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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
*Protecting Texas by Reducing and Preventing Pollution*

March 24, 2011

MR CARL E EDLUND P.E.  
DIRECTOR MULTIMEDIA PLANNING AND PERMITTING DIVISION  
US ENVIRONMENTAL PROTECTION AGENCY REGION 6  
1445 ROSS AVE STE 1200  
DALLAS TX 75202-5766

Re: Executive Director's Response to EPA Objection  
Initial Issuance  
Permit Number: O3049  
Rhodia, Inc.  
Houston Plant  
Houston, Harris County  
Regulated Entity Number: RN100220581  
Customer Reference Number: CN600125330

Dear Mr. Edlund:

On December 4, 2009, the U.S. Environmental Protection Agency (EPA) Region 6 office signed a letter identifying objections to the issuance of the proposed federal operating permit for the above referenced site. In accordance with Title 30 Texas Administrative Code (TAC) §122.350, the Texas Commission on Environmental Quality (TCEQ) may not issue the permit until the objections are resolved. In addition, the letter identifies certain additional concerns. The TCEQ understands that the additional concerns are provided for information only, and do not need to be resolved in order to issue the permit.

The TCEQ has completed the technical review of your objections and offers the enclosed responses to facilitate resolution of the objections. In addition, the attached responses to the objections describe the changes, if applicable, that have been made to the revised proposed permit and supporting statement of basis. The revised proposed permit and statement of basis are attached for your review.

Consistent with Title 30 TAC §122.350, please provide an indication of your acceptance or assessment of the responses and resolutions to the objections as soon as possible. After receipt of your acceptance to the responses and resolutions to the objections, TCEQ will issue the proposed permit. Thank you for your cooperation in this matter. Please contact Mr. Alfonzie "Al" Stepney III at (512) 239-1830 if you have any questions concerning this matter.

Mr. Carl E Edlund  
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March 24, 2011

Sincerely,



Steve Hagle, P.E., Director  
Air Permits Division  
Office of Permitting and Registration  
Texas Commission on Environmental Quality

SH/AS

cc: Mr. Floyd Dickerson, Environmental Manager, Rhodia, Inc, Houston  
Mr. Al Semaan, Plant Manager, Rhodia, Inc, Houston  
Wei Liu, Ph. D., P.E., Trinity Consultants, Houston  
Bureau Chief of Air Quality Control, Health and Human Services Department, City of  
Houston, Houston  
Director, Environmental Public Health Division, Harris County Public Health and  
Environmental Services, Pasadena  
Air Section Manager, Region 12 - Houston

Enclosures: TCEQ Executive Director's Response to EPA Objection  
Proposed Permit  
Statement of Basis

Project Number: 12052

**EXECUTIVE DIRECTOR'S RESPONSE TO EPA OBJECTION**  
**Permit No. O3049**

The Texas Commission on Environmental Quality (TCEQ) Executive Director (ED) provides this Response to EPA's Objection to the initial issuance of the Federal Operating Permit (FOP) for Rhodia, Inc, Houston Plant, Permit No. O3049, Harris County, Texas.

**BACKGROUND**

Procedural Background

The Texas Operating Permit Program requires that owners and operators of sites subject to 30 Tex. Admin. Code (TAC) Chapter 122 obtain a FOP that contains all applicable requirements to facilitate compliance and improve enforcement. The FOP does not authorize construction or modifications to facilities, and it does not authorize emission increases. To construct or modify a facility, the responsible party must have the appropriate new source review authorization. If the site is subject to 30 TAC Chapter 122, the owner or operator must submit a timely FOP application for the site and ultimately must obtain the FOP to operate. Rhodia, Inc. applied to the TCEQ for a initial issuance of the FOP for the Houston Plant located in Houston, Harris County on June 2, 2008, and notice was published on October 9, 2009 in *The Houston Chronicle*. The public comment period ended on November 10, 2009 and no public comments were received. During the concurrent EPA review period, TCEQ received an objection to the permit from EPA on December 4, 2009.

In accordance with state and federal rules, the permit initial issuance may not be issued until TCEQ resolves EPA's objections.

Description of Site

Rhodia, Inc. owns and operates the Houston Plant, located at 8615 Manchester in Houston, Harris Texas 77012. The Houston plant manufactures sulfuric acid and recycles spent sulfuric acid. Sulfuric acid is widely used and plays some part in the production of nearly all manufactured goods from fertilizers, to synthetic detergents, to petroleum refining. It is also the acid used in lead-acid automobile batteries.

The following responses follow the references used in EPA's objection letter.

**EPA OBJECTION 1:** EPA objected to incorporation by reference of PSD-TX-1081. The New Source Review Authorization References table in the draft Title V permit incorporates NSR Permit Number PSD-TX-1081 pending amendment February 3, 2009, issued October 2, 2008, by reference. The EPA addressed incorporation by reference in White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program dated March 5, 1996 (White Paper 2). As EPA explained in White Paper 2, incorporation by reference may be useful in many instances; though it is important to exercise care to balance the use of incorporation by reference with the obligation to issue permits that are clear and meaningful to all affected parties, including those who must comply with or enforce their conditions. *Id.* at 34-38 See, also, In the Matter of Tesoro Refining and Marketing, Petition No IX-2004-6 at 8 (March 15, 2005)(Tesoro Order). As EPA noted in the Tesoro Order EPA's expectations of what requirements may be referenced and the necessary level of detail are guided by Sections 504(a) and (c) of the Act and

corresponding provisions at 40 CFR §§ 70.6(a)(1) and (3). *Id.* Generally, EPA expects that Title V permits will explicitly state all emission limitations and operational requirements for all applicable emission units at a facility. *Id.* EPA notes that TCEQ's use of incorporation by reference for emissions limitations from minor NSR permits and permits by rule is acceptable. See 66 Fed. Reg. 63318, 63325 (Dec. 6, 2001); see also, *Public Citizen v. EPA*, 343 F.3d 449, at 460-61 (5th Cir. 2003) (upholding EPA's approval of TCEQ's use of incorporation by reference for emissions limitations from minor NSR permits and permits by rule). In approving Texas' limited use of incorporation by reference of emissions limitations from minor NSR permits and permits by rule, EPA balanced the streamlining benefits of incorporation by reference against the value of a more detailed Title V permit and found Texas' approach for minor NSR permits and permits by rule acceptable. See *Public Citizen*, 343 F.3d 449, at 460-61. EPA's decision approving this use of incorporation by reference in Texas' program was limited to and specific to minor NSR permits and permits by rule in Texas. The EPA noted the unique challenge Texas faces in integrating requirements from these permits into Title V permits. See 66 Fed. Reg. at 63,326; 60 Fed. Reg. at 30,039; 59 Fed. Reg. 44572 and 44574. The EPA has not approved TCEQ's use of incorporation by reference of emissions limitations for other requirements. See *In the Matter of Premcor Refining Group, Inc.*, Petition No. VI-2007-02 at 5 and *In the Matter of CITGO Refining and Chemicals Co.*, Petition No. VI-2007-01 at 11. Pursuant to 40 CFR § 70.8(c)(1), EPA objected to the issuance of the Title V permit because it: 1) incorporates by reference PSD-TX-1081 and 2) fails to include emission limitations and standards as necessary to assure compliance with all applicable requirements. See 40 CFR § 70.6(a)(1).

**TCEQ RESPONSE 1:** In response to EPA's objection, the ED has revised permit No. O3049 to include, in a new Appendix B of the permit, copies of permit No. 19282 and PSDTX1081 and their corresponding terms and conditions, and emission limitations. With regard to IBR of major NSR, the ED respectfully disagrees with EPA's interpretation of its approval of Texas's operating permit program on this issue. The ED recognizes that respective agency staff are actively involved in continuing, extensive discussions on how to resolve this issue; namely, how much detail of the underlying major NSR authorization should be reiterated in the face of the Title V permit. The federally approved operating permit program for Texas has allowed for applicable requirements to be incorporated by reference into the FOP since 1996. See *Final Interim Approval*, 61 Fed. Reg. 32693, June 25, 1996; *Final Full Approval*, 66 Fed. Reg. 63318, December 6, 2001; and *Final Approval of Resolution of Deficiency*, 70 Fed. Reg. 16134, March 30, 2005. Title 30 TAC §122.142 states that the operating permit shall contain the specific regulatory citations in each applicable requirement identifying the emission limitations and standards. Additionally, EPA discussed the use of incorporation by reference in the preamble to the final Part 70 rule, discussing the requirements of § 70.6, Permit Content, stating:

Section 70.6(a)(1)(i) requires that the permit reference the authority for each term and condition of the permit. Including in the permit legal citations to provisions of the Act is critical in defining the scope of the permit shield, since the permit shield, if granted, extends to the provisions of the Act included in the permit. Including the legal citations in the permit will also ensure that the permittee, the permitting authority, EPA, and the public all have a common understanding of the applicable requirements included in the permit. *This requirement is satisfied by citation to the State regulations or statutes which make up the SIP or*

*implement a delegated program. See 57 Fed. Reg. 32250, 32275 July 21, 1992, emphasis added.*

In comments on the proposed final interim approval of the operating permit program, in 1995, the commission (then-TNRCC) proposed to include a standardized permit provision that incorporated by reference all preconstruction authorizations, both major and minor, to resolve the EPA identified deficiency of Texas' failure to include minor NSR as an applicable requirement. In the June 25, 1996 Final Interim Approval, EPA directed, "the State must be quite clear in any standardized permit provision that all of its *major 'preconstruction authorizations* including permits, standard permits, flexible permit, special permits, or special exemptions' are incorporated by reference into the operating permit *as if fully set forth therein* and therefore enforceable under regulation XII (the Texas Operating Permit Regulation) as well as regulation VI (the Texas preconstruction permit regulation)." (61 Fed. Reg. at 32695, emphasis added.) Given this explicit direction in EPA's 1996 final interim approval of the Texas program, TCEQ understood that the standardized permit provision for preconstruction authorizations incorporated all NSR authorizations by reference, including major NSR

As a result of Texas' initial exclusion of minor NSR as an applicable requirement of the Texas Operating Permit program, and EPA's final interim approval of a program that provided for a phase-in of minor NSR requirements using incorporation by reference, EPA was sued by various environmental groups. *See Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449 (5<sup>th</sup> Cir. 2003). The petitioner's brief raised several issues, including the use of incorporation by reference of minor NSR, because the exclusion of minor NSR as an applicable requirement was a program deficiency identified by EPA. The petitioner's brief acknowledges that Texas' Operating Permit program incorporates all preconstruction authorizations by reference, through use of a table entitled "Preconstruction Authorization References". The Petitioner's brief includes an example of this table, which clearly contains sections for Prevention of Significant Deterioration (PSD), nonattainment (NA), 30 TAC Chapter 116 Permits, Special Permits and Other Authorizations, and Permits by Rule under 30 TAC Chapter 106. See Brief of Petitioners, p. 30. The brief goes on to discuss the sample permit, Permit No. O-00108, which documents "six different minor NSR authorizations and one PSD permit" requiring one to look at each of the underlying permits in addition to the Title V permit. The Department of Justice (DOJ), in its reply brief for EPA, responded to this allegation of improper use of IBR in the context of the specific allegation – whether "EPA reasonably determined that Texas corrected the interim deficiency related to minor new source review", answering unequivocally "yes". "Nothing in the statute or regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions addressing the content of Title V permits specify what Title V permits 'shall include,' but do not speak to how the enumerated items must be included." See, Brief of Respondents, pp. 25-26. The Court did not distinguish between minor and major NSR when concluding that IBR is permissible under both the CAA and Part 70.

Thus, it is the ED's position that incorporation by reference of both major and minor NSR permits is acceptable and was fully approved by EPA. However, given EPA's differing opinion, as reflected in the Premcor and CITGO orders, this objection, and the June 10, 2010 letter from EPA Region VI regarding this issue, the ED has revised permit No. O3049 to include, in a new Appendix B of the permit, copies of permit Nos. 19282 and PSDTX1081 and their corresponding terms and conditions, and emission limitations, which was initially suggested by EPA as

adequate to resolve this objection. Inclusion of the major NSR permits as an appendix should address EPA's objection and ensure that the Title V permit is clear and meaningful to all affected parties. The ED will continue efforts with EPA on how to resolve IBR of major NSR on a broader, programmatic basis.

**EPA OBJECTION 2:** EPA objected to the issuance of the Title V permit since recordkeeping requirements of NSR Permit Numbers 4802 and 19282 were not in compliance with the requirements of 40 CFR § 70.6(a)(3)(ii)(B). Under the *General Terms and Conditions* provision of the draft Title V permit, reference is made to 30 TAC § 122.144 of the Texas FOP program which requires records be kept for five years; however, Special Condition No. 9(N) of NSR Permit Number 4802 (amended December 29, 2008) only requires records be kept for three years. Also, Special Condition No. 6(C) of Permit Number 19282 (altered January 30, 2008) only requires records to be kept for two years. The EPA states these conditions are inconsistent with the five-year recordkeeping requirements of 40 CFR § 70.6(a)(3)(ii)(B) and cannot be carried forward into the Title V permit.

**TCEQ RESPONSE 2:** The TCEQ requires five-year recordkeeping for all FOPs. Pursuant to 30 TAC § 122.144(1), all records of required monitoring data and other permit support information must be kept for a period of five years from the date of the monitoring report, sample, or application unless a longer data retention period is specified in an applicable requirement. This is consistent with the recordkeeping requirements of 40 CFR § 70.6(a)(3)(ii)(B). The requirements of 30 TAC § 122.144(1) have been and will continue to be incorporated for all FOPs through the general terms and conditions of the FOP, which specifically require "The permit holder shall comply with all terms and conditions contained in 30 TAC § 122.143 (General Terms and Conditions), 30 TAC § 122.144 (Recordkeeping Terms and Conditions), and 30 TAC § 122.146 (Compliance Certification Terms and Conditions)." These requirements were (and still are) also reiterated on the cover page of the FOP.

As all terms and conditions of preconstruction authorizations issued under 30 TAC Chapter 106, Permits by Rule, and 30 TAC Chapter 116, NSR are applicable requirements and enforceable under the FOP, the five-year record retention requirement of 30 TAC § 122.144(1) supersedes any less stringent data retention schedule that may be specified in a particular permit by rule or NSR permit. To further clarify the five-year recordkeeping retention schedule for the FOP, the following text will be added to the General Terms and Conditions of the FOP.

"In accordance with 30 TAC § 122.144(1), records of required monitoring data and support information required by this permit, or any applicable requirement codified in this permit, are required to be maintained for a period of five years from the date of the monitoring report, sample, or application unless a longer data retention period is specified in an applicable requirement. The five-year record retention period supersedes any less stringent retention requirement that may be specified in a condition of a permit identified in the NSR Authorization attachment."

**EPA OBJECTION 3:** EPA objected to the *Special Terms and Conditions* provisions of the draft Title V permit, Condition 3, requiring stationary vents with certain flow rates to comply with identified provisions of 30 TAC Chapter 111 (EPA-approved rules in Texas' SIP) without identification of the specific stationary vents that are subject to those requirements. As such, EPA objected to this condition as failing to meet the requirement of 40 CFR § 70.6(a)(1), since

the condition lacks the specificity to ensure the compliance with the applicable requirements associated with those unidentified emission units. In addition, EPA noted that the Statement of Basis document for the draft Title V permit does not provide the legal and factual basis for Condition 3, as required by 40 CFR § 70.7(a)(5). Pursuant to 40 CFR § 70.8(c)(1), EPA objected to the issuance of the Title V permit since Condition 3 was not in compliance with the requirements of 40 CFR § 70.8(c)(1) and 70.7(a)(5).

**TCEQ RESPONSE 3:** The EPA has previously supported the practice of not listing emission units in the permit that only have site-wide or “generic” requirements. See *White Paper for Streamlined Development of Part 70 Permit Applications*, July 10, 1995. The ED documented in the draft FOP that the Chapter 111 visible emission requirements for stationary vents were site-wide requirements - applying uniformly to the units or activities at the site. Because the applicant indicated in its application that only the Chapter 111 site-wide requirements apply to these stationary vents and other sources, the applicant is not required to list these smaller units individually in the unit summary, and therefore, these emission units did not appear in the applicable requirements summary table in the draft FOP.

With regard to stationary vents, there are three basic opacity requirements in 30 TAC § 111.111 that may apply, depending upon specific applicability criteria. Stationary vents constructed on or before January 31, 1972 must meet the requirements of 30 TAC § 111.111(a)(1)(A), which states that opacity shall not exceed 30% averaged over a six-minute period. Stationary vents constructed after January 31, 1972 must meet the requirements of 30 TAC § 111.111(a)(1)(B), which states that opacity shall not exceed 20% averaged over a six-minute period. Lastly, stationary vents where a total flow rate is greater than or equal to 100,000 actual cubic feet per minute (acfm) may not exceed 15% opacity averaged over a six minute period, unless that source has an installed optical instrument capable of measuring opacity that meets specified requirements, specified in 30 TAC § 111.111(a)(1)(C). Subsection 111.111(b) merely states that any of the emission units subject to section 111.111 (for this permit area, this would include all stationary vents and gas flares) shall not include contributions from uncombined water in determining compliance with this section.

However, the ED does agree that the FOP could be revised to more clearly group stationary vents according to which opacity limit applies. The site has vents that are subject to the 30% opacity requirement of 30 TAC § 111.111(a)(1)(A) and are identified by emission point identification number (EPN) in Special Condition 3.A. Vents with a flow rate greater than or equal to 100,000 acfm are subject to 15% opacity and are identified in the Applicable Requirements Summary. All other vents at the site are subject to 20% opacity, as noted in the revised Special Condition 3.B., which is a site-wide term and condition, as allowed in the *White Paper for Streamlined Development of Part 70 Permit Applications*, July 10, 1995.

A determination of the legal and factual basis for Condition 3 was added to the Statement of Basis document for the draft Title V permit and is enclosed.

**EPA OBJECTION 4:** EPA objected to the *Adequacy of the Compliance Schedule* of the draft Title V permit. On April 26, 2007 a Consent Decree was lodged in federal court resolving alleged violations of the Clean Air Act at several of its plants, including the Houston Plant. See *United States v. Rhodia, Inc.*, Civ. 2:07CV134WD (N.D. Indiana). The Consent Decree requires

Rhodia to effect changes to its operations in accordance with an agreed upon schedule and to incorporate those changes in federally enforceable permits, including Title V permits. **Since the changes extend into the future, the CAA-related requirements of the Consent Decree must be included in the Title V and reflected in the Title V permit's Compliance Schedule.** See *In the Matter of CITGO Refining and Chemicals Co.*, Petition No. VI-2007-01 at 12-14. 40 CFR § 70.6(c)(3) requires Title V permits to contain “[a] schedule of compliance consistent with § 70.5(c)(8).” In turn, 40 CFR § 70.5(c)(8) requires, among other things, that compliance schedules “shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.” 40 CFR § 70.5(c)(8)(iii)(C). The Compliance Schedule in the draft Title V permit is deficient because it fails to reference any of the requirements of the Consent Decree for actions and dates that extend into the future. Pursuant to 40 CFR § 70.8(c)(1), EPA objected to the issuance of this permit because the compliance schedule in the Title V permit did not meet the requirements of 40 CFR § 70.6(c)(3) and 40 CFR § 70.5(c)(8).

**TCEQ RESPONSE 4:** The ED respectfully disagrees with the EPA’s interpretation of the Federal Clean Air Act (FCAA), Title V, and the implementing regulation, 40 Code of Federal Regulations (CFR) Part 70 regarding this issue. Neither Title V of the FCAA or the implementing regulation, 40 CFR Part 70, include as part of the definition of “applicable requirement” consent decrees or other enforcement mechanisms such as Agreed Orders. As a result, the EPA approved operating permits program in Texas does not specify that consent decrees or other enforcement mechanisms are “applicable requirements.” Instead, as required in 40 CFR § 70.6(c), a schedule of compliance consistent with the requirements of 40 CFR § 70.5(c)(8) is required to be included in the permit when sources are not in compliance. For each *applicable requirement*, the schedule must “resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.” Since consent decrees are not “applicable requirements” under 30 TAC Chapter 122 or 40 C.F.R. Part 70, there is no requirement to include consent decree obligations in the Federal Operating Permit. Additionally, where a company did not admit to noncompliance in a consent decree, there is no determination that noncompliance existed upon which to require a “schedule of compliance” under either 30 TAC Chapter 122 or 40 CFR §§ 70.5(c)(8) or 70.6(c).

The specific consent decree that applies to Rhodia, in Civil Action No. 2:07-CV-134-WCL, U.S. District Court for the Northern District of Indiana, contains specific provisions regarding the incorporation of consent decree requirements into federally enforceable permits. Section VI.16, Permits, Future Emission Limits and Standards, of the consent decree, page 25-26 of the consent decree specifically notes that Rhodia agreed to incorporate the emission limits and standards required by the Consent Decree into federally enforceable air permits ***other than Title V permits***, and then to file any applications necessary to incorporate the requirements of those permits into the Title V permits of the covered units (emphasis added). Section 17, Permits, Emission Limits and Standards, on pages 26 -27 requires that specific items required by the consent decree shall be incorporated into Title V permits, under paragraph 16, discussed above. Section 18, Permits, Mechanism for Title V Incorporation, specifically requires that incorporation of consent decree requirements ***shall be in accordance with state Title V rules***, including applicable administrative amendment provisions of such rules (emphasis added). The consent decree also specifically notes on page 3 of the decree that Rhodia does not admit any liability to the United States or any of the States arising out of the acts or omissions alleged in the Compliant. Therefore, by its own

terms the consent decree does not establish that Rhodia was or is out of compliance with respect to the noted requirements.

Since 30 TAC Chapter 122 does not include consent decree obligations as an “applicable requirement”, those obligations are not required to be included as such in Federal Operating Permits issued under the federally approved Texas program. Instead, the TCEQ has required that companies either incorporate their consent decrees by reference in their federal operating permit, or note outstanding consent decree obligations in either schedules of compliance (where a company admits that they have a noncompliance issue) or in a consent decree schedule similar to a compliance schedule.

**ADDITIONAL CONCERNS**

TCEQ acknowledges the additional concerns EPA has with the Houston Plant FOP and will address these issues as appropriate.