**No. 10-60614**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**STATE OF TEXAS, ET AL.,**

*Petitioners*

**v.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

*Respondent*

On Petition for Review of Final Action
of the United States Environmental Protection Agency

# REPLY BRIEF FOR PETITIONERS TEXAS OIL & GAS ASSOCIATION, TEXAS ASSOCIATION OF MANUFACTURERS, BCCA APPEAL GROUP, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, TEXAS CHEMICAL COUNCIL, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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## ARGUMENT

EPA's Disapproval is based not on legal precedent or empirical data but instead on a misreading of the Flexible Permit Program ("Program") rules and hypothetical speculation regarding how those rules might be abused. Neither EPA nor Intervenors contend that the Program has had a negative effect on air quality or would do so in the future. As detailed below, the Court should vacate the Disapproval because it exceeds EPA's statutory authority, is arbitrary and capricious, and is unsupported by the administrative record.[1]

### I. The Disapproval Exceeds EPA's Limited Authority.

In disapproving the Flexible Permits Program, EPA exceeded its statutory authority. "EPA's role in approving air pollution control plans is limited." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 826 (5th Cir. 2004). "EPA must approve a plan if it meets minimum statutory requirements . . . ." *Id*. (citing 42 U.S.C. § 7410(k)(3)). EPA concedes that the issue presented is whether EPA validly disapproved the Program as a revision to Texas's SIP for *Minor* NSR. *See* EPA Br. at 18.

It is undisputed that the Clean Air Act affords States wide discretion and flexibility with respect to Minor NSR. *See* EPA Br. at 18; Industry Pet'rs Br. at 4-

[1] The Disapproval presents various grounds for EPA's decision as an interdependent collective. If the Court invalidates any of these grounds, the Disapproval should be vacated.

6. EPA contends that its authority to disapprove the Program derives from Section 110(*l*) of the Clean Air Act, which provides:

> The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . , or any other applicable requirement of this chapter.

42 U.S.C. § 7410(*l*). EPA did not find, however, that the Flexible Permits Program ***would interfere*** with attainment of national air quality standards in Texas. Nor did EPA point to any evidence that the Program, during its 16-year operation, ever had interfered with attainment. Instead, the Disapproval repeatedly states that EPA "***lacks sufficient information***" to determine that the Program "***will not interfere*** with [NAAQS] attainment[, RFP], or any other requirement of the Act." *See*, *e.g.*, 75 Fed. Reg. 41,312, 41,313/2 (July 15, 2010) (emphasis added).

Petitioners do not advocate "unfettered discretion" for States over Minor NSR. *See* EPA Br. at 18. State discretion is constrained by EPA's authority to disapprove SIP revisions pursuant to Section 110(*l*). Because EPA did not determine whether that sole condition for disapproval exists, the Disapproval should be vacated. *See Kentucky Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006) (rejecting a reading of Section 110(*l*) that "would substitute 'could' for 'would'" because "Congress did not intend that the EPA reject each and every SIP revision that presents some remote possibility for interference"); *see also*

*Galveston-Houston Ass'n for Smog Prevention v. EPA*, 289 Fed. App'x 745, 754 (5th Cir. 2008) (citing *Kentucky Res.* with approval).

## II. EPA's Speculation Regarding Potential Circumvention Of Major NSR Is Contrary To The Record And Is Arbitrary And Capricious.

EPA asserts that the Program "does not preclude its use for Major NSR in a sufficiently clear manner[,]" and "potentially" allows circumvention of Major NSR requirements. EPA Br. at 22-23. The record contradicts EPA's position. *See* Texas Br. at 18-27, 30-31; Industry Pet'rs Br. at 32-37, 39-42. In fact, all parties agree that the Program cannot legally be used to circumvent Major NSR requirements.

### A. The Program Unambiguously Prohibits Circumvention Of Major NSR.

The Flexible Permits Program rules require compliance with Major NSR in Sections 116.711(8)-(9):

> (8) Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, *each facility shall comply with all applicable requirements concerning nonattainment review* in this chapter.
>
> (9) Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, *each facility shall comply with all applicable requirements in this chapter concerning PSD review*.

30 TEX. ADMIN. CODE §§ 116.711(8)-(9) (emphasis added).[2] The "applicable requirements" concerning nonattainment and PSD review (*i.e.*, Major NSR) are separately located in the SIP. *See* 30 TEX. ADMIN. CODE §§ 116.150-116.151, 116.160-116.163. Additionally, Texas law separately prohibits "the emission of any air contaminant or the performance of any activity in violation of . . . any commission rule or order[,]" including Major NSR requirements. TEX. HEALTH & SAFETY CODE § 382.085(b).[3]

Since Texas unambiguously requires flexible permit holders to comply with Major NSR, EPA belatedly argues that EPA policy requires something more. EPA argues that Texas must also "expressly prohibit" use of Minor NSR exemptions to exempt major sources from Major NSR requirements. EPA Br. at 25 (emphasis

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[2] Consistently, TCEQ Guidance reiterates that the Program "does not affect the applicability of Non-attainment or PSD review." *Flexible Air Permit Application Guidance: Subchapter G* at 2 (Apr. 1996) (attached hereto as Reg. Add. 1, 4). "The applicant must provide an applicability demonstration with the flexible permit application." *Id*. *See also* App. F. at 96. Contrary to EPA's implication, TCEQ never "conceded" that the Program was unclear. *See* EPA Br. at 24, 30. TCEQ unequivocally stated that the Program "requires a federal applicability demonstration and thereby prevents circumvention of the Major NSR SIP requirements." App. P at 193-94.

[3] Violation of Major NSR requirements is thus enforceable under state *and* federal law, which authorizes EPA enforcement actions for Major NSR violations. 42 U.S.C. § 7413(b). EPA does not dispute that it can remedy a Major NSR violation in federal court, even where the violation arises from conduct authorized by a state permit. *See Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 469 (2004).

omitted).[4] EPA did not make this argument in the Disapproval. To the contrary, EPA acknowledged that "inclusion of such specific language is not ordinarily a minimum NSR SIP program element . . . ." 75 Fed. Reg. at 41,319/1.

The Court cannot consider on appeal a ground that was not the basis for the agency's decision below. *Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269-70 (5th Cir. 1986). EPA's "'action must be measured by what [it] did, not by what it might have done.'" *Id*. (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). *See also NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (refusing to consider grounds not articulated in underlying agency action); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 693-94 (D.C. Cir. 1995) (same).

In any event, Texas law does expressly prohibit exemption of Major NSR requirements. TCEQ "may not exempt any modification of an existing facility defined as 'major' under any applicable preconstruction permitting requirements of the federal Clean Air Act or regulations adopted under that Act." TEX. HEALTH & SAFETY CODE § 382.057(a).

[4] EPA now cites for this proposition a 1987 proposed policy statement regarding two particular pollutants in nonattainment areas. EPA Br. at 25 (citing 52 Fed. Reg. 45,044, 45,106/3 (Nov. 24, 1987)). The referenced language was not subsequently adopted in a "final" policy, *compare* 55 Fed. Reg. 38,326 (Sept. 18, 1990), and the Disapproval does not cite the proposed policy.

No Flexible Permit Program provision expressly *authorizes* circumvention of Major NSR, and EPA does not contend otherwise. Because Major NSR requirements are entirely separate from, and unaffected by, the Flexible Permits Program, many of EPA's and Intervenors' assertions are simply untrue. For example, the Program does not allow for "significant modifications" without any regulatory review. Intervenors Br. at 14, 17-19. Nor is the purpose of the Program "to allow sources to avoid *any* NSR review when they make changes to the otherwise applicable requirements of previous permits . . . ." EPA Br. at 34.

In fact, whether an operator has a flexible permit or not, modifications defined as "major"[5] require independent regulatory review and must satisfy Major NSR requirements. 30 TEX. ADMIN. CODE § 116.711(8)-(9). In addition, regardless whether an operator has a flexible permit, adding a new facility or making a change resulting in emission of a contaminant not previously emitted requires regulatory review and a permit amendment. *See id.* §§ 116.721(a), 116.718. Just as driving a car requires compliance with both speed limit and seat belt laws, modifying a facility under a flexible permit requires compliance with

[5] Modifications that cause increases above pollutant-specific thresholds are defined as "major" under state and federal law. *See* 30 TEX. ADMIN. CODE § 116.150(c); 40 C.F.R. § 51.166(b)(23). Intervenors' suggestion that a 9% insignificant factor in the Flexible Permits Program somehow allows major modifications to avoid review, Intervenors Br. at 21-22, is not a ground for the Disapproval and conflicts with above-cited Texas and federal law.

both the permit conditions and Major NSR requirements. Conceivably, a contemplated change could meet the conditions of a flexible permit but not be allowable under Major NSR. Satisfying one does not relieve an operator (or driver) from compliance with the other.

EPA nonetheless maintains that the Program is "unnecessarily ambiguous . . . in light of the other Texas programs that contain more specific limiting statements in their rules." EPA Br. at 30. But EPA does not dispute that Program rules requiring compliance with Major NSR are identical to the provisions of Texas's general Minor NSR program, which EPA approved. *See* Industry Pet'rs Br. at 35-36. It was clear to EPA then, as it should be now, that obtaining a Minor NSR permit was not a substitute for compliance with Major NSR requirements.

The same is true whether the Minor NSR permit is issued under the general permitting program, the Flexible Permits Program, a Permit By Rule, or a Standard Permit. Each of these is a separate Minor NSR program, implemented at various times and codified separately in the Texas Clean Air Act and the Texas Administrative Code.[6] Viewing the provisions together only emphasizes their consistency—each requires independent compliance with Major NSR.

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[6] TEX. HEALTH & SAFETY CODE §§ 382.003(9)(F), 382.05195, 382.05916; 30 TEX. ADMIN. CODE ch. 116, subch. G (Flexible Permits); *id.* at ch. 116, subch. F (Standard Permits); *id.* at ch. 106 (Permits By Rule).

On its face and in the context of the Texas Clean Air Act as a whole, the Flexible Permits Program does not allow circumvention of Major NSR. EPA's contrary conclusion is unsupportable, arbitrary and capricious.

### B. Any Ambiguity In TCEQ's Regulations Should Be Resolved In Favor Of Texas's Reasonable Interpretation.

The Disapproval rests on EPA's "legal interpretation" that the Program presents "the potential for an unacceptable ambiguity about a permit holder's obligations to continue to comply with the Major NSR requirements." 75 Fed. Reg. at 41,319. EPA concedes that its interpretation conflicts with the State's. EPA Br. at 32. Even if the Program were ambiguous (which it is not), EPA and the Court must defer to *Texas*'s interpretation of Texas regulations. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981).

In *Florida Power*, the Court "emphasized that EPA is to be accorded no discretion in interpreting state law. Quite the contrary is true: '[*the United States*] *should defer to the state's interpretation of the terms of its air pollution control plan* when said interpretation is consistent with the Clean Air Act.'" 650 F.2d at 588 (emphasis added).

That accords with the general rule that courts "defer to the agency's interpretation of its own regulation 'unless plainly erroneous or inconsistent with the regulation.'" *Frame v. City of Arlington*, 616 F.3d 476, 483 (5th Cir. 2010). Here, EPA purports to interpret regulations that *TCEQ* promulgated. "[D]eference

is inappropriate when [an agency] interprets regulations promulgated by a different agency.'" *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1015 (D.C. Cir. 2002).

EPA asserts that "EPA gets deference in interpreting state law provisions that are part of a SIP." EPA Br. at 32 n.9. But EPA repeatedly emphasizes that the Flexible Permit Program is *not* part of the Texas SIP because EPA disapproved it. In contrast, *American Cyanamid Co. v. EPA*, 810 F.2d 493, 498 (5th Cir. 1987), on which EPA relies, was a federal action to enforce a SIP provision that EPA *already had approved*. *See, e.g., id.* at 497 n.5.[7] *American Cyanamid* does not even cite *Florida Power* regarding state-law interpretation.[8]

On the question of deference, Intervenors confuse EPA's interpretation of the federal Clean Air Act with EPA's interpretation of state regulations. The first question before the Court is what the Texas Program's *own terms* mean. Only after deciding that can the Court evaluate whether EPA exceeded its authority under the Clean Air Act by disapproving the Program. EPA receives no deference when interpreting TCEQ regulations. As *Florida Power* and myriad other cases confirm, the agency that promulgates the regulation in question receives utmost

[7] Likewise, in *Sierra Club v. EPA*, 496 F.3d 1182, 1186 (11th Cir. 2007), the rule in question had "the force and effect of federal law and [could] be enforced by the [EPA] in federal courts."

[8] Further, *American Cyanamid* "may no longer be good law[.]" *United States v. Marine Shale Processors*, 81 F.3d 1329, 1337 n.3 (5th Cir. 1996) (citing *General Motors Corp. v. United States*, 496 U.S. 530, 536 n.1 (1990)).

deference in interpreting that regulation. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), *quoted in* Intervenors Br. at 7. Other cases Intervenors cite also do not contradict *Florida Power*.[9]

Following *Florida Power* here would not result in the slippery slope Intervenors imagine. Intervenors Br. at 13-14. Obviously, Petitioners do not argue that a state can avoid EPA review simply by opining that a SIP revision complies with Clean Air Act requirements. In light of EPA's contention that Texas law is ambiguous regarding circumvention of Major NSR, however, TCEQ deserves the same deference afforded other agencies: namely, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (quotation marks omitted). If, unlike here, an agency were to advocate a demonstrably untenable interpretation of its own regulation, then the Court could reject that interpretation as "plainly erroneous." *Id.*

Finally, EPA attempts a sleight of hand by asserting that it is "reasonable for EPA to insist that Texas amend the Program's rules to make it absolutely clear"

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[9] For example, *Michigan Dep't of Envtl. Quality v. Browner*, 230 F.3d 181 (6th Cir. 2000), concerned the meaning of a *Clean Air Act* provision, not the meaning of a SIP provision. *Id.* at 184. The other cases Intervenors cite also afford EPA *Chevron* deference in interpreting the Clean Air Act—not state regulations. *See* Intervenors Br. at 10 n.6, 12 (citing cases).

and that this "should not be difficult for Texas to achieve . . . ." EPA Br. at 27. EPA could have approved the Program conditionally, subject to a going-forward clarification by the State, but that is not what EPA did.[10] Instead, EPA retroactively disapproved a Program under which Texas has issued, with EPA's knowledge, scores of flexible permits. The Court should vacate the Disapproval because EPA acted arbitrarily, capriciously and beyond its authority in doing so.

### C. EPA's Unsubstantiated Speculation Cannot Support The Disapproval.

Rather than determining whether the Flexible Permit Program "would interfere" with Texas's attainment of national air quality standards, EPA's Disapproval rests on speculation regarding how the Program might be abused. *See, e.g.*, EPA Br. at 35 ("a Flexible Permit holder might *improperly* disregard the Major NSR requirements, or *wrongfully* presume they do not apply, due to the overly broad definition of account"); *id*. at 28 (absence of explicit requirement for continued compliance with Major NSR permits that predate a flexible permit "*could* allow major sources to escape the requirements for their Major NSR

[10] As detailed above, throughout the Program's long existence, TCEQ has agreed that, regardless of the existence of a flexible permit, if Major NSR thresholds are triggered, the facility must independently comply with Major NSR requirements. Since the Disapproval, TCEQ has amended Program rules to make this even more explicit. *See* Texas Br. at 12-13; 35 Tex. Reg. 11,909 (Dec. 31, 2010).

permits"). It is undisputed, however, that no provision of the Program *allows* for circumvention of Major NSR, before or after a flexible permit issues. To the contrary, the Program rules, Texas statutory law, and TCEQ Guidance expressly require compliance with Major NSR.

"Musings and conjecture are 'not the stuff of which substantial evidence is made.'" *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991). An agency's decision cannot be based on "mere fears for the future" or "snatched from the air on a purely hypothetical 'worst case' analysis . . . ." *Memphis Light, Gas & Water Div. v. FPC*, 504 F.2d 225, 234 (D.C. Cir. 1974). "What are required are . . . facts and findings, a statement of reasons that is supported by concrete inferences from substantial evidence . . . ." *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 874, 888 n.78 (D.C. Cir. 1976). EPA's failure to support its decision with sound reasoning based on evidence that supports the requisite finding under Section 110(*l*) mandates that the Disapproval be vacated. 5 U.S.C. § 706(2).

## III. EPA's Disapproval Of The Program's Monitoring, Recordkeeping, And Reporting Provisions Exceeds EPA's Authority And Is Arbitrary, Capricious And Unsupported By The Record.

EPA's secondary argument is that the Flexible Permits Program is not "enforceable" and therefore that the Disapproval is authorized by Section 110(a)(2) of the Clean Air Act. That section provides that each SIP shall:

> (A) include enforceable emission limitations and other control measures, . . . (including economic incentives such as fees, marketable

> permits, and auctions of emissions rights), . . . as may be necessary or appropriate to meet the applicable requirements of this chapter;
>
> *****
>
> (C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source . . . as necessary to assure that national ambient air quality standards are achieved . . . .

42 U.S.C. § 7410(a)(2)(A), (C). EPA argues that the Program monitoring, recordkeeping and reporting ("MRR") requirements are not specific enough and allow too much discretion to TCEQ to impose permit-specific MRR conditions. Based on that assumption, EPA concludes that the MRR rules violate EPA's "long-standing interpretation of the requirement in [Section 110(a)(2)(A)] that SIPs contain enforceable measures." EPA Br. at 37.

No statute or rule, however, authorizes EPA to disapprove a Minor NSR program that allows a state agency to impose permit-specific MRR requirements rather than detailing such requirements in Program rules. In fact, EPA *encouraged* States to "mov[e] detail from SIP's to permits[.]" 57 Fed. Reg. 13,498, 13,568/2 (Apr. 16, 1992). In any event, EPA's conclusion is based on hyperbole and exaggeration, not an accurate assessment of the Program rules and the context in which they have operated for 16 years.

### A. EPA's "General Preamble" And "Enforceability Memorandum" Do Not Support Disapproval.

EPA recognizes that the Clean Air Act does not expressly authorize EPA to disapprove a Minor NSR SIP revision because the Program MRR rules are general rather than particular. EPA and Intervenors seek to bolster their position by reliance on a 1987 "Enforceability Memorandum" and a 1992 "General Preamble." EPA Br. at 19-20. Neither establishes authority for EPA's Disapproval, and neither is entitled to judicial deference.

"Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).[11] The Memorandum, which combines two internal memos authored by various mid-level personnel, was not published in

[11] EPA acknowledges that policy statements like the Memorandum "often are intended in whole or in part to guide only EPA Regional Offices, and in such instances they have no implications whatsoever for a State's administration of its program." 58 Fed. Reg. 10,957, 10,962 (Feb. 23, 1993); *see also United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

the *Federal Register* or subjected to public scrutiny through the notice-and-comment process.[12]

Deference questions aside, the Memorandum does not purport to interpret EPA's Minor NSR regulations and does not distinguish EPA's authority over *Major* NSR SIP revisions from its more limited authority over *Minor* NSR SIP revisions. The Memorandum does, however, emphasize that EPA "should generally defer to a State's interpretation of the scope of its authority." App. T. at 293.

The 1992 "General Preamble" also does not expressly address Minor NSR SIP revisions. The Preamble responded to Clean Air Act amendments, particularly those dealing with SIP requirements for major sources in nonattainment areas. *See* 57 Fed. Reg. at 13,498. Although the document was published in the *Federal Register*, it is not a product of notice-and-comment rulemaking. Instead, it describes EPA's "preliminary views[,]" which "do not bind the States[.]" 57 Fed. Reg. at 13,498/1.

The salient portion of the Preamble undermines EPA's current argument by encouraging the very thing about which EPA now complains. It is undisputed that Congress and EPA have for decades encouraged flexible permitting. *See*

[12] *See* App. T at 288-289; 75 Fed. Reg. at 41,322 & n.4 (citing Memorandum as "in the docket").

Industry Pet'rs Br. at 8-10, 19-21. The Preamble notes that because Title V of the Clean Air Act "affords significant operational flexibility[,]" EPA will be "adopting provisions to facilitate the movement toward more flexible SIP's." 57 Fed. Reg. at 13,568/2, 3. EPA further explains:

> The EPA recognizes that it will take time to complete the transition from a regulatory system where SIP's are the primary tool for implementing and enforcing the Act, ***to one where operating permits ultimately assume primary responsibility for implementation and enforcement***.
>
> The EPA is considering what means will aid in ensuring a smooth transition to ***increasingly general, and thus more flexible, SIP's***, which ***may allow permits rather than the SIP's to specify the details of how SIP limits and objectives apply to subject sources***. In particular, EPA will be seeking to develop information in the following areas: (1) The most efficient ways of implementing requirements of SIP's through permits, such as ***moving detail from SIP's to permits*** . . . .

57 Fed. Reg. at 13,568/2 (emphasis added). Moving detail from SIPs to permits is exactly what Texas did in the Flexible Permits Program in 1994, two years after the Preamble appeared.

In the nearly 20 years since the Memorandum and the Preamble were written, EPA has confirmed that its authority over Minor NSR is limited.

> [Minor NSR] is designed to ensure that the construction or modification of any stationary source does not interfere with the attainment of the NAAQS. Aside from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs. The implementing regulations, which are found at 40 CFR 51.160 through 51.164, also are stated in very general terms.

74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009). Against this backdrop, it is apparent that the MRR requirements in the Flexible Permits Program are not a valid basis for the Disapproval.

### B. EPA Incorrectly Characterizes Applicable MRR Requirements.

EPA argues that MRR requirements applicable to flexible permits "are insufficient to ensure that the Program is enforceable." EPA Br. at 41. This argument not only lacks legal foundation, but is also factually unsupported. EPA disregards numerous Program rules that demonstrate enforceability.

First, the Program requires that flexible permit applicants specify (i) each source of emission to be included in the flexible permit; (ii) each contaminant emitted by such sources; and (iii) the control technology to be used to meet the cap. 30 TEX. ADMIN. CODE § 116.711(13)-(14). The applicant must "demonstrate compliance with all emission caps at expected maximum production capacity." *Id*. § 116.711(14).

Second, contrary to EPA's assertion that "it makes no difference what a permit applicant represents in its application[,]" EPA Br. at 51, such representations "become conditions upon which the . . . flexible permit is issued." 30 TEX. ADMIN. CODE § 116.721(a). Absent an approved permit amendment, it is unlawful to vary from a representation by emitting a new contaminant, allowing

emissions from a new facility, or allowing emissions exceeding the cap from any source. *Id.*

Third, as EPA acknowledges, a flexible permit holder is required to maintain at all times and make available for inspection "information and data sufficient to demonstrate continuous compliance with the emission caps and individual limitations contained in the flexible permit." *Id.* § 116.715(c)(6). EPA erroneously asserts, however, that the Executive Director has "unfettered discretion as to whether any specific monitoring requirements will be imposed . . . and what those monitoring requirements will be . . . ." EPA Br. at 40-41. To the contrary, a flexible permit applicant must demonstrate that "the proposed facility . . . *will have provisions* for measuring the emission of air contaminants . . . ." 30 TEX. ADMIN. CODE § 116.711(2) (emphasis added).

The Program allows TCEQ to specify particular monitoring methods in conditions of particular permits. *See* Industry Pet'rs Br. at 43-45; Texas Br. at 34-36, 40-42. EPA's assertion that there are not "even minimal criteria" to guide that discretion, however, is incorrect. EPA Br. at 41. Texas law identifies various "sampling methods and procedures" that the TCEQ "may prescribe" for use "in determining . . . compliance with the commission's rules . . . ." TEX. HEALTH &

SAFETY CODE § 382.021.[13] The TCEQ may prescribe a method other than those statutorily specified only if it is "generally recognized in the field of air pollution control." *Id*. § 382.021(a)(4). Further, the TCEQ may prescribe new methods only if (i) existing methods are "not adequate to meet the needs and objectives of the commission's rules" and (ii) "the scientific applicability of the new methods or procedures can be satisfactorily demonstrated to the commission." *Id*. § 382.021(b).[14]

EPA urges the Court not to consider that EPA approved in Texas's rules for general Minor NSR the same Director-discretion provisions that it disapproved in the Flexible Permits Program. *See* Texas. Br. at 34-38, 47; Industry Pet'rs Br. at 42-44. Although EPA argues that this issue was not addressed in administrative proceedings, EPA Br. at 47, EPA's proposed disapproval *expressly conceded* the point. 74 Fed. Reg. 48,480, 48,493/1 (Sept. 23, 2009).[15]

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[13] EPA's contention that there is "no menu from which to choose any particular monitoring requirements[,]" EPA Br. at 41, is thus wrong. TCEQ's 1996 Guidance similarly lists permissible measurement methods, including "stack sampling, ambient monitoring, continuous emissions monitors, leak detection and repair programs for fugitive emissions, and predictive or parametric emission monitors." *See* Reg. Add. at 3.

[14] Similarly, TCEQ can accept for permit compliance only laboratory information prepared by a laboratory that is TCEQ-accredited or meets enumerated statutory standards. TEX. WATER CODE § 5.134.

[15] Intervenors erroneously assert that EPA has "since determined" that director discretion provisions should not be approved. Intervenors' Br. at 31. In fact, there

(*footnote continued on next page*)

The Director's discretion with respect to monitoring in the Flexible Permits Program is also comparable to the discretion afforded EPA under the federal Plantwide Applicability Limits ("PAL") program that EPA promulgated for Major NSR in 1996. The PAL program lists allowable monitoring approaches, but also allows an operator to "employ an alternative monitoring approach . . . if approved by the reviewing authority." 40 C.F.R. § 51.165(f)(12)(i)(C). Alternative approaches under the PAL program must be generally accepted in the scientific community, just as methods used by TCEQ must be generally recognized in the air-pollution field and scientifically applicable.

### C. EPA Considered Particular Permits "Irrelevant" To The Disapproval, And Intervenors' References To Particular Permits Are Inaccurate.

In the Disapproval, EPA insisted that "comments on implementation of the submitted Program are not relevant to this action . . . ." 75 Fed. Reg. at 41,327. The Disapproval is not based on any analysis of actual flexible permits, and EPA does not argue on appeal that any particular permit is relevant to the Court's decision. Accordingly, Intervenors' assertions regarding the terms and conditions of two flexible permits (of nearly 200 issued since 1994) are inappropriate and improper for the Court to consider. *Texas Power & Light Co.*, 784 F.2d at 1269-

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has been no change in law or regulation to justify EPA's inconsistent treatment of identical state provisions.

70; *see also Maine Pub. Serv. Co. v. FERC*, 964 F.2d 5, 9 (D.C. Cir. 1992) (refusing to consider intervenor's argument because "a court cannot sustain an agency's ruling on a ground not offered by the agency").

Additionally, Intervenors' characterizations of the permits are misleading and inaccurate. In fact, the ExxonMobil Baytown refinery permit illustrates environmental benefits that Texas has derived from the Flexible Permits Program and provides no support for EPA's Disapproval. Just as TCEQ intended, the Program encouraged ExxonMobil to bring under permit hundreds of "grandfathered" facilities.[16] Previously, these facilities were exempt under federal and state law from any emissions-control requirements.

The Baytown refinery is large, and its permit is detailed, and therefore lengthy. But Intervenors do not explain how one permit covering multiple sources is more "daunting," Intervenors' Br. at 22, than multiple traditional permits, each covering individual sources.[17] EPA's review generally found just the opposite.

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[16] App. U at 314. A "grandfathered facility" is one constructed before Texas initiated its air permit program in 1971 and not modified so as to require permitting or updated controls. *See* TEX. HEALTH & SAFETY CODE § 382.0518(g).

[17] As Intervenors concede, before the flexible permit, one would have had to review more than 30 different permits to determine limits applicable to the sources covered by a single flexible permit at the refinery. *See* Intervenors' Br. at 24. Ironically, having argued that the Program fails to require sufficient recordkeeping, Intervenors also complain that an unidentified company reportedly maintained *too much* information documenting compliance with its flexible permit. *Id*. at 30-31.

Permitting authorities in six States reported that "conducting inspections of sources with flexible permits is comparable to conducting inspections of sources with conventional permits."[18] Further, EPA concluded that flexible permits generally "enhanced information sharing between the companies and permitting authorities" and "provided to the public equivalent or greater information than conventional permits."[19]

Intervenors also fail to inform the Court that the Baytown refinery flexible permit produced significant emissions reductions. For example, Intervenors misleadingly suggest that, for all facilities under the permit, the cap on emissions of nitrogen oxides ($NO_x$) is 21,507 tons per year ("TPY"). Intervenors' Br. at 22. In fact, while that was the *initial* cap for the year 2000, the permit expressly requires this cap and others to decline by specific increments over the following six years, by which time the "final cap value" must be reached. By 2006, the nitrogen oxides cap was not 21,507 TPY, it was 8,663, a 60% reduction from the initial cap.[20]

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18 App. S at 241.

19 *Id*. at 6-7.

20 *See* Intervenors' Br. at 31; App. U at 316, Special Condition 1. The cap in the currently applicable permit, which is not in the record, is half that—4,158 TPY.

Intervenors further misrepresent that the Baytown refinery permit "imposes no reporting requirements . . . ." *Id*. at 32. To the contrary, Special Condition 42 mandates as follows:

> An annual summary of the emissions inventory for each criteria pollutant for which an emission cap has been established . . . shall be provided. . . . This summary will include a table listing the criteria pollutant, actual total annual emissions for that pollutant, and the emission cap for that pollutant.

App. U at 335. *See also, e.g., id.* at 321, Special Condition 17D (requiring records of continuous flow monitors on vent streams); *id.* at 324, 21F (requiring on-site list of tanks and daily monitoring of throughput); *id.* at 322, 20A (requiring monthly monitoring of cooling tower return water and recording of monitoring and maintenance efforts).

In addition, numerous other general reporting requirements apply by regulation to flexible permit holders. For example, flexible permit holders must report the occurrence of any "emission event," *i.e.*, an upset or other unscheduled event, that results in emissions exceeding permit limits. 30 TEX. ADMIN. CODE § 101.222. Flexible permits also are incorporated into Title V operating permits, which require bi-annual certified reports of all deviations, *i.e.*, non-compliance with permit terms and conditions, including identification of each deviation, its probable cause, and any corrective actions or preventative measures taken. *Id*. § 122.145. Further, each major source in Texas must submit to TCEQ yearly

inventories that detail annual routine emissions; excess emissions occurring during maintenance activities, including start-ups and shutdowns; and emissions resulting from upset conditions. *Id.* § 101.10

Intervenors' contention that TCEQ "voided" pre-existing permits and that the Program "eliminates Major NSR permit terms" goes far afield of EPA's Disapproval and is also highly misleading. *See* Intervenors' Br. at 23-25. When a flexible permit is issued, just as when a traditional permit is amended, the new permit represents updated emissions limits. Pre-existing limits are not "entirely eliminate[d]" by a flexible permit, however. Intervenor Br. at 25. Instead, the limits are modified, in compliance with applicable Major NSR requirements, to reflect the flexible permit conditions.

Under a flexible permit, sources that previously were subject to source-specific limits may instead be grouped with other sources and subjected to an aggregate cap. So long as the total emissions from the grouped sources do not exceed the cap, the operator has flexibility to alter emissions from any particular source in the group without amending the permit.[21] An operator, for example,

[21] As discussed above, any changes also must comply with Major NSR, and changes resulting in emission of new contaminants or emissions from new facilities require a permit amendment.

might choose to operate a more efficient source for a greater number of hours, while decreasing operation of an older, less efficient source.

Intervenors erroneously contend that previous limits on particular sources at the Baytown refinery (fluid catalytic cracking units) "were . . . eliminated," as if those sources had no limits at all under the flexible permit. *Id.* at 24. In fact, under the flexible permit, those sources are grouped with other sources and limited by aggregate caps for particular pollutants, rather than being subject to source-specific limits.[22] In addition, the document reflecting the flexible permit for the Baytown refinery also incorporates a "PSD permit," as designated by its PSD permit number (PSD-TX-730), which reflects TCEQ's determination that the permit limits satisfy both flexible permit rules and independent Major NSR requirements. Contrary to Intervenors' suggestion, therefore, the Baytown permit exemplifies a permit holder undertaking, rather than avoiding, Major NSR review.

Intervenors' discussion of a different permit involving an ExxonMobil storage facility also provides no support for EPA's Disapproval. *See* Intervenors' Br. at 28-29. Intervenors reference EPA's objection to a federal Title V operating permit, not a flexible permit. EPA complained that the Title V permit did not identify specific monitoring conditions ***that were included as special conditions in***

[22] *See, e.g.*, App. U, Maximum Allowable Emissions Rate Table, at 345, 350, 354, 358, 364.

***an underlying flexible permit***.[23] TCEQ agreed to resolve the objection by "identify[ing] the specific NSR monitoring conditions of [flexible] permit 49131 that apply to each storage tank" in the Title V permit.[24] The Disapproval makes no mention of this issue.

## IV. EPA's Contention That The Program "Lacks Sufficient Detail" Regarding Calculation Of Emissions Caps Does Not Support Disapproval.

EPA concedes that "it is clear from the Program" that emissions caps for each criteria pollutant in a flexible permit are calculated by applying Best Available Control Technology ("BACT") to each of the sources of emissions covered by the cap. EPA Br. at 53. The permit may express emission limits in the form of an aggregate cap covering multiple sources and/or individual limitations applicable to individual sources. *Id*. EPA inexplicably concludes, however, that the Program "lacks sufficient detail of how the cap is to be determined in all circumstances." *Id*. at 54.

As the opening briefs explain, the Program framework for calculating and establishing emissions caps is straightforward. Texas Br. at 50-54; Industry Pet'rs Br. at 49-52. The permit application identifies each contaminant for which an

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[23] App. W.

[24] *See* Letter from TCEQ to EPA at 7 (June 3, 2010), *at* http://www.tceq.texas.gov/assets/public/permitting/air/Announcements/exec_dirres_06_03_10.pdf.

emission cap is desired and each source of emissions to be covered by the proposed permit. 30 TEX. ADMIN. CODE §§ 116.711(13). Emissions for each source and each contaminant to be covered are calculated based on application of BACT. *Id*. § 116.716(a). For each contaminant, the sum of the calculated emissions limits for each of the covered sources equals the cap on emissions of that pollutant for those covered sources. *Id*. The permit specifies which sources and contaminants it covers and the corresponding emission limits. *Id*. § 116.715(c)(7). From the permit, anyone can replicate this process by applying the generally applicable BACT tests to each of the covered facilities and summing the results. Texas Br. at 53.

## V. Intervenors' Argument Regarding Public Notice Requirements Is Not An Independent Basis For EPA's Disapproval.

Intervenors, but not EPA, argue that the Program's public notice provisions are deficient. Intervenors' Br. at 34. This argument was not a substantive basis for EPA's Disapproval and cannot support affirmance. *Tex. Power & Light*, 784 F.2d at 1269-70; *NorAm Gas*, 148 F.3d at 1165. EPA did not analyze the public notice provision, which incorporates regulatory language from other SIP provisions that EPA addressed in a separate rulemaking. Instead, EPA simply found that it was "not severable" from the Program provisions discussed above. 75 Fed. Reg. at 41,332/3.

## VI. The Court Should Not Ignore EPA's Extraordinary And Unexplained Disregard For Its Own Statutory Deadline.

The statutory deadline for EPA to approve or disapprove the Flexible Permit Program expired 18 months after the Program was submitted in 1994, and EPA missed the deadline by well over a decade. It is undisputed that state regulators and regulated industry have relied on the Program rules since 1994. Regardless of whether EPA's extraordinary delay might alone require reversal, it should at least factor into judicial review.

Courts have excused agency delay where the record showed that meeting the statutory deadline was impossible. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979). Even then, the agency bears a "heavy burden" to demonstrate impossibility, lest officials "seize on a remedy made available for extreme illness and promote it into the daily bread of convenience." *Id*. (quotation marks omitted); *see also Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 155-57 (D.C. Cir. 2010) (record established that statutory deadlines were unrealistic).

The Disapproval does not even *acknowledge* EPA's delay, let alone try to explain it. The Disapproval is not based on any empirical analysis or scientific review, but purportedly only on EPA's legal interpretation of the Program rules, which comprise a few sections of the Texas Administrative Code. That such a review could require more than a decade to complete is inexcusable.

EPA argues that *General Motors Corp. v. United States*, 496 U.S. 530 (1990), "is controlling" and renders EPA's extraordinary delay "irrelevant." EPA Br. at 56-57. *General Motors* involved a different question, however, and was decided before Congress imposed a deadline for review of SIP revisions. 496 U.S. at 534-37. That case held that EPA was not barred from enforcing an *existing* SIP even if EPA unreasonably delayed in reviewing a SIP *revision*. *Id*. at 540. Here, EPA is not seeking to enforce an existing SIP, and neither *General Motors* nor any other authority suggests that in reviewing the Disapproval the Court must ignore EPA's unusually lengthy delay. The fact that EPA did not even consider (i) the passage of time, (ii) the State's actual experience with the Program during that time, (iii) the demonstrated air quality improvements during implementation, or (iv) the severe disruption that invalidating the Program now would cause, strongly indicates that the decision is arbitrary and capricious, especially where EPA premised disapproval on a purported lack of information.

EPA contends that a State "normally" should not implement a SIP revision before EPA approves it and may not implement a revision that is "less stringent" than the approved SIP. EPA Br. at 36, 56 (citing 42 U.S.C. § 7416). The "normal" case, however, does not involve 16 years of agency delay. Further, in the Disapproval, EPA drew no conclusion regarding whether the Flexible Permit

Program is "more or less stringent than the SIP requirements." 75 Fed. Reg. at 41,318.

In fact, the Program is *more* stringent than the preceding SIP. TCEQ designed the Program "to exchange flexibility for emission *reductions*." 19 Tex. Reg. 9360, 9360 (Nov. 25, 1994) (emphasis added); *see also* 19 Tex. Reg. 7334, 7335 (Sept. 20, 1994) (anticipating "environmental benefits" from the Program). Absent the Program, the SIP would have allowed grandfathered facilities to continue operating without a permit at 1970's emissions levels dramatically higher than those required by BACT. Indeed, an operator now must employ BACT to obtain a flexible permit covering any source, and proposed caps in a flexible permit application may not lessen the existing level of control for any facility under the cap. *See* 30 TEX. ADMIN. CODE. § 116.711(3); Texas Br. at 51-52; Industry Pet'rs Br. at 59.

EPA does not dispute that since the Flexible Permit Program began, Texas air quality has improved significantly, and numerous areas have moved from nonattainment to attainment status. *See* Industry Pet'rs Br. at 59. The Clean Air Act does not prohibit a state from taking action to improve air quality despite EPA's failure to timely act on a SIP revision. And 16 years later, EPA cannot substitute unsubstantiated speculation for the evidence and reasoned decisionmaking the Administrative Procedure Act requires.

## CONCLUSION

Industry Petitioners respectfully request that the Court vacate the Disapproval, remand to EPA for prompt action in accordance with the Act and the Court's instructions, and provide such other relief as justice may require.

Respectfully submitted,

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March 17, 2011

## CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 17th day of March, 2011. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam J. White
Adam J. White

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(i) because it contains 6,981 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

March 17, 2011

/s/ Adam J. White
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# Regulatory Addendum

April 1996
RG-224

TNRCC

# Flexible Air Permit Application Guidance
# **SUBCHAPTER G**

New Source Review Division

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TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

**Reg. Add. 1**

The term "flexible permit", as used in this document, means an air quality permit as defined in Subchapter G, 30 TAC, Section 116.7 (Regulation VI).

This document supplements the Form PI-1, Air Quality Permit Application Instructions, with sufficient depth to cover the flexible permitting requirements appropriate for a large and/or complex facility. Obviously, not all items apply to every application. Many applications for smaller and simpler facilities will not require the use of all of the information described herein. Pre-permit communications between the applicant, applicant's consultant (if any) and the staff of the New Source Review Division are important to ensure a satisfactory permit application and to prevent unnecessary time delays and expense to the applicant.

Comments or suggested improvements to this guidance document are welcome. Please submit your comments in writing to the New Source Review Division, MC-162, P.O. Box 13087, Austin, Texas 78711-3087.

## PURPOSE AND SCOPE

The purpose of this document is to provide guidance for preparing and submitting a flexible permit application. Texas Natural Resource Conservation Commission (TNRCC) Regulation VI was amended to add Subchapter G to create a new category of permit that allows an operator more flexibility in managing their operations by establishing a facility emissions cap. Certain physical or operational changes made under this subchapter may not require prior notification. The flexible permit provides an alternative to, but does not completely replace, traditional permitting where operations are restricted to permit representations. The TNRCC feels that more flexibility could be afforded to well controlled facilities. Some existing sources could become well controlled by adding additional controls and/or modifying operating procedures resulting in emission reductions. Industry would benefit from increased flexibility and authorization to make process changes in response to market opportunities. The state would benefit from the increased number of facilities permitted with lower overall emission rates and improved controls. The following paragraphs contain guidance to enhance the understanding and intent of the specific rule language. The paragraph identifications (**§116.710** Applicability, for example) allow the user to correlate this guidance with the paragraphs in Subchapter G. The content which follows does not constitute the actual wording in the regulation.

# SUBCHAPTER G
# FLEXIBLE AIR PERMIT APPLICATION GUIDANCE

For Flexible Permits issued in Texas
under the Texas Clean Air Act and the Federal Clean Air Act

## §116.710 Applicability

A person may obtain a flexible permit for a facility, group of facilities, or account before making any operational changes, as an alternative to a new source review permit under §116.110. Only one flexible permit may be issued at an account site, and a flexible permit may not cover sources at more than one account site. Once a flexible permit has been issued, new facilities and modifications to existing facilities may be authorized through an amendment to the flexible permit.

All applications for a flexible permit or flexible permit amendment with an estimated capital cost in excess of $2 million, and not subject to any exemption contained in the Texas Engineering Practice Act, shall be submitted under the seal of a registered professional engineer.

## §116.711 Flexible Permit Application

Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1, General Application, with supporting information which demonstrates that all of the following are met:

(1) Protection of public health and welfare. This may include air dispersion modeling, ambient monitoring, sufficient reductions, complaint history, or compliance history depending on the size and scope of the review.

(2) Measurement of emissions. The applicant must propose how emissions will be measured. This can include stack sampling, ambient monitoring, continuous emissions monitors, leak detection and repair programs for fugitive emissions, predictive or parametric emission monitors, and recordkeeping.

(3) Best Available Control Technology (BACT). An emissions cap shall be calculated assuming that BACT has been applied to all facilities covered by the flexible permit. Control technology beyond BACT may be applied to a portion of the existing facilities or an account, to provide emission reductions necessary to meet the proposed emissions cap. However, the existing level of control may not be lessened for any individual facility. The BACT shall be demonstrated for each individual new facility as required by Subchapter B, §116.111(3). BACT examples for specific processes and control equipment may be found in the TNRCC Technical Guidance Documents available from the New Source Review Division.

(4) Federal New Source Performance Standards (NSPS) Title 40 Code of Federal Regulation Part 60 (40 CFR 60). (As applicable). The applicant for a flexible permit should identify any appropriate NSPS and discuss how the unit will be operated to comply with the applicable standards. The applicant should also discuss any exemptions or reasons why an appropriate standard does not apply.

(5) National Emission Standards for Hazardous Air Pollutants (NESHAPS) (40 CFR 61) and Maximum Achievable Control Technology (MACT). (As applicable). The applicant for a flexible permit should identify any appropriate NESHAPS and discuss how the unit will be operated to comply with the applicable standards. The applicant should also discuss any exemptions or reasons why an appropriate standard does not apply.

(6) Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application.

(7) Nonattainment review. (If applicable). Detailed guidance on the requirements for non-attainment review may be found in the "Non-attainment NSR Manual." The applicant must provide an applicability demonstration with the flexible permit application.

(8) Prevention of Significant Deterioration (PSD) (40 CFR 52.21) review. (If applicable) A number of papers and a U.S. Environmental Protection Agency (EPA) guidance document are available from the New Source Review Division to provide a more detailed discussion of PSD review requirements. The applicant must provide an applicability demonstration with the flexible permit application.

**Note:** Subchapter G does not affect the applicability of Non-attainment or PSD review as described in the PI-1 General Instructions.

(9) Air dispersion modeling or ambient monitoring. A determination on the necessity of these items is made as required by the PI-1 General Instructions and the Modeling and Health Effects Review Applicability Guidance Document for Non-criteria Pollutants. Both documents are available upon request from the New Source Review Division. If the reviewing engineer determines that modeling is required for an air pollutant, a modeling protocol meeting will be held with the TNRCC Modeling Section to establish specific modeling criteria. The TNRCC Office of Air Quality, Monitoring Operations Division can provide guidance regarding ambient monitoring plans.

(10) In addition, the applicant shall:

(A) identify each air contaminant for which an emission cap is desired. For example: Nitrogen oxide ($NO_x$), carbon monoxide (CO), benzene, acetone, volatile organic compound (VOC), and sulfur dioxide ($SO_2$). If a total VOC cap is desired, the applicant is still held to the individual compound caps that made up the VOC cap;

(B) identify each facility to be included in the flexible permit. For example: Crude Unit, Reaction Train, Loading Rack, storage tanks, and bulk liquids terminal;

(C) identify each source of emissions to be included in the flexible permit and for each source of emissions identify the emission point number (EPN) and the air contaminants emitted. For example: Heaters, boilers, flares, fugitives, tanks, and process vents;

(D) for each emission cap, identify all associated EPNs and provide emission rate calculations as described in the PI-1 General Instructions, Section VI.C. Emissions Data;

(E) for those sources not included in the emissions cap, identify the EPN and provide emission rate calculations for each individual emission limitation, based on the expected maximum capacity and the proposed best available control technology.

(11) The applicant shall specify the control technology proposed for each emission unit and propose a means of demonstrating compliance with all emission caps at maximum production capacity. A demonstration of compliance may include initial stack testing, monitoring devices for specific pollutants or operating parameters, production or usage records, etc.

**§116.712-713 (RESERVED)**

**§116.714 Application Review Schedule**

The TNRCC will determine if the application is complete or if additional information is required. See §116.114 in TNRCC Regulation VI relating to Application Review Schedule. If additional information or clarification of the application is required, the applicant will be notified in writing within 90 days of receipt of the flexible permit application or amendment.

**§116.715 General and Special Conditions**

(a) Flexible permits will be issued with general and special conditions. If the flexible permit review indicates that an increase in emissions of a particular air contaminant could result in a significant impact on the environment, or could cause the facility to become subject to Nonattainment or PSD review, the permit may include a special condition which requires written approval before constructing any additional facilities or making changes under a standard exemption or standard permit.

(b) A pollutant specific emission cap and/or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit. Emission caps may be compound specific or may be included in an overall emission cap. For example, VOCs may be listed individually or in an overall cap. These caps or limits will be included on the Emission Cap Table which is part of the maximum allowable

emission rates table.

(c) The general conditions applicable to all flexible permits can be found in Attachment 1. These conditions are contained in Subchapter G (§116.7) and are not negotiable.

(d) Special conditions are developed during the review process. Such conditions may be more restrictive than the requirements of 30 TAC. These conditions are developed on a case-by-case basis using representations from the permit application to ensure enforceability and outline specific requirements and/or implementation schedules. These conditions will be negotiated with the applicant before the permit is issued. The special conditions may contain items such as record keeping, testing, monitoring, specific operational requirements or limitations, reporting requirements, authorized chemicals, etc.

**§116.716 Emission Caps and Individual Emission Limitations**

The applicant may decide whether to use emission caps or individual emission limitations, or any combination thereof.

(a) Each emission cap for a specific pollutant may be established as follows:

(1) Both annual (ton/year) and short term (lb/hr) emission rates will be calculated for each facility based on application of current BACT at expected maximum capacity.

(2) The calculated emissions for each facility will then be summed to establish the emission cap for each pollutant.

(b) An individual emission limitation will be established for each pollutant not covered by an emission cap in the flexible permit. In addition, an individual emission limitation may be established for a pollutant covered by the emission cap to prevent a facility from exceeding emission levels appropriate for the proposed controls. In some cases a single unit may be required by state or federal rule to meet an emission limitation which does not allow flexibility under the emission cap. For example, a catalytic cracking unit may be limited by federal regulation to an $SO_2$ exit concentration level which is more restrictive than the emission cap might allow. Individual emission limitations may also be required if dictated by the review of air quality impacts.

(c) If a facility that contributes to an emission cap is shut down for a period longer than 12 months, the emission cap shall be lowered by the amount contributed from the shut down facility. Subchapter G requires that the appropriate emission cap shall be adjusted accordingly if a new facility is brought into the flexible permit. The flexible permit must be amended to authorize the addition of any new facilities.

(d) An insignificant emissions factor of up to 9.0 percent can be included in the total emission cap or individual emission limitation. In some cases the applicant may wish to

use an emission factor below 9 percent to avoid netting or triggering PSD or Non-attainment review, and based on the review of air quality impacts.

(e) An emission cap will be adjusted for any reduction required by any new state or federal regulation. The adjustment will be made at the time the flexible permit is amended or altered. The permittee must submit a request to alter the permit within 60 days of making the change if an amendment is not required to meet the new regulation. The request shall include information describing how compliance with the new requirement will be demonstrated.

**§116.717 Implementation Schedule for Additional Controls**

The flexible permit shall specify an implementation schedule for any additional controls required to meet an emission cap. For example, if the applicant proposes to add additional seals to several storage tanks, a date for final completion and a schedule outlining the number of tanks per year to be retrofitted shall be included in the application. The permit may also specify how the emission cap will be adjusted if the facility is shut down or the additional control equipment is not installed.

**§116.718 Significant Emission Increase**

For state review purposes, an increase in emissions at an existing facility covered by a flexible permit is insignificant if the increase does not exceed either the emission cap or the individual emission limitation. This section does not apply to an increase in emissions from a new facility or the emission of any new air contaminant(s). Also any existing facility covered by a flexible permit may claim an applicable standard exemption or standard permit, provided the emissions from the standard exemption or standard permit do not cause an exceedance of an emission cap or individual emission limitation.

**§116.720 Limitation on Physical and Operational Changes**

Operational and/or physical changes shall not result in an increase in actual emissions at facilities not covered by the flexible permit unless those changes are authorized by a separate permit action under §116.110 (relating to applicability). Additional facilities may be authorized under standard exemption, standard permit, or Subchapter B, but the new facility may not take advantage of any flexibility until a flexible permit amendment is requested for those facilities.

**§116.721 Amendments and Alterations**

(a) All representations with regard to construction plans and operation procedures in an application for a flexible permit, as well as the general and special conditions, become conditions upon which the subsequent flexible permit is issued. It shall be unlawful for any person to vary from such representation or flexible permit condition if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in a significant increase in emissions, unless an application to amend the flexible permit is approved by the TNRCC. Application for flexible permit amendment

shall be submitted with a completed PI-1 and subject to the requirements of §116.711. Keep in mind that BACT shall be demonstrated for each individual facility.

(b) Flexible permit alterations:

(1) A flexible permit alteration is used for any variation from a representation in a flexible permit application or special condition of a flexible permit that does not require a flexible permit amendment.

(2) All flexible permit alterations which may involve a change in a special condition contained in the flexible permit, or affect control equipment performance, must receive prior approval by the TNRCC Executive Director. The TNRCC Executive Director shall be notified in writing of all other flexible permit alterations within 10 days of implementing the change. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner's or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. Copies of all flexible permit alteration documents shall be provided to the appropriate TNRCC Regional Office and any local air pollution program having jurisdiction.

(3) Flexible permit alterations are not subject to BACT review.

(c) The following changes do not require an amendment or alteration, unless the change causes a change in the method of control, the character of the emissions, or results in a significant increase in emissions:

(1) a change in throughput; or
(2) a change in feedstock.

(d) No permit amendment or alteration is required if the changes to the permitted facility qualify for an exemption under Subchapter C (Permit Exemptions) unless specifically prohibited by flexible permit condition. All exempted changes to a permitted facility shall be incorporated into the permit when it is amended or renewed. Emission increases authorized by standard exemption at an existing facility covered by a flexible permit shall not exceed the emissions cap or individual emission limitation.

**§116.722 Distance Limitations**

A flexible permit will not be issued unless the distance and location restrictions for certain specific facilities identified in §116.117 (Distance Limitations) are met.

**§116.730 Compliance History**

Any type of flexible permit review will include a Compliance History review as defined in §116.12

of Subchapter B (New Source Review Permits, Compliance History).

**§116.740 Public Notice and Comment**

Any person who applies for a flexible permit to authorize a new facility not previously authorized by 30 TAC Chapter 116 (Regulation VI) shall follow the Public Notification and Comment Procedures described in §116.13 of Subchapter B. Any person who obtains a flexible permit by amending an existing state permit shall comply with the provisions in §116.13 regarding Public Notification and Comment Procedures.

Amendments to existing permits do not normally require public notice unless there is a significant increase in emissions. Renewals of flexible permits shall follow the Public Notification and Comment Procedures in §116.312.

**§116.750 Flexible Permit Fee**

Flexible permit application fees are based on the total annual allowable emissions from the permitted facility, group of facilities, or account to be included in the flexible permit. The fee is $25 per ton with a minimum fee of $450 and a maximum fee of $75,000. Flexible permit amendment fees are $25 per ton for the incremental emission increase with a maximum fee of $75,000. There are no fees for flexible permit alterations, changes of ownership, or changes of location.

All permit fees for a flexible permit shall be remitted in the form of a check or money order made payable to the TNRCC and delivered with the application for flexible permit or flexible permit amendment. The required fee should be sent to the Cashier's Office, MC-214, TNRCC, PO BOX 13088, Austin, Texas 78711-3088. In addition, the fee should be accompanied by a cover letter which states the company name, permit number, TNRCC Account ID and type of review. Required fees must be received before the agency will begin review of the application.

If the applicant withdraws the application prior to issuance of the flexible permit or flexible permit amendment, one-half of the fee will be refunded, except that the entire fee will be refunded for any application for which a standard exemption is allowed. No fees will be refunded after a deficient application has been voided, denied, or after a flexible permit or flexible permit amendment has been issued by the agency.

**§116.760 Flexible Permit Renewal.**

Flexible permits will be renewed in accordance with Subchapter D (Permit Renewals).

**General Information**

**Public Notice.** A state permit can be amended and converted into a flexible permit without initiating public notice requirements if there are no significant increases in emissions above the

current authorization.

**Permit Numbers.** A state permit which is converted into a flexible permit will normally retain the same permit number. If the flexible permit will replace more than one state permit, the earliest issued permit number will generally be retained as the flexible permit number. Existing state permit numbers which are associated with facilities amended into the flexible permit will be voided if all the sources covered by the state permit are reauthorized by the flexible permit.

**Renewal Cycle.** Issuance of a new flexible permit face page does not change the renewal cycle for any existing permit which is converted into a flexible permit. The renewal cycle is still dependent on the original construction or operating permit issuance date, or the date of the last permit renewal. When necessary, a special condition reflecting this renewal cycle may be included in the flexible permit.

**Forms.** Form PI-1, General Application, is used to apply for a flexible permit. In Section I, indicate that the type of application is a flexible permit.