

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
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Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 6, 2010

Mr. Lawrence Starfield
Deputy Regional Administrator
6RA-D
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75202-2733

Dear Larry:

In our recent videoconference calls with EPA Region 6 staff, the Texas Commission on Environmental Quality (TCEQ) committed to provide a description of options for companies voluntarily opting to "de-flex" from a flexible permit to a State Implementation Plan (SIP)-approved New Source Review (NSR) permit within TCEQ's existing regulatory framework. Further, at EPA's June 16, 2010 meeting with industry and environmental groups in Dallas, TCEQ staff provided a brief verbal overview of potential de-flex mechanisms. This letter serves to elaborate on the mechanisms described in recent discussions to allow for companies to voluntarily "de-flex" their permits.

Because 30 Texas Administrative Code (TAC) Chapter 116, Subchapter B, is State Implementation Plan (SIP)-approved, the TCEQ has focused on provisions for changing permits in Section 116.116, namely amendments and alterations. In addition, the TCEQ has looked to 30 TAC Chapter 116, Subchapter D, relating to renewals. (Subchapter D is also SIP-approved.) Finally, the TCEQ has looked at administrative orders as a potential mechanism.

It is important to note that Section 116.116, the amendment and alteration provision in Subchapter B, contemplates *changes* to facilities. In the de-flex context, there may not be any changes as contemplated in Subchapter B; however, the dialogue between the two agencies has been focused on existing regulatory mechanisms to restructure flexible permits with unit-specific emission limits, and if possible, caps. The TCEQ understands that EPA's position is that a separate rulemaking to establish a de-flex process is not an option. Accordingly, the agency has refined its review of potential de-flex mechanisms to essentially two options:

1) Permitting "Two-Step" –

Applications for an alteration and *amendment* under Subchapter B

Applications for an alteration (under Subchapter B) and *renewal* (under Subchapter D)

2) Permitting/Enforcement "Two-Step" – Application for an alteration under Subchapter B and Enforcement Order

Option 1

The permitting "two-step" de-flex option is a mechanism for companies to voluntarily and expeditiously restructure flexible permits to Subchapter B. The balance achieved with the two-step approach is a federally enforceable Subchapter B permit with unit-specific emission limits (as well as caps if appropriate) in a relatively short timeframe (approximately 45-60 days) followed by a permitting process which would allow for public participation.

In the first step, the summed emission units comprising the flexible permit cap would be apportioned on a unit-by-unit basis. Monitoring, reporting and recordkeeping requirements would be reviewed and updated as appropriate to ensure that the applicant can demonstrate compliance with the permit. Because there is no public participation requirement for an alteration, the alteration would include a condition requiring the permit holder to apply for an amendment or a renewal within a specific timeframe to allow for public review of the alteration as well as to conduct a "no circumvention" review of Major NSR requirements. The condition would also require that a copy of the application be submitted to EPA. TCEQ staff are reviewing the Title V condition which was agreed upon by Conoco Phillips and EPA as a template for an alteration condition.

Importantly, in the second step, the subsequent amendment or renewal application would be subject to public participation requirements under 30 TAC Chapter 39.

With regard to TCEQ's technical review and evaluation of the alteration application, the TCEQ would conduct its review in accordance with applicable provisions of 30 TAC Chapter 116, Subchapter B as further refined in EPA's May 14, 2010 letter addressing federal requirements applicable to the de-flex process, e.g., BACT, netting, etc.¹ See enclosed letter. Note that the alteration rule requires that "[a] request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with [BACT] requirements . . ." See 30 TAC Section 116.116(c)(4)

It is also important to note that if the criteria for a permit alteration are not met, the flex permit holder would be unable to avail itself of the "two-step" process. This in essence results in either an amendment (under Subchapter B) or a renewal application (under Subchapter D) as the mechanism for de-flexing.

Regarding Step 2 and public participation, it is important to note that state law sets forth specific public participation requirements for renewal applications. As reflected in the agency's recent public participation rulemaking preamble discussion, the renewal process is unique to state law. So, while the agency recently modified its public notice provisions to require notice of draft minor NSR permits to meet federal requirements, no changes were made to the renewal public notice provisions. See 30 TAC Section 39.419(e) and 35 *Tex. Reg.* 5205, June 18, 2010

To recap renewal application public participation requirements, if the application would not result in an increase in allowable emissions and would not result in an increase in the emission of an air contaminant not previously emitted, the commission may not seek further public comment or hold a

¹ TCEQ staff will clarify several items in the May 14, 2010 letter with EPA staff as part of the continuing dialogue on how to restructure flexible permits.

public hearing. See Texas Health and Safety Code (THSC) Section 382.056(g); 30 TAC Section 39.411(e)(11); and, 30 TAC Section 39.419(e). The TCEQ would apply its renewal rules if an applicant elected to pursue an alteration and renewal application process to de-flex its Subchapter G permit.

With respect to amendment applications, if a contested case hearing is requested 1) before the close of the 30-day comment period in response to the NORI for Minor NSR applications, or 2) before the close of the comment period [i.e., 30 days after final publication of second notice, Notice of Application and Preliminary Decision (NAPD) or the end of a public meeting held on the permit application) or within 30 days after the mailing of the Executive Director's response to comments for Nonattainment or Prevention of Significant Deterioration permit applications, if applicable, that hearing request will be considered by the commission (unless it is withdrawn)].² However, if the application would not result in an increase in allowable emissions and would not result in an increase in the emission of an air contaminant not previously emitted, the commission may not hold a contested case hearing. See THSC Section 382.056(g)

Option 2

Option 2 is similar to Option 1 -- the alteration would establish unit-specific emission limits while an administrative order under TWC Section 7.002 would require a no circumvention review of federal Major NSR requirements. If there was circumvention, there would be a technical requirement ordering the respondent to apply for proper authorization within a specific timeframe; the permit application process would include public participation. The enforcement order itself would allow for public input as set forth in TWC Section 7.075. A review of the unit-specific emission limits established in the alteration could also be covered by a technical requirement.

Similar to Option 1, with regard to TCEQ's technical review and evaluation of the alteration application, the TCEQ would conduct its review in accordance with applicable provisions of 30 TAC Chapter 116, Subchapter B as further refined in EPA's May 14, 2010 letter addressing federal requirements applicable to the de-flex process e.g. BACT, netting, etc.

Please do not hesitate to call me at (512) 239-5105 if you have questions. In addition, I encourage appropriate EPA staff to contact Richard Hyde, Deputy Director of the Office of Permitting and Registration at (512) 239-1317 or Stephanie Bergeron Perdue, Deputy Director of the Office of Legal Services, at (512) 239-0615, with questions regarding potential de-flex mechanisms.

Sincerely,



Mark R. Vickery, P.G., Executive Director
Texas Commission on Environmental Quality

Enclosure: May 14, 2010 letter from Deputy Regional Administrator Lawrence Starfield

² As discussed in TCEQ's October 23, 2009 letter to EPA, a request for a public meeting (or "hearing" in federal rules terminology) is distinct from Texas' contested case hearing process. TCEQ's recent air permitting public participation rulemaking addressed federal requirements for public meetings, including responding to all comments before an application is approved. See 30 TAC Section 55.156(b). These regulatory changes are effective June 24, 2010.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
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May 14, 2010

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

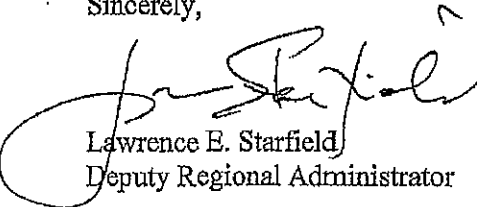
Dear Mr. Vickery:

During our meeting in Austin on April 1, 2010, EPA shared three discussion papers on how a permit rehabilitation process might proceed for flexible permits to address the consequences of a potential EPA decision to disapprove the flexible permit SIP package. The discussion papers address: 1) Creating unit-specific permit conditions, 2) Permit prioritization, and 3) an Audit program.

At our joint April 16, 2010 video conference call, you requested our position on four questions related to these discussion papers. These questions deal with issues such as EPA's interpretation of federal requirements (applicability, BACT and netting) as well as the impact of new standards.

We appreciate the benefit of our bi-weekly video calls and see these as an opportunity to continue to discuss next steps. We hope the next call will give us the opportunity to discuss any questions you may have on our answers, and to discuss your response to the three papers. Thank you for your continued willingness to devote staff and your time to the issues before us, ensuring that progress is made as quickly as possible.

Sincerely,



Lawrence E. Starfield
Deputy Regional Administrator

Enclosure

cc: Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

- Will EPA require 2010 best available control technology (BACT) or lowest achievable emission rate (LAER) for restructured flexible permits?

In general, we have the following view of the appropriate date to consider of when BACT or LAER would apply in determining new unit-specific limits. We anticipate that BACT or LAER will be applied considering the time of major construction or major modification. However, if it is determined through an audit or during the restructuring of the flexible permit that a source circumvented or failed to obtain a major NSR permit before commencing construction of a major stationary source or a major modification as required by the approved State Implementation Plan (SIP) during the time frame when the source had a flexible permit, then we will require the emissions unit(s) that underwent a physical change or change in the method of operation to obtain a major NSR permit for any regulated NSR pollutants which exceeded significance levels as a result of the change. Consistent with EPA's policy, a source must apply current-day BACT or LAER to such emissions units.

- Will EPA require BACT for greenhouse gas emissions (GHGs) for permits restructured after January 2, 2011?

The assignment of unit-specific emission limits does not necessarily by itself result in the triggering of BACT requirements for GHG. GHGs are not currently a regulated NSR pollutant (63 FR 17019, April 2, 2010), and therefore, a source would not currently need to address GHG BACT. However, after the time GHGs become a regulated NSR pollutant, sources in all states undergoing new construction and modifications will need to address the applicability of the major NSR permitting requirements to GHGs in accordance with rules issued by EPA.

Once GHGs become subject to regulation for purposes of Title V, sources also must describe their GHG emissions to the extent necessary for the permitting authority to determine if there are any applicable requirements.

- What netting rules apply to evaluating whether modifications cause significant increases in emissions?

The federally approved rules that exist when a source undertakes a potentially major modification apply when determining if the change triggers major NSR permitting. In the case of Texas, the existing SIP-approved, major NSR program is the basis of the netting rules that apply to determine if past changes triggered major NSR.

- Will NAAQS compliance have to be addressed in permits being restructured?

We will not require modeling to show compliance with a NAAQS when the permitting authority restructures Title V permits to eliminate flexible permits and assure that the Title V permit properly incorporates all Federally applicable requirements for the source unless such modeling is otherwise required by EPA rules or guidance.

If a source going through the restructuring process is also obtaining a new major NSR permit, the source generally will have to model and show compliance for any of the NSR regulated pollutants covered by the new NSR permit, and as otherwise required by EPA rules or guidance.