions cap, and similarly that a flexible permit cannot authorize or be used for a major stationary source or major modification, and the emissions from facilities subject to Prevention of Significant Deterioration (PSD) BACT and nonattainment new source review (NNSR) Lowest Achievable Emission Rate (LAER) cannot be included in the summation of the flexible permit's emissions cap(s); 2) that each individual unit under an emissions cap must meet at the very least, its specific emission limitation derived from a federal applicable requirement; and 3) the use of terminology unique to the Texas SIP, namely the use of the SIP-approved terms "facility" and "account." The commission's responses to those comments are discussed elsewhere in this preamble. Notably, the EPA did not provide any comments that indicated its review of the proposed amendments found that the rules are inadequate for most of the reasons included in its Disapproval Notice.

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 Part 51 requirements

where the revisions are different from Part 51. These amendments are intended to remove any doubt that the EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are environmentally beneficial and approvable as a minor NSR permitting program as part of the Texas SIP.

In response to the Disapproval Notice, and in support of these rule amendments, the commission provides the following information. The EPA did not find that the current rules actually are ambiguous on the commission's position that these rules are for a minor NSR permitting program. Rather, the EPA wants express language, despite the rule text that requires consideration of major NSR requirements. That part of the Disapproval Notice as well as the EPA's comments regarding this rulemaking not only ignore the current rule text, but also the commission's amendments which make this abundantly clear. The EPA also ignores the fundamental structure of the SIP-approved Texas permitting system, which requires a permit for all facilities, including a major NSR permit when applicable.

As originally developed and subsequently implemented by TCEQ in 1994, the Texas flexible permit program is a minor NSR program. The flexible permit does not substitute for PSD or NNSR. No provision of the Texas flexible permit program rules may be read to circumvent major NSR permitting or any state or federal permitting requirements. The rules expressly require compliance with all applicable requirements relating to nonattainment and PSD review.

That limitation, adopted in 1994 as §116.711(8) and (9), continues as §116.711(2)(H) and (I); *see also*, e.g., §§116.710(a)(5), 116.711(2)(C)(ii), and 116.718(b) and (c). The program does not

supersede or negate federal requirements, nor allow circumvention of those requirements. The flexible permit program may not be used as a shield for protection or exemption from federal programs including major NSR permitting. Persons making changes under a flexible permit must maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review Permits; Division 6, Prevention of Significant Deterioration Review; and Subchapter E, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). A major modification, as defined in §116.12, may not occur without first being subject to a Nonattainment and/or PSD review. Likewise, an owner or operator may not use flexible permit rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in the 40 CFR Part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under NNSR and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a major NSR permit or major modification under the appropriate major NSR program, as well as a HAP permit to meet requirements of FCAA, §112(g) if case-by-case MACT applies; and a minor NSR permit amendment. Further, the flexible permit program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

The EPA's concerns, expressed in its comments in this rulemaking, focus on ensuring PSD BACT and NNSR LAER are met. In its Disapproval Notice, the EPA stated that the flexible permits

program fails to ensure that the terms and conditions of major NSR SIP permits are retained. The EPA fails to recognize that the flexible permits program is a minor NSR program, and that TCEQ's implementation of PSD and nonattainment permit requirements is not impaired by its choice to issue both a minor NSR permit and a major NSR permit in one document. That practice does not impair compliance with all applicable rules, nor does it allow a minor NSR permit to remove any major NSR permit requirements. Allowing major sources to operate under an allowable-based emission cap, while ensuring that any federal emissions limitation is not circumvented, is not prohibited under the FCAA. Emission caps are developed based on the potential to emit *after* the application of BACT or LAER emission controls, as applicable. This is exactly the same emission standard as required for other permitting. Further, allowable emission limits, expressed as a cap or for an individual facility, are expressed in terms of annual (tons per year) or short term (e.g., pounds per hour) units. BACT is typically expressed in terms of a mass emission calculation, such as pounds per million British thermal units (lb/MMBtu) or parts per million (ppm). Establishment of caps after application of the appropriate control technology necessarily does not relax the control technology, and therefore the EPA has no basis to prescribe exclusion of PSD and NNSR facilities from flexible permit authorization or the caps established by the flexible permit.

Control technology flexibility is available under the flexible permit program for existing facilities to the extent that an applicant may over-control one facility, i.e., with technology or practices that are more stringent than BACT in order to avoid additional controls at another facility, provided that the net sum of control technologies is equivalent to (or better than) BACT being applied to each facility. However, the flexible permit rules prohibit avoidance of controls

required under PSD and NNSR, and such facility-specific requirements are included within the permit document. Operational flexibility is available under the flexible permit to the extent that an owner or operator 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 are maintained. 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. For new facilities, BACT shall be demonstrated for that individual facility or affected source. Therefore, the existing facilities do not operate in violation of any BACT requirements. Similarly, because major NSR permitting is not circumvented, the flexible permit program is an approvable minor NSR program.

The rules are an enforceable NSR permitting program because they include requirements necessary for enforcement and assurance of compliance, including specific up front methodologies to support the determination of compliance. These requirements are found, for example, in §§116.711, 116.715, and 116.716.

The TCEQ includes specific MRR conditions in flexible permits issued under the current rules, as appropriate for the type of facilities and emissions authorized under a cap, and these MRR conditions are adequate for determining compliance. In addition, the permit file contains documentation about how caps are established in the permits. Regardless, more specific MRR requirements are in these amendments, are adopted to satisfy EPA's concerns about accountability, and the means of determining compliance are found in §116.715(d).

The commission has added text to ensure that the rules include replicable procedures for establishing an emissions cap; see §116.716.

The EPA stated that the program fails to meet the statutory and regulatory requirements for a minor NSR SIP revision and is not consistent with EPA policy and guidance on minor NSR SIP revisions. By requiring controls at least as stringent as BACT, the flexible permit program rules assure that the NAAQS are achieved and thereby satisfy the requirements of FCAA §110(a)(2)(C) and EPA's rules regarding minor NSR permitting. Moreover, Texas requires regulation of facilities that are broader in scope than the specific requirements for regulation of major stationary sources as required by FCAA, Title I, Parts C and D. Texas law, and its SIP, is broader, in terms of types of facilities and pollutants subject to regulation. The flexible permit program as it exists and as amended in this rulemaking action meets both the FCAA and the Texas Clean Air Act.

Finally, EPA provides no basis for its conclusion that the program is not consistent with EPA policy and guidance on minor NSR SIP revisions. The commission responds that these amendments ensure that the program meets applicable statutory and regulatory requirements and are approvable as revisions to the Texas SIP.

The executive director is preparing documentation consistent with §110(l) of the FCAA, in support of these rules for submission to EPA.

SECTION BY SECTION DISCUSSION

§116.13, Flexible Permit Definitions

The commission is adopting detailed MRR requirements in proposed §116.715(c)(5), (6) and (12) and (d); *see also* §116.711(2)(G). To support these MRR requirements, the commission is adopting definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS) in §116.13. The definitions for these terms are derived from similar definitions established in 40 CFR §52.21, with minor changes to account for their use in the flexible permit program. The changes relating to MRR are intended to address the EPA's comment that the Texas flexible permit program lacks the specialized MRR requirements necessary to enforce flexible permits.

The commission adopts amendments to the definition of "emission cap" and the definition of "individual emission limitation" under §116.13 to delete references to the "insignificant emissions factor." The commission has also removed the insignificant emission factor from other sections of Subchapter G as discussed in following sections of this preamble. The EPA identified the insignificant emissions factor as a concern in the March 12, 2008, correspondence to the commission. The elimination of the insignificant emissions factor would improve the accounting of emissions authorized under the flexible permit, and in part addresses the EPA's comments that the Texas flexible permit program lacks replicable, specific, established implementation procedures for establishing the emission cap, and does not sufficiently address major NSR requirements.

§116.710, Applicability

The commission adopts the amendment to §116.710(a)(5) to clarify and emphasize that any project that constitutes a new major stationary source or major modification that would trigger major NSR requirements must comply with Subchapter B, Division 5 or 6, as applicable.

Amended §116.710(a)(5) also contains a statement to emphasize that Subchapter G cannot be used to circumvent applicable major NSR permit requirements, including those requirements which include retention of established limits. The adopted changes address the EPA's comments that the Texas flexible permit program is not clearly limited to minor NSR thereby allowing new major stationary sources to construct without a major NSR permit, and has no regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR SIP requirements.

The commission also adopts minor editorial changes throughout §116.710 to correct outdated cross-references and obsolete terminology.

§116.711, Flexible Permit Application

The commission adopts amendments throughout §116.711 to restructure and renumber the contents of this section to provide improved readability and greater consistency with similar requirements in §116.111. The commission also adopts minor changes throughout this section to update terminology and correct cross-references.

The commission adopts the amendment to §116.711(2)(C)(i) to more clearly describe the application of BACT to new and existing facilities. New §116.711(2)(C)(i)(I) requires all new facilities are required to use BACT. New §116.711(2)(C)(i)(II) provides that facilities may be

considered on a grouped basis, such that some facilities within the group may be controlled at a higher level than BACT in order to provide the emission reductions necessary so that other facilities within the group may be controlled to a lesser degree. In response to a comment, the rule has been revised to allow new facilities to employ controls exceeding BACT in order to provide emission reductions that could be used to balance a lower level of control on existing facilities, so long as the overall level of control is at least as good as BACT. The existing level of control may not be reduced for any facility from its current authorization.

The commission adopts the amendment to §116.711(2)(C)(ii), which contains language to clarify that projects which constitute a new major source or major modification that would be subject to federal PSD or nonattainment permitting must comply with applicable requirements of §§116.150, 116.151, or 116.160 to determine the necessary emission controls. This amendment is intended to ensure that applicants understand and comply with all applicable federal major NSR control requirements. This amendment addresses the EPA's comments that the flexible permit rules could be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or NNSR projects. Compliance with control requirements established for facilities subject to PSD or NNSR and which are included in a cap in a flexible permit is discussed in the RESPONSE TO COMMENTS portion of this preamble.

The commission adopts the amendment to §116.711(2)(G), which requires that flexible permits shall specify requirements for initial compliance testing and methods of determining ongoing compliance. The EPA expressed a concern that the existing rule language, which contains the term "may" instead of "shall," is not sufficiently specific. Although flexible permits already

specify appropriate compliance testing and compliance determination methods within the conditions of the permit, the commission has revised the rule language for greater clarity. This amendment, in combination with others in this proposal, addresses the EPA's comments that the flexible permit program is lacking in supporting MRR requirements, and is not sufficiently enforceable.

The commission adopts amended §116.711(2)(H) and (I), which specify that prior to applying the requirements of Subchapter G, the applicant must first perform an analysis to determine the applicability or nonapplicability of federal NNSR requirements or PSD requirements. These amendments address the EPA's comment that the flexible permit program could be used to exempt or shield changes from federal permitting requirements because the program does not require that first an applicability determination be made whether the construction or modification is subject to major NSR. In response to a comment, the word "separate" was deleted from the rule text as proposed, to clarify that the federal applicability determination analysis could be part of the permit application.

The commission adopts the amendment to §116.711(2)(J), which adds a requirement that any permit application for a new flexible permit, 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 amendment addresses the EPA's comment that the flexible permit program does not sufficiently protect the NAAQS.

The commission adopts the amendment to §116.711(2)(M)(iv), which requires that permit applicants provide a complete description of the emission point numbers (EPNs) and facilities that will be included in an emissions cap. This amendment addresses the EPA's comment that flexible permits must be structured in such a way that they sufficiently identify which units are subject to emission caps and individual emission limits.

The commission adopts the amendment to §116.711(2)(M)(vi) to specify that calculations to determine the controlled emission rates from each facility shall be performed in accordance with TCEQ Air Permits Division guidance.

The commission adopts the amendment to §116.711(2)(M)(vii) to specify that the flexible permit application must identify any terms, conditions, and representations in any Subchapter B permit or permits which will be superseded or incorporated under a 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. This amendment addresses the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for.

The commission adopts an amendment to §116.711(2)(N). In response to a comment, the commission has deleted the term "unit" and replaced it with the more appropriate term "facility."

§116.715, General and Special Conditions

The commission adopts the amendments to restructure and renumber portions of §116.715, and adopts other minor changes to improve readability and update terminology and cross-references throughout the section. Other amendments to §116.715 address the EPA's comments that the flexible permit program lacked sufficient MRR to ensure accountability and determine compliance with flexible permits.

The commission adopts the amendment to §116.715(a) by deleting existing language concerning the executive director's ability to limit the use of standard permits or permits by rule in cases where the increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to federal PSD or nonattainment permitting. This requirement has been reorganized and relocated to §116.715(f).

The commission adopts the amendment to §116.715(b) to clarify that a flexible permit may contain more than one emission cap for a specific air contaminant. The commission also adopts language to specify that a permit holder shall comply with any emission caps and individual emission limitations in the permit, and that an exceedance of a flexible permit emission cap(s) or individual emission limitations is a violation of the permit. These amendments are in response to comments in the EPA's correspondence to the commission dated March 12, 2008.

The commission adopts the amendments to §116.715(c)(5). Amended §116.715(c)(5)(A) requires that each flexible permit specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit. Amended §116.715(c)(5)(B)

requires that each flexible permit specify emission calculation methods for calculating annual and short term emissions for each pollutant. These amendments address the EPA's concerns that the flexible permit rules are not sufficiently specific concerning the monitoring and enforcement of flexible permit emission caps and individual emission limits.

The commission adopts the amendment to §116.715(c)(6). The amendment reorganizes the recordkeeping requirements applicable to flexible permits, and adds specific new recordkeeping requirements to address certain EPA comments in the Notice and in the March 12, 2008, correspondence from the EPA to the commission. The amended requirements require flexible permit applicants to maintain records of any other permit applications associated with the flexible permit; require specific recordkeeping to document compliance with annual and short term emission caps and individual emission limitations; and require that flexible permit holders maintain records for five years instead of two years, as suggested by the EPA's March 12, 2008, correspondence. In response to a comment, the commission has added a recordkeeping requirement under §116.715(c)(6)(A)(iv) to specify that permit holders shall maintain records of any air quality analyses performed under §116.718(c).

The commission adopts the amendments to §116.715(c)(7). In response to a comment, the commission has revised this paragraph to include references to "group of facilities" and "account."

The commission adopts amendments to §116.715(c)(8), concerning compliance with representations in a flexible permit application. The proposed language concerning representations was slightly revised in response to a comment.

The commission adopts the amendments to §116.715(c)(9). In response to a comment, the commission has replaced the term "unit" with the more appropriate term "facility."

The commission adopts the amendments to §116.715(c)(10). In response to a comment, the commission has revised this paragraph to include references to "group of facilities" and "account."

The commission adopts the amendments to §116.715(c)(12) and (d), which specify MRR procedures associated with emission caps in a flexible permit. The amendments require semiannual reporting relating to compliance with long and short term emission caps similar to the semiannual reporting suggested by the EPA's March 12, 2008, correspondence to the commission. The amendments include requirements to address absence of monitoring data, require revalidation of site generated data, and define minimum characteristics of the monitoring system. In response to a comment, the commission has added language to the revalidation requirements to clarify that if revalidation testing shows that emission factors have increased, the permit holder must obtain a permit alteration or amendment to adjust the factor and account for the increased emissions. Also in response to a comment, the commission has revised §116.715(c)(12)(A)(i)(IV) so that only data that is necessary to demonstrate compliance is required to be included in the semiannual report. The commission has also revised

§116.715(c)(12)(A)(i)(VII) in response to a comment, to clarify that the term monitoring system means a system that is used for determining compliance with the emission cap or any individual emission limit of the permit. In response to comments, the commission has also revised §116.715(c)(12)(A)(i)(VIII) to correct an erroneous cross-reference, and to reference the six-month period for adjusting emission caps due to the shutdown of facilities. The commission has also revised §116.715(c)(12)(C) in order to clarify what action is needed in the event that revalidation testing demonstrates that emissions have increased.

In response to a comment, the commission also adopts an amendment to §116.715(d) which requires that the permit specify which of the monitoring options under §116.715(d)(2)(A)-(E) are designated as the method of determining compliance.

In response to comments, the commission has revised §116.715(d)(2)(D)(iii) to eliminate the proposed reference to the term "significant facility." The adopted rule maintains the validation testing requirement, but instead of applying to significant facilities as defined in §116.12, this requirement would apply to facilities that emit or have the potential to emit the relevant pollutant(s) in quantities that exceed PSD or NNSR significance levels.

The commission adopts the amendments to §116.715(e) and (f) without change from the proposed text.

§116.716, Emission Caps and Individual Emission Limitations

The commission has adopted changes throughout this section to improve readability and update terminology, and has restructured proposed changes in subsection (a) to now be located in subsections (a) - (c). Other amendments throughout §116.716 are intended to address the EPA's comment that the flexible permit program lacks replicable, specific, established implementation procedures for determining an emissions cap, and address several of the EPA's comments in the March 12, 2008, correspondence to the commission.

The commission is adopting an amendment to §116.716(a). In response to comments, the commission has revised the proposed language concerning like-kind facilities and a site-wide emission cap, and has restructured and rephrased subsection (a) to use more appropriate terminology which is consistent with definitions in Chapter 101, General Air Quality Rules, and to improve clarity. The adopted rule allows a permit applicant to establish an emission cap for all facilities at an account, which would include every facility at the account, or to establish an emission cap comprised of a designated group of facilities at the account. A designated group would logically be a subset of all of the facilities at an account. Account is defined in §101.1 as, "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. " The amended rule allows permit applicants full flexibility to designate facilities for inclusion in an emission cap as they see fit, without restriction on the type or location of the facility, as long as it complies with the definition of account. The rule still provides, as proposed in subsection (a)(1) and adopted in new subsection

(b), that the executive director may exclude a proposed facility from an emissions cap if the executive director determines that the inclusion of the facility in the cap could interfere with the ability to monitor compliance with the permit, or determines that the inclusion of the facility in the cap could interfere with the protection of human health and the environment.

The commission adopts the amendment proposed to §116.716(a)(2), adopted as §116.716(c)(1), which contains requirements associated with the required application of controls for facilities under an emission cap. The amendment adds language to clarify and reinforce the application of federally-required control technology for any project that constitutes a major stationary source or major modification. This provision further addresses the EPA's stated concerns that the flexible permit program could allow a facility to avoid federally-required control technology.

The commission adopts the amendment proposed to §116.716(a)(3), adopted as §116.716(c)(2), which requires that facilities subject to LAER in accordance with Subchapter B, Division 5, must be included in a separate emissions cap or provided with individual emission limitations. This provision ensures that sources subject to LAER are fully controlled as required by federal NSR regulations and Subchapter B.

The commission adopted no changes to proposed §116.716(a)(4), but has renumbered this paragraph as §116.716(c)(3).

The commission adopts the amendment proposed to §116.716(a)(5), adopted as §116.716(c)(4), which specifies that a permit applicant may propose an emission cap that is lower than the

emission cap determined by subsection (c)(3), if the permit applicant provides technical information to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

The commission adopted no changes to proposed §116.716(b), but has renumbered it at adoption as §116.716(d).

The commission adopts the amendment proposed to §116.716(c), adopted as §116.716(e), which requires that each flexible permit 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. This amendment addresses the EPA's comment that each flexible permit must be structured in such a manner that it will be clear which facilities are included under the permit and emission cap, and which facilities are subject to individual emission limitations.

The commission deletes existing §116.716(d), concerning the "insignificant emissions factor" which the EPA had identified as a concern.

The commission adopts the amendment proposed to §116.716(d), adopted as §116.716(f), which clarify how an emission cap is to be adjusted or determined for several situations. Section 116.716(f)(1) requires that an emission cap be adjusted downward to account for the shutdown of a facility for a period longer than six months. This would ensure that the emissions cap corresponds to the actual operation of the facilities under the cap and ensure that appropriate emission control is maintained even when some sources within the cap are not operating. The

commission also adopts language to clarify how the emission cap is to be adjusted when a previously shut down facility is restored to operation.

Section 116.716(f)(2) is amended to clarify that a permit amendment is required to add a facility to a flexible permit emission cap. Section 116.716(f)(3) is also amended to further explain how the emission cap shall be adjusted when new facilities are added or when facilities in the cap are modified. The commission has rephrased and restructured §116.716(f)(3) in response to a comment relating to major NSR applicability. Subsection (f)(3) is further subdivided into subparagraphs (A) and (B) to provide clarity with regard to the types of facilities included in application for adjustment that is an increase in an emission cap.

The commission adopts the amendment proposed to §116.716(d)(4), adopted as §116.716(f)(4), concerning the adjustment of emission caps when facilities under a cap become subject to new rules or regulations that require emission reductions. The commission has added references to the terms "group of facilities" and "account" to this paragraph in response to a comment.

The commission adopts the amendment proposed to §116.716(e), adopted as §116.716(g), which requires that each emission cap or individual emission limitation have an annual emission limit, based on a 12-month rolling period. The adopted rule also requires that each emission cap or individual emission limitation include an appropriate short term (such as hourly) emission limit.

The commission adopts §116.716(h) which provides that when a cap is established or adjusted, major NSR requirements must be met prior to issuance, amendment, or alteration of the permit.

§116.717, Implementation Schedule for Additional Controls

The commission adopts the amendment to §116.717 to clarify that any control implementation schedule contained in a flexible permit is a requirement of the permit, such that if the schedule cannot be met, the permit holder must obtain a permit amendment or alteration to revise the control schedule in order to maintain compliance with the permit. The permit amendment or alteration would have to be approved by the executive director before the control schedule deadline specified in the permit passes. In addition, the commission has adopted language in this section to acknowledge and emphasize that certain federally-required controls, such as BACT or LAER required by PSD or NNSR, must be in place and operational before the permitted facility can begin operation. The amendment addresses the EPA's comments relating to implementation schedules in the March 12, 2008, correspondence from the EPA to the commission, and further ensures that the flexible permit program cannot be used to forestall or avoid major NSR control requirements.

§116.718, Significant Emission Increase

The commission adopts the amendment to §116.718(b) which includes several requirements related to major NSR review. Since proposal, the commission has subdivided the rule into six paragraphs for clarity and readability. This subsection clarifies that a physical or operational change under a flexible permit for any project that constitutes a federal major modification must comply with Subchapter B, Division 5 or 6. Adopted §116.718(b) further requires that the permit

holder must document that any increases under this section are not major modifications. The amendment further addresses the EPA's comments that the flexible permit program could be used to avoid applicable major NSR requirements by specifying that when determining whether a change is a major modification as defined in §116.12, the project emissions increase and the project net shall be determined as specified as defined in §116.12, regardless of how the existing facilities are authorized. In addition, this subsection requires that 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 the use of an alternate method is demonstrated).

The commission adopts the amendment to §116.718(c) which requires a permit holder to perform an air quality analysis to demonstrate that any increases under this section would not interfere with attainment and maintenance of the NAAQS. This amendment addresses the EPA's comment in the Notice that the flexible permit program does not contain sufficient assurances that the NAAQS will not be violated. In response to a comment, the commission has slightly revised the language to clarify that the air quality analysis is required if operational or physical changes cause an increase in emissions from *any* facility (even if there are emission decreases at other facilities). The commission has also revised §116.718(c) to include references to "group of facilities" and "account," as suggested by a comment.

§116.720, Limitation on Physical and Operational Changes

The commission adopts the amendment to §116.720, which consists of minor changes to improve readability.

§116.721, Amendments and Alterations

The commission adopts the amendment to §116.721 which clarifies under what circumstances a flexible permit amendment is required. The amendment to §116.721(a) includes language stating that any action that would relax emission controls, add a new facility or facilities, or would constitute a major modification requires the permit holder to obtain a permit amendment. Similar language has been added to §116.721(c) for the same purpose. These changes are intended to prevent "backsliding" of emission controls, and ensure that projects that constitute a major modification are subject to an appropriate review for applicable federal requirements. The commission also adopts minor editorial changes to this section to update terminology and improve readability.

§116.730, Compliance History.

The commission adopts minor editorial changes to §116.730 to improve readability and update terminology.

§116.740, Public Notice and Comment

The commission adopts minor editorial changes to §116.740 to improve readability and correct outdated cross-references. In a separate action, the commission has adopted revised rules regarding public participation in Chapter 39, Public Notice, Subchapters H and K, and in

Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment,
Subchapter E. Some of these changes apply to flexible permit applications.

§116.750, Flexible Permit Fee

The commission adopts an amendment to §116.750 that revises how fees for flexible permits are determined. Since the inception of the flexible permit program in 1994, fees for flexible permits have been determined based on the quantity of emissions authorized, at a rate of \$32 per ton (with a minimum fee of \$900, and a maximum fee of \$75,000). The amended rule requires that flexible permit fees be based on a percentage of project capital cost, rather than based on emission rate. The amendments make flexible permits subject to the existing fee system used for Subchapter B air permits, as specified in §116.141. The minimum fee of \$900 and the maximum fee of \$75,000 have been retained.

§116.765, Compliance Schedule.

The commission adopts new §116.765 to specify that the rule changes in this action would not apply to permit applications or permit amendments until the date 60 days after the EPA publishes final approval of these sections as revisions to the Texas SIP. Until such time, the existing Subchapter G rules concerning flexible permitting would apply. The commission has eliminated the proposed alternate compliance date of December 1, 2012, in response to a comment. The commission has also revised the rule language so that this section specifies a compliance date, rather than an effective date for the rule. This change provides the commission with more flexibility to revise these rule sections, if necessary, in the future.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 adopted rules is to amend various sections of Subchapter G to address concerns expressed by the EPA regarding the agency's flexible permit program submitted by the commission as a revision to the SIP. These changes to established rules for the flexible permit program are necessary to ensure that the rules can be a federally-approved part of the Texas SIP. Specifically, these amendments: 1) include detailed MRR requirements; 2) provide replicable, specific, established implementation procedures for establishing the emission cap; 3) clearly limit the rules to minor NSR; 4) include regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR permitting; 5) ensure that the rules cannot be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or NNSR projects; 6) specify requirements for initial compliance testing and methods of determining ongoing compliance; 7) ensure that the NAAQS are sufficiently protected; 8) include requirements for clarity of which facilities are

included under the permit and any emission cap, and that there are sufficient monitoring and enforcement requirements for the emission caps and individual emission limits; and 9) provide for a delayed compliance date.

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." Specifically, the amendments were developed to correct EPA-identified deficiencies in the commission's flexible permit program to ensure SIP approval by the EPA and thus meet a requirement of federal law. 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 rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). The commission did not receive any comment on the DRAFT REGULATORY IMPACT ANALYSIS.

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 percent 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 this rulemaking action under Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits to obtain federal approval of the rules into the Texas SIP. The rules will not create any additional burden on private real property. The 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 rules 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 adopted rules will not cause a taking under Texas Government Code, Chapter 2007.

The commission did not receive any comment regarding the Takings Impact Assessment.

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 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 Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this 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 adopted rules will benefit the environment by ensuring that the flexible permit program meets applicable federal 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.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under Chapter 122, Federal Operating Permits Program. 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 any new applicable Chapter 116 requirements.

PUBLIC COMMENT

The commission held a public hearing on the proposed rules in Austin on July 29, 2010, at 2:00 pm, in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 2, 2010. The commission received comments from EPA Region 6, District 90 State Representative Lon Burnam (Rep. Burnam), The City of Houston, Environmental Integrity Project (EIP), Texas Chemical Council (TCC), Texas Industry Project (TIP), Texas Oil and Gas Association (TxOGA), and the United States Department of Energy Pantex Plant (Pantex).

RESPONSE TO COMMENTS

General Comments or Comments Covering Multiple Sections

The City of Houston commented that the proposed rules do not adequately address the EPA's concerns and do not ensure compliance with the FCAA, and that its comments support this conclusion.

The commission does not concur that the proposed rules do not address the EPA's concerns and do not ensure compliance with the FCAA. This is demonstrated by the rule text and accompanying preamble text.

TIP expressed support for the existing flexible permits program and stated that it has contributed toward significant air quality improvements over the last decade. TIP stated that they support revisions and clarifications to the program that further the goal of a federally-approved set of regulations.

The commission appreciates the support and concurs that the flexible permits program has contributed toward air quality improvements.

TxOGA stated that it supports the current flexible permits program and encouraged TCEQ to make only limited changes as necessary to address reasonable concerns of the EPA.

The commission appreciates the support, and in general, nearly all of the rule changes are directly or indirectly related to concerns identified by the EPA.

TxOGA indicated concurrence with the detailed comments submitted by TIP.

The commission has added a reference to TxOGA in association with detailed comments submitted by TIP.

TxOGA stated that it opposes redefining by rule major NSR applicability definitions and principles.

This rulemaking concerns the flexible permits program, which is a minor NSR permit program. It does not affect major NSR requirements. Rather, the amendments to §116.711(H) and (I) were added to reinforce the current rule requirement that major NSR review is always the first review conducted when an application is received.

Rep. Burnam expressed support for certain specific aspects of the proposed rulemaking (such as §116.710(a)(5), §116.718(b), §116.716(c), and the proposed deletion of §116.716(d), relating to the nine percent insignificant emission factor), but also expressed concern that the proposed changes as a whole do not go far enough toward addressing the EPA's fundamental concerns

about the program. Rep. Burnam commented that the commission should not adopt the proposed flexible permitting program.

The commission appreciates Rep. Burnam's support for the referenced provisions. The commission does not concur that the proposed changes are not sufficient to address the EPA's fundamental concerns with the program. The proposed changes have addressed the EPA's major alleged deficiencies, in areas such as: practical enforceability (by improved MRR requirements); protection of air quality and NAAQS (by the proposed requirement for an air quality analysis for changes that could affect air quality); prevention of circumvention of major NSR requirements; replicable procedures for determining emission caps (by more explicit requirements concerning the determination of the emission cap and adjustments to the emission cap); and other changes. These are discussed more thoroughly elsewhere in this preamble, and the commission refers the commenter to that discussion.

Rep. Burnam commented that the proposed revisions do not address the shortcoming that a permit applicant may determine the emission cap using a potential-to-emit baseline. Rep. Burnam stated that starting from a high-end baseline allows for too lenient an emission standard. Rep. Burnam stated that actual emissions should be used to make applicability determinations.

Emission caps are developed based on the potential to emit after the application of BACT or LAER emission controls, as applicable. This is exactly the same emission standard as required for other permitting. The term "baseline" is used in determining the applicability of major NSR. The newly adopted rule makes these requirements more explicit in §116.711(H) and (I). This evaluation requires the use of actual emissions, not the potential to emit. TCEQ rules do not, and never have, allow the use of allowable emissions in lieu of actual emissions in this analysis.

The City of Houston stated that the proposed rules fail to adequately address 40 CFR §51.165(a)(2)(ii), which requires that the flexible permits program include applicability determination procedures for major NSR applicability review that use the specific provisions of 40 CFR §51.165(a)(2)(ii)(A) - (F) unless the flexible permit regulations are at least as stringent in all respects as the federal provisions. The City of Houston also commented that the proposed rules do not adequately address 40 CFR §51.166(a)(7), which requires that the flexible permit regulations include the specific applicability determination procedures of §51.166(a)(7)(i) - (vi) for PSD applicability review.

Section 116.711(2)(H) and (I) of the flexible permit rules require that these applicability determinations be performed. The commission's rules regarding PSD review in Chapter 116, Subchapter B, Division 6 are approved as part of the Texas SIP. The most recent versions of the commission's rules regarding nonattainment review in Chapter 116, Subchapter B, Division 5, as adopted prior to 2006, were

previously approved as part of the Texas SIP. The commission has proposed rule amendments, as published in the August 27, 2010 issue of the *Texas Register*, to address the EPA's concerns with the rules as amended in 2006, and is confident that these proposed amendments will be approved by the EPA as revisions to the SIP and are at least as stringent as the EPA's rules. Regardless, PSD and nonattainment applicability reviews are properly conducted for all permit applications.

The City of Houston commented that the proposed rules should require both air dispersion modeling and ambient air monitoring. The City of Houston stated that air monitoring could be used to validate and verify the required dispersion modeling, and monitoring allows for background concentrations to be measured and considered to ensure that proposed emission increases will not interfere with the attainment and maintenance of the NAAQS.

No change was made in response to this comment. Although the commission agrees that ambient air monitoring is a useful tool, it is simply not practical, necessary, or economically feasible to require site-specific air monitoring, either before or after construction, for every project which results in an emission increase. The commission already conducts extensive air monitoring for purposes of monitoring regional air quality, and specialized air monitoring in targeted areas where emissions of certain pollutants are known to be a concern. Permits issued by the commission are demonstrated to be protective, so there is typically no

justification to require monitoring in conjunction with the permit. It is possible that in specific cases, a flexible permit may include provisions for ambient air monitoring, but this would be decided on a case-by-case basis and would not be a generalized requirement for all flexible permits.

The City of Houston commented that the rule changes should include a requirement that the worst-case emissions from each individual source be included in the permit application, and that these limits from the permit application be included in the permit as an emission limit. Alternatively, the City of Houston stated that TCEQ should clarify in the rule, if only certain individual source's emission limitations are included in the permit and others are not, what the criteria are for individual source's emission limits being included in the permit. The City of Houston stated that the individual emission limitations of each source should be readily available in the permit document, in order to support compliance determinations.

No changes were made in response to this comment. The application must identify the facilities to be included in emission caps and the emissions at the maximum expected capacity; however, these rates may change if minor operational or physical changes are made after the permit is issued; of course, prior to these changes the review for major NSR determined that it was not triggered. Individual emission rate limits may be included in the permit if requested by the applicant. Other reasons for individual limits, separate caps, or subcaps may be to clearly specify a mode of operation (such as emission caps for maintenance, startup, and

shutdown) or to limit emissions of a specific compound (such as benzene). The permit will clearly identify any sources subject to individual emission limitations, and will clearly identify the applicable emission limit for those sources.

The City of Houston commented that the rules should stipulate that all source-specific emission limitations that are based on BACT or LAER must be in the permit document.

Any source-specific emission rate limits must be shown in the permit regardless of whether they are based on BACT, LAER, or some other more stringent basis, such as off-property impacts concerns. Note that most, if not all, control technology requirements are independent of a facility's operating rate and are specified in the permit conditions. No change was made in response to this comment.

EIP acknowledged that certain aspects of the proposed rules included useful clarifications or positive changes relative to the existing flexible permit rules. EIP specifically noted the following proposed rule changes as being improvements: the language clarifying that the flexible permit program may not be used to circumvent, or be used in lieu of, the PSD or NNSR programs; the clarification that exceedances of flexible permit caps or individual emission limitations constitute violations; the requirement of proposed §116.715(c)(5) that the permit, itself, reflect most of the monitoring requirements and the algorithms (for limits that are not rather directly monitored); the requirement that application representations are conditions upon which a permit is issued; the requirement that terms of existing NSR permits – when superseded by, or

incorporated into the terms of the flexible permit – be explicitly addressed in flexible permit applications; and, the proposed recordkeeping and production requirements of proposed §116.715(c)(6).

The commission appreciates the support for the cited portions of the proposed rule.

EIP commented that although the proposed rules may contain certain improvements, the proposed rule changes are not sufficient to resolve larger problems with the flexible permit program, including a lack of practical enforceability, and opportunities for permit applicants to circumvent NSR.

The commission does not agree that the rules lack practical enforceability, allow circumvention of applicable NSR requirements, or lack public participation. Specifically, the commission notes that there are several rule amendments that address practical enforceability issues, including, for example, the changes to §116.715(b), which specifies that the permit holder shall comply with all flexible permit emission caps and individual emission limitations; §116.715(c)(5),(6), and (12), regarding MRR requirements; §116.715(d), regarding specifications for monitoring systems; and §116.716(g), regarding specification of an annual emission limitation in tons per year and a practically enforceable short term emission limitation. This rulemaking also contains a number of amendments

specifically addressing major NSR requirements, relating to applicability, circumvention, and appropriate control technology reviews for major NSR. No change was made in response to this comment.

EIP commented that there is a lack of public participation when changes are made at facilities covered by a flexible permit.

No change was made in response to this comment. Although the EPA formally disapproved the public participation rule in the flexible permit program, §116.740, the commission adopted new and amended rules in Chapters 39 and 55 on June 2, 2010 (as published in the June 18, 2010 issue of the *Texas Register*) that address concerns with and applicability of public participation requirements for flexible permit applications. Therefore, this comment is beyond the scope of this rulemaking.

EIP commented that the overhead for the permit applicant, TCEQ staff, and the public associated with adhering to (for the permit holder) and understanding and enforcing (for the staff and the public) a permit issued under the flexible permit program, and meshing the requirements for that permit with those for the PSD, NNSR and other minor NSR programs, outweighs the benefits the permit applicant receives from this program. EIP stated that if adopted, the proposed rules will continue to place Texas industry at risk of violating the FCAA, and will deny the public the protections offered by that federal law.

No changes were made to the rules in response to this comment. The commenter has not clearly explained what it means that the flexible permit program creates an "overhead" of requirements that outweigh the benefits of the program for applicants, the public, or TCEQ, and therefore the commission cannot provide a response that specifically addresses this comment. The flexible permit rules are for a separate minor NSR program, and are developed to provide operational flexibility while ensuring that major NSR is not circumvented, and that practically enforceable permits are issued which meet requirements for control technology and are protective of public health and the environment. The EPA has consistently recognized that states have flexibility to develop their minor NSR programs, required by §110(a)(2)(C) of the FCAA. Texas has done this while meeting the applicable federal and state statutory and regulatory requirements. The amendments adopted in this rulemaking ensure that the practices of the commission in developing and issuing enforceable permits are adequately and thoroughly included in the rules for this minor NSR program. Over the prior years that this program has been in place, substantial air quality improvements have been made under the flexible permits program, and at the same time, flexible permit holders have benefited from the flexibility afforded by the program. The commission does not concur that the flexible permit program violates the FCAA, and it expressly finds that these rules meet the applicable requirements of the FCAA.

EIP commented that TCEQ should not approve the proposed flexible permit program rules because the flexible permit program is not approvable into the Texas SIP. EIP stated that the program can be an addition to federal SIP-approved requirements, but the program cannot be used in lieu of or replace the obligation of new sources of air pollution or modifications of existing sources to obtain NSR, including minor NSR, permits.

This comment is not specific as to why the flexible permit program is not approvable into the SIP. The flexible permits program does not replace or eliminate the obligation of new or modified sources to obtain NSR authorization, be they minor or major sources. The rules do not replace the major source permitting rules in Chapter 116, Subchapter B, Divisions 5 and 6. Further, these rules do not replace the minor NSR rules in Chapter 116, Subchapter B; rather, this is an additional minor NSR permit program that can be approved by the EPA as part of the Texas SIP. No change was made in response to this comment.

EIP commented that, based on the language of proposed §116.710(a)(5), §116.715(f), and §116.716(a)(2)(B), a PSD or NNSR source could obtain a flexible permit, and therefore all of the reasons the EPA stated for rejecting the current flexible permit program as not meeting substitute major NSR program requirements also apply to the proposed flexible permit program.

The commenter is correct that under the existing and proposed flexible permit rules, a project with facilities subject to PSD or NNSR can be included in a flexible permit, and can be included in a cap in a flexible permit; this is discussed in more detail elsewhere in this preamble. However, the flexible permit authorization is a minor NSR authorization only, and does not exempt any facilities from meeting all applicable major NSR requirements, such as appropriate federal BACT, or LAER, or other federal requirements. In summary, if there are facilities subject to PSD and/or NNSR requirements, a PSD and/or NNSR authorization is part of the same document that includes the minor NSR flexible permit authorization. No change was made in response to this comment.

EIP commented that the EPA disapproved the current flexible permit program because the MRR was not sufficient to satisfy the criteria of enforceability. EIP stated that the proposed changes (§116.715(c)(5), (6), and (12); (d); and §116.711(2)(G)) do not remedy this defect. EIP stated that proposed §116.715(c)(5)(A) requires monitoring or demonstrating compliance, thus, monitoring is not necessarily required. Furthermore, §116.715(c)(5)(C) provides that whatever monitoring is actually included in the permit can nevertheless be disregarded without any public review if the permittee requests it. EIP stated that similarly §116.715(d)(2)(E) also provides the executive director with wide latitude for picking a monitoring system regardless of the parameters set forth in §116.715(d)(2)(A) - (D).

The commission does not agree with the comment. The language in proposed §116.715(c)(5)(A) relating to monitoring or demonstrating compliance is a

deliberate choice because in some cases direct monitoring of emissions or parameters may not be the only possible method of determining compliance. In addition, in some cases the permit may specify a method of monitoring plus additional methods or techniques related to determining compliance. Proposed §116.715(c)(5)(C) and (d)(2)(E) do allow for a permit holder to request an alternative method of monitoring or sampling, but these requests must be approved by the executive director prior to their use. The ability of the executive director to approve alternate methods is necessary because the rules and standard methods cannot address every possible fact situation, and at times a unique or creative approach is needed, or is more efficient than a standard method. Both rules adopted by the commission, such as §116.115(b)(2)(D) and §115.725(a)(4), and permits routinely provide the executive director with the authority to evaluate and approve alternate methods of testing and monitoring. No change was made in response to this comment.

EIP commented that, in disapproving the existing flexible permit program, the EPA found the rules fail to require specific recordkeeping sufficient to ensure that all terms and conditions of existing permits (including representations in the applications for such permits) that are incorporated into the flexible permit continue to be met. The rules lack adequate program requirements for the tracking of existing SIP permits' major and minor NSR terms, limits, and conditions, and whether such requirements are incorporated into a flexible permit or they remain outside the coverage of the flexible permit. Minor and major NSR permits, as well as minor NSR SIP permits by rule and standard permits, can be incorporated into a flexible permit

without any program requirement in place that ensures the SIP permits' terms and conditions are included in the flexible permit, as published in the *Federal Register* (74 FR 48493). EIP stated that the proposed rules have the same problem. EIP stated that the proposal explains that the "flexible permit would then become the controlling authorization for all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to all or part of the facilities."

No change was made in response to this comment. Section 116.711(2)(M)(vii) specifically requires applications that include currently authorized facilities issued under Chapter 116, Subchapter B must 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. This will allow the commission to review the application to ensure there is no backsliding from existing requirements. Therefore, to be eligible for a flexible permit, applicants will have to maintain sufficient records to meet this specific requirement.

In addition, although an applicant can apply for a flexible permit to change the authorization for minor sources from authorization under Subchapter B, or from a standard permit to permit by rule, partial permitting is not allowed. As a result, facilities cannot have both a Subchapter B minor NSR permit and a Subchapter G

minor NSR permit. Facilities that are currently authorized by a permit by rule or a standard permit that are proposed to become authorized under a flexible permit must meet the requirements to be authorized under the Subchapter G rules.

The primary purpose of this rulemaking is to address deficiencies alleged by the EPA, as discussed elsewhere in this preamble. With regard to major sources, §116.710(a)(6) specifically provides that no person shall use the rules in Subchapter G to circumvent the requirements for major NSR permits that are in Chapter 116, Subchapter B, Divisions 5 and 6. This paragraph, together with §116.711(2)(H) and (I), ensure that major NSR is considered prior to issuance or amendment of a flexible permit, a minor NSR permit, and that any existing major NSR permit continues to comply with the applicable requirements. Therefore, there is no basis for adding additional requirements in the flexible permit rules for tracking major NSR permit terms in the Subchapter G minor NSR permit.

The EPA commented that the commission must delineate the definitions of "account," "facility" and "group of facilities" where used in Subchapter G. In addition, it is not clear how a "unit" relates to these terms. The EPA states that the use of these terms must be explained sufficiently so that it is clear why one (or more) of these terms is used in certain instances and not in others throughout Subchapter G.

The commission has revised the rules in response to this comment. As the EPA is aware, the cornerstone of the Texas air quality permitting program is a "facility." The term is defined in the Texas Clean Air Act, Texas Health and Safety Code, §382.009(3), and in commission rule in §116.10(4), and is approved as part of the Texas SIP. "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 an air contaminant. The commission did not intend the use of the term "unit" and has replaced it with the most appropriate term "facility" in §116.711(2)(N) and §116.715(c)(9).

However, the commission has made no change with regard to the use of these three terms in Subchapter G, except as discussed elsewhere in this preamble relating to the EPA's comment concerning the use of the terms "account" and "group of facilities" in specific rule sections. A flexible permit is limited to facilities at one account, and can cover a group of facilities or all the facilities at that account. Further, the term "account" is defined in §101.1(1) as "for those sources required to be permitted under Chapter 122, 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." An account can include multiple "sources," which, for these

rules, is equivalent to multiple "facilities" under Texas minor NSR definitions.

This definition, and the definition of "facility," are included in the commission's "General Rules" Chapter, and as such are applicable to all of the commission's rules for its air quality programs.

In its final disapproval of the flexible permit rules, the EPA stated that the definition of "account" is not limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source. The EPA approved the use of similar text in §116.111(2)(C) without a similar limitation. The commission cannot adopt a change to the definition of "account" because it was not proposed for change. Regardless, the commission declines to effectively limit the use of the term "account" in the Subchapter G rules because major sources can be included under a cap, as discussed elsewhere in this preamble. The flexible permit rules allow for different federal sources, which may have different primary Standard Industrial Classification (SIC) codes, located at the same account to be treated separately in the flexible permit if necessary to establish limits on potential to emit. This situation is expected to be rare as there are very few accounts that contain more than one federal source. Regardless, the sources are reviewed to determine major NSR applicability and the requirements are followed if triggered. Therefore, the EPA's concern is not warranted.

Inclusion of Major Sources in a Flexible Permit

The EPA submitted several comments relating to various portions of §§116.711, §116.716, and 116.718, stating that, as proposed, the rules could be interpreted as allowing nonattainment major stationary sources or major modifications to be authorized under a flexible permit. The EPA stated that the rules must be revised to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification. The EPA also stated that emissions from facilities subject to PSD BACT and/or NNSR LAER cannot be included in an emission cap. The EPA provided suggested rule language to clarify that a flexible permit application cannot include facilities authorized by a PSD or major NNSR permit.

The commission does not agree with the EPA's position that the flexible permit rules must categorically exclude major stationary sources and major modifications from coverage within a flexible permit or an emission cap. The commission emphasizes that projects that trigger major NSR requirements such as PSD review or NNSR are required to comply with applicable major NSR requirements, as specified under Chapter 116, Subchapter B, Division 5 or 6, as applicable, and under applicable federal regulations. These requirements include appropriate control technology determinations for major NSR BACT or LAER. The inclusion of a major stationary source or major modification in a cap established in a flexible permit does not negate or circumvent the application of applicable federal major source requirements any more so than the inclusion of such a project in a traditional NSR permit authorized under Chapter 116, Subchapter B. When facilities are to be placed under an emissions cap, the project is reviewed as a modification of those facilities, and if the project increase and the net emission

increase are significant, it is reviewed as major. For changes under a cap that are subject to major NSR, the application is reviewed to determine whether the facilities are collocated on the basis of whether they are on contiguous or adjacent property, are under common control and ownership, and whether they are part of the same primary SIC code, just like changes to any facility or unit that is not under a cap. Otherwise, it is reviewed as a minor modification in the same manner as for a construction permit. For flexible permits which include major sources, as with all major NSR permits, the TCEQ does not aggregate or combine major stationary sources which have different primary SIC codes for purposes of major NSR.

Subsequent to the submittal of these comments, the executive director's staff held discussions with representatives of EPA's Region 6 Office, Office of Air Quality Planning and Standards, and Office of General Counsel. The EPA representatives stated that major sources, subject to PSD or NNSR permitting requirements, can be included in and operate under a cap. However, EPA representatives also stated that those major sources (units) must still comply with all PSD or NNSR requirements, as applicable, including any requirements that were effective prior to the unit being included in a cap. For example, if a limit, such as a pound per hour or pound per million Btu, is established in a prior PSD permit, then the unit remains subject to such limit. Although an annual BACT limit is not required by EPA, if one has been established, the PSD unit must still comply with it also. In addition, EPA representatives also noted that if a unit is later modified and a new

BACT determination is made without any annual limit, then it can remain in or be removed from the cap as long as the change is made using a SIP-approved process for PSD permits, including evaluation of BACT, preparation of an air quality analysis, and public notice.

In response to EPA's comments, the commission revised §116.710 by adding text that provides, that major NSR requirements, including retention of established limits must be included for issuance of a flexible permit. In addition, the commission added §116.716(h) from proposal that requires that when a cap is established or adjusted, major NSR requirements must be met prior to issuance, amendment or alteration of the permit.

The EPA stated that it must be clear that minor NSR BACT determinations are required to be at least as stringent as the federal applicable requirement, e.g. SIP rule, new source performance standards (NSPS), NESHAPS, and MACT.

The commission respectfully disagrees with the comment that minor NSR BACT determinations are required to be at least as stringent as federal requirements of the type listed in the comment. Section 116.711 of the flexible permit rules requires that any facilities authorized by the permit meet all of the requirements cited (such as NSPS, NESHAP, and MACT emission standards) in addition to BACT. The application of BACT is an additional requirement, not a replacement or substitute.

Facilities which are subject to a combination of standards must comply with all applicable requirements, including whichever is most stringent. The commission notes that §116.715(10) provides that acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission 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. No change was made in response to this comment.

The EPA commented that each individual unit under an emission cap must still meet at least its specific emission limitation derived from a federal applicable requirement, e.g., a SIP rule, Minor NSR SIP BACT determination, NSPS, MACT, or NESHAPS. The EPA stated that a unit cannot violate its federal applicable requirement. The EPA stated that an exception could be units that were previously grandfathered units not subject to any federal applicable requirement other than a Minor NSR SIP BACT determination made at the time of issuance of the original flexible permit.

Regardless of whether a unit is included in a flexible permit emission cap, any emission limitation originating from a federal requirement (such as major source BACT or LAER, NSPS, MACT, or NESHAPS) still applies. Compliance with federal requirements such as major source BACT or LAER, NSPS, NESHAPs, and MACT is

required by §116.711(2)(C), (D), (E), and (F) respectively. No change was made in response to this comment.

The EPA stated that proposed §116.715(c)(7), last sentence, must include a reference to "account." The EPA also stated that proposed §116.715(c)(10) must include a reference to "account." The EPA stated that proposed §116.716(d)(4) and §116.718(c) must include references to "account" and "group of facilities."

As discussed in more detail in the Section by Section portion of this preamble for §116.716, the commission has revised the cited rules to include references to the terms "group of facilities" and "account" as requested by the EPA.

Comments on §116.13

The EPA stated that because the commission is proposing to eliminate the insignificant emissions factor, the reference to it in the definitions of "emissions cap" and "individual emission limitation" at §116.13 must be deleted.

These changes recommended by the EPA were already included in the proposed revisions to the referenced definitions in §116.13, as indicated by the bracketed text, so no further action is necessary.

Pantex commented that neither §§116.10, 116.12, nor 116.13 defines "significant level for that plant-wide applicability limit (PAL) pollutant." Pantex recommended that for clarity, §116.12 or §116.10 should contain a definition of "significant level for that PAL pollutant."

The rule has been revised to eliminate the reference to "significant facility" as defined in §116.12, which is the origin of the language that this comment references. Therefore, there is no longer a need for a definition of the referenced phrase in the adopted rules.

EIP stated that the CPMS definition in §116.13(2) should clarify when, if ever, what are thought to be abnormal readings may be discarded in the recording of the "average operational parameter values."

The definition for CPMS is consistent with the EPA's NSR rules and therefore the commission will not attempt to specify criteria for "abnormal readings" in this rule. The permits issued by the TCEQ typically require that all data be used except if the monitor is malfunctioning. No change was made in response to this comment.

TIP and TXOGA commented that the proposed definition of CPMS fails to specify the type of averaging period that will apply. TIP and TxOGA suggested adding the phrase "record in units of

the applicable emission limit" to the definition, and allow for any further averaging period details to be specified in applicable permits as necessary.

The commission has not changed the rule in response to this comment. The addition of the suggested language to the definitions of CEMS, CPMS, and PEMS would complicate the definitions and add little new information. The relevant averaging period and any associated details will be specified in the permit.

TCC, TIP, and TxOGA commented on the proposed definitions of "continuous emission monitoring system" and "continuous parameter monitoring system" in §116.13. TCC stated that the commission's proposed definitions are modified versions of federal definitions of these terms, and that the commission revised these definitions for the purpose of the flexible permit program. TCC stated that the state and federal definitions should be consistent to avoid confusion and promote clarity. TCC, TIP, and TxOGA also noted that the proposed definitions are different from the commission's definitions for "continuous monitoring" found in Chapter 115, Control of Air Pollution from Volatile Organic Compounds, and "CEMS" and "PEMS" found in Chapter 117, Control of Air Pollution from Nitrogen Compounds. TCC, TIP, and TxOGA recommended that TCEQ align these various definitions and place them in Chapter 101.

The commission has not changed the rule in response to this comment. TCC is correct that the commission adapted federal definitions of "continuous emission monitoring system" and "continuous parameter monitoring system" for use in

§116.13. Although this did introduce minor differences between the definitions of these terms as stated in §116.13, and 40 CFR §52.21, these differences are minimal and administrative in nature and should not introduce any confusion. TCC is also correct that the proposed definitions in §116.13 are not the same as the definitions of "continuous monitoring", "CEMS", and "PEMS" in other TCEQ rule chapters such as Chapter 115 or Chapter 117. Chapters 115 and 117 are rules intended to ensure that reasonably available control technology is applied to new and existing sources in specific areas in order to help those areas achieve and maintain attainment with the ozone NAAQS. The objectives, control technology requirements, implementation strategy, and underlying rule language is necessarily different when comparing a minor NSR authorization program such as the commission's flexible permits program, to rules such as those in Chapters 115 and 117. The definitions as proposed are more appropriate for use with the flexible permits program than are the existing definitions within Chapters 115 and 117. Revising the definitions in Chapters 115 and 117, or establishing new definitions within Chapter 101, would be beyond the scope of this rule change.

Comments on §116.711

TIP and TxOGA stated that proposed §116.711(2)(C)(i) appears to limit the ability to apply additional controls beyond BACT to only existing facilities. TIP and TxOGA stated that permit applicants should have the option to apply controls above BACT to both new and existing facilities. TIP and TxOGA stated that TCEQ should delete the term "existing" from the proposed rule.

The commission agrees that permit applicants should have the option to apply additional controls to new facilities as part of the flexible permit. The commission has revised the rule so that permit applicants would have the option to apply controls in excess of BACT to new facilities to offset or balance controls on existing facilities.

The City of Houston commented on §116.711(2)(G), stating that the proposed rule makes initial compliance testing with ongoing compliance as determined by engineering calculations, parametric or predictive monitoring, stack monitoring, or stack testing obligatory instead of an option within TCEQ's discretion. The City of Houston stated that emission estimates based on emission factors typically are a replication of what the emission limitations are based on, rendering the emission limitations meaningless, and the permit need only limit the relevant process variable. The City of Houston stated that compliance should be independently verified by measurement as part of the performance demonstration. The City of Houston stated that the performance demonstration should include continuous or periodic parametric or predictive monitoring, emissions monitoring, or stack testing, if engineering calculations based on process variables are used to determine ongoing compliance.

No change was made in response to this comment. Emission limitations for individual facilities are typically based on BACT, not on emission factors developed from stack testing. If technically feasible and economically warranted, a

stack test will be required to determine actual emissions of pollutants from the facility. These results may be used to develop an emission factor which may be then used in determining and reporting actual emissions from the facility. For example, if fuel flow to a heater is monitored, emissions factors may be generated in terms of pounds of pollutant per cubic foot of natural gas flow firing the heater. There are other sources, such as tanks, where stack testing is not practical. In these cases, generally accepted calculation methods are used with measured parameters, such as throughput, to estimate actual emissions.

The City of Houston and EIP commented that proposed §116.711(2)(H) and (I) do not adequately address the EPA's applicability determination concern because they allow the permit applicant to conduct a separate analysis as the applicability review and submit it with the application. EIP stated that the proposed rules do not provide requirements for how the applicability determination is to be made; and do not state that the applicability determination must be based on actual emissions and on emissions increases and decreases that occur within a major stationary source. The City of Houston stated that allowing a regulated source to make applicability determinations is not consistent with federal NSR and PSD applicability review requirements. In addition, the City of Houston commented that the methodology prescribed by 40 CFR §51.165(a)(2)(ii) and §51.166(a)(7) is extensive, and the proposed rules fail to prescribe the specific applicability review requirements.

State and federal rules require that regulated sources complete applicability determinations in accordance with the applicable rules. The reviewing authority will then review the analysis submitted, require additional information, if necessary, and ultimately agree or disagree with the analysis. The commission respectfully disagrees that its rules, in §§116.12, 116.150, 116.151, and 116.160, fail to prescribe the specific applicability review requirements. No change was made in response to these comments.

The City of Houston and EIP commented that the proposed rules allow the applicant to self-evaluate for NSR and PSD applicability, without review by the state or the public, and that the proposed rules contain no mechanism to prevent an erroneous determination from being carried forward. The City of Houston commented that the applicability determination should be conducted by TCEQ and the analysis should be consistent with 40 CFR §51.165(a)(2)(ii) and §51.166(a)(7).

The federal rules cited do not require the reviewing authority to independently perform an analysis for federal NSR for every project contemplated by every regulated entity in the state. Rather, these rules require the permit program, though rules and implementation of those rules, specify the procedure identified (or equivalent). To require that every emission-related project be reviewed would be impractical. The proposed rule requires these analyses be submitted with any permit application, be submitted and approved before any physical change having

a potential increase in actual emissions sufficient to require netting (§116.718(a)), and to identify any changes to facilities in the semiannual report, (116.715(c)(12)(A)(i)(V)). No change was made in response to these comments.

TIP and TxOGA commented that in proposed §116.711(2)(H) and (I), the commission introduces a requirement for a separate analysis of applicability of federal PSD or nonattainment review. TIP and TxOGA expressed concerns that the proposed language is redundant of the existing requirement to ensure compliance with major NSR, and is not clear as to the scope of the "separate analysis" requirement. TIP and TxOGA commented that the major NSR applicability analysis is typically combined for one or more pollutants, and is typically integrated into a single application document with a discussion of each of the other rule requirements for a permit. TIP and TxOGA commented that the existing rule language is sufficient to establish the requirement to assure compliance with major NSR requirements, and objected to adding a new, separate documentation requirement.

While the commission understands TIP's and TxOGA's concern that other existing rules already require compliance with major NSR, the proposed requirement is necessary to satisfy the EPA's concern that the existing flexible permits program could be used to circumvent major NSR. The EPA specifically requested rule language to require that a federal applicability determination be conducted before the permit applicant could use the rules in Subchapter G. The commission agrees that the term "separate" may be misleading and is unnecessary, and it has been

removed from the rule. This analysis is required prior to commencing any physical or operational change that may be a major modification.

Rep. Burnam and EIP commented that §116.711(2)(J) should require computer dispersion modeling. Rep. Burnam and EIP stated that assessing ambient impacts without computer dispersion modeling is no longer considered scientifically valid. In addition, should modeling be conducted, EIP stated that the regulation does not specify which computer dispersion modeling must be used. Rep. Burnam stated that some computer models are no longer favored. EIP stated that 40 CFR §51.160(f)(1) requires the proposed program to use the Guideline on Air Quality Modeling (40 CFR Part 51, Appendix W).

No change was made in response to this comment. There can be situations where computer dispersion modeling is not necessary to determine that a proposed change would interfere with the NAAQS or other impacts criteria. For example, it may be apparent through engineering judgment or calculations that a small increase at a site would not result in an impacts concern, especially if existing modeling was available demonstrating that the source before the proposed change was meeting applicable standards and effects screening levels by a significant margin. In addition, computer dispersion modeling carries substantial costs. The commission will retain the flexibility to determine which projects require computer dispersion modeling on a case-by-case basis. Although the commission generally concurs that dispersion modeling used to support permit actions should

comply with the EPA's Guideline on Air Quality Modeling, this guideline is very general and may not adequately cover or address all source configurations or situations. In addition to 40 CFR Part 51, Appendix W, the TCEQ applies internally-developed guidance and procedures in the review of dispersion modeling. Therefore, the commission declines to add the suggested reference to 40 CFR Part 51, Appendix W to the rule.

EIP recommended that the rules require NAAQS impact modeling for all amendments or alterations to flexible permits for which dispersion modeling was not previously required. EIP commented that as written, proposed §116.711(2)(J) would not require this if the amendment or alteration did not increase an individual limit or the overall cap.

As stated previously, computer dispersion modeling is not necessary in every case in order to determine if a proposed change would interfere with maintenance or attainment of the NAAQS. The commission will retain the flexibility to require computer modeling on a case-by-case basis. No change was made in response to this comment.

TIP and TxOGA commented on proposed §116.711(2)(J), which requires the permit applicant to conduct an air quality analysis to demonstrate that the proposed action will not interfere with attainment of maintenance of the NAAQS. TIP and TxOGA stated that this proposed requirement is redundant with existing requirements, and appears to track FCAA, §110(l), a test

that is not applicable to individual permit actions. TIP and TxOGA also stated that creating a separate obligation with regard to NAAQS could create confusion with regard to the air quality analysis that is more generally required under Chapter 116 permitting.

The commission acknowledges that existing rules already provide the commission with the authority to require modeling or monitoring to assess air quality impacts, but this more explicit requirement with respect to the NAAQS is necessary to address the EPA's concerns that the flexible permits program does not sufficiently protect against changes that could interfere with attainment or maintenance of the NAAQS. The NAAQS-related requirement is sufficiently clear as to not cause confusion with other analyses or reviews that are required for air permits. No change was made in response to these comments.

The EPA requested clarification of proposed §116.711(2)(M)(ii), (iv), and (vi), as to why the identification does not include "in an account." The EPA also asked for clarification as to why subparagraphs (ii) and (vi) should not require the identification of "each facility included in a 'group of facilities'."

The cited rules do not include the phrase "in an account" because a flexible permit may only authorize facilities at a single account, as required by §116.710(a)(4). Similarly, by logical extension of the same rule, an emission cap can only include facilities that are all under a single account. Adding the phrase "in an account" to

the cited rules would be redundant and not convey any new information about the facility or emission cap. With respect to the phrase "each facility included in a group of facilities," the existing rule requires that the permit applicant identify each facility; this implicitly includes any facilities that are part of a group of facilities. The phrasing suggested by the EPA would not change the information provided by an applicant and would make the rule more confusing. The commission has not changed the rule in response to this comment.

TIP and TxOGA commented on §116.711(2)(M)(vii), which requires an analysis of how terms and conditions of prior Subchapter B permits will be carried forward in a flexible permit. TIP and TxOGA stated that the proposed provision is unworkable as permit conditions do not remain static, and not every condition can be maintained. TIP and TxOGA stated that the proposed rule should provide an opportunity for applicants to show how conditions from previously-issued permits changed, or are changing, in a flexible permit or permit amendment.

The commission has not changed the rule in response to this comment. The cited requirement is necessary so that the applicant and TCEQ can identify relevant terms and conditions of the existing Subchapter B permit and address them appropriately in the proposed flexible permit. The overall intent of this requirement is to ensure that the change to a flexible permit does not result in any backsliding of emission controls or any other applicable requirements. An analysis must be completed for each condition explaining how the requirements will be

included in the proposed flexible permit. The commission agrees that permit conditions and limits do not remain static, and may change based on subsequent applications presented to the agency. The analysis required by §116.711(2)(M)(vii) must justify changes and demonstrate that emission control requirements are not relaxed or eliminated with the issuance of a flexible permit. The rule does not require that the proposed flexible permit maintain identical terms, limits, and conditions compared to the original permit. Once a facility or facilities are authorized under the flexible permit, the terms and conditions of the previous permit would no longer apply but could be carried forward in the flexible permit.

EIP commented that TCEQ proposed §116.711(2)(M)(vii) to address the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for. However, §116.711(2)(M)(vii) is just a requirement of what needs to be the in an application, not a permit itself. EIP stated that, therefore, the proposed rule fails to address the EPA's concern.

The commission does not agree with the comment, and no change was made in response to this comment. The cited rule is necessary so that the applicant and TCEQ can identify relevant terms and conditions of the existing Subchapter B permit and address them appropriately in a subsequently issued flexible permit. The overall intent of this requirement is to ensure that the change to a flexible permit does not result in any backsliding of emission controls or any other

applicable requirements. However, the permit terms, limits, and conditions may still change as part of this process. An analysis must justify changes and demonstrate that emission control requirements are not relaxed or eliminated with the issuance of a flexible permit. It would not be practical for the rule to require that the proposed flexible permit maintain identical terms, limits, and conditions compared to the original Subchapter B permit. To do so would not result in providing operational flexibility that is a feature of this permit program. The rules adequately address the issue of backsliding, and the ability to properly review any requested change.

EIP recommended that permit alteration or amendment materials for flexible permits should identify any terms, conditions, and representations of prior permits that will be superseded by or incorporated into the altered or amended flexible permit. EIP stated that a variation of proposed §116.711(2)(M)(vii) would accomplish this.

The commission has not changed the rule in response to this comment. In cases where the terms, conditions, or representations of existing permits have been incorporated or superseded into a flexible permit, an analysis of those terms and conditions would be performed and any changes justified. In any subsequent permit action, a similar justification would be required if those permit terms or conditions were to change.

Comments on §116.715

EIP commented that §116.715(c)(5), as proposed, would not require a permit statement of the emissions calculation that is used for compliance in those situations where there is continuous operating parameter monitoring but where CEMS are not measuring emissions levels. EIP stated that the method of converting the parameter measurements to emission estimates should be specified.

The commission agrees that the calculation methods should be identified for all pollutants and facilities, and has removed the cited exceptions from the rule language.

TIP and TxOGA commented that the proposed MRR requirements in §116.715 should not impose PAL requirements where they confuse or complicate the flexible permits program for sites that have not opted into the PAL program.

The commission acknowledges that the emission cap MRR requirements of proposed §116.715 are similar to requirements of the federal PAL program. The commission used the PAL requirements as the foundation for these MRR requirements because the use of existing federally-approved requirements should be acceptable to the EPA. Although these requirements may have originated from another program, these requirements are reasonable to support compliance with emission caps in the flexible permit program. Many of the requirements and

elements of these proposed MRR rules cover the same or similar information that is already maintained under existing flexible permit rules or permit requirements. Although the implementation of these requirements may require some changes in flexible permits and in the practices of permit holders, these requirements can be implemented without unreasonable confusion or burden on the permit holder.

Pantex noted that proposed §116.715(c)(5)(B) requires that each flexible permit specify methods for calculating annual and short term emissions for each pollutant when continuous emission monitoring or continuous operating parameter monitoring is not required. Pantex further noted that §116.711 as proposed does not include any requirement for an applicant to represent the use of continuous emission monitoring or continuous operating parameter monitoring in the application. Pantex asked, with respect to §116.715, how would TCEQ determine if continuous emission monitoring or continuous operating parameter monitoring is to be included in the operation of the unit.

Several factors would be considered by both the permit applicant and TCEQ when making the determination as to whether continuous emission monitoring or continuous operating parameter monitoring would be required under the permit. The determination of the appropriate type of monitoring would be a case-by-case decision involving the nature of the facility and the nature of the pollutant(s) to be monitored. Certain processes, for example coatings operations, can accurately determine emissions using relatively straightforward material balance

calculations. It would generally not be necessary to require continuous emission monitors for such a situation, unless other factors were a concern. However, if a process has emissions of pollutant(s) that cannot be predicted or calculated in a straightforward way, continuous emission monitoring or continuous emission parameter monitoring is more likely to be required, so that compliance with the permit can be confirmed. No change was made in response to this comment.

Pantex asked, with respect to the terms of proposed §116.715(c)(5)(B), whether the commission proposes incorporation by reference (to the permit application), or whether the commission extracts the methodologies from the application and incorporates them into the permit.

In many cases, the TCEQ will reference standardized methods (such as those used to determine emissions from tanks or loading). In other cases, the permit may specify how sample data is to be used to estimate actual emissions, such as for cooling water. The permit application may be referenced in a permit condition, but it is unlikely that complex calculation methods would be reproduced in their entirety in the permit. In addition, §116.116(a) and §116.715(c)(8) provide that the conditions upon which a permit is issued include the representations with regard to construction plans and operation procedures in an application for a permit, as well as any general and special conditions attached to the permit. No change was made in response to this comment.

Pantex commented that proposed §116.715(c)(5)(B),(d)(1), and (2) appear to be redundant, or at least overlapping, regarding conditions that must be provided in the permit to be issued. Pantex commented that the provisions should be combined.

No change was made in response to this comment. Section 116.715(c)(5)(B) is intended to ensure that, in the general case, all flexible permits include appropriate calculation methods to determine emissions. Section 116.715(d)(1) and (2) contain more specific monitoring and calculation requirements that only apply to facilities that are subject to an emission cap. While these rules may appear to be overlapping, the commission has purposely identified which conditions will be applicable in every permit in §116.715(c), and which conditions will be required for facilities subject to caps in a flexible permit. The commission has determined that this organization makes this sufficiently clear.

EIP recommended that proposed §116.715(c)(8) regarding application representations should explicitly say that a violation of a condition on which a permit was issued is a permit violation. EIP expressed concern that the term "operation procedures" does not have a sufficiently agreed-upon connotation. EIP suggested that providing examples (e.g., design heat rate or average fluid residence time or tons per hour throughput) would help clarify the term.

The commission has rephrased §116.715(c)(8) to state that noncompliance with permit representations constitutes noncompliance with the permit. The term

"operation procedures" has not been changed, as it has been used for many years in Chapter 116 rule language concerning permit representations, and the commission is not aware of any difficulties with the terminology.

TCC, TIP, and TxOGA opposed the proposed reporting requirements in §116.715(c)(12)(A)(i). TCC stated that the flexible permit program is a minor NSR program, and TCC stated that the burden of the reporting requirements is not justified for a minor NSR program. TIP and TxOGA stated that the reporting requirements were duplicative of other rules such as the Federal Operating Permits Program and Chapter 101, and were excessive and unduly burdensome. TCC stated that a requirement to keep records sufficient to show compliance is all that should be necessary.

No changes were made in response to this comment. The commission has determined that the reporting requirements are necessary as part of the changes needed to obtain EPA approval for the flexible permits program. The EPA's notices relating to disapproval of the program specifically referred to what it perceived as a lack of documentation and enforceability with respect to emission caps. The requirement for semiannual reporting will ensure that the owner or operator is attentive to how changes at the site may affect compliance with the emission cap, and ensures that the commission, and by extension the public, can readily determine whether or not the permit holder is maintaining compliance with the emission cap.

Pantex and TCC expressed concern relating to the requirement for "all data" in §116.715(c)(12)(A)(i)(IV). Pantex and TCC stated that a literal reading of the requirement could require a permittee to provide all quality assurance and quality control data for each source and parameter monitored, which could represent an immense and unwieldy amount of data. Pantex provided an example of a boiler that could have four or more parameters monitored; if the system maintains data points for every 15 minutes, this would be 11,520 data points for a 30-day month. This does not include the quality assurance and quality control span and zero-span checks that might be performed by a continuously monitored system. Pantex noted that while this language in §116.715(c)(12)(A)(i)(IV) replicates language in Chapter 116, Subchapter C, Plant-Wide Applicability Limits, literal compliance would inundate the TCEQ with detailed information that might never be reviewed, and the data could be provided in a format that the TCEQ might not be able to review. Pantex recommended that the term be replaced with "all pertinent data", "all data sufficient to demonstrate compliance," or a requirement that each permit provide case-by-case specification of data to be submitted.

The commission concurs with the commenters' recommendation and reasoning to use more specific terminology in the cited rule, and has therefore rephrased this requirement so that the permit holder is only required to submit such data as is necessary to demonstrate compliance.

TCC, TIP and TxOGA commented that the term "monitoring system" as used in §116.715(c)(12)(A)(i)(VII) is not defined. TCC stated that there should be more clarification of this term. TIP and TxOGA stated the term could be interpreted to mean equipment such as fuel flow meters or hydrogen sulfide analyzers as they are used to calculate actual emissions.

In §116.715(c)(12)(A)(i)(VII), the term "monitoring system" is intended to mean any device, system, or method that is used to determine compliance with an emission cap, as described under §116.715(d)(2)(A) - (D). The monitoring system could be a CEMS, PEMS, or a system that uses emission factors or mass balance calculations to determine emissions. The term is meant to encompass any systems providing an input into the emission rate determination. If equipment such as fuel flow meters or hydrogen sulfide analyzers are used as the basis for verifying compliance with the emission cap, then that equipment would be included in this requirement. The commission has revised the rule language to clarify that the term "monitoring system" as used in this rule applies only to systems that are used in determining compliance with the emission cap or any individual emission limit of the permit.

Pantex and TCC commented that proposed §116.715(c)(12)(A)(i)(VIII) referred to §116.716(e)(1), but there is no §116.716(e)(1) in the newly formatted regulations. Pantex and TCC suggested that the reference was meant to be §116.716(d)(1).

Pantex and TCC are correct that the reference to §116.716(e)(1) is an error. The citation has been corrected to refer to §116.716(f)(1).

Pantex, TIP, and TxOGA commented that §116.716(d)(1) refers to a shutdown lasting six months, while §116.715(c)(12)(A)(i)(VIII) refers to a one-week shutdown. The United States Department of Energy/National Nuclear Security Administration recommended use of a six-month time frame for adjusting emission caps for shutdown facilities. TIP and TxOGA opposed the proposed changes to the existing rule concerning shutdowns, and stated that this aspect of the rule was not an EPA approval issue and the existing rule should be retained.

The reference to a one-week shutdown period in §116.715(c)(12)(A)(i)(VIII) is an error and has been corrected. The commission has maintained the proposed six-month timeframe for the adjustment of emission caps due to the shutdown of cap facilities. The six-month timeframe allows for a reasonable degree of operational flexibility, while ensuring the maintenance of appropriate emission controls on facilities subject to an emission cap.

Pantex recommended that the term "shut down" as used in §116.715(c)(12)(A)(i)(VIII) should be clarified. TIP and TxOGA also noted that the term "shut down" was not defined and could be read to include turnarounds and other routine maintenance activities. Pantex gave an example of a facility that produces products on a batch basis, where some units may be used to produce a specific product once annually or biennially. In this example, the unit has not been "shut down"

as inferred by the use of the term nor to allow additional capacity to another unit. Pantex further stated that frequent adjustment of an emission cap due to temporary pauses in operation, or for units that are designed and managed on a campaign basis, may pose a significant opportunity for permittees to inadvertently find themselves in violation, if only administratively. Pantex recommended that the term "shut down" in this context be applied only in regard to continuously operated units.

No change was made in response to this comment. The term "shut down" as used in the proposed rule is not formally defined, but generally means the cessation of production or operation of a facility so that it is in an idle state and has no potential for emissions to the atmosphere. TCEQ uses the term "shutdown" in several different rules without an explicit definition, and the term is sufficiently clear within the context of the rules and the general understanding of the term. For Pantex's example of a batch facility that only operates one or two times in a given year, the TCEQ would consider that facility to be shut down when it is not in operation producing a product or otherwise performing its intended purpose, and it is also not producing air emissions. The commission does not concur that this requirement should only apply to continuously operated units, as other commission requirements relating to shutdowns (such as in Chapter 101, Subchapter F, Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities) do not distinguish between batch and continuous operation.

TCC, TIP, and TxOGA commented that the language in proposed §116.715(c)(12)(B) could potentially lead to a permit exceedance. TCC recommended that in those instances where there is an absence of monitoring data, facilities be allowed to utilize data substitutions rather than be required to use maximum potential emissions. TCC stated that Chapters 115 and 117 both provide for data substitution to address missing monitoring data. TIP and TxOGA commented that TCEQ should allow permit holders to use good engineering practices to address any absence of monitoring data. TCC also stated that facilities should be able to use an alternative method for determining emissions at a later point and not have to have that designated at the time the permit is written.

No change was made in response to this comment. During periods when monitoring data is not available, there is typically not enough information to determine the actual emission rate from the facility. During these periods, it is conservative to assume maximum emission rates unless another method has been established in the permit. The rule does not exclude permit holders from using another method to determine emissions, including methods based on good engineering practices, as long as the method is reviewed and approved in the permit. In order to provide maximum flexibility for choices in monitoring data collection, the regulated entity is encouraged to apply and obtain alternative (data substitution) methods written into the permit. It is beyond the scope of this rulemaking to attempt to list all current and future approvable data substitution methods as long as the permit review process allows for future review and approvals. The commission respectfully disagrees that data substitution methods

should be allowed without approval as evidenced by their inclusion as a permit term.

TIP and TxOGA commented that instead of a wholesale incorporation of federal PAL provisions into the flexible permit regulations, the commission should consider drawing from other sources, such as the Texas NO_x and highly-reactive volatile organic compound (HRVOC) rules for provisions to address data issues. TIP and TxOGA stated that §117.340(c)(3) allows several methods that can be used as substitute emissions compliance data when NO_x monitors are offline. TIP and TxOGA noted that the HRVOC rule allows data substitution at "§115.764."

Although the Chapter 115 HRVOC cooling tower rule allows for specific data substitution techniques, it also provides for manual sampling as a backup to the required monitoring. The HRVOC cooling tower monitoring requirements are intended to apply to a specific type of source and specific pollutants. Similarly, the Chapter 117 NO_x rules are tailored for specific combustion sources and a specific pollutant. The proposed emission cap monitoring requirements are intended to be sufficiently general so that they are appropriate for virtually any type of source. Flexible permit applicants who seek an alternate method of demonstrating compliance with an emission cap during periods of monitoring system downtime can propose a different method, as allowed for under §116.715(c)(12)(B). This could include the use of data substitution or other methods if approved by the executive director. No change was made in response to these comments.

Pantex commented that the term "site generated test data" in §116.715(c)(12)(C) is ambiguous.

Pantex noted that it is common for TCEQ to require performance testing of a source to demonstrate compliance with a permit. Pantex stated that if the intent of the TCEQ is to require performance testing of a source every five years, then the provision should state that the TCEQ will require the action in permits issued pursuant to Subchapter G. If not, then the TCEQ should define the term "site generated test data," and its expectations on what forms of "revalidation" will be considered as compliant.

Site generated test data, as used in the cited rule, means any data obtained by completing stack testing or sampling of site facilities, which is used to determine emissions. An emission factor generated from the testing may then be used with an operating parameter that will be continuously monitored during subsequent operation to estimate emissions. An example of this would be the use of stack sampling to measure the NO_x emission rate from a heater at known fuel firing rates, and determining an emission factor from the test data. The revalidation would require testing/sampling under conditions similar to those maintained in the original test, using TCEQ-approved testing or sampling methods. The commission has added language to clarify that if revalidation testing shows that emission factors have increased, the permit holder must obtain a permit alteration or amendment to adjust the factor and account for the increased emissions.

EIP stated that the requirement in proposed §116.715(c)(12)(C) that revalidation of site generated test data must occur only every five years is too generous. EIP recommended that data be revalidated no less often than every three years, and if a year's results deviate more than some percentage, such as 10percent, from the original data (i.e., the data on which the permit was based), then the revalidations should occur annually for a period of years. EIP also stated that there should be a reporting requirement (e.g., §116.715(c)(12)(D)), requiring the permit holder to promptly forward to TCEQ the results of testing at the site that is directly relevant to determining emission rates or the character of emissions for covered facilities.

No change was made as a result of this comment. The proposed revalidation period of five years is consistent with, and derived from, federal regulations authorizing plant-wide applicability limits, which is conceptually similar to a flexible permit. The commission does not have sufficient justification to require all data to be subject to revalidation on a more frequent basis than these federal regulations; however, the rule does allow for a more stringent revalidation period on a case-by-case basis. The proposed rule requires that revalidation testing results be submitted to the executive director no later than three months after completion of such test, which is a reasonably limited period of time given that in many cases a substantial amount of analysis is needed to evaluate the test results and develop a report.

TCC commented that with regard to proposed §116.715(c)(12)(C), emissions testing at every facility every five years is impractical and too costly. TCC stated that often a site will test one facility to establish representative emissions for all similar facilities at the site. TCC stated that a requirement to retest all the facilities would be unduly burdensome and economically unreasonable. TCC stated that TCEQ should take time, resources, and cost considerations into account with regard to the revalidation requirements.

No changes were made in response to this comment. The commission does not agree that revalidation testing to confirm site-specific data every five years is unreasonable. This requirement is analogous to the revalidation requirements used under federal regulations relating to plant-wide applicability limits. The revalidation would require testing or sampling under conditions similar to those maintained in the original test. In those limited cases where it may be appropriate to sample one facility to establish representative emissions for similar facilities, the revalidation may be performed in a similar manner. Note that in cases such as this, it is likely that sampling would be required more often than every five years and would be rotated so that all facilities are sampled.

Pantex asked, with respect to §116.715(d), if a permittee desires to change the methodology for calculating or measuring emissions, what would be the appropriate permit action, an alteration, or amendment.

The commission understands that this comment is made regarding a desired change after a flexible permit is issued. If the change in methodology would result in a lower calculation or measurement of emissions, the change can usually be accomplished with a permit alteration. If the change would result in an increase in emissions, the change would require a permit amendment. No change was made in response to this comment.

EIP stated that the permit should specify which of the four monitoring options provided by proposed §116.715(d)(2) is used to determine the levels of emissions from each facility.

The commission has revised the rule to require that the permit identify which of the four monitoring options under §116.715(d)(2) is applicable to each facility. This change will help clarify applicable monitoring requirements for the permit holder and for the TCEQ or other air pollution control agencies with jurisdiction.

TCC stated that it does not understand the need for §116.715(d)(2)(D)(i) and (ii), and encouraged TCEQ to remove those requirements. TCC stated that if emissions factors are suggested by the applicant, the permit engineer will determine the appropriate factor based on the degree of uncertainty or limitation of the suggested factor and set an emissions limit. TCC stated that the permit holder then must operate that facility below that emissions limit to be in compliance. TCC stated that there is no need to have an "operating range" specified in the permit.

The commission has not changed the rule in response to this comment. Section 116.715(d)(2)(D)(i) allows for the permit to specify how an emission factor is to be adjusted in order to account for uncertainty or other limitations in the development of the factor. It is important that the factor being used to determine the emissions is clearly indicated in the permit so that compliance with the emission limit, including supporting calculations, can be verified. Section 116.715(d)(2)(D)(ii) is necessary because there could be situations where an emission factor is only valid for a certain range of operating parameters, and it would not be appropriate for a facility to use an emission factor as a monitoring or compliance method in operational circumstances where the factor is not reliable.

TIP and TxOGA commented on proposed §116.715(d)(2)(D)(i) and (ii), stating that the provisions that required permit holders to "adjust emission factors to account for the degree of uncertainty or limitations in the factor's development," and operate in the determined range, are unworkable. TIP and TxOGA recommended that owners or operators identify what the appropriate emission factor will be with the TCEQ permit engineer, and then operate below the resulting emissions rate.

The commission did not change the rule in response to this comment. Section 116.715(d) specifies requirements that must be implemented through the permit special conditions. Any potential uncertainties, limitations in development, and

applicable ranges of proposed emission factors should be identified in the permit application. These should then be incorporated into the permit special conditions developed for the facility.

Pantex commented that the phrase "significant facility as defined in §116.12 of this title," in proposed §116.715(d)(2)(D)(iii), introduces ambiguity as to the intent of the proposed regulation. From the context of §116.715(d)(2)(D)(iii), this proposed regulation is intended to be applicable to all sources applying for a permit under Chapter 116, Subchapter G, with or without a PAL permit. In §116.12 are terms applicable to permit review for major source construction and major source modification in nonattainment areas. Pantex commented if §116.715(d)(2)(D)(iii) is applicable only to permit reviews for major source construction and major source modification in nonattainment areas, then it should be so stated in the text of §116.715(d)(2)(D)(iii).

In order to reduce confusion with respect to the definition of "significant facility" and the references to PAL requirements in the proposed rules, the commission has deleted the reference to this definition, and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability, which are more relevant criteria for characterizing large facilities under NSR permits. The significant thresholds for nonattainment pollutants are contained in Table I of §116.12(18)(A), and the significant thresholds for PSD pollutants are located in 40 CFR §51.166(b)(23).

Pantex commented that proposed §116.715(d)(2)(D)(iii) is applicable to any significant facility as defined in §116.12. Section 116.12(33) defines "significant facility" as "a facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant." Pantex stated that if §116.715(d)(2)(D)(iii) is intended to be applicable only to permits that also have a PAL, then it should be so stated in the text of §116.715(d)(2)(D)(iii). Pantex also stated that if §116.715(d)(2)(D)(iii) is intended to be applicable to all sources applying for a permit under Subchapter G with or without a PAL, the proposed regulations need to be reworded to make the intent of the regulation clear and unambiguous. Pantex stated that if the proposed regulation contains terms that need to be defined (i.e. "significant facility" and "significant level") those terms need to be defined in §116.10 or §116.13 without using the term PAL.

The cited rule requirement, as proposed, is not intended to only apply to facilities that have a PAL. In order to reduce confusion with respect to the references to PAL requirements in the proposed rules, the commission has removed the term "significant facility" and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability. The revised rule would apply to facilities with emissions (or potential to emit) exceeding the threshold levels specified in Table I of §116.12(18)(A), or 40 CFR §51.166(b)(23), as applicable.

Pantex commented on proposed §116.715(d)(2)(D)(iii), stating that the literal terms of this provision would require every valve, pump seal, vent of identical and like sources, relief valve, or other source to undergo performance testing, even though the emissions from these sources are well understood. Pantex noted that it is common for the TCEQ to require performance testing of a source to demonstrate that the source meets emission rates stated in the permit. Pantex stated that when a permit is issued that does not require the performance testing of a source, by the issuance of the permit, the executive director has determined that performance testing is not required. Pantex recommended that §116.715(d)(2)(D)(iii) should be revised to read: "The owner or operator of a major facility as defined in §116.12(16) of this title that 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 operations of the facility, whichever is later, as prescribed in the issued permit."

As previously discussed, the commission has revised the rule to refer to facilities that emit, or have the potential to emit, the monitored pollutant in quantities that meet or exceed major NSR significance levels. None of the examples identified in this comment would be large enough to exceed the applicability criteria of the cited rule. The rule as proposed allows for the executive director to not require testing in appropriate circumstances. The permit conditions should specify where site generated test data is to be used as well as the frequency it is required to be obtained.

TIP and TxOGA commented on proposed §116.715(d)(2)(D)(iii), which states that "owners or operators of a significant facility as defined in §116.12" using emission factors to monitor emissions "shall conduct 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." TIP and TxOGA stated that this requirement is unclear as to whether it applies only to facilities operating under a PAL permit, or if the definition of significant facility is meant to be applied to facilities that have the potential to emit pollutants that are regulated under a flexible permit emission cap. TIP and TxOGA also stated that the proposed rule is more stringent than the corresponding federal PAL rule, at 40 CFR §52.21(aa)(12)(vi)(C), which only requires site-specific testing of emission factors if it is "technically practicable."

In response to this and other comments on this subject, the commission has removed the term "significant facility" from the rule and has revised the rule to directly refer to the significance levels for PSD or nonattainment review applicability. The requirement in §116.715(d)(2)(D)(iii) does not depend on the applicability of PAL to the facility. The rule as proposed already allows the executive director the authority to not require testing. This includes situations where the executive director determines that testing would not be technically practicable.

TCC, TIP, and TxOGA expressed concerns with §116.715(d)(3)(A) - (B). TCC stated that having the executive director establish default values for determining compliance with the emissions cap based on the highest potential emissions is all that is needed when a correlation between monitored parameters and the pollution emissions rate at all operating points of the facility cannot be demonstrated. TCC, TIP, and TxOGA suggested that subparagraph (B) is unnecessary and should be removed from the rule language.

No changes were made in response to this comment. While its use is likely to be infrequent, there may be circumstances under which it is not possible to identify or agree upon a value based on the highest potential emissions. In these cases, limiting operation of the facility pursuant to §116.715(d)(3)(B) may be appropriate. These issues would be addressed in the development of a draft permit.

EIP recommended revising proposed §116.715(f) to make the "approval" requirement a mandatory condition of flexible permits. EIP stated that there should be a non-discretionary check on the impact of standard permit and permit by rule emission increases at sites where some or all facilities are covered by a flexible permit. EIP also stated that the phrase "significant impact on the air environment" is not a conventional term of art, so it should be defined.

The commission has not changed the rule in response to this comment. Standard permits employ BACT and are carefully reviewed for impacts during development of the standard permit. In addition, standard permits have restrictions, where

appropriate, on the use of the standard permit in combination with other types of authorization, when necessary to ensure protection of human health and the environment. Permits by rule authorize insignificant emission increases. It is not reasonable to require all flexible permit holders to obtain written approval in advance of claiming or registering an applicable standard permit or permit by rule, nor is there any such requirement in the commission's existing SIP-approved minor NSR rules. The proposed language allows the executive director sufficient discretion to restrict the use of standard permits and permits by rule in those situations where special attention to small emission increases is warranted. With respect to the commenter's concern over the phrase "significant impact on the air environment", this text has been used for many years in the SIP-approved rules supporting Subchapter B NSR permits. The commission declines to adopt a definition because, as written, the commission has the ability to make case-by-case determinations of what is significant for any given situation. For example, the commission establishes "air pollutant watch list areas" where specific air quality concerns have been identified. If the application concerned one of those air contaminants in or near a current or historical area of concern, the commission has the ability to address that very specific concern. Further, the commission has not provided the public with an opportunity for notice and comment on such a definition, and therefore declines to do so at this time without following that procedure.

EIP and Rep. Burnam commented that the EPA disapproved the original flexible permit program because it lacked replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit. EIP commented that the proposed §116.716 does not sufficiently change this situation. First, EIP stated that "like-kind" facilities is not defined in the regulations, so it is an invitation for confusion and protracted litigation rather than provide for an enforceable cap. Second, EIP stated that proposed §116.716(a)(1) still allows site-wide caps, so it does not change anything. Rep. Burnam stated that the EPA requires the methodologies to be completely defined in the regulations so as to be independently replicable. Rep. Burnam stated that the proposed regulations do not provide enough specificity or information for agencies, courts, or the public to determine compliance.

The commission does not agree that the proposed rules lack adequate procedures for establishing an emission cap. An emission cap is, by design, intended to be flexible in nature such that the selection of facilities participating in the cap, and the level of individual controls applied to those facilities, is not necessarily something that can be explicitly defined by rule. Even in cases of similar facilities seeking a flexible permit, the owners or operators of those facilities may have substantially different approaches or objectives for the emission cap. The flexible permits program is structured so that permit applicants can propose and use an emission cap that allows their facilities an appropriate degree of operational flexibility, while at the same time protecting human health and the environment, and maintaining the required level of emission control for sources under the cap. However, in response to this and other comments that suggested proposed

§116.716(a)(1) could cause confusion or would not be effective, the commission has revised the language to eliminate the references to "like-kind" and "site-wide" emission caps. The revised rule, in §116.716(a), allows a permit applicant to request and the executive director to establish an emission cap which includes every facility at the account, or to establish an emission cap for a designated group of facilities at an account. The revised language would maintain substantial flexibility for the construction of emission caps while using terminology that meets the regulatory purpose better than the use of the term "site." The commission respectfully disagrees with Rep. Burnam's comment that the rules do not provide enough specificity or information to allow a determination of compliance. As discussed elsewhere in more detail in this preamble, the rules require a comprehensive program of MRR requirements to support enforcement of flexible permits.

Rep. Burnam commented on proposed §116.716(a)(1), and stated that the proposed language was unclear. Rep. Burnam stated that a site-wide emission cap would presumably cover facilities that are not of like-kind. Rep. Burnam also stated that even if a permit does not include a site-wide cap, it was still unclear as to what facilities are included under a given emission cap, or even which facilities are "like-kind".

In response to this and other comments relating to the proposed language concerning site-wide emission caps and like-kind emission caps, the commission

has revised the language for clarity, and has eliminated the references to "like-kind" and "site-wide" emission caps. The final rule will not restrict emission caps to like-kind units and will not require emission caps to apply site-wide. The revised rule allows a permit applicant request and the executive director to establish an emission cap which includes every facility at the account, or to establish an emission cap for a designated group of facilities at an account. The revised language maintains substantial flexibility for the construction of emission caps, while using more understandable terminology. An applicant can still request similar facilities at an account or all the facilities at an account be under a cap.

The EPA commented that proposed §116.716(a)(1) provides for a site-wide emission cap, and stated that the definition of site is too broad and provides broad discretion to delineate the boundaries of the emission cap. The EPA stated that under this definition, a site-wide emission cap could include all minor stationary sources and all minor modifications on a company's property.

In response to this and other comments regarding proposed §116.716(a)(1), the commission has revised the language to eliminate the references to "like-kind" and "site-wide" emission caps. The revised rule allows for a permit applicant to request and the executive director to establish an emission cap, or an emission cap made up of a subset of facilities at an account. The term "account" is more appropriate for use in a minor NSR program such as Subchapter G than the proposed use of

"site." The use of the word "site" in §116.716 could possibly lead to some confusion because it is a defined term in the commission's federal operating permit program in §122.10(27). The term "account" is the appropriate term to use because the flexible permit program is designed to work within the commission's established, defined term "account." Account has been used in the flexible permit minor NSR context for purpose of delineating the scope of the flexible permit authorization. As discussed elsewhere in this preamble, the use of "account" provides a boundary for what can be included. Therefore, there is no executive director discretion as to the boundaries of what facilities that may be included in a flexible permit. One of the objectives of the flexible permit program is to allow the permit applicant substantial flexibility in designating the facilities that are to be included in an emission cap or caps, subject, of course, to commission approval. This could range from a small number of facilities or all facilities at the account as long as it is practically enforceable.

EIP stated that the cap calculation in proposed §116.716(a)(2)(A) relies on the definition of "expected maximum capacity" in §116.13(4). EIP commented that this allows the capacity value to be less than the physical and operational design value, if the "planned operation" of the facility were less than its physical and operational design. EIP stated that if the cap is to be calculated taking into consideration the "planned operation" of a facility at less than its physical and operational design, then the lesser level of operation needs to be specified as a permit term. EIP stated that if that is not desirable, then the §116.13(4) definition needs to be amended to remove the "planned operation" relaxation.

The commission has not changed the rule, now located in §116.716(c)(1)(B), in response to this comment. The commenter has not explained why it is undesirable to establish a lower emission limit in a flexible permit emission cap. One key intent of the flexible permit program is to allow for potential increases in operating rate with no increase in emissions (increased emission control) provided the increased operating rate does not trigger major NSR.

EIP commented that TCEQ proposed §116.716(a)(2)(B) and (3) to address the EPA's concerns that the flexible permit program could allow a facility to avoid federally-required control technology. EIP stated that this section apparently means to discuss how the emission cap will be determined, even though it actually says it is determining "emissions." EIP stated that emissions have to be determined by monitoring, testing and recordkeeping. EIP further stated that even with the suggested correction, the section fails to achieve its objective because it does not discuss averaging times. EIP gave an example that if a BACT limit based on a one-hour averaging time is used to calculate an annual emission cap, the BACT limit is no longer being used because averaging time is a component of an emission limit. EIP stated that the proposed regulations do not require the emission cap to match the original emission limit and do not define the meaning of "short term." EIP also stated that any emission limit that is averaged into a cap with other emission limits from other emission points no longer exists if it is not applied to the specific unit for which it is meant. EIP stated that the same problems exist with proposed §116.716(a)(3)'s attempt to address LAER.

The commenter is correct that proposed §116.716(a)(2)(B) and (3), the text of which is adopted as §116.716(c)(1)(A) and (c)(2), are intended to describe how the emission cap itself will initially be determined. This rule is not intended to describe how compliance with the emission cap will be determined, which will be with some combination of testing, monitoring, and calculations. Facility-specific maximum allowable emission rate limits only reflect BACT at the design operating condition. If it were relied upon to ensure BACT was in place, operation at rates less than the design capacity would not be required to meet BACT. Due to this, control technology requirements are usually captured in permit conditions and not the maximum allowable emission rates. This ensures that BACT is applied throughout the operating range and not only at the maximum operating rate. Due to this, BACT can be maintained for facilities in caps. For example, if a heater is authorized by a permit, BACT for NO_x control may be identified as 0.01 lb/MMBtu in the permit conditions. NO_x emissions will be continuously monitored by a CEMS (also required by permit condition). If a heater is operated at 50 percent of its design firing rate, the permit condition will limit its NO_x emissions to 50 percent of the allowable emission rate. The allowable emission rate limit would allow NO_x emissions of up to 0.02 lb/MMBtu. No change was made in response to this comment.

TIP and TxOGA opposed the requirement in proposed §116.716(a)(3) that facilities subject to LAER review be included in separate emission caps. TIP and TxOGA stated that facilities subject

to BACT, MACT, LAER, and other control levels are eligible for cap inclusion under the federal PAL rules. TIP and TxOGA stated that there seems to be no EPA-related rationale for segregating LAER-controlled facilities.

The commission has not changed the rule, the text of which is in adopted §116.716(c)(2), in response to this comment. The proposed rules are not intended to be the same as federal PAL rules in all respects. Emission caps in flexible permits have little to do with whether subsequent modifications are subject to major NSR, while that is exactly the purpose of PALs. In most cases, when an emission cap is established, the permit holder has to either demonstrate that creating the emission cap does not result in a major modification (not subject to major NSR), or perform a major NSR review of all facilities subject to the cap per §§116.150, 116.151, or 116.160, as applicable. The representations made when requesting an emission cap typically allow for the greatest operational flexibility. This is not the case if facilities with differing control requirements are included in the same emission cap. This is most clearly illustrated with an example. Typically, if tanks are to be authorized under an emission cap, the application may state that throughput could be through a single tank or through all tanks (consistent with a demonstration of acceptable off-site impacts). This is not a concern because all tanks are reviewed for BACT. If a number of new tanks are to be added to that permit and a nonattainment review is required, the new tanks would be subject to LAER and the project emission increase must be offset. If the new tanks were to be added to the existing emission cap, the cap could not be increased or all existing

tanks would be modified as well (if there are no other limits, they could now emit at the higher emission cap rate), and be subject to LAER. If the new tanks were added to an unchanged emission cap, a subcap would be required for the new tanks to limit the project increase to less than the magnitude of emission cap. This would be more restrictive than establishing a separate LAER cap.

Pantex asked, with regard to proposed §116.716(b), if the permit has an emission cap for volatile organic compounds (VOC), and the application and permit identify all facilities which may emit VOC, whether that constitutes "inclusion" for all the chemicals that are considered VOC, and similarly, for all other "grouped" air contaminants (e.g., Ozone Depleting Substances, HAP).

If a flexible permit has an emission cap for VOC (or some other grouped pollutant category), and the emission cap includes all facilities which may emit that category of pollutant, then that would constitute "inclusion" of all VOC. However, in order to protect human health, there may be individual air contaminants that, while being a subset of VOC or other relevant contaminant category, have separate and distinct emission limits specified in the permit in addition to the emission cap for VOC.

EIP commented that the proposed requirements of §116.716(c) may help make flexible permits more practically enforceable, and specifically noted support for the proposed deletion of the nine percent insignificant emission factor.

The commission appreciates the support.

EIP commented on proposed §116.716(d)(1) and stated that the proposed six-month adjustment period relating to shutdowns effectively weakens an emission rate based on BACT, LAER or other requirements, at least for six months, when a facility that was used to calculate the emission cap is shut down. TIP, TxOGA, and TCC also commented on proposed §116.716(d)(1), stating there are several situations where, due to maintenance or a shutdown due to malfunction, weather events such as hurricanes, or market conditions, a facility subject to an emissions cap would be shut down for longer than six months. TIP, TxOGA, and TCC also stated that the EPA has not taken issue with the 12-month shutdown period in the existing rule, so the commission should leave it unchanged. TIP and TxOGA stated that the EPA's reactivation policy contains a two-year presumption. TCC also stated that the commission should clarify that increasing the emissions cap back to its original amount when a facility is started back up requires only a permit alteration.

The commission has not changed the rule, located in adopted §116.716(f)(1), in response to these comments. The commission has maintained the proposed six-month timeframe relating to the shutdown of cap facilities. The commission acknowledges and understands that some maintenance programs or natural events may result in extended shutdowns. A six-month timeframe provides an appropriate balance between operational flexibility and the need to ensure that

emission caps reasonably correspond with actual conditions at the permitted facilities. TCC is correct that restoring a facility to operation under §116.716(f)(1) only requires a permit alteration, as long as the original emission cap amount is not exceeded.

EIP commented that proposed §116.716(d)(2) allows the addition of new facilities via a flexible permit amendment but does not require a major source applicability determination and does not state that the new facility must be a minor modification.

No change was made in response to this comment. The addition of new facilities under adopted §116.716(f)(2) requires a permit amendment, and such a permit amendment would require a major source applicability determination under §116.711(2)(H) and (I). The new facility does not necessarily have to be a minor modification so long as the project complies with all applicable major NSR requirements.

TIP and TxOGA commented on proposed §116.716(d)(3), stating that the revised language is at odds with the Texas statutory definition of "modification" and with federal NSR applicability requirements established in several rounds of rulemaking, most recently NSR reform. TIP and TxOGA stated that the provision is unnecessary and redundant to other provisions that require compliance with major NSR. TIP and TxOGA objected to the establishment by rule of a special-

purpose set of major NSR applicability definitions and principles, divorced from the statutory language and established requirements.

The commission respectfully disagrees that the rule, as proposed, does not comply with Texas or federal law. However, changes have been made in response to this comment to ensure that the requirements are clearly stated. The term "modification" is typically used in relation to changes to facilities or sources; however, Texas Clean Air Act §382.003(9) provides that "a modification of an existing facility" 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. However, this does not mean that a flexible permit cannot be modified. A flexible permit is subject to requirements or an amendment when there is an emissions increase of the cap. Adding a new facility, or making a physical or operational change to an existing facility that results in an increase of an emission cap and/or an individual emission limitation, is considered to be a modification of a flexible permit, and an amendment application is required for consideration of a change to a flexible permit cap or individual emission limit. If there is a change to a facility but that change would not result in a change to the cap, then an alteration application is required. In addition, the state's definition of "modification" is much broader than the federal definition, and does not require any consideration of the status of the other facilities already under the cap. Therefore, because major NSR applicability must be determined first, the commission has revised and restructured the rule as adopted §116.716(f)(3) to ensure that the major

modification analysis is conducted first for applications to add a facility to or modify a facility under the cap.

With regard to the portion of the comment regarding compliance with major NSR requirements, the commission respectfully disagrees that proposed §116.716 (d)(3), adopted as §116.716(f)(3), is at odds with federal applicability requirements. As TIP acknowledges, the federal definition of "modification" applies when the analysis is conducted for major NSR applicability. The use of the phrase "shall be considered modified" may be misunderstood. In the analysis of whether a change is a major modification, the commission properly assumes that, unless there are certain restrictions (specifically, a physical modification and a separate permit limit or physical constraint on the facility's potential to emit), all facilities could have an increased potential to emit by the addition of a new facility or the modification of a facility within the emission cap. This analysis doesn't result in a modification, which may be the confusion. Therefore, the rule was revised to provide that all facilities under the cap will be included in the evaluation for major NSR applicability. The use of the word "evaluation" indicates that no final decision has been made as to whether a modification has occurred.

Although the major NSR applicability text may be redundant of other changes made in this rulemaking, the commission has retained it in this paragraph to ensure that the procedures for cap adjustment are clearly listed.

EIP commented that the final sentence of proposed §116.716(d)(3) needs to be clarified. EIP asked, if a like-kind cap were being increased because of the modification of a covered unit (say, a physically-changed catalytic cracking unit), whether the rule would require that all other like-kind facilities under the cap be treated as though they too were modified, unless each one of them were, in fact, unmodified and had a unit-specific limit or potential to emit constraint. EIP asked whether all or some covered units that are not subject to separate permit limits will experience a change in their methods of operation, so as to realize the benefits of the physically-modified unit, but have not themselves had physical modifications, will those covered units be considered "not modified," even though their potential to emit had earlier been based on their "planned operation," rather than on their physical design limits. EIP stated that the recalculation of the permit cap over time is important and difficult, and the rules for this need to be particularly clear. EIP suggested that at a minimum, the preamble language should include examples reflecting how the texts of proposed §§116.13, 116.711, and §116.716(d) interact.

As discussed elsewhere in this preamble, the commission has revised §116.716 so that references to like-kind and site-wide emission caps have been deleted. With this change, the rule does not differentiate between the type of units within an emission cap. Under adopted §116.716(f)(3), if a change or changes to facilities within an emission cap potentially constitute a major modification, all facilities within the cap will be evaluated for major NSR applicability. See also the discussion regarding how facilities that are subject to PSD or NNSR may be included in a cap in a flexible permit discussed earlier in this preamble.

TIP and TxOGA commented on proposed §116.716(e), which requires both long and short term emission limits in an emission cap. TIP and TxOGA stated that the commission should preserve the option for permit holders to establish annual emission caps, while retaining individual short term emission limits. TIP and TxOGA explained that this approach allows a facility to be subject to a year-long rolling emission cap, while also being subject to a short term emission limit that is specific to the facility.

The commission has not changed the rule in response to this comment. Adopted §116.716(g), renumbered from §116.716(e), does not prohibit permit holders from using a short term facility-specific individual emission limit in combination with an annual emission cap.

TxOGA opposed the proposed rule requiring both long term and short term emission caps for a facility.

One aspect of the existing flexible permitting program that the EPA specifically identified as a concern was the lack of short term emission limitations for facilities under an emission cap. The commission attempted to address this in the proposed rule by stating that an emission cap must include long term and short term emission limits. However, the short term emission limitation may be in the form

of a short term emission cap, or a short term individual emission limitation. No change was made in response to this comment.

Comments on §116.717

EIP commented that the proposed rule should clarify that a delay in the implementation of required emission controls is a relaxation of emission controls; EIP stated that the "alteration" language in proposed §116.717 might be read to imply that delays in required emission controls may be allowed by permit alteration.

The commission agrees with the commenter that a delay in the implementation of permit-required controls would generally be considered a relaxation of emission controls, and would therefore require a permit amendment, not an alteration. However, there may be other circumstances involving changes to the control schedule or other details relating to the required controls in which a permit alteration would be all that is required. The commission will maintain the proposed language to account for both possibilities.

TCC, TIP, and TxOGA commented on proposed §116.717, relating to the implementation schedule for controls. TCC stated that there are situations where the proposed rule would be problematic. TCC gave an example of a situation where a permit amendment for a phased construction project is issued, and the equipment is modified in sequential process and brought online in a phased manner over time. TCC and TIP stated that some project sequences may

dictate that the under-controlled device come back online before the over-controlled device is brought back online. Therefore, TCC, TIP, and TxOGA stated that the implementation schedule must allow for phasing of emission controls.

If a minor project involves existing facilities, emission controls must be implemented such that modified facilities are not, on average, uncontrolled upon startup. It must be emphasized that the controls on modified facilities must always meet or exceed BACT, on average, and no backsliding of existing controls is authorized. If a project is subject to major NSR review, all new and modified facilities must have BACT or LAER, as applicable. The permit applicant should work with the permit engineer to develop permit conditions that allow the desired flexibility while meeting applicable requirements for controls. No change was made in response to these comments.

Comments on §116.718

EIP commented that proposed §116.718(b) attempts to rely on existing §116.12 and §116.121, but the relevant parts of those regulations are not SIP-approved. The EPA will have to rely on the SIP-approved version of these rules, which are not adequate for determining whether a major modification has occurred.

The commission has proposed some amendments to §116.12, and has proposed §116.121 be repealed and the text moved to a new §116.127. If the amendments are

adopted by the commission, those sections will be presented to the EPA as revisions to the SIP. The commission respectfully disagrees that its rules are inadequate to determine whether a major modification has occurred. No change was made in response to this comment.

TIP and TxOGA stated that it is strongly opposed to the proposed revisions in §116.718(b). TIP and TxOGA stated that major NSR applicability principles are well established in rules and guidance, and the proposed special-purpose rules in this provision are at odds with those requirements. In particular, TIP and TxOGA referred to the language that stated that "... the potential to emit shall be considered as the proposed emissions cap unless a separate permit limit or physical constraint limits the facility's potential to emit... ." TIP and TxOGA stated that this language was unclear and could be read to mean that each facility must have a physical constraint in order to avoid having a physical or operational change attributed to it with the potential to emit of one facility being set as the potential to emit of the entire emissions cap. TIP and TxOGA stated that the proposed language was inconsistent with the requirements and guidance related to physical or operational changes triggering major NSR.

Section 116.718(b) has been restructured from the proposed version to ensure clarity and readability. The commission respectfully disagrees with the assertion that this language is inconsistent with requirements and guidance to determine the applicability of major NSR. If there is not a permit limit or physical constraint limiting the potential to emit for a new or modified facility, it may emit as much as

the cap allows. This is explained in the *Federal New Source Review Permits Applicability Determination* guidance document available on the TCEQ Air Permits Division web site, in which Example 3 states: "If the emission cap is increased, all the tanks under the cap are modified because they can all now emit up to ...the cap limit..., unless there are other operational limits in the permit conditions that would prevent them from emitting at that rate." The commission has added language to §116.718(b)(4) to clarify that, instead of potential to emit, an alternative method, if demonstrated, may be used to determine the emission cap.

EIP commented that the program fails to ensure that minor sources will not cause or contribute to a violation of NAAQS or increment in Texas or other states. EIP explained that proposed §116.718(c) lacks a requirement that minor sources demonstrate that they will not cause or contribute to a violation of NAAQS. EIP stated that proposed §116.718(c) only requires a source to submit its air quality analysis if off-site ambient concentrations may be greater than *de minimis*. EIP and Rep. Burnam commented that this proposed rule does not define *de minimis*, nor does Texas have a SIP-approved definition of *de minimis* for ozone, particulate matter less than 2.5 micrometers (PM_{2.5}), the new one-hour nitrogen dioxide (NO₂) primary NAAQS, or the new one-hour sulfur dioxide (SO₂) primary NAAQS. Rep. Burnam stated that the term "*de minimis*" is not an enforceable standard, and EIP stated that the proposed requirement is not enforceable as a practical matter.

The commission respectfully disagrees with the commenter's assertion that the rule does not ensure that minor sources will not cause or contribute to a violation of NAAQS. The flexible permit application requires, in §116.711(2)(J), an analysis demonstrating that there will be no interference with attainment of maintenance of the NAAQS. Further, the commission specifically proposed, and has adopted §116.718(c), which includes this type of analysis for the types of increases covered by this section. The review will also ensure that there is no violation of any control strategy to ensure that the permits will comply with the SIP and the requirements of the FCAA. The commission has revised the recordkeeping requirements to ensure that permit holders maintain records of any air quality analyses required by §116.718(c). Further, the term "*de minimis* impact" is defined in §101.1, and this definition is applicable to Chapter 116. The commission notes that the EPA has not established *de minimis* values for ozone, PM_{2.5}, the new one-hour NO₂ primary NAAQS, or the new one-hour SO₂ primary NAAQS.

EIP stated that proposed §116.718(c) should make an increase in off-site emission impacts, not an increase in facility emissions, the trigger for NAAQS impact modeling. EIP stated that especially for the new one-hour NO₂ standard, the locations within a site from which emissions originate can impact off-site NAAQS attainment, even in the absence of an overall increase in site criteria pollutant emissions.

The commission concurs with the comment that the specific location within a site from which emissions are released can influence off-site NAAQS attainment, even in cases where the overall site or cap emissions do not increase. However, it is not practical or economically reasonable to require a detailed impacts analysis for every change under a flexible permit. Using ambient impacts as the criteria or trigger for additional modeling would be substantially more complex than using an increase in emissions as the criteria. The commission has revised §116.718(c) to require that the permit holder must conduct an air quality analysis for any operational or physical change at facilities covered under a flexible permit, if the change may result in an increase in the emission rate from any facility under the flexible permit. This requirement would apply even if there are contemporaneous decreases in emissions at other facilities authorized by the flexible permit.

EIP commented that the proposed rules lack agency or public review for any analysis that an applicant believes shows impacts below the *de minimis* level. EIP commented that permit applicants' ambient impacts analysis routinely contain errors. EIP stated that without combined public and regulatory agency review, it will not be possible to determine if the applicant has validly concluded that sources will only cause *de minimis* ambient impacts.

The commission has revised the rule to specify that permit holders are required to maintain records of any air quality analyses required under §116.718(c). These records are to be made available upon request to the TCEQ or to any local air

pollution control agency with jurisdiction. Upon request, the commission shall make any such records available to the public in a timely manner.

EIP commented that the variation or relocation of emissions under a flexible permit can result in sources creating or contributing to NAAQS or increment violations. EIP gave an example where emissions were increased at a source with a short stack located near the fenceline, and decreased at a source with a tall stack located farther from the fenceline. EIP noted that this could substantially change the impacts from the site, and could result in NAAQS or increment exceedances.

The commission acknowledges that the impacts of a source can vary dramatically depending on the location and characteristics of the emission point(s). However, the air quality analysis impacts review for a flexible permit should take into account any reasonable possibility that emissions from the sources under an emissions cap may vary from source to source. The impacts review is based on conservative assumptions that make it unlikely that the facility would interfere with the NAAQS or other standards or criteria. Further, §116.718(c) requires that the permit holder perform an air quality analysis in such a case and, depending on the results, maintain records of the analysis or submit it to the TCEQ for review. The commission has slightly revised §116.718(c) to clarify that the air quality analysis is required for any change that results in an emission increase at any existing facility, regardless of location. Finally, depending on the details, such a

change could be considered a variation from a representation in a flexible permit application, requiring an alteration request be submitted to TCEQ and demonstration of compliance with §116.711.

Comments on §116.721

EIP commented on proposed §116.721(a), which defines "a significant increase in emissions" as a trigger for the requirement of a permit amendment. EIP stated that this phrase needs to be defined, or there needs to be a reference to a definition stated elsewhere. EIP also stated that the phrase should clearly refer to actual, as opposed to allowable, emissions. EIP commented that the trigger should specify that the determination of an emissions increase be a determination based on actual typical short term or typical annual emissions. EIP recommended that the phrase be restated as: "a significant increase in actual emissions under any typical short term or annual operating conditions."

The commission has not changed the rule in response to this comment. In §116.721(a), the phrase "a significant increase in emissions" means an increase that is not insignificant as determined under §116.718. Any increase that fails to meet the criteria of §116.718(a) or (b) is a significant emission increase. When determining whether an emission increase is significant or insignificant, the increased actual emissions are compared to the allowable emissions under the applicable emission cap or individual emission limitation. The commission

declines to use the language suggested by the commenter because the existing terminology is well understood and sufficient.

EIP commented that the proposed rules suffer from persistent problems regarding permit alterations. EIP stated that proposed §116.740(a) does not require public notice and comment on flexible permit alterations. EIP stated that permit alterations have been widely abused by applicants seeking to make modifications, emissions increases, or removing previously enforceable important application representations. EIP stated that TCEQ has routinely allowed permit alterations when emissions increases are expected as long as emissions are not expected to exceed allowable limits. EIP also stated that TCEQ has routinely granted permit alterations when emissions could increase, on the theory that emissions will not, under all operating scenarios, increase. EIP stated that TCEQ has routinely allowed permit alterations that would never be allowed under federal rules or longstanding EPA policies. EIP stated that TCEQ allows permit alterations to remove existing operational restraints such as increasing hours of operation, removing throughput or heat input limitations, or increasing emissions so long as there is no increase in allowables. EIP stated that for these reasons, the commenters oppose alterations to flexible permits when the alteration lacks public notice or opportunity for comment.

Section 116.721(b) requires a flexible permit alteration 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. This

requirement precludes the use of alterations for changes that would change the method of control or character of emissions, would relax emission controls, would add a new facility or facilities, would result in a significant increase in emissions, or would constitute a major modification as defined by §116.12. Note that in the case of flexible permits, it would be possible to make changes through alteration that may increase actual emissions as long as the change did not result in emissions greater than any emission cap or limit, did not involve construction of a new facility, did not involve a change in method of control, or a relaxation of control. With the exception of this, the commission respectfully disagrees with EIP's characterizations of past permit changes made through permit alteration, made without any specific supporting examples or data, as abuses of the rules or process. EIP's comments fail to acknowledge that the commission's minor NSR SIP-approved program is an allowable-based program.

The commission respectfully disagrees that the alteration rule in Subchapter B allows changes that would never be allowed under federal rules or longstanding EPA policies. This is because the EPA's rules prescribe requirements for major stationary sources and major modifications, for which the alteration rule does not violate. The EPA's very broad and general rules applicable to minor NSR do not prohibit the types of permit actions that are covered by the commission's alteration rule. Furthermore, the commission's alteration rule, §116.116(c), is an approved part of the Texas SIP. Finally, as discussed elsewhere in this preamble, the commission recently amended its public participation rules, and alterations

for flexible permits or for permits issued under Chapter 116, Subchapter B are not subject to the public notice requirements in Chapter 39 of the commission's rules. No change was made in response to this comment.

EIP stated that the language of §116.721(c) plainly supports the EPA's concern that a flexible permit can allow changes to SIP permit terms such as limits on throughput and fuel type. Therefore, the proposed flexible permit program continues to fail to meet applicable requirements.

If a SIP permit contains conditions that restrict throughput or fuel type, those conditions would be carried through into the flexible permit if justified, and under §116.721(c), a permit amendment would be required to make a change that conflicts with an existing permit condition. No change was made in response to this comment.

Comments on §116.765

TIP and TxOGA expressed support for proposed §116.765, which provides a delayed effective date for the proposed rules; however, TIP and TxOGA recommended deleting the portion of the rule that would establish December 1, 2012 as an earlier effective date. TIP and TxOGA's recommended change would mean that the rules would only go into effect after final approval by the EPA.

The commission agrees with this comment and has revised the rule as suggested by the commenters to eliminate the alternate compliance date of December 1, 2012. Under the requirements of the FCAA, the EPA has 18 months from receipt of the SIP submittal to take final action on this rulemaking. Allowing the EPA its fully allotted time to act, including publication of its final rulemaking and effective date 30 - 60 days later would be close to December 1, 2012. Until the EPA acts, the rule provides that the current rules remain in effect. If the commission is successful of its challenge of the EPA's disapproval of the existing rules in Subchapter G and requests the EPA to re-review them, then the rules will be available for the EPA's review. If the EPA approves the rules, then the effective date will be timely for applicants to use these rules for permit actions.

SUBCHAPTER A: DEFINITIONS

§116.13

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; 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 adopted 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; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; §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; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

§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.

(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.

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

(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, 116.720, 116.721, 116.730, 116.740, 116.750,
116.765**

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and §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 adopted 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; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; §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; §381.0511, concerning Permit Consolidation and Amendment; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider

in determining a facility modification; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0514, concerning Sampling, Monitoring, and Certification; §382.0515, concerning Application for Permit, §382.0517, concerning Determination of Administrative Completion of Application, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; and §382.062, concerning Application, Permit, and Inspection Fees.

This 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, 382.0518, 382.056 and 382.062.

§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;

(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 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 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 EPA under authority granted under the 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 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;

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

(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;

(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 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. 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 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 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.

(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.

(4) An emission cap will be 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. 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 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.

§116.720. Limitation on Physical and Operational Changes.

Operational or physical changes authorized under this subchapter may not result in an increase in actual emissions at facilities not authorized by the flexible permit unless those affected facilities are authorized pursuant to §116.110 of this title (relating to Applicability).

§116.721. Amendments and Alterations.

(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit 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, 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(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.

§116.730. Compliance History.

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

§116.740. Public Notice and Comment.

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

(b) Any person who applies for an amendment to a flexible permit regarding an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the requirements in Chapter 39 of this title.

§116.750. Flexible Permit Fee.

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

(b) Fee amounts. The fee to be remitted with a flexible permit application shall be determined as set forth in §116.141 of this title (relating to Determination of Fees).

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

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

§116.765. 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.

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

(c) Until the compliance date specified by subsection (b) of this section, applications for flexible permits are governed by §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title, as they existed immediately before January 5, 2011, and those rules are continued in effect for that purpose. All other sections in this subchapter remain applicable to applications for flexible permits.