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

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

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 submitted to the EPA as a proposed SIP revision in 1994. 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 (U.S.C.) §7410(k)(1)(B) and (k)(2)), EPA took 15 years to take any formal action and did so only in response to litigation brought by holders of flexible permits (s*ee BCCA Appeal Group, et al v. United States EPA et al*, No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited the following assertions as the basis for disapproval of the flexible permit program as a minor New Source Review (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 Texas flexible permit program rules (Chapter 116, Subchapter G, Flexible Permits) 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 programs under the supervision of Task Force 21. The rules created a new type of permit called a flexible permit, which functions as an optional alternative to the traditional preconstruction permits that are authorized in 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. 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. Only one flexible permit can be issued for a particular plant site 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 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.

The flexible permit is not a substitute for or in lieu of major NSR permitting if federal NSR review is triggered. 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 the permitted facility. The environmental benefits of the flexible permit program have included the permitting of grandfathered units, substantial emission reductions from the installation of controls, and a comprehensive evaluation of emission impacts.

The commission maintains that its flexible permit program rules, as adopted and implemented, 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. 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). Additionally, permits issued under the flexible permit rules are consistent with the FCAA and EPA rules implementing NSR.

As originally developed and subsequently implemented by TCEQ in 1994, the Texas flexible permit program is a minor NSR program. No provision of the Texas flexible permit program rules may be read to circumvent federal requirements. The rules expressly require compliance with all applicable requirements relating to nonattainment and Prevention of Significant Deterioration (PSD) review.

That limitation, adopted in 1994 as §116.711(8) and (9), continues as proposed §116.711(a)(2)(H) and (I); *see also*, e.g., proposed §§116.710(a)(5), 116.711(a)(2)(C)(ii), and 116.718(b) and (c). The program does not supersede or negate federal requirements. The flexible permit program may not be used as a shield for protection or exemption from federal programs. 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 Code of Federal Regulations (CFR) Part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under Nonattainment and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a federal NSR permit or major modification under the appropriate federal 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.

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 EPA's implementing regulations (see 42 U.S.C. §7407(a) and 40 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 EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are at least as stringent as the commission's SIP-approved minor NSR permitting program.

SECTION BY SECTION DISCUSSION

§116.13, Flexible Permit Definitions

The commission is proposing detailed MRR requirements in proposed §116.715(c)(5), (6) and (12) and (d); *see also* §116.711(a)(2)(G). To support the proposed MRR requirements, the commission is proposing definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS). The proposed 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 proposed 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 proposes to revise 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 also proposes to remove 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 proposed changes to eliminate the insignificant emissions factor would improve the accounting of emissions authorized under the flexible permit, and would address 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 EPA has commented 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 thereby allowing sources to use a flexible permit to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a major NSR preconstruction permit. As previously discussed in the BACKGROUND AND SUMMARY section, the commission does not concur with the EPA's comment that the flexible permit program allows sources to circumvent or avoid major NSR requirements. However, the commission is proposing §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. Proposed §116.710(a)(5) also contains a statement to emphasize that Subchapter G, cannot be used to circumvent applicable federal major NSR permit requirements. Proposed §116.710 also

contains minor editorial changes to correct outdated cross-references and obsolete terminology throughout the section.

§116.711, Flexible Permit Application

The commission proposes 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 proposes minor changes throughout this section to update terminology and correct cross-references.

The commission proposes §116.711(a)(2)(C)(i) to more clearly describe the application of BACT to new and existing facilities. All new facilities are required to use BACT. Existing 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. The existing level of control may not be reduced for any facility.

The commission proposes §116.711(a)(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 proposed change is intended to ensure that all applicable federal major NSR control requirements are applied. This proposed change addresses EPA's comments that allege that the flexible permit rules could be used to bypass the federal BACT or Lowest Achievable Emission Rate (LAER) control technology determination that is required for major PSD or nonattainment NSR projects.

The commission proposes amended §116.711(a)(2)(G), which would specify 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 proposed to revise the rule language for greater clarity. The proposed change, 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 proposes amended §116.711(a)(2)(H) and (I), which would 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 nonattainment NSR requirements or PSD requirements. These proposed changes address 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.

The commission proposes amended §116.711(a)(2)(J), which would add 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 proposed change addresses EPA's comment that the flexible permit program does not sufficiently protect the NAAQS.

The commission proposes to amend §116.711(a)(2)(M)(iv) by adding language to ensure that permit applicants provide a complete description of the emission point numbers (EPNs) and facilities that will be included in an emissions cap. This proposed change 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 proposes §116.711(a)(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 proposes §116.711(a)(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 proposed change is intended to address the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for.

§116.715, General and Special Conditions

The commission proposes to restructure and renumber portions of §116.715, and proposes other minor changes to improve readability and update terminology and cross references throughout the section.

The commission proposes to amend §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 proposes an 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 proposes to add 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 proposed changes are in response to comments in the EPA's correspondence to the commission dated March 12, 2008.

The commission proposes amendments to §116.715(c)(5). Proposed §116.715(c)(5)(A) would require that each flexible permit specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit. Proposed §116.715(c)(5)(B) would require that each flexible permit specify emission calculation methods for calculating annual and short term emissions for each pollutant when continuous emission monitoring or continuous operating parameter monitoring is not required. These proposed changes 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 proposes to amend §116.715(c)(6). The proposed amendment would reorganize the recordkeeping requirements applicable to flexible permits, and add 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 proposed recordkeeping requirements would require flexible permit applicants to maintain records of any other permit applications associated with the flexible permit; would require specific recordkeeping to document compliance with annual and short term emission caps and individual emission limitations; and would require that flexible permit holders maintain records for five years instead of two years, as suggested by the EPA's March 12, 2008, correspondence.

The commission proposes §116.715(c)(8), concerning compliance with representations in a flexible permit application. This requirement parallels existing requirements relating to representations under §116.116.

In the Notice, the EPA commented that the flexible permit program lacked sufficient MRR to ensure accountability and determine compliance with flexible permits. The commission does not concur with the EPA's comment, as each individual permit establishes appropriate MRR requirements on a case-by-case basis. However, more specific rule language relating to MRR may be appropriate to clearly establish MRR requirements in the rule, especially relating to emission caps. The commission proposes §116.715(c)(12) and (d), which would specify MRR procedures associated with emission caps in a flexible permit. The proposed rules would 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 proposed rules include requirements to address absence of monitoring data, require revalidation of site-generated data, and define minimum characteristics of the monitoring system. The proposed rules are intentionally structured in a manner similar to federal regulations for recordkeeping, reporting, and monitoring associated with Plant-wide Applicability Limits,

for which the commission has adopted rules in Subchapter C, Plant-wide Applicability Limits, with minor changes as necessary for compatibility with the flexible permit program.

§116.716, Emission Caps and Individual Emission Limitations

The commission is proposing minor changes throughout this section to improve readability and update terminology. Other proposed changes throughout §116.716 are intended to address 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 proposing §116.716(a)(1), which would specify that only like-kind facilities could be included in an emissions cap. As an alternative to this requirement, a site-wide emission cap could be established to cover all facilities at a site. Like-kind facilities means those facilities which are similar in operational nature and in emissions, such that all the facilities within an emission cap would share certain basic characteristics. Examples of like-kind facilities could include, but are not limited to: engines; turbines; boilers and process heaters; storage vessels; or similar chemical or refining process units. The executive director would reserve the right to 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 EPA expressed concern in the Notice that under the existing rules, hundreds of unrelated emission sources could be subject to one emission cap and/or individual emission limitations. The proposed change would address this concern by

narrowing the scope of the types of sources that could be included together in an emission cap, referred to as a like-kind facilities cap. The commission has also included the option to have a site-wide cap.

The commission is proposing §116.716(a)(2)(B), which would add language to clarify and reinforce the application of federally-required control technology for any project that constitutes a federal major source or major modification. This provision is intended to further address EPA's stated concerns that the flexible permit program could allow a facility to avoid federally-required control technology.

The commission is proposing §116.716(a)(3), which would require 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 is intended to ensure that sources subject to LAER are fully controlled as required by federal NSR regulations and Subchapter B.

The commission is proposing §116.716(a)(5) to specify that a permit applicant may propose an emission cap that is lower than the emission cap determined by subsection (a)(4), if the permit applicant provides technical information to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

The commission is proposing §116.716(c), which would require 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 proposed change addresses 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 proposes to delete existing §116.716(d), which currently allows an emission cap or individual limitation to include an insignificant emissions factor of up to 9%.

The commission proposes §116.716(d) which would clarify how an emission cap is to be adjusted or determined for several situations. Proposed §116.716(d)(1) would require that an emission cap be adjusted downward to account for the shutdown of a facility for a period longer than six months. The current rule does not require the emission cap to be adjusted until a facility is shut down for longer than 12 months. The time period has been proposed to be reduced from 12 months to ensure that the emissions cap corresponds to the actual operation of the facilities under the cap and to ensure that appropriate emission control is maintained even when some sources within the cap are not operating. Proposed §116.716(d)(1) also includes language to clarify how the emission cap is to be adjusted when a previously shut down facility is restored to operation. The commission proposes §116.716(d)(2) to clarify that a permit amendment is required to add a facility to a flexible permit emission cap. Proposed §116.716(d)(3) further explains how the emission cap shall be determined when the permit is amended.

Proposed §116.716(e) would require that each emission cap or individual emission limitation have an annual emission limit, based on a 12-month rolling period. The proposed rule would also require that each emission cap or individual emission limitation include an appropriate short term (such as hourly) emission limit.

§116.717, Implementation Schedule for Additional Controls

The commission proposes an 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 added language to this section to acknowledge and emphasize that certain federally-required controls, such as BACT or LAER required by PSD or nonattainment NSR, must be in place and operational before the permitted facility can begin operation. The proposed amendment addresses the EPA's comments relating to implementation schedules in the March 12, 2008, correspondence from the EPA to the commission, and would further ensure that the flexible permit program cannot be used to forestall or avoid major NSR control requirements.

§116.718, Significant Emission Increase

The commission proposes §116.718(b) to clarify that this section may not be used to authorize an emission increase under a flexible permit for any project that constitutes a federal major modification. Proposed §116.718(b) further requires that the permit holder must document that any increases under this section are not major modifications. The proposed changes further address the EPA's comments that the flexible permit program could be used to avoid applicable major NSR requirements.

The commission proposes §116.718(c) which would require 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 proposed change 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.

§116.720, Limitation on Physical and Operational Changes

The commission proposes minor editorial changes to §116.720 to improve readability.

§116.721, Amendments and Alterations

The commission proposes amendments to §116.721 to clarify under what circumstances a flexible permit amendment is required. The proposed rule under §116.721(a) includes new language to state that any action that would relax emission controls, add a new facility or facilities, or would constitute a major modification would require the permit holder to obtain a permit amendment. Similar language is proposed to be added to §116.721(c) for the same purpose. The proposed change is 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 proposes minor editorial changes to this section to update terminology and improve readability.

The Notice stated that the proposed disapproval was based, in part, on the EPA's understanding that the flexible permit program allows holders of a flexible permit to make de facto amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of minor and major NSR permits, without a preconstruction review. The Notice further stated that while the EPA has recognized that under certain circumstances changes to PSD permits may be appropriate, such changes are generally not allowed without a review of the new circumstances by the permitting authority. The EPA stated that any time a change to a permit limit founded in BACT is being considered, a corresponding reevaluation (or reopening) of the original BACT determination may be necessary, and cited a memo from 1987.

The EPA's understanding of the Texas flexible permit rule is incorrect, and the case cited by EPA does not match the point EPA is attempting to support. Authorizing facilities in a flexible permit emission cap (regardless of their previous status) is a modification and requires a complete preconstruction review. Once established in a flexible permit, changes in the terms and conditions (such as any restrictions on throughput, fuel type, or hours of operation) of minor and major NSR permits without a preconstruction review are not allowed. Section 116.721(b)(2) provides that any change to permit conditions requires executive director approval. In general, flexible permits will not have conditions that restrict throughput or hours of operation unless they are necessary for BACT or to ensure acceptable off-site impacts. Changing any condition related to BACT requires a permit amendment, pursuant to §116.721(a). Any change in permit conditions that could result in a major modification as well as any fuel switch must undergo a preconstruction review, §116.721(a).

§116.730, Compliance History.

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

§116.740, Public Notice and Comment

The commission proposes minor editorial changes to §116.740 to improve readability and correct outdated cross-references. In a concurrent rulemaking, the commission has proposed new and amended 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 proposes an amendment to §116.750 that would revise 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 proposed changes would require that flexible permit fees be based on a percentage of project capital cost, rather than based on emission rate. The proposed changes would 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 would be retained. The commission is proposing this change because the relatively small volume of flexible permit actions in relation to the number of Subchapter B permit actions does not justify maintaining a separate fee system.

§116.765, Delayed Effective Date

The commission proposes new §116.765 to specify that the rule changes proposed in this action would not become effective until the earlier of 60 days after the EPA publishes final approval of these sections as revisions to the Texas SIP, or December 1, 2012. Until such time, the existing Subchapter G rules concerning flexible permitting would remain in effect.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will base the calculation of the flexible permit fee on the capital cost of a project instead of annual emissions. The

impact on agency revenue will vary depending on the complexity of each project, but the overall impact to agency revenue is not expected to be significant. Most local governments are not expected to experience fiscal impacts as a result of the proposed rules, but some governmental entities that have flexible permits could experience fiscal impacts if they choose to apply for a new flexible permit or modify facilities in a way that would require them to request an amendment to a flexible permit.

The EPA has proposed to disapprove existing rules in Subchapter G that relate to the flexible air permits program. The existing flexible permits program allows different sources to be grouped together under an emissions cap instead of having an individual emission limit for every emission point in a permit. The proposed rules are intended to address the EPA's concerns so that it will approve the flexible permits program.

For the most part, the proposed rules are clarifications of already existing agency practices and policies concerning the review and issuance of flexible permits. The proposed rules provide more detail, reorganize existing requirements, clarify and reference applicable federal requirements if a project triggers federal NSR permitting, clearly state that the flexible permits program cannot be used to circumvent federal NSR permitting, clearly state that exceedance of flexible permit caps or individual emission limitations is subject to enforcement action, and detail other requirements that are not expected to have a fiscal impact on regulated entities.

The proposed rules also incorporate provisions that are expected to have fiscal impacts, although these impacts are not expected to be significant. The proposed rules will only have fiscal impacts on regulated entities if they apply for a new flexible permit or are required to amend an existing flexible permit.

Provisions of the proposed rules that may have a fiscal impact on regulated entities include changes to require that new permit or amendment applications include an air quality analysis to demonstrate that proposed actions will not interfere with attainment and maintenance of NAAQS, and specify a five-year record retention period.

The proposed rules may have a fiscal impact on agency revenue, but the impact is not expected to be significant. The basis for calculating the flexible permit fee will change from being based on tons of emissions per year to a percentage of project capital cost, which is the same basis used to assess a fee for a construction permit. Based on historical data, the average fee for an initial flexible permit has been $19,000, but a new flexible permit could range from $900 to $75,000. The number of initial flexible permits has been five to seven per year, and the number of flexible and construction amendments have averaged 30 per year. The average fee for a flexible permit amendment has been about $5,700. The average fee for an initial construction permit has been $11,000 and the fee for an amendment has been $5,700. If an average of six initial flexible permits and 30 flexible amendments are issued in a year, the estimated decrease in agency revenue could be as much as $48,000 per year in Account 151 – Clean Air Account. However, since projects requiring flexible permits are often complex, the effect on agency revenue due to the change in the basis for assessment could vary considerably. If a large number of complex projects are submitted, fees assessed could actually increase agency revenue.

Agency records indicate that there may be as many as one local government, one state agency, and one federal installation that could experience fiscal implications as a result of the proposed rules if they need a new flexible permit or are required to amend an existing flexible permit. Fiscal implications will vary depending on the complexity of each project. Permit fees will vary depending on the complexity of the

project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A governmental entity would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state.

The proposed rules modify the types of emission units allowed in a group to determine emission caps. Instead of allowing any kind of unit in an emission cap, the proposed rules allow that an emission cap have similar units. As an alternative to this requirement, permit applicants would also have the option to establish a site-wide emission cap that would cover all facilities at the site. Local governments with flexible permits could experience cost increases if facilities are placed in different emission caps. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with federal requirements and additional clarity regarding the flexible permit program.

Individuals are not expected to experience fiscal impacts as a result of the proposed rules. Individuals do not typically operate facilities that would elect to use the flexible permit program for operational flexibility.

Large businesses will be affected by the proposed rules if they elect to apply for a new flexible permit or elect to modify facilities in a way that requires an amendment of a flexible permit. Trends suggest that there may be as many as 37 plants per year that could be affected by the proposed rules, and examples of businesses that might be affected include chemical plants, refineries, pipeline companies, oil and gas companies, power plants, and others. Fiscal implications will vary depending on the complexity of each project. Permit fees paid will vary depending on the complexity of the project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. If the project is more complex, a flexible permit fee could increase. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A large business would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state. Businesses could also experience higher costs for monitoring or control devices if they choose to place facilities in different emission cap groupings. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that operate facilities under flexible permits unless they apply for a new flexible permit or modify facilities in a way that would require them to amend their flexible permits. Agency records indicate that most flexible permits are held by large businesses, but there may be as many as ten small businesses that have flexible permits. If these small businesses elect to apply for a new flexible permit or modify facilities in a way that requires an amendment of a flexible permit, they will experience the same fiscal impacts as those experienced by a large business.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed amendments to the rules are required for approval as part of the Texas SIP. The approval will be based on whether the commission's flexible permit program rules meet federal requirements. For purposes of the fiscal analysis, the requirements of the flexible permit program apply to both large and small businesses alike.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a

major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rules is to amend various sections of 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. The proposed 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) propose 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 Nonattainment NSR 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 effective 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 proposed 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 proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS portion of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and

Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 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 the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits in order to obtain federal approval of the rules into the Texas SIP. The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 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 proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments will benefit the environment by ensuring that the 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.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must,

consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 2010, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-007-116-PR. The comment period closes August 2, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Mr.

Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER A: DEFINITIONS

§116.13

STATUTORY AUTHORITY

The amendment is proposed 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 proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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, O_2 or CO_2 concentrations), and to record average operational parameter value(s) on a continuous basis.

(3) [(1)] Emission cap--Emission limit for a specific air contaminant based on total emissions of that pollutant [adjusted by an insignificant emissions factor] from all facilities [sources] that are included in a flexible permit.

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

(5) [(3)] Individual emission limitation--Emission limit for a specific air contaminant [not covered by an emission cap] for an individual facility [adjusted by an insignificant emissions factor].

(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, O_2 or CO_2 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

STATUTORY AUTHORITY

The amendments and new rule are proposed 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 amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 <u>for</u> [at] an account [site];

(2) modifications to existing facilities <u>included in</u> [covered by] a flexible permit may be <u>authorized by</u> [handled through] the amendment of an existing flexible permit;

(3) [permitting of] a new facility may be <u>authorized by</u> [handled through] the amendment of a flexible permit; [and]

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

(5) a flexible permit application, review, and issued permit used to authorize any facility, group of facilities, account, or any change to existing facilities 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), as applicable. 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) [§116.110(d)] of this title, provided however, that all facilities authorized [covered] 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) [§116.110(e)] 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.

[Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. The Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete.] 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: [information to the commission which demonstrates that all of the following are met.]

(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)[(1)] 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 [and regulations] 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)[(2)] 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)[(3)] Best available control technology (BACT).

(i) All new facilities must [The proposed facility, group of facilities, or account will] utilize BACT [, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis]. Existing facilities shall utilize BACT with consideration given to the

technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility or group of existing facilities basis. Control technology beyond BACT may be used on certain existing facilities to provide the emission reductions necessary to comply with this requirement on a group of existing facilities [or account] basis, provided however, that the existing level of control may not be lessened for any facility. [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 C 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.]

(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) [(4)] 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) [(5)] 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) [(6)] 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) [(7)] 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 [may] be required as specified in each flexible permit.

(H) [(8)] 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; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal Nonattainment New Source Review requirements.

(I) [(9)] 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; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal PSD review.

(J) [(10)] 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 [New Source Review] 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) [(11)] 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 [C] of this chapter.

(L) [(12)] 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 [(13)] Application content. In addition to [any] other requirements of this chapter, the applicant shall:

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

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

(iii) [(C)] 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) [(D)] 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) [(E)] 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) [(14)] Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each unit [to meet the emission cap] 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. [Upon a specific finding by the executive director that an 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 review under §116.150 and §116.151 and §§116.160 - 116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).]

(b) A pollutant specific emission cap or [multiple emission caps and/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 [shall be reported] 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 [shall be notified] 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 [Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility].

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Air Permits Division [Office of Permitting, Remediation, and Registration] 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 [of stacks or process vents] is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement 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 when continuous emission monitoring or continuous operating parameter monitoring is not required to be used to monitor emissions for that type of facility.

(C) [It shall be the responsibility of the] The flexible permit holder must [to] 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 [Alternative] emission control, sampling, monitoring, or calculation methods [shall be applied for] must be submitted in writing for review and approval [and must be reviewed and approved] by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. The permit holder shall:

(A) maintain a [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 [shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production

records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained]. 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; and

(iii) Production records and operating hours.

(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 [attached to] the flexible permit. Flexible permitted facilities [sources] are limited to the emission limits and other conditions specified in the table in [attached to] the flexible permit.

(8) Representations and conditions. The following are the conditions upon which a flexible permit or a flexible permit amendment is issued:

(A) representations with regard to construction plans and operation procedures in an application for a permit or permit amendment; and

(B) any general and special conditions included in the permit.

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

(10) [(9)] Maintenance of emission control. The facilities authorized [covered] 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) [(10)] 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[, Regulations,] and Orders of the commission issued in conformity with the Texas Clean Air Act [TCAA] and the conditions precedent to the granting of the permit. 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 executive director 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) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual emission cap pollutant emissions, and short-term emission cap pollutant emissions;

(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 (relating to Significant Emission Increase);

(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, 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 one week as required by §116.716(e)(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.

(d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. 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 significant facility as defined in §116.12 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 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) [(d)] There may be additional special conditions included in [attached to] 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. Each emission cap for a specific pollutant will be established as follows:

(1) either as a site-wide cap or a like-kind facilities cap. The executive director reserves the right to reject or 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.

(2) [(1)] emissions will be calculated for each facility within an emission cap as follows: [based on application of current Best Available Control Technology at expected maximum capacity;]

(A) based on application of best available control technology at expected maximum capacity; or

(B) 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.

(3) 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.

(4) [(2)] the calculated emissions for all facilities within an emission cap will be summed.

(5) a lower emission cap than that determined by paragraph (4) 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.

(b) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not included in [covered by] an emission cap for facilities authorized [covered] by the flexible permit. In addition, an individual emission limitation may be established for a pollutant included in [covered by] 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.

(c) 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.

(d) [(c)] Adjustment [Readjustment] of emission cap.

(1) If a facility subject to an emission cap is shut down for a period longer than six [12] months, the emission cap shall be adjusted [readjusted] 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 [new] facility is to be added to [brought into] the flexible permit, a permit amendment is required to establish a revised emission cap [, an emission cap shall be adjusted by modifying the emissions cap accordingly].

(3) If an existing emission cap is to be increased through a permit amendment as a result of adding a new facility or the modification of a facility within the emission cap, the emission cap shall be increased by the sum of the emissions from each of the new or modified facilities determined in accordance with subsection (a) of this section and decreased by the sum of the previous emission cap contributions from the facilities to be modified. For the purpose of determining whether an increase in the emission cap constitutes a major modification for the pollutant as defined by §116.12 of this title, all facilities under that cap shall be considered modified unless there has been no physical modification of that facility and a separate permit limit or physical constraint limits its potential to emit.

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

(4) [(e)] An emission cap will be adjusted [readjusted] downward for any facility authorized [covered] 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 [at] 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 [regulation], 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.

(e) 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.

§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 [or fails to install the additional control equipment as provided by the implementation schedule]. 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 [covered] by a flexible permit is insignificant, for the purposes of minor [state] new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

(b) This section does not apply to any change 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). 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 §116.121 of this title (Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases). 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. 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 a separate permit limit or physical constraint limits the facility's potential to emit. 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 an existing facility authorized by a flexible permit and the area is not designated as nonattainment for the pollutant. If the emission increase may result in off-site ambient concentrations greater than *de minimis* for that pollutant, the air quality analysis shall be submitted to the commission for review and approval prior to making the change.

§116.720. Limitation on Physical and Operational Changes.

Operational or [Neither operational nor] physical changes authorized under this subchapter may not result in an increase in actual emissions at facilities not authorized [covered] 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 [provisions attached], 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, [or] 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, [or] 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 [covered] 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 [provisions found in] 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 [provisions] 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 [C] 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 [provisions] in Chapter 39 of this title [(relating to Public Notice)].

§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) [based on the total annual allowable emissions from the permitted facility, group of facilities, or account for which the flexible permit is being sought. The fee shall be $32 per ton with the minimum fee being $900 and the maximum fee $75,000. For flexible permit amendments, the fee shall be calculated based on $32 per ton for the incremental emission increase with the minimum fee being $900 and the maximum fee being $75,000].

(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 [New Source Review] 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. Delayed Effective Date.

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 1, 2010, shall be effective on the earlier of 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, or December 1, 2012. Until such time, these sections, as they existed prior to the adoption of these amendments, remain in effect.