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Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 23, 2009

Ms. Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 6101A
Washington, DC 20460

Dear Ms. McCarthy:

This letter addresses the seven issues raised in Carl Edlund's September 29, 2009 email. Pursuant to your request at our October 8, 2009 meeting, we are providing a formal response.

First, the participation of Environmental Protection Agency (EPA) headquarters representatives, including yourself and Bob Sussman, is important to the Texas Commission on Environmental Quality (TCEQ) in ensuring that EPA appreciates and understands the TCEQ's perspective on its air permitting program. Your direct participation in the meeting with TCEQ commissioners and executive management is recognized for the importance that EPA places on Texas' New Source Review (NSR) air permitting program. Likewise, TCEQ is keenly interested in resolving the issues identified in EPA's *Federal Register* notices so as to provide certainty to Texas' air permitting process – to both the regulated community and the public.

Second, I hope that this letter will lay the foundation for a path forward to address the global concerns raised by EPA in September. I also ask, not to belabor the issue but rather to advance a dialogue, that EPA recognize the tremendous advances in improved air quality made by Texas with programs such as the Flexible Permit as well as stringent State Implementation Plan (SIP) control measures. While the Flexible Permit rules adopted by TCEQ's predecessor agency in 1994 could have been more concise with respect to the overlay of federal permitting requirements, the TCEQ was able to bring grandfathered facilities into the permitting process absent a modification.¹ This was the beginning of an effort to end the status of grandfathered

¹ The term "modification" is defined by the Federal Clean Air Act §111(a)(4) as "[a]ny physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

facilities in Texas -- which notably has been accomplished.² So, I question the utility of an extended dialogue debating what reductions might have been achieved over a decade ago when the fact of the matter is that virtually all grandfathered facilities have either shut down or obtained permits. Further, as you are aware, the FCAA provides the EPA with a powerful enforcement tool to gather evidence to ascertain whether there has been circumvention of federal requirements.³ In short, TCEQ unequivocally recognizes the importance of public participation and practical enforceability, but let's not let process overcome substance. The TCEQ will continue its commitment to address EPA's concerns in an expeditious, prospective manner so that we can focus our resources on continued improvement to air quality. Accordingly, I have addressed EPA's global comments and concerns below.

EPA's September 29, 2009 Email

I. Notice to the Regulated Community

EPA requested that the TCEQ issue a letter to industry advising "that it would be unwise for new permit applicants to seek Flexible Permits or to become Qualified Facilities because of the long term ramifications should EPA's final action on the proposals be consistent with proposals."

Rather than sending a letter to a large number of regulated entities, TCEQ will email via listserv and post on its website (with link from TCEQ's homepage) the following information:

- 1) Brief discussion of and link to *Federal Register* notices;
- 2) Reference to EPA's September 25, 2007 Fair Notice letters in which EPA notes federal enforceability issue concerns with the current EPA-approved SIP; and,
- 3) Advise regulated entities that any action taken on pending applications which are implicated in *Federal Register* notices may result in additional permitting or enforcement because of the uncertainty of future EPA action on the proposed *Federal Register* disapproval notices.

II. Timeline to Propose Rulemaking

EPA requested a timeline for TCEQ to propose rules addressing the *Federal Register* notices, including "emergency rulemaking for re-establishing Prevention of Significant Deterioration."

As noted at our October 8, 2009 meeting, TCEQ commits to initiate rulemaking to address 40 Code of Federal Regulations Section 52.21 Prevention of Significant Deterioration (PSD) requirements, including the definition of Best Available Control Technology (BACT). Additionally, TCEQ notes EPA has stated in writing that it "agrees with many of the statements in TCEQ's [June 13, 2008] letter" regarding TCEQ's long-standing three-tiered, federally equivalent BACT analysis.⁴ TCEQ trusts that initiation of rulemaking to address PSD BACT requirements will address citizen concerns that "TCEQ is failing to properly implement the Texas PSD program." TCEQ adamantly disagrees that it is failing to implement its PSD program based on its continued evaluation of major NSR requirements notwithstanding the

² See also Senate Bill (SB) 766 (76th Regular Session, 1999) and House Bill 2912 (77th Regular Session, 2001); Texas and Safety Code (THSC) Sections 382.0519 and 382.05181 respectively.

³ In 2008 EPA sent "Section 114" letters to a number of Texas Flexible Permit holders. If EPA has identified or needs assistance in evaluating any federal permitting circumvention, TCEQ is available to provide the appropriate resources.

⁴ EPA Region 6 October 27, 2008 letter responding to TCEQ's four letters dated June 13, 2008

deletion of the incorporation by reference of the federal regulatory citation. With respect to emergency rulemaking, the Texas Administrative Procedure Act (APA) provides that an emergency rulemaking is effective for not longer than 120 days with a one-time extension of 60 days.⁵ In short, the rules expire on their own accord. Given the limited effectiveness of an emergency rulemaking, the TCEQ will expedite and prioritize its rulemaking to address PSD requirements in accordance with Texas APA non-emergency rulemaking requirements.

Please also note that state law requires adoption of a proposed rule within six months of publication, or the proposed rule is considered to have been withdrawn.⁶ Accordingly, the schedule below for proposed rulemaking will necessarily require adoption within six months of proposal to comply with the Texas APA.⁷

> Public Participation Rulemaking:

Consent Decree deadline for EPA final action: 11/30/2009

TCEQ Rule Proposal: 12/9/2009 Agenda

> PSD BACT/40 CFR 52.21 Rulemaking:

Consent Decree deadline for EPA final action: Aug. 2010 (NSR Reform)

TCEQ rule proposal: 1/13/2010 Agenda

> Qualified Facilities Rulemaking:

Consent Decree deadline for EPA final action: 3/31/2010

TCEQ Rule Proposal: 3/30/2010 Agenda

> Flexible Permits Rulemaking:

Consent Decree deadline for EPA final action: 6/30/2010

TCEQ Rule Proposal: 5/19/2010 Agenda

> NSR Reform Rulemaking:

Consent Decree deadline for EPA final action: 8/31/2010

TCEQ Rule Proposal: 8/2010 Agenda⁸

Of critical importance to TCEQ is confirmation from EPA on conceptual approaches to resolving several key deficiencies identified in the *Federal Register* notices:

- 1) If TCEQ limits both Qualified Facilities and Flexible Permits to Minor New Source Review (NSR) Program (no federal circumvention), is the use of these Minor NSR Programs at major sites allowed?
- 2) Likewise, will EPA conditionally approve Flexible Permit rules that establish a source cap based on permit allowables (after first concluding that federal NSR is not triggered and there is no federal circumvention of Major NSR requirements)?

⁵ Texas Government Code Section 2001.034

⁶ Texas Government Code Section 2001.027

⁷ The proposed rulemaking schedule coincides with the deadlines for EPA final action set forth in the Consent Decree and Settlement Agreement (Consent Decree) resolving the lawsuit brought by the Business Coalition for Clean Air (BCCA) Appeal Group, et al. See notice of Proposed Consent Decree and Settlement Agreement; 74 Fed. Reg. 38,015 (July 30, 2009).

⁸ Commission agenda meetings are scheduled only through June 2010 at this time.

- 3) If TCEQ revises its public participation rules to provide for a notice and comment hearing process for Minor NSR draft permits, will EPA approve TCEQ's public participation rules?

From TCEQ's perspective, the goal of "simultaneous" TCEQ rule proposals and EPA final action is conditional approval or other appropriate, favorable final action. TCEQ recognizes that simultaneous action will require extensive coordination with EPA on draft rule language to ensure a favorable final action by EPA. TCEQ also understands that given the deadline for final action on EPA's *Federal Register* notice regarding public participation, EPA may have to proceed with limited approval and limited disapproval absent an extension of the November 30, 2009 deadline established in the Consent Decree. TCEQ further acknowledges that the *Federal Register* notices raise additional, detailed issues that will need to be addressed in its rulemaking.⁹

III. Reformation of TCEQ Existing Permits

EPA requested that TCEQ "publish a strategy to reform existing permits should proposed disapprovals become final." TCEQ respectfully submits that it will not "reform" permits absent rulemaking to address *Federal Register* notices and subsequent EPA SIP approval. So, a strategy for reforming permits necessarily involves rulemaking and an accompanying schedule which is discussed above. To that end, TCEQ commits to coordinate with EPA and work diligently towards conditional approval of its rules.

With regard to long-term reformation of its permits, a preliminary review and analysis of the Texas Clean Air Act (TCAA) provides a legal basis to both revise its procedural rules and update existing permits. The essential elements of the process for reforming TCEQ permits are briefly described below.

⁹ In the November 2008 *Federal Register* notice, EPA cites specific rule sections as deficient regarding new or modified Minor NSR sources, projects subject to PSD as well as Project for a Plantwide Applicability Limitation (PAL). With regard to PSD projects, TCEQ rules address the concerns raised by EPA. As EPA is aware, TCEQ's procedural rules apply to water quality, waste and air quality applications. As a result, requirements relating to requesting a public meeting and responding to public comment, for example, do not specify a specific permitting program.

With regard to PSD permit applications, TCEQ rules currently require notice of draft permit, opportunity to request a public meeting and preparation of a response to comment prior to approval of a permit application. See 30 Texas Administrative Code (TAC) Sections 39.403(b)(8); 39.419(e)(3); 39.420; 39.603; 39.411(c)(6); and 55.156. With regard to notice of the decree of increment of consumption, TCEQ includes this in its notices based on 30 TAC Section 39.411(b)(12) which provides authority to include any other information needed to satisfy public notice requirements of any federally authorized programs. In addition, 30 TAC Section 39.413(12) provides authority for notice to be sent to the persons identified in its November 2008 *Federal Register* notice. Please note that Section 39.605(1)(B) currently requires notice be provided to all local air pollution control agencies with jurisdiction in the county in which the construction is to occur. The TCEQ offers this brief explanation to assure EPA that PSD public participation requirements are satisfied under existing rule. As part of TCEQ's public participation rulemaking effort, TCEQ commits to expressly addressing federal PSD notice provisions.

A. Public Participation

Section 382.056(p) of the Texas Health and Safety Code (THSC) provides that “the Commission by rule shall provide for additional public [participation] to obtain or maintain delegation or approval of a federal program.” Given the proposed November 2009 *Federal Register* notice, TCEQ would rely on this existing statutory provision as authority to provide notice of draft permits for Minor NSR applications.

B. New, Amendment and Renewal Applications

Section 382.0518 of the TCAA requires preconstruction permits for new, amendment and renewal applications. And, while state law limits the commission’s authority to impose more stringent requirements than the existing permit when renewing a preconstruction permit, Section 382.055(e) establishes that the commission may impose more stringent requirements when they are “necessary to ensure compliance with otherwise applicable federal or state air quality control requirements.”

Accordingly, the TCEQ may elect to proceed with revising its rules under current statutory authority and then subsequently apply both procedural and substantive rule changes into existing permits at permit amendment or renewal (federal law does not require renewal; state law requires a permit to be renewed every 10 years), whichever occurs first.

IV. Initiate Rulemaking to Address Public Participation Requirements

EPA requested that TCEQ “initiate rule-making (assuming no legislative change is required) to provide for a 30-day public comment period and opportunity for public hearing on the air quality impact of major and minor source draft permits and in addition, provide the opportunity for a public hearing for new or modified sources subject to PSD and ensure the comments received and the Executive Director’s Response to these Comments are part of the record provided to the Commissioners.” EPA further inquired whether there was “a way to start this voluntarily.”

As discussed under Responses 2 and 3 above, I will present to the commission a proposed rulemaking to address the *Federal Register* notice regarding public participation under existing statutory authority. As you are aware, the TCEQ’s major NSR permitting program is already consistent with federal law. The process includes a 30 day application notice as well as a 30 day draft permit notice which includes an air quality impact analysis.

A. Minor NSR

Rulemaking is required to impose 30-day notice of and opportunity for public hearing on Minor NSR draft permit applications. For clarity, TCEQ is contemplating a notice and comment process, similar to Title V permit applications, for Minor NSR draft permits that do not receive a request for contested case hearing in response to notice of application (first notice).

With regard to this last point, it is important to note that TCEQ would continue to follow existing state law which provides for notice of the draft permit if there is a request for contested case hearing.¹⁰ Simply stated, the contested case hearing process will continue to apply to this universe of Minor NSR permit applications. If there is no request for a contested case hearing in response to the first notice, a notice and comment process, not contested case hearing process, would apply.

¹⁰ THSC Section 382.056(a) and (g)

Please also note that the opportunity to request a public meeting (or "hearing" in federal parlance) is addressed under current statute and rule.¹¹ This is distinguished from the Texas public participation process which in addition to an opportunity for public meeting includes notice and opportunity for a *contested case hearing* (for certain applications). A contested case hearing is presided over by an administrative law judge and requires parties to follow discovery and evidentiary requirements for the development of a recommendation for the commission to consider.

As discussed above, under Texas law, permit renewals are subject to certain restrictions. Again, TCEQ is looking at existing statutory language as a basis for additional notice and opportunity for public meeting/hearing for Minor NSR.

Finally, agency rules would need to be amended to reflect the agency's current practice of holding public meetings after the draft permit is prepared.¹²

B. Major NSR

Importantly, 30-day notice of and opportunity for public meeting on Major NSR draft permits is currently required under existing statute and rule.¹³ And, as previously stated, the TCEQ will need to amend its rules to reflect the agency's current practice of holding public meetings after the draft permit is required.

Additionally, regardless of whether a regulated entity seeks a Minor NSR or Major NSR permit, a response to comments (RTC) is currently prepared by the Executive Director (ED) and is filed with the agency's Office of the Chief Clerk; the commission is required to evaluate the ED's RTC (along with public comment, requests for reconsideration, and requests for contested case hearing) when a permit application is *contested*.¹⁴ The ED's RTC is included in the administrative record.¹⁵ *Uncontested* permits do not go before the commission; they are issued by the ED.¹⁶ The RTC is filed with the Chief Clerk and mailed to those persons who submitted comments during the public comment period prior to ED approval of an uncontested permit.¹⁷ Please note that agency rules provide that certain uncontested permit actions are subject to a Motion to Overturn which allows for further public participation by seeking commission review of the ED's decision.¹⁸

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

EPA has requested that TCEQ "[i]ncrease the transparency of new and re-issued Texas Title V permits by including requirements of any pre-existing federal permits, identifying permit conditions incorporated by reference from underlying permits and identifying State only

¹¹ THSC Section 382.056(k); 30 TAC Section 55.154.

¹² TCEQ can hold one or more public meetings during the comment period (which begins after an application is declared administratively complete and continues for 30 days after notice of the draft permit is published or public meeting, whichever is later).

¹³ THSC 382.056(f), (i), (p); 30 TAC 39.403(b)(8); 39.419(e)(3); 39.411(c); 55.152; and 55.154.

¹⁴ THSC 382.056(l); 30 TAC Sections 39.420, 55.156 and 55.211(b).

¹⁵ 30 TAC Section 80.118(a)(6)

¹⁶ 30 TAC Chapter 50, Subchapter G; FN 14 *supra*.

¹⁷ 30 TAC Section 55.156(b)(1) and (c)

¹⁸ 30 TAC Sections 50.131 and 50.139

requirements.” Additionally, EPA stated that “[c]opies of all underlying permits should be attached to or included with the draft Title V permit at notice.”

TCEQ commits to continue dialogue with EPA to clarify and address Title V transparency concerns; however, because the *Federal Register* notices deal with Title I program deficiencies, not Title V, it is imperative that TCEQ focus on resolving the immediate issues raised in proposed *Federal Register* disapproval notices in order to provide legal certainty to Texas’ NSR air permitting process. The deadline for TCEQ to respond to the three notices regarding Flexible Permits, Qualified Facilities and NSR Reform is November 23, 2009. I recognize that TCEQ’s written responses to the *Federal Register* notices is pivotal to EPA’s analysis and final action on these programs and have accordingly prioritized the agency’s efforts. The aggressive schedule for EPA final action in the BCCA Appeal Group Consent Decree further necessitates TCEQ’s resources and efforts be directed to the pending *Federal Register* notices and attendant rulemaking. Please know TCEQ staff currently assigned to the two Title V permits to which EPA has objected will continue to work with EPA Region 6 staff as discussed below.

Finally, TCEQ will provide EPA with draft Title V permits for Citgo and Premcor, as required by rule, with the underlying permits attached.

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

As indicated above, TCEQ is committed to resolving EPA’s Title V objections. TCEQ staff is in regular communication with EPA Region 6 staff regarding the two Title V petitions granted on May 28, 2009, and remains committed to thoroughly and comprehensively addressing EPA objections, which include the frequency of monitoring, recordkeeping and reporting requirements. Because the objections raise complex programmatic issues, TCEQ is carefully evaluating its response and proposed resolution. As reflected in TCEQ’s July 6, 2009 extension request pursuant to its EPA-approved Title V Program, additional time is needed to ensure adequate review, assessment and prepared resolution to these objections. While staff has made progress on this issue, TCEQ is unable to commit to a specific schedule at this time but is diligently working to resolve EPA’s objections on these two permits.

TCEQ recognizes that EPA ultimately has authority to modify, terminate or revoke a Title V permit.

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

EPA requested that TCEQ “[c]larify the legal meaning of Texas minor source program terms in comparison to federal definitions” and cites as examples the terms “facility and account versus major or minor source, or facility in federal permit regulations.” EPA stated that this “may also help inform our review of whether Qualified Facilities and Flexible Permits are confined to minor sources.”

As indicated above, the TCEQ is prepared to clearly identify in its rules that Flexible Permits and Qualified Facilities are Minor NSR programs. Further, as requested in EPA’s September 23, 2009 *Federal Register* notice relating to Qualified Facilities, TCEQ will address EPA’s interpretation of Texas law, including the definition of “facility” and its application to Texas’ air permitting program.

Ms. Gina McCarthy

Page 8

October 23, 2009

In closing, I hope that EPA will engage with us in a constructive dialogue and that this will result in a better understanding of the TCEQ's air permitting program. I realize there are several areas where TCEQ can make changes, consistent with state law as discussed in this response, that will improve our program, and I am committed to making these changes. I cannot, however, blindly move forward with fixes to areas that may not be broken, and I cannot ignore, no matter how complex or difficult to follow, the tremendous improvements in air quality resulting from Texas' permitting program.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark R. Vickery', with a long, sweeping horizontal line extending to the right.

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

cc: The Honorable Rick Perry, Governor of Texas
The Honorable David Dewhurst, Lieutenant Governor of Texas
The Honorable Joe Straus, Speaker, Texas House of Representatives
The Honorable Glenn Hegar, Chairman, Texas Sunset Commission
The Honorable Carl H. Isett, Vice Chairman, Texas Sunset Commission
The Honorable Kip Averitt, Chairman, Texas Senate Committee on Natural Resources
The Honorable Byron Cook, Chairman, Texas House of Representatives Committee on Environmental Regulation
The Honorable Allan Ritter, Chairman, Texas House of Representatives Committee on Natural Resources
The Honorable Joe Barton, U.S. House of Representatives
Bryan W. Shaw, Ph.D., TCEQ Chairman
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Lawrence Starfield, Acting Regional Administrator, U.S. Environmental Protection Agency Region 6