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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 24, 2010

Mr. Lawrence Starfield
Deputy Regional Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75201-2733

Dear Larry:

I am writing in response to your April 15, 2010 letter as well as to update you on issues discussed in Ms. Gina McCarthy's November 12, 2009 letter. Additionally, I am inviting discussion on the issue of the Environmental Protection Agency (EPA) issuing Title V permits with pending objections during the pendency of respective agency efforts to resolve programmatic Title V provisions.

As noted in your letter, biweekly videoconference calls have been scheduled and have allowed questions to be raised regarding Title V permit objections as well as raise issues concerning the conversion of 30 Texas Administrative Code (TAC) Chapter 116 Subchapter G flexible permits to State Implementation Plan (SIP)-approved 30 TAC Chapter 116 Subchapter B minor New Source Review (NSR) permits. This "de-flex" process has necessitated an upfront understanding between the two agencies as to how these permit applications will be processed both technically and procedurally. On a related note, I am in receipt of your May 14, 2010 letter which addresses issues such as EPA's interpretation of federal requirements [applicability, Best Available Control Technology (BACT) and netting] as well as the impact of new standards on the de-flexing process. I have shared this letter with staff and will advise if there are any additional follow-up questions. Finally, Texas Commission on Environmental Quality (TCEQ) staff are also scheduled to meet in Dallas on June 3, 2010, with EPA staff, including Bill Hartnett, to continue the dialogue on TCEQ's flexible permitting program. The purpose of this meeting is to

provide a demonstration of the review of a flexible permit - - including the BACT analysis, federal applicability, protection of public health evaluation, and public notice - - using an actual flexible permit application. In addition, example records from the company showing compliance with the issued permit will also be provided.

I. Prioritizing Permitting Workload

At this time, the prioritization of both EPA and TCEQ's permitting workload is being driven by companies in need of final resolution of Title V concerns so as to begin operation on expansion projects, meet financing obligations, meet fuel-specific production requirements, etc. Accordingly, TCEQ staff have been coordinating with both EPA staff as well as company representatives regarding potential EPA objection to draft Title V permits. For example, TCEQ staff attended a Region 6 meeting with TOTAL to discuss and identify any potential questions or objections EPA may have with their draft Title V permit. With regard to establishing a schedule for categories of Title V permits that can be addressed on a monthly basis, in the absence of coming to an understanding on the core elements of the "de-flexing" process as well as resolving programmatic Title V issues, such as incorporation by reference of underlying authorizations, neither EPA nor TCEQ will be able to adhere to such a schedule. Accordingly, I remain committed to ensuring that these issues are expeditiously resolved (while recognizing that EPA may be legally required to issue Title V permits in the meantime). At that point, it may be possible to establish a schedule. It is important to note though that the TCEQ does not have authority nor the desire to "call in" NSR permit authorizations (unlike Title V which allows for reopening permits without a positive environmental benefit). However, there are several companies as you are aware that have expressed an interest in voluntarily obtaining a minor NSR permit under Subchapter B.

II. Flexible Permits

EPA has made clear its desire to transition flexible permits to minor NSR permits that meet the requirements of the SIP particularly in light of EPA's anticipated final disapproval of the flexible permit program by June 30, 2010, per its consent decree with the Business Coalition for Clean Air, et al. EPA has also made clear that any such transition to unit-specific emission limits should involve a review to ensure there has been no federal circumvention of federal permitting requirements. In response to your question concerning whether the TCEQ can reopen underlying permits, create new limits and then reopen the operating permit to get the new conditions listed if there is a Title V objection, the apparent integration of the Title V and NSR permitting issues does present certain impediments. As mentioned above, the TCEQ does not have authority to initiate amendments to underlying NSR permit authorizations. Additionally,

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there is a separate public participation process applicable to individual NSR permit authorizations. This creates a potential situation in which the TCEQ is unable to resolve the Title V objection within the applicable Title V timeframes (i.e., 90 days).

Given EPA's anticipated final disapproval of our flexible permit program, several companies have expressed interest in voluntarily undergoing a de-flex process to provide legal certainty on the status of their NSR permits. These instances present an opportunity to work through both the practical and legal aspects of converting from a flexible permit to a Chapter 116 Subchapter B minor NSR permit. With upfront EPA feedback on fundamental issues such as applicable BACT requirements, it will be possible to advance EPA's request that companies convert from Subchapter G to Subchapter B permits. TCEQ also anticipates that a voluntary de-flex process will also present an opportunity to discuss emission caps for like units particularly when this results in a lower permit allowable.

With regard to a Memorandum of Understanding, TCEQ expects that an exchange of letters between the agencies regarding our respective, mutual understanding regarding the resolution of issues such as BACT, netting and public participation will provide the necessary underpinning for moving forward with a de-flexing process. Accordingly, once staff has reviewed your May 14, 2010 letter, I will respond to your letter so that our respective staffs are both working under the same understanding of the de-flex process.

It is important to note that while the TCEQ will diligently work with EPA on a de-flex process, the TCEQ is proceeding with its proposed rulemaking to address EPA's September 23, 2009 *Federal Register* notice as discussed in my October 23, 2009 letter. One minor note is the date on which the rulemaking proposal will be considered by the commission; it is now scheduled for the June 16th agenda, rather than May 19th. This is critical for the long-term, prospective solution to EPA's minor NSR permitting concerns associated with the state's flexible permitting program.

As a matter of principle, the TCEQ strongly disagrees that there has been wholesale federal circumvention of Prevention of Significant Deterioration (PSD) requirements. As indicated previously, the TCEQ conducts a review to determine whether major NSR requirements are triggered; if PSD is triggered, the application goes through the major NSR permitting process. It is the TCEQ's preference to shift the mindset of this effort from one of "rehabilitation" and a presumption of federal circumvention to that of a parallel, collaborative effort for federal approval of a minor NSR permitting program which retains flexibility and ensures practical enforceability.

III. Third-Party Audit

In your letter, you raised the issue of whether a federal audit program could be efficiently incorporated into a state permitting process. While TCEQ recognizes that an accounting of historical emissions by companies undergoing the de-flex process will be an integral component in order to demonstrate that there has been no federal circumvention of major NSR permitting requirements, the TCEQ does not view a third party audit to be an efficient transition process. The TCEQ has significant concerns with the efficiency of such an undertaking given that the permitting process would necessarily involve the same exercise, and I am sure EPA does not wish to delay what they consider to be federally approved permits.

From a permitting authority perspective, TCEQ also has concerns with how "findings . . . memorialized in a Consent Agreement Final Order (CAFO)" are included in the "appropriate NSR authorization" if there is a different technical conclusion reached by the TCEQ's permit engineer with regard to emission limits. Additionally, how does the TCEQ's public participation process on a particular application fit within the process if the TCEQ is for all practical purposes bound by a third party review which has been agreed to by the particular company? Finally, any observations from the state regulatory perspective are separate and apart from actual participation in such a program by the regulated community.

IV. Proposed Rulemakings

I'd like to take this opportunity to update you on the agency's rulemaking effort that was set forth in the October 23, 2009 letter.¹ To date, the agency has proposed rulemakings regarding public participation and the federal definition of BACT and is scheduled to present these rulemakings to the commission for adoption on June 2, 2010. The proposed Qualified Facilities rulemaking was considered at the commission's March 30, 2010 agenda and is currently in the public comment phase. Please note that in response to EPA's request, the deadline for public comment has been extended to June 7, 2010. The proposed flexible permit rulemaking will be considered for proposal on June 16, 2010; lastly, the proposed NSR reform rulemaking will be considered on August 11, 2010.

In your April 15th letter, you indicated that EPA has prioritized Title V work and that it may be unable to comment on the proposed Qualified Facilities and flexible permit rulemakings. From TCEQ's perspective, the agency was asked

¹ The TCEQ's Air Permit Division webpage is being updated to reflect recent activity regarding Texas' air permitting program, including EPA's recent Federal Clean Air Act 114 letter sent to all flexible permit holders as well as your May 14, 2010 letter addressing EPA's interpretation of federal requirements in the de-flex context. See: <http://www.tceq.state.tx.us/permitting/air/announcements/20091109>

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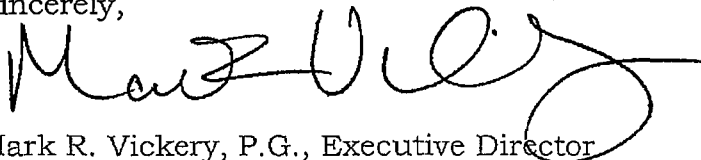
last October to establish a rulemaking schedule to address the *Federal Register* notices and did so on an expedited basis. The TCEQ has substantially adhered to this schedule with the exception of the proposed flexible permit rulemaking. The TCEQ is steadfastly focused on addressing the perceived deficiencies and obtaining SIP approval of these programs for the long-term certainty of Texas' air permitting program. To that end, the TCEQ is balancing its limited resources with its long-term goals and EPA's Title V legal obligations. Given EPA's focus on public notice and participation, I am confident that your agency will seriously consider TCEQ's proposed changes to the Qualified Facilities and Flexible Permit programs you have asked for in those *Federal Register* notices.

V. EPA Issuance of Title V Permits with Pending Objections

As discussed throughout, the TCEQ remains committed to reaching resolution of Title V objections, including more programmatic-type concerns relating to the incorporation by reference of underlying authorizations. The TCEQ provided draft responses to EPA's objections on Citgo and Premcor on February 9, 2010, and looks forward to formal EPA feedback. While TCEQ's preference is to receive feedback from EPA on responses recently submitted rather than second-hand inferences of dissatisfaction with the responses, TCEQ also recognizes that certain companies' business needs, as previously noted, may necessitate issuance of Title V permits by EPA in the absence of EPA concurrence with TCEQ's responses. It seems the only way EPA or TCEQ will be able to understand what is expected to alleviate any Title V programmatic objections is for EPA to issue a Title V permit. This will also ensure the timely issuance of Title V permits. As applicable, the TCEQ remains amenable to including agreed-upon Title V-related conditions between companies and EPA in its issuance of Title V permits. My goal is simply to ensure that companies needing Title V permits to operate may do so without unnecessary delay.

In conclusion, I believe over the past six months that EPA has developed a better understanding of TCEQ's permitting program. We still have significant differences in opinion on a number of issues, but processes for moving forward have been developed. A collaborative effort will continue to be beneficial for both agencies' limited resources and the continued protection of the environment and public health.

Sincerely,



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