



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 12 2009

OFFICE OF
AIR AND RADIATION

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

Dear Mr. Vickery:

In my letter of October 30, 2009, I expressed my appreciation for the Commission's timely and detailed October 23, 2009 letter outlining your plans to address our concerns about State Implementation Plans (SIP) proposed by the Commission. We were particularly encouraged by your proposed schedule for rulemaking to correct the deficiencies in these SIPs identified in recent EPA Federal Register notices.

We have now completed a more detailed review of your letter. I have attached a response to your three questions as well as a detailed assessment of your proposed action plan. It identifies areas in which additional information is needed to fully understand the extent of the Texas Commission of Environmental Quality's (TCEQ) rulemaking actions, and areas in which important additional commitments will be necessary in addition to the steps you have already agreed to take.

My hope is that the Commission will work with the EPA staff to discuss and resolve quickly all of the issues identified in the attachment and our Federal Register notices. The Region 6 staff will be in touch to arrange a meeting. I am confident that working with you, industry, environmental organizations and community leaders, we will enhance the level of environmental protection provided by Texas State law and the Federal Clean Air Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Gina McCarthy".

Gina McCarthy
Assistant Administrator

cc: Mr. Bryan W. Shaw, Chairman, Texas Commission on Environmental Quality
Mr. Buddy Garcia, Commissioner, Texas Commission on Environmental Quality
Mr. Carlos Rubinstein, Commissioner, Texas Commission on Environmental
Quality

EPA Detailed Response to TCEQ Letter of October 23, 2009

Response to Questions

In your letter you pose three questions, stating that EPA's answers are critically important to resolving key deficiencies identified in the *Federal Register* notices (FRNs). Your first question is whether EPA would allow qualified facility permits and flexible permits to be used at major sources and, second, you ask whether EPA would conditionally approve flexible permit rules that establish source emission caps based on permit allowable emissions. These aspects of the qualified facility and flexible permits rules raise novel approaches to permitting that EPA has not specifically addressed in prior rulemakings. Nonetheless, we do not view the use of "allowable" emissions in regulations governing minor construction activities at minor or major stationary source to be prohibited *per se*. While we would like to provide assurances to TCEQ that we will approve a program based on allowable emissions for use at minor or major sources, we lack sufficient information to make this finding. We need to understand the other changes you will make to the regulations to address the concerns raised in our FRNs (e.g. modeling, enforceability, definitions) and understand the environmental effect of approving these programs into the SIP. In addition, any program a State submits to meet the requirements of Section 110(a)(2)(c) of the Clean Air Act (CAA) must regulate "the modification and construction of any stationary source as necessary to assure that national ambient air quality standards [NAAQS] are achieved." Any revision to the SIP also must comply with Section 110(l) and would not be approvable if it "would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act."

Importantly, TCEQ must explain how the environmental protection provided by each program assures protection of the NAAQS given the unique and important air quality concerns in Texas. TCEQ must also explain how the air quality protections provided in these new programs compare to the existing SIP-approved minor NSR program to assure that the program satisfies the provisions of Section 110(l) of the Clean Air Act (CAA). In essence, TCEQ will have to submit an environmental analysis of the new programs that explains the environmental benefits of the programs and compares this benefit to the existing SIP-approved programs. If TCEQ decides to continue such programs and perform the necessary demonstrations, it is very important that you coordinate such work with us to ensure that we can understand the purposes and goals of the program and assist in commenting on the methodology for the analyses. By working together, we can assure that you are addressing all of the issues raised in the FRNs.

The third question you pose relates to whether TCEQ's public participation rules are approvable if you provide a notice-and-comment hearing process for minor NSR draft permits. The addition of such a requirement to the minor NSR permit rules is a positive step toward the development of approvable rules, but it is not the only change needed to make your public participation rules approvable. Our November 26, 2009 FRN details the concerns that must be addressed before EPA can approve the public participation rule for the minor NSR program (see 73 Fed. Reg. 72009 to 72014), including: 1. the rule

does not provide an opportunity for public comment on the State's analysis of the effect of construction or modification on ambient air quality from new minor sources or minor modification identified under 40 CFR 51.160, including the State's proposed approval or disapproval; 2. Sections 39.403(b)(8) and 39.419(e)(1)(c) fail to provide the minimum public participation requirements of 40 CFR 51.161; and 3. Texas did not provide a demonstration of how the Chapter 39 and 55 rules for public participation for minor NSR sources regulated under the SIP meet the public participation requirements of 40 CFR Part 51.

Moreover, the November 2009 FRN also highlights necessary changes to the Texas PSD program including: 1. an opportunity for a public hearing; 2. the need for the public notice of a PSD permit contain the degree of increment consumption; 3. the need for a requirement to provide a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv) and CAA 165(d); and 4. the need for a requirement that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii) and to facilitate the appeals process. Additional detailed concerns are raised in the FRN related to plantwide applicability limits, flexible permits and other issues related to transparency of the permitting actions.

Seven Issues

I. Notice to Regulated Community

We appreciate your efforts to post a brief discussion of our FRNs on your website and to reference our September 25, 2007 fair notice letters. This should provide regulated entities with additional fair notice of their obligations to comply with the requirements of the Clean Air Act (CAA) and approved State Implementation Plan (SIP). we further ask that you include a copy of the fair notice letter on your website to ensure that any viewer can readily access the letter.

In the third item you propose to include on your website, you will advise regulated entities that any action taken on pending applications which are implicated in the FRNs may result in additional permitting or enforcement because of uncertainty about the future EPA action on the proposed disapprovals. It is very important for you to note on your website that sources remain obligated to apply for major or minor New Source Review (NSR) permits under the existing, approved SIP irrespective of any future action we take to approve or disapprove the SIP submittals. Obtaining a qualified permit or a flexible permit to comply with state regulations will not relieve regulated entities from the obligation to obtain the appropriate minor or major NSR permit to comply with Federal requirements. We ask that if you choose to issue flexible or qualified facility permits to satisfy state requirements that you make clear that a Federally-enforceable SIP-approved permit also may be required before beginning construction to comply with

Federal requirements in the existing, approved SIP. We also ask that you identify requirements emanating from qualified facility and flexible permits as State-only requirements in the Title V operating permits.

II. Timeline to Propose Rulemaking

We understand your explanation for not pursuing emergency rulemaking, and agree that TCEQ is setting an aggressive schedule for moving forward with regulatory changes. We would strongly urge you to make every effort to expedite adoption of the PSD BACT/40 C.F.R. 52.21 rulemaking. We believe that it is critical that you finalize that rule as early as possible to assure that major NSR permits meet CAA best available control technology (BACT) requirements. We appreciate the ambitious schedule you have set for the public participation rules. To achieve the goal of a final rule that meets federal CAA requirements, we strongly recommend a high level of interaction with EPA staff. Moreover, throughout your rulemaking process, it would be extremely helpful if TCEQ would maintain an open dialogue with Region 6 by, at a minimum, providing detailed outlines of proposed rules in the early drafting stages. This is absolutely necessary if there is to be any parallel processing on our part.

Even with a high level of interaction, there does not appear to be sufficient time between the TCEQ deadlines and the EPA Consent Decree deadlines. If EPA were to take the Texas actions into account, then we would need to re-negotiate our Consent Decree deadlines.

III. Reformation of TCEQ Existing Permits

We are encouraged that TCEQ identifies existing legal authority to fix existing permits. It is essential that you develop a plan for addressing existing permits using this legal authority. Even if we approve a flexible permit program and qualified facilities program into the SIP, our future action can not remedy any regulated entities' past reliance on these permits to avoid major or minor NSR permitting requirements. Moreover, we do not believe that all existing major NSR permits meet CAA BACT requirements given TCEQ State-BACT definition and case-by-case determination process. We ask TCEQ to work with EPA to devise a plan that will offer industry source(s) an opportunity to true-up their permitting and emission history so that when SIP-based federally-enforceable permit program is approved sources will be in the best position to obtain whatever permits are required.

Finally, EPA also would like to further discuss Footnote 9 of your letter with your staff. We do not agree that your current public participation process meets major NSR public notice requirements and would like to better understand your position on this issue. We are confident that working together we can implement a manageable plan for addressing existing permit deficiencies.

IV. Initiate Rulemaking to Address Public Participation Requirements

We are encouraged by your willingness to address public participation requirements and believe you propose some positive regulatory changes. Importantly, however, your letter does not contain a detailed outline of the scope of your rulemaking efforts and it will be important to coordinate your actions with Region 6 to assure that all public participation concerns identified in our FRN are addressed for all SIP-approved permitting regulations. EPA would also like to better understand how existing statutory authority precludes you from implementing a second public hearing before completion of final rule changes.

V. Increase Transparency of New and Re-issued Title V Permits

We appreciate your commitment to continue a dialogue with EPA on Title V transparency issues and understand that you may face resource constraints. Nonetheless, we believe that it is imperative that you take immediate steps to assure that your permit writers clearly show how proposed permits satisfy CAA Title V requirements when issuing new, revised or renewed Title V permits. We believe that responding to citizen comments and EPA objections on every Title V permit that incorporates a flexible or qualified permit and fails to explain how it meets all applicable requirements of the Act will be a much larger resource burden for the State. Accordingly, we ask TCEQ to re-evaluate its prioritization of this issue so that there is no further delay in assuring increased transparency of Title V permits.

VI. Schedule for Correcting Deficiencies Identified in Two Title V Petitions

We understand TCEQ's position is that our Title V objection Orders raise "complex programmatic issues," and that you are reluctant to commit to a specific schedule to resolve these objections. We encourage you to work as expeditiously as practicable to respond to the objections on the Premcor and Citgo permits, and to provide for public comment on new draft permits. Your positive action on these two permits can become a model for other permits, and can alleviate the need for many objections by EPA to Title V permits.

VII. Clarifying the Legal Meaning of Texas Minor Source Programs in Comparison to Federal Definitions

TCEQ's commitment to clarify that flexible permits and qualified permits may only be used to satisfy minor NSR permitting requirements represents a positive step toward developing approvable programs. However, EPA continues to believe that engaging in a meaningful discussion on the definitional differences between the State program and Federal requirements will improve everyone's understanding of Texas' regulatory intent, and assure that any objectionable differences are addressed in your rulemaking process. Only responding to the questions we raised in the FRNs in your comments on the rulemakings may not fully accomplish this goal. Accordingly, we would like to engage in further discussions with your staff on this issue.