IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.**
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the State of Texas hereby petitions the Court for review of a final action of respondent United States Environmental Protection Agency (EPA) published in the Federal Register at 75 Fed. Reg. 41,312 (July 15, 2010) and titled, "Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits."

By its final action, EPA has disapproved of SIP revisions submitted to it by the State of Texas that constitute Texas' Flexible Permits Program (FPP). The FPP is a voluntary authorization mechanism for Minor NSR sources designed to enhance control of emissions while allowing for greater operational flexibility. Texas, through its Commission on Environmental Quality (TCEQ), has issued Flexible Permits since establishing the FPP in 1994. The net effect is greater

regulatory efficiency, well-controlled facilities, and significant reductions in air emissions. In short, Texas' FPP improves air quality while helping regulators and regulated entities operate more efficiently.

EPA has taken this action because it concluded that the FPP "does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for substitute Major NSR revision." 75 Fed. Reg. at 41,312. But EPA's final action -- more than 15 years after the TCEQ's original FPP SIP submission -- is in error. The 1994 FPP Minor NSR program is at least as stringent as the TCEQ's SIP-approved Minor NSR Program. No provision of the Texas FPP may be read to circumvent federal Major NSR requirements because the 1994 rules expressly require compliance with all applicable requirements relating to Nonattainment and Prevention of Significant Deterioration review. The program is neither a substitute for nor in lieu of Major NSR permitting if federal NSR is triggered.

EPA acknowledges, under applicable federal regulations, that states have broad discretion to determine the scope of their Minor NSR programs as needed to attain and maintain the National Ambient Air Quality Standards ("NAAQS"). In Texas' instance, the FPP is an optional alternative to the traditional Minor NSR preconstruction permits that are authorized by TCEQ. It has resulted in the permitting of grandfathered units (when there was no modification), and it has achieved substantial emission reductions from the installation of controls based on

a comprehensive evaluation of emission impacts. Importantly, the Texas' FPP requires application of BACT to minor sources even though it is not required to do so under federal law. For these reasons, the TCEQ maintains that the FPP rules, as adopted and implemented in 1994, are fully approvable as revisions to the SIP.

Respectfully submitted,

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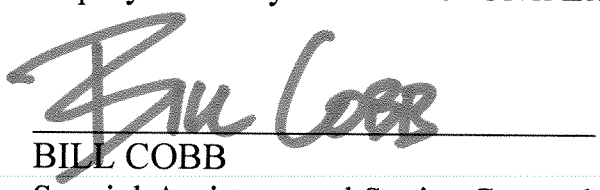
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation



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ATTORNEYS FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on July 23, 2010, I served a copy of the foregoing Petition for Review by United States mail on the following:

United States Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

United States Environmental Protection Agency
Office of the General Counsel
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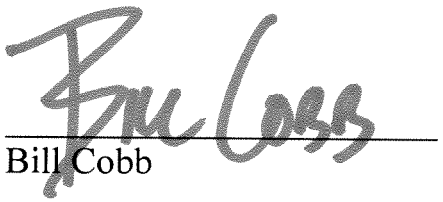

Bill Cobb

Federal Register

Thursday,
July 15, 2010

Part III

Environmental Protection Agency

40 CFR Part 52

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

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2005–TX–0032; FRL–9174–1]

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: Final rule.

SUMMARY: EPA is taking final action to disapprove revisions to the SIP submitted by the State of Texas that relate to the State's Flexible Permits Program (the Texas Flexible Permits Program or the Program). EPA is disapproving the Texas Flexible Permits 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 taking this action under section 110, part C, and part D, of Title I of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on August 16, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2005–TX–0032. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *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 Freedom of Information Act 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 part of the EPA record, are also available for public inspection at the State Air Agency listed below 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 Federal 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 Title I, section 110(a)(2)(C) and 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.
- "MRR" means monitoring, reporting, and recordkeeping requirements.

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I. What action is EPA taking?

EPA is taking final action to disapprove the Texas Flexible Permits State Program, as submitted by Texas on November 29, 1994, as revised by severable portions of 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 of the October 25, 1999; September 11, 2000; April 12, 2001; September 4, 2002; October 4, 2002; and September 25,

2003; SIP revision submittals. These submittals include revisions to 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. 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 Permit Definitions, and the definition in 30 TAC 116.10(11)(F) of "modification of existing facility." These State regulations and definitions do not meet the requirements of the Act and EPA's NSR regulations. EPA has concluded that none of these identified elements for the submitted Flexible Permits Program is severable from each other.

EPA proposed an action for the above SIP revision submittals on September 23, 2009 (74 FR 48480). We accepted comments from the public on this proposal from September 23, 2009, until November 23, 2009. A summary of the comments received and our evaluation thereof is discussed in section III below. In the proposal and in the Technical Support Document (TSD), we described our basis for the actions identified above. The reader should refer to the proposal, the TSD, section IV of this preamble, and the Response to Comments in section III of this preamble for additional information relating to our final action.

EPA is disapproving the submitted Texas Flexible Permits State Program as not meeting the requirements for a Minor NSR SIP revision. Our grounds for disapproval as a Minor NSR SIP revision include the following:

- The submitted Program has no express regulatory prohibition clearly limiting its use to Minor NSR and has no regulatory provision clearly prohibiting the use of this submitted Program from circumventing the Major NSR SIP requirements, thereby potentially exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;
- It is not an enforceable NSR permitting program. The submitted Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or by a holder of a Flexible Permit, and it cannot assure compliance with the Program or of the affected source;
- 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. The submitted Program is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit;
- It lacks replicable, specific, established implementation procedures for establishing the emissions cap in a Minor NSR Flexible Permit;
- It fails to ensure that the terms and conditions of Major NSR SIP permits are retained. Major stationary sources and major modifications can use this submitted Program to fundamentally change the way they comply with specific terms and conditions established in their Major NSR SIP permits. Holders of Major NSR SIP permits are not prohibited from using the submitted Program's allowables-based emissions cap. The Act prohibits the use of an allowables-based cap for Major NSR SIP permittees;
- It fails to meet the statutory and regulatory requirements for a Minor NSR SIP revision and is not consistent with EPA policy and guidance on Minor NSR SIP revisions; and
- Based upon, among other things, the lack of any objective, replicable methodology for establishing the emission cap, the too broad director discretion provision regarding whether or not to include MRR conditions in a Flexible Permit, the lack of sufficient MRR requirements for this type of permit program, and the lack of enforceability, EPA lacks sufficient information to determine that the requested revision to add the new permit option to the Texas Minor NSR SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other requirement of the Act.

We are disapproving the submitted Texas Flexible Permits State Program as not meeting the requirements for a substitute Major NSR SIP revision. EPA understands that the TCEQ intended for the submitted Program to be a Minor NSR program but we are required to review it as a substitute Major NSR SIP revision because the State should have included express language stating that, as it did in the two other Minor NSR SIP alternative permit options (Standard Permits and Permits by Rule), that the submitted Program is clearly limited to Minor NSR and prohibits circumvention of Major NSR. Our grounds for disapproval as a substitute Major NSR SIP revision include the following:

- It is not clearly limited to Minor NSR thereby potentially exempting new major stationary sources to construct and major modifications to occur 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 include a demonstration from the TCEQ, as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), showing how the use of "modification" is at least as stringent as the definition of "modification" in the EPA Major NSR SIP program and meets the Act;
- It does not include a demonstration from the TCEQ, as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), showing the submitted Program is at least as stringent as 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;
- To the extent that major stationary sources and major modifications are exempted from Major NSR, it fails to meet the statutory and regulatory requirements for a Major NSR SIP revision and is not consistent with EPA policy and guidance on Major NSR SIP revisions;
- Because it fails to include, among other things, the required demonstration from the State showing how the customized Major NSR SIP revision is in fact as stringent as EPA's Major NSR revised program, any objective, replicable methodology for calculating the emissions cap, provides too broad director discretion regarding whether or not to include monitoring, recordkeeping, and reporting (MRR)

conditions in a Flexible Permit, lacks sufficient MRR requirements for this type of permit program, and is not enforceable, EPA lacks sufficient information to make a finding that the submitted Program will ensure protection of the national ambient air quality standards (NAAQS), and noninterference with the Texas SIP control strategies and RFP.

The provisions in these submittals relating to the Texas Flexible Permits State Program that include the Chapter 116 regulatory provisions and the nonseverable definitions in the Flexible Permits Definitions and the General Definitions were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted Texas Flexible Permits State Program does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

II. What is the background?

A. Summary of Our Proposed Action

On September 23, 2009, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to the Flexible Permits Program. These affected provisions include regulatory provisions at 30 TAC 116.110(a)(3) and 30 TAC Subchapter G—Flexible Permits, definitions in 30 TAC 116.13, Flexible Permits Definitions, and a nonseverable portion of the definition at subparagraph 116.10(11)(F) of "modification of existing facility" under Texas's General Definitions in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions are not severable from each other.

B. Summary of the Submittals Addressed in This Final Action

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 final action is discussed in sections III through V of this preamble. The TSD (which is in the docket) 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. • 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. • 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). • 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.
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" at (F).
		7/22/1998	6/17/1998	• Repealed and Adopted new 30 TAC 116.10(9)(F).
		9/4/2002	8/21/2002	• Redesignated 30 TAC 116.10(9)(F) to 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.

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

Section	Title	Date submitted	Date adopted by State	Comments
				• 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.
Section 116.711	Flexible Permit Application	9/11/2000	8/9/2000	• Revised subsection (b).
		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	3/7/2001	• 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.
Section 116.715	General and Special Conditions.	7/22/1998	6/17/1998	• Revised introductory paragraph.
		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.
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.

C. Other Relevant Actions on the Texas Permitting SIP Revision Submittals

The Settlement Agreement in *BCCA Appeal Group* v. *EPA,* Case No. 3:08–cv–01491–N (N.D. Tex), as amended, currently provides that EPA will take final action on the State's Public Participation SIP revision submittal by October 29, 2010. EPA intends to take final action on the submitted NSR SIP by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group* v. *EPA,* Case No. 3:08–cv–01491–N (N.D. Tex). EPA published its final action on the Texas Qualified Facilities Program and its associated General Definitions on April 14, 2010 (*See* 75 FR 19467) as provided in the Consent Decree.

Additionally, EPA acknowledges that TCEQ is developing a proposed rulemaking package to address EPA's concerns with the current Flexible Permits rules. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of the current Flexible Permits Program, and we have concluded that the current Program is not approvable for the reasons set out in this notice.

III. Response to Comments

In response to our September 23, 2009, proposal, we received comments from the following: Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Gulf Coast Lignite Coalition (GCLC); Office of the Mayor—City of Houston, Texas (City of Houston); Harris County Public Health and Environmental Services (HCPHES); Sierra Club—Houston Regional Group (Sierra Club); Sierra Club Membership Services (including 2,062 individual comment letters) (SCMS); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Members of the Texas House of Representatives; Texas Association of Business (TAB); Texas Oil and Gas Association (TxOGA); and University of Texas at Austin School of Law—Environmental Clinic on behalf of Environmental Integrity Project (the Clinic), Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition and Citizens Opposing Power Plants for Clean Air.

A. General Comments

Comment 1: The following commenters support EPA's decisions to disapprove the Flexible Permits State Program: HCPHES; several members of the Texas House of Representatives; the Sierra Club; the City of Houston, and the Clinic.

Response: Generally, these comments support EPA's analysis of Texas's Flexible Permits Program as discussed in detail at 74 FR 48480, at 48485–48494, and further support EPA's action to disapprove the Flexible Permits Program submission.

Comment 2: The SCMS sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters (sent via e-mail), which support EPA's proposed ruling that major portions of the TCEQ air permitting program do not adhere to the CAA and should be thrown out. While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions such as halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy; creating a moratorium on the operations of any new coal fired power plants; reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and putting stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

The commenters further state that Texas: (1) Has more proposed coal and petroleum coke fired power plants than any other State in the Nation; (2) Is number one in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years. Strong rules are needed to make sure the coal industry is held responsible and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments that Texas should rely on wind power, solar energy, and natural gas as clean alternatives to coal. Other comments expressed general concerns related to: Impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns.

Response: To the extent that the SCMS letters comment on the proposed disapproval of the Flexible Permits Program, they support EPA's action to disapprove the Flexible Permits submission. The remaining comments are outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 3: The Clinic comments that EPA should issue an immediate SIP call for Texas' failure to enforce the current SIP and should require those facilities operating under a Flexible Permit to apply for a SIP-approved permit.

Response: This final rulemaking only addresses the approvability of the Texas Flexible Permits Program as a SIP revision submittal. Therefore, comments related to other EPA action are outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 4: The ERCC comments that to avoid negative economic consequences EPA should exercise enforcement discretion statewide for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority. EPA should not require any injunctive relief and should consider penalty only cases.

Response: EPA enforcement of the CAA in Texas is outside the scope of our proposed action relating to the Flexible Permits Program.

Comment 5: TIP, BCCA, TAB, and TxOGA comment that the Federal NSR SIP regulations recognize the importance of providing operational flexibility. In 1990, Congress added Title V to the CAA and it specifies that State Title V programs must include provisions to allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of Title I of the Act and do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions). *See* section 502(b)(10) of the Act. In order to provide operational flexibility, EPA adopted 40 CFR 70.4(b)(12) which requires that States establish Title V programs that allow three specific avenues to establish

operational flexibility, including establishment of federally-enforceable emission caps in their Title V programs. *See* 40 CFR 70.4(b)(12)(iii). EPA emphasized the importance of enabling plant sites to maintain operational flexibility in the preamble of to 40 CFR part 70. *See* 57 FR 32250, at 32267 (July 21, 1992).

Response: EPA acknowledges that the Title V Federal program requirements allow a State to provide for operational flexibility using the establishment of federally enforceable emissions caps. EPA, however, must review the submitted Program as a SIP revision submittal under Title I of the Act, not Title V. We are not disapproving the submitted Program because it provides for the establishment of emissions caps. As discussed in the proposal and this final action, EPA is disapproving the submitted Program for inclusion in the Texas NSR SIP because it is not enforceable, does not include any replicable methodology for calculating the emissions caps, provides too broad director discretion regarding the monitoring, recordkeeping, and reporting (MRR) requirements, and lacks sufficient MRR requirements. The submitted Program fails to meet section 110 and parts C and D of the Act and the requirements of 40 CFR part 51. As stated elsewhere in the proposal and throughout this final action, we have identified areas in which the submitted Program does not meet these statutory requirements. *See* 74 FR 48480, at 48490, 48491–48492, and 48492–48493; and sections III.D.3 and IV.C, for further information.

Comment 6: BCCA, TIP, TAB, and TxOGA comment on several Federal Flexibility Permitting rules in which EPA promotes permit flexibility. These include the following:

- Flexible Permit Pilot Study. EPA focused on the importance of operational flexibility in a decade-long Flexible Permit pilot study that included flexible emission cap permits in six states and found that flexible permits worked well and could be used to further both environmental protection and administrative flexibility. Both States and EPA recognized the need to respond rapidly to market signals and demand in today's increasingly global markets while delivering products faster, at lower cost, and of equal or better quality than their competitors. EPA recognized that the flexible permits could reduce the administrative "friction" of time, costs, delay, uncertainty, and risk associated with certain types of operational changes.
- Plantwide Applicability Limits (PALs). EPA recognized the advantages of emissions caps in permits in promulgating its NSR Reform in 1996 and 2002. These advantages include the ability to make changes an emissions cap that do not require a permit for each change so long as the plant's emissions do not exceed the cap rather than face piecemeal applicability decisions for each and every contemplated change. EPA further noted environmental benefits that could result from PALs because sources participating in a cap-based program strive to create enough headroom for future expansion by voluntarily controlling emissions.
- EPA's Proposed Indian Country Rule. In the 2006 proposed rule for Indian Country, EPA recognized the importance of flexibility in air permitting programs. EPA intended this rule to be a representative template of State NSR programs that serve to provide operational flexibility while leveling the regulatory playing field.
- EPA's Flexible Air Permit Rule. In October 2009, EPA promulgated the Federal Flexible Air Permit rule, which incorporated changes to the Title V rules that were intended to clarify and reaffirm opportunities for accessing operational flexibility under existing regulations. EPA recognized that State permitting authorities have discretion to pre-approve minor changes and re-affirms pre-existing authority for State to craft flexible air permits.

Response: EPA acknowledges that each of these cap-based permitting programs has resulted in, or has the potential to result in, increased operational flexibility and may enable the owner or operator to make certain changes without the need to apply for and receive a permit for each individual change whenever the change does not result in emissions that exceed the cap. However, of the four identified programs, one was a pilot study and one has not been finalized. The State did not submit the Flexible Permits Program for consideration by EPA as a PALs NSR SIP revision. Moreover, the submitted Flexible Permits Program does not meet the minimum requirements contained in the PALs NSR SIP regulations, which include procedures for establishing replicable emission caps, protecting the NAAQS and control strategies, and MRR requirements sufficient to ensure compliance with the terms and conditions of the permit that establishes the emissions cap. As we discussed in the proposal and now through this final action, the submitted Flexible Program does not meet the requirements for the establishment of replicable emissions caps and sufficient MRR requirements. The submitted Program has no specific, only general, requirements pertaining to MRR. Paragraph (c)(6) of submitted 30 TAC 116.715 generally requires maintenance of data sufficient to demonstrate continuous compliance with emission caps and individual emission limits contained in the Flexible Permit. That is all. To contrast, the submitted Flexible Permit Program lacks the specific requirements of another cap-base program, the Federal PAL SIP rule. The Federal PAL SIP rule requires that the program require each PAL permit to contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time. The PAL SIP rule further provides that the monitoring system must be based upon sound science and meet generally acceptable scientific procedures for data quality and manipulation; and the information generated by such system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit. The SIP requirements for an approvable PAL monitoring system are the employment of one or more of the following approaches: Mass balance calculations for activities using coatings or solvents, continuous emission monitoring system, predictive emission monitoring system, continuous parameter monitoring system, and emission factors, if approved by the reviewing authority. The PAL SIP rule provides the technical specifications for each of the allowable monitoring systems and provides replicable procedures for the approval of any alternative monitoring system. *See* 40 CFR 51.165(f)(12) and 51.166(w)(12). The submitted Flexible Permit Program, in contrast, is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit.

The Federal Flexible Air Permit Rule, although it is not a NSR SIP program but

a Title V program that provides for an alternative NSR SIP approach, is a cap program but it too requires replicable methodologies and sufficient MRR requirements. The submitted Program does not contain a replicable methodology for establishing the emissions cap and sufficient MRR requirements. *See* 74 FR 48480, at 48490, 48491–48492, and 48492–48493; and sections III.D.3 and IV.C, for further information. Finally, *see* section III.D.3 (response to comment 4) concerning MRR for the proposed Indian Country Minor NSR rule.

Comment 7: GCLC, TIP, BCCA, and TCC comment that EPA ignores the fact that the Texas Flexible Permit Program has had a significant impact on improving air quality in Texas. TCEQ commented that significant emission reductions have been achieved by the submitted Program through the large number of participating grandfathered facilities, which resulted in improved air quality based upon the monitoring data.

BCCA, TAB, TxOGA, and ERCC comment that the legal standard for evaluating a SIP revision for approval is whether the submitted revision mitigates any efforts to attain compliance with a NAAQS. EPA's failure to assess the single most important factor in the submitted Program, the promotion of continued air quality improvement, is inconsistent with case law and the Act and is a deviation from the SIP consistency process and national policy. EPA should perform a detailed analysis of approved SIP programs through the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Response: We are disapproving the submitted Program because it is not enforceable, it lacks an objective, replicable methodology for establishment of the emissions caps, it provides broad director discretion concerning whether or not to include a MRR condition in a Flexible Permit, lacks sufficient MRR requirements, is ambiguous regarding circumvention of Major NSR, and there is not sufficient information to enable EPA to make a finding that the submitted Program will protect the NAAQS and control strategies. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); *See* also *BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (D.C Cir. 1995). Also *see* section III.A (response to comment 6) for further information.

Even if the commenters' premises are to be accepted, they fail to substantiate their claim that the Texas Flexible Permit Program has had a significant impact on improving air quality in Texas by producing data showing that any such gains are directly attributable to the submitted Program, and are not attributable to the SIP-approved control strategies (both State and Federal programs) or other Federal and State programs. They provide no explanation or basis for how their numbers were derived. Moreover, since the submitted Program is not enforceable, claims of emission reductions are not assured on a continuous basis.

EPA is not required to initiate the SIP consistency process within EPA unless the pending SIP revision appears to meet all the requirements of the Act and EPA's regulations but raises a novel issue. EPA is disapproving the submitted Program because it fails to meet the Act and EPA's regulations. Because the submitted Program fails to meet the requirements for a SIP revision, the SIP consistency process is not relevant.

Furthermore, since the commenters thought EPA was acting inconsistently, they should have identified SIPs that are inconsistent with our actions and provided technical, factual information, not bare assertions.

Comment 8: BCCA and ERCC comment that the concepts embedded in the Program have been part of the Title V, NSR, and PAL programs for many years and were upheld as consistent with the Clean Air Act by the U.S. Supreme Court in *Chevron* v. *NRDC,* 467 S.C. 837 (June 25,1984). Texas' Program is actually more stringent than EPA's interpretation of the NSR program upheld by the Supreme Court.

Response: The U.S. Supreme Court found, in the cited case, that the pertinent legislative history was silent on the precise issue of the bubble concept as it related to what constituted a major stationary source and found that EPA should have wide discretion in implementing the policies of the 1977 amendments. Id at 862. This opinion is not relevant to EPA's grounds for disapproving the submitted Program. Not only is it not relevant but none of the concepts cited by the commenters was before the Court in *Chevron.* EPA's disapproval is not based on a per se finding that a preconstruction program based on emissions caps is unacceptable or more or less stringent than the SIP requirements. We are disapproving the submitted Program because it is not enforceable, it lacks a replicable methodology for establishment of the emissions caps, it provides broad director discretion concerning whether or not to include a MRR condition in a Flexible Permit, lacks sufficient MRR requirements, and there is not sufficient information to enable EPA to make a finding that the submitted Program will protect the NAAQS and control strategies. *See* section III.A (response to comment 6) for further information.

B. Whether the Flexible Permits Program Is Clearly a Minor, not a Major, NSR SIP Revision

Comment 1: TCEQ comments that though it has always considered the Flexible Permit Program to be a Minor NSR program, this fact is not specifically stated in the rule. TCEQ, nevertheless, asserts that its implementation of the Program includes a review process that always determines the applicability of Federal Major NSR, as well as any other Federal and State requirements. The TCEQ states that it understands EPA's concerns regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance.

Response: We acknowledge TCEQ's description that it intends to implement the submitted Program in such a manner that the submitted Flexible Permit Program does not supersede the duty to comply with the Texas Major NSR SIP. In contrast to the submitted Program, however, in its Minor NSR SIP for Permits by Rule and Standard Permits, TCEQ included additional regulatory language that explicitly prohibits the use of the Permits by Rule alternative permit program and the Standard Permits alternative permit program from being used for major stationary sources and major modifications and explicitly prohibits circumvention of the Major NSR requirements.[1] Specifically, the Standard Permits and Permits by Rule NSR SIP rules explicitly require a Major NSR applicability determination at 30 TAC 116.610(b) and 30 TAC 106.4(a)(3). In each, the State specifically expressed its intention to require a Major NSR applicability determination. The Flexible Permits Program is also an alternative permit program. If the State wishes for it to be considered as solely a Minor NSR SIP revision submittal, the TCEQ should have included express language stating that it explicitly

[1] Although the Texas Minor NSR SIP rules for Permits by Rule and Standard Permits remain acceptable for a Minor NSR SIP revision, EPA is conducting a review of each individual Permit by Rule and/or Standard Permit. EPA is conducting this review to ensure that the TCEQ is implementing the SIP appropriately and that each such individual Minor NSR SIP permit protects the NAAQS and control strategies and is enforceable.

prohibits the use of the Flexible Permit Program from being used for major stationary sources and major modifications and explicitly prohibits circumvention of the Major NSR requirements, as it did in the two other Minor NSR alternative permit options. This submitted Program lacks such language. While the inclusion of such specific language is not ordinarily a minimum NSR SIP program element, we conclude that the inconsistent treatment between the similar types of NSR programs creates the potential for an unacceptable ambiguity about a permit holder's obligations to continue to comply with the Major NSR requirements.

EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See* also *BCCA Appeal Group* v. *EPA*, 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore unapprovable. *See* 74 FR 48480, at 48485–48487 for further information.

Comment 2: TCC notes that 30 TAC 116.711 identifies the use of Flexible Permits as only a Minor NSR option and concludes that TCEQ's rules therefore do not intend for the Flexible Permits Program to be an equivalent to a Major NSR program.

Response: We disagree that 30 TAC 116.711 identifies the use of Flexible Permits as only a Minor NSR permitting option. Contrary to commenter's assertion, this rule merely replicates certain general permitting requirements that are also common to Subchapter B, that also apply to all Texas Major and Minor NSR SIP permits. There are no requirements or terms in 30 TAC 116.711 that expressly identify use of Flexible Permits as only a Minor NSR option. As noted above in section III.B (response to comment 1), the TCEQ should have included express additional regulatory language prohibiting the use of the submitted Program for Major NSR and explicitly prohibiting circumvention of the Major NSR requirements, as it did in the two other Minor NSR SIP alternative permit options.

C. Whether the Flexible Permits Program Meets the Requirements for a Substitute Major NSR SIP Revision

1. General Comment on Whether the Program Is a Substitute Major NSR SIP Revision

Comment: TCEQ comments that it did not view the Flexible Permit Program as a substitute Major NSR SIP revision when it adopted it nor does it wish for it to be considered as a SIP revision submittal for a substitute Major NSR SIP revision. It has always viewed the Program as a Minor NSR program. In its implementation of the Program, TCEQ comments that it requires a Federal applicability demonstration but acknowledges that the submitted Program's rules are not clear on this point. TCEQ states that it will confirm through upcoming rulemaking and SIP revision that the Program is not a substitute Major NSR SIP revision.

Response: EPA appreciates TCEQ's statement that it does not view its Flexible Permit Program as a substitute Major NSR SIP revision submittal. However, EPA must review the content of the Program as submitted for inclusion into the Texas SIP. The submitted Program is ambiguous when compared to the regulatory structure of existing similar Texas Minor NSR SIP programs, as it contains no express provision that clearly limits the Program to Minor NSR and no explicit provision that prohibits circumvention of the Major NSR SIP requirements. *See* 74 FR 48480, at 48488 and section III.B (response to comment 1) of this notice for further information.

2. Requirements for Major NSR Applicability Determinations

Comment 1: Although TCEQ comments that the Flexible Permit Program requires that the applicability of Major NSR requirements be evaluated prior to considering whether the new construction or modification can be authorized under a Flexible Permit, TCEQ also comments that it understands EPA's concerns with issues regarding Major NSR applicability vis a vis the submitted Program, based upon the application of today's legal requirements. TCEQ undertakes to consider rulemaking to ensure Major NSR applicability requirements are included in Flexible Permit reviews, and that the requirements of the appropriate Major NSR permitting program are met when triggered.

Response: EPA appreciates TCEQ's understanding that the Program lacks clarity on the issue of the applicability of Major NSR requirements and that the State plans to revise its rules to ensure it is clear that the Major NSR applicability determination requirements are required before one can use the Program, and that the requirements of the appropriate Major NSR permitting program are met when triggered. Nonetheless, EPA must review the content of the Program as submitted for inclusion into the Texas SIP. The submitted Program's regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the construction or change to Minor NSR as was included in the SIP rules for Standard Permits and Permits by Rule. *See* section III.B (response to comment 1) for additional information.

Comment 2: TAB, TxOGA, TIP, and BCCA comment that there are safeguards in the Texas Flexible Permit rules at 30 TAC 116.711(1), (8), (9), 116.718, and 116.720 that constrain regulated community from making major changes without complying with Major NSR requirements.

Response: The regulations cited by the commenters do not explicitly require sources to comply with the Major NSR rules. 30 TAC 116.711(1) provides for protection of public health and welfare and does not address applicability of Major NSR. 30 TAC 116.711(8) and (9) generally require compliance with all applicable requirements for nonattainment and PSD review within that Chapter of the rules. Despite commenters contentions there are no express terms or requirements within the cited rules that compel a Major NSR applicability determination. The cited regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the construction or change to Minor NSR or clearly prohibiting circumvention of Major NSR, as was included in the SIP rules for Standard Permits and Permits by Rule. The absence of such provisions in the submitted Flexible Permit rules creates an unacceptable ambiguity. 30 TAC 116.718 and 116.720 do not address Major NSR. *See* section III.B (response to comment 1) for additional information.

Comment 3: ERCC comments that the concepts embedded in the Flexible Permit Program have been a part of the NSR program for many years and are well-settled law. The fact that the emission rates used in the calculation of the cap(s) are reflected in a "bubble" permit is of no consequence and is consistent with applicable statutory and regulatory requirements under the Clean Air Act.

The submitted Program explicitly requires any new source or major

modification that is applying for a Flexible Permit to go through Major NSR review and if necessary, have the Flexible Permit altered.

Response: EPA disagrees with these comments. First, the submitted Program has not been a part of the Texas NSR SIP "for many years." Therefore, it is not "well-settled law." Furthermore, any source operating under a Flexible Permit risks potential Federal enforcement action. Second, it is being disapproved today because of not meeting the Federal NSR SIP requirements, not because it embeds the concepts of a cap program. The commenter's comments are also at odds with TCEQ's comments. TCEQ comments that its Program is intended to be a Minor NSR SIP program only and not intended to address Major NSR SIP requirements. In contrast, the commenter describes the submitted Program as covering major modifications and having a Flexible Permit (not a Major NSR SIP permit) altered to reflect the Major NSR review. TCEQ disputes this concept in its comments. *See* our response to TCEQ's comments section III.C.3 (response to comment 1).

3. Circumvention of Major NSR

Comment 1: TCEQ comments that it understands EPA concerns regarding the "the lack of specificity" in its rules but maintains that the Program does not circumvent Federal Rules. TCEQ maintains that its implementation of the submitted rules includes Federal applicability review that includes determination of actual rates, project emission increases, and net emission increases. It also includes BACT analysis to establish the cap, NAAQS and increment analysis if PSD is triggered; and LAER and offsets if Nonattainment Review is triggered. TCEQ states that its implementation also includes a Federal Major NSR Review which is conducted parallel with the Minor NSR Review and TCEQ does not allow applicant to use Flexible Permits to circumvent Major NSR. TCEQ plans to confirm EPA's concerns in future rulemaking.

Response: EPA appreciates TCEQ's understanding of its concerns regarding the "lack of specificity." While it is commendable that TCEQ may implement the Program in a manner consistent with the Federal Major NSR requirements, we cannot approve the Program as submitted. *See* CAA 110(k)(3). *See* also *BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (D.C. Cir. 1995). Moreover, relying upon an agency to continue to implement a program consistently with the Federal requirements even though not constrained to do so by its rules, makes EPA, the agency, industry, and the public vulnerable to the agency's unfettered discretion to change how it implements its program.

In this instance, there is no express provision in the submitted Subchapter G similar to the Minor NSR SIP provisions for Minor NSR SIP Permits by Rule and Standard Permits that prohibit circumvention of the Major NSR requirements. Both the SIP-codified rules for Permits by Rule and the SIP-codified rules for Standard Permits contain clear regulatory provisions prohibiting the use of these Minor NSR permits from circumventing Major NSR. There are no regulatory provisions prohibiting circumvention of Major NSR in the submitted Chapter 116, Subchapter G, for Flexible Permits. *See* 74 FR 48480, at 48488 and section III.B (response to comment 1) for further information. The BACT analysis that TCEQ references for establishing the cap upon a plain reading of the rules and the associated Texas Registers means the Texas Minor NSR SIP BACT requirement, not the PSD Major NSR SIP BACT requirement. The failure to distinguish in the Program's rules that it is Minor NSR SIP BACT that is used to create the cap contributes to the confusion of the reach of the Program.

Comment 2: TCC and ERCC comment that the Flexible Permit Program does not circumvent Major NSR review. The Program is explicit in that any new major stationary source or major modification must go through Major NSR and the Flexible Permit must be altered. *See* 30 TAC 116.805. Moreover, the Flexible Permits employ two emissions cap, an initial cap and a final cap, which combine to ensure that the Major NSR permitting requirements are not circumvented.

Response: EPA disagrees with commenters. Unlike the Texas Minor NSR SIP rules for Permits by Rule and Standard Permits, the submitted Program's regulations do not contain any express regulatory provision that prohibits circumvention of the Major NSR requirements. This lack of such express provisions distinguishes the Flexible Permit Program and contributes to its nonapprovability. *See* 74 FR 48480, at 48488, and section III.B (response to comment 1) of this notice. Furthermore, the referenced 30 TAC 116.805 does not add an explicit requirement to the submitted Program. Rather, it applies to a separate class of Existing Facility Flexible Permits that is severable from the Flexible Permits Program.

4. Use of Allowable Emissions in Major NSR

Comment: TCC, TAB, and TxOGA comment that when TCEQ is evaluating emissions increases on a project level, the Program requires the use of actual baseline emissions to determine whether a project will result in an increase that triggers Major NSR applicability. TCC further states that the application of BACT to facilities subject to the emission cap results in an allowable that is lower than the pre-change actual emissions.

Response: As noted above in the preceding response, EPA must evaluate the submitted Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. The commenters are not clear whether they are referring to PSD BACT or the Texas Minor NSR SIP BACT. This lack of specificity by industry contributes to EPA's concerns about whether the submitted Program is clearly limited to Minor NSR. We recognize that the application of either type of BACT to facilities subject to the emission cap could result in allowable emissions that are lower than the pre-change actual emissions at the initial issuance of a Flexible Permit. However, the commenter provided no information to show a comparison of actual emission to potential to emit for changes that occur after the Flexible Permit is issued to evaluate that the net emission increase is based upon changes from baseline actual to either projected actual emissions or potential to emit. In such case, the baseline actual emissions resulting from such proposed change must be established as provided under applicable Federal requirements. *See* 40 CFR 51.165(a)(2)(ii) and (a)(1)(vi)(A)(2) and 51.166(a)(7)(iv)(c)–(d) and (b)(3)(i)(b). Accordingly, there are no provisions in the Program that require the use of actual baseline emissions to determine whether a project will result in an increase that triggers Major NSR applicability. *See* 74 FR 48480, at 48489–48490, for further information.

5. Retention of Major NSR Permit Terms and Conditions

Comment: TAB, ERCC, and TxOGA comment that the submitted Program requires that conditions of an existing PSD or Nonattainment permit be carried forward into a Flexible Permit. The submitted Program does not "void" the pre-existing Major NSR SIP permits.

Response: The submitted Program does not explicitly provide that the holder of a Flexible Permit still be required to continue to comply with all of the terms and conditions in the pre-existing Major NSR SIP permits. Federal NSR SIP regulations do not provide for a blanket elimination of emission limits at individual units. The submitted Program does not assure the retention of the pre-existing Major NSR SIP permits' terms and conditions.

EPA's long-held position is that permits issued under federally approved PSD, NNSR, and Minor NSR SIP programs must remain in effect because they are the legal mechanism through which the underlying NSR requirements (from the Act, Federal regulations, and federally approved SIP regulations) become applicable, and remain applicable, to individual sources. NSR programs enable the relevant permitting authority to impose source-specific NSR terms and conditions in legally enforceable permits, and provide states, EPA, and citizens with the authority to enforce these permits. SIP-approved permits impose continual operational requirements and restrictions upon a source's air pollution activities and, accordingly, may not expire so long as the source operates.[2]

The lack of enforceability and adequacy of the MRR requirements in the submitted Program contributes to EPA's concern that not all of the conditions of a PSD or NNSR SIP permit existing before the issuance of a Flexible Permit were carried forward into the Flexible Permit fully and completely. *See* section III.A (response to comment 6) for further information. The submitted Program does not meet the requirements of section 110(a)(2)(A)–(C) of the Act, which requires that SIP revision submittals be enforceable. Section 116.711(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. We are concerned with the broad director discretion whether to include MRR requirements in a Flexible Permit and the lack of adequacy of the MRR requirements in the submitted Program.[3] EPA has interpreted the Act's requirements for enforceability as specifying that SIP revision submittals must "specify clear, unambiguous, and measurable requirements." *See* 57 FR at 13567. There must be legal means in a SIP revision for ensuring compliance when conditions of an existing PSD or Nonattainment permit are carried forward in a Flexible Permit. The submitted Program does not contain sufficient enforceable means. This submitted Program is an intricate program, thus to be approved as a Major (as well as a Minor) NSR SIP revision, it requires detailed MRR requirements in order to ensure, among other things, that a project triggering the Major NSR SIP requirements is covered under Major NSR or there are adequate means for ensuring compliance of each affected entity.

Without clear, objective, requirements in the submitted Program for retaining and distinguishing the Flexible Permits terms and conditions from the Texas Major NSR SIP permits terms and conditions, the submitted Program lacks clear, unambiguous, and measurable requirements necessary for approval as a SIP revision. The submitted Program does not ensure the retention of the pre-existing Major NSR SIP permits' terms and conditions.

6. Protection of the NAAQS Attainment Under Major NSR

Comment: The Clinic comments that the Program represents a relaxation of the current SIP and is inadequate to assure protection of the NAAQS, increments, and control strategies.

Response: Without the required demonstration from the State showing how the customized Major NSR SIP revision is in fact as stringent as EPA's Major NSR revised program and without, among other things, an objective, replicable methodology for establishing the emission cap, the too broad director discretion provision for whether or not to include MRR conditions in a Flexible Permit, the lack of sufficient MRR requirements for this type of permit program, and the lack of enforceability of the submitted Program, EPA lacks sufficient information to make a finding that the submitted Program, as a substitute for a Major NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP, as required by section 110(l) of the Act. *See* section III.A (response to comment 6) for further information.

D. Whether the Flexible Permits Program Meets the Requirements for a Minor NSR SIP Revision

1. Applicability for a Minor NSR Program

Comment 1: The Clinic comments that the Flexible Permit rules do not include adequate provisions for ensuring that changes that should trigger Major NSR are subject to technology and air quality analysis requirements.

Response: EPA agrees with this comment. *See* section III.B (responses to comments 1 and 2), section III.C.1 (response to comment), and section III.C.2 (responses to comments 1, 2, and 3), and section III.C.3 (responses to comments 1 and 2) for further information.

Comment 2: TCC comments that the Flexible Permit authorization method used at a source does not exempt any facilities located at a source from Major NSR permitting requirements. If a source has a Flexible Permit that does not contain all the facilities located at that source and a project within the Flexible Permit triggers netting, all facilities (under the cap and outside the cap) at the source are evaluated to determine whether a net significant emissions increase at the source has occurred. If a resulting net emissions increase is significant, Major NSR is triggered.

Response: We disagree with this comment. *See* section III.D.1 (response to comment 1, above) for further information.

Comment 3: TIP, BCCA, and TCC comment that TCEQ rules provide two separate "modification" definitions. The first is at 30 TAC 116.12(18) for Major NSR applicability. The second is at 30 TAC 116.10(11) for Minor NSR sources and does not limit its scope to federally regulated pollutants. EPA applies the term "modification" differently in the Minor NSR context and the Major NSR context. Therefore, it also is within Texas's discretion to define the term differently for purposes of Minor NSR. Citing the EAB in *In re Tennessee Valley Authority,* 9 EAD 357,461 (EAB Sept. 15, 2000) commenters maintain that Texas has the discretion to define the term differently for purposes of Minor NSR.

Response: EPA acknowledges that that TCEQ defines the term "modification" differently for Major NSR and for Minor NSR. However, the submitted Program does not specifically state which definition of modification it uses the one for Major NSR or the one for Minor NSR. This contributes to making the submitted Program not clear

[2] *See* EPA Letter from John Seitz, Director, Office of Air Quality Planning and Standards, to Robert Hodanbosi and Charles Lagges, STAPPA/ALAPCO, dated May 20, 1999.

[3] 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.

on its face that the Major NSR applicability requirements must be evaluated and met when triggered and that the State is required under its submitted Program to apply the Major NSR applicability concepts during the technical review of a Flexible Permit. Therefore based upon the ambiguities in the Program's rules, we disagree that the Flexible Permit Program is exclusively a Minor NSR program. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore do not adequately prohibit use under Major NSR. *See* section III.B (response to comment 1) for further information.

2. Establishment of the Emission Cap Under Minor NSR

Comment: TIP and BCCA comment that the submitted Program's rules do contain an established and replicable method for determining an emissions cap. TAB and TxOGA comment that EPA provides no example of any unsuccessful attempt to replicate an emission cap using the current TCEQ rules. TAB and TxOGA comment that the submitted Program requires that each Flexible Permit establish a cap by simple summation of BACT emission rates. Each Flexible Permit involves the summing of BACT emission rates. While BACT determinations may vary between specific types of sources, the use of Federal and State BACT guidance results in a replicable procedure for establishing caps. In addition, the authorization under a Flexible Permit has no effect on sources or pollutants not covered in the Flexible Permit for a particular site. Both sources and emissions that are not incorporated into a Flexible Permit are subject to whatever rules or authorizations are in effect or should be applied to those emissions. An applicant for a Flexible Permit is required to meet BACT standards as applicable to all facilities individually contributing to an emission cap. In addition to an emission cap, a Flexible Permit may also impose individual emission limits where necessary to ensure satisfaction of off site screening levels of hazardous air pollutants or NAAQS for criteria pollutants, or to prevent violation of any Federal permitting requirement.

Response: The proper scope of review for this SIP revision submittal does not include a review of the State's individually issued Flexible Permits to determine whether there are replicable caps in each permit. Instead, EPA's review is focused on the structure of the submitted Program, ensuring that it includes legally sufficient objective and replicable criteria for establishment of the cap in each Flexible Permit and information submitted by the State to demonstrate that the program meets the requirements of the Act. Review based on the submittal, rather than improper implementation, is necessary to ensure that as structured the submitted Program does not interfere with NAAQS attainment, the Texas SIP control strategies, and RFP, and is enforceable pursuant to section 110(a) (2)(A)–(C) of the Act. 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. A copy of this document is in the docket at document ID EPA–R06–OAR–2005–TX–0032–0022.[4] *See also* the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," (GP) 57 FR 13498 at page 13556 (April 10, 1992).

The submitted Program establishes a cap in a Flexible Permit that is a summation of BACT requirements (or a more stringent requirement if applicable). The submitted rules are not clear as to how the State does the summation. Even the State fails in its comment letter to clarify whether the cap includes the summation of not only the minor stationary sources and minor modifications but also the major stationary sources' and major modifications' emissions limitations. This failure to clarify the methodology for the establishment of the cap contributes to the ambiguity of the submitted Program. Specific, objective, and replicable criteria are to be set forth for determining the emissions cap.

The commenter states that if a source or emissions are not covered under a Flexible Permit, then they are subject to whatever rules or authorizations are in effect or should be applied to those emissions. EPA is however concerned that it is not clear which facilities are covered by a Flexible Permit. The submitted Program does not clearly delineate which emissions are covered by a Flexible Permit. EPA proposed disapproval because 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. Without a clearly defined replicable process for determining what the process is, and how the emission cap is adjusted for the addition of new facilities, the public and EPA cannot independently calculate an emission cap and reach the same conclusions as the State. Therefore, the submitted Program is unapprovable. This conclusion was reached based on our review of the submitted Program pursuant to the CAA.

3. Enforceability of a Minor NSR Program

Comment 1: TCEQ comments that although the submitted rules do not specify special conditions that ensure recordkeeping, reporting, and testing to assure compliance with the Flexible Permit, the State issues Flexible Permits containing special conditions requiring periodic stack testing, continuous emissions monitoring, and other parametric monitoring requirements, along with recordkeeping requirements to ensure compliance with the Flexible Permit cap and BACT. Because of the wide variety of industrial source types, TCEQ has carefully drafted its rules to ensure it has the ability to adequately implement specific and detailed MRR requirements. TCEQ will address EPA concerns in a forthcoming rulemaking and SIP revision.

Response: Although TCEQ plans in a future rulemaking action to add specific conditions as part of the Program to address MRR requirements, the submitted Program lacks these requirements. *See* section III.A (response to comment 6) for further information. EPA must evaluate the Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. Any SIP revision must have adequate recordkeeping, reporting, testing, and monitoring requirements to assure there can be compliance with the submitted plan and ensure that the plan is enforceable, as well as ensure that each affected entity can be easily identified and that there are means to determine its compliance. *See New York I,* 413 F.3d at 33–36. 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,

[4] You can access this document directly at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2bccd.*

and measurable requirements." *See* the GP 57 FR 13498 at page 13567.

Comment 2: The City of Houston states that it has long opposed the use of Flexible Permits. Quoting its comments on TCEQ's proposed renewal of the Flexible Permit issued to a refinery in Houston, it states that "[t]he permit terms violate Federal law and are not federally enforceable. This refinery (and others) could have sought other SIP-approved permitting." The City of Houston also noted that the structure of the Flexible Permit Program fails to assure compliance with the Major NSR requirements and that these Flexible Permits are essentially unenforceable. The City of Houston strongly supports the EPA's decision to seek the changes necessary in the Flexible Permit Program to make it federally enforceable, consistent with the CAA and ensure that emissions are controlled and reduced from the State's largest sources of pollutants.

Response: EPA agrees with these comments. Texas has opted for a program that allows the permit holder to select which new facilities and/or new modifications to include under the umbrella of a Flexible Permit. The submitted Program fails to provide clear criteria for determining what type of MRR requirements are needed and furthermore leaves the choice to the director, including whether to include any MRR requirements in a Flexible Permit. *See* section III.A (response to comment 6) for further information. Without the appropriate specialized MRR requirements, it is generally impractical 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, it is generally impractical 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 MRR requirements, EPA cannot find that the submitted Program is enforceable, as required by section 110(a)(2)(A) and (C) of the Act. *See* 74 FR 48480, at 48492.

The submitted Program lacks provisions explicitly addressing the type of MRR 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.

Without specialized MRR requirements, it is difficult for EPA 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.

Comment 3: TIP, BCCA, TAB, and TxOGA comment that the submitted Program contains comprehensive and stringent provisions for monitoring, recordkeeping, and reporting. These are more than adequate to ensure compliance on the part of permit holders, enforceability by TCEQ, and protection of public health. *See* 30 TAC 116.715(c). They require the regulated community to monitor and submit information sufficient to safeguard environmental quality.

Response: EPA disagrees with commenters. The commenters failed to point to any such specific provisions. 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. EPA finds that 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. Paragraph (c)(6) of submitted 30 TAC 116.715 generally requires maintenance of data sufficient to demonstrate continuous compliance with emission caps and individual emission limits contained in the Flexible Permit but lacks the necessary specificity and replicability needed to ensure the enforceability of the submitted Program and the protection of the NAAQS and control strategies. *See* section III.A (response to comment 6) for further information.

Comment 4: TIP, BCCA, TAB, and TxOGA note that TCEQ also may impose additional recordkeeping requirements appropriate for a specific source covered by a Flexible Permit. The submitted Program's rules contemplate that additional recordkeeping requirements may be tailored to the type of source covered by a Flexible Permit. TIP comments that the submitted Flexible Permits rules are as stringent as EPA's proposed Indian Country Minor NSR rules. This commenter claims that with respect to emission events and maintenance, startup, and shutdown emissions (SSM), the submitted rules go far beyond Federal benchmarks because they require compliance with 30 TAC 101.201 and 101.211. Section 101.201 includes record-keeping requirements to report all reportable and non-reportable emissions events within two weeks, which in the view of this commenter is more stringent than the "prompt" reporting requirement of the proposed Indian Country counterpart. Again citing Section 101.201, commenter claims the record retention requirements of the submitted Program for records of reportable and non-reportable emissions events are similar to their proposed Indian Country counterparts.

Response: EPA disagrees with this comment. Commenters' reliance upon the Texas rules for malfunction emissions and maintenance, startup, and shutdown emissions is misplaced. Section 101.201 concerns Emissions Event Reporting and Recordkeeping Requirements; and Section 101.211 concerns Scheduled Maintenance, Startup, Shutdown Reporting and Recordkeeping Requirements. These two referenced sections concern emission events that are a subset of the universe of air emissions. Emission events are unauthorized emissions by nature. *See* 30 TAC 101.1(28). Malfunction related emissions are those unauthorized emissions that result from

a sudden and unavoidable breakdown of process or control equipment.[5]

EPA agrees that the submitted Program's rules contemplate that additional recordkeeping requirements may be required (at the discretion of the director). Yet as EPA noted in the proposal, the submitted Program is an intricate program and therefore, for approvability as a Major or Minor NSR SIP revision, there is a greater need for detailed MRR requirements to ensure, among other things, there are adequate means for ensuring compliance by each holder of a Flexible Permit. Without detailed MRR requirements, the program is unenforceable. The MRR requirements are needed additionally to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, violate the Texas control strategy, or violate any other CAA requirement. *See* 74 FR 48480, at 48490. The submitted Program lacks provisions explicitly addressing the type of MRR 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. The underpinnings of the submitted Program are so complex as to necessitate more detailed MRR requirements to ensure that the emission cap and/or individual emissions limitations in the issued Flexible Permits are enforceable.

Without the appropriate specialized MRR requirements, it is generally impractical to determine for instance, which emission points are covered, which modifications of existing non-covered emission points are covered, *etc. See* section III.D.3 (response to comment 2) for further information.

Commenter's comparison of the submitted Program to EPA's proposed Indian Country Minor NSR rules is misplaced in the context of this action. As an initial point, we clearly stated in the proposed rule that we did not intend for this regulation of national scope to serve as a model or comparison for development of State Minor NSR programs. *See* 71 FR 48695, at 48700 (August 21, 2006). EPA regulations require that it review a Minor NSR SIP revision to determine if a plan includes "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).

We believe the reporting requirements we proposed for the Indian Country Minor NSR rules will ensure protection of the NAAQS and control strategy. Moreover, the standard of review in this instance is not a comparison between the MRR provisions in the submitted Program and any MRR provisions in the proposed Indian Country Minor NSR rules but a determination whether the submitted Program has sufficient 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. As stated above, the submitted Program lacks provisions explicitly addressing the type of MRR 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.

Comment 5: TIP, BCCA, TAB, and TxOGA also point out that there is a wide array of additional Texas rules specifying monitoring, recordkeeping, and reporting requirements. For instance, the Texas Flexible Permit rules also require compliance with section 101.201, related to reporting and recordkeeping of malfunction emissions, and section 101.211, related to reporting of maintenance, startup, and shutdown emissions. Commenters claim that there are many detailed monitoring, recordkeeping and reporting requirements that Flexible Permit holders are subject to and there are indeed very explicit requirements that adequately document the operations of sources covered by Flexible Permits.

Response: EPA disagrees with this comment. The submitted Program does not have provisions explicitly specifying the monitoring requirements for this Program.

Without the appropriate specialized MRR requirements, it is generally impractical to determine information such as which emission points are covered, and which modifications of existing non-covered emission points are covered. *See* section III.D.3 (response to comment 2) for further information. Without replicable implementation procedures for establishing the emission cap and sufficient and MRR requirements, EPA lacks sufficient information to make a finding 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.

Further, commenters' reliance upon the Texas rules for malfunction emissions and maintenance, startup, and shutdown emissions is misplaced. Section 101.201 concerns Emissions Event Reporting and Recordkeeping Requirements; and Section 101.211 concerns Scheduled Maintenance, Startup, Shutdown Reporting and Recordkeeping Requirements. These two referenced sections concern emission events that are a subset of the universe of air emissions. Emission events are unauthorized emissions by nature. *See* 30 TAC 101.1(28). Malfunction related emissions are those unauthorized emissions that result from a sudden and unavoidable breakdown of process or control equipment.[6] EPA's concern with the structure of the Program and its lack of specific MRR requirements is not with how malfunction and SSM emissions are treated concerning MRR but with the emissions that are normally emitted and how one can determine if the emitted emissions are meeting the Flexible Permit's emission limitations. *See* section III.A (response to comment 6) for further information.

As EPA noted in the proposal, the submitted Program is an intricate program and therefore, for approvability as a Major or Minor NSR SIP revision, there is a greater need for detailed MRR requirements whether to ensure, among other things, that a project triggering the Major NSR SIP requirements is covered under Major NSR or there are adequate means for ensuring compliance by each holder of a Flexible Permit. These are needed additionally to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, violate the Texas control strategy, or violate any other CAA

[5] *See* Footnote 1 of the Attachment to the Memo entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 1999 Policy) from Steve Herman and Robert Perciasepe. You can access this document at: *http://epa.gov/ttn/oarpg/t5/memoranda/exemmpol092099.pdf.*

[6] *See* Footnote 1 of the Attachment to the Memo entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 1999 Policy) from Steve Herman and Robert Perciasepe. You can access this document at: *http://epa.gov/ttn/oarpg/t5/memoranda/exemmpol092099.pdf.*

requirement. *See* 74 FR 48480, at 48490, and section III.D.3 (response to comment 4) for further information.

Comment 6: TAB and TxOGA comment that the submitted Flexible Permit rules provide for the enumeration of special conditions including requirements for monitoring, testing, recordkeeping, and reporting (MRR). Commenter also asserts that EPA does not include any analysis that might lead one to understand what additional specificity or detail is necessary, or how or why the many detailed requirements in TCEQ's rules (specifically 30 TAC 101.10, 115.116, 117.801 and 111.111) are inadequate.

Response: EPA disagrees with this comment that the Agency has not provided a reasonable basis for it findings. Appropriate MRR provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and control strategies are protected. 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." *See* 57 FR at 13567. The Program's rules do not contain specific enumerated requirements for MRR. It is not legally sufficient even if the State is issuing individual Flexible Permits with special conditions requiring MRR. In order for the Program to be approvable as a SIP revision, the Program itself must contain specific objective, replicable MRR requirements that ensure compliance with all terms and conditions of each Flexible Permit issued by the TCEQ. There are no provisions providing clear criteria for determining what type of MRR requirements are needed. The Program is too complex to leave the choice of MRR requirements up to the individual issuance of a Flexible Permit, and up to the discretion of the Executive Director of the TCEQ. EPA finds such director discretion provisions are not acceptable for inclusion in SIPs, unless each director decision is required under the plan to be submitted to EPA for approval as a single-source SIP revision. This Program does not contain specific, objective, and replicable criteria for determining whether the Executive Director's choice of MRR requirements will be effective in terms of enforceability, compliance assurance, and ambient impacts. *See* 74 FR 48480, at 48490, and section III.A (response to comment 6) for further information.

Comment 7: TAB and TxOGA comment that EPA does not provide any example of a permit or permits the review of which led to that conclusion that absence of certain recordkeeping and reporting made it difficult to derive information from Flexible Permits. TCC notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, it is difficult for TCEQ to implement rulemaking for every type of recordkeeping, monitoring and tracking requirements that may apply. Attempting to incorporate these variable components into one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. BCCA comments that the Flexible Permit rules contemplate that additional recordkeeping requirements many be tailored to the type of source covered by a Flexible Permit making them as least as stringent as their Federal counterparts. BCCA highlights a comparison to the proposed Indian Country Minor NSR rules to make this point.

Response: The proper scope of review for this SIP revision submittal does not include a review of the State's individually issued Flexible Permits to determine whether there are adequate recordkeeping and reporting requirements in each permit. These Flexible Permits never should have been issued since the submitted Program is not part of the Texas NSR SIP. EPA's review is instead focused on the structure of the submitted Program, ensuring that it includes legally sufficient recordkeeping and reporting requirements. This is necessary to ensure that not only does the submitted Program not interfere with NAAQS attainment, the Texas SIP control strategies, and RFP, but the proposed revision is enforceable pursuant to section 110(a))(2)(A)–(C) of the Act. 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 at page 13566. Submitted rules that are 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. *See* 74 FR 48480, at 48492. Furthermore, any permitting rule will apply to a variety of sources (unless it is a permit adopted specifically for a source category and limited to that affected source category).

The submitted Program allows a Flexible Permit holder to selectively include new facilities and/or new modifications under the umbrella of a Flexible Permit. Without the appropriate specialized MRR requirements, it is generally impractical to determine information such as which emission points are covered, and which modifications of existing non-covered emission points are covered. *See* section III.D.3 (response to comment 2) for further information. Submitted 116.711(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, or may not, be required and provides no guidance for when monitoring will be required. *See* section III.A (response to comment 6) for further information.

The submitted Flexible Permit Program does not compare favorably with the MRR requirements that are proposed in the proposed Indian Country Minor NSR rules. The proposed Indian Country Minor NSR Rules would require the permit to include monitoring sufficient to assure compliance with any control technology requirements contained in the permit. Monitoring approaches may include continuous emission monitoring systems, predictive emission monitoring systems, continuous parameter monitoring systems, periodic manual logging of monitor readings, equipment inspections, mass balances, periodic performance tests, and/or emission factors, as appropriate for the minor source. None of these monitoring approaches is addressed in the submitted Program. The proposed Indian County Minor NSR Rules also would require the permit to include recordkeeping sufficient to assure compliance with enforceable emission limitations in the permit and require retention of the records for five years from the date of the record. The submitted Program lacks this specificity for the recordkeeping requirements. The proposed Indian County Minor NSR Rules also would require annual

monitoring reports showing whether the permittee has complied with the permit emission limitations and prompt reports of deviations from permit requirements, including those attributable to upset conditions, probable cause of such deviations, and any corrective or preventative measures taken. *See* 71 FR 48695, at 48715–48716 and 48738 (August 21, 2006). Thus even assuming such a comparison represented the proper scope of review, the MRR provisions of the submitted Program do not compare favorably to those in the proposed Indian Country Minor NSR Program. The MRR provisions of the Texas Flexible Permit Program do not contain this level of MRR or otherwise sufficient MRR provisions given the features of the Program.

Comment 8: The Clinic comments that there are no provisions for ensuring that emission reductions are real, permanent, and enforceable.

Response: Specific, objective, and replicable criteria are required to be set forth for determining whether this new type of NSR permit program will be truly equivalent to the other Minor NSR SIP permit programs in terms of being consistent with the levels specified in the control strategies, including air quality impacts, *etc.* Appropriate MRR provisions are necessary to establish how compliance will be determined and be sufficient to ensure that the NAAQS and Texas control strategies are protected. Without replicable procedures for establishing the emissions caps, the lack of enforceability, the director discretion regarding whether or not to require MRR and the lack of sufficient MRR requirements, EPA cannot be assured that the submitted Program does indeed produce permanent emission reductions. *See* section III.A (response to comment 6) for further information.

Comment 9: The Clinic comments that the Flexible Permit rules fail to assure that permits include enforceable limits, as required by the Clean Air Act. There is no required monitoring or reporting to assure compliance with the terms and conditions. Likewise, the Flexible Permit rules fail to require adequate monitoring and reporting for those emission limits and requirements that are included in the Flexible Permit. The rules require measurement of emissions "as determined by the executive director." *See* submitted 30 TAC 116.711(2). They also require that unspecified "information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit" be kept at the plant site and made available for TCEQ inspection. *See* submitted 30 TAC 116.715(c)(6). These requirements are clearly insufficient to demonstrate compliance with emission caps applicable to dozens of dissimilar emission units. For a program as complex as the Texas Program, stringent monitoring must not be left up to the discretion of the Executive Director. Instead, stringent monitoring and reporting requirements must be required by regulation for all units covered under a Flexible Permit. Because the Texas Flexible Permit is more complex than either the PAL or the Green Groups proposal, it should include monitoring at least as stringent as required by those rules.

Response: EPA generally agrees with these comments. The submitted Program does not meet the requirements of section 110(a)(2)(A)–(C) of the Act, which require that SIP revision submittals be enforceable.[7] There are no specific up-front methodologies in the submitted Program to be able to determine compliance. There are no sufficient MRR provisions in the submitted Program. Accordingly, the Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or for an affected source, and it cannot assure compliance with the Program or by the holder of a Flexible Permit. *See* 74 FR 48480, at 48490, section III.A (response to comment 6) for further information.

Instead, MRR requirements appropriate for such a complex Program must be required by regulation for all units covered under a Flexible Permit. Whether or not to require MRR requirements in a Flexible Permit should not be left to director discretion. This complex and intricate Program, for enforceability purposes, requires sufficient MRR requirements for each Flexible Permit. In the proposal, we stated that we are concerned with the adequacy of the MRR requirements in the submitted Program.[8] This submitted Program is an intricate program and therefore, for approvability as a NSR SIP revision, there is a greater need for detailed MRR 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 under both Major and Minor NSR. *See* section III.D.3 (response to comment 2) for further information.

Finally, the commenter stated that because the Texas Flexible Permit Program is more complex than either the Federal PAL SIP rule or the Federal Green Groups proposal, it should include monitoring at least as stringent as required by those rules. EPA is not requiring that the Program include the specific MRR as required or proposed for another program. As stated above, to be approvable as a SIP revision, the Program must contain specific, replicable MRR requirements that ensure compliance with all terms and conditions of each Flexible Permit issued by the TCEQ. *See* section III.C.6 (response to comment 2) for additional information.

Comment 10: The Clinic comments that the Program does not assure that permit terms of pre-existing NSR permits remain as part of the Flexible Permit and therefore enforceable. The Clinic provided information on a refinery that had a PSD permit and subsequently received a Flexible Permit from TCEQ. The PSD permit included emission limits for two fluid catalytic cracking units (FCCUs). When the Flexible Permit was issued, these emission limits in the PSD permit were not included as separate from the limits in the Flexible Permit; instead, the Flexible Permit included the FCCUs among the units subject to the emission caps. When the refinery subsequently reported emission events, it reported only the Flexible Permit and its associated caps as the applicable limits, rather than the limits from the pre-existing Major NSR SIP permits.

Response: The submitted Program lacks adequate program requirements for whether or not the terms and conditions of pre-existing Major and Minor SIP permits are incorporated into a Flexible Permit or they remain outside the coverage of the Flexible Permit. While the comments on implementation of the submitted Program as related to a particular source are not relevant to this action, they do highlight EPA's concerns about why the submitted Program is not approvable. The submitted Flexible Permit Program also lacks sufficient recordkeeping provisions to ensure that all terms and conditions of pre-existing Major and

[7] Section 116.711(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.

[8] 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.

Minor NSR SIP permits (including representations in the applications for such permits) that are incorporated into the Flexible Permit continue to be met. These underlying Major and Minor NSR SIP permits remain legally enforceable but the lack of specificity in the submitted Program impacts practical enforceability. *See* 74 FR 48493, and section III.A (response to comment 6) and section III.D.3 (response to comment 11, below) for further information.

Comment 11: A member of the Sierra Club cites to references from the proposal that relate to the lack of appropriate MRR requirements in the Program. An individual commenter states that as an air quality investigator for the City of Houston Bureau of Air Quality Control, investigating documentation of compliance for a Flexible Permit was presented an entire roomful of binders, containing emissions information for different sources under one cap. The company representative said that this was the documentation of the company's compliance with the Flexible Permit. Confronted with these practical difficulties, the commenter was unable to determine the company's compliance with its Flexible Permit Cap.

Response: The EPA agrees with these comments. While the comments on implementation of the submitted Program are not relevant to this action, they do highlight EPA's concerns about why the submitted Program is not approvable. 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. This comment also highlights the lack of 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. This further highlights the lack of MRR sufficient to establish how compliance will be determined and to ensure that NAAQS and Texas control strategies are protected. *See* 74 FR 40480, at 40493, section III.D.3 (responses to comment 1, 2, 4, 5, 7, and 10, above), and section III.A (response to comment 6) for further information.

4. Revocation of Major NSR Permits Under a Minor NSR Program

Comment: The Clinic comments that Flexible Permits are used to eliminate or amend existing Nonattainment NSR and PSD permit terms without following SIP required procedures for permit amendments.

Response: We are disapproving the submitted Program because it is ambiguous and could be interpreted to 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). *See* 74 FR 40480, at 48493 and a copy of the document is in the docket at document ID EPA–R06–OAR–2005–TX–0032–0025.[9]

5. Protection of the NAAQS Under a Minor NSR Program

Comment: The Clinic comments that the submitted Flexible Permits Program is inadequate to assure protection of the NAAQS, increments, and control strategy.

Response: Approval of the submitted Program as a Minor NSR SIP revision requires that it include legally enforceable procedures that enable the State to determine whether construction or modification by a holder of a Flexible Permit would violate a control strategy or interfere with attainment or maintenance of the NAAQS. *See* 40 CFR 51.160(a)–(b). Without a replicable methodology for establishing the emissions caps, the lack of enforceability, the director discretion concerning whether or not to require MRR conditions in a Flexible Permit, and the lack of sufficient MRR requirements in the submitted Program, EPA lacks sufficient information to make a finding 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. *See* 74 FR 48480, at 48490–48492, and section III.A (response to comment 6) for further information.

E. Definition of Account

Comment 1: TCEQ does not agree with EPA's understanding of the term "account" as applied by TCEQ. TCEQ maintains that it has included in each of its permitting rules appropriate definitions to meet State and Federal requirements. TCEQ interprets an "account" to include multiple "sources." Within this rule, it interprets "sources" as being equivalent to multiple "facilities" (a facility is a discrete piece of equipment or source of air contaminants) under Texas Minor Source definitions. A Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR purposes.

Response: We appreciate TCEQ's explanation of the terms "account," "facility" and "source" as it intends them to apply in the submitted Program. We are pleased to learn that the State does not intend to allow a Flexible Permit to cover multiple major stationary sources and that companies complying with a Flexible Permit understand the continued obligation to comply with the SIP-approved Major NSR program at all major stationary sources and major modifications. Nonetheless, we believe that the definitions are not sufficiently limiting to preclude issuance of a Flexible Permit to multiple major stationary sources. This is because the terms "source" and "account" rely on the term "site" which does not contain the SIC code limitation contained in the Federal definitions. Without this limitation, the broad terms can encompass more than one major stationary source. For example, a petroleum refiner (SIC code 2911) may be collocated with a Plastic Materials and Resins manufacturer (SIC code 2821) and be under common control and ownership, and neither source is a support facility to the other. But, under the Major NSR program, these two facilities would be considered separate major stationary sources by virtue of a

[9] You can access this document directly at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2bd1d.*

difference in each facility's SIC irrespective of the fact that they are located at the same "site." Notably this is not the case for the Title V and Section 112 programs. A single Title V permit can be issued to the "site." TCEQ asserts that an account includes multiple sources and that the term "source" is limited to a discrete piece of equipment or source of air contaminants. There is nothing in the submitted Program's rules and definitions that limit the term "account" to one "major stationary source" much less to a discrete piece of equipment. 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). 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. *See* the approved SIP rule 30 TAC 101.1(1), second sentence. On its plain face, the term "account" cannot be interpreted to be limited to a single major stationary source.

Comment 2: BCCA, TCC, TIP and TAB, and TxOGA comment that the definition of "account" is tied to the definition of "site" at 30 TAC 101.1(1) and (87). These commenters view this as limiting an account to a specific plant site. Commenters also point to the Title V rules as providing additional limitation. Citing 30 TAC 116.710(a)(1) and (4), the commenters point out that 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. In summary, commenters conclude that if these rules are read together they provide sufficient safeguards against a major stationary source netting a significant emissions increase against a decrease occurring outside a site using a Flexible Permit. TAB comments if a Flexible Permit could be obtained for more than one site, the only reasonable construction of the rule would be "* * * a facility, group of facilities, account or accounts * * *" but the rule is not so constructed because it does not extend a Flexible Permit to more than one site.

Response: EPA disagrees with the comment. Concerning the comment that an account is limited to a site and that the submitted Flexible Permit Program limits only one Flexible Permit at an account does not address our concern that an account may include more than one major stationary source. *See* the section III.D.1 (response to comment 1) and 74 FR 48480, at 48489 for further information. The commenter's reliance on the Title V rules does not identify a specific provision in the Texas Title V program that supports the commenter's position.

Furthermore, the reliance on the Title V program as providing additional limitation for limiting an account to a major stationary source does not address this matter. The Title V program is an operating permit program that incorporates the applicable requirements of the CAA (including the requirements of the approved SIP) into the operating permit. *See* 40 CFR 70.2—definition of "applicable requirement" and 70.6(a)(1). The Title V Program generally does not create applicable requirements independently of the applicable requirements in the approved SIP and other requirements of the CAA. *Public Citizen* v. *EPA,* 343 F.3d 449, 453 (5th Cir. 2003) ("Title V permits do not impose additional requirements on sources but, to facilitate compliance, consolidate all applicable requirements in a single document. *See* 42 U.S.C. 7661a(a); *see also Virginia* v. *Browner,* 80 F.3d 869, 873 (4th Cir.1996) (Title V permit "is a source-specific bible for [CAA] compliance"), *cert. denied,* 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997)."); *Sierra Club* v. *Georgia Power Co.,* 443 F.3d 1346, 1348 (11th Cir. 2006) (Title V "generally does not impose new substantive air quality control requirements.")

In summary, for the reasons stated above, the definition of "account" is not limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source.

F. Public Participation

Comment 1: TCC comments that any future changes in the public participation aspects of the Flexible Permit program should apply prospectively and have no effect on the existing permits.

Response: EPA cannot comment on what actions it will take regarding any future changes in the public participation aspects of the Flexible Permit Program and therefore defers responding because those changes are outside the scope of the present rulemaking. We wish to note, however, existing Flexible Permits were not issued under the Texas NSR SIP, and any future Flexible Permits also will not be issued under the Texas NSR SIP.

Comment 2: The Clinic comments that the CAA and its implementing regulations include minimal requirements for public participation in permitting. This includes, for Major and Minor NSR permits and modifications, the requirements under 40 CFR 51.161 and for PSD permits, additional requirements as provided under 40 CFR 51.166(q). Texas public participation rules for Flexible Permits in 30 TAC Chapter 39 require 30-days public notice and comment on initial issuance of Flexible Permits and amendments to a Flexible Permit if the action involves construction of a new facility or meets certain criteria, including modifications resulting in allowable emissions increases of 250 tons per year of carbon monoxide and nitrogen oxides or 25 tons per year of other pollutants. *See* 30 TAC 39.403(b). This restriction is inconsistent with Federal requirements for both Major and Minor NSR. The commenters further object to the use of alterations and permits by rule to change Flexible Permit terms and conditions; such changes should be made through permit amendment with at least 30-days public notice and comment.

Response: In the proposal, EPA proposed to disapprove 30 TAC 116.740 because this submitted rule relates to the public participation requirements of the submitted Flexible Permit Program, and is not severable from the Program. Because we are disapproving the Flexible Permit Program, we are likewise disapproving the inseverable provisions in 30 TAC 116.740, Public Notice, for the Program. *See* 74 FR 40480, at 48491 and 48493.

The comments relating to the provisions in 30 TAC Chapter 39, the use of permit alterations and Permits by Rule in lieu of permit amendment with at least 30-days public notice and comment are outside the scope of this action.

Comment 3: GCLC provided comments on Texas's submitted public participation program that it is robust and fully compliant with Federal requirements and in fact exceeds Federal requirements. GCLC comments that even parties not residing in the State may comment on an air permit application and TCEQ is obligated to respond whereas under Federal requirements only affected persons are allowed to comment and trigger a response obligation. GCLC asserts that the "public meeting" component of the State program is equivalent to the "public hearing" component of the Federal program. GCLC comments that the trial-type contested hearing process in the Texas program goes well beyond the Federal requirements which permit only interested parties to participate during the notice and comment period.

Response: We recognize that our proposal included a brief discussion of how the submitted Flexible Permit Program requires compliance with provisions in Chapter 39 of the Texas

Administrative Code. 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). In our November 26, 2008, proposal of the Texas Public Participation rules, we proposed no action on 30 TAC 116.740 and stated that we would address that section in a separate action. *See* 73 FR 72001, at 72015. In our proposal of the Texas Flexible Permits Program, we proposed to disapprove 30 TAC 116.740 because this submitted rule relates to the public participation requirements of the submitted Flexible Permit Program, and is not severable from the Program. Because we are disapproving the Flexible Permit Program, we are likewise disapproving the inseverable provisions in 30 TAC 116.740, Public Notice, for the Program. *See* 74 FR 40480, at 48491 and 48493.

IV. What are the Grounds for This Disapproval Action of the Texas Flexible Permits State Program?

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Flexible Permits State Program, identified in the above Tables 1 and 2. Sources are reminded that they remain subject to the requirements of the federally approved Texas SIP and may be subject to enforcement actions for violations of the SIP. *See* EPA's Revised Guidance on Enforcement during Pending SIP Revisions, (March 1, 1991). You can access this document at: *http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/enf-siprev-rpt.pdf.* However, this final disapproval action does not affect Federal enforceability of Major and Minor NSR SIP permits.

The provisions affected by this disapproval action include regulatory provisions at 30 TAC 116.110(a)(3), 116.710, 116.711, 116.714, 116.715, 116.716, 116.717, 116.718, 116.720, 116.721, 116.722, 116.730, 116.740, 116.750, and 116.760; and definitions at 30 TAC 116.10(11)(F), and 30 TAC 116.13 under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Flexible Permits State Program are not severable from each other. Specifically, EPA is making the following findings and taking the following actions as described below:

A. The Texas Flexible Permits Program is Unclear Whether It is for a Major or Minor NSR SIP Revision

Several commenters claim that the submitted Program is clear that every project for which a Flexible Permit is issued must also comply with Major NSR requirements, and therefore was not intended to be a Major NSR SIP revision. Other commenters disagree and say the rules are not clear on their face that the Program requires compliance with the Major NSR requirements. The latter commenters agree with EPA's analysis of the submitted Program in the proposal and comment that we correctly stated that we were required to review the submittal as a substitute for a Major NSR program because the submittal is not clearly limited to minor sources and minor modifications. TCEQ states that the Flexible Permit Program was not intended to be a substitute for the Major NSR permitting requirements but that it understands EPA's concerns with ambiguity regarding the applicability of the submitted Program, that this is not specifically stated in the submitted Program's regulations. Furthermore, the TCEQ commits to revise its rules to make it clear that the Program is limited to Minor NSR.

The submitted Program is analogous to two other Minor NSR programs (Standard Permits and Permits by Rule) in Texas's SIP because they too provide a different permit option for facilities. In particular, these programs exempt facilities from obtaining a source-specific (*i.e.,* case-by case) permit. Unlike the submitted Program, however, the SIP rules for Standard Permits and Permits by Rule include an applicability statement and a regulatory provision that expressly limits applicability to minor sources and minor modifications. The Standard Permits rules explicitly require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions explicitly require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b). In each, the State specifically expressed its intention to require a Major NSR applicability determination and prohibit circumvention of Major NSR. The absence of a similar Major NSR applicability determination requirement and a similar regulatory prohibition for circumvention of the Major NSR SIP permitting requirements in the submitted Flexible Permits Program creates unacceptable ambiguity. The commenters opposing our proposed action fail to provide an explanation of why the TCEQ did not write the submitted Flexible Permit rules with the same provisions as the Texas Minor NSR Permits by Rule and Standard Permit SIP rules. A clear intention to limit the submitted Program to minor sources and minor modifications would have resulted in a similar structure to the Texas Minor NSR Permits by Rule and Standard Permit SIP rules. The State, however, did not include such provision in the submitted Flexible Permits Program. *See* 74 FR 48480, at 48487, and section III.B (response to comment 1) for further information.

B. The Texas Flexible Permits Program is Not Approvable as a Substitute Major NSR SIP Revision

Because of the State's disavowal of any intent to have this SIP revision submittal treated as a substitute for a Major NSR SIP program, it did not submit a demonstration as required by 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv) to show that its Program was as stringent as the EPA Major NSR SIP program requirements. It also did not explain how the submitted Program is consistent with the Act's requirements for a Major NSR SIP revision. As discussed at 74 FR 38480, at 48487, and in section III.B (response to comments 1 and 2), section III.C.1 (responses to comments 1 and 2), and section III.C.3 (responses to comments 1 and 2) of this notice, the State did not structure the submitted Program in a similar fashion as the Texas Minor Standard Permits and Permits by Rule NSR SIP programs. This lack of a similar regulatory structure creates the ambiguities whether the submitted Program is truly limited to Minor NSR and whether it prohibits the circumvention of the Federal Major NSR SIP requirements. Without the required demonstration and with the ambiguities, EPA is disapproving the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met and that prevent circumvention of Major NSR. *See* 74 FR 48480, at 48488, section III.B (response to comment 1) and section III.C.1 of this notice for further information.

Some commenters assert that the submitted Program meets the netting criteria for a Major NSR SIP revision. Others argue differently. 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 Program allows an emission cap to be established under a Flexible Permit account to include multiple major stationary sources and 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, and, in other circumstances, allowing an evaluation of emissions of a subset of units at a major stationary source. 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. *See* section III.E (responses to comments 1 and 2) for further information.

Therefore, the submitted Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power* v. *Costle*, 636 F.2d 323, 401–403 (D.C. Cir. 1980) and *Asarco* v. *EPA*, 578 F.2d 320 (D.C. Cir.1978). The submitted Program does not meet the Major NSR SIP requirements for netting. Second, the Program authorizes existing allowable emissions, rather than actual emissions, to be used as a baseline to determine applicability. Therefore, this use of allowables is inconsistent with the requirements of the Act for Major NSR and is contrary to *New York* v. *EPA*, 413 F.3d 3, 38–40 (D.C. Cir. 2005) ("New York I"). *See* 74 FR 48480, at 48489–48490, and section III.C.2 (response to comment 2) for further information.

Several commenters claim that the submitted Program requires the retention of the conditions of an existing PSD or Nonattainment NSR permit and that the TCEQ is required under the submitted Program to carry forward such terms and conditions in a Flexible Permit. On the other hand, there was a comment that the submitted Program contains no such requirement and that TCEQ regularly voids existing Nonattainment and PSD NSR permits when it issues a Flexible Permit. The submitted Flexible Permit Program is not clear and explicit that Flexible Permits cannot be used to eliminate or amend existing Nonattainment and PSD NSR SIP permit terms and conditions. There are not sufficient provisions in the submitted Program requiring the holder of a Flexible Permit to maintain recordkeeping sufficient to ensure that all terms and conditions of pre-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 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. The submitted Program is ambiguous and can be interpreted to 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 Major NSR permits, without a preconstruction review by Texas. *See* section III.C.5 for further information.

Therefore, the submitted Program does not require the retention of the conditions of Major NSR SIP permits upon the issuance of a Flexible Permit, as is required for a Major NSR SIP revision.

Pursuant to 40 CFR 51.165(a)(2)(ii) and 51.166(a)(7)(iv), where a State submits a revision to its Major NSR SIP that differs from the Federal Major NSR base program SIP requirements, the State has an affirmative obligation to explain how the submitted program satisfies the CAA and to demonstrate why the submitted program is in fact at least as stringent as the Major NSR SIP requirements of the Federal base program. It is not EPA's obligation to surmise how the submitted program might work and if it may under certain circumstances be more or less stringent than the Federal Major NSR SIP base program. The State did not submit such a demonstration because it did not view the submitted Program as a substitute for a Major NSR SIP revision.

Without the required customized Major NSR demonstration, the lack of a replicable methodology for the establishment of the emissions cap, the provision allowing director discretion in deciding whether or not to include a MRR condition in a Flexible Permit, the lack of sufficient MRR requirements, and the lack of enforceability, EPA lacks sufficient information to make a finding that the submitted Flexible Permits Program will prevent interference with NAAQS attainment and RFP or violations of any State control strategy that is required by the Texas NSR SIP, or any other applicable CAA requirement. *See* 74 FR 48480, at 48492, section III.D.3, and section III.A (response to comment 6) for further information.

Therefore, the Program does not meet the requirements of the Act and EPA regulations for a substitute Major NSR SIP.

In summary, EPA is disapproving the submitted Flexible Permits Program as not meeting the Major NSR SIP requirements.

C. The Texas Flexible Permits Program Is Not Approvable as a Minor NSR SIP Revision

Several commenters claim the Texas Flexible Permit Program explicitly requires permit holders to comply with the Federal Major NSR rules. In contrast, another commenter says that the submitted Program does not include adequate provisions for ensuring that changes that should trigger Major NSR are subject to technology and air quality analysis requirements. Commenters assert that the submitted Program prohibits circumvention of Major NSR. Another commenter notes to the contrary. We evaluated the submitted Program under CAA section 110(a)(2)(C), which requires each State to include a Minor NSR program in its SIP. EPA regulations implementing the Act 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 (*see* 40 CFR 51.160(a)(1)), or "interference with a national ambient air quality standard," (*see* 40 CFR 51.160(a)(2)), and to prevent the source from doing so (*see* 40 CFR 51.160(b)). There is, however, no express provision in the submitted Flexible Permit Program rules that prohibits its use for Major NSR. There is no express regulatory provision in the submitted Program requiring that it cannot be used to circumvent the requirements of Major NSR. There are no regulatory provisions clearly prohibiting circumvention of Major NSR. *See* 74 FR 48480, at 48486, and section III.D.1 for further information.

Therefore, EPA is disapproving the submitted Program as a Minor NSR SIP revision because it is not clearly limited to Minor NSR and it does not prevent circumvention of the Major NSR SIP requirements.

Several commenters state that the submitted Program does contain comprehensive and stringent provisions for MRR or assert that there is a wide array of additional Texas rules specifying MRR requirements. A commenter notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, requiring one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. In contrast, another commenter notes that the submitted Program does not contain adequate MRR requirements to assure compliance with the emission limits in Flexible Permits.

On the other hand, TCEQ admits the submitted Program does not specify special conditions that ensure recordkeeping, reporting, testing, and reporting to assure compliance with the Flexible Permit.

The submitted Program is an intricate and complex program and therefore, for approvability as a Major NSR SIP revision, there is a greater need for detailed MRR 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 source under both Major and Minor NSR. These are needed to make the submitted Program enforceable and to ensure that the issuance of the Flexible Permits does not cause or contribute to a NAAQS violation, the Texas control strategy, or violate any other CAA requirement. The submitted Flexible Permit Program is generic concerning the types of monitoring that is required rather than identifying the employment of specific monitoring approaches, providing the technical specifications for each of the specific allowable monitoring systems, and requiring replicable procedures for the approval of any alternative monitoring system. It also lacks the replicable procedures that are necessary to ensure that (1) adequate monitoring is required that would accurately determine emissions under the Flexible Permit cap, (2) the Program is based upon sound science and meets generally acceptable scientific procedures for data quality and manipulation; and (3) the information generated by such system meets minimum legal requirements for admissibility in a judicial proceeding to enforce the Flexible Permit.

The submitted Program therefore lacks provisions explicitly addressing the type of MRR 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. The commenters' assertion that there are additional MRR SIP requirements applicable to the submitted Program is incorrect; there are no such additional applicable MRR SIP requirements. Moreover, the submitted Program leaves it to the director's discretion to require a MRR condition in a Flexible Permit. *See* 74 FR 48480, at 48490, and section III.C.5 (response to comment), III.D.3 (response to comments 4, 5, and 9), and section III.A (response to comment 6) for further information.

Without specialized MRR requirements in the submitted Program, it is difficult for EPA 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. *See* 74 FR 48480, at 48492, and section III.D.3 for further information. Accordingly, the submitted Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or by a holder of a Flexible Permit, and it cannot assure compliance with the Program or of the affected source.

Several commenters state that the submitted Program does contain comprehensive and stringent provisions for MRR or assert that there is a wide array of additional Texas rules specifying MRR requirements. A commenter notes that there is significant difference in the types of sources that apply for a Flexible Permit; therefore, requiring one comprehensive rule could severely limit TCEQ's ability to implement adequately these requirements. In contrast, another commenter notes that the submitted Program does not contain adequate MRR requirements to assure compliance with the emission limits in Flexible Permits.

First, the commenters point to no other specific SIP rules that apply to Flexible Permits and are detailed MRR requirements. Although the submitted Program requires the same MRR 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 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. *See* 74 FR 48480, at 48492, and section III.D.3 for further information. Secondly, the submitted Flexible Permit Program is complex and intricate and therefore, for approvability as a NSR SIP revision, there is a greater need for detailed MRR 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 under both Major and Minor NSR. *See* 74 FR 48480, at 48490, section III.A (response to comment 6), and section III.D.3 (response to comment 2) for further information.

Moreover without specialized MRR requirements in the submitted Program, it is difficult for EPA 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 when it applies. *See* 74 FR 48480, at 48492, and section III.D.3 of this notice for further information. Accordingly, the Program lacks requirements necessary for enforcement and assurance of compliance. There are no specific up-front methodologies in the Program to be able to determine compliance. It fails to meet the enforceability requirements as a program or for a holder of a Flexible Permit, and it cannot assure compliance with the Program or by the holder of a Flexible Permit.

Therefore, the submitted Program is not enforceable, as required by section 110(a)(2)(A)–(C) of the Act for a Minor NSR SIP revision, and it fails to prohibit the issuance of a Flexible Permit that could interfere with attainment of a NAAQS or violate a control strategy. Because of its lack of enforceability, EPA lacks sufficient information to make a finding that the Flexible Permits Program is adequate to ensure that no construction and changes authorized under the Program will prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. *See* 74 FR 48480, at 48492, and section III.D.3 for further information.

Several commenters claim that the submitted Program requires the retention of the conditions of an existing PSD or Nonattainment NSR permit and that the TCEQ is required under the submitted Program to carry forward such terms and conditions in a Flexible Permit. On the other hand, there was a comment that the submitted Program contains no such requirement and that TCEQ regularly voids existing Nonattainment and PSD NSR permits when it issues a Flexible Permit. The submitted Flexible Permit Program is not clear and explicit that Flexible Permits cannot be used to eliminate or amend existing Nonattainment and PSD NSR SIP permit terms and conditions. The regulatory structure of the submitted Program does not ensure that existing Major NSR SIP permits' terms

and conditions are retained. It lacks 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) clearly identify each covered point of emissions; which existing Minor NSR permits and their types (*e.g.*, Minor NSR SIP permit, Minor NSR SIP standard permit, Minor NSR SIP permit by rule); and which of their permitted terms, limits, conditions and representations in the permit application, are moved into the Flexible Permit. The regulatory structure of the submitted Program also is not 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. Finally, there are not sufficient provisions in the submitted Program 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 or not such requirements are incorporated into a 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. The submitted Program also allows holders of a Flexible Permit to make *de facto* amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of Minor and Major NSR permits, without a preconstruction review by Texas. *See* section III.C.5 and section III.D.3 (response to comment 10) for further information.

Therefore, the submitted Program does not require the retention of the conditions of Major NSR SIP permits upon the issuance of a Flexible Permit, as is required for a Minor NSR SIP revision and allows for revision of existing permits without adequate public notice and comment as required by 40 CFR 51.160–161.

Several commenters claim that the submitted Program does contain an established and replicable method for determining an established emissions cap; others claim differently. The submitted Program does not describe in sufficient detail the calculation methodologies and underlying technical analyses used to determine a cap. It lacks specific, established, replicable procedures in the submitted regulations 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.* The process also is not clear for how the emission cap is adjusted for the addition of new facilities. *See* 74 FR 48480, at 48491 and section III.D.2 for additional information.

Therefore, the submitted Program lacks replicable procedures for the establishment of the emissions cap, as is required for a Minor NSR SIP revision.

The submitted Program provides an alternative permit option but there is not sufficient information to determine whether this alternative is as stringent as the existing Texas Minor NSR SIP. Consequently, the submitted Program could create a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. Additionally, the legal test for whether an alternative Minor NSR permit approach can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)–(b). 74 FR 48480, at 48491. Therefore, we are disapproving the submitted Flexible Permits Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(1) of the Act and 40 CFR 51.160. Without a replicable methodology for establishing the emission caps, the provision allowing director discretion whether or not to include a MRR condition in a Flexible Permit, the lack of sufficient MRR requirements and the lack of enforceability of the submitted Program, EPA lacks sufficient information to make a finding 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. *See* 74 FR 48480, at 48492, and section III.A (response to comment 6) for further information.

Based upon the above, overall, the submitted Program fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected. Therefore, EPA is disapproving the Program for not meeting the requirements for a Minor NSR SIP revision.

D. The Texas Flexible Permits Program Does Not Meet the NSR Public Participation Requirements

A commenter stated that any future changes in public participation aspects of the Flexible Permit Program should apply prospectively and should have no effect on existing permits. Another commenter stated that the submitted Program lacks the minimum public participation in 40 CFR 51.161 for a NSR SIP submittal and for a PSD SIP submittal, the public participation requirements in 40 CFR 51.166(q). Another commenter asserts that the submitted public participation program is robust and fully compliant with Federal requirements and in fact exceeds Federal requirements because of its broader scope and trial-type contested hearings process.

The submitted rule is not severable from the Program because it relates to the public participation requirements of the submitted Program. We are disapproving the Texas Flexible Permits State Program, and we are disapproving the submitted 30 TAC 116.740, because this submitted rule for public participation is not severable from the submitted Program. *See* 74 FR 48480, at 48490 and 48493 and section III.F for further information.

E. Definition of "Account"

TCEQ does not agree with EPA's understanding of the term "account" as applied by TCEQ. It further states that it has integrated and translated the many Federal definitions of the "source" in an attempt to maintain consistent terminology between State and Federal programs. TCEQ comments that its definition of an "account" references the term "source" as defined in Texas law. According to TCEQ, within this rule, it interprets "sources" as being equivalent to multiple "facilities" (a discrete piece of equipment or source of air contaminants) under Texas Minor Source definitions. TCEQ further commented that a Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR purposes. *See* comment 1 under section III.E. To be approvable, a Flexible Permit cannot cover more than one major stationary source, as the term is used by EPA and TCEQ for Federal NSR

purposes. Other commenters note that the definition of "account" is tied to the definition of "site" at 30 TAC 101.1(1) and (87). This, in their view limits an account to a specific plant site. These commenters also point to the Title V rules as providing additional limitation. Citing 30 TAC 116.710(a)(1) and (4), these commenters point out that 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. In summary, these commenters conclude that if these rules are read together they provide sufficient safeguards against a major stationary source netting a significant emissions increase against a decrease occurring outside a site using a Flexible Permit. Another commenter comments if a Flexible Permit could be obtained for more than one site, the only reasonable construction of the rule would be "* * * a facility, group of facilities, account or account * * *" but the rule is not so constructed because it does not extend a Flexible Permit to more than one site. After considering these comments EPA observes that that an account could include an entire company site, which could 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 stationary source from facilities on the account site that are covered under a Flexible Permit. An account may also allow an emission increase to be determined based on an evaluation of a subset of facilities within a major stationary source. *See* section III.E (response to comment 1) above and 74 FR 48480, at 48489 for further information. The commenter's reliance on the Title V rules does not identify a specific provision in the Texas Title V program that supports the commenter's position.

In summary, for the reasons stated above, the definition of "account" is not clearly limited to a single major stationary source and may include multiple major stationary sources, or in other circumstances, may include a subset of a major stationary source. The submitted Program is not approvable because it does not 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. *See* 74 FR 48480, at 48485 and section III.E for further information.

V. Final Action

EPA is disapproving the Texas Flexible Permits State Program submitted in a series of SIP revisions, identified in the Tables in section II 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 disapproving 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 also are disapproving 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.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

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 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). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

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. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

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 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 Federal action determines that pre-existing requirements under State or local law should not be approved as part of the Federally approved SIP. It 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 disapproving 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. This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. 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 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 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 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 the Office of Management and Budget, 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. Today's action does not require the public to perform activities conducive to the use of VCS.

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

Executive Order 12898 (59 FR 7629, (February 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 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 disapproves 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.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of

this action must be filed in the United States Court of Appeals for the appropriate circuit by *September 13, 2010.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

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.

Dated: June 30, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. Section 52.2273 is amended by adding a new paragraph (c) to read as follows:

§ 52.2273 Approval status.

* * * * *

(c) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification as follows:

(1) The following provisions under 30 TAC Chapter 116, Subchapter A—Definitions:

(i) Portion of the definition of "modification of existing facility" in 30 TAC 116.10(11)(F), submitted March 13, 1996; repealed and readopted June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; and revised August 21, 2002 and submitted September 4, 2002;

(ii) 30 TAC 116.13—Flexible Permit Definitions, adopted November 16, 1994 and submitted November 29, 1994; repealed and readopted June 17, 1998 and submitted July 22, 1998;

(2) The following provision in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 1—Permit Application: 30 TAC 116.110(a)(3)—Applicability, adopted November 16, 1994 and submitted November 29, 1994; repealed and readopted June 17, 1998 and submitted July 22, 1998;

(3) The following sections in 40 TAC Chapter 116, Subchapter G—Flexible Permits:

(i) 30 TAC 116.710—Applicability—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and adopted August 9, 2000 and September 11, 2000;

(ii) 30 TAC 116.711—Flexible Permit Application—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; revised March 7, 2001 and submitted April 12, 2001; and revised August 21, 2002 and submitted September 4, 2002;

(iii) 30 TAC 116.714—Application Review Schedule—adopted November 16, 1994 and submitted November 29, 1994, and revised June 17, 1998 and submitted July 22, 1998;

(iv) 30 TAC 116.715—General and Special Conditions—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; revised March 7, 2001 and submitted April 12, 2001; revised August 21, 2002 and submitted September 4, 2002; and revised August 20, 2003 and submitted September 25, 2003;

(v) 30 TAC 116.716—Emission Caps and Individual Limitations—adopted November 16, 1994 and submitted November 29, 1994;

(vi) 30 TAC 116.717—Implementation Schedule for Additional Controls—adopted November 16, 1994 and submitted November 29, 1994;

(vii) 30 TAC 116.718—Significant Emission Increase—adopted November 16, 1994 and submitted November 29, 1994;

(viii) 30 TAC 116.720—Limitation on Physical and Operational Changes—adopted November 16, 1994 and submitted November 29, 1994;

(ix) 30 TAC 116.721—Amendments and Alterations—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and revision adopted August 9, 2000 and submitted September 11, 2000;

(x) 30 TAC 116.722—Distance Limitations—adopted November 16, 1994 and submitted November 29, 1994; and revision adopted August 9, 2000 and submitted September 11, 2000;

(xi) 30 TAC 116.730—Compliance History—adopted November 16, 1994 and submitted November 29, 1994; and revised June 17, 1998 and submitted July 22, 1998;

(xii) 30 TAC 116.740—Public Notice and Comment—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; and revision adopted September 2, 1999 and submitted October 25, 1999;

(xiii) 30 TAC 116.750—Flexible Permit Fee—adopted November 16, 1994 and submitted November 29, 1994; revised June 17, 1998 and submitted July 22, 1998; adopted August 9, 2000 and submitted September 11, 2000; and revision adopted September 25, 2002 and submitted October 4, 2002;

(xiv) 30 TAC 116.760—Flexible Permit Renewal—adopted November 16, 1994 and submitted November 29, 1994.

[FR Doc. 2010–16776 Filed 7–14–10; 8:45 am]

BILLING CODE 6560–50–P