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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 13, 2008

Mr. Larry Starfield  
Deputy Regional Administrator  
United States Environmental  
Protection Agency Region 6  
1445 Ross Avenue Suite 1200  
Dallas, Texas 75202

Re: Public Participation

Dear Mr. Starfield:

I'm writing in response to the letters from the U. S. Environmental Protection Agency (EPA) Region 6 and ongoing discussions between EPA and the Texas Commission on Environmental Quality (TCEQ) staff regarding Texas' flexible permit program. The concerns expressed by EPA in its March 12, 2008 letter regarding flexible permits are broader in applicability than the flexible permit program. These concerns have consequences for other parts of the New Source Review (NSR) permitting programs in Texas and have the potential to affect both major NSR and minor NSR permit reviews. The issues relating to the State Implementation Plan (SIP) approval of TCEQ's public participation rules will need to be resolved before the concerns which are specific to the flexible permitting program can be addressed. This response addresses some of the issues related to public participation as part of the air permitting program. A more detailed response to EPA's letter regarding TCEQ's public participation rules presented for SIP approval will also be provided to EPA.

EPA has asked TCEQ to provide a justification of why our rules are approvable. In implementing the requirements of House Bill (HB) 801 (76<sup>th</sup> Legislature, 1999), the public participation rules relating to air permitting were clarified and strengthened as compared to the rules previously in effect (last amended in 1998), which were most recently approved into the SIP in 2002 and 2006, specifically:

1. The general requirement for publishing notice in § 116.130(a) was changed to provide a uniform time for publication of the notice of the application (within 30 days of determination of administrative completeness). § 39.418.
2. Previously, permit amendments were the subject of notice at the discretion of the executive director, without any specific criteria included in the rule [§ 116.130(a)]. This

provision was removed, thus requiring notice of amendment applications [§ 39.403(b)(8)] as required by § 39.402.

3. Previously, a copy of the application was required to be available for public inspection in Austin and at the appropriate regional office. §§ 116.131(b) and 116.132(7). The 1999 rule also required a copy be placed in a public place, available for inspection and copying, in the municipality in or nearest to the proposed location of the facilities that are the subject of the application. § 39.405(g).
4. The new rules add the opportunity to request a public meeting, and, if held, a written response is provided to oral comments made together with any timely written comments. In addition, this response to comments (RTC) is considered by the commission if it considers any contested case hearing requests in a commission meeting. The RTC is provided to all commenters and persons who request to be on a mailing list related to the application. §§ 39.420, 55.152, 55.154, 55.156.
5. Notice of preliminary decision and draft permit was extended from applying only to nonattainment and prevention of significant deterioration (PSD) permits [see § 116.132(a)(6)] to any minor source permit or permit amendment which was subject to notice of application if that application was the subject of a request for contested case hearing. § 39.419.

In addition, both sets of rules go beyond minimum federal requirements by:

1. requiring sign posting in §§ 116.133 and 39.604;
2. providing for a "display type" notice in the newspaper in §§ 116.132(b) and 39.603(c)(2);
3. providing for responses to comments on certain minor source permit applications in §§ 55.152, 55.154, 55.156;
4. providing alternate language notice in newspaper and sign posting in §§ 116.132(c), 116.133 (f), 39.405(h) and 39.604(e); and,
5. providing an opportunity for contested case hearings, which are trial-type proceedings. In addition, in some cases, more than one public meeting to accept public comment is held.

Therefore, there was no backsliding with the implementation of the new requirements in HB 801 and the commission's reorganization of its public participation rules for air quality permits as part of its overall public participation rules. However, TCEQ acknowledges there were some additions to the public participation rules, such as referencing various types of permits (including flexible permits), that were not in the previously SIP approved rules.

For TCEQ to consider changing its rules, TCEQ needs EPA to provide a detailed legal basis for certain specific public participation requirements that EPA has included in its letters, particularly notice of all minor amendments and alterations to PSD and nonattainment permits. Changes to TCEQ rules may require statutory changes which would need to be presented to the Texas

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Legislature. In addition, based on the June 3, 2008 conference call, we understand that EPA will develop options to resolve this issue based on current state law.

The TCEQ is willing to work with the EPA to gain an understanding of EPA's specific concerns as they relate to and affect our air permitting program as a whole. After we have reached an understanding regarding what specific public participation rules can achieve SIP approval, we can then begin to address concerns that are specific to the flexible permitting program.

We appreciate the opportunity to discuss these concerns and look forward to reaching a position of clarity so that we can proceed in addressing your questions related to the flexible permit program.

Sincerely,



Glenn Shankle, Executive Director  
Texas Commission on Environmental Quality

cc: Mr. Dan Eden, Deputy Director, Office of Permitting, Remediation and Registration  
Ms. Stephanie Bergeron Perdue, Deputy Director, Office of Legal Services  
Mr. John Sadlier, Deputy Director, Office of Compliance and Enforcement  
Mr. Richard A. Hyde, P. E., Director, Air Permits Division