



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
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August 9, 2010

Carlos Rubinstein, P.E.
Commissioner
Texas Commission on Environmental Quality (TCEQ)
Post Office Box 13087
Austin, Texas 78711-3087

Dear Commissioner Rubinstein:

Thank you for coming to Dallas on July 27, 2010 to talk about the TCEQ air permits. I hope you found the meeting as productive as I did.

As we work together, it is important that we resolve two key areas: (a) incorporation by reference in operating permits, and (b) transition mechanisms by which existing flexible permit holders can receive SIP-approved permits. I want to share additional thoughts I have been considering since our meeting about both topics.

On June 10, 2010, I sent a letter to Mark Vickery outlining my concerns with incorporation by reference (IBR). EPA has provided TCEQ with multiple options to address IBR. I am pleased that you agree that we should be able to come to a quick resolution on IBR; we believe that inclusion of additional narrative information like that provided in Louisiana permits, or a detailed table sorted by pollutant and unit with appropriate monitoring, reporting, and recordkeeping links, may be an acceptable permitting structure.

It serves everyone's best interest for us to come to agreement on IBR solutions quickly. As soon as emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements, are included in operating permits, EPA will be in a position to stop objecting to permits on IBR grounds. I remain optimistic that this is one issue we should be able to solve in the near-term.

In response to our discussions of a state process by which businesses with flexible permits can obtain SIP-approved permits, Mark Vickery sent a May 24, 2010 letter setting out variations of a "two-step deflex" process. As we discussed on July 27th, to the extent that TCEQ is contemplating eliminating some of the flexible permit terms using the state's alteration process as a "step one," EPA has many concerns, including transparency and enforceability. We could spend many months trying to work out a way that use of an alteration in a two step process might be acceptable to create interim permits. However, there is no guarantee that such an effort would be successful, and thus trying to move forward with it places at risk our joint objective of soon developing a transition mechanism to get SIP-approved permits to flexible permit holders. We do believe that other options exist for giving some near-term certainty to permit holders and to both agencies, and we look forward to discussing these with you and your staff.

I was pleased to hear that plans are underway for a joint meeting between TCEQ and EPA representatives later this week. I have had several discussions with my staff about the upcoming meeting, about my goals for current flexible permit holders, and the methods that I think allow for a legal and transparent transition process.

EPA is about to finalize with a voluntary federal audit program that will include a year-by-year examination of operational and permitting history during the time of the flexible permit, to determine the appropriate unit-specific requirements. It would be a positive development for TCEQ to establish a process that accomplishes the same goal, and we have prioritized working with you on this matter. As a way to help make the upcoming TCEQ/EPA meeting productive, I wanted to outline for you some of the key concepts I have shared with my staff about how to transition flexible permits.

- (1) The process should include an enforceable mechanism so that companies that enter into it complete it in a timely manner. EPA expects companies transitioning their flexible permits to submit permit applications with unit-specific limits (including mass per unit time limits) to TCEQ within 6-12 months.
- (2) The primary goal is to determine the federally-applicable requirements for each emission unit and set them forward in a permit through a process that involves opportunities for public review and comment.
- (3) The Flexible Permit cap would be eliminated, but we can discuss the use of a federal plantwide applicability limit (PAL) if the federal program is adopted by the Commission and the appropriate rules are approved by EPA in the SIP. In addition, companies have access to alternate operating scenarios under Title V, which can provide important operational flexibility.
- (4) The starting point for the transition should be the federally-applicable requirements spelled out in federal rules, prior permits issued pursuant to federally-approved state rules, consent decrees and other enforcement agreements, and the approved SIP the day before the first flexible permit was issued.
- (5) An examination (i.e., a walk-forward, look-back, true-up, or de-flex) should be completed, in which the operational and permitting history of the emission units under the flexible permits is examined, so that the federal consistency of the permits and changes to the permits are determined. Permit terms established by the TCEQ in ways that were consistent with federal requirements would be carried forward.

- (6) If the examination identifies changes that were made that are not consistent with federal requirements, then the permit conditions would need to be corrected, and the issue of NSR circumvention would be handled through enforcement.
- (7) For units that have received consent decrees or for which applicable requirements were established by regulation after the issuance of the flexible permit, examinations of operational or permitting history between the time of the first flexible permit and the more recent action setting the applicable federal requirements are not needed for the relevant permit terms (i.e., a “slide forward”).
- (8) The examination should result in a nonattainment NSR/PSD permit application submitted to TCEQ by a deadline. This application, along with TCEQ’s technical review and the draft permit, should be available for public and EPA review.
- (9) The final permit should be properly incorporated into a Title V operating permit, without use of incorporation by reference.

As I committed to you, I am willing to withhold the tools available to EPA – such as a new federal permit application request, or an objection, reopening, or revocation of a permit – for flexible permit holders entering into a process we jointly develop for this permit transition.

On a related matter, there have been questions from numerous stakeholders about whether the process of transitioning flexible permits into SIP-approved permits would trigger upcoming federal requirements regarding greenhouse gases (GHGs). I want to reiterate the Agency’s position, and provide some clarity on this issue.

GHGs will become regulated NSR pollutants after January 2, 2011. After this date, sources in Texas and all states undergoing major new construction or major modification will need to analyze the applicability of the major NSR permitting requirements for GHGs in accordance with rules issued by EPA.

However, EPA does not view the assignment of unit-specific emission limits and the transition to SIP-approved permits by current flexible permit holders alone as triggering federal NSR requirements for GHG rules, even if this occurs after January 2, 2011.

I know the EPA staff looks forward to discussing the transition process with their TCEQ counterparts at the upcoming meeting, and they are anticipating that TCEQ will bring forward its own ideas about these and other issues.

I appreciate your leadership and our recent discussions, and I look forward to additional productive meetings.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Al Armendariz". The signature is fluid and cursive, with a large initial "A" and a long, sweeping underline.

Al Armendariz
Regional Administrator

cc: Dr. Bryan Shaw, Chairman, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ
Mr. Mark Vickery, Executive Director, TCEQ