



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Texas Commission on Environmental Quality
Commissioners' Offices

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SEP 13 2010 Chief Jay

Bryan W. Shaw, Ph.D.
Chairman
Texas Commission on Environmental Quality
Post Office Box 13087
Austin, TX 78711-3087

DUE DATE: FYI

Dear Dr. Shaw:

Thank you for your letters of August 2, 2010, about new source review (NSR) permitting in Texas after January 2011, and of August 6, 2010, about Texas Commission on Environmental Quality (TCEQ) air pollution permits programs. Since my appointment as regional administrator on November 30, 2009, I have placed a high priority on resolving the air permitting and state implementation plan disagreements that have existed for many years between TCEQ and the U.S. Environmental Protection Agency (EPA).

In your August 6, 2010, letter you discussed issues related to state implementation plan (SIP) rulemakings, converting flexible permits, and incorporation by reference (IBR) in Title V operating permits. I feel each deserves a full response, so I will structure this letter in that manner.

SIP Rulemakings

As you know, EPA is subject to a consent decree and legal-settlement with industry litigants ("BCCA agreement") to act on a series of SIP packages, most of which were sent to EPA by TCEQ and its predecessor agencies long before you and I were in our current positions. While the BCCA agreement has put EPA under an aggressive workload schedule to act on Texas SIP revisions, acting on these SIP packages will provide clarity that is well overdue.

Spurred by the BCCA agreement, collaborative efforts between our two agencies to restore the core NSR program are underway. For example, EPA was pleased to be able to work with TCEQ on public-participation rules. I am encouraged by the positive direction of the revised rules. For instance, adding a notice and comment period on draft NSR permits once the technical review is complete will give all interested parties an improved opportunity to provide input. In addition, my staff was glad to participate in conference calls and meetings about TCEQ's recent work to reinsert the federal definition of best available control technology (BACT) into the TCEQ's prevention of significant deterioration (PSD) permitting rules. While reinsertion of a definition alone may not be sufficient to ensure that TCEQ processes comply with federal requirements, it is an

essential move in the right direction. The work on these two rule submittals is vital to help repair the core NSR permitting program at TCEQ. We look forward to working with the state as it moves to address additional issues with the core program, including the NSR Reform regulations.

I must contrast the work on these rules, which are focused on the core NSR permitting program of the TCEQ, to other rule submittals. On April 30, 2010, we finalized our disapproval of the Qualified Facilities submittal, and on June 30, 2010, we finalized our disapproval of the Flexible Permit submittal. Unlike public participation or the federal definition of BACT, the Flexible Permitting Program and the Qualified Facilities exemption are not required core elements of the federal Clean Air Act (CAA) or components needed for the approved elements of the Texas SIP to operate.

I know that TCEQ is considering a new state rule package, to create another "flexible" permit program. As noted in Assistant Administrator McCarthy's November 12, 2009, letter to Mark Vickery, among the requirements that would have to be met before the Agency could consider the approvability of a new flexible permit program are CAA Sections 110(a) (2) (c) and 110(l). Section 110 (a) (2) (c) of the Act requires that SIP programs have enforceable emission limitations and other control measures to meet attainment of the National Ambient Air Quality Standards (NAAQS). Section 110 (l) further requires that if a state submits any revision to its SIP (including alternative preconstruction permitting options), then it must demonstrate how this revision would not interfere with any applicable requirement concerning attainment, reasonable further progress (RFP), or any provision of the CAA.

A rigorous technical demonstration is required, as discussed in the November 12, 2009, letter to Mark Vickery. Obviously, because of the requirements of the CAA, EPA cannot guarantee that a new SIP submittal from any state, whether for a new flexible permitting program or for any other purpose, will obtain EPA approval, nor opine on how long approval could take if revisions to submittals are necessary.

While our primary concern is restoring the core NSR program in Texas, my staff sent preliminary comments on the new flexible permitting program draft state rulemaking to TCEQ on August 2, 2010, in which we identified some major concerns. We understand that TCEQ may eventually adopt a final rule and send it to EPA for evaluation and consideration for incorporation into the SIP. All SIP-approved states have the prerogative to propose changes or amendments to their SIPs, and EPA will perform a full evaluation of the new program if it is submitted to the Agency. I must be frank that the demonstration required for a new flexible permitting program to get approval will not be easy if the new program has common elements of – and/or is implemented in a manner similar to – the prior program that we just disapproved.

Our agencies also need to consider the connection, or lack thereof, between future "flexible" rulemaking and the current holders of flexible permits issued under the previous program. The 125 existing flexible permits that were issued under the previous program do not and will not have an automatic connection to any future "flexible"

permitting regime. Even if the state were to develop a flexible permit program that met federal requirements, and that program was approved into the SIP, sources would still have to transition their existing flexible permits into permits that complied with the federally approved program.

In your letter of August 6, 2010, you stated that you believed that we had lost focus on rulemaking as the primary goal for both agencies to reform TCEQ's air permit program. While rulemaking is an essential leg of the agreed pathway, reform of the current TCEQ permitting program is just as important. Indeed, in November 2009, Assistant Administrator McCarthy stressed the need to address both rulemaking and reform of the existing program. Since then, I have made it clear to you in our conversation on March 2, 2010, and in subsequent conversations that, in addition to rulemaking, reform of the current TCEQ permitting program is just as critical to give the business community and the public the regulatory certainty they require.

As a result, I believe that we should focus our collective resources on addressing the core Texas NSR program and assisting the 125 flexible permit holders' transition into that program. There are already approximately 1700 holders of regular (non-flexible) Texas NSR air quality permits, including many major refiners, utilities, chemical companies, and large federal facilities. In addition we also need to correct issues we have identified in our Title V permit objections, such as TCEQ's use of certain permits by rule (PBR), and the use of IBR.

Transitioning Flexible Permits

I want to thank Mr. Vickery and the dedicated members of your staff for submitting a proposal to us on May 24, 2010, on how to transition flexible permits. I committed to Mr. Vickery and to Commissioner Rubinstein that if a rigorous program was developed by the TCEQ, in consultation with EPA, then I do not intend to initiate permit objections, the reopening, revising, or revoking of permits, or requests for new federal permit applications for companies transitioning their permits in that process. The TCEQ proposal has initiated a lot of discussion within the Agency, and I know my staff has talked about its elements with their TCEQ counterparts on numerous occasions.

EPA has many concerns about using an "alteration" as a first step in any two-step process, including a lack of transparency and enforceability. We could spend many months of valuable time trying to work out a way that the use of an alteration in a two-step process might be acceptable to create interim permit limits, but there is no guarantee that it would be successful. We believe that better alternatives exist, and EPA and TCEQ staff is working on a process that establishes federally-applicable, unit-specific limits, allows for public comment, and gives regulatory certainty to permit holders. Those discussions seem promising, and we are committed to working with you to define such a process.

In parallel with that effort, EPA will soon issue a federal audit program that will allow flexible permit holders to determine the federally-applicable requirements for their

facilities, and simultaneously receive an enforcement covenant from EPA for any circumvention issues that are identified during the audit.

As I have told numerous industry stakeholders, my primary goal is to get good permits and to do so through processes that involve opportunities for public review and comment.

The most critical elements of good transitioned permits will be the unit-specific federally-applicable requirements, and determining these requirements will require an examination of the unit's operational and permitting history. This will be the core element of the federal audit program and I am encouraged that TCEQ has engaged us in a discussion of the kind of review that a TCEQ-led program should require from permit holders so that the process has EPA concurrence.

I sent a letter on August 9, 2010, to Commissioner Rubinstein, in which I outlined the steps I felt a proper permit transition should include. As we discussed during our meeting last Tuesday, EPA looks forward to continued dialogue on this issue with TCEQ.

Incorporation by Reference in Title V Permits

EPA has objected to an unprecedented number of TCEQ draft Title V operating permits, partly because for many of them TCEQ did not explicitly write all the federally applicable requirements in the Title V permits. Instead, the Executive Director's policy has been to only refer to the previously-issued NSR permits in a plain list of permit ID numbers, the process of IBR.

I want to make sure that EPA's position on this matter is clear. EPA expects that on the face of the Title V permit, TCEQ will list the applicable emissions limitations and standards including those operational requirements from underlying major NSR permits that assure compliance with all applicable requirements. IBR of these requirements is not appropriate, not by TCEQ nor by any other state agency. IBR of major NSR permits into TCEQ-issued Title V permits, without bringing emissions limits forward onto the face the permit, was not approved as a part of the Texas Title V program and does not comply with the May 28, 2009, orders from Administrator Jackson regarding two Texas-issued Title V permit petitions. EPA intends to continue to object to Title V permits that utilize IBR in this manner for major NSR permits. This is not a new message. In her October and November 2009 letters, Assistant Administrator McCarthy made it clear that while EPA would work with TCEQ on its SIP packages, the Agency would also continue to review permits and raise objections if those permits failed to meet the requirements of the CAA.

In your August 6, 2010, letter, you stated that TCEQ had responded to approximately 26 of the 39 objection letters, and that you had submitted a proposal to address IBR issues. However, as your staff is aware, those responses did not address our

IBR concerns. We have provided to TCEQ examples of Title V permits from several other state operating programs, including states within Region 6 such as Louisiana. These states do not use IBR for their major source permits in the manner TCEQ does, and the Agency is not objecting to Title V permits in these states on IBR grounds. It is unclear to me why TCEQ continues to send draft Title V permits to EPA, especially and including recent proposed draft permits for facilities that we have already objected to once, when those permits do not list the underlying requirements from major NSR authorizations, and instead use IBR.

In your letter, you wrote that the IBR issue with the Harrington Station Power Plant had been solved in discussions between TCEQ and EPA. After reviewing the matter with my staff, I agree that the issue with this applicant has been largely resolved. The resolution of the Harrington permit, however, has not led to resolution of IBR deficiencies for the remaining 1700 Title V permit holders. In fact, the Executive Director continues to issue Title V permits that do not comport to the Harrington model or resolve the IBR deficiencies. Likewise, TCEQ's responses to EPA's Title V objections on IBR do not follow Harrington or resolve the IBR deficiencies. It is worth noting that Harrington was only resolved because of several direct discussions between EPA and the permit applicant, as well as discussions between EPA, TCEQ, and the permit applicant. The applicant had to directly request that TCEQ include a non-IBR table of all the federally applicable requirements in a new permit because of its desire to get a federally-consistent permit.

I was also extremely concerned to see that in the new proposed draft Title V permit for the Citgo facility issued on August 13, 2010, TCEQ defended its use of IBR of major NSR permits. The issuance of the Citgo permit and the positions set out in that proposal represent a severe obstacle to continued progress on IBR issues, and I would urge you to reconsider them.

It is regrettable that IBR has become such a stubborn issue to resolve between our agencies. One of the clear goals of the Title V program was to provide regulatory agencies, permit holders, and the public with transparent and inclusive operating permits. Inappropriate use of IBR of underlying requirements undermines that key goal. If TCEQ would include additional narrative information like that provided in Louisiana permits, or detailed tables sorted by unit with appropriate monitoring, reporting, and recordkeeping, then we could quickly make progress and instead focus attention on the more difficult issues related to air permitting.

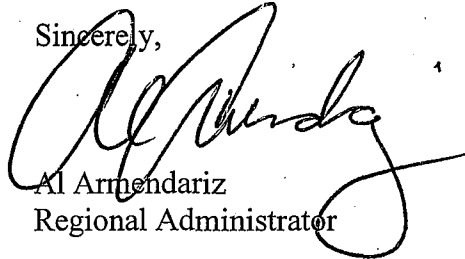
I would be remiss if I did not bring to your attention that, in light of the large number of EPA objections to Title V permits, TCEQ's practice of issuing permits inconsistent with what EPA approved in the Title V program (*even after* those concerns have been brought to TCEQ's attention in writing), and the recent development of EPA now beginning to request federal Title V permit applications for facilities in Texas, we now feel compelled to consider our CAA authorities related to programmatic deficiencies in the TCEQ Title V program.

Conclusion

The Clean Air Act has a long track record of success in its federal/state partnership structure. EPA is anxious to work with TCEQ on the matters outlined in this letter. TCEQ already has a core NSR program and an approved Title V operating permits program. Their proper legal underpinnings and correct implementation of these approved programs are cornerstones of a good EPA/TCEQ relationship. Where there are regulatory or implementation concerns with the core programs, solving these problems is of utmost priority for the Agency.

As you know, TCEQ and EPA staff have been meeting and communicating on a regular basis about TCEQ air permitting programs. I am encouraged that serious dialogue continues between our EPA and TCEQ colleagues and I look forward to continuing to work with you and your staff to address these important issues. Please contact me at (214) 665-2100 if you have any questions.

Sincerely,



Al Armendariz
Regional Administrator

cc: Mr. Mark Vickery
Executive Director, Texas Commission on Environmental Quality

Mr. Buddy Garcia
Commissioner, Texas Commission on Environmental Quality

Mr. Carlos Rubinstein
Commissioner, Texas Commission on Environmental Quality