thereby left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

According to 40 CFR 51.125, each state submitting a CAIR SIP revision must provide for emissions reporting requirements of $SO_2$ and $NO_X$ emissions data. EPA is proposing to approve revisions to Alabama's Section 335–3–1–.14 and addition of Section 335–3–1–.16 to fulfill this requirement. Consistent with 40 CFR 51.121, these rule revisions allow the State to make the transition from the $NO_X$ budget trading program ($NO_X$ SIP Call) to the CAIR $NO_X$ ozone season trading program, beginning with the 2009 ozone season. Alabama's $NO_X$ budget trading program does not apply to any ozone season after the 2008 ozone season.

This proposed action is consistent with the Court's decision in North Carolina v. EPA discussed above. While the Court identified several issues with CAIR, the rule was not vacated because of the loss of environmental benefit generated by the rule. As EPA works to remedy CAIR to satisfy the Court, CAIR remains in effect, including its trading programs. Currently, Alabama's $NO_X$ SIP Call trading program ends after the 2008 ozone season, and so to continue the environmental benefits of the trading program, consistent with CAIR and the Court's opinion, Alabama must revise its SIP, as proposed, to transition into the CAIR $NO_X$ trading program.

## IV. Proposed Action

EPA is proposing to approve the aforementioned revisions, specifically, Chapter 335–3–1, Sections 335–3–1–.14, and 335–3–1–.16 into the Alabama SIP. These revisions were submitted by ADEM on March 7, 2007, and are consistent with EPA regulations, policy, and guidance.

## V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: September 11, 2009.

**J. Scott Gordon,**

*Acting Regional Administrator, Region 4.*

[FR Doc. E9–22904 Filed 9–22–09; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R06–OAR–2005–TX–0032; FRL–8958–6]**

## Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing disapproval of submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ) to revise the Texas SIP to include a new type of NSR permitting program, Flexible Permits (the Texas Flexible Permits State Program or the Program). EPA proposes disapproval of the Texas Flexible Permits State Program because it does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision. We are proposing action under section 110, part C, and part D, of the Federal Clean Air Act (the Act or CAA). EPA is taking comments on this proposal and intends to take a final action.

**DATES:** Any comments must arrive by November 23, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R06–OAR–2005–TX–0032 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *U.S. EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6coment.htm.* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.
- *E-mail:* Mr. Stanley M. Spruiell at *spruiell.stanley@epa.gov.*
- *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), at fax number 214–665–7263.
- *Mail:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency,

1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–R06–OAR–2005–TX–0032. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals, which are also part of the EPA docket, are also available for public inspection at the State Air Agency during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number (214) 665–7263; e-mail address *spruiell.stanley@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, the following terms have the meanings described below:

- ''We,'' ''us,'' and ''our'' refer to EPA.
- ''Act'' and ''CAA'' mean the Clean Air Act.
- ''40 CFR'' means Title 40 of the Code of Federal Regulations—Protection of the Environment.
- ''SIP'' means State Implementation Plan established under section 110 of the Act.
- ''NSR'' means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- ''Minor NSR'' means NSR established under section 110 of the Act and 40 CFR 51.160.
- ''NNSR'' means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- ''PSD'' means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- ''Major NSR'' means any new or modified source that is subject to NNSR and/or PSD.
- ''Program'' means the SIP revision submittals from the TCEQ concerning the Texas Flexible Permits State Program.
- ''TSD'' means the Technical Support Document for this action.
- ''NAAQS'' means any national ambient air quality standard established under 40 CFR part 50.

**Table of Contents**



## I. What Action Is EPA Proposing?

We are proposing to disapprove the Texas Flexible Permits State Program, as

submitted by Texas in Title 30 of the Texas Administrative Code (30 TAC) at 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, because it does not meet certain provisions of the Act and EPA's NSR regulations. This includes the following regulations under Chapter 116: 30 TAC 116.110(a)(3), 30 TAC Subchapter G—Flexible Permits, the definitions in 30 TAC 116.13, Flexible Permits, and the definition in 30 TAC 116.10(11)(F) of ''modification of existing facility.'' It is EPA's position that none of these identified elements is severable from each other.

We are proposing to disapprove the submitted Texas Flexible Permits State Program as not meeting the requirements for a substitute Major NSR SIP revision. Our grounds for proposing disapproval as a substitute Major NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby allowing new major stationary sources to construct without a Major NSR permit;
- It has no regulatory provisions clearly prohibiting the use of this 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;
- It does not require that first an applicability determination be made whether the construction or modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;
- It does not include a demonstration from the TCEQ showing how the use of ''modification'' is at least as stringent as the definition of ''modification'' in the EPA Major NSR SIP program;
- It does not include the requirement to make Major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source;
- It fails to meet the statutory and regulatory requirements for a SIP revision;
- It is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions; and
- It fails to include, among other things, adequate accountability provisions, compliance determination procedures, replicable implementation procedures, sufficient monitoring, recordkeeping, and reporting requirements so that issued permits incorporate emission limitations and other requirements of the Texas SIP that ensure protection of the national ambient air quality standards (NAAQS), and noninterference with the Texas SIP control strategies and reasonable further progress (RFP).

We are proposing to disapprove the submitted Program as not meeting the Minor NSR SIP requirements. It is not clearly limited to Minor NSR. It has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements. This Program does not require that first an applicability determination be made whether the construction or modification is subject to Major NSR. The Program does not ensure that a Major NSR permit's requirements are retained.

In addition to the failures to protect Major NSR SIP requirements, EPA cannot find that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP. We are proposing to disapprove this Program as a Minor NSR SIP revision because it does not meet certain provisions of the Act and EPA's Minor NSR SIP requirements. Our grounds for proposing disapproval as a Minor NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby allowing new major stationary sources to construct without a Major NSR permit;
- It has no regulatory provisions clearly prohibiting the use of this 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;
- It does not require that first an applicability determination be made whether the construction or modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;
- It fails to meet the statutory and regulatory requirements for a SIP revision;
- It is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions;
- It lacks replicable, specific, established implementation procedures for establishing the emission cap in a Minor NSR Flexible Permit;
- It is not an enforceable Minor NSR permitting program;
- It allows the issuance of Flexible Permits that do not incorporate emission limitations and other requirements of the Texas SIP; and
- It lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements required for this type of Minor NSR program, as selected by Texas, to ensure accountability and provide a means to determine compliance.

We have evaluated the submitted Texas Flexible Permits State Program, submitted in a series of packages dating back to 1994. Based upon our evaluation, EPA has concluded that the portions of the submitted SIP revisions specifically applicable to the Program do not meet the requirements of the Act and 40 CFR part 51. All these portions of the submittals for the Program are not severable and therefore are not approvable. As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittals are severable, EPA may approve the portions of the submittals that meet the requirements of the Act, take no action on certain portions of the submittals, and disapprove the portions of the submittals that do not meet the requirements of the Act. When the deficient provisions are not severable from all of the submitted provisions, EPA must propose disapproval of the submittals, consistent with sections 301(a) and 110(k)(3) of the Act. The submitted provisions work together to form the Texas Flexible Permits State Program and are not severable from each other. Therefore, EPA is proposing disapproval of the submitted Program.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a mandatory requirement of the Act starts a sanctions clock and a Federal Implementation Plan (FIP) clock. The provisions in these submittals relating to the Texas Flexible Permits State Program were not submitted to meet a mandatory requirement of the Act. Therefore, if EPA takes final action to disapprove this submitted Program, no sanctions and FIP clocks will be triggered.

## II. What Are the Other Relevant Proposed Actions on the Texas Permitting SIP Revision Submittals?

This proposed action should be read in conjunction with two other proposed actions appearing elsewhere in today's **Federal Register**, (1) proposed action on the Texas NSR SIP, including PSD, NNSR for the 1997 8-Hour Ozone Standard, NSR Reform, and a Minor NSR Standard Permit (NSR SIP), and (2)

proposed action on the Texas NSR SIP, the Qualified Facilities Program and the General Definitions.[1] On November 26, 2008, EPA proposed limited approval/limited disapproval of the Texas submittals relating to public participation for air permits of new and modified facilities (73 FR 72001). EPA believes these actions should be read in conjunction with each other because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the NAAQS and to protect the health of the communities where these sources are located. Our proposal is based upon our interpretation of the Texas preconstruction permitting program which is outlined in each notice and accompanying technical support document (TSD). Those interested in any one of these actions are encouraged to review and comment on the other proposed actions as well.

EPA intends to take final action on the State's Public Participation SIP revision submittals in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP on August 31, 2010. These dates are expected to be mandated under a Consent Decree (see, Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009).

## III. What Has the State Submitted?

This notice provides a summary of our evaluation of Texas' November 29, 1994 SIP revision submittal, as revised by severable portions in the March 13, 1996, SIP revision submittal, and severable portions of the July 22, 1998 SIP revision submittal that repealed and replaced portions of, as well as revised, the 1994 submittal and repealed and replaced all of the 1996 submittal; and as revised by severable portions in the October 25, 1999, September 11, 2000, April 12, 2001, September 4, 2002, October 4, 2002, and September 25, 2003, SIP revision submittals. We provide our reasoning in general terms in this preamble, but provide a more detailed analysis in the TSD that has been prepared for this proposed rulemaking. Because we are proposing to disapprove this submitted Program based on the inconsistencies and deficiencies discussed herein, we have not attempted to review and discuss all of the issues that would need to be addressed for approval of this submitted Program as a Major NSR SIP revision.

On November 29, 1994, Texas submitted revisions adding a new Subchapter G—Flexible Permits, to 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, adding a new 30 TAC 116.13, Flexible Permit Definitions, to Subchapter A, Definitions, and a revision to Subchapter B, New Source Review Permits, Division 1, Permit Applications at 30 TAC 116.110(a), authorizing the use of a Flexible Permit for construction of any new facility and modification of any existing facility. Texas submitted on March 13, 1996, a severable revision to Subchapter A, Definitions, in 30 TAC 116.10, General Definitions, which included, among other things, a definition for ''modification of existing facility,'' at (F) in 30 TAC 116.10 addressing modifications under Flexible Permits. On July 22, 1998, Texas submitted severable revisions that included the repeal of the contents of the 1996 submittal and some of the contents of the 1994 submittal. Among other things, the 1998 submittal included a new 30 TAC 116.13, Flexible Permit Definitions, a new 30 TAC 116.10, General Definitions, ''modification of existing facility,'' at (9)(F), and a new 30 TAC 116.110 (a). In the September 4, 2002, SIP submittal, Texas submitted a redesignation of 30 TAC 116.10(9)(F) to 30 TAC 116.10(11)(F). Texas submitted revisions to Subchapter G—Flexible Permits—in a severable portion of the July 22, 1998 SIP revision submittal, and more revisions to Subchapter G in SIP revision submittals on October 25, 1999; September 11, 2000; April 12, 2001; September 4, 2002; October 4, 2002; and September 25, 2003.

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this proposal is discussed in sections V, VI, and VII of this preamble. The TSD includes a detailed evaluation of the submittals.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

| Title of SIP submittal | Date submitted to EPA | Date of state adoption | Regulations affected |
|---|---|---|---|
| Flexible Permits | 11/29/1994 | 11/16/1994 | Revision to 30 TAC 116.110.<br>Adoption of New 30 TAC 116.13 and New Subchapter G, 30 TAC 116.710, 116.711, 116.714, 116.715, 116.716, 116.717, 116.718, 116.720, 116.721, 116.722, 115.730, 116.740, 116.750, and 116.760. |
| Qualified Facilities and Modifications to Existing Facilities. | 3/13/1996 | 2/14/1996 | Revision of 30 TAC 116.10 to add new definition of ''modification of existing facility'' at (F). |
| NSR Rule Revisions; section 112(g) Rule Review for Chapter 116. | 7/22/1998 | 6/17/1998 | Repeal and new 30 TAC 116.10 (9) (F), 116.13 and 116.110(a)(3) adopted.<br>Revisions to Subchapter G, 30 TAC 116.710, 116.711, 116.714, 116.715, 116.721, 116.730, and 116.750. |
| Public Participation (HB 801) | 10/25/1999 | 9/2/1999 | Revision to Subchapter G, 30 TAC 116.740. |
| Air Permits (SB–766)—Phase II | 9/11/2000 | 8/9/2000 | Revisions to Subchapter G, 30 TAC 116.710, 116.715, 116.721, 116.722, and 116.750. |
| Emissions Banking and Trading | 4/12/2001 | 3/7/2001 | Revisions to Subchapter G, 30 TAC 116.711 and 116.715. |
| House Bill 3040: Shipyard Facilities and NSR Maintenance Emissions. | 9/4/2002 | 8/21/2002 | Revision to 30 TAC 116.10, redesignating 30 TAC 116.10(9)(F) to 116.10(11)(F).<br>Revisions to Subchapter G, 30 TAC 116.711 and 116.715. |
| Air Fees | 10/4/2002 | 9/25/2002 | Revisions to Subchapter G, 30 TAC 116.750. |

[1] In that proposed action, the submitted definition of BACT is not severable from the proposed action on the PSD SIP revision submittals. EPA may choose to take final action on the definition of BACT in the NSR SIP final action rather than in the final action on the Qualified Facilities and the General Definitions. EPA is obligated to take final action on the submitted definitions in the General Definitions for those identified as part of the Texas Qualified Facilities State Program, the Texas Flexible Permits State Program, Public Participation, Permit Renewals (there will be a proposed action published at a later date), and this BACT definition as part of the NSR SIP.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION—Continued

| Title of SIP submittal | Date submitted to EPA | Date of state adoption | Regulations affected |
|---|---|---|---|
| Offset Certification, New Source Review Permitting Processes and Extensions for Construction. | 9/25/2003 | 8/20/2003 | Revision to Subchapter G, 30 TAC 116.715. |

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

| Section | Title | Date submitted | Date adopted by state | Comments |
|---|---|---|---|---|
| **Chapter 116—Control of Air Pollution by Permits for New Construction or Modification** | | | | |
| **Subchapter A—Definitions** | | | | |
| Section 116.10(11)(F) | General Definitions | 3/13/1996 | 2/14/1996 | Revised to add new definition of ''modification of existing facility.'' |
| | | 7/22/1998 | 6/17/1998 | Repealed and Adopted new 30 TAC 116.10(9)(F). |
| | | 9/04/2002 | 8/21/2002 | Redesignated 30 TAC 116.10(11(F). |
| Section 116.13 | Flexible Permit Definitions | 11/29/1994 | 11/16/1994 | Initial Adoption. |
| | | 7/22/1998 | 6/17/1998 | Repealed and Adopted new 30 TAC 116.13. |
| **Subchapter B—New Source Review Permits** | | | | |
| **Division 1—Permit Application** | | | | |
| Section 116.110 | Applicability | 11/29/1994 | 11/16/1994 | Revised (a) to add reference to Flexible Permits. |
| | | 7/22/1998 | 6/17/1998 | Repealed and adopted a new 30 TAC 116.110. Included reference to Flexible Permits in new 30 TAC 116.110(a)(3). |
| **Subchapter G—Flexible Permits** | | | | |
| Section 116.710 | Applicability | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised subsection (a). Removed subsection (b) and Redesignated existing subsections (c)–(e) to subsections (b)–(d). Revised subsections (b)–(d) as redesignated. |
| | | 9/11/2000 | 8/09/2000 | Revised subsection (b). |
| Section 116.711 | Flexible Permit Application. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised introductory paragraph and paragraphs (1)–(5); Added new paragraphs (6) and (11): Redesignated existing paragraphs (6)–(9) to paragraphs (7)–(10) and existing paragraphs (10)–(11) to paragraphs (12)–(13); and Revised paragraphs (8)–(10) as redesignated. |
| | | 4/12/2001 | 3/07/2001 | Added new paragraph (12); and Redesignated existing paragraphs (12)-(13) to paragraphs (13)–(14). |
| | | 9/4/2002 | 8/21/2002 | Designated existing as subsection (a); Added new subsection (b); and Revised paragraphs (a)(8)–(11) as redesignated. |
| Section 116.714 | Application Review Schedule. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised introductory paragraph. |
| Section 116.715 | General and Special Conditions. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised subsection (a), and paragraphs (c)(3)–(6), and (9)–(10). |
| | | 9/11/2000 | 8/9/2000 | Revised subsection (a). |
| | | 4/12/2001 | 3/7/2001 | Revised paragraph (c)(3). |
| | | 9/4/2002 | 8/21/2002 | Revised paragraph (c)(9). |
| | | 9/25/2003 | 8/20/2003 | Revised paragraphs (c)(1) and (c)(9). |
| Section 116.716 | Emission Caps and Individual Limitations. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| Section 116.717 | Implementation Schedule for Addition Controls. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| Section 116.718 | Significant Emission Increase. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| Section 116.720 | Limitation on Physical and Operational Changes. | 11/29/1994 | 11/16/1994 | Initial adoption. |

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

| Section | Title | Date submitted | Date adopted by state | Comments |
|---|---|---|---|---|
| Section 116.721 | Amendments and Alterations. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised paragraphs (b)(2) and (d)(1)–(2). |
| | | 9/11/2000 | 8/9/2000 | Revised subsection (d) and paragraph (d)(1). |
| Section 116.722 | Distance Limitations | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 9/11/2000 | 8/9/2000 | Revised introductory paragraph. |
| Section 116.730 | Compliance History | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised introductory paragraph. |
| Section 116.740 | Public Notice and Comment. | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Designated existing text as subsection (a); and Added new subsection (b). |
| | | 10/25/1999 | 9/2/1999 | Revised subsections (a)–(b). |
| Section 116.750 | Flexible Permit Fee | 11/29/1994 | 11/16/1994 | Initial adoption. |
| | | 7/22/1998 | 6/17/1998 | Revised subsections (b)–(d). |
| | | 9/11/2000 | 8/9/2000 | Revised subsection (d). |
| | | 10/4/2002 | 9/25/2002 | Revised subsections (b)–(c). |
| Section 116.760 | Flexible Permit Renewal | 11/29/1994 | 11/16/1994 | Initial adoption. |

## IV. Is the Texas Flexible Permits State Program Submittal for a Major or Minor NSR SIP Revision?

### *A. Description of the Submitted Program*

This part of today's action describes the Program submitted by Texas to EPA for approval into the State's SIP. The submitted Program adds a new permit option under State law for any person who plans to construct any new facility or to engage in the modification of any existing facility, which may emit air contaminants into the air. See submitted 30 TAC 116.110(a)(3). Under the program submitted by Texas, any person planning the construction of a new facility or a modification to an existing facility may satisfy the conditions of 30 TAC Subchapter G—Flexible Permits, rather than obtaining a NSR SIP case-by-case permit or satisfying the conditions for a minor NSR SIP Standard Permit or Permit by Rule.[2] *See* submitted 30 TAC 116.110(a)(3). The submitted Program is one component of Texas' current preconstruction permit program, but the Program is not a part of the federally approved Texas SIP.

Under the submitted Program, a Flexible Permit allows for flexibility in managing operations by staying under an overall emission cap or individual unit specific emission limitation. 30 TAC 116.716. Texas adopted the use of Flexible Permits for construction of new facilities, modifications of existing facilities, and grandfathered facilities.[3] When Texas adopted its Program in 1994, the State did not have the statutory authority to impose controls on or require permits for grandfathered facilities. In particular, the State expected this new Program to provide a mechanism for placing controls on grandfathered refinery and petrochemical sites. The Program did result in grandfathered facilities voluntarily imposing emission controls and limiting their emissions using a Flexible Permit. However, the current regulatory structure does not fit neatly within the parameters of the Texas minor NSR SIP and the Texas major NSR SIP or within the Federal minor or major NSR SIP requirements.

The following discussion provides a summary of some of the specific components of Texas' Flexible Permits State Program. For more information about the Program, please see the SIP revisions submitted by Texas and the TSD for this proposed action, which are available in the docket for this action.

Pursuant to the submitted Program, only one Flexible Permit may be issued at an account site.[4] *See* submitted 30 TAC 116.710(a)(1). Therefore, a Flexible Permit cannot cover sources at more than one account site. See submitted 30 TAC 116.710(a)(4). A person may qualify for a Flexible Permit for construction of a new facility[5] at the account site. 30 TAC 116.110(a)(3) and 30 TAC 116.710(a)(1). A person may qualify for a Flexible Permit for a modification of an existing facility at the account site. 30 TAC 116.110(a)(3) and 116.710(a)(1).

If a person has a Flexible Permit and wishes to make a change, he can obtain a minor or major NSR SIP case-by-case permit amendment (codified in the SIP at 30 TAC 116.116(b)) or qualify for a *Flexible Permit amendment. See* submitted 30 TAC 116.710(a)(2). In lieu of either of these two options, the holder of the Flexible Permit making the change may qualify for a minor NSR SIP permit by rule, codified in the SIP at 30 TAC 116.116(d).

[2] The Texas NSR SIP provides for three types of NSR permits for construction of new minor sources and for minor modifications of existing major stationary sources and minor sources: A case-by-case minor NSR SIP permit (30 TAC 116.110(a)(1)), satisfying the conditions for a minor NSR SIP standard permit (30 TAC 116.110(a)(2)), and satisfying the conditions for a minor NSR SIP permit by rule (30 TAC 116.110(a)(4)). There are two types of permits available for minor modifications to existing permitted major stationary sources and minor facilities, a case-by-case minor NSR SIP permit amendment (30 TAC 116.110(b)) and 30 TAC 116.116(b)) and a minor NSR SIP permit by rule (30 TAC 116.116(d)). A case-by-case minor NSR SIP permit alteration (30 TAC 116.116(c)) or a minor NSR SIP permit by rule (30 TAC 116.116(d)) are allowed for changes among which includes a decrease in allowable emissions. *See* SIP rule 30 TAC 116.116(c)(1)(A) –(B) for the changes that may be authorized by a minor NSR SIP permit amendment/minor NSR SIP permit by rule. The SIP requires that any issued permit is subject for review every ten years after the date of issuance. *See* 30 TAC 116.311(c).

[3] Grandfathered facilities are facilities that were once exempt from most State air permitting requirements because the facilities predated the 1971 Texas Clean Air Act that required preconstruction review and operating permits for construction of any new source and modification of any existing source that may emit air contaminants into the atmosphere of the State.

[4] ''Account'' for NSR purposes is defined at 30 TAC 101.1(1), second sentence, as ''any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.'' This definition is approved as part of the Texas SIP (March 30, 2005 (70 FR 16129)).

[5] ''Facility'' is defined in the SIP approved 30 TAC 116.10(6) as ''a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment.''

If a person does not have a Flexible Permit and wishes to make a change but have only the change covered under a Flexible Permit, he can obtain a minor or major NSR SIP case-by-case permit amendment or qualify for a *Flexible Permit.* In lieu of either of these two options, he may qualify for a minor NSR SIP permit by rule.

If the holder of a Flexible Permit wishes to construct a new facility, he may qualify for a Flexible Permit amendment. *See* submitted 30 TAC 116.710(a)(3). This is analogous to the minor and major NSR SIP process of using a minor NSR SIP Permit by Rule or a minor NSR SIP permit, for authorization to construct a new facility on the site. See footnote 1 for further explanation.

Under the approved Texas NSR SIP, a change to an existing facility is defined as one that would cause a change in the method of control of emissions; a change in the character of the emissions; or an increase in the emission rate of any air contaminant. 30 TAC 116.116(b)(1). Such a change is required under the SIP to be authorized under a minor or major NSR SIP permit amendment or a minor NSR SIP permit by rule. 30 TAC 116.116(b) and (d). If the change is a decrease in allowable emissions; or any change from a representation in an application, general condition, or special condition in a permit that does not cause a change in the method of control of emissions; a change in the character of emissions; or an increase in the emission rate of any air contaminant (30 TAC 116.116(c)(1)), the change must be authorized by a minor or major NSR SIP permit alteration or a minor NSR SIP permit by rule. 30 TAC 116.116(c) and (d). The submitted Program at 30 TAC 116.721(a) has the same first two definitions for a change to an existing facility: one that would cause a change in the method of control of emissions; a change in the character of the emissions. It, however, has a different definition for the third type of change. Rather than the change being ''an increase in the emission rate,'' it is a change that is a ''significant increase in emissions.'' Submitted 30 TAC 116.718 defines a ''significant increase in emissions.'' First, the increase in emissions must come from a facility with a Flexible Permit and second, there is no significant increase if the increase does not exceed either the emission cap or individual emission limitation.

The submitted Subchapter G establishes an aggregated emission limit, based upon the application of minor NSR SIP BACT [6] at expected maximum capacity (or the application of a more stringent required control) for each covered facility, i.e., an emission cap. The cap for a specific criteria pollutant includes each covered facility with its individually calculated emission rates. The total sum of the covered facilities' calculated emission rates is the emission cap. In other words, the emission cap is a limit on the potential to emit (PTE).

An emission cap established in a Flexible Permit enables the holder to operate facilities with less technical and administrative effort than would be required under the minor and major NSR SIP Permits, minor NSR SIP Standard Permits, and minor NSR SIP Permits by Rule, which impose unit-specific mass emission limits. See submitted 30 TAC 116.716. Under the submitted 30 TAC 116.716(a), Texas may establish an emission cap for a specific pollutant by calculating the total emissions for all of the facilities covered by a Flexible Permit, using the application of minor NSR SIP BACT at expected maximum capacity for each covered facility. Nevertheless, where the existing control for a facility is more stringent than the application of minor NSR SIP BACT, e.g., NSPS, NESHAPS, control strategy rule, then that level of control for that facility is used in the calculation methodologies. *See* submitted 30 TAC 116.715(c)(9) and (10). Alternatively, Texas will set an individual emission limitation in the same Flexible Permit for each pollutant not covered by an emission cap for the covered facilities. See submitted 30 TAC 116.716(b). In some cases, a single unit may be required by a state or federal rule to meet an emissions limitation, which does not allow flexibility under the cap. In these cases, individual emission limitations are set. *See* submitted 30 TAC 116.716(b), second sentence. Moreover, in the calculation methodologies for the cap and the individual emission limitations, an ''Insignificant Emissions Factor'' (of up to nine percent) may be included in the summation. *See* submitted 30 TAC 116.716(d).

Under the submitted Program, a pollutant's cap must be readjusted downward if one of the facilities under the Flexible Permit shuts down for longer than 12 months. See submitted 30 TAC 116.716(c), first sentence. If a new facility is brought into the Flexible Permit, the cap must be readjusted to accommodate its calculated emission rates. See submitted 30 TAC 116.716(c), second sentence. The cap must be readjusted downward for any facility covered by a Flexible Permit if that facility becomes subject to any new State or Federal regulation. *See* submitted 30 TAC 116.716(e), first sentence. A readjustment of the cap required by any new State or Federal regulation must be made either at the time the Flexible Permit is amended or altered. 30 TAC 116.716(e), second sentence. If an amendment to a Flexible Permit is not required to meet the new regulation, the permittee must submit a request for a permit alteration within sixty days of making the change, describing how compliance with the new requirement will be demonstrated. *See* submitted 30 TAC 116.716(e), third sentence.

Under submitted 30 TAC 116.717, a Flexible Permit may include an implementation schedule for the installation of additional controls to meet an emissions cap for a pollutant. Submitted 30 TAC 116.715(c)(8) provides that 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 downward for the period the unit is out of service. Unless a special provision in the Flexible Permit specifies the method of readjustment of the emission cap, the facility must obtain a permit amendment.

*B. Is the Submitted Program Clearly a Minor NSR SIP Revision?*

Our evaluation of Texas' submitted SIP revisions is guided by whether the

[6] Texas adopted a revised NSR State rule on July 27, 1972, to add the requirement that a proposed new facility and proposed modification utilize at least best available control technology (BACT), with consideration to the technical practicability and economical reasonableness of reducing or eliminating the emissions from the facility. EPA approved the revised 603.16 into the Texas SIP, presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C). For more information, please see the **Federal Register** published today concerning the Texas Qualified Facilities State Program and the General Definitions. The Federal definition for PSD BACT is part of the Texas SIP as codified in the SIP at 30 TAC 116.160(a). (This current SIP rule citation was adopted by the State on October 10, 2001, and EPA approved this recodified SIP rule citation on July 22, 2004 (69 FR 43752).) EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of BACT, in 1992. *See* proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992). EPA specifically found that the SIP BACT requirement (now codified in the Texas SIP at 30 TAC 116.111(a)(2)(C)) did not meet the Federal PSD BACT definition. To meet the PSD SIP Federal requirements, Texas chose to incorporate by reference, the Federal PSD BACT definition, and submit it for approval by EPA as part of the Texas PSD SIP. Upon EPA's approval of the Texas PSD SIP submittals, both EPA and Texas interpreted the SIP BACT provision now codified in the SIP at 30 TAC 116.111(a)(2)(C) as being a minor NSR SIP requirement for minor NSR permits.

submitted Flexible Permits State Program applies to major NSR or minor NSR, or both. In correspondence and other materials, Texas has expressed an intent that its submitted Flexible Permits State Program applies only to construction of minor sources, existing grandfathered sources, and to minor modifications. *See* e.g., 19 Tex. Reg. 7336 (September 20, 1994), 19 Tex. Reg 9366 (November 25, 1994), the Texas Clean Air Act (TCAA) Section 382.003(9), introductory paragraph and (A)–(G), January 2001 ''Flexible Permit Application Guidance'' by the Air Permits Division of the TCEQ (*see* in particular, NOTE on page 4), Interoffice Memorandum dated December 31, 1998, from Victoria Hsu, P.E., Division Director, NSR Permits, to New Source Review (NSR) Permit Engineers, entitled ''Flexible Permits and the Plantwide Applicability Limit (PAL)'' (see in particular the last paragraph in ''Federal Enforceability Policy for Flexible Permits'', immediately preceding ''Plantwide Applicability Limit (PAL),'' and Interoffice Memorandum dated March 17, 1999, from Johnny Vermillion, P.E., Technical Specialist, NSRPD Chemical Section and David Howell, P.E., Team Leader, NSRPD Core Section to NSRPD Permit Engineers, entitled ''Permit Renewals during Flexible Permit Reviews'' (see in particular the first sentence in the second paragraph). We find, however, that Texas State law and the regulatory text submitted by the State is inconsistent with this expressed intent.

The Texas statutory definition for ''modification of existing facility'' at Section 382.003, Health and Safety Code, was revised by the legislature in 1995 to add, among other things, subsection (F) addressing modification of an existing facility through a Flexible Permit. It provides that increases in emissions are not modifications if they are authorized by a Flexible Permit. This statutory definition for ''modification of existing facility'' on its face, however, does not prohibit the use of a Flexible Permit for a major modification as defined by the CAA and EPA's major NSR SIP regulations. It has never been explicitly revised to prohibit major modifications. Furthermore, in contrast to the statutory prohibition against the use of a Permit by Rule for the construction of a major stationary source added in 1999, there are no statutory prohibitions against the use of a Flexible Permit for construction of a major stationary source. *See* TCAA section 382.05196. Finally, Texas State law does not contain any explicit prohibition against using a Flexible Permit for major modifications, notwithstanding provisions prohibiting the use of an Exemption or Permit by Rule or a Standard Permit for major modifications, as added in 1999. *See* TCAA Section 382.057. There are no statutory provisions in the TCAA that clearly limit modifications under the submitted Program to minor sources and/or minor modifications and construction of new sources to minor sources and/or minor modifications.

Similarly, the regulatory provisions submitted by Texas also do not prohibit the use of the submitted Program for construction of new major stationary sources and major modifications of existing major stationary sources and minor sources. The submitted rules do not limit the use of the submitted Program to minor NSR. For example, the title for the submitted Subchapter G is ''Flexible Permits,'' not ''Minor NSR Flexible Permits, and Flexible Permits for Grandfathered Facilities.'' The submitted Subchapter G does not contain any emissions limitations, applicability statement, or regulatory provision restricting the construction to minor sources and minor modifications as do the Texas minor NSR SIP rules for Permits by Rule in Chapter 106 and Standard Permits in Chapter 116, Subchapter F. Moreover, unlike the minor NSR SIP rules for Standard Permits in 30 TAC 116.610(b) and Permits by Rule in 30 TAC 106.4(a)(3) and (4), the submitted rules do not require that construction of a major stationary source or a major modification, as defined in the Major NSR SIP regulations, must meet the Major NSR permitting requirements.

If Texas truly intends for the submitted Flexible Permits State Program to apply only to minor NSR, at a minimum Texas must amend Subchapter G to include additional provisions that clearly limit its applicability to minor NSR as it did in the Texas minor NSR SIP at 30 TAC Chapter 106 for Permits by Rule and 30 TAC Chapter 116 Subchapter F for Standard Permits.

Without a clear statement of the applicability of the Program, the Program as submitted is confusing to the public, regulated sources, government entities, or a court, because it can be interpreted as an alternative to evaluating the new source or modification as a new major stationary source or major modification under Major NSR. The submitted Program fails to limit clearly the use of it to only the Texas minor NSR SIP requirements. Because of the overly broad nature of the regulatory language in the State's SIP revision submittal and the lack of any Texas statutory prohibitions, we propose to find that the State has failed to limit the submitted Program only to minor NSR.

Consequently, we are compelled to evaluate this submitted Program as being a substitute for the Texas Major NSR SIP. Accordingly, as discussed below in Section V, we evaluated whether the submitted Program meets the requirements for a Major NSR SIP revision, the general requirements for regulating construction of any stationary sources contained in Section 110(a)(2)(C) of the CAA, and the applicable statutory and regulatory requirements for an approvable SIP revision. Below is a summary of our evaluation of the submitted Program as a Substitute Major NSR SIP revision submittal. Section VI contains a summary of our evaluation of the submitted Program as a Minor NSR SIP revision submittal.

## V. What Is EPA's Evaluation of the Submitted Texas Flexible Permits State Program as a Substitute Major NSR SIP Revision?

### *A. What Are the Requirements for EPA's Review of a Submitted Major NSR SIP Revision?*

Before EPA's 1980 revised Major NSR SIP regulations, 45 FR 52676 (August 7, 1980), States were required to adopt and submit a Major NSR SIP revision where the State's provisions and definitions were identical to or individually more stringent than the Federal rules. Under EPA's 1980 revised Major NSR SIP regulations, States could submit provisions in a Major NSR SIP revision different from those in EPA's Major NSR rules, as long as the State provision was equivalent to a rule identified by EPA as appropriate for a ''different but equivalent'' State rule. If a State chose to submit *definitions* that were not verbatim to the Federal definitions, the State was required to *demonstrate any different definition* has the effect *of being as least as stringent.* (Emphasis added.) *See* 45 FR 52676, at 52687. The demonstration requirement was expanded to *explicitly* include not just different definitions *but also different programs* in the EPA's revised Major NSR regulations, as promulgated on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021). Therefore, to be approved as meeting the 2002 revised Major NSR SIP requirements, a State submitting a customized Major NSR SIP revision *must demonstrate why its program and definitions* are in fact at least as stringent as the Major NSR revised base

program. (Emphasis added). *See* 67 FR 80186, at 80241.

Moreover, because there is an existing Texas Major NSR SIP, the submitted Program must meet the anti-backsliding provisions of the Act in section 193 and meet the requirements in section 110(l) where EPA may not approve a SIP revision if it will interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act. Furthermore, any submitted SIP revision must meet the applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of the Act, and be consistent applicable statutory and regulatory requirements as interpreted in EPA SIP policy and guidance. These can include, among other things, enforceability, compliance assurance, accountability, test methods, a program element's replicability, and whether the submitted rules are vague. There are four fundamental principles for the relationship between the SIP and any implementing instruments, e.g., Major NSR permits. These four principles as applied to the review of a major or minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing means to determine compliance; (3) the NSR program's measures be replicable by including sufficiently specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the Major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments. *See* EPA's April 16, 1992, ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (57 FR 13498) (''General Preamble''). In particular, there is a specific discussion illustrating the principles and elements of SIPs that apply to sources in implementing a SIP's control strategies beginning on page 13567 of the General Preamble.

*B. Does the Submitted Program Prohibit Circumvention of Major NSR?*

There is no express provision in the submitted Subchapter G similar to the Texas minor NSR SIP provisions for minor NSR SIP Permits by Rule and minor NSR SIP Standard Permits that prohibit circumvention of the Major NSR requirements. *See* 30 TAC 106.4(b) and 30 TAC 116.610(c). Both the SIP-codified Chapter 106, Subchapter A for Permits by Rule and the SIP-codified Chapter 116, Subchapter F for Standard Permits [7] contain clear regulatory applicability requirements limiting their use to minor NSR, clear regulatory requirements prohibiting their use for any project that constitutes a new major stationary source or major modification subject to Major NSR, and clear regulatory provisions prohibiting the use of these minor NSR permits from circumventing Major NSR. There are no similar regulatory applicability requirements prohibiting the use for Major NSR, and no regulatory provisions prohibiting circumvention of Major NSR in the submitted Chapter 116, Subchapter G, for Flexible Permits.

There is no express provision clearly requiring that this submitted Program cannot be used to circumvent the requirements of major NSR. We are proposing to find that the State failed to demonstrate that the submitted Program prevents the circumvention of major NSR. Therefore, we are proposing to disapprove the Program as not meeting the major NSR SIP requirements to prevent circumvention of Major NSR.

*C. Does the Submitted Program Meet the Major NSR Applicability Determination Criteria?*

Because there is no express provision in the TCAA and/or in the submitted Program clearly limiting this Program to minor NSR, and there is no explicit provision prohibiting circumvention of the Major NSR SIP requirements, we must evaluate the submitted Program with respect to the criteria for Major stationary source NSR applicability determinations. This includes the absence of a requirement to evaluate if a project triggers Major NSR pursuant to the applicability criteria of the applicable regulations.

We do not find any provisions in the submitted Program that require a Major NSR applicability determination for the changes prior to construction and modification. The submitted Program's rules and definitions are not clear on their face that *first* one must determine the threshold question of whether the construction or change is a major stationary source or a major modification subject to Major NSR. The construction and modifications that would be authorized under the submitted Subchapter G can include new major stationary sources or major modifications. The change that could be a major modification or be a major stationary source could bypass the Major NSR SIP requirements, including the application of PSD BACT or NNSR LAER control requirements, in the absence of an express requirement to perform the Major NSR SIP applicability review.

The submitted Program fails to require that the applicability of the Major NSR requirements be evaluated prior to considering whether the construction of a new source or making a change can be authorized under a Flexible Permit. We are proposing to find that the State failed to demonstrate that the Program requires an evaluation of Major source NSR applicability based on the currently approved SIP provisions or upon the current federal rules. Therefore, we are proposing to disapprove the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met.

*D. Does the Submitted Program Meet the CAA and Major NSR SIP Requirements for a Major Modification?*

In evaluating Major NSR SIP revision submittals impacting ''major modifications,'' that differ from EPA's, our review is primarily guided by section 111(a)(4) of the Act that describes when a ''source'' is to be considered modified: ''The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.'' Texas did not submit any demonstration showing how its use of the definition ''modification'' was at least as stringent as the definition of ''modification'' in EPA's Major NSR SIP rules.

In conducting our review, we particularly were mindful of the United States Court of Appeals for the District of Columbia Circuit regarding the scope and requirements of Section 111(a)(4) for determining whether a change is a ''major modification.'' *See* e.g., *New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005) (''New York I'') (evaluating EPA's 2002 revised major NSR rules and interpreting Section 111(a)(4)). As discussed below, there are a number of principles associated with Section 111(a)(4) that the Program appears to violate. Moreover, the State failed to

[7] The Texas SIP does not include the State Pollution Control Project Standard Permit. In a separate action in today's **Federal Register**, EPA is proposing action upon this individual Standard Permit. Please see the proposal notice concerning the Texas NSR SIP submittals for PSD, NNSR for the 1997 8-hour ozone NAAQS, NSR Reform, and a Standard Permit. Those interested in this other action are encouraged to review and comment on it as well.

submit a demonstration showing how its use of ''modification'' is at least as stringent as the definition of ''modification'' in EPA's Major NSR SIP rules.

1. Does the Submitted Program require an evaluation of Emission Increases from the Major Stationary Source?

As noted above, Section 111(a) (4) requires an evaluation of whether a project has resulted in an increase in emissions from ''such source.'' Under this requirement, an evaluation of whether a physical change has resulted in an emission increase must be evaluated based on whether the project resulted in an emission increase across the major stationary source, not by an evaluation of increases outside the major stationary source or a subset of units at the major stationary source. *See Alabama Power* v. *Costle,* 636 F.2d 323, 401–403 (D.C. Cir. 1980) (holding that Agency appropriately allowed consideration of emission increases across the stationary source); *Asarco* v. *EPA,* 578 F.2d 320 (D.C. Cir. 1978) (holding that EPA inappropriately allowed a determination if a modification had occurred based on emission decreases from outside of the facility).[8] We are concerned that the submitted Program in certain circumstances, may allow an emission increase to be avoided by taking into account emission decreases outside of the major stationary source and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source.

First, we are concerned that the submitted Program violates the requirements of the Act and the Major NSR SIP rules, because applicability can be determined based on decreases outside of the major stationary source. This submitted Program establishes an emissions cap over a group of one or more emissions points located at an ''account'' site. 30 TAC 101.1(1). In this way and as discussed above in B and C, the submitted Flexible Permits State Program allows facilities to avoid triggering Major NSR requirements. The Texas SIP defines an ''account'' to include an entire company site, which could include more than one plant and certainly more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence. Accordingly, under a Flexible Permit, a single emissions limitation in the emission cap could apply to multiple major stationary sources,[9] and if emissions remain below the emissions limitations in the emission cap, Major NSR preconstruction review is not triggered.

By allowing an emission cap to be established for an account, which can include multiple major stationary sources, the submitted SIP revisions may allow a major stationary source to net a significant emissions increase against a decrease occurring outside the major stationary source, from facilities on the account's site that are covered under the Flexible Permit. This approach is not consistent with the Court's findings in *Alabama Power* and *Asarco,* and it does not meet the CAA's definition of modification and the Major NSR SIP requirements.

Second, we are concerned that the submitted Program may allow an emission increase to be determined based on an evaluation of a subset of facilities within a major stationary source. There are no regulatory provisions addressing how one meets the applicable major NSR netting requirements at a site when some of the units are under a Flexible Permit and others are not. Under the submitted Program, not all emission points, units, facilities, major stationary sources, minor modifications to an existing major stationary source, and so forth, at a site are required to be included in the site's Flexible Permit. The submitted regulations state, ''A person may obtain a flexible permit * * * for a facility, a group of facilities, or account * * *'' *See* submitted 30 TAC 116.710(a). Although such a requirement is not necessarily *per se* inconsistent with the CAA and EPA's Major NSR SIP requirements, we propose to find that the submitted Program lacks the necessary accountability and replicability required for an approvable SIP revision under the Act and EPA's interpretations of it, because the submitted regulations and the supporting record from the State fail to explain how physical and operational changes that occur under a Flexible Permit emission cap, which may cause emissions changes outside of the emission cap, are evaluated for Major NSR applicability. Likewise, the submitted regulations and supporting record fail to explain how physical or operational changes that occur outside an emission cap, that cause emissions changes within the emission cap, are evaluated for Major NSR applicability. In essence, neither the submitted regulations nor the supporting documentation from Texas explain how emissions increases are calculated (both the significant emissions increase from a project, and a significant net emissions increase over the contemporaneous period) for the entire major stationary source if the major stationary source is subject to two different permitting regulations, the Flexible Permit regulations and the Major NSR SIP regulations. As a result, the regulated community may apply these regulations inconsistently and in a way that fails to evaluate emissions changes at the entire major stationary source correctly as required by the Major NSR SIP regulations. This approach is not consistent with the Court's finding in *Alabama Power,* and it does not meet the CAA's definition of modification and the Major NSR SIP requirements.

Therefore, we propose to find that the State has failed to demonstrate the approaches are consistent with the Court's findings in *Alabama Power and Asarco,* meet the Act, and include the necessary replicability and accountability for approval as a SIP revision. Therefore, we are proposing to disapprove the submitted Program as not meeting the Major NSR SIP requirements that require an evaluation of emission increases from the major stationary source.

2. Does the Submitted Program require the Use of Actual Emissions, rather than Allowables?

Under Section 111(a)(4) of the Act since the 1977 CAA Amendments, a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required. *See* New York I at 38–40. Therefore, to determine whether a change at a unit will be subject to Major NSR requires an evaluation that, after netting, an actual

[8] While the court's analysis regarding the scope of what constitutes a source in these two cases was rejected by the Supreme Court in *Chevron* that decision did not call into question the holding that once the EPA has defined what constitutes a ''source'' (facility for Major Stationary Source) that this is the unit of analysis for applicability. See *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984).

Given the plain language of Section 111, EPA agrees that the appropriate unit of analysis for determining if there is an emission increase is the ''source'' as section 111(a)(4) provides that a modification occurs if the project ''increases the amount * * * emitted by such source.''

[9] The Federal regulations define a stationary source as, among other things, all of the pollutant emitting activities that belong to the same industrial grouping. An industrial grouping is defined based on the Standard Industrial Classification (SIC code). *See,* e.g. 40 CFR 51.166(b)(5) and (6). If a stationary source has the potential to emit or actually emits at certain specified levels then the stationary source is a ''major stationary source'' for purposes of major NSR applicability. *See Id.* at 166(b)(1). By not limiting an ''account'' to pollutant-emitting activities within the same SIC code, an account can include pollutant-emitting activity that includes one or more major stationary sources. While under certain circumstances it may be appropriate to lump units/facilities from differing SIC codes into a single stationary source, this is generally based on an interdependence of the various units. Texas's rule does not require such interdependence.

to projected actual test or an actual to potential emissions test (or alternatively a PAL based on actual emissions) be used. *See* 40 CFR 51.165(f) and 51.166(w). EPA lacks the authority to approve any submitted Program that does not meet this statutory requirement. We therefore are proposing disapproval because the submitted Program would authorize existing allowable, rather than actual emissions to be used to determine applicability in violation of the Act and the Major NSR SIP requirements.

Our concerns arise because the submitted Program fails to show how the Flexible Permit program procedures, which use expected maximum capacity as a component in establishing the level of control for each covered facility's emission limit, assure that a Flexible Permit's emission cap is set at a level that is equivalent to or more stringent than one based on existing actual emissions. As discussed previously in section IV. A, the cap is essentially a combined PTE for the emissions units covered by the cap. Subchapter G establishes an aggregated emission limit, based upon the application of minor NSR SIP BACT at expected maximum capacity (or the application of the required control that is more stringent than minor NSR SIP BACT; *see* submitted 30 TAC 116.711(3)) for each covered facility, i.e., an emission cap. This means the cap is set at a level not based on actual emissions. Additionally, there is nothing in the submitted Program that prevents a proposed change at a major stationary source with a Flexible Permit to use allowable, rather than actual emissions, as a baseline to calculate the project's proposed emissions increase. Thereby the change could circumvent the major modification applicability requirements under the Major NSR rules, rules that are based upon using actual emissions to calculate baseline emissions.

We propose to find that the State's procedures for establishing a Flexible Permit emission cap do not meet the CAA and EPA's Major NSR SIP requirements that emissions increases from facility changes must be measured in terms of changes from existing baseline actual emissions and, rather than source-specific allowable emissions.

*E. Does the Submitted Program Meet the Major NSR SIP Requirements for Enforceability?*

Any SIP revision to be approved must have adequate recordkeeping, reporting, testing, and monitoring requirements to assure there can be compliance with the submitted plan and to ensure the plan is enforceable, as well as to ensure each affected entity can be easily identified and there are means to determine its compliance. The more intricate a plan, the greater the need for detailed requirements. *See* New York I, 413 F.3d at 33–36 (remanding EPA's recordkeeping and reporting requirements since they did not provide adequate assurances that the Major Source NSR modification requirements were complied with). There is the CAA's requirement in section 110(a)(2)(A) that a SIP revision submittal must include enforceable emission limitations and control measures. There is further discussion in the General Preamble about EPA's interpretation of the Act's requirements for enforceability and that submitted rules must ''specify clear, unambiguous, and measurable requirements.'' 57 FR at 13567. The SIPs must contain means to track emission changes at sources and provide for corrective action if they do not achieve the emissions reductions. There must be legal means for ensuring compliance with the control measures. These principles are consistent with the required ability of both EPA and citizens to enforce against violations of both major and minor NSR SIP requirements because absent such requirements, compliance cannot be determined.

We are concerned with the adequacy of the recordkeeping, reporting, tracking, and monitoring requirements in the submitted Program.[10] This submitted Program is an intricate program and therefore, for approvability as a Major NSR SIP revision, there is a greater need for detailed recordkeeping, reporting, tracking, and monitoring requirements whether to ensure that a project triggering the Major NSR SIP requirements is covered under Major NSR or to ensure that there are adequate means for ensuring compliance of each affected entity. These are needed additionally to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, violate PSD increments or the Texas control strategy, or violate any other CAA requirement. For example, due to the lack of a program requirement for records with detailed crosswalks and of tracking and reporting requirements, one cannot determine which grandfathered units on a site are covered or not by a Flexible Permit, or which pre-existing minor NSR permitted units are covered or not by a Flexible Permit, much less which permit terms, limits, and conditions are covered, are not covered, are retained, or not.

A Texas Flexible Permit may apply to hundreds of dissimilar units. These covered emissions units can vary in size and type of operations as well as having widely different regulatory requirements and different applicable testing requirements. Yet for this submitted intricate Program, there are no program requirements for the tracking of existing SIP permits' major and minor NSR terms, limits, and conditions, and whether such requirements are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. Minor and Major NSR SIP permits, as well as minor NSR SIP Permits by Rule and Standard Permits, can be incorporated into a Flexible Permit without any program requirement in place that ensures the SIP permits' terms, limits, and conditions are included in the Flexible Permit. There are no program requirements in the submitted intricate Program for specific recordkeeping and monitoring that ensures a holder of a Flexible Permit maintains sufficient records and performs sufficient monitoring such that each term, limitation, and condition in an existing SIP permit that is incorporated into the Flexible Permit and the rationale for removing any such term, limitation, or condition from the contents of the Flexible Permit is available.

EPA therefore is proposing to disapprove this Program as a Major NSR SIP revision because it does not meet the Act's requirements for an enforceable program.

*F. Does the Submitted Program meet the Major NSR SIP Public Participation Requirements?*

On November 26, 2008 (73 FR 72001), EPA proposed limited approval and limited disapproval of the Chapter 39 public participation rules, including 30 TAC 39.403(b)(8)(A) and (B) for Flexible Permits. 30 TAC 39.403(b)(8)(A) and (B) formed the part of the basis for the proposed limited disapproval. *See* 73 FR 72008 and 72013. We intend to take final action on the Chapter 39 rules prior to final action on this submitted Program.

In the November 2008 proposal, we also took no action on submitted 30 TAC 116.740, Public Notice. This section is in the submitted Subchapter G and relates to the public participation requirements for the submitted SIP revisions for Flexible Permits. We

[10] EPA's letter of March 12, 2008, on pages 12 to 13 of the Enclosure provides some examples of, and concepts on how to establish replicable recordkeeping, reporting, tracking, and monitoring requirements up-front in a NSR program without requiring every director discretion decision to be adopted and submitted to EPA for approval as a source-specific SIP revision.

proposed no action in the November 2008 proposal on submitted 30 TAC 116.740 because we were still reviewing the submitted Program, including 30 TAC 116.740. We stated in the November 2008 proposal that we would address the submitted 30 TAC 116.740 in a separate action on the submitted Texas Flexible Permits State Program.

Today, we propose to address 30 TAC 116.740. Because this submitted rule relates to the public participation requirements of the submitted Program, this rule is not severable from the Program. Because we are proposing to disapprove the Program, we propose likewise to disapprove 30 TAC 116.740, Public Notice, for the Program.

*G. Does the Submitted Program Meet Section 110(l) of the Act for a Major NSR SIP Revision?*

Section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

The State did not provide any demonstration showing how the submitted SIP revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other CAA requirement.

*H. What is EPA's Summary of whether the Submitted Program Meets the Requirements for a Substitute Major NSR SIP Revision?*

The submitted Program does not require that first one must determine whether a change is subject to major NSR and that actual emissions be used as the baseline for determining whether a change is subject to Major NSR. It does not prevent circumvention of the Major NSR SIP requirements. The submitted Program allows emission decreases from outside a major stationary source to count in complying with a cap in a Flexible Permit, as well as allowing emission decreases from within a subset of units within the major stationary source. Yet the submitted Program lacks any regulatory provisions ensuring that netting for Major NSR applicability purposes is conducted only within the major stationary source and across the entire major stationary source. The Program is an extremely complex permitting program that lacks specialized regulatory provisions that include monitoring, testing, recordkeeping, and reporting requirements specifically to ensure that compliance can be determined, and that triggering of Major NSR can be easily identified and applicable Major NSR requirements are met. The Program does not include any assurances that the NAAQS, control strategies, reasonable further progress, and the PSD increments will not be violated.

These are requirements of the Act and EPA's Major NSR SIP requirements that the submitted Program does not meet. Furthermore, there is no information to determine whether the Program would not interfere with any applicable requirement concerning attainment and RFP, or any other requirement of the Act, thus violating section 110(l) of the Act. Consequently, EPA is proposing to find that the Program does not meet the requirements for a substitute Major NSR SIP revision.

**VI. What is EPA's Evaluation of the Submitted Texas Flexible Permits State Program as a Minor NSR SIP Revision?**

We evaluated the submitted Program using the federal regulations under CAA section 110(a)(2)(C), which require each State to include a minor NSR program in its SIP. EPA regulations require that a plan include ''legally enforceable procedures that enable'' the permitting agency to determine whether a minor source will cause or contribute to violations of applicable portions of the control strategy, 40 CFR 51.160(a)(1), or ''interference with a national ambient air quality standard,'' 40 CFR 51.160(a)(2), and to prevent the source from doing so. 40 CFR 51.160(b). The procedures must ''discuss the basis for determining which facilities will be subject to review,'' 40 CFR 51.160(e), and ''discuss the air quality data and the dispersion or other air quality modeling used'' to assess a source. 40 CFR 51.160(f). Generally, SIPs must be enforceable (see section 110(a) of the Act) and must not relax existing SIP requirements (see section 110(l) of the Act). Additionally, we reviewed and compared the Program with any other applicable SIP statutory and regulatory requirement.

*A. Is the Submitted Program Clearly a Minor NSR SIP Revision?*

There are no statutory and/or regulatory provisions that clearly prohibit the use of the Program for major stationary sources and major modifications. Nor are there any statutory and/or regulatory provisions clearly limiting the use of the Program to minor sources and/or minor modifications. There are no provisions that prohibit the use of the Program for construction of new major stationary sources and major modifications of existing major stationary sources and minor sources. There are no regulatory applicability requirements limiting use of the Program to minor NSR and no regulatory requirements prohibiting the using it for Major NSR, in the submitted Chapter 116, Subchapter G—Flexible Permits. There is no express provision in the submitted Subchapter G requiring that this submitted Program cannot be used to circumvent the requirements of Major NSR. There are no statutory and/or regulatory provisions clearly prohibiting circumvention of Major NSR. The Program further fails to require that the applicability of the Major NSR requirements be evaluated prior to considering whether the construction of a new source or making a change can be authorized under a minor NSR Flexible Permit. The regulatory provisions in the submitted Program fail to require that *first* one must determine the threshold question of whether the construction or change is a major stationary source or a major modification subject to Major NSR, based upon an actual emissions baseline. *See* section V and the TSD for additional discussion and information.

*B. Does the Submitted Program Meet the Minor NSR SIP Requirements for Establishing the Emission Cap?*

The submitted Program addresses how the cap is calculated. It, however, does not describe in sufficient detail the calculation methodologies and underlying technical analyses used to determine a cap. There are not specific, established, replicable procedures providing available means to determine independently, and for different scenarios, how the State will calculate a Flexible Permit's cap and/or individual emissions limitations for a company's site, plants on the site, major stationary sources on the site, a facility within a major stationary source on the site, facilities on the site, a group of units on the site, for one pollutant but not another, etc.

While facilities are limited to one Flexible Permit per site account, applicants can choose which facilities to include under a Flexible Permit. To be approvable, the submitted Program must include legally enforceable procedures for ensuring that both the permit application and the State's permitting processes (i.e., the State's review, supporting technical information, the public notice and comment process, the record, and most importantly the structuring of each Flexible Permit in such a manner as to be clear) will clearly inform the public, other governmental agencies, or a court, which facilities are included under the permit and cap, and which are included

under the permit but subject to individual limitations.

The submitted Program's legally enforceable procedures must ensure adequate enforcement of all applicable limitations for sources under an emission cap and for sources with individual emissions limits under a Flexible Permit. Since a Flexible Permit may contain an overall emission cap for all sources per pollutant, combination of multiple emission caps that cover groups of facilities, and/or individual emission limitations for individual facilities, the submitted Program also must contain enforceable procedures for determining what limits each facility is subject to, as well as enforcing each source's obligations regarding each limit applicable to that source, under the cap, multiple caps, and/or an individual limitation, for each pollutant in a Flexible Permit. Because applicants can choose to establish caps or individual emission limitations for just certain pollutants rather than for all pollutants emitted from the source(s) included in the Flexible Permit, the submitted Program also must contain legally enforceable procedures for determining both the cap and individual emissions limitations for each relevant pollutant for each source and address how sources or pollutants not included in the Flexible Permit will be regulated.

Finally, applicants may choose to combine grandfathered, existing permitted, and newer facilities to maximize flexibility at the site in a Flexible Permit. This requires that the submitted Program must contain legally enforceable procedures to ensure that both the permit application and the State's permitting processes (i.e., the State's review, supporting technical information, the public notice and comment process, the record, and most importantly the structuring of each Flexible Permit in such a manner as to be clear) clearly identify each covered point of emissions, which existing permits and their types (e.g., minor NSR SIP permit, minor NSR standard permit) and which of their permitted terms, limits, conditions and representations in the permit application, are moved into the Flexible Permit. The legally enforceable procedures must also ensure it is clear which existing permits and their types and terms, limits, conditions and representations in the permit application, are *not* being moved into the Flexible Permit.

In sum, the submittal lacks specific, established, replicable procedures providing available means to determine independently how the source or the State will calculate an emission cap, determine the coverage of a Flexible Permit, establish individual emissions limitations for each site, a facility on the site, a group of units on the site, or for one pollutant but not another. It also is not clear to EPA what the process is and how the emission cap is adjusted for the addition of new facilities. *See* submitted 30 TAC 116.716(c). Furthermore, the submitted regulations include a term, ''multiple emission caps,'' with an ambiguous meaning. *See* submitted 30 TAC 116.715(b). It is not clear whether this term means multiple emission caps because there is one cap for each pollutant, or whether there can be more than one cap for one pollutant.

*C. Does the Submitted Program Meet the Minor NSR SIP Enforcement Requirements?*

Section 110(a)(2)(A)—(C) of the Act requires that SIP revision submittals be enforceable. The September 23, 1987, Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, and Thomas L. Adams Jr., Assistant Administrator for Enforcement and Compliance Monitoring, entitled ''Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency'' provides EPA's guidance for interpreting this provision in the Act. *See* also the General Preamble. Submitted rules that are clearly worded, clear as to who must comply, and explicit in their applicability to regulated sources are appropriate means for achieving the statutory enforcement requirement. Specific, objective, and replicable criteria are to be set forth for determining whether this new type of NSR permit will be truly equivalent to the other minor NSR SIP permits in terms of being consistent with the levels specified in the control strategies, including air quality impacts, etc. Appropriate testing, recordkeeping, reporting, and monitoring provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and PSD increments are protected.

Under this Program as selected by Texas, there is an option to select which new facilities and/or new modifications to include under the umbrella of a Flexible Permit. Without the appropriate specialized MRR requirements, there is no way to determine for instance, which emission points are covered, which modifications of existing non-covered emission points are covered, etc. Texas also chose to allow both a cap and an individual emission limitation to apply to selected units, or just the cap, or just the individual emission limitation. Without the appropriate MRR requirements, there is no way to determine if a covered unit is subject to the cap or an individual emission limitation, if a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies at what time. Further, there can be existing units on the site not covered under the Flexible Permit cap that may be modified, and use the provisions of the Flexible Permit program for the modification. Without replicable implementation procedures for establishing the emission cap and sufficient monitoring, recordkeeping, and reporting requirements, EPA cannot find that the submitted Program, as a minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP.

EPA proposes to find that the Program does not meet the requirements of section 110(a)(2)(A)–(C), which require that SIP revision submittals be enforceable.[11] There are no specific up-front methodologies in the submitted Program to be able to determine compliance. Nor did EPA find the testing, recordkeeping, reporting, and monitoring provisions necessary to establish how compliance will be determined and to ensure that the NAAQS are protected. For example, the Program could allow hundreds of unrelated emission sources to be subject to one emission cap and/or individual emission limitations. Yet the submitted Program contains no time period for the cap (e.g., hourly, monthly, and/or annual limits such as rolling limits). Submitted 116.117(7) is an illustration of our concerns. It states that initial compliance testing with ongoing compliance by engineering calculations ''may be required.'' This means that under the Program, compliance testing may not be required at all and provides no guidance for when monitoring will be required.

Emission units can vary in size and type or operation, as well as having widely different regulatory monitoring, and compliance requirements. Demonstrating compliance with a cap covering multiple emission points requires more detailed information than point-by-point compliance. To demonstrate compliance with a unit-by-unit emission limit, a source can often establish a parameter that if not met indicates the unit is out of compliance. For example, emissions from an incinerator may be shown to be in

[11] Section 116.117(2) of the submitted Program provides that emissions will be measured ''as determined by the executive director.'' This broad discretion lacks accountability, replicability and fails to provide for a full evaluation of the enforceability of permits issued under the Program.

compliance if the temperature stays above a certain level indicating thorough combustion. Under a cap program, it is necessary to know the actual emission rate from each unit so that the emission unit can be totaled to show compliance with the cap.

The submitted Program lacks provisions explicitly addressing the type of monitoring requirements that are necessary to ensure that all of the movement of emissions between the emission points, units, facilities, plants, etc., still meet the cap for the pollutant, still meet the individual emissions limitations, and still meet any other applicable state or federal requirement. In addition, there are no limits on the types of sources that can be included in the cap. It is also difficult to quantify emissions from some units, such as tanks, fugitive emissions from leaking valves, or wastewater emissions points that can be included in a Flexible Permit under this Program.

Because of the use of the Program to permit grandfathered facilities in the past and the continued use for new construction and modifications, as well as allowing a meticulous selection of which facilities and changes to include in a Flexible Permit, EPA is concerned with the enforceability of an emissions cap for each pollutant (combined with individual emissions limitations or not). Each pollutant's cap and individual emissions limitations may apply to a very large number of selective emission sources, with ongoing construction and modifications being selectively. Although the submitted Program requires the same monitoring, recordkeeping, reporting, and testing requirements at 30 TAC 116.711(2) and 116.715(c)(4)—(6), as do the SIP rules codified in Subchapter B of Chapter 116, the underpinnings of the submitted Program are so complex that EPA believes that even for a minor NSR SIP program, there should be more detailed MRR requirements to ensure that the emission cap and/or individual emissions limitations in the issued Flexible Permits are enforceable.

Without specialized testing, monitoring, recordkeeping and reporting requirements, it is difficult for EPA, Texas or the public to determine which units are covered by a flexible permit, which modifications to non-covered units are covered by a flexible permit, whether a covered unit is subject to the emission cap or an individual emission limitation, whether a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies and at what time.

Finally, there are not sufficient provisions requiring the holder of a Flexible Permit to maintain recordkeeping sufficient to ensure that all terms and conditions of existing permits (including representations in the applications for such permits) that are incorporated into the Flexible Permit continue to be met. The submitted Program lacks adequate program requirements for the tracking of existing SIP permits' major and minor NSR terms, limits and conditions, and whether such requirements are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. Minor and Major NSR permits, as well as minor NSR SIP Permits by Rule and Standard Permits, can be incorporated into a Flexible Permit without any program requirement in place that ensures the SIP permits' terms and conditions are included in the Flexible Permit.

*D. Does the Submitted Program Meet the Minor NSR SIP Requirements for Revision of Existing Major NSR SIP Permits?*

We also are proposing to disapprove the submitted Program because it would allow 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 by Texas. While we have 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. As EPA has explained, 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. *See,* ''Request for Determination on Best Available Control Technology (BACT) Issues—Ogden Martin Tulsa Municipal Waste Incinerator Facility,'' from Gary McCutchen, Chief of OAQPS NSR Section (Nov. 19, 1987).

*E. Does the Submitted Program Meet the Minor NSR SIP Public Participation Requirements?*

On November 26, 2008 (73 FR 72001), EPA proposed limited approval and limited disapproval of the Chapter 39 public participation rules, including 30 TAC 39.403(b)(8)(A) and (B) for Flexible Permits. 30 TAC 39.403(b)(8)(A) and (B) formed a part of the basis for limited disapproval. We intend to take final action on the Chapter 39 rules prior to final action on this submitted Program.

We also noted in the November 2008 proposal that Texas submitted 30 TAC 116.740—Public Notice. This rule was submitted November 29, 1994, as part of the Texas Flexible Permits State Program under 30 TAC Chapter 116, Subchapter G. Revisions were submitted July 22, 1998; and October 25, 1999. This submitted rule provides that any person who applies for a Flexible Permit shall comply with the provisions in Chapter 39, which relates to Public Notice. In the November 2008 proposal, we stated that we were reviewing the November 29, 1994, and July 22, 1998, submittals of 30 TAC 116.740 and would address these in a separate action. 73 FR 72015. We also indicated that we were taking no action on 30 TAC 116.740 as submitted October 24, 1999. 74 FR 72006.

In the November 2008 proposal, we stated that we would address 30 TAC 116.740 in a separate action. Because this new rule is not severable from the Texas Flexible Permits State Program, we are proposing to disapprove the submitted 30 TAC 116.740.

*F. Does the Submitted Program Meet Section 110(l) of the Act for a Minor NSR SIP Revision?*

Section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

The State did not provide any demonstration showing how the submitted SIP revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other CAA requirement.

*G. What is EPA's Summary of Whether the Submitted Program Meets the Requirements for a Minor NSR SIP Revision?*

The submitted Program is not clearly limited to minor NSR and does not prevent circumvention of the Major NSR SIP requirements. The submitted Program does not require that first one must determine whether a change is subject to Major NSR and actual emissions are used as a baseline for determining whether a change is subject to Major NSR. It fails to meet the enforceability requirements as a program or of an affected entity, and it cannot assure compliance with the program or of the affected entity. It is an extremely complex permitting program but lacks specialized regulatory provisions tailoring monitoring, testing, recordkeeping, and reporting

requirements specifically to ensure that compliance can be determined, enforcement can be taken, and that triggering of minor (and major) NSR is easily identified and that the preconstruction requirements of the Act are met. The Program lacks requirements necessary for enforcement and assurance of compliance. Moreover, it does not ensure that existing and future minor NSR SIP permits' terms and conditions are retained. The methodologies for establishing the caps in the Flexible Permits provide too much director discretion and lack replicable procedures. Overall, the submitted Program fails to include sufficient enforceable safeguards to ensure that the NAAQS and control strategies are protected. Furthermore, there is no information to determine whether the submitted Program is as stringent as the existing Texas minor NSR SIP, and whether the revisions would not violate the NAAQS, PSD increments, the State's control strategies, interfere with reasonable further progress, or otherwise meet any other requirement of the Act, thus violating section 110(l) of the Act. Therefore, we are proposing to find that the submitted Texas Flexible Permits State Program does not meet the requirements for a minor NSR SIP revision.

## VII. Proposed Action

EPA is proposing disapproval of the Texas Flexible Permits State Program submitted in a series of SIP revisions, identified in the Tables in section III of this preamble. These affected provisions are addressed in Texas' November 29, 1994, SIP revision submittal, as revised by severable portions in the March 13, 1996, SIP revision submittal, and severable portions of the July 22, 1998, SIP revision submittal that repealed and replaced portions of, as well as revised, the 1994 submittal and repealed and replaced all of the 1996 submittal; and as revised by severable portions in the October 25, 1999, September 11, 2000, April 12, 2001, September 4, 2002, October 4, 2002, and September 25, 2003, SIP revision submittals.

EPA is proposing disapproval of the submitted Texas Flexible Permits State Program, as a substitute Major NSR SIP revision, because it does not meet the Act and EPA's regulations and is not consistent with applicable statutory and regulatory requirements as interpreted in EPA guidance and policy. We also are proposing disapproval of the submitted Texas Flexible Permits State Program as a Minor NSR SIP revision because it does not meet the Act and EPA's regulations and is not consistent with applicable statutory and regulatory requirements as interpreted in EPA guidance and policy.

We will accept comments on this proposal for the next 60 days. After review of public comment, we will take final action on the SIP revision submittals that are identified herein.

EPA intends to take final action on the State's Public Participation SIP revision submittal in November 2009. EPA intends to take final action on the submitted Texas Qualified Facilities State Program by March 31, 2010, the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP by August 31, 2010. These dates are expected to be mandated under a Consent Decree (see, Notice of Proposed Consent Decree and Proposed Settlement Agreement, 74 FR 38015, July 30, 2009). Sources are reminded that they remain subject to the requirements of the Federally-approved Texas SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

## VIII. Statutory and Executive Order Reviews

### *A. Executive Order 12866, Regulatory Planning and Review*

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (*58 FR 51735,* October 4, 1993) and is therefore not subject to review under the Executive Order.

### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

### *D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 ''for State, local, or tribal governments or the private sector.'' EPA has determined that the proposed disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

*E. Executive Order 13132, Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

*F. Executive Order 13175, Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is proposing to disapprove would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

*H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: September 8, 2009.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2009–0188; FRL–8960–6]**

## Determination of Attainment of the 1997 8-Hour Ozone Standard for Imperial County, CA

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to determine that the Imperial County, California moderate 8-hour ozone nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. The State of California has requested this determination, which is based upon three years of certified ambient air monitoring data that show the area has monitored attainment of the 8-hour ozone NAAQS since the 2006–2008 monitoring period. If this proposed determination is made final, the requirements for the State to submit certain reasonable further progress requirements, an attainment demonstration, contingency measures and other planning requirements of the Clean Air Act related to attainment of the 1997 8-hour ozone NAAQS shall be suspended for so long as the area continues to attain the 8-hour ozone NAAQS.

**DATES:** Comments must be received on or before October 23, 2009. Public comments on this action are requested and will be considered before taking final action.