EPA'S GREENHOUSE GAS AND CLEAN AIR ACT REGULATIONS: A FOCUS ON TEXAS' ECONOMY, ENERGY PRICES AND JOBS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MARCH 24, 2011

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C O N T E N T S

WITNESSES

SUBMITTED MATERIAL

EPA'S GREENHOUSE GAS AND CLEAN AIR ACT REGULATIONS: A FOCUS ON TEXAS' ECONOMY, ENERGY PRICES AND JOBS

THURSDAY, MARCH 24, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., at the Garrett-Townes Auditorium, South Texas College of Law, 1303 San Jacinto Street, Houston, Texas, Hon. Ed Whitfield (chairman of the subcommittee) presiding.

Present: Representatives Whitfield, Olson, Barton, Green, and Gonzalez.

Also present: Representative Brady of Texas.

Staff present: Allison Busbee, Legislative Clerk; Cory Hicks, Policy Coordinator; Mary Neumayr, Counsel; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; and Jacqueline Cohen, Democratic Counsel.

Mr. WHITFIELD. Welcome. My name is Ed Whitfield. I am chairman of the Energy and Power Subcommittee of the Energy and Commerce Committee in Washington, DC. We're delighted to be here today. We're having a hearing on the EPA's Greenhouse Gas and Clean Air Act Regulations and its focus on the impact on Texas' economy, energy prices, and jobs.

I'm sure I don't need to introduce the other Members here because you all know all of these people very well, but we certainly have with us this morning Mr. Joe Barton, the co-chairman of the Energy and Commerce Committee. Still—is now emeritus of the committee and is one of the leaders of our committee for many years and has been a strong advocate, as you know, for energy issues and has provided great leadership in the State of Texas.

Mr. Gene Green here is with us because I saw him just a few minutes ago. He is the ranking—serving as ranking member of the Energy and Power Subcommittee today. And, of course, you all know him because he's from Texas.

In addition, we have Pete Olson, who is a member of the subcommittee from Texas.

And we have Mr. Kevin Brady, who is not a member of the Energy and Commerce Committee but provides great leadership within the Congress. And we're delighted that he's here. I know he represents part of this area.

And, of course, Charles Gonzalez, who is also from Texas, and is a member of the Energy and Commerce Committee and the subcommittee.

So, we are delighted to be here today. And before I give my opening statement, the way we're going to operate this today is that each member is going to have 5 minutes for an opening statement and then we're going to introduce the panel and then they will give their 5-minute opening statements. And then at that point, well, each member will have the opportunity to ask questions and answers—have a question-and-answer period. And when that is over, not because we're trying to discriminate against Mr. Brady, but the rule is that since he's not a member of the committee, he simply would wait until last to ask his questions. His questions may be the very best, but the rules are he waits until we all finish. So, I know that he'll do a tremendous job.

VOICE. Mr. Chairman, don't they have different rules in Texas?

Mr. WHITFIELD. Well, I haven't been informed yet. I'm sure I will be. I've heard that Texas frequently steps to its own drummer. So, I want to be compliant and flexible with Texas.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

But I'm delighted to be here today. The Environmental Protection Agency, as you know, has begun to impose greenhouse gas regulations under the Clean Air Act affecting both mobile and stationary sources, including new rules establishing initial new preconstruction permitting requirements under the Prevention of Significant Deterioration program which became effective January 2nd, 2011, and initial new operating permit requirements that will become effective July 1st, 2011, under the Title V program. These greenhouse gas rules, which have been subject to a variety of legal challenges, represent the beginning of EPA's regulation of greenhouse gas emissions under the Clean Air Act, and additional greenhouse gas-related rulemakings are scheduled or expected, including for power plants and refineries and other sectors.

I will tell you that we've already reported out legislation in the Energy and Commerce Committee to prohibit the regulation of greenhouse gas emissions. We did that for a number of reasons. Number one, Congress, on three separate occasions, has said no specifically to that issue. In 1990 Congress said no. In 2007 the U.S. Senate by a vote of 97 to nothing sent a resolution asking the President not to even send up the kill of protocol for ratification. And then last year the Senate refused to act on the Cap and Trade bill.

So, Congress has made its will very clear on this issue. In addition, the greenhouse gas regulations in 2010, EPA formally disapproved the Texas Commission on Environmental Qualities' Flexible Air Permits program. TCEQ submitted the original rules for this program to EPA for approval as a revision of the State Implementation Plan in 1994; and only recently, after about 16 years, has that issue been resolved. And, of course, we don't consider it over yet.

I might also say that it's very perplexing to see EPA trying to take this authority away from the State of Texas because from 2000 to 2008 Texas lowered nitrous oxide levels by 46 percent, ozone levels were reduced by 22 percent, all major urban areas in Texas currently meet the Federal 8-hour ozone standard of 85 parts per billion except Dallas; and they have made remarkable improvement.

Suffice it to say that Texas in this—on this regard has really been a leader in the Nation in meeting EPA standards.

So, our objective today is to find out what's going on. And Congress is going to reassert itself into the Clean Air Act because for the last 10 or 15 years we've almost had a laissez faire attitude about it. But we cannot stand to simply sit by and we are going to reassert ourselves. And we want some questions answered. And if we have to do legislation, we're going to consider that, as well.

[The prepared statement of Mr. Whitfield follows:]

Statement of U.S. Rep. Ed Whitfield
Chairman, Subcommittee on Energy and Power
"EPA's Greenhouse Gas and Clean Air Act Regulations: A Focus on Texas' Economy, Energy Prices and Jobs."

- I am pleased to be in Texas to hear testimony regarding the Environmental Protection Agency's implementation of its greenhouse gas and Clean Air Act regulations in the State of Texas, and how EPA's actions may be impacting the State's economy, energy sector and jobs, while undermining good environmental policy.

- Balancing the relationship between the state and federal government has always been a unique balancing act since the foundation of our nation. Allowing states to function properly, and to regulate effectively while meeting the needs of each individual state, is something I believe the federal government should encourage.

- Obviously, there are times when the federal government must intervene for the good of the nation as a whole, but I believe that EPA's actions in the State of Texas reflect an overreach of federal authority.

- As many of you know all too well, the EPA in Washington recently took over aspects of the clean air permitting process in Texas. This heavy handed regulation has caused more uncertainty in the area and placed in limbo a system that was working to reduce pollution.

- In order to see the positive impacts, let's look at the statistics:
    - From 2000-2008 Texas lowered nitrous oxide levels by 46 percent
    - Ozone levels reduced by 22 percent
    - All major urban areas in Texas currently meet the federal eight-hour ozone standard of 85 parts per billion, except Dallas and they have made remarkable improvements.

- In contrast, the national reductions are:

  - Nitrous oxide fell only 27 percent
  - Ozone only fell by 8 percent.

- The difference between Texas' impressive reductions and the national average reflects that the State has been a national leader in reducing emissions and known pollutants under its air quality programs.

- One of the matters at issue today is Texas' flexible permitting program, which encourages older grandfathered facilities to adopt emission controls, which would not be required normally.

- It is my understanding that this flexibility allows for facilities to meet emission caps, instead of each individual source of emissions meeting caps.

- Interestingly enough the flexible permitting program was proposed in 1994 by the state of Texas, but EPA did not respond with an approval or disapproval until June 30, 2010- nearly 16 years later. It is my understanding that EPA was required to approve or disapprove the proposal within 18 months after the submission.

- However, the Obama Administration's EPA has arbitrarily decided to disapprove and take over the permitting process 16 years later. Their actions will, as I understand it, invalidate over 100 permits across Texas issued since the early 90s, reversing good environmental and economic policies.

- Another matter at issue is EPA's effort to use the Clean Air Act as a vehicle to regulate greenhouse gases. The Clean Air Act was never intended to be a vehicle for such regulation, which is why Chairman Upton and I moved H.R. 910, the Energy Tax Prevention Act, through the House Energy and Commerce Committee. This bill would stop EPA from regulating greenhouse gases for the purposes of addressing climate change.

- If there are other areas where EPA is acting to exercise its authority under the Clean Air Act for purposes for which it was never designed, I hope that

we can figure out exactly how to change the Clean Air Act to ensure that Congressional intent is as clear as possible.

- I look forward to hearing from our witnesses and I now yield to my colleague Rep. Green from Texas for his opening statement.

Mr. WHITFIELD. So, with that, it's my pleasure to introduce the ranking member at this time, Mr. Gene Green, for his opening statement.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Thank you, Mr. Chairman. I want to welcome you not only to Texas but to Houston. It's great to have a Congressional hearing here. We don't always get these type of field hearings in our community. In fact, this is home. I wast born about five blocks from here at St. Joseph's Hospital. So, I take my Texas roots very seriously.

And I want to welcome my colleague to Houston. As the energy capital of the world, I hope you enjoy your time here and that you have an informative visit. Sometime when you have more time I would love to take you over to what I call our "jobs corridor" on 225 in East Harris County where you can see the huge amount of investment in the energy sector we have over there, along with the Port of Houston.

In our district, which encompasses most of East Harris County here in the Houston area, we do everything energy, both upstream and downstream, including being the home of five refineries, several manufacturing facilities, and 50 plus chemical plants. For this reason I have closely watched the Texas Flexible Permit debate in order to ensure that our facilities have the permits they need to operate.

In August of 2008, the Business Coalition of Clean Air and Fuel Group, the Texas Association of Business, and the Texas Oil and Gas Association filed suit against the EPA to take action on pending permit-related SIP actions such as flexible permits. In July of 2009 these groups reached an agreement regarding the timing of Federal Review of aspects of Texas' Air Permitting program, and in July of 2010 EPA took final action disapproving Texas' flexible permit program SIP provision. The EPA determined that the revisions proposed by the TCEQ's New Source Review program did not meet the Federal Clean Air Act requirements. Reaching a workable agreement that would make Texas compliant with the Clean Air Act without imposing excessive and unnecessary costs on refiners and other businesses is in the best interest of both the EPA and the TECQ or TCEQ. I would hope that both the EPA and the TCEQ would agree, and I look forward to an update from both on the status of these discussions.

Now, I, like my colleagues on the other side of the aisle, have concerns about the timing of this issue, in particular, that the EPA did not object to the Texas Flexible Permit when they originally issued it in the early 1990s. But it's completely false to say that the EPA voiced no concerns over this program until they disapproved last year.

In fact, both the Clinton and Bush Administration sent several letters to TCEQ outlining their concerns with the Texas SIP provisions. Additionally, the Bush Administration sent a Fair Notice letter to flexible permit holders in 2007 emphasizing that they must comply with the Clean Air Act provisions in addition to the Texas Flexible Permit provisions.

Mr. Chairman, without objection, I would like to ask unanimous consent to insert a copy of the Fair Notice letter that was sent to the flex permit holders into the record as well as a copy of the Warren TCEQ letter sent by the Bush administration to TCEQ.

Mr. WHITFIELD. Without objection.

Mr. GREEN. Thank you.

[The information follows:]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

September 25, 2007

Re: Flexible Permit Number

Dear :

The Environmental Protection Agency, Region 6 (EPA) and the Texas Commission on Environmental Quality (TCEQ) have been working together to address the complex issues related to air quality in the State of Texas. One of the areas that we have been focusing on is the development of a federally-approvable flexible permit rule. Although TCEQ has state-approved flexible permit rules in Title 30 of the Texas Administrative Code, Chapter 116, Subchapter G (30 TAC 116.710 et seq.), EPA has not approved these rules into the implementation plan for the State of Texas (Texas SIP). Consequently, permits issued under these flexible permit rules reflect Texas state requirements and not necessarily the federally-applicable requirements.

The purpose of this letter is to clarify that you, as owner or operator of sources included in a TCEQ flexible permit, are obligated to comply with the federal requirements applicable to your plant, in addition to any particular requirements of your flexible permit.

_____ was issued Flexible Permit Number 39142, under 30 TAC 116.710 et seq. We recognize that the flexible permit is the State permitting vehicle for certain operational requirements at your plant. However, unless and until such time as the Texas flexible permitting rules become part of the Texas SIP, you must continue to comply with applicable federal requirements, including those in the Texas SIP. This includes all terms and conditions of permits approved under the Texas SIP. An example of what is meant by the reference to "federal requirements" is the emission control limitations (e.g., lbs/MMBtu) and destruction efficiencies together with the associated monitoring and recordkeeping provisions contained in state or federal permits issued under SIP-approved rules.

Enclosed is a list of Frequently Asked Questions regarding this letter and the federal and state permitting programs. Should you have further questions or inquiries, please contact Raymond Magyar of my staff at (214) 665-7288, or Rick Bartley in the Office of Regional Counsel at (214) 665-8046.

Sincerely yours,

John Blevins
Director
Compliance Assurance and
Enforcement Division

Enclosure

cc: Steve Hagle, Assistant Director, Air Permits Division
Texas Commission on Environmental Quality

Q3: Compliance with "legacy permits": EPA's letter states that it expects our facility to comply with the SIP-approved permit conditions and terms that existed prior to issuance of our flexible permit. What does that mean for my facility?

Response: EPA maintains that SIP permits issued to a source remain effective until amended, modified, or revoked in accordance with the SIP-approved methods for effecting such permit changes. This means that all SIP permit conditions and terms, including any representations upon which the SIP permit was issued, are not, and have not been, superceded, voided, or replaced by the terms, conditions, or permit application representations associated with a flexible permit. Owners and operators of sources included in a TCEQ flexible permit should review their previously issued SIP permits ("legacy permits") to ensure that they are complying with those terms, conditions, and representations. To the extent that such conditions, terms and representations were rolled over into the flexible permit, then there should be no issue associated with compliance obligations and the source should simply continue to comply with those requirements. However, EPA understands that there may be some instances where specific terms, cor[illegible] or representations made in the legacy permits have been "modified" or [illegible]y the flexible permit. Therefore, in accordance with EPA's policy entitled [illegible]evi[illegible] Guidance on Enforcement During Pending SIP Revisions," [illegible]ttp://[illegible]vw.epa.gov/compliance/resources/policies/civil/caa/stationary/enf-siprev-[illegible]rpt.pdf) dated March 1, 1991, EPA will assess its enforcement options on a case-by-case basis.

New U[illegible] Not Covered by a SIP Permit: I was issued a flexible permit for a new source [illegible]) or a new or amended flexible permit for a change to a source (site) that involves [illegible]ruction of a new unit. Is the source operating in violation of federal requirements [illegible] obtained authorization for those emissions in a non SIP-approved permit?

Response: To the extent that the modification followed the federally-approved review requirements *but for* the inclusion of those requirements in a SIP-approved permit, EPA will look to the 1991 guidance referenced above in determining whether or not to bring an enforcement action for failure to effect changes to the source in accordance with approved SIP procedures. As previously mentioned in response to Q2, EPA's focus will be to ensure that the source is not creating any adverse air quality impacts as a result of its operations under the flexible permit. In addition, if there is a need for changes to the monitoring, record-keeping, or reporting requirements to ensure no adverse air quality impacts, then an EPA enforcement action to effect those changes may be appropriate under the circumstances.

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APR 11 2006

Mr. Steve Hagle
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Texas Commission on Environmental Quality
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Austin, TX 78711-3087

RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State Implementation Plan (SIP) Revisions for Flexible Permits

Dear Mr. Hagle:

This letter is a follow-up to our meeting in Austin on October 12, 2005, and subsequent discussions concerning revisions to the Texas SIP related to Flexible Permits, Subchapter G of Chapter 116 of Title 30 of the Texas Administrative Code (30 TAC). We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements or identify changes you will make to address our concerns. We will review and take action on these rules prior to taking final action on your New Source Review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

Originally Signed
by David Neleigh

David Neleigh
Chief
Air Permits Section

Enclosure

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Comments on Texas SIP revisions, Subchapter G, Chapter 116, Flexible Permits

1. General Comment

We understand that the Flexible Permit rules apply to major and minor sources and that the rules are designed to provide an exemption from minor NSR requirements if sources do not exceed an allowable emissions cap. In general, the allowable emissions cap assumes Best Available Control Technology (BACT) emission rate plus up to 9% for all units under the permit. Partial Flexible Permits are allowed. We reviewed the Flexible Permit rule as it applies to major sources for consistency with Federal major NSR regulations and 40 CFR 51.160 and 51.161. Texas adopted the Flexible Permit rules prior to finalization of Federal NSR Reform regulations. The final Federal regulations measure emissions increases which result from a modification at existing major sources using the baseline actual-to-projected actual applicability test. The final rules also provide an exemption from the definition of major modification for sources with an actual Plantwide Applicability Limit (PAL). The Court in *New York v. EPA*, 413 F.3d 3, (D.C. Cir. June 24, 2005) struck down provisions of the regulations that provided for exemptions from major NSR applicability that were not based upon actual emissions. The Court held that the NSR modification requirement, which incorporates by reference Clean Air Act (Act) § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions." Therefore, many of our comments relate to how Flexible Permits are consistent with Federal major NSR requirements.

We have reviewed the Flexible Permit rules as they apply to minor sources and minor modifications for consistency with 40 CFR 51.160 and 51.161.

2. Voiding of Existing SIP-approved Permits

The Texas Commission on Environmental Quality (TCEQ) has stated that all existing permits applicable to the permittee are voided upon issuance of a Flexible Permit. The Flexible Permit becomes the controlling authority for the site, as explained at 10 TexReg 7336:

> The applicant for a flexible permit may combine existing permitted facilities, grandfathered facilities, and new facilities into the flexible permit. The flexible permit will then become the controlling authorization for all facilities included in the permit, replacing any existing permits that may have been applicable to all or part of these facilities.

The rules provide for initial issuance of a flexible permit "as an alternative to obtaining a new source review permit" where the source triggers major NSR requirements. We understand that the resulting BACT or Lowest Achievable Emission Rate limits are not enforceable at the new or modified source. Nonattainment NSR (NNSR), prevention of

> significant deterioration (PSD) or air quality, minor NSR permits, and permit application representations incorporated by reference into the permits previously issued under the Texas SIP are voided upon issuance of the Flexible Permit. We also understand that these permits are voided without public participation in many cases.
>
> Please explain the legal authority under which TCEQ voids existing federally enforceable NNSR, PSD, and minor NSR permits.
>
> Title I of the Act requires permitting authorities to establish in permits source specific terms and conditions necessary for sources to comply with the requirements of the PSD and NSR programs of parts C and D of the Act. EPA's long-held position is that these permits must remain in effect because they are the legal mechanism through which the underlying PSD or NSR requirements become applicable, and remain applicable, to individual sources.[1] 40 CFR 70.1 requires that each title V source permit assures compliance with all applicable requirements, including any term or condition of any preconstuction permit issued pursuant to programs approved or promulgated under title I of the Act. Amendments to PSD or NSR or minor NSR permits must be made in accordance with the SIP and approved permitting programs. Terms and conditions of construction permits are permanent and remain effective unless changed using title I procedures or a new construction permit is issued. The Federal PAL rule provides a procedure, including public participation, for the elimination of permit limits that were taken to avoid applicability of major NSR applicability and are replaced by a PAL. Federal NSR regulations do not provide for a blanket elimination of emission limits at individual units. Operational flexibility under Federal regulations and policy can be obtained by preapproving future modifications or by setting an actual PAL in order to avoid major NSR netting.

The preamble to the final PAL rule provides:

> Can a PAL Eliminate Existing Emission Limitations? An actuals PAL may eliminate enforceable permit limits that a source may have previously taken to avoid the applicability of major NSR to new or modified emissions units. Under the major NSR regulations at §§52.21(r)(4), 51.166(r)(2), and 51.165(a)(5)(ii), if you relax these limits, the units become subject to major NSR as if construction had not yet commenced on the source or modification. Should you request a PAL, today's revised regulations allow the PAL to eliminate annual emissions or operational limits that you previously took at your stationary source to avoid major NSR for the PAL pollutant. This means that you may relax or remove these limits without triggering major NSR when the PAL becomes effective. Before removing the limits, your reviewing authority should make sure that you are meeting all other regulatory requirements and that the removal of the limits does not adversely impact the National Ambient Air Quality Standards (NAAQS) or PSD

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[1]See EPA Memorandum from John Seitz, to Robert Hodanbosi, dated May 20, 1999.

increments. We are not taking a position on whether compliance with requirements contained in a PAL permit could serve to demonstrate compliance with certain pre-existing requirements on individual units. The reviewing authority may assess on a case-by-case basis whether any streamlining would be appropriate in the title V permit consistent with part 70 procedures and our existing policies and guidance on permit streamlining.

See also the Federal PAL rule:

> 40 CFR 52.21(aa)(1) - Applicability, "(iii) Except as provided under paragraph (aa)(1)(ii)(c) of this section, a major stationary source shall continue to comply with all applicable Federal or State requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL."

The same requirement is found in 40 CFR 51.165(f)(1)(iv) and 51.166(w)(1)(iii).

The EPA has also addressed supersession of existing NSR permit requirements by title V permits. See May 20, 1999, letter to Robert Hodanbosi:

> It is the Agency's view that title V permits may not supersede, void, replace, or otherwise eliminate the independent enforceability of terms and conditions in SIP-approved permits. To assure compliance with "applicable requirements" such as SIP-approved permits and conditions, title V permits must record those requirements, but may not eliminate their independent existence and enforceability under title I of the Clean Air Act (i.e., may not supersede them).

See also White Paper for Streamlined Development of part 70 permit Applications, Lydia Wegman, July 1995, (White Paper #1) which recommends an efficient procedure for revising NSR permits during title V review to eliminate obsolete or environmentally insignificant terms in NSR permits. See also, Approval of Wisconsin Construction Permit Permanency SIP Revision 71 FR 9934, April 28, 2006, and Notice of Deficiency for Clean Air Act Operating Program in Wisconsin, 69 FR 10167, March 4, 2004.

Our review of the Flexible Permit rules indicates that the voided NSR permits are federally enforceable terms and conditions which may be revised only through approved SIP procedures.

3. Definition of Modification

Please distinguish between the definition of "major modification" at 30 TAC 116.12(11) in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review

Definitions, and the definition of "modification of an existing facility" at 30 TAC 116.10(11) of Subchapter A, General Definitions. The definition of "modification of existing facility" states:

> Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:
>
> a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

Under the current Texas SIP, a permit amendment is required in order to vary from any representation or permit condition if the change will cause: (A) a change in the method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in the emission rate of any air contaminant.

Please clarify whether the exemptions from the requirement to obtain a permit amendment in the submitted definition of "modification of an existing facility" apply to significant project emission increases or significant net emission increases at major sources or major modifications. Please explain how exemptions in the definition of "modification of an existing facility" relate to major modifications. We believe these definitions as written are vague and may be interpreted to provide an exemption to major NSR applicability.

4. Consistency with Federal Major NSR Requirements

Because Flexible Permits become the controlling authorization for major sources and authorize the source to make modifications without a permit amendment as required by the current SIP, the rules, as they are applicable to major sources, must be consistent with Federal NSR requirements and the PAL rule. We note that the rules eliminate permitting vehicles necessary to demonstrate netting for major sources. We have identified the following list which discusses some of the inconsistencies between the Flexible Permit rules and Federal regulations. Please provide information to explain how the following requirements are met under the Flexible Permit rules:

A Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. The Flexible Permit emission cap is based upon allowable emissions rather than actual emissions. There are no regulatory requirements that the cap be set below actual emissions. The rules do not ensure that the emissions cap will be set at a level that does not trigger major NSR applicability for major sources or major modifications based upon the baseline actual to projected actual calculation in the State's NSR rules. Please explain how the flexible permit rules are inconsistent with the Federal PAL rule at 40 CFR 52.21(aa)(6).

C. The rule allows an implementation schedule to install required BACT controls which may last for many years. The rule also allows sources to increase the emission cap for sources that "fail to install the additional control equipment as provided by the implementation schedule." How does the rule ensure that the emission cap is set below actual emissions during these periods? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(6) and (11). Please explain whether a Flexible Permit always assumes current BACT in calculating the emission cap.

D. The Flexible Permit authorizes modifications that do not exceed the emission cap. NSR compliance is required only upon initial issuance of the permit. Please explain how the rule ensures that modifications subject to major NSR and the public participation requirements of Part 51 are reviewed. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(5) and (11); and 51.161.

E. For sources without a PAL, major NSR applicability must be determined by monitoring actual emissions on a unit by unit basis (rather than by compliance with the emissions cap) consistent with TCEQ's major NSR rules for baseline actual to projected actual emissions calculations. Please explain how the rule ensures that major sources determine major NSR applicability on a unit by unit basis. Our review indicates that the monitoring requirements from the Flexible Permit rule at §116.715(c)(6) requires " information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction." Please explain how the rule provides for monitoring, recordkeeping and reporting necessary to determine project emission increases and to enforce major NSR requirements on a unit by unit basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d), and (f); 52.21(aa)(12) through (14).

F. Please explain how the public participation requirements of Part 51 and the PAL rule are met by the Flexible Permit rules. Under Chapter 39 of the TAC,

initial issuance of and amendments to flexible permits are exempt from public notice requirements unless the action involves new construction or a modification that results in emissions increases above Texas' permits by rule limits (250 tons per year (tpy) of carbon monoxide, 250 tpy of nitrogen oxides, 25 tpy of volatile organic compounds, sulfur dioxide , or particulate matter less than 10 micrometers, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen and oxygen). These provisions are inconsistent with Federal requirements which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP. Please explain how the Flexible Permit rules are consistent with 40 CFR 51.161 and 52.21(aa)(5) and (11).

G. The Flexible Permit rules allows sources to exclude units at a facility from the permit. Federal rules do not allow for partial PALs. Note that the Federal PAL rule requires that all units at a facility must be subject to the plantwide limit. See 40 CFR 52.21(aa)(6)(i) through (ii). Emission increases and decreases at all units at the facility must be considered to determine major NSR applicability. How does the Flexible Permit provide that increases and decreases are quantified, determined to be contemporaneous, and made practically enforceable for sources that are not subject to a PAL? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d) and (f).

H. There is no requirement in the Flexible Permit rules that startup, shutdown and malfunction emissions must be included in determining compliance with the emission cap. This is inconsistent with the Federal PAL rule. Please explain how the Flexible Permit rules can ensure that non-routine emissions are not masked by the emission cap. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(7)(iv).

I. There is no requirement in the Flexible Permit rules that compliance with the emission cap is determined on a 12-month rolling average, as required by the Federal PAL rule and EPA policy. We have reviewed Flexible Permits that base compliance on a calendar basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a). Please explain how enforcement of Flexible Permits on a calendar year basis is enforceable as a practical matter.

J. There is no requirement in the Flexible Permit rules that the owner or operator

must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average for each month. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a) and 52.21(aa)(7)(vi).

K. There is no requirement in the Flexible Permit rules that monitoring to determine compliance with the cap must be based upon continuous emissions monitoring systems, continuous emissions rate monitoring systems, predictive emissions monitoring system, continuous parameter monitoring system, or emission factors, or an equivalent method as approved by the permitting authority, as is required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(12)(ii)(a) through (d).

L. There are no requirements in the Flexible Permit rule for semi-annual reports or deviation reports as required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(14)(i) through (ii).

M. The record retention requirement in the Flexible Permit rules is for two years. This is inconsistent with the Federal PAL rule and title V which require five year recordkeeping. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(13)(ii).

N. Are short-term limits under the emission cap required by the Flexible Permit rules? Please explain how short-term limits are calculated and how they ensure attainment and maintenance of the NAAQS. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(1)(iii).

O. The Flexible Permit emission cap may be increased by 9% of total emissions, called an Insignificant Emissions Factor. The Flexible Permit rule in § 116.718 states, "An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of state new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility." Please explain how this definition is distinguishable from the terms "significant" and "insignificant" used elsewhere in your rules. We believe these terms must be clearly distinguishable to facilitate compliance and enforcement of the rules. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(b)(23) and 52.21(aa)(6)(i).

5. Minor Sources

We have reviewed the Flexible Permit rules as they apply to minor sources for

consistency with 40 CFR 51.160 and 51.161.

A. Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. Please explain how the revisions meet the requirements of 40 CFR 51.161, which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP.

Mr. GREEN. It was only when the courts forced the EPA to make a decision on the flex permit program that they finally disapproved the program. I don't say this in an effort to take sides. I say this because I think it's important to set the record straight because unfortunately most of the rhetoric on this issue would have you believe that the issue just came to light in the last couple of years, when instead it was percolating for several years.

Finally, concerning upcoming greenhouse gas rules to utilities and refineries, I must emphasize that I'm opposed to the EPA moving forward with regulations on large utilities and refineries in our country because I believe it's the Congress who should be the decision maker on these carbon-control issues.

However, we can't discount the Supreme Court decision and say "climate change is not an issue" and move on without it, which is the approach some of my colleagues want to take. Instead we should pass a bill that would delay the EPA from moving forward with these regulations so that the Congress has the time to address this issue with input from Members that represent diverse constituencies nationwide.

Again, I look forward to the testimony of our witnesses. And, again, thank you, Mr. Chairman, for coming to Houston and to Harris County. And you're welcome back any time.

Mr. WHITFIELD. Thank you, Mr. Green.

At this time I recognize the chairman emeritus, Mr. Barton.

Mr. BARTON. Well, thank you, Chairman Whitfield. We sincerely appreciate you coming to Houston, Texas. There are lots of things you could be doing in Kentucky, and we appreciate you spending a day to come down to the energy capital of the world and focus on a hearing that's very, very specific to Texas.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I'm a strong proponent of strong environmental protection. I was a co-sponsor and voted for the Clean Air Act in the early 1990s. I am a past subcommittee chairman of the Oversight Subcommittee of this committee and of the Energy Subcommittee with Mr. Whitfield, who is currently the chairman, and of the full committee. I have probably participated and chaired more hearings on the Clean Air Act and greenhouse gases than almost any current member of Congress and perhaps any member of Congress, ever.

I want a strong EPA. I want a strong Texas Counsel of Environmental Quality. I want an Attorney General in Texas who enforces the environmental laws not only of the State of Texas but of the United States of America.

So, we are not engaged today in a witch hunt against the Environmental Protection Agency, but we do believe that the Environmental Protection Agency, like every other agency of the Federal Government, should follow the law and not make it. And with regards to the air—Clean Air Act and the flexible permits that have been issued under that Act and with regards to the issue of greenhouse gases, you know, it is my strong belief that the EPA has acted without legal foundation in terms of the air quality permits and without due consideration in their promulgation and decision to try to regulate greenhouse gases under the Clean Air Act.

There are two separate issues. Let's look at the first issue, the air permits. Under the Clean Air Act, beginning in the mid 1990s, States had to comply with the new law and submit to Washington State implementation plans and specific permits for various facilities that were jurisdictional under that Act for six criteria pollutants.

In Texas, you know, our region and our industry were compliant with five of the six, I believe, almost from the get-go. We have had a problem in the Houston area, the Beaumont-Port Arthur area, the El Paso area, and the Dallas-Fort Worth area on ozone. So, Texas decided to use a facility-wide flexible permitting approach where they would set a cap for a facility and not try to set a standard within each facility for each piece of equipment. This was done under Governor Ann Richards' direction and under President Bill Clinton's Presidency. So, this was not some Republican initiative.

Basically, as I understand it, the policy difference between the EPA today and the State of Texas today is that the Texas legislature and the Texas Counsel of Environmental Quality, all the various officials in Texas have decided to take a facility-wide approach where you decide to cooperate with the affected regulated industry, share a joint goal, and try to meet the Federal law that way.

The EPA under President Obama has decided that they want a command and control and that we have got to force people to do things equipment by equipment. And I'm going to ask the Attorney General and the chairman of the Council of Environmental Quality here how many permits have been affected. But my information is it's about 180. So, we want strong air quality enforcement in Texas, but we want a State that can grow economically. And as the testimony will show, depending on your baseline, 1990 or 2000, Texas employment is growing, Texas population is growing, but Texas air quality is also improving. OK, if you can add 4 million people in 10 years and decrease emissions, that should be something that you're patted on the back and given a medal for, not something that your permits are revoked.

So, Mr. Chairman, we are here to get to the bottom of this, to put some things on the record. We're going to hear from our State officials and then our industry officials, and then we have been blessed that the number two person at the EPA, the head of the Air and Radiation Agency there, is going to come and—what we're not going to hear from, Mr. Chairman, is the Regional VI administrator. He and his aides couldn't make it 180 miles from Dallas to testify in public about this. So, we will have some questions for the record for our friends from Dallas, who probably had to get a haircut or something this morning and couldn't make it down.

With that I yield back.

Mr. WHITFIELD. Thank you, Mr. Barton.

Yes, we are quite disappointed that the regional director of EPA is not with us this morning. Although, we certainly asked at the time.

At this time I'd like to recognize the gentleman—another gentleman from Texas, Mr. Gonzalez, who will give a brief statement.

OPENING STATEMENT OF HON. CHARLES A. GONZALEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GONZALEZ. Thank you very much; and, Mr. Chairman, welcome to Texas. You are surrounded by Texans today from both sides of the aisle. And I can tell you now that regardless of party affiliation that I think and I believe that we often agree on the following: And that is that Texas has been, is, and will remain an energy State. We understand what we've done historically. We understand what need to effectuate as it relates to traditional fuels and sources of energy but we also will be a leader in the alternatives and the renewals.

Now, much time is lost in the politics of the present subject matter that's before us today. If we were to believe in areas surrounding the flexible permit program, the Obama Administration disapproved the program in order to punish Texas and take over its program. What seems to get lost is that previous Administrations, as pointed out by Mr. Green, have expressed concerns with the flex permitting program for the past 16 years. Rather than favoring the EPA on this decision, the responsible thing to do is to figure out the past program. Past permit holders are now in limbo and that cannot be good for business. To create the regulatory certainty that businesses need, TCEQ and EPA need to reach an agreement. I've been told that they're at an impasse. They don't have ongoing discussions and negotiations, which is very unfortunate. I look forward to hearing both the EPA and TCEQ on what the next steps are and how we plan on working together to reach a resolution amenable to both sides.

On the question of greenhouse gases, rather than stripping EPA of its authority to regulate greenhouse gases, Congress should pass legislation that creates a framework for how we deal with greenhouse gas emissions. We know that the House acted on this previously. The Senate did not. We'll see where we vote in 111th Congress.

However, I've not been presented nor have I seen any proposals that would address this issue in a legislative way if we don't want a regulatory agency to do the work for us. All we've witnessed are against a critical EPA and to redebate the climate items without putting forward any new ideas on how we are going to address the problem and how we are going to compete with China, Germany, and other countries who have made key investments in alternative energy and positioned themselves to be leaders in this new energy sector.

A secure energy future will no doubt include fossil fuels for the foreseeable future. It is needed and will serve as our transition fuel as we move to cleaner energy alternatives. Our State and Federal Government have a responsibility and a role to play in mitigating the effects of climate change and putting us on a sound path to making that energy transition. I believe our constituents expect and deserve as much.

Again, thank you very much, Mr. Chairman. I yield back.

Mr. WHITFIELD. Thank you, Mr. Gonzalez.

At this time I recognize the gentleman from Texas, Mr. Olson, for 5 minutes.

OPENING STATEMENT OF HON. PETE OLSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. OLSON. Thank you, Mr. Chairman. And I want to thank you for bringing this hearing to Space City, USA, and the energy capital of the world. And I appreciate your courtesy for letting me deliver this speech. Unfortunately, I have to leave a little bit early here; and I apologize to the witnesses. Thank you for coming today; and, unfortunately, I won't be here for much of your testimony but we do have a record and we know we're going to be working close with you in the future.

But make—make no mistake, we are here today because the EPA has overstepped its bounds and it does not respect the authority of the individual States. Unfortunately, Texas has found itself in the crosshairs of this radical EPA that simply refuses to acknowledge our successes in increasing production while reducing pollution. All this while we're the fastest-growing State in population in the Nation. Since the recession of 2008, the great State of Texas has produced half the private sector jobs in our country—half the private sector jobs.

Even with adding to the Nation's jobs, population and economic growth, Texas has improved air quality through its flexible permitting program, which the EPA has disapproved. We've had a 22 percent reduction in ozone and a 53 percent in NOx emissions. The national average was 15 percent for ozone, 27 percent for NOx. And this was from the time period 2000 to 2008. With those numbers, it's very clear: Flexible permitting works. These are successes that the EPA refuses to recognize.

Another great example of the EPA overreach was in the emergency administrative order issued late last year by EPA to raise resources. Earlier this week the Texas Railroad Commission announced that it had determined that range resources was not—was not the source of the contaminant in any domestic water wells. This finding rightly indicates that the Texas Railroad Commission handled the contamination incident properly. And the EPA had no authority to take the extraordinary steps they did by going around our State regulators.

The EPA improperly usurped State authority and has repeatedly demonstrated a disturbing pattern of behavior of abuse of their Federal authority in the State of Texas, and it must stop. I will continue to press the EPA to remain within their Federal parameters and exercise common sense and caution when attempting to intervene in matters under the jurisdiction of this State.

And, finally, as our Nation's economy struggles to regain its footing, this Administration has continued its backdoor approach to cap and trade through EPA regulation. I believe this act is unconstitutional. We know these regulations will destroy jobs and hurt an already weak economy. At a time of near record gas prices, these regulations will only force Americans to pay more at the pump.

This document, the Constitution, dictates that Congress, not unelected bureaucrats, has the authority to decide whether and how greenhouse gases are going to be regulated. As our chairman said in his opening statement, just last week this committee passed, with my strong support, the Energy Tax Prevention Act,

which would prevent the EPA from implementing a cap and tax scheme through onerous regulation and restore much-needed regulatory certainty to businesses trying to grow our economy. This bill would also roll back the rule that EPA has already implemented that has allowed them to seize control of Texas greenhouse gas permitting authority.

Texas and American business owners alike need the assurance that this Government will not continue to regulate them out of business.

Again, I appreciate the chairman's courtesy and I apologize to the witnesses for an early departure. I yield back my time.

Mr. WHITFIELD. Thank you, Mr. Olson.

We're sorry that you have another engagement, but thank you very much for coming on this issue. We appreciate your being here.

In Washington we really do not allow members that are not members of the committee to make an opening statement. However, since Mr. Brady is with us today and he's informed me in Texas they have different rules, I thought I would give him an opportunity to speak.

Mr. BARTON. Mr. Chairman, point of parliamentary inquiry?

Mr. WHITFIELD. Yes, sir.

Mr. BARTON. If we allow Mr. Brady—and I'm certainly encouraging you do that—if Congresswoman Jackson Lee comes, I would hope that we would give her the opportunity to give a statement, also.

Mr. WHITFIELD. We will—we will do that.

Mr. BARTON. OK. Thank you.

Mr. WHITFIELD. Mr. Brady, do you want to go?

Mr. BRADY. Thank you, Mr. Chairman. I thought you were just picking on us Ways and Means members.

Mr. WHITFIELD. We just want your jurisdiction.

Mr. BRADY. I do have a compelling opening statement that is likely to bring you all to your feet. So, just save your comments until [inaudible].

[The prepared statement of Mr. Brady follows:]

Congressman Kevin Brady
House Subcommittee on Energy and PowerField Hearing—Houston, TX
A Focus on Texas' Economy, Energy Prices and Jobs
Thursday, March 24, 2011
As Prepared for Delivery

- Mr. Chairman, thank you for holding this very important hearing in Houston.

- I want to recognize and thank my Texas colleague and Committee Chair Emeritus Rep. Joe Barton for also inviting me to be here today.

- We have three top issues in Texas: JOBS, JOBS, and JOBS.

- Jobs you can raise a family on with strong wages, steady demand, and good benefits.

- In Texas – those jobs are energy jobs. This Gulf Coast area is home to not only Texas' but the COUNTRY's petro-chemical community.

- Texas believes in American Made Energy – it's minted here.

- We're the leading crude-oil producing state in the nation. The state accounts for ¼ of our nation's refining capacity and produces ¼ of our supply of natural gas.

- And, contrary to popular belief, we don't stop at traditional sources of energy. As a state, Texas excels in renewable energy potential—helping to lead the nation in wind and solar production.

- In Washington our fight is to keep the White House from choking the life out of it with excessive regulations, the "permit-torium" in the Gulf, and an overzealous EPA that wants to shut down most of the states' manufacturing – a state that BY THE WAY has reduced and exceeded its air emissions goals.

- Congress and the American people have already said "NO" to Cap and Trade. Congress and the American people are saying "YES" to more domestically produced energy.

- What we are discussing today—EPA's clear overreach—absolutely poses one of the greatest threats not only to the Texas economy, but to our nation's energy independence and our ability to create jobs and see long-term economic growth.

- The EPA is pursuing a massive job-killing agenda with questionable levels of environmental benefit.

- And, the uncertainty brought by the myriad of new federal regulations (from air permitting to greenhouse gases to boilers, cement kilns and coal-fired power plants) is stopping business investment during a time of economic recovery.

- The businesses in my district from the hardware store to the paper producers to the chemical plants and refiners in southeast Texas all tell me that it's hard enough to gauge the market but impossible when they also have to gauge what new regulation or burden the federal government might throw on them next.

- Just two days ago, I toured a facility in my district that manufactures plastic PVC pipe—the largest PVC manufacturer in North America. After seeing business drop off significantly during the recession they are seeing a bit of light at the end of the tunnel. They've found some new customers and old ones are slowly coming back.

- They had two concerns: energy prices and the impact of what's coming out of Washington on the business climate.

- Uncertainty on both fronts keeps them from making the additional investments they'd like to make.

- Yet, this administration continues to pursue policies and regulation—whether slow walking drilling permits, closing off areas from energy exploration or aggressive agency actions—that drive up energy prices and stifles the job growth that our constituents are demanding.

- The Middle East is in crisis – oil's over $100 a barrel – and gasoline is over $3 a gallon. If ever America needed American Made Energy – If ever America needed TEXAS to do what it does best – IT's NOW.

Mr. BARTON. The guys from Agriculture are fighting for jobs here in Texas and for the authorities to state to permit these businesses and to the fight that these mandates, the Federal Government has no authority to impose on us. I want to make two points. One is that there is, so far this morning, this belief that because there has been an exchange of letters between Texas and the Federal Government, that gives Washington the authority to seize our permitting process. The truth of the matter is this is to the contrary. With an exchange of letters between Washington and every State on issues for Medicaid, Medicare, clean water, highway transportation, and endangered species, and fisheries, and water, a normal routine exchange of letters between and among Federal programs is no basis for seizing our authority.

And, secondly, let me be real clear, this isn't a choice between clear air and jobs. Texas is achieving both. The question here is, does Washington have the power to seize these States' permitting authority and impose among other mandates a global warming agenda that Congress has rejected? If the answer is yes, well, there is no limits to the power of the unelected, unaccountable bureaucracy in Washington. If the answer is no, factually, it restores Congress' constitutional jurisdiction over the districts and restores the State's rights as a partner with the Federal Government to achieve these goals.

I'm anxious to hear from our witness, Mr. Shaw. Thanks for joining us, as well, today. Chairman, thanks for having me.

Mr. WHITFIELD. Thank you very much.

And I want to welcome the first panel. We appreciate you being here today.

We have as a witness the Honorable Greg Abbott, who is the Attorney General of the State of Texas. In addition, we have Mr. Todd Staples, who is the Commissioner of Agriculture of Texas. And then we have Mr. Bryan Shaw, who is the chairman of the Texas Commission on Environmental Quality. So, we appreciate your being here. We look forward to your testimony.

And Attorney General Abbott, I'll recognize you first for your opening statement.

STATEMENTS OF GREG ABBOTT, ATTORNEY GENERAL, STATE OF TEXAS; TODD STAPLES, COMMISSIONER, TEXAS DEPARTMENT OF AGRICULTURE; AND BRYAN W. SHAW, CHAIRMAN, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

STATEMENT OF GREG ABBOTT

Mr. ABBOTT. Thank you, Mr. Chairman. And let me join in in welcoming you to Texas. I hope you could get some good food while you were here. Thank you for the opportunity to appear before this subcommittee.

For the record, my name is Greg Abbott, and I am the Attorney General from Texas. And I'm here today to focus primarily on the litigation that Texas is waging against the EPA and explain why Texas believes the EPA is violating the Clean Air Act, as well as other laws.

First, before I go into that—and we have submitted in greater detail in our prepared remarks—Texas has worked effectively with

the EPA to enforce environmental laws. Texas also strives to prevent pollution before it occurs. Over the last decade, as has been recounted already, Texas cut NOx in half and reduced ozone more than any other State in the country. And Texas has achieved one of the largest reductions in greenhouse gas emissions of all the States in the country. Texas remains committed to working with the EPA to improve air quality and to hold polluters accountable. But Texas cannot support the EPA's efforts to regulate greenhouse gases and federalize the Texas air permitting system. Texas believes the EPA's actions are not only bad policy and harmful to creating jobs but also believes that EPA has repeatedly violated the law.

Along these lines, the EPA has ignored the plain language of the Clean Air Act, violated notice and comment requirements, and attempted to rewrite Federal laws that were written by the United States Congress by way of the administrative rulemaking process.

Texas lodges several legal challenges. I'll mention just three because of lack of time that reveal legal problems with the EPA's regulations. One is called the "Tailoring Rule." The Clean Air Act defines in precise numerical terms the emission thresholds that trigger permitting requirements for stationary sources. The EPA conceived that the regulation of greenhouse gases at these stationary thresholds are inconsistent with the Congressional intent concerning the Clean Air Act by subjecting thousands of schools, churches, farms, and small businesses to Clean Air Act regulation. These harsh results show that greenhouse gases simply are not the kind of substance the Clean Air Act was designed to regulate. To get around Congress' clear instructions, the EPA basically amended the Clean Air Act by administrative fiat. The EPA calls the revised language the "Tailoring Rule." The Tailoring Rule purports to create new thresholds for greenhouse gases in place of the thresholds that were mandated by Congress, itself.

These new thresholds are several hundred times higher than those in the Clean Air Act. Well, with this Tailoring Rule, the EPA effectively rewrote the Clean Air Act by unilaterally raising emission thresholds.

A second legal violation is in the SIP call rule issued by the EPA. The Clean Air Act gives States up to 3 years to bring their programs into compliance with major new Federal mandates, such as the greenhouse gas regulations. Well, the time allowed by the EPA violated the Clean Air Act by giving States only 15 months rather than the allotted 3 years to change their laws and regulations to comply with the new greenhouse gas mandate. The EPA bases its decision on statutory provisions for bringing a SIP into compliance with existing standards, but the greenhouse gas rules are new standards. So, the 3-year requirement applies. EPA's failure to give States 3 full years violates the Clean Air Act.

The last one I'll mention is the legal violation in the FIP rule. Absent an overriding emergency, the Administrative Procedure Act requires the EPA to solicit notice and comment from the public before issuing regulations. The FIP rule was issued without notice and comment in violation of the APA. There was no emergency to rush the rule. The EPA had plenty of time to respond to Texas' position on greenhouse gases. A notice and comment period was,

therefore, required by the FIP rule. EPA's failure to provide it should doom the rule. Thank you.

[The prepared statement of Mr. Abbott follows:]

STATEMENT OF TEXAS ATTORNEY GENERAL GREG ABBOTT

Before the Energy & Power Subcommittee
of the House Energy & Commerce Committee
March 24, 2011

Thank you, Mr. Chairman, for the opportunity to appear before this Subcommittee. My name is Greg Abbott, and I am the Attorney General of Texas. I am here today to discuss litigation the State of Texas has filed against the U.S. Environmental Protection Agency ("EPA") and explain why the EPA's regulation of greenhouse gases ("GHGs") violates the Clean Air Act.

Although the EPA's legally flawed pursuit of GHG regulations has forced Texas into a legal dispute against our federal partners, the last year of litigation stands in contrast to years of cooperative enforcement between Texas and the EPA.

For example, in 2009 we worked with the EPA to shut down a lead smelter in El Paso. Under a settlement negotiated by Texas, the EPA, and other States, ASARCO was required to pay more than $1.8 billion for environmental remediation across the country—including more than $100 million for clean-up in the State of Texas.[1]

[1] Press Release, Attorney General Greg Abbott, ASARCO Pays $52 Million to Fund Environmental Cleanup at Former El Paso Smelter (Dec. 10, 2009), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=3181.

We also worked with the EPA to obtain the largest-ever air quality settlement with a refining company when we required San Antonio-based Valero to spend more than $700 million upgrading its facilities.[2]

While Texas has a demonstrated record of enforcing environmental laws in conjunction *with* the EPA, we also have a record of doing so on our own—as we did when we obtained the largest-ever penalty under the Texas Clean Air Act in a case where Huntsman was required to pay more than $9 million for unlawful emissions at its Port Arthur facility.[3]

In addition to enforcing existing environmental laws and holding polluters accountable, Texas also strives to prevent pollution before it occurs. And Texas is a success story on that front too.

According to the Texas Commission on Environmental Quality, ozone and nitrogen oxide emissions from industrial sources in Texas have been on a steady decline since 2000. Industrial ozone emissions are down 22 percent, and nitrogen oxide emissions have been reduced by 46 percent.[4] As Governor Perry explained in a letter to President Obama last spring, "Texas electricity generators have the 11th lowest NOx emission rates for all states."[5]

But Texas is not only reducing the harmful pollutants that have long been subject to EPA regulation under the Clean Air Act, it also has a demonstrated record of reducing greenhouse gas emissions. As the State explained in the Petition for Reconsideration that we filed with the EPA, since 2004 no other state in the nation has reduced power-sector CO2 emissions more than

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[2] Press Release, Attorney General Greg Abbott, Attorney General Abbott Wins For Texas In Largest Environmental Settlement With A Refiner (June 16, 2005), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=1028.
[3] Press Release, Attorney General Greg Abbott, Attorney General Abbott Lands Record Environmental Penalty From Huntsman (May 13, 2003), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=78.
[4] Texas Ozone and NOx Emissions Trend Analysis, Texas Commission on Environmental Quality (Jan. 11, 2010), *available at* http://www.tceq.state.tx.us/assets/public/implementation/air/success/2010.01.10-txOzoneNoxTrends.pdf.
[5] Letter from Governor Rick Perry to President Barack Obama (May 28, 2008), *available at* http://governor.state.tx.us/files/press-office/O-ObamaBarack201005280133.pdf.

Texas.[6] Further, Texas has already installed more wind power than any other state—and all but four countries.[7] Thanks to the State's efforts to foster renewable energy sources, Texas effectuated one of the two largest absolute declines in greenhouse gas emissions of any state in the nation.[8]

Texas remains committed to working with the EPA to improve air quality and hold polluters accountable. But Texas cannot support the EPA—and in fact must challenge it—when it pursues regulations that are contrary to the law and devastating to the economy. Such is the case when it comes to the EPA's efforts to regulate greenhouse gases. In its zeal to regulate greenhouse gases, the EPA has ignored the plain language of the Clean Air Act, violated notice and comment requirements, and attempted to re-write congressionally enacted federal laws by administrative rule-making.

I. Texas's Legal Challenges

In order to understand why the Clean Air Act cannot legally be used to regulate carbon dioxide—and why Texas has challenged the EPA's actions—it is important to first explain what the Clean Air Act does target. The Clean Air Act was designed to target toxic pollutants that directly poison or injure the human body. As Congressman Collin Peterson (D-MN) put it, the Clean Air Act "was meant to clean up the air, to get lead out of the air. It was not meant to fight global warming."[9] According to Senator Mary Landrieu (D-LA), "the Clean Air Act was never intended to regulate greenhouse gases. It was designed to reduce the smog and acid rain that was

[6] Petition for Reconsideration of the State of Texas at 5, *Endangerment Finding*, EPA Docket No. EPA-HQ-OAR-2009-0171 (Feb. 16, 2010).
[7] *Id.* at 5-6.
[8] *Id.*
[9] Press Release, Rep. Collin Peterson, Peterson Sponsors Legislation to Restrict EPA (Feb. 2, 2010), *available at* http://collinpeterson.house.gov/press/111th/Peterson%20sponsors%20legislation%20to%20restrict%20the%20EPA.html.

choking our cities in the 1970s and 1980s. That law, which I support, has worked fairly well. But greenhouse gases do not harm our lungs and pollute our air."[10]

The Clean Air Act requires that pollution levels be measured at the state or local level, and it calls on the EPA—in partnership with the states—to set goals for reducing the amount of each regulated pollutant on the state or local level. Substances such as carbon monoxide and sulfur dioxide, which are poisonous when inhaled and can be effectively measured and reduced on a localized basis, are classic examples of substances the Clean Air Act targets. The Act provides that facilities that emit more than a certain threshold of a regulated pollutant are subject to permitting requirements. The threshold has the effect of exempting many small businesses and other small entities like farms, schools, and churches, while targeting major sources of pollution that have a major effect on air quality.

The fundamental problem underlying all the EPA's GHG rules is that carbon dioxide simply does not fit with the pollution-reduction framework envisioned by the Clean Air Act. As Senator Landrieu put it, "to regulate carbon emissions with the Clean Air Act would be to jam a square peg into a round hole."[11]

A. The Endangerment Finding Violates the Clean Air Act.

The EPA's legal troubles begin with the endangerment finding, in which it concluded that six greenhouse gases emitted from new motor vehicles endanger public health. Contrary to what some have claimed, the Supreme Court's decision in *Massachusetts v. EPA* did not require the EPA to regulate carbon dioxide or any other greenhouse gas. The Supreme Court ruled that

[10] Press Release, Sen. Mary Landrieu, Landrieu Co-Sponsors Resolution to Halt EPA Efforts to Use Clean Air Act to Regulate Greenhouse Gases (Jan. 21, 2010), *available at* http://landrieu.senate.gov/mediacenter/pressreleases/01-21-2010-2.cfm.
[11] *Id.*

greenhouse gases are "air pollutants," as that term is defined in the Act. But the Court's opinion clearly states that the Court "need not and does not reach the question whether" carbon dioxide is the kind of air pollutant the EPA *must* regulate under the Clean Air Act.[12] The EPA, not the Supreme Court, decided to try to force the square peg of carbon dioxide into the round hole of the Clean Air Act.

The endangerment finding is legally flawed in several ways. First, the endangerment finding is arbitrary because the EPA did not define or apply any standards or criteria by which to judge endangerment to public health. Second, the endangerment finding includes two gases that are not emitted at all from motor vehicles, meaning that the EPA plainly lacked legal authority to make an endangerment finding for these gases under section 202 of the Clean Air Act.

1. The Endangerment Finding Is Arbitrary Because it Does Not Identify or Apply Any Standards by Which to Judge the Endangerment Caused by GHG Emissions or Climate Change.

The EPA cannot implement the Clean Air Act, or any other statute, in an arbitrary manner.[13] The EPA needed to define standards or thresholds by which to judge whether certain levels of greenhouse gas emissions endanger public health or welfare—or whether reductions in emissions as a result of regulation will benefit public health or welfare. Because the EPA failed to do this, the Endangerment Finding is arbitrary and therefore unlawful.

In its endangerment finding, the EPA did not state the amount of greenhouse gases that endanger public health or welfare, or the amount of greenhouse-gas-related climate change that constitutes a danger to public health. Similarly, the EPA has not established a method for measuring the

[12] 549 U.S. 497, 534 (2007).

[13] 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) ("The agency's action . . . may be set aside if found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.").

effect of its regulations on reductions in greenhouse gas levels. The EPA seeks to regulate greenhouse gases, but it is unwilling or unable to determine the level at which those gases pose a danger to public health or the reductions needed to avoid a danger to public health. In essence, the EPA is saying: "Just trust us." But we cannot. Because the truth is that—unlike with other gases regulated under the Clean Air Act—there is not a specific atmospheric level of carbon dioxide the EPA can identify as a dangerous level. And even with the strictest of regulations, the EPA cannot prevent greenhouse gases from permeating our air, because the greenhouse gases in our air are just as likely to come from China and India as they are to come from Houston or Dallas.

2. The Endangerment Finding Included Gases Which Are Not Emitted by Motor Vehicles.

Section 202 of the Clean Air Act only applies to mobile sources. The EPA can only make an endangerment finding under Section 202 for substances emitted from new motor vehicles.[14] But the EPA failed to abide by the CAA, because two of the six gases it deemed to endanger public health or welfare under section 202 are not emitted *at all* by new motor vehicles.[15] The endangerment finding thus contravenes the plain text of section 202, and accordingly, the EPA's inclusion of two of the six gases in its endangerment finding violates the Clean Air Act.

B. The Tailpipe Rule is Unlawful.

The Clean Air Act requires the EPA, before issuing a rule, to give "appropriate consideration to the cost of compliance" with the rule.[16]

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[14] 42 U.S.C. § 7521(a)(1).
[15] The two gases are hydrofluorocarbons and hexafluoride.
[16] 42 U.S.C. § 7521(a)(2).

In promulgating the Tailpipe Rule—which requires motor vehicle manufacturers to comply with federal fuel economy standards—the EPA did not fully consider the costs associated with the rule. The EPA admitted that, under its interpretation of the Clean Air Act, the Tailpipe Rule would *require* the EPA to regulate stationary sources of greenhouse gases. In other words, the EPA views the Tailpipe Rule as a triggering mechanism for the EPA's authority to regulate stationary sources. But when it promulgated the Tailpipe Rule, the EPA failed to consider costs associated with regulating emissions from stationary sources. This omission violates the Clean Air Act.

C. The Timing Rule is Unlawful.

The Timing Rule provides that the EPA's regulation of greenhouse gases under the Tailpipe Rule automatically triggers regulation of stationary sources of greenhouse gases. According to the EPA, once it made a finding that greenhouse gases emitted by motor vehicles are dangerous, it had no choice but to regulate stationary sources of carbon dioxide.

Contrary to the EPA's assertions, the Clean Air Act authorizes regulation of stationary sources of a pollutant only after the EPA has established a National Ambient Air Quality Standard (NAAQS") for the pollutant. The problem for the EPA is that they have not established a NAAQS for carbon dioxide. In fact, it would be completely impracticable to do so because of the way carbon dioxide exists in the air.

The Clean Air Act was designed to reduce emissions of toxic air pollutants. Atmospheric levels of these pollutants can be meaningfully measured and reduced on a localized basis. Carbon dioxide, by contrast, is a non-toxic substance that exists throughout the atmosphere. Levels of carbon dioxide in the atmosphere cannot be meaningfully measured or reduced on a localized

basis. As the Union for Jobs and the Environment put it in comments on the EPA's proposed rules, "Due to the global nature and long atmospheric residence times of greenhouse gas emissions, individual states, regions or nations cannot effect meaningful change in atmospheric greenhouse gas concentrations."[17] In other words, it is impossible to achieve reduction-targets for atmospheric levels of carbon dioxide using the Clean Air Act, because emissions far outside Texas, for example, affect the concentration of carbon dioxide in Texas. The Timing Rule ignores this reality and improperly premises regulation of stationary sources on the Tailpipe Rule.

D. The Tailoring Rule is Unlawful.

Even the EPA concedes that regulation of GHGs produces results "inconsistent with congressional intent concerning the applicability of the [Clean Air Act]" by subjecting thousands of schools, churches, farms, small businesses, and other small facilities to Clean Air Act regulation.[18] These absurd results indicate that carbon dioxide and other greenhouse gases simply are not the kind of substance the Clean Air Act was designed to regulate. However, instead of acknowledging that reality, the EPA unilaterally changed the law by promulgating the Tailoring Rule.

The Clean Air Act requires stationary sources that emit above 100 or 250 tons per year (depending on the source) of a regulated pollutant to obtain permits. But the Act does not give the EPA discretion to change these congressionally established thresholds.

[17] Comments of Union for Jobs and the Environment at 7, *Endangerment Finding*, Docket No. EPA-HQ-OAR-2009-0171 (June 23, 2009).
[18] Tailoring Rule, 75 Fed. Reg. 31,514, 31,541.

With the Tailoring Rule, however, the EPA unilaterally raised the statutory thresholds despite the lack of any legal authority to do so. In doing so, the EPA went beyond its role as regulator and usurped the role of legislator. Under the Tailoring Rule's new thresholds, permitting requirements kick in at either 75,000 or 100,000 tons per year—instead of the 100 or 250 tons mandated by the Act. Regardless of the desirability of these new thresholds as a policy matter, as a legal matter the EPA lacks the legal authority to amend the plain terms of the Clean Air Act, which is precisely what the Tailoring Rule does. Accordingly, the Tailoring Rule is patently illegal.

E. The Sip Call Rule is Unlawful.

The EPA issued the "SIP Call Rule" on September 2, 2010. The SIP Call Rule requires states to change their laws and regulations by December 2, 2011 to comply with the EPA's new stance on greenhouse gases. A SIP is the "state implementation plan" under which state regulators issue Clean Air Act permits for pollution sources in their state. Once a state's SIP has been approved—as Texas's was under the Clinton Administration in 1994—the state's permits are federally recognized and federally enforceable.

The Clean Air Act gives the EPA the power to require states to amend their permitting programs by issuing a SIP Call, but it also gives states up to three years to bring their regulatory schemes into compliance with major new federal mandates such as the EPA's new greenhouse gas regulations. This congressionally mandated timeframe allows states adequate time to conduct their internal law-making and rule-making procedures and provides time for robust public input through an open, transparent process at the state level. The EPA's timeframe, on the other hand,

violates the Clean Air Act by giving the states just fifteen months to comply, rather than the three years required by the Act.

In an effort to justify its illegal actions, the EPA improperly invoked a section of the Clean Air Act that allows the EPA to require adjustments to SIPs that fail to comply with pre-existing federal requirements. When a major new requirement such as greenhouse gas regulation comes into existence, however, the Clean Air Act entitles the states to a three-year transition period. The EPA's failure to provide the states with the full three years therefore violates the law.

F. The FIP Rule is Unlawful.

On August 2, 2010, Texas informed the EPA of its inability to comply with the EPA's demand that states amend their air quality laws and regulations to comport with the EPA's new stance on greenhouse gases. Approximately three months later, on October 28, 2010, Assistant EPA Administrator Regina McCarthy swore in a statement filed with the D.C. Circuit Court that, in light of the SIP Call deadline established by the EPA, the federal government could not take over Texas's air permitting responsibilities "until December 2, 2011 at the earliest." Despite this sworn statement, the EPA did a 180-degree turn on December 23, 2010, when it issued an "emergency" FIP Rule that purported to immediately federalize Texas's permitting regime—which meant the EPA would not recognize Texas permits and would instead require Texas-based stationary sources to obtain additional federal permits beginning January 2, 2011.

Absent an overriding emergency, the Administrative Procedure Act requires the EPA to solicit notice and comment from the public before issuing regulations. The notice and comment period allows for transparency and public participation in the rulemaking process. The FIP Rule, however, was issued without any notice and comment period at all, in direct violation of the law.

There was no emergency, as the EPA had over four months to react to Texas's August 2, 2010 letter. Instead, the EPA waited until the last minute to announce its intentions. No emergency existed, and as a result, a notice and comment period was required for the FIP Rule just as for any other rule. The EPA's failure to provide it dooms the FIP Rule.

Not only was this FIP Rule issued without the notice and comment required by the Administrative Procedure Act, it was promulgated just before the Christmas/New Year holidays, in an obvious attempt to minimize public scrutiny of the EPA's actions. The EPA had known for over four months that Texas was unable to comply with the SIP Call Rule, yet it waited until just before Christmas to announce—without public notice or comment—that a supposed "emergency" required it to seize control of air permitting in Texas just two weeks later, on January 2, 2011.

Thus, not only are the SIP Call and FIP Rules substantively flawed in that they were premised on the EPA's misuse of the Clean Air Act to regulate carbon dioxide, they are also procedurally deficient in ways that plainly ignore the "transparency, public participation, and collaboration" that President Obama has demanded of his Administration.[19] Government by "emergency" bureaucratic fiat—rather than by deliberative legislative process—is not only contrary to our constitutional order, it also undermines public confidence in the rule of law and in the integrity and fairness of our political system. As Senator Ben Nelson (D-NE) put it, "Just because somebody's frustrated with the pace of action in Congress doesn't mean the EPA should become a super-legislative body."[20] It is elected members of Congress, not unelected and unaccountable

[19] Barack Obama, Memorandum for Heads of Executive Departments and Agencies: Transparency and Open Government, *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.
[20] Press Release, Sen. Ben Nelson, Nelson Warns EPA Overreach Could Damage Nebraska's Economy (June 10, 2010), *available at* http://bennelson.senate.gov/press/press_releases/061010-01.cfm.

bureaucrats at the EPA, that must decide whether and how the federal government regulates carbon dioxide emissions.

II. Economic Impact of the EPA's Actions

By bringing an end to the EPA's job-killing greenhouse gas regulations, Congress can remove a direct burden on the energy, manufacturing, and agricultural sectors, potentially saving thousands of jobs. As Senator Nelson aptly put it, we must protect all sectors "of our nation's economy from EPA overreach. . . . [F]armers, ranchers, business owners, cities, towns and hundreds of thousands of electricity consumers should not have their economic fortunes determined by unelected bureaucrats in Washington."[21]

The effects of these burdensome new costs will be felt in all sectors of our economy and in all parts of our society. As the National Black Chamber of Commerce warned, "Instead of alleviating our country's current 10% unemployment rate, heavy handed 'command and control' of carbon emissions would trigger further fallout. These and other costs would disproportionately burden lower-income and minority populations who already spend a large portion of their earnings on energy."[22] The Congress on Racial Equality gave the EPA similar advice about the impact the new regulations will have—not just on industry—but on every American: "By driving up energy costs, imposing major permitting and compliance costs on businesses, and micromanaging virtually every business, economic and personal decision, the proposed regulatory program would impose the equivalent of a massive tax hike – in the midst of our most severe economic crisis in decades – further harming families, especially poor, minority and

[21] *Id.*
[22] Press Release, National Black Chamber of Commerce, Unemployment Statistics Reinforce Need to Drop Climate Change Bill. NBCC Study shows Bill would kill 2.5 Million US Jobs (Dec. 23, 2009), *available at* www.nationalbcc.org.

elderly households."[23] At a time of high unemployment, low consumer confidence, and nagging economic uncertainty in this country, the Administration should be looking for ways to encourage investment and reduce the cost of doing business in America. Allowing unaccountable federal bureaucracies to unilaterally amend the law without Congress' consent reduces confidence in our democratic system and in the rule of law, which in turn discourages new investment and economic growth.

In the words of our second president John Adams, ours is "a government of laws, not of men." The public's continued confidence that we are governed by legitimately enacted laws rather than by the political whims of powerful people is not only central to our constitutional form of government, it is vital to our nation's future economic prosperity. If government is permitted to eschew transparency and accountability out of political expediency, the unavoidable result is public uncertainty about the rule of law. And uncertainty, particularly legal uncertainty, is the enemy of economic prosperity. We are blessed to live in a nation whose traditions of constitutionally limited government and respect for the rule of law provide an environment in which businesses and individuals can invest their resources confidently in the future. But we cannot take these blessings for granted. Most nations—both today and throughout human history—have not enjoyed them, and we will not enjoy them for long if we do not guard them jealously. By reining in a bureaucracy run-wild like the EPA, Congress can begin to restore the American people's confidence in the rule of law and in the future of our nation's economy.

[23] Comments of Congress of Racial Equality at 2, *Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act*, Docket ID: EPA-HQ-OAR-2008-0318 (November 25, 2008).

Mr. WHITFIELD. Thank you, Mr. Abbott.

Mr. Staples, you're recognized for 5 minutes.

STATEMENT OF TODD STAPLES

Mr. STAPLES. Thank you, Mr. Chairman and members, for the opportunity to be here with you today and thank you for your leadership for our country and our State.

I'm here today to share with you concerns of Texas agriculture with a number of efforts underway to regulate greenhouse gases and to discuss the negative consequences not only to American agriculture, but particularly to consumers and its negative impact on jobs here in our country.

American agriculture produces the safest, the most affordable, and the most reliable food supply in the world. Texas is a big part of that. Texas leads the nation in the production of cattle and cotton and sheep and goats and many other categories. It has an economic impact annually of about $100 billion on our State's economy and represents about 9 and a half percent of our entire gross State economy.

To demonstrate the connectivity between agriculture in urban Texas right here in Houston, the Port of Houston is the biggest exporter of Texas agriculture products. We're all involved in agriculture at least in some form today.

The EPA's regulation of greenhouse gases in Texas under the Clean Air Act will have a detrimental effect on Texas' agriculture. It will increase input costs which farmers and ranchers will have no choice but to either absorb or stop producing the food that we eat and the clothes that we wear. Ultimately, in this process, it is the consumer, American families, that will be picking up the tab for these higher costs. Based on a USDA study, released just this year, Americans spend about $41 billion for the transportation of food from the farm to the consumer. The Department of Labor reported that the increase in food costs are the highest in four decades. All with very minimal inflation. And I might add that these are natural, market-driven costs. And costs associated with greenhouse gas regulations will only add to these already higher costs that consumers are facing.

Uncertainty of regulation threatens the health of production agriculture. Agriculture is an industry more vulnerable than most. Agriculture producers have to fight pests, disease, weather, and volatility of the market each and every day. They should not have to fight their own Governmental regulatory agencies.

Since the EPA began consideration of the endangerment finding, analysts have sounded statistical alarm bells loudly and clearly. Costs estimates run the gamut but all prove that greenhouse gas regulation will have a negative impact on agriculture and a negative impact on consumers.

If the input costs for American agriculture are higher than those of our competitors in other countries, this will have the net effect of moving production agriculture outside the borders of the United States and along with it the jobs that are created.

These regulations, members, are proven in their cost but they are questionable in their benefit.

Generally, when establishing regulations, we're doing it to achieve an end. There are consequences for every regulatory action. That's why following sound science is a fundamental principle by which all regulators across the United States have always lived and practiced. Now we believe the EPA is abandoning these principles and this process. In this case, there's no measurable positive impact and no way to determine if your regulation is achieving the result worth the economic disruption that it's causing.

And this isn't just a disruption to farmers and ranchers. It's disruption to the consumers who benefit from American agricultural products is what is on the table. Today Americans spend about 10 percent of their disposable income on food. That compares to about 24 percent in Mexico and, roughly, 33 percent to our competitors in China.

Food security is a part of national security. There are no greater better stewards than our farmers and ranchers. No one cares more for the land and air and water than them. We're pleading to you for your help today to turn to the courts, we have turned in voluminous communication to the EPA, and we're asking for your help in this process.

Thank you for the opportunity to be here.

[The prepared statement of Mr. Staples follows:]

Summary of Statement made by Texas Agriculture Commissioner Todd Staples
Hearing on "EPA's Greenhouse Gas and Clean Air Act Regulations: A Focus on Texas' Economy, Energy Prices and Jobs"
Before the House Subcommittee on Energy and Power
of the House Committee on Energy and Commerce
March 24, 2011

- American agriculture produces the safest, most affordable, most reliable food supply in the world, and Texas is a major factor in production. The Long Star State leads the United States in production of cattle, cotton, sheep, goats, mohair and many other food and fiber products. Agriculture is also a very big part of the Texas economy, producing an economic impact of more than $100 billion annually. One in seven jobs, representing 9.5 percent of the Texas economy, is attributable to agriculture.

- EPA regulation of greenhouse gases in Texas through the Clean Air Act will add an additional burden on Texas farmers and ranchers at a time when rising energy prices are already putting a crunch on agriculture. An increase in input costs for farmers and ranchers will increase the price of food for consumers at a time when many Americans face unemployment and our broader economy is fragile.

- Uncertainty of regulation threatens the health of production agriculture. In every industry, you need to know your costs to plan ahead, and that's even more crucial in agriculture.

- If the input costs for American agriculture are higher than those in other countries, agricultural production – and American jobs – will be driven overseas. Food security is important for national security. We all understand the dangers of being dependent on foreign oil; we cannot afford to be dependent on foreign food.

- Agriculture producers have to fight pests, disease, weather and the volatility of the market. They should not have to fight their own government over burdensome regulations made as political maneuvers and based on disputed science. Greenhouse gas regulations are proven in their cost but questionable in their benefit.

- There are no greater stewards of our nation's natural resources than farmers and ranchers. According to a recent study published by the Congressional Research Service, more than $4 billion was invested in agriculture's conservation efforts in 2010 alone. Farmers and ranchers have successfully and voluntarily improved water and soil quality, and measurably reduced air emissions. Texas and private industries are taking steps to improve our environment, and we need a responsible partner in our federal government. We need to work together and put the consumers, not politics, at the heart of the solution.

Statement of Texas Agriculture Commissioner Todd Staples
Hearing on EPA's Greenhouse Gas and Clean Air Act Regulations:
A Focus on Texas' Economy, Energy Prices and Jobs
Before the House Subcommittee on Energy and Power
of the House Committee on Energy and Commerce
March 24, 2011

Thank you, Mr. Chairman and Members of the committee, for the opportunity to testify before you today. I am Todd Staples, Commissioner of the Texas Department of Agriculture.

I am pleased to be with you today and to take this time to share the concerns of Texas agriculture producers with the many federal efforts that are underway to regulate greenhouse gases in Texas.

American agriculture produces the safest, most affordable, most reliable food supply in the world, and Texas is a major contributor to production efforts. The Lone Star State leads the nation in the production of cattle, cotton, sheep, goats, mohair and many other food and fiber products. Agriculture is also a significant sector of the Texas economy, producing an economic impact of more than $100 billion a year. One in seven jobs, representing 9.5 percent of the Texas economy, is attributable to agriculture. It touches all parts of the Lone Star State, even right here in Houston. For example, the Port of Houston is the largest exporter of Texas agricultural products.

EPA's regulation of greenhouse gases through the Clean Air Act will have a costly and negative effect on Texas agriculture. The agency's regulations will add an increasing burden on Texas farmers and ranchers at a time when rising energy prices, coupled with increased costs for other inputs, are already pressuring farmers and ranchers, who operate on razor-thin profit margins. For agriculture, there is no choice but to absorb these increased costs or to stop producing the food we eat and the clothes we wear, or, ultimately, for consumers to pick up the tab.

The ultimate losers are the consumers. A 2006 USDA study shows Americans spent approximately $43.4 billion for the transportation of food from farm to the consumer. The Department of Labor reports that the monthly increase in food costs has risen the highest in 36 years – all with minimal inflation. It is not a coincidence that the 3.9 percent rise in food prices in February happened at the same time as a 3.3 percent increase in energy prices. These are natural, market-driven increases. Greenhouse gas regulations will be *in addition to those.*

Uncertainty of regulation threatens the health of production agriculture. In every industry, you need to know your costs to plan ahead, and that's even more crucial in agriculture. As a savvy business associate once told me, the market can stand good news, and it can stand bad news, but it cannot stand uncertainty.

Agriculture as an industry is more vulnerable than most. The average age of a U.S. farmer or rancher is 57. They have to fight pests, plant and animal diseases, weather and the volatility of the market. They should not have to fight their own government. The role of a bureaucratic agency is not to impose a tax on the American people to pursue a political agenda or to penalize the men and women who provide the basic necessities that Americans use daily.

Since EPA began consideration of the endangerment finding, reports by various credible analysts have sounded statistical alarm bells about threats ranging from sharp declines in farm income to increases in operating costs and declines in gross domestic product as a result of the proposals designed to regulate greenhouse gas emissions.

These costs run the gamut but all prove greenhouse gas regulation will have a negative impact on agriculture:

- A study by the Fertilizer Institute demonstrated the effects of carbon regulation, which would increase costs to Texas producers anywhere from $400 million to $779 million, through rising expenses for inputs like fuel and fertilizer for farmers raising corn, soybeans, wheat, cotton, rice, sorghum, barley, and oats.

- An early U.S. Department of Agriculture study estimated the potential impact of an EPA's regulation of greenhouse gases on farms and ranches. The study found that if regulation were based on Clean Air Act thresholds, many small agriculture businesses would be, for the first time, subject to EPA regulation. In Texas, we estimated the following number of farms and ranches would need to seek permitting: 575 dairy facilities, 58 swine operations, 1,300 corn farmers, and 28,000 beef cattle ranchers.
- Interestingly, the authors and sponsors of cap and trade legislation proposed in a past Congress estimated costs for citizens would be about the price of a postage stamp.

EPA has implemented rules to limit the impact of greenhouse gas emission regulations as public protest has increased. The cost fluctuates, but the same truth remains constant: greenhouse gas regulation will increase costs for agriculture and ultimately consumers.

And, if the input costs for American agriculture are higher than those in other countries, it will drive agricultural production – and American jobs – overseas.

These regulations are proven in their cost but questionable in their benefit.

Generally, when an agency establishes regulations, it is attempting to achieve a positive and measurable end. We practice this at TDA. For example, before instituting a plant pest quarantine, we use science to determine if a problem truly exists; we use science to determine if there are alternatives to shutting down businesses and commerce; we use science to weigh the cost of regulation against the benefit to the agriculture industry, the environment and the consumer.

We know there are consequences for regulatory action. That's why following sound science is a fundamental principle by which regulators all across the U.S. have always lived and practiced, and EPA is abandoning these principles. In the case of greenhouse gas regulation, there is no measurable positive impact, no way to tell if the regulation is achieving a result worthy of the economic disruption it is causing.

This is not just disruption to farmers and ranchers. It is a disruption to the consumers who benefit from American agricultural products. Americans today spend less than 10 percent of their income on food. Citizens of Mexico, in comparison, spend more than 24 percent. Chinese spend more than 33 percent.

Food security is tied to national security. We all understand the dangers of being dependent on foreign oil; we cannot afford to be dependent on foreign food.

Unfortunately, EPA's history does not give us reason to believe that protecting American food security is one of their motives. We need to base regulation on protection of the consumers and on sound science, not political science.

There are no greater stewards of our nation's natural resources than farmers and ranchers. According to a recent study published by the Congressional Research Service, more than $4.7 billion was invested in agriculture's conservation efforts in 2010 alone. In addition to federal, state and local funding, farmers and ranchers have successfully and voluntarily invested their own resources to improve water and soil quality, and measurably reduced air emissions. Texas and private industries are taking steps to improve our environment, and we need a responsible partner in our federal government. We need to work together and put the consumers, not politics, at the heart of the solution.

Thank you for the opportunity to testify. I look forward to any questions you may have.

Mr. WHITFIELD. Thank you, Mr. Staples.

And, Mr. Shaw, you're recognized for 5 minutes.

STATEMENT OF BRYAN W. SHAW

Mr. SHAW. Thank you, Chairman and members. It is an honor to be here and to be able to address this group and talk about the issue of flexible permitting in Texas. And I hope to take the time that you've allotted me to give some background on why we are where we are as well as to address some of the issues as far as what is that path forward looking like.

As a way of background—and, by the way, I am Bryan Shaw, the chairman on the Texas Commission on Environmental Quality, for the record.

The flexible permit program is one of the tools in our toolbox to allow us to accomplish our agency's mission, which is to protect the environment in the state of Texas, to do so to induce it to continue economic development. As we recognize that we need to have both a strong economy and a strong environment or we'll have neither.

So, toward that end we perceive that the Clean Air Act's delegation of authority to States such as Texas not only gave us an opportunity but we believe affords us a responsibility to customize our environmental regs with the program to find innovative ways to approach and to obtain the environmental goals that are set either by our State or by the Federal Government and to do so in a way that we can economically get there and ensure that we have a strong economy so that we can continue to improve our environment as well as recognizing the strong influence that a strong economy has on the health of our Texans because of the nutritional and other health care issues that are positively effected by a strong economy.

If you look at the process of the flexible permit program, it was a tool that was developed largely to help us to find innovative ways to incentivize enhanced environmental performance. We were able to trade flexibility to the regulated communities for reductions in environmental emissions. This is something that was on the heels of a Federal program known as "Project XL." It's a program that we believed and to this day believe not only does it provide for a stronger economic base and in job creation because of that flexibility but also provides opportunity for environmental reduction and ensures the technique through the way that the program is set up.

It has been in the past, as is mentioned, there have been letters exchanged between my agency and the EPA expressing concerns about the permit program. There have even been concerns expressed about individual permits. And when my agency has been given the opportunity to sit down with the EPA and address individual permits, we have been able to identify and explain where the misperceptions occurred, where the permit authorizations were indeed correct. And to this day, I'm unaware of any permit that has been discovered where our flexible permit program led to the exceedance of the Federal requirements.

I think that's critical because we have indicated, I have multiple times, that I stand ready to stand with the EPA to identify a flexible permit when our program allows that facility to then operate

to exceed Federal requirements. And, in fact, both the State, Federal laws as well as the State regulations prohibit flexible permit holders from circumventing Federal permit review to know where if the permit holders were to try to use that permitting program to get around the requirements of the Federal Government, the Federal emission laws, we would have enforcement action and it would potentially render that permit null and void.

And, so, we had this process where these letters were exchanged over the years; and certainly it was miscommunication. And if we tried to address those off and on, we had occasional bouts of success and failure with regard to communicating that to the EPA. And the lawsuit that was mentioned previously where EPA was forced to go to the Federal Register with their perceived deficiencies in the program happened in 2009 and the final disapproval came in 2010. That forced the EPA to lay out what the perceived deficiencies of the program were.

This was actually a relief for me because it allowed us to finally have EPA put into a legal context those concerns that they had with our program. And we were able to then take those concerns and explain how they were misconceptions. We did make some changes in an agreed rulemaking process with the EPA, an expedited process, to address and clarify concerns they had with the program. Unfortunately, the EPA has yet to consider those rule changes we made that only worked to clarify why our program does indeed meet Federal requirements. And, instead, they went ahead and disapproved our program without considering those changes that we need to address and clarify, concerns they had with the program.

With regard to the path forward, we believe that our program has led to environmental enhances and the program was developed and it also is one of the concerns I have is that as we move away from the flex permit program, we've had several unintended consequences. Among those are environmental benefits that we had because of the way this program was set up which will be lost if we allow companies to overcontrol facilities located near grandfathered facilities, for example, and we've got additional reductions from that and if we start underflexing it, if you will, your options are—in many cases my concern is to either increase those emissions or to shut some of those facilities down.

We have a number of facilities that are in the process of deflexing through the State. And I'm concerned that we may see the impact of that as we move forward. But we stand committed to allowing them to take advantage of the permitting tools we have and work with the EPA for a path forward. Hopefully, we can retain as much of the environmental benefit and economic development aspects of the flexible permit program as we move forward as possible.

Thank you, sir.

[The prepared statement of Mr. Shaw follows:]

Field Hearing of the U.S. House of Representatives Energy and Power Subcommittee of the U.S. House Energy and Commerce Committee

Testimony of Bryan W. Shaw, Ph.D., Chairman
Texas Commission on Environmental Quality

March 24, 2011

What you will hear the U.S. Environmental Protection Agency (EPA) say about Flexible Permits:

1. Texas Commission on Environmental Quality's (TCEQ's) flexible permitting program allows companies to circumvent federal New Source Review (NSR) permitting requirements;
2. Flexible permits are not transparent and are hard to understand;
3. Flexible permits lack enforceability;
4. Flexible permits lack adequate monitoring, recordkeeping, and reporting (MRR);
5. Federal law requires all permits to have individual emission rates;
6. No other state uses site-wide caps in permits like Texas;
7. The TCEQ's delegated Title V program is not consistent with the Federal Title V program; and
8. In a meeting with EPA headquarters on October 8, 2009, EPA stated that fixing TCEQ rules is of utmost importance.

Although we disagree with all of these statements, we wanted to provide certainty to the regulated community in Texas and continue to work with the EPA so we have done the following:

1. Adopted revised flexible permit rules on December 14, 2010, that:
   - Further enhanced our rigorous MRR requirements; and
   - Our MRR requirements are very similar to the federal Plant-wide Applicability Limit (PAL) program.

2. Adopted rules on June 2, 2010, that enhanced public participation for all air permits in Texas.

   - Federal notice and comment process requires 30 days of notice;
   - Texas process requires a minimum of 60 days of public notice as well as the contested case hearing process;
   - Texas' thresholds for notice of modified sources are significantly lower than the federal thresholds for notice; and
   - An example would be total particulate matter equal to or less than 10 microns in diameter (PM_{10}) (5 tons per year [tpy] for Texas vs. 15 tpy for EPA).

3. Circumvention of Major NSR is specifically not allowed under state law, federal law or any of our permitting rules (not just flexible rules).

   - The revised flexible permit rules further clarify this requirement as well;
   - To EPA's surprise many of the flexible permit holders have undergone major NSR reviews over the years; and
   - Many have prevention of significant deterioration (PSD) and non-attainment (NA) permits in addition to the state flexible permit authorization.

4. The EPA has yet to point to any federal law or rule that requires individual emission rates because this law does not exist.

5. Other states have developed permits with site-wide emission caps for similar sources as done in Texas.

   - Virginia, Minnesota, Illinois, Florida, Ohio, and Louisiana; and
   - Permits in Louisiana, Virginia, and Florida have been reviewed and approved by EPA.

6. The TCEQ's Title V Program is a delegated program and was given interim approval in 1996 and final approval in 2001.

   - It's EPA's program and they have the right to change their mind. That is what they have done.
   - The program is not broken; they want us to do things different for no added environmental benefit.
   - In 2001 when we were given final approval, many of these permitting elements, including Incorporation by Reference (IBR), were known by EPA and approved by EPA as stated in the federal register notice.
   - If these elements were such major flaws in our program why did they not bring them up at that time or not give us final approval?

7. If our rules are so important why did we get a letter dated April 15, 2010, that said EPA is not sure they have time to look at our revised flexible permitting rules when submitted.

   - Chairman Shaw wrote a letter dated August 9, 2010, expressing his concern that we have drifted away from our agreement that we would work together on fixing our rules made in an October 8, 2009 meeting, and subsequently confirmed in a TCEQ letter dated October 23, 2009; and
   - The EPA response continued to find additional faults with our program and made little effort in getting back to our agreement of fixing our rules.

8. How has TCEQ improved the environment of Texas?

   - Eliminated grandfathered facilities – EPA has not done this;
   - Improved Air Quality significantly;
   - From 2000 to 2009, ozone levels in Texas have decreased by 27 percent statewide, more than any other state in the nation; and
   - By comparison, the rest of the nation averaged only a 12 percent decrease in ozone levels over this same time period.

Mr. WHITFIELD. Well, thank you very much for your testimony.

And I was just reading a sentence from Ms. McCarthy's testimony. She is the administrator for the EPA on air quality, and she'll be testifying later today. But in her testimony she said, "Texas has been a part of the Clean Air Act success. For example, in 2000 the number of bad air days in Houston exceeded those in Los Angeles. Today Houston's ozone levels have decreased so that the area is currently meeting the 1997 ozone air quality standards."

So, one of the perplexing things about the flex permit issue is that it does appear that the flex permit worked well for Texas and did—as a result of that, Texas was able to meet the ambient air quality standards and did very well. I mean, would you agree with that, Mr. Shaw?

Mr. SHAW. Yes, I would agree that the flex permit is one of those tools in our toolbox that has helped to obtain hundred of thousands of tons of reduced emissions based on what staff has reported to me. And, certainly, it's been one of those tools that has helped to incentivise companies to make voluntary reductions, which I will submit is one of the best ways we can move forward with environmental enhancement, to have regulations that offer to incentivise companies to move forward on their own, to develop better technologies.

Mr. WHITFIELD. And, you know, one thing about the Clean Air Act, it is so complex and there are so many aspects to it that any way that you can simplify it and still meet the goal, seems to me to be an advantage.

And on the Tailoring Rule, for a minute—we'll switch from there over to the greenhouse gas for just a minute. I know the EPA has been sued for their Tailoring regulation and my recollection is the Tailoring regulations would give the EPA authority to regulate any greenhouse gas emissions above 100,000 tons per year. And as the law says, the Clean Air Act, itself, says anything above 150 or 250, depending on what it is. So, there's no question that the clear language is that the EPA violated the Clean Air Act and State of Texas did not sue them on the Tailoring Rule.

Did you or didn't you?

Mr. ABBOTT. We did.

Mr. WHITFIELD. And environmental groups have also sued them on that. And—is that correct?

Mr. ABBOTT. I'm not sure if they have done so yet. We anticipate those lawsuits coming, if they haven't been filed yet.

Mr. WHITFIELD. Well, my understanding's that there was, but I maybe should be corrected on that.

Mr. ABBOTT. I can't confirm it or deny it right now.

Mr. WHITFIELD. But I do remember when Ms. Jackson—Lisa Jackson, the administrator of the EPA, appeared before our committee. She was asked a question back on the greenhouse gas issue, with—will your regulations be effective in reducing greenhouse gases. And she said it would be negligible because unless other countries are willing to take the same stand that we do in America, it's in the stratosphere, it's very difficult to control. And there's been a lot of discussion today about China. So, we know that China is relying more and more and more on coal. And, so,

the whole issue here that bothers a lot of us is the ability of America to remain competitive in the global marketplace.

But—but on this—back to the flex permits, just a minute, Mr. Shaw. Am I correct that you set an overall limit of emissions; and as long as you fall within that limit, then you're in compliance. Is that—is that true?

Mr. SHAW. That's correct. And it's actually more complex than that. We actually require those companies to do what we call "worst case modeling" in order to prove that if that facility operates with that flexibility under that cap, if you will, under the worst-case scenario, the worst emissions and the worst location in that facility, that it will be protective of the health and environment off-site. And, so, it actually means that facility is going to be operating safer in normal operating mode because they have to model the worst-case scenario. So, yes, they do have to stay under that.

There are rumors that they can, then, spew the evil things over the fence line. That's not correct. They have to upfront model and improve under the worst-case operating errors to ensure they meet the standards.

Mr. WHITFIELD. And over the 16 years that we've been issuing these, it's my understanding you've issued over 120 permits and that EPA never expressed any opposition at the time; is that correct?

Mr. SHAW. Well, there have been those letters we've talked about. I think it's maybe 140. We can confirm the total number. But there has been a hot-and-cold relationship. The EPA has expressed concerns; we've addressed them in—on a—case by case. And, in fact, in one facility the region administrator was at a ribbon cutting and held his program up as innovative and what should be taken back to the EPA in DC and be spread across the United States as the type of program that we ought to be having for combating environmental challenges.

Mr. WHITFIELD. I might just add, on the Tailoring Rule, Mr. Abbott, that when we know that it strictly violates the letter of law but the EPA—the officials at the EPA will tell you that the doctrine they use to give them the authority to change it administratively debate that they want to prevent an absurd result. And the absurd result is that they do not have the manpower, the money, or anything else to issue all the permits and do anything everything they would be required to do if they do not have the Tailoring Rule.

Mr. ABBOTT. Right. And we don't believe the so-called "Absurd Results Doctrine" is going to hold up in court. What is absurd is that a regulatory agency can come in and have unelected bureaucrats rewrite a law that the United States Congress wrote. We don't think the court will uphold that rewriting of a law by a Federal agency.

Mr. WHITFIELD. Thank you.

Mr. Green, you're recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Shaw, how long have you been the chair of the TCEQ?

Mr. SHAW. Since September of 2009.

Mr. GREEN. OK. And you know the letters we put in the record. There has been an exchange of letters in the last 7 years, even

back to President Clinton when the flex permits were started in '94, I think. And they're—they—TCEQ has worked out those differences between those administrations since 1990.

Mr. SHAW. We had worked on regular basis, but I would say that while we attempted to bring those to a point where we thought the EPA would then approve the permit program, it's sort of getting put on the back burner historically and then maybe a couple years later there will be another letter. And, so, it was—and interestingly, those same concerns in those letters were finally in the Federal Register in 2009.

Mr. GREEN. And I guess this didn't happen in January of 2009. Those letters were far back and there's always been a relationship between the EPA and the TCEQ. Sometimes it's good and sometimes it's not so good.

Mr. SHAW. I think I described it as "hot and cold" on this issue, sir.

Mr. GREEN. Yes. I understand how Federal agencies work. Sometimes another fire picks up somewhere else and they get on that, not unlike a lawyer having one file and going to another one.

So, we heard that TCEQ is at an impasse on this deal coming to a mutually agreeable resolution on deflexing the Texas permits. And I understand the concern, I think is—and correct me—that EPA needs to look back to ensure there are no Title V violations on the SIP cap.

Are you still in negotiations with EPA or—and I know the lawsuit has been filed; but, you know, frankly, I've been told that because the lawsuit's filed, there's no new negotiations. Frankly, I thought that was when most attorneys negotiated.

Mr. SHAW. We certainly stand ready to have additional discussions. And the key thing is there's really not a lot of fertile area for negotiations. I stand ready, but what has happened instead, Congressman, is that most facilities because of the uncertainty associated with the EPA's denial of the program and the threats that they want, I believe I've been told that I can't know specific permitting issues because of ex parte prohibitions under the Texas statutes. But I've been told that those permit holders have all indicated to the EPA that they would agree to get into more conventional permits. And, so, we have a number of them that I suppose are inhouse going through and converting from flexible permits to a conventional permitting program.

And my concern is are we going to have negative environmental components of that? That's sort of the path forward at this point is companies are availing themselves of an opportunity to get permits with more certainty.

Mr. GREEN. Are you hearing from individual companies on the problems they're having deflexing their permits?

Mr. SHAW. I can't hear those because that would officially be an ex parte prohibition. So, I'm not trying to avoid your question, but I—my staff may be hearing those, but I cannot.

Mr. GREEN. I know we have a saying here, "if it ain't broke, don't fix it." And Texas air quality has improved and Ms. McCarthy, who will be here later, will testify to that. Having represented a lot of these industries that achieved that reduction over a period of time and I congratulate them on that. My understanding is that the

EPA does not contest that emissions have gone down, but rather they can't specifically tie the use of flex permits to this reduction.

Is that your understanding?

Mr. SHAW. My staff—and, again, it makes it somewhat difficult for me to look at individual permits. But when I've asked staff specifically that question, my staff has identified technologies that were developed through this flexible permit program because it incentivized developing new technology to overcontrol new facilities. That incentivized those companies and I understand that some of those areas are in the cat cracker unit. To reduce emissions, I suspect, if not, that those have then led to nominal reductions in those flexible permits holders but also led to reducing the control standard or the threshold for other permit areas in Texas and across the U.S. So, it incentivized development of greater technology for pollution reduction.

Mr. GREEN. You may know this because I know we'll hear it later from the EPA. The number of flex permits that have been issued in Texas compared to our neighboring States, that I understood in discussions with the EPA, part of the problem is that other States are saying why can't we do this when Texas is doing hundreds, and I don't have any problem with that; but obviously some of the 48 States or 49 States may.

Mr. SHAW. I haven't heard that complaint from other States. I know that there are a handful of other States that do have somewhat similar programs, and some—including, I believe Virginia and Florida have had EPA approve those fairly recently. They do have a similar flexible permit type. They call it something different, obviously. But it's similar to the Project XL that I mentioned in my opening remarks. So, there are other States that do have similar programs that EPA apparently hasn't taken issue with yet.

Mr. GREEN. But Texas took advantage of it, and I don't fault that, in the '90s. You gave us some rules that we abided by to the best we could. But it seems like you give the numbers from other States that are very small compared to ours, but we'll get to that testimony later.

Attorney General, again welcome. Welcome home.

Mr. ABBOTT. Great to be back.

Mr. GREEN. You appeared before our committee in Washington a few weeks ago, and your testimony states that Congress in effect they should decide on regulating carbon dioxide emissions; and, believe me, I agree with that. It should be a congressional responsibility.

And I strongly agree with you. That's why I supported delaying regulations. Given Texas' opposition and EPA's approach to this issue, I'm curious, what type of Federal carbon-controlling program could Texas support?

Mr. ABBOTT. Well, you know, my perspective comes from the legal perspective. And that's really a policy-laden question that I would have to defer to the policymakers.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. WHITFIELD. Mr. Barton, you are recognized for 5 minutes.

Mr. BARTON. Thank you. Thank you, Mr. Chairman.

Each of you gentlemen is an official of the State of Texas and as such have been elected by the people with the exception of Mr. Shaw, who is appointed by the Governor and I think confirmed by the Senate. But each of you do take an oath to defend and uphold the laws of the State of Texas but you also take an oath to defend and uphold the laws of the United States; is that not correct?

Mr. SHAW. Yes, sir.

Mr. ABBOTT. Yes, sir.

Mr. BARTON. So, there's not any of you that's here to say "Let's just do what's good for Texas and don't worry about the laws of the United States?" I mean, we're all—we want to defend the laws at both the State level and the Federal level; is that not correct?

Mr. ABBOTT. That's correct, sir.

Mr. SHAW. Correct.

Mr. BARTON. Now, Mr. Shaw, I'm going to ask you, as the chief regulator for environmental protection, the chairman of the Texas Commission on Environmental Quality, is it your understanding that the reason the Flexible Air Quality permitting program was disavowed by the Federal government—was it disavowed on its own merits, that it wasn't effective, or was it disavowed because the State refused to submit a State Implementation Plan incorporating the greenhouse gases into its existing air programs?

Mr. SHAW. The flexible permit program was disapproved theoretically because of concerns of it having deficiencies to meet Federal programs. Although, interestingly, what the EPA went forward with in the Federal Register was addressed both verbally with officials in the EPA and especially with the regional administrator. And when we addressed that those were incorrect, the discussion moved from it fails to meet those requirements to we don't want to have Federal flexible permit programs. That's separate from the greenhouse gases——

Mr. BARTON. Well, it's an important distinction. My understanding at the time was that the Federal—the EPA was disavowing our flexible air permits because of—of defects in that as a stand-alone program. Not because the State was refusing to submit greenhouse gas regulations to comply with the endangerment findings. So, that you've got two separate issues. You're looking at air quality and flexible permitting of existing permits in one box and then the whole debate that the Attorney General has educated us on is whether the Federal Government has the right to basically make law on its own by proposing these Tailoring Rules and all of that. So, it's two issues.

Mr. SHAW. Correct.

Mr. BARTON. It's not one that's linked. They didn't—they didn't refuse or reject our air permits under flexible air permitting program because of controversy on greenhouse?

Mr. SHAW. That's correct.

Mr. ABBOTT. I agree.

Mr. BARTON. And Commissioner Staples, you agree?

Mr. STAPLES. Yes.

Mr. BARTON. Now, having said that, did they—did the EPA allege specific permits that were not in compliance? Did they say the permit for Dow Chemical was not in compliance or did they say the—generically the ambient air quality standard for ozone in the

North Texas region is deteriorating because your flex permitting systems are not working?

Mr. SHAW. Yes. Their objections to these programs were based on our not having the same program that they have. The differences they perceived in theirs, but not on an individual failure to meet the ozone requirements that were individual permits. They did later take issues with individual permits. But in the Federal Register announcement, clearly it was based on those perceived initiatives. The program didn't do——

Mr. WHITFIELD. So, the letter that Mr. Green or Mr. Gonzalez put in the record where EPA officials have had some problems with their flex permitting, those letters don't allude to a specific substantive difference. They basically refer to how to implement a particular permit or something like that.

Mr. SHAW. Right. And—and to that end, when they have identified individual permits they thought they had concerns with, when we were able to sit down with them, we were able to explain where those were misunderstandings were.

Mr. WHITFIELD. Now, Mr. Attorney General, I've got a document—a sworn affidavit that Ms. McCarthy put in the court record in one of the lawsuits that you're defending the State on. It's dated October the 28th, 2010.

Have you seen that affidavit?

Mr. ABBOTT. Personally, I have not. I am aware of it because it is a part of—frankly it was a part of the testimony that was provided——

Mr. BARTON. Is my time expired, Mr. Chairman?

Mr. WHITFIELD. No. Go ahead.

Mr. BARTON. In that—that's a sworn affidavit and in that affidavit, at the end of the affidavit, she says that not only with regard to Texas, but I think with regard to any State, the EPA is not going to—to use a slang term—FIP a State program. In other words, they're not going to take over for a State if you don't have a State Implementation Plan that the EPA has agreed meets all the requirements under the Clean Air Act and their new greenhouse gas regulations. Isn't that true?

Mr. ABBOTT. That's true, and it is part of our lawsuit—part of our FIP lawsuit in explaining to the Court why we think that the EPA has acted illegally and improperly. And——

Mr. BARTON. And her sworn statement was that they weren't going to do anything for at least a year.

Mr. ABBOTT. Her sworn statement was they were not going to do anything. They could not take over Texas' Air Permitting program, quote, until December 2nd, 2011, at the earliest. That, of course, is about eight months.

Mr. BARTON. And how many days later did they do just that?

Mr. ABBOTT. It was—that was in October and it was about two months later where they issued an emergency FIP rule on December 23rd. The reason why I point that out is because it was done right before the Christmas/New Year's holiday. And——

Mr. BARTON. So, in October she says you've got at least a year and then two months later they do exactly opposite what she said they would do?

Mr. ABBOTT. Under the cover of darkness. I don't——

Mr. BARTON. My time has expired, but we'll come back to it.

Thank you, Mr. Chairman.

Mr. WHITFIELD. Mr. Gonzalez, you're recognized for 5 minutes.

Mr. GONZALEZ. Thank you, Mr. Chairman.

Mr. Shaw, first of all, thank you for service and thank you for coming to Washington and meeting with us. You've always been incredibly informed and it's helped us, again, come to where we are today, trying to understand who [inaudible].

Who is Dan Eder?

Mr. SHAW. Dan Eder is a former employee of the agency TCEQ.

Mr. GONZALEZ. And the reason is we're going over the history and correspondence between your agency and the EPA—and there's numerous letters that have been introduced today—but there is a letter back in March 12th, 2008, and that's the date that I have here that's on it. And in it Congress meets Carl Edlund, director of Multi-Media Planning and Permitting Division of the EPA, does write a letter to Mr. Eaton and the reason that I want to read this to you is that you referred to the fact that other States have some sort of flex permitting protocols and you didn't indicate whether they're substantially different than the State of Texas. There may be a reason why EPA may be looking at Texas differently than other States. I think that may be the composition.

Let me ask you if this still holds true, because in Mr. Edlund's letter, there's an enclosure. And it says unlike flexible permit programs in other States, the Texas Flexible Permit program is not limited to minor sources.

Can you clarify? Is that a distinction? Are those others—those other flex permit programs in other States different in that respect?

Mr. SHAW. That is one of those—the reason—there was probably a lot of frustration because it was only in the last year and a half that EPA was made to realize that their perception that our program applied to major NSR was incorrect. In other words, our flexible permitting does not apply to major sources of NSR——

Mr. WHITFIELD. So, that would be incorrect; and, in fact, in March 2008——

Mr. SHAW. EPA was—was confused about our program. And it applied to major NSR [inaudible] where people specifically prohibit companies from circumventing major New Source Review. And that's one of the things that we were able to clarify then whenever EPA clearly explained——

Mr. GONZALEZ. To their satisfaction? Let me ask you that because I'm not in your position. I—you say you've explained it. I'm just wondering did they communicate that is a fair, complete, and acceptable explanation?

Mr. SHAW. Not in writing, but we had several meetings. And this is important because we had a meeting where we talked about each of those individual items and it seemed that the consensus within the room was "we now understand this." And I made the comment, to paraphrase, was not that we've addressed that these perceptions or the perceived failures of our program have been addressed, can we now move with how we can move forth to get this permit program approved. And the discussion moved to we are not interested

in having the flex permit program fixed. So, that was our concerns. We had those issues that were legitimate——

Mr. GONZALEZ. Well, I mean——

Mr. SHAW. And I think——

Mr. GONZALEZ. And that when you get that kind of an admission on a major issue, that it simplify would inquire and request something in writing from them. OK. And simply to recite it in letter and transpire it our discussion, that is our understanding, if we don't hear from you, we will assume that we are correct in our interpretation.

But my question is, I think we're going to go round and round on these issues because your perception of things and their perception of things are different. And that's something that we just—I only have 5 minutes here.

I'm going to go to General Abbott. It's good seeing you again. I must say it's been a lot more fun than our previous encounters, but it is good to see you, sir.

Let me ask you a couple of questions about the lawsuit—or lawsuits. And this is from a memorandum that was prepared by the staff. In the 2007 decision, Massachusetts v. EPA, the Supreme Court held that greenhouse gases, including carbon dioxide are air pollutants under the Clean Air Act. Is that accurate?

Mr. ABBOTT. Yes, sir.

Mr. GONZALEZ. And, so, that means that EPA would be the regulatory agency that would have jurisdiction regarding certain policies enforcing, regulating and such pollutants including greenhouse gases. Is that fair?

Mr. ABBOTT. The jurisdictional component of your questions would be correct, that the issue does require a tiny bit of lead which it sounds like you may be getting to, before they can go ahead and begin that process of the regulation, they must have arrived at the endangerment finding. So, there's a predicate or a threshold that must be satisfied. And that's exactly what the Supreme Court said, that their decision was. Now, EPA, you can no longer avoid making the decision about whether or not there is an endangerment posed by greenhouse gases. You have to go ahead and make that decision and then if you make that decision, there's several other predicates that must be satisfied before they can begin the process of doing the regulation.

Mr. GONZALEZ. Fundamentally, then, I think you have an argument that they have not met certain preconditions and such requirements.

Mr. ABBOTT. That would be one umbrella, if you would. There are several key points under that one umbrella or silo, but, yes, that would be one.

Mr. GONZALEZ. Mr. Chairman, if you'll allow me one last question because it is the Attorney General, and I'm going to read one paragraph from the memorandum.

Once greenhouse gas became subject to regulation and the EPA issued the Tailoring Rule, State PESE permitting authorities needed to ensure that they had adequate authority to issue key PESE permits for greenhouse gases and that State permitting requirements would not be triggered and so on.

Only Texas failed to take the necessary action. The chairman on the Texas Commission on Environmental Quality and the Texas Attorney General wrote to the EPA on August 2nd, 2010, saying, quote, on behalf of the State of Texas we write to inform you that Texas has neither the authority nor the intention of usurping, ignoring, or amending each clause in order to compel the permitting of greenhouse gas emissions.

Is it an issue of greenhouse gas emissions more than anything else, as Mr. Barton has already pointed out that may be a two-prong issue going on here.

Is that statement that I just read to you about the intentions or the authority of Texas to do anything regarding permitting of greenhouse gas emissions something that is going to remain in place even if the EPA went through the three conditions that you have already outlined?

Mr. ABBOTT. Well, a couple of things. The point of your question seems like it asks about the permitting process, and I'm not in charge of that. I would have to defer to Chairman Shaw about that. On the legal side, it is our contention and my—my position, unless I'm instructed otherwise by my client or other clients in the State of Texas, to press on with our lawsuit about greenhouse gases because of multiple reasons.

The—we—we live under the rule of law. And the EPA has clearly violated the rule of law by failing and refusing to follow the Clean Air Act, by failing and refusing to follow the APA as well as other laws. And we—we believe that the regulations that they have come up with for greenhouse gases are completely noncompliant with the laws passed by the United States Congress. And, also, I will submit that—I'm sorry.

Mr. WHITFIELD. No. Go ahead.

Mr. ABBOTT. I submit, also, that what the EPA is doing is inconsistent with the Massachusetts v. the EPA decision upon which they claim provides them the authority to do this.

Mr. GONZALEZ. Thank you very much.

Mr. BARTON. Mr. Chairman, could I ask a follow-up question——

Mr. WHITFIELD. Sure.

Mr. BARTON [continuing]. Since we were—yes. You're being very generous in allowing both sides more than 5 minutes.

Your contention as the official legal representative of the State of Texas representing the Texas Council on Environmental Quality is that the EPA is violating the law because they're clearly ignoring the plain statutory language of the Clean Air Act and that any source that emits at least 100 tons per year is subject to the Act.

Mr. ABBOTT. That's one of the things. That's—that's the Tailoring Rule.

Mr. BARTON. And my understanding is that the Tailoring Rule is exempting massive facilities from that requirement and I could speculate, but I don't won't do it, but—but that's one of the contentions of the lawsuit is that the EPA is not a legislative body and they're clearly legislating by exempting under the Clean Air Act large numbers of facilities, that according to the clear language, should be subject to the law.

Mr. ABBOTT. Well, it—it creates that level of uncertainty because what they—the impression that we have is they have created this

one level for now and they are going to be lowering that threshold later and when they lower that threshold later, it will begin to get into farms, ranches, hospitals, schools.

But here's the key point, if I could bring this back to the one case that authorized and categorized the EPA to begin this in the first place, and that is the Massachusetts v. the EPA. And here's the key deal: What they said is if—if I could read one sentence to you from this opinion.

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutants from new motor vehicles. I could repeat sentences like that in here. I don't have time; but the bottom line, this applies to new motor vehicles. It doesn't apply to stationary sources like what they're using the Tailoring Rule to try to apply to.

Mr. BARTON. Thank you, Mr. Chairman.

Mr. WHITFIELD. Mr. Staples, I've been told that you have a previous appointment. Do you need to leave now or——

Mr. STAPLES. [Inaudible.] A few more minutes——

[Simultaneously speaking.]

Mr. WHITFIELD. OK. All right. Mr. Brady is recognized for 5 minutes.

Mr. BRADY. Thank you. I'll be [inaudible].

Mr. Whitfield, Chairman, thank you for hosting this and coming to Houston.

Mr. WHITFIELD. Very much appreciated.

Mr. BRADY. Ranking Member, to you, as well.

A quick question to [inaudible] Commissioner Staples and the Attorney General. You testified that the Federal Government violated regulations and timetables regarding our State Implementation Plan. Are States allowed to ignore and violate Federal regulations and timetables in this regard?

Mr. ABBOTT. Not that I'm aware of.

Mr. BRADY. What happens when we do?

Mr. ABBOTT. We get sued.

Mr. BRADY. I thought it might be appropriate for you to respond to, as well [inaudible].

Commissioner Staples, thank you for your leadership, too. You, as well, Commissioner.

Energy is a big part of the Texas economy, but agriculture. As you [inaudible] before—we are very good at selling our ag products around the world and reaping the benefits with jobs as a result of that. If these greenhouse mandates piled a half a billion dollars or more on our Texas ag producers, does that make us less competitive? And what's the impact if they drive the prices up when we're competing around the world?

Mr. STAPLES. Agriculture becomes extremely dependent on energy for its production. In fact, it's about 15 percent of the production costs, alone, for fuel and fertilizer and chemicals and utilities. And each and every day we compete with Countries that have lower labor standards than we do, lower environmental standards than we do. And we're having and seeing and dealing with this Environmental Protection Agency regulating us away from market-based solutions. And that's a concern and impact on jobs and food security.

Mr. BRADY. So, we lose sales and it drives up the prices at the dinner table because we lose sales, as well, for our local——

Mr. STAPLES. Lose sales and lose the associated jobs with that and the domestically-based food sources that Americans have come to rely upon.

Mr. BRADY. Thank you for testifying on this issue. I appreciate it.

Chairman Shaw, Texas has outperformed the rest of the country in reducing ozone and NOx emissions. That's correct?

Mr. SHAW. That's correct.

Mr. BRADY. I get the impression from the EPA that we've literally done nothing to really make that happen. And one question is how much has Texas spent over the years to make our air cleaner? Is it a couple thousand dollars or——

Mr. SHAW. No, Congressman. It's a fairly large expenditure. The agency that I chair typically has about a billion-dollar biannual budget. So, about $500 billion per year is spent in the various aspects of what we do. Perhaps, more importantly, if you look at these challenges that dictate fate meeting the ozone in our metropolitan areas, one of the big concerns and challenges have been that largely local sources are responsible to the tune of about 60 percent of ozone count being Dallas-Fort Worth and Houston are mobile sources which we are pre-empted from regulating because they are Federally regulated sources. That indicates legislature has appropriated and we've spent almost a billion dollars over the last 5 to 10 years in enhancing and speeding up [inaudible] over a motor vehicle to get those reductions. And that's just one of the many areas of expenditures. So, it has been a great investment that's taken seriously. And we're seeing the fruits of that investment.

Mr. BRADY. So, Texans have spent billions of dollars——

Mr. SHAW. Yes.

Mr. BRADY [continuing]. To make our air cleaner and businesses have invested, as well, over the last decade; and yet the EPA is imposing and seizing our permits. Is that right?

Mr. SHAW. That's correct.

Mr. BRADY. Thank you, Mr. Chairman.

Mr. GREEN. Mr. Chairman, could I just—Attorney General, far be it from us to say you can't go to the courthouse since we're sitting at the South Texas College of Law. All right.

Mr. WHITFIELD. Thank you, Mr. Brady. And I want to thank the first panel. We appreciate your being with us and answering our questions.

Mr. BARTON. Could I ask one question to the Ag Commissioner?

Mr. WHITFIELD. Yes, sir.

Mr. BARTON. Mr. Commissioner, under the—under the—if greenhouse gas regulations were to be implemented and you did not have a Tailoring Rule, how much of Texas agriculture would be subject to the Clean Air Act?

Mr. STAPLES. Let us thank you, the Congress, for exempting us. Even though the rules say that we would be and you have made certain that the appropriations process does not impact that directly; but if we were, just—we'd have 575 dairy facilities, 58 swine operations, 1300 corn farmers, and 28,000 cattle ranchers would

fall under this permitting and reporting process. And we're very concerned about that as it moves forward. We're particularly concerned about the impact on our energy costs today that we're so heavily intensive users of.

Mr. BARTON. And is there any truth to the rumor that, again, if greenhouse gas regulations were imposed on Texas agriculture, that animal emissions would be mobile source emissions under the Act?

Mr. STAPLES. We have seen many different scenarios that are extremely troubling and we do support policies such as cat 3 methane from our animal facilities, carbon sequestration. There are many things that we can do and want to do and are doing to help address this in a market-based program.

Mr. BARTON. Thank you, Mr. Chairman.

Mr. WHITFIELD. Well, if this Tailoring act is ruled invalid, you will come under it and the only way that would be able to be stopped would be to change the law or stop appropriations in some way.

Mr. STAPLES. That's absolutely right, Mr. Chairman.

Mr. WHITFIELD. Well, thank you all very much. And we look forward to continuing to work with you.

Mr. WHITFIELD. At this time I'd like to call up the second panel. And on the second panel, we have Mr. James Griffin, who is plant manager of Dianal America and he's also chairman of the board of the East Harris County Manufacturers Association. We also have Mr. James Marston, who is of the Environmental Defense Fund, from Austin, Texas. And we have Ms. Kathleen Hartnett White, Director of the Armstrong Center, Texas Public Policy Foundation. So, I want to welcome all of you. We appreciate you being with us this morning very much.

Well, once again, thank you all for joining us this morning and we do look forward to your testimony. And at this time, Mr. Griffin, we'll recognize you for your opening statements; and you'll be recognized for 5 minutes and the light there will denote where we are in the process. Thank you.

So, if you would like to proceed.

STATEMENTS OF JAMES GRIFFIN, PLANT MANAGER, DIANAL AMERICA; JAMES MARSTON, ENVIRONMENTAL DEFENSE FUND; AND KATHLEEN HARTNETT WHITE, DIRECTOR, ARMSTRONG CENTER, TEXAS PUBLIC POLICY FOUNDATION

STATEMENT OF JAMES GRIFFIN

Mr. GRIFFIN. Well, Mr. Chairman, and local Congressman Gene Green and all the Representatives from Congress, welcome to Houston, Texas, on this beautiful day in spring; and we just appreciate you hearing from the constituents regarding the important issues on greenhouse gas.

As you know, Houston is a global leader in energy and almost 50 percent of all the petrochemicals in the United States are right here in Houston. As we sit here in the shadows of these refineries and petrochemical plants, I want you to rest assured that we're in full compliance with the Clean Air Act and our skies are bluer and we continue to improve in emissions.

The industry has worked very hard on this and over the years, working with the Texas Commission of Environmental Quality, we've continued to reduce these emissions and achieve compliance of with the Clean Air Act. And, of course, that's delegated with the authorities of the EPA.

Again, my name is Jim Griffin, and I'm the chairman of the East Harris County Manufacturers, called "EHCMA." And I'm one of your local plant managers. I've been in the industry for 30 years.

The East Harris County Manufacturers, EHCMA, is an organization of 120 manufacturing facilities, made up of refineries and petrochemical plants. We have 300,000 jobs here in East Harris County. 300,000 good jobs, scientists, engineers, skilled labor. The products that we make range from products that go into healthcare. Of course, chemicals for pharmaceuticals; ag chemicals, which we talked about earlier; and, of course, the fuel that brought you in on your plane today and fueled your car; also the plastics that make car more energy-efficient and that plane more environmentally-friendly.

We do support regulations that are based on sound science and result in healthful air quality for our region. We've invested billion of dollars towards meeting regulations that reduce the ozone in the Houston area, leading to the unprecedented 2 years running of measured attainment with the EPA's air quality standard in ozone. And we're very proud of this accomplishment. Yet when it comes to greenhouse gas, we believe that the EPA is heading completely in the wrong direction.

EHCMA members fully expect that implementing greenhouse gas regulations as planned and designed by the U.S. EPA will result in closures of manufacturing facilities here in Texas and across the United States. We already have a struggling economy and this will do us further harm.

EHCMA fully supports action by Congress to strip EPA of any authority to regulate greenhouse gases. Overly burdensome and uncertain U.S. regulations which drive U.S. industry to developing countries with less or no regulations will likely increase greenhouse gas emissions.

Last night I was at a community advisory panel. Once a month all the plant managers meet with the community and the community sets the agenda. Last month we covered air emissions. We do that every year. The trend is continue to improve. Last night's agenda was all about the economy and jobs and the importance of the industry to this community.

EPA's greenhouse gas regulations require a convoluted regulatory path that is neither appropriate nor supported by EPA's authority. In order to move the program into play so quickly, EPA required individual States to develop State Implementation Plans in a fraction of the time required to develop these plans. The net result is 12 to 18 months for permits and high costs for permits, and it's unfortunate that Region VI is not represented here today because we met with senior officials, our committee, our environmental committee, our experts. And Region VI officials were unable to answer many questions that must be resolved in order to issue the very first Texas greenhouse gas permit.

EHCMA urges members of Congress to work towards congressional legislation that fully strips EPA of any authority to regulate greenhouse gases unless and until Congress adopts new legislation structuring the policies and granting the authority to EPA.

Prudent regulations must not only be based on sound science but also recognize the balance between clean air and a strong economy. Texas has proven we can do both. In my job as a plant manager, my boss is in Tokyo. I work for a global company. It's a very capital-intense business. When we make decisions on where to spend capital, we base that in big part due to regulations; and when regulations are burdensome and uncertain, we spend that capital in other geographic locations around world.

So, again, thank you for allowing East Harris County Manufacturing to address the esteemed House and Energy Committee and we sure do appreciate you being in Houston.

[The prepared statement of Mr. Griffin follows:]

EHCMA STATEMENT ON GHG

- Mr. Chairman, our local U.S. Congressmen Gene Green and Pete Olson, and other distinguished U.S. Congressmen, welcome to Houston on this beautiful spring day and thank you for coming to hear from constituents regarding the important issue of climate change and greenhouse gas emissions. As you know, Houston is the global leader in energy and nearly 50% of all petro-chemicals in the US. As you sit here in the shadow of refineries and chemical plants, rest assured you are in a U.S. Environmental Protection Agency Clean Air Act **compliant** area where our skies are bluer and air cleaner than in the past. The credit for cleaner air that meets EPA standards is due in big part to the efforts of the petrochemical industry working closely with the Texas Commission on Environmental Quality which has put into place stringent regulatory programs to achieve clean air, with the delegated authority of EPA.
- My name is Jim Griffin and I am the Chair of the East Harris County Manufacturers' Association, known as EHCMA. I am a plant manager with 30 years experience in the chemical industry. I speak to you today in my capacity as the EHCMA Chair.
- EHCMA is an organization of 120 manufacturing facilities, all located in East Harris County. Our member companies are chemical plants and refineries. We provide 300,000 jobs in the Greater Houston area. These are good, high-paying jobs requiring engineers, scientists, and skilled labor. Our member companies produce goods that are essential to daily life, ranging from plastics for healthcare equipment, chemicals for pharmaceuticals, the fuel and gasoline that powered the jet or car that brought you here, as well as the plastics that make that jet and car lighter, more energy-efficient and less intrusive on our environment.

- We support regulations that are based on sound science and result in more healthful air quality for our region. We have invested billions of dollars toward meeting regulations that reduced ozone emissions in the greater Houston area, leading to the unprecedented two years running of measured attainment with the U.S. Environmental Protection Agency, EPA's air quality standard for ozone. We are very proud of this accomplishment demonstrated by 2009 and 2010 air monitoring results.
- Our accomplishments toward clean air have resulted from a balance of emissions reductions and good jobs.
- Yet, when it comes to greenhouse gases, we believe that EPA is heading completely in the wrong direction.
- EHCMA members fully expect that implementing greenhouse gas regulations as planned and designed by our U.S. Environmental Protection Agency will result in closure of manufacturing facilities in the United States and in Texas. We already have a struggling economy, and this will do further harm.
- **EHCMA fully supports action by Congress to strip EPA of any authority to regulate greenhouse gases.**
- The existing Clean Air Act is not a suitable tool for regulating greenhouse gases, which act differently in the environment than priority pollutants identified in the Clean Air Act. The existing regulatory frameworks based on far lower quantities of emissions simply do not adapt well to greenhouse gases.
- Overly burdensome and uncertain U.S. regulation which drive US industry to developing countries with less or no regulation will likely result in an increase in GHG emissions.
- When Congress adopted the Clean Air Act in the 1970s and amended it in 1990, they never contemplated using it to regulate greenhouse gases. Setting sweeping and significant new policies such as those needed to regulate greenhouse gases is best

addressed by elected officials in Congress through open and transparent debate.

- Furthermore, EPA's greenhouse gas regulations require a convoluted regulatory path that is neither appropriate nor supported by EPA's authority. In order to move the program into place so quickly, EPA required individual States to develop State Implementation Plans in a fraction of the time required for developing such plans. Furthermore, in the case of Texas, EPA had to retract part of its approval for air permitting plans granted to Texas many years ago on the basis that it was approved in error because it did not address greenhouse gases. Yet, at the time of EPA's original approval, no one contemplated addressing greenhouse gases in this manner. So, how could the State have known to include it at that time? It would have been impossible.
- The net result of EPA's convoluted plan for approving greenhouse gas permits in Texas will be to delay permitting for facilities for an untenable period of time, possibly as much as 12 to 18 months for any individual facility seeking an air permit. To meet market changes and remain competitive in a global economy, US companies must be able to obtain air permits in a reasonable and predictable amount of time. Yet, in a recent meeting with EPA staff regarding the implementation of their greenhouse gas permitting program in Texas, the most senior officials of EPA Region VI, headquartered in Dallas, were unable to answer many questions that must be resolved with a clear plan in order to issue the first Texas greenhouse gas permit.
- While many believe that delaying the effective date of EPA's regulations for permitting greenhouse gases by two years may allow individual States to take over the program, EHCMA does not support this solution which merely moves the problem two years out rather than addressing it fully.
- EHCMA urges members of the U.S. Congress to work toward Congressional legislation that fully strips EPA of any authority to

regulate greenhouse gases unless and until Congress adopts new legislation, structuring the policies and granting the authority to EPA.

- Prudent regulations must not only be based on sound science, but must also recognize the balance needed between clean air and a strong economy. Texas has proven we can do both. We must have a predictable system that allows our member companies to compete globally. Mr. Chairman, in my plant manager role, I work for a global company headquartered in Japan. I know first-hand that investment decisions are made on a global basis and that overly burdensome and uncertain U.S. regulation restricts my ability to secure investment to renovate and expand my plant facilities.

Again, thank you for allowing the East Harris County Manufacturers Association to addressed the esteemed House Energy and Commerce Committee. We appreciate you being in Houston.

Mr. WHITFIELD. Thank you, Mr. Griffin.

Mr. Marston, you're recognized for 5 minutes.

STATEMENT OF JAMES MARSTON

Mr. MARSTON. Thank you. I'm Jim Marston. I'm the Regional Director of the Environmental Defense Fund and have been for 22 years.

In 1867 Mark Twain wrote, "The most outrageous lies that can be invented will find believers, if a man only tells them with all his might." Sadly, I think this committee and many members of Congress have been told a bunch of Texas-sized whoppers by Texas officials. And my testimony is really to talk about the myths and the lies that have been permeating this debate. I'll talk about a couple of them in my oral testimony; and, certainly, will welcome questions on the rest.

Let's start with the idea that this is somehow an Obama Administration vendetta against Texas. Since 1994 EPA has been saying the Texas flex program is illegal. It is a unique program. It's illegal, not like anything else in the country. And the Bush Administration in 2006 and 2008 wrote to TCEQ and said the program is illegal. And in 2007 said every one of the permit holders under the flex permits to tell them their permit was not legal. This is not new. There also is—and I will agree, the air quality has improved in Texas; and we're happy about that. But it did not improve because of the flex permits.

In my testimony, I have six programs that are documented to improve the air quality in Texas. I'll be happy to talk about those in detail. But they're not the flex program.

As proclaimed by Professor Shaw that the—the flex permit program improved our air quality reminds me of the rooster who believes that his crowing caused the sun to come up. The truth is that where we are on the flexible permit issue is really a much ado about nothing. Seventy-four companies had flex permits. Seventy-one of them have already come into EPA and said, "We get it. We're fixing it. And we'll have a legal permit within a year." This is an issue that's now already passed. It's not an ongoing issue.

And EPA is not also picking on Texas in regard to its greenhouse gas permits. The reason why we got sued, we were the only state that did not actually ask to get its permitting program in line. What we should have done is what Wyoming did. Start moving toward fixing our permit. If we didn't like it, sue like Wyoming. We got our permit program taken over because we did not file what other States did.

Finally, let me talk just a bit about the science. Congressman Barton, you and I agree on a couple of things.

Mr. BARTON. Well, miracles do occur.

Mr. MARSTON. You and I agree we need a college playoff system.

Mr. BARTON. Good.

Mr. MARSTON. And we also agree that Texas A&M is a fine university. I'm a little confused——

Mr. BARTON. That's not debatable.

Mr. MARSTON. I'm a little confused why we're here today and why you didn't take this committee and, frankly, Professor Shaw and the Attorney General down to A&M to the preeminent climate

scientists there. And I wish you would ask them what their opinion is on the climate science. If you had—and they've just published this—they say we are all, the tenured and tenure tract faculty members of the atmospheric science program at Texas A&M University. We believe science is clear. Climate change is happening. It's caused mainly by humans. And if we don't act soon, we could have serious adverse impacts.

I know the committee has already voted out this bill to strip EPA of the greenhouse gas authority. Before you actually go to the floor, I ask that—with that bill, I ask you all to go talk to the Aggie scientists. Please ask the Aggies about what role science plays. It's clear. And I know we think that this is the going to harm the Texas economy for claiming this. But there will be winners and losers in the greenhouse gas regulations. The States that are going to win are those who have large amounts of natural gas, a lot of wind and solar, have geologic formations that can handle carbon dioxide storage, where we use enhanced oil recovery, we have a good clean community, and where we have little energy deficiency investments.

By the way, welcome to Texas. If we do it right, God has placed Texas in a perfect position to win under a low carbon economy.

[The prepared statement of Mr. Marston follows:]

Testimony of Jim Marston
Regional Director of Texas Office of the Environmental Defense Fund
Before the Energy and Power Subcommittee of the House Energy and Commerce Committee

March 24, 2011

In 1867, Mark Twain wrote, "The most outrageous lies that can be invented will find believers, if a man only tells them with all his might." Sadly, that is what is going on here. The members of this committee have been fed some Texas-sized whoppers by certain Texas officials.

This Committee has passed legislation that would strip EPA of its authority to regulate greenhouse gases. Unfortunately, this legislation provides no alternatives for reducing harmful climate-disrupting pollution and is based entirely on misconceptions about EPA's role in regulating these deleterious pollutants. When it comes to the flexible permitting system and the regulation of greenhouse gases the problem isn't EPA – it's Texas.

The legal background:
EPA has a non-discretionary legal responsibility to supervise all Clean Air Act permits in all the States, including Texas, to ensure compliance with the Federal Act.

EPA is not some interloper, butting into the business of the Texas. Like many other federal environmental statutes, the Clean Air Act is founded on cooperative federalism. Congress "offer[ed] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). For example, under the Act states have the opportunity to implement the pre-construction review permit program required through federally-approved state programs. *See Alaska Dept. of Envtl. Cons. v. EPA*, 540 U.S. 461, 472-74 (2004). But the Act provides EPA with "encompassing supervisory responsibility" over preconstruction permitting, *id.* at 484 (citing 42 U.S.C. §§ 7413(a)(5), 7477). "In notably capacious terms, Congress armed EPA with authority to issue orders stopping construction when 'a State is not acting in compliance with any [Clean Air Act] requirement or prohibition ... relating to the construction of new sources or the modification of existing sources,' § 7413(a)(5), *ADEC*, 540 U.S. at 484.

As early as 1989, Texas specifically promised to follow EPA guidelines on air permits. Now Texas has reneged on that promise. The air quality review permit program under the nation's Clean Air Act ensures large pollution sources deploy cost-effective, made in America solutions to reduce the harmful airborne contaminants that will be discharged over the life of the facility, with many major facilities operating for half a century or longer.

On September 5, 1989, in obtaining the delegation of the federal PSD permitting program, the predecessor agency to TCEQ told EPA, and the public, that Texas is committed to the implementation of EPA decisions regarding PSD program requirements [Appendix 1]. In the proposed rule recommending that Texas receive delegation published in the Federal Register on

December 22, 1989, EPA stated, "[A]ction by the EPA to approve this PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations." [Appendix 2- 54 Fed. Reg.245, 52823 (Dec. 22, 1989)]. The final rule reiterated that obligation of Texas and the on-going supervisory role of EPA. [Appendix 3 - Texas 57 Fed. Register No. 122 28093 (June 24, 1992)].

Not only has Texas made promises that EPA is legally required to monitor and enforce, but the TCEQ gets about $43 million dollars a year from the federal government for which EPA has a fiduciary duty to the taxpayer to assure this money is not squandered or misappropriated for purposes other than its intended legal use.

Myths about Flexible Permits in Texas

Myth No. 1:
The only reason why EPA has objected to the Texas "flexible permits" is because President Obama is "punitive" against "big, red" Texas.

The Facts:
EPA has raised concerns about the illegality of the Texas flexible permitting programs since 1994. The Bush Administration in 2006 and 2008 wrote letters saying that the Texas program did not meet the legal standard of the Clean Air Act. This is not a new complaint by EPA and it is not political. The only people playing politics are Texas officials who are misrepresenting the facts.

EPA has raised concerns about the illegality of the Texas flexible air permits since **1994**. I will discuss the illegal nature of the paper later in this testimony. The Environmental Protection Agency raised concerns about the program when it was first proposed [Appendix 4 -Oct 3 hearing letter from EPA]. The TCEQ never seriously addressed the legal concerns of EPA. The legal problems with flexible permits have spanned the terms of three Texas Governors and three U.S. Presidents respectively. And contrary to testimony that you'll hear today, EPA has not been silent on the issue – rather Texas has been deaf.

Following years of patience with TCEQ's repeated attempts to develop a legal permitting program, and many further attempts to work with Texas, the Bush EPA wrote formal letters to Texas laying out the legal problems with their flexible permits [Appendices 5 and 6 – letters from April 11, 2006 and March 12, 2008]. EPA under President George W. Bush issued a letter to flexible permit holders in 2007 [Appendix 7 – letter to industry from EPA], notifying the TCEQ that their permits issued under the flexible permit program did not comply with the Clean Air Act. While intelligent companies made the decision to transition out of their flexible permits upon receipt of their letter, others (often egged on by counsel who had wrongly advised them that the flexible permits were legal) decided to sue EPA to force a decision on the issue of flexible permits and other portions of the Texas permitting program.

As a result of the industry lawsuit, EPA settled with the industry plaintiffs and agreed to a deadline of June 30, 2010 to make a formal ruling on the Texas flexible permitting program. On

June 30, 2010, EPA gave industry the clarity and certainty they asked for. EPA formally announced to Texas the same thing that they'd been saying to Texas for over 15 years, the same position as the Bush EPA – that the flexible permitting program did not comply with the long-standing protections under the Clean Air Act.

It is more than a myth; it is a serious misrepresentation to claim that EPA's concern about the illegality of the Texas program began with the Obama administration or that EPA's action is a result of the way Texas voted in recent elections.

Myth No. 2:
The Texas flexible permit program has resulted in large emission reductions.

The Facts:
The improvement in air quality is due to factors other than the flex permitting program, mainly national clean air protections and EPA enforcement actions.

Air Quality has improved in Texas, but the improvement is in spite of, not because of the flexible permitting program. The vast majority of the documented reductions of emissions in Texas are from the following five actions:

1. Consent decree settlements between **U.S. EPA** and several Texas facilities. These agreements alone have accounted for 21,967 tons per year of NOx reductions and 54,280 tons per year of SO2 reductions found in Appendix 8;
2. Emissions controls in many parts of the state adopted as part of the **federally required State Implementation Plan (SIP)**. In the Houston area, for example, point source NOx emissions have been cut by approximately 80% and stringent limits placed on highly reactive VOCs. A more complete list of control measures can be found in Chapter 4 of the Adopted HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard.
3. **National emission standards for vehicles and engines** that have been adopted by the EPA. A few of the most recent standards adopted can be found in Appendix 9.
4. **Citizen suits under the Federal Clean Air Act** against industry have resulted in large emission reductions. For example, a recent settlement between Sierra Club and Shell refinery requires that Shell reduce its emissions from upset emission events by nearly three-quarter of a million pounds per year.
5. Emission reductions from use of infrared technologies such as the infrared camera have caught permit violations and required reductions that are estimated to be 7,000 tons of volatile organic compounds per year.
6. Emission reductions from SB 7 in 1999 that statutorily required "grandfathered" plans to reduce their emissions by 50%.

Even with these reductions, however, Texas air quality is nothing to brag about [Appendix 10]. Over 66% of Texans breathe air that is considered unhealthy. And the TCEQ themselves has identified 13 areas around the state where Texas citizens are at increased risk for health effects from air toxics [Appendix 11]. Many of these areas have shown no improvement over the years.

Myth No. 3:
Flexible Permits are legal and just as good at protecting the public as the permits in other states.

The Facts:
The flexible permits are unenforceable, don't protect public health, and have far higher emission rates of pollution than at facilities in other states with enforceable, transparent, legally compliant permits limiting air pollution discharges.

1. **The flexible permit pollution trading system is unenforceable and fails to protect public health.** Flexible permits allow sources to lump hundreds of pieces of polluting equipment under a single pollution limit. Because most of the equipment is not monitored, it is almost impossible to determine whether or not companies are complying with their pollution caps.

2. **Flexible permits eliminate individual unit-specific pollution limits designed to protect public health.** Flexible permits eliminate Clean Air Act, unit-specific, pollution limits that are intended to assure that public health is protected from industrial air pollution. This means that facilities could alter the location of their emissions, including increasing emissions at the fence line, concentrating exposures to neighbors, without having to address any of the impacts that might affect air quality or the surrounding community.

3. **Flexible permit emission caps violate the principle of Best Available Control Technology (BACT).** Industry made a covenant with the public at the time of the enactment of the Clean Air Act in 1970. In return for not having to have existing plants meet new air standards, industry agreed that every time they made a major investment in the project, they would simultaneously up-grade there pollution controls to meet a standard called Best Available Control Technology. Flexible permits because there is an overall cap rather than an individual source limit, allow companies to avoid having to meet BACT, as long as they do not exceed the overall cap. Texans are not getting the continuous improvement that other states get because of the Texas flexible permit.

Myth No. 4:
The disapproval of Texas's unique "flexible" permitting program is costing jobs.

The Facts:
This is now much ado about nothing, because almost all of the companies with flex permits have come forward with proposals that will result in them having legal and better permits within the year.

You may have hard claims by some that EPA's disapproval of the flexible permit program has resulted in some unnamed, mysterious company from coming to Texas. First, states across the nation – other than Texas – comply with the Clean Air Act by ensuring the largest polluters put in place cost-effective, Made-in-America solutions to reduce their harmful air pollution.

Industrial facilities operate just fine in those states. Texas company executives are not dumber or less resourceful than their counter-parts and can likewise make money while following the Clean Air Act permit protections employed in other states.

In Texas, now that they have a clear ruling, Texas companies are coming in left and right to get deflexed permits. Of the 74 companies with legally flawed Texas flex permits, 71 have informed the EPA that will revise their permits or "deflex" their permits in order bring their permits in compliance with the Clean Air Act with the next year.

As is often the case with environmental policy these days, industry is ahead of many of the politicians.

The Big Lies about EPA Greenhouse Gas permitting actions in Texas

Lie No. 1:
EPA is picking on poor little ol' Texas.

The Truth:
Texas is an outlier among all the states. Texas alone decided not to modify its permitting program to comply with the law.

On, December 1, 2010, EPA released the State Implementation Plan (SIP) Call Rule for greenhouse gas emissions that flowed from the Supreme Court decision in Massachusetts v. EPA. In the SIP call, EPA found that Prevention of Significant Deterioration (PSD) permitting regulations in 13 states did not meet CAA requirements because their programs did not cover GHG emissions. EPA asked those states to change their laws and submit those changes as a part of a revised SIP for review and approval, giving them one year to change their laws. Twelve states cooperated, Texas alone refused to cooperate with EPA's efforts to apply GHG requirements in the PSD program.

In order to allow industry in Texas to be able to obtain legal permits, the EPA was forced to issue a Federal Implementation Plan (FIP) and to handle the responsibility of issuing the PSD permits for stationary power plants, large factories and other industrial facilities.

EPA had no other choice – Texas refused to take the responsibility of granting permits.

Lie No. 2:
EPA is acting unilaterally and without Congressional authorization.

The Truth:
EPA is enforcing the Clean Air Act as written, and as interpreted by the Supreme Court. It is not that EPA is engaging in its own discretionary program -- it has acted pursuant to mandatory CAA requirements that EPA regulate where, as here, a pollutant endangers the public.

What the Upton bill will do is slash away at longstanding provisions in the Act itself. The bill would be unprecedented in the extent to which it repeals basic Clean Air Act protections.

Furthermore, if it were true that EPA had gone beyond the bounds of the Clean Air Act, there would be a ready remedy without gutting the Act itself: Every key step EPA has taken concerning regulation of GHGs under the Clean Air Act is subject to judicial review. Parties, including Texas and sources located in Texas, have a full opportunity to place before the court arguments that EPA acted inconsistent with the law; invaded states' constitutional authority; acted arbitrarily; made decisions not warranted by the record, or failed to allowed for full and fair participation in its decision-making process. Numerous parties, including states, trade associations, public policy groups, and companies, have challenged virtually all aspects of EPA's decisions in court. The courts, and not politicians and industry lobbyists, are a much better judge of whether EPA acted outside the bounds of the law -- and Congress should let the judicial review process play out.

Lie No. 3:
Texas has a legitimate lawsuit concerning the endangerment finding that is aimed at protecting Texans.

The Truth:
The Texas lawsuit was filed at the behest of industry lawyers, the state is represented by a Yankee lawyer whose firm represents Exxon among other polluters, and the claims are based on faulty legal and factual basis.

The lawsuit filed by the Texas Attorney General challenging the finding of endangerment will largely turn on the issue of climate science. An email exchange obtained under a Texas Open Records Act request shows an attorney at Vinson & Elkins, who represents many of the nation's biggest polluters, urged Texas to challenge these EPA clean air protections. [Appendices 12 & 13 - emails December 30, 2010]. The Attorney General is represented in this lawsuit by a New York law firm who represents many big polluters including Exxon [Appendix 14].

Attorney General Abbott asked Congress to pass legislation gutting EPA's authority to regulate many pollutants, including CO_2. The basis for Abbott's litigation is that the science that is basis of the EPA greenhouse gas finding of endangerment was laced with "cover-ups, and the suppression, and destruction of scientific evidence" [Appendix 15]. Why is Abbott seeking recourse to Congress, which would unravel bedrock Clean Air Act protections, if he believes he has sound legal claims?

Attorney General Abbott admits not consulting with the State Climatologist or any of the atmospheric scientists at Texas A & M, Texas Tech, Rice, or the University of Texas. If he had, they would have told him that and that their own work and that the National Research Council and the U.S. Global Climate Research Program, along with the IPCC show that the EPA's finding is based is good science [Appendices 16, 17, & 18].

Lie No. 4:
Texas industries just can't comply with the greenhouse gas regulations.

The Truth:
Many Texas industries are going beyond the minimum requirements of EPA's rules. Officials are selling Texas' businesses short.

Texas state officials have claimed that it will be impossible or too burdensome for Texas firms to comply with the greenhouse gas regulations that like industries have to comply with in other states and thus, these regulations will hurt jobs.

But the PSD permitting guidance that EPA issued in November 2010 makes clear that new facilities should be able to meet permit requirements solely through the use of energy efficiency, efficiencies that saves the companies and their customer's money.

In fact, the largest electric utilities in Texas are saying that they can make more emission reductions than required by the EPA rule. The largest investor-owned electric company in the State, Energy Future Holdings has made a commitment to reduce its greenhouse gas emissions back to 1990 levels by 2020, a more rigorous requirement than EPA's PSD permitting rule for new plants. The company reported earlier this year to its Sustainable Energy Advisory Board that the company is on schedule to meet that target and does not anticipate that meeting their greenhouse gas commitment will exacerbate the admittedly difficult financial situation.

The second largest investor-owned electric company, NRG, has made large investments in the last two years in solar, wind, off-shore wind, nuclear, smart grid, and electric vehicles. In February, NRG President David Crane laid out a vision for his company that includes a clean generation share of more than 50% of the electricity they will produce by 2050.

The two largest municipal utilities have adopted clean energy plans that surpass the requirements of the EPA regulations.

This is what Texas innovation looks like.

Lie No. 5:
The EPA GHG regulations put Texas at a terrible competitive disadvantage.

The Truth:
Texas has natural resources that mean it can be a big winner with greenhouse gas regulations, IF we have forward thinking leaders.

Yes, as always when things change in economies, there will be winners and losers. There is near unanimous opinion that the States that will win under greenhouse gas regulations have:

- Large amounts of producible natural gas;

- Strong winds;
- Abundant, bright sunshine;
- Geologic formations that can sequester carbon dioxide from power plants and refineries for decades near old oil fields that can come to life again with enhance recovery techniques using that same CO_2;
- A strong clean tech industry; and
- Made relatively few energy efficiency investments to-date so that there is a lot of low-hanging fruit (money saving efficiency opportunities) available.

Welcome to Texas. Perhaps there is no state that fits the profile of a winner under greenhouse gas regulation better than Texas. The issue is whether Texas tries to protect old polluting industries as some officials are doing or whether the State uses its natural resource and other advantages to embrace the economy of the future.

Chevron Oil Company has a new TV ad that declares that "oil companies should put their profits to good use." We agree. And there is no better use of oil company profits than to provide large health benefits to Texans, which these regulations will bring. It would be a shame if this Congress guts clean air protections based on myths and lies coming out of Texas.

Appendix 1

TEXAS AIR CONTROL BOARD
6330 HWY. 290 EAST, AUSTIN, TEXAS 78723, 512/451-5711

DICK WHITTINGTON, P.E.
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MARY ANNE WYATT

RECEIVED
SEP 11 1989
ENFORCEMENT PROGRAM

RECEIVED
SEP 8 1989
DEPUTY EXECUTIVE DIRECTOR

September 5, 1989

Mr. Robert Layton, Jr., P.E.
Regional Administrator
U. S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Dear Mr. Layton:

This is in reply to Mr. Bill Hathaway's letter of July 25, 1989 regarding proposed approval of the Texas Prevention of Significant Deterioration (PSD) revisions to the State Implementation Plan. That letter notes concerns regarding implementation by the Board of the PSD program, and requests certain commitments in order to address those concerns.

The commitments requested in Mr. Hathaway's letter are the result of comments from a Texas Air Control Board (TACB) staff member to a member of your staff in a letter dated January 19, 1989. Mr. Hathaway's letter states that these comments indicated a lack of intent to follow federal interpretations of the Clean Air Act and Environmental Protection Agency (EPA) operating policies, most specifically, the "Top-Down" approach for Best Available Control Technology (BACT) analysis in reviewing PSD permit applications. I have reviewed the referenced letter and am satisfied that, although severe in certain criticisms, it was written to address unresolved staff concerns regarding PSD implementation in Texas and should not be construed as representing a lack of intent on the part of our agency to implement federal requirements. In that regard, I am pleased to note that substantial progress toward resolving those concerns has been made through recent grant negotiations. In any event, you may be assured that the position of the agency is, and will continue to be, to implement EPA requirements relative to programs for which we have received State Implementation Plan approval, and to do so as effectively as possible. In the same vein, we appreciate EPA's continued assistance in coordinating federal initiatives with Texas' comprehensive permit program without undue disruption.

Again, the TACB is committed to the implementation of EPA decisions regarding PSD program requirements. We look forward to approval of the PSD revisions and believe EPA will find the management of that program in Texas to be capable and effective.

Sincerely,

Eli Bell

Allen Eli Bell
Executive Director

Appendix 2

ability shall be immediately referred by the Federal Emergency Management Agency to appropriate State representatives without referral to SBA, in order to expedite assistance to victims. Disaster victims who desire to do so, however, may file an application with SBA in order to obtain a decision on their eligibility for financial assistance from SBA (OMB Approval No. 3245-0017 or 3245-0018).

14. Section 123.25 *Special Conditions—home loans* is further amended by removing paragraph (g) *RESPA* therefrom and renumbering present paragraph (h) as paragraph (g).

§ 123.26 [Amended]

15. Section 123.26 *Special Conditions—business loans* is amended by removing from the second sentence of paragraph (a) *Limits* the reference "§ 121.3-2" and inserting instead "Part 121."

16. Section 123.29 is revised to read as follows:

§ 123.29 Loans to privately owned colleges and nonprofit organizations.

SBA is authorized to make physical disaster loans in the case of loss or damage as a result of a declared Disaster (see § 123.23), to the extent that such loss or damage is not compensated by insurance or otherwise, to a privately owned college or university. SBA may further, in the case of a Major Disaster, waive interest payments on loans to such schools for the first three years of the term of such loans. See also § 123.13. SBA may also make such physical disaster loans to nonprofit organizations, including agricultural cooperatives (see § 123.41(b)(3)). Loans to such schools and such nonprofit organizations able to obtain Credit Elsewhere (as defined in § 123.3) shall be made at the Old Formula Rate. Loans to such concerns unable to obtain Credit Elsewhere shall be made at the same rate as loans to small concerns unable to obtain Credit Elsewhere (see § 123.26(b)).

17. Section 123.40 *Introduction* is amended by revising the first sentence thereof to read as follows:

Loans to which this subpart applies are available only to small business concerns (including small nurseries affected by a drought disaster) and small agricultural cooperatives situated in a Disaster Area (see definition in § 123.3), which have suffered or are likely to suffer substantial economic injury (as defined in § 123.41(a)) as a result of that specific Disaster (see § 123.23).* * *

18. Section 123.41 is amended by revising paragraph (b) to read as follows:

§ 123.41 General Provisions.

* * * * *

(b) *Eligible Applicants.* (1) Loans under this subpart are authorized only for small business concerns (including small nurseries affected by a drought disaster designated by the Secretary of Agriculture) and small agricultural cooperatives (see paragraph (b)(3) of this section), located within the Disaster Area and meeting the size standards of Part 121 of this Chapter as of the time (stated in the relevant declaration or designation) when the economic injury commenced, and which have suffered or are likely to suffer substantial economic (as distinguished from physical) injury directly resulting from a declared Disaster and are unable to obtain Credit Elsewhere (as defined in § 123.3).

(2) Small concerns regardless of their business activity are eligible to apply for these loans, except for multi-level sales distribution plans of the "pyramid" type, media of any description, gambling, illegal activities (see § 120.101-2 of this Chapter), investment, speculative ventures (e.g., mineral exploration), and rental property (see § 120.102 of this Chapter).

(3) Consumer and marketing cooperatives are eligible for loans under this subpart. Other cooperatives are eligible only if small and each of the owners would itself qualify as small under part 121 of this chapter. However, small agricultural cooperatives acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C. 1141), and meeting the size standards of part 121 of this Chapter as of the time of the Disaster with respect to which a declaration or designation under section 7(b)(2) of the Act has been issued, are eligible.

(4) Applicants determined by SBA as able to obtain Credit Elsewhere are not eligible for loans under this subpart.

* * * * *

§ 123.41 [Amended]

19. Section 123.41 *General Provisions* is further amended by removing from the provision in paragraph (é) thereof "§ 121.3-2" and inserting "part 121".

(Catalog of Federal Domestic Assistance, Numbers 59002, Economic Injury Disaster Loans, 59008, Physical Disaster Loans)

Dated: August 23, 1989.

Susan Engeleiter,

Administrator.

[FR Doc. 89-29645 Filed 12-21-89; 8:45 am]

BILLING CODE 8025-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3699-4]

Approval and Promulgation of Implementation Plan, State of Texas; Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: The purpose of this Federal Register notice is to propose approval of a revision to the Texas State Implementation Plan (SIP) that contains the Texas Air Control Board (TACB) Regulation VI, Section 116.3(a)(13), for the Prevention of Significant Deterioration (PSD) program. This proposed approval, when finalized, will enable the State of Texas to issue and enforce PSD permits directly in certain areas of the State without final approval by the EPA. Texas Regulation VI, Section 116.3(a)(13), does not apply to the sources located or wanting to locate on Indian lands. Neither is Section 116.3(a)(13) applicable to new major sources or modifications to existing major stationary sources which must include emissions from docked vessels. This PSD SIP revision is proposed for approval under the statutory requirements of Sections 110 and 160-169 of the Clean Air Act as amended August 1977.

Today's notice is published to solicit public comments on the proposed approval of the Texas State PSD regulations. The rationale for this proposed action is contained in this notice and further explained in detail in the *Technical Support Document.*

DATE: Comments must be received on this proposed action on or before January 22, 1990.

ADDRESSES: Written comments should be submitted to the address below: Chief, SIP New Source Section (6T-AN), Air Programs Branch, Air, Pesticides, and Toxics Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

Copies of the State's submittal and EPA's *Technical Support Document* along with other information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least twenty-four hours before the visiting day.

SIP New Source Section, Air Programs Branch, Air, Pesticides, and Toxics Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 655-7214

Texas Air Control Board, Technical Support and Regulation Development, 8330 Highway 290 East, Austin, Texas 78723, Telephone: (512) 451-5711.

FOR FURTHER INFORMATION CONTACT: Mr. J. Behnam, P.E.; SIP New Source Section, Air Programs Branch, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, telephone (214) 655-7214.

SUPPLEMENTARY INFORMATION: On November 10, 1980, the State of Texas requested delegation of the technical and administrative review portion of the Federal PSD program. The PSD partial authority was granted on April 23, 1981, subject to certain conditions. Subsequently, additional authority was granted to the State to conduct compliance inspections and to review compliance test reports for PSD sources on December 28, 1982, and a notice was published in the Federal Register of February 9, 1983 (48 FR 6023).

On October 26, 1987, the Governor of Texas submitted a copy of the revision to Texas Air Control Board (TACB) Regulation VI, Control of Air Pollution by Permits for New Construction or Modification, as a SIP revision to the EPA for approval. The revised section of Regulation VI (Section 116.3(a)(13)) incorporated by reference (IBR) the Federal PSD regulations (40 CFR 52.21); however, the TACB excluded Control Technology Review (40 CFR 52.21(j)), Air Quality Models (40 CFR 52.21(1) and Public Participation (40 CFR 52.21(q).

It should be noted that the October 26, 1987, submittal did not include the PM_{10} revisions which were incorporated into the Federal PSD regulations by promulgation of the PM_{10} standards on July 1, 1987, because the State regulations were in the State's process of public participation and approval before the PM_{10} promulgation date. The TACB, in response to the PM_{10} SIP requirements, has further revised Section 116.3(a)(13) to include the PM_{10} revisions in its permit regulations. Since the TACB adopted the Federal regulations by reference, the only revision to satisfy the requirements of the PM_{10} revisions was to replace the November 6, 1986 date (the date that 40 CFP 52.21 was adopted by the State) with August 1, 1987, in Section 116.3(a)(13). This amendment was adopted by the TACB on July 15, 1988, and it was submitted by the Governor on September 29, 1988, for approval. The EPA by this notice is acting on both of the October 26, 1987 and September 29, 1988 submittals, and the final approval of the Texas PSD program will be based on the combined evaluation of these revisions.

Also, on October 26, 1987, the Governor of Texas submitted a revision to the Texas SIP and regulations to meet the requirements of visibility New Source Review for Federal Class I areas (40 CFR 51.307) and the stack height regulations. The TACB stack height regulations, Regulation VI, Section 116.3(a)(14), have been reviewed and approved by the EPA and published under a separate action in the November 22, 1988, Federal Register (53 FR 47189).

The State's Regulation VI requires review and control of air pollution from new facility construction and modification and allows the TACB to issue permits for stationary sources subject to this regulation. Section 116.3(a)(13) of the TACB Regulation VI adopts the Federal PSD program (40 CFR 52.21) by IBR; however, the State explicitly excludes several sections of that regulation and other requirements which are necessary for an approvable PSD SIP revision. The reasons for these exclusions are discussed later in this notice. The TACB conducted a complete public participation program pursuant to 40 CFR 51.102 and the final revisions were adopted by the Board on July 17, 1987. The State's revised regulations became effective on August 30, 1987.

The EPA has reviewed and evaluated the TACB's revised Regulation VI, Section 116.3(a)(13), based on the criteria specified in the Federal regulations 40 CFR 52.21, 40 CFR 51.166, and the Clean Air Act amended August 1977. The EPA's review also included other relevant TACB regulations and the State statutes including the Texas Clean Air Act. The results of this evaluation are discussed in the following sections of this notice.

In adopting the Clean Air Act, Congress designated EPA as the agency primarily responsible for interpreting the statutory provisions and overseeing their implementation by the states. The EPA must approve state programs that meet the requirements of 40 CFR 51.166. Conversely, EPA cannot approve programs that do not meet those requirements. However, PSD is by nature a very complex and dynamic program. It would be administratively impracticable to include all statutory interpretations in the EPA regulations and the SIPs of the various states, or to amend the regulations and SIPs every time EPA interprets the statute or regulations or issues guidance regarding the proper implementation of the PSD program, and the Act does not require EPA to do so. Rather, action by the EPA to approve this PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations, as well as EPA's operating policies and guidance (but only to the extent that such policies are intended to guide the implementation of approved state PSD programs). Similarly, EPA approval also will have the effect of negating any interpretations or policies that the state might otherwise follow to the extent they are at variance with EPA's interpretation and applicable policies. Of course, any fundamental changes in the administration of PSD would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166, and subsequent SIP revisions.

Upon approval of the state's PSD SIP, EPA will continue to oversee implementation of this important program by reviewing and commenting upon draft permits. Specifically, EPA will comment upon any failure to follow the letter of the law, as well as EPA's statutory and regulatory interpretations and applicable guidance. If a final PSD permit still does not reflect consideration of the relevant factors, EPA will deem the permit to be not in conformance with the PSD requirements of the Act and the State's SIP, and will consider appropriate enforcement action under sections 113 and 167 of the Clean Air Act to address the permit deficiency. However, except as to matters which could have been raised in the court of appeals upon promulgation of the PSD regulations or other final action of the EPA, any party which is the target of an enforcement action may seek judicial review of the EPA interpretation or policy in question in defending against the enforcement action. See section 307(b)(2) of the Clean Air Act.

Control Technology Review—The Federal regulations in 40 CFR 51.166(j) require applicants for PSD permits to consider and install the best available control technology (BACT) in construction of new sources or modification of existing major stationary sources. This provision of the Federal PSD regulations has been excluded from the TACB Regulation VI because the TACB claims that the Texas Clean Air Act and the existing State regulations have provisions for application of BACT as stringent as the Federal requirements in reviewing the permit applications. The EPA review of the Texas Clean Air Act and Regulation VI (Sections 116.3(a)(3) through 116.3(a)(5)) have

indeed revealed that the existing TACB permit requirements meet the provisions of the Federal PSD regulations specified in 40 CFR 51.166(j)(1) through 51.166(j)(3) with the exception of 40 CFR 51.166(j)(4). Section 40 CFR 51.166(j)(4) concerns permitting of and BACT analysis for phased construction projects. Lack of this provision in the State regulation requires the TACB to issue a new permit for each phase of a facility's phased construction project, or issue a single permit for all phases of a planned construction if a continuous construction program can be maintained without interruption and the entire project can be completed within a reasonable time frame. Since in either case the applicants will be required to consider and apply the latest state-of-the-art BACT in order to secure PSD permits under the State regulations, exclusion of 40 CFR 51.166(j)(4) does not relax the Federal BACT application to phase construction projects in Texas.

In addition, the TACB adopted the definition of BACT by reference as found in 40 CFR 52.21(b)(12) (40 CFR 51.166(b)(1)). Adoption of this definition combined with the State's BACT regulations (as discussed above) fulfill the basic requirements of 40 CFR 51.166 (and Clean Air Act section 160-169) for the proposed approval of this SIP.

However, as noted above, EPA's approval of the Texas PSD SIP requires the state to follow EPA's statutory interpretations and applicable policies. With respect to BACT, EPA is proposing approval of the PSD SIP with the understanding that Texas will adhere to the following interpretations.

EPA has interpreted the BACT definition in section 169(3) of the Clean Air Act and 40 CFR 52.21(b)(12), which Texas has adopted by reference, as containing two core criteria. First, a PSD applicant must consider the most stringent control technology (and associated emission limitation) that is available in conducting a PSD analysis. Second, if the applicant proposes as BACT a control alternative that is less effective than the most stringent available, it must demonstrate to the State through objective indicators that case-specific energy, environmental, or economic impacts renders that alternative unreasonable or otherwise not achievable. The State must exercise independent judgment in reviewing that demonstration. These statutory interpretations are further amplified in case examples such as Honolulu Resource Recovery Facility (PSD Appeal No. 88-8; Remand Order of June 22, 1987); New Jersey Resource Recovery Facility, Pennsauken County, (PSD Appeal No. 88-8; Remand Order of November 10, 1986); and Columbia Gulf Transmission Company (PSD Appeal No. 88-11; Remand Order of June 21, 1989). In order to implement these statutory interpretations, the EPA has issued further guidance ("Improving New Source Review Implementation", dated December 1, 1987, A Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, to the Regional Administrators) calling on states to use a "top-down" approach to BACT analyses. In EPA's judgment, the core BACT requirements can be most efficiently satisfied if the BACT analysis considers first the most stringent—i.e., "top"—control alternative.

In addition, EPA has interpreted [See North County Resource Recovery Associates (PSD Appeal No. 85-2; Remand Order of June 3, 1986)] the "environmental impacts" component of the BACT definition as requiring the permitting authority, in establishing BACT for pollutants that are regulated under the Clean Air Act, to consider the environmental impacts of the various control alternatives on emissions of unregulated pollutants.

In support of the discussion above, the Executive Director of the TACB has submitted a letter, dated September 5, 1989, which commits the TACB to implement the PSD SIP approved program in compliance with all of the EPA's statutory interpretations and operating policies. Specifically, the TACB's letter states that (1) "* * * you may be assured that the position of the agency is, and will continue to be, to implement EPA requirements relative to programs for which we have received State Implementation Plan approval, and to do so as effectively as possible * * *", and (2) "* * * the TACB is committed to the implementation of the EPA decisions regarding PSD program requirements * * *". The EPA has evaluated the content of this letter and has determined that the letter sufficiently commits the TACB to carry out the PSD program in accordance with the Federal requirements as set forth in the Clean Air Act, applicable regulations, and as further clarified in the EPA's statutory and regulatory interpretations, including the proper conduct of BACT analyses. The EPA also interprets this letter as committing the TACB to follow applicable EPA policies such as the "Top-Down" approach. This letter will be incorporated into the SIP upon the final approval action.

2. Vessel Emissions—The EPA's 1980 PSD regulations included the dockside emissions of vessels as primary emissions in determining PSD applicability for a proposed source or modification. *See* 45 FR 52676, 52690, 52738 (August 7, 1980). The EPA subsequently decided to reconsider that decision, and in 1982 issued revised regulations excluding dockside vessel emissions.

See 47 FR 27554 (June 25, 1982). In 1984, the court of appeals vacated that portion of EPA's 1982 actions which excluded dockside vessel emissions for PSD applicability purposes (including the provision "* * * except the activities of any vessel * * *" in 40 CFR 51.166 (b)(6) [formerly designated as 51.24(b)(6)] and remanded the matter to EPA for further action. *NRDC* v. *EPA*, 725 F.2d 761 (D.C. Cir. 1984). The court's disposition had the effect of reinstating the dockside emission provisions of the 1980 regulations pending further rulemaking by EPA. *Id.* at 772. The EPA has not yet acted on the court's remand.

The TACB has declined to accept the EPA comments on the draft Texas SIP that recommended consistency between the State regulations and the court's decision. Instead, the Texas rules incorporate 40 CFR 51.166 (b)(6) as it currently appears in the Code of Federal Regulations. Accordingly, EPA proposes to retain PSD permitting authority over sources and modifications that would be effected by the dockside emissions of vessels. After the final approval of the Texas PSD program, the TACB will have to submit all such affected PSD applications to the EPA for review and issuance of the permits.

3. Air Quality Model—Section 40 CFR 51.166(1) of the Federal PSD regulations requires the applicants to use the EPA approved models for all PSD permitting purposes. The *Guideline on Air Quality Models (Revised 1986)* which contains the EPA approved models is incorporated by reference into the PSD regulations under Section 40 CFR 51.166(1). The TACB has excluded the Federal modeling provisions from its regulations; however, the State added an air quality modeling provision to its regulations under Regulation VI, Section 116.3(e)(13). The text of this language is provided below:

> * * * All estimates of ambient concentrations required under this paragraph shall be based on the applicable air quality models and modeling procedures specified in the *EPA Guideline on Air Quality Models*, as amended, or models and modeling procedures currently approved by EPA for use in the state program, and other specific provisions made in the state PSD State Implementation Plan. If the air quality impact model approved by EPA or specified in the guideline is inappropriate, the model may be

modified or another model substituted on (1) a case-by-case basis, or (2) a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval fo the Administrator of the EPA * * *

The EPA has reviewed this added language and has determined that the TACB's modeling requirements specified in Regulation VI, Section 116.3(a)(13), are equivalent and consistent with the provisions of 40 CFR 51.166(1).

4. Public Participation—The State has excluded Section 40 CFR 51.166(q), PSD permit public participation, from its Regulation VI. However, the TACB has fulfilled the requirements for public participation by (1) the existing State regulations and (2) imposing additional procedures in the SIP supplement entitled "Revision to the Texas State Implementation Plan for Prevention of Significant Deterioration of Air Quality". Sections 116.10(a) and 116.10(c) of Regulation VI contain provisions that are equivalent to 40 CFR 51.166(q) except for several sections. These excepted sections are: 40 CFR 51.166(q)(1) that requires the reviewing agency to notify the applicants of the completeness or a deficiency in the application within a specified time period; 40 CFR 51.166(q)(2)(ii) that requires the State to include the degree of expected increment consumption (in ug/m³) from the source or modification in the public notice; and 40 CFR 51.166(q)(2)(iv) that requires the State to send a copy of the public notice to any comprehensive regional land use planning agency and to any other affected agencies or Indian Governing Body. These requirements are covered under the SIP supplement which will become an enforceable part of the Texas PSD SIP when EPA finally approves this program.

5. Jurisdiction over Indian Lands—The Congress of the United States enacted "Yeleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act" on August 18, 1987. This Act established two Federally designated Indian lands in the State of Texas; namely "Title I—Yeleta del Sur Pueblo Restoration" and "Title II—Alabama and Coushatta Indian Tribes of Texas". Section 107(b) of Title I and Section 207(b) of Title II explicitly exclude the State's regulatory jurisdiction from the Federally designated Indian lands. Therefore, the State of Texas can not perform any air quality regulatory activities on these Indian lands. In addition, the State did not request any authority for Indian land nor did it protest the Federal authority when the EPA expressed its intention of retaining this authority in the PSD SIP comment letters to the TACB. Based on this statutory limitation, the EPA retains its authority for air quality regulatory and enforcement activities including issuance of PSD permits for sources located (or wanting to locate) on these Federally designated Indian lands. Questions, inquiries, and any other activities related to air quality planning and enforcement that affect Indian lands directly or indirectly should be referred to the EPA Region 6 Office at the address given in this notice.

6. Other Provisions—The EPA will retain authority for extension of the permits which were issued by the regional office before approval of this SIP. In response to this, the TACB has excluded 40 CFR 52.21(r)(2) from its Regulation VI. In addition, other sections of the Federal PSD regulations such as 40 CFR 52.21(s), 40 CFR 52.21(u), and 40 CFR 52.21(w) which are applicable only to the Federal agency are excluded from incorporation by reference. The plan requirements under 40 CFR 51.166(a) are addressed in the State SIP supplement.

7. New Source Review Visibility—On October 23, 1984 [49 FR 42670], EPA required those States that had not yet done so (including Texas) to submit State Implementation Plan (SIP) revisions for visibility protection by May 8, 1985. The State's plan had to contain a visibility monitoring strategy and visibility new source review (NSR) regulations in compliance with the provisions of 40 CFR 51.305 (visibility monitoring) and 51.307 (visibility NSR). Texas submitted its plan for NSR on December 11, 1985. EPA published a Notice of Delegation of Authority for Visibility NSR under the Federal Prevention of Significant Deterioration (PSD) program on November 4, 1986 (51 FR 40072). The October 28, 1987, submittal, which incorporated by reference the Federal PSD regulation, contained all of the visibility NSR requirements specified in 40 CFR 51.307. Therefore, the EPA is also proposing to approve the TACB's plan for protection of visibility in mandatory Federal Class f areas under the NSR program.

In summary, the TACB has adopted the Federal PSD regulations in 40 CFR 52.21 through incorporation by reference, but the State has excluded several sections of the Federal regulations. However, the State has argued that its existing regulations for new source review and the Texas Clean Air Act have provisions that fulfill the requirements of the excluded sections as effectively as the Federal regulations.

The EPA has reviewed and evaluated the TACB's existing SIP regulations, the PSD SIP submitted by the Governor of Texas, the TACB's commitment letter of September 5, 1989, and the Texas Clean Air Act. The EPA's preliminary determination is that the State's regulations, procedures, incorporation of the Federal PSD regulations, and the PSD commitment letter are adequate for authorizing the TACB to directly review the PSD permit applications, and issue and enforce the PSD permits in certain areas of the State. For the reasons discussed in this notice, the EPA will retain authority for reviewing, issuing, and enforcing the PSD permits on Indian lands and new or modification of major stationary sources which include emissions from docked vessels. Based on this evaluation, the EPA proposes to approve the Texas PSD SIP revision.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under 5 U.S.C. 605(b), I certify that this proposed SIP approval will not have a significant economic impact on a substantial number of small entities (46 FR 8709).

This proposed rulemaking is issued under the authority of sections 110, 160–169, and 301 of the Clean Air Act, 42 U.S.C. 7410, 7470–7479, and 7601.

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide and Hydrocarbons.

Dated: October 20, 1989.

Robert E. Layton Jr., P.E.,

Regional Administrator.

[FR Doc. 89–29772 Filed 12–21–89; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 88–06, Notice 6] RIN: 2127–AC43

Federal Motor Vehicle Safety Standards; Side Impact Protection—Light Trucks, Buses, and Multipurpose Passenger Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to extend the existing requirements of Federal Motor Vehicle Safety Standard

Appendix 3

EPA is approving these SIP revisions without prior proposal because the Agency views these as noncontroversial amendments and anticipates no adverse comments. This action will be effective 60 days from the date of this **Federal Register** notice unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted. If such notice is received, this action will be withdrawn before the effective date by simultaneously publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective on [60 days from today].

FINAL ACTION: EPA is approving COMAR 26.11.01.01 Z. and CC., the definitions of true vapor pressure and vapor pressure, as part of the Maryland SIP. These definitions are consistent with the Clean Air Act and EPA guidance.

The Agency has reviewed this request for revision of the federally-approved state implementation plan for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

This action, pertaining to the approval of the definitions of true vapor pressure and vapor pressure for the Maryland SIP, has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The Office of Management and Budget has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Under section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in civil or criminal proceedings to enforce its requirements. (See 42 U.S.C. 7607(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 22, 1992.

Edwin B. Erickson,

Regional Administrator, Region III.

For the reasons set out in the preamble, Chapter I, title 40 of the Code of Federal Regulations is amended as follows.

PART 52 [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart V—Maryland

2. Section 52.1070 is amended by adding paragraph (c)(89) to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

(89) Revisions to the State Implementation Plan submitted by the Maryland Department of the Environment on June 30, 1987.

(i) *Incorporation by reference.*

(A) Letter from the Maryland Department of Environment dated June 30, 1987 submitting a revision to the Maryland State Implementation Plan pertaining to the definitions of true vapor pressure and vapor pressure.

(B) Maryland Register Volume 13, page 2048; COMAR 10.18.01.01Definitions V–1. and X–1 (Now recodified as COMAR 26.11.01.01 Z. and CC.).

[FR Doc. 92–14683 Filed 6–23–92; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 52

[TX 4097; FRL 4137–8]

Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: This Final Rule approves a revision to the Texas State Implementation Plan (SIP) that includes amendments to the Texas Air Control Board (TACB) Regulation VI, General Rules, a Supplement, and commitment letters, all related to the Prevention of Significant Deterioration (PSD) program. This approval enables the State of Texas to issue and enforce PSD permits directly in most areas of the State without final issuance of those PSD permits by the EPA. The proposed approval notice was published in the **Federal Register** on December 22, 1989. The EPA has reviewed and considered the public comments it has received in taking final action to approve this SIP revision; responses to significant comments are presented in this notice.

The Texas PSD SIP revision does not apply to sources located or wanting to locate on Indian lands. Neither is it applicable to new major sources or major modifications to existing stationary sources for which applicability determinations would be affected by dockside emissions from vessels. This PSD SIP revision has been approved under the statutory requirements of Sections 110 and 160 through 169 of the Clean Air Act (the Act).

As a result of today's final action, the TACB will have direct authority on the effective date of this rule, to issue and enforce the PSD permits in most areas of Texas, with the limitations described in this rule. The PSD delegation agreement of April 23, 1981, additional authority dated December 28, 1982, and addendum dated August 21, 1988, shall remain in effect for major new sources and major modifications to existing sources for which applicability determinations would be affected by dockside emissions from vessels. Under this agreement, the TACB has administrative, technical review, and public participation authority for PSD permit applications associated with dockside vessel emissions, and the EPA has final permit approval and enforcement authority regarding such sources including oversight of PSD applicability determinations regarding such sources. All of the inquiries,

requests, and PSD applications related to emissions from docked vessels should be directed initially to the TACB at the address given in this notice. Further rationale for this final approval action is contained in the notice of proposed rulemaking and this final action, and is further explained in detail in the Technical Support Document.

EFFECTIVE DATE: This action become effective on July 24, 1992.

ADDRESSES: Copies of the State's submittal and EPA's Technical Support Document along with other relevant information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least twenty-four hours before the visiting day.

Chief, Planning Section (6T-AP), Air Programs Branch, Air, Pesticides, and Toxics Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202. Telephone: (214) 655-7214, or.

Texas Air Control Board, Planning and Development, 12124 Park 35 Circle, Austin, Texas 78753, Telephone: (512) 908-1000.

In addition, all requests, reports, applications, and any other communications relating to PSD permits for the affected facilities in Texas, in areas outside of Indian lands, should be sent directly to the Texas Air Control Board, 12124 Park 35 Circle, Austin, Texas 78753. Sources located on Federally-designated Indian lands in the State of Texas should submit the information specified above to the Chief, Region 6 Air Programs Branch, U.S. Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202-2733.

FOR FURTHER INFORMATION CONTACT: Mr. J. Behnam, P. E.; Air Programs Branch, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, telephone (214) 655-7214.

SUPPLEMENTARY INFORMATION:

Background

On November 10, 1980, the State of Texas requested delegation of the technical and administrative review and public participation portions of the Federal PSD program. Pursuant to 40 CFR 52.21(u), the PSD partial delegation of authority was granted on April 23, 1981, subject to certain conditions. On December 28, 1982, additional authority was granted to the State to conduct compliance inspections and to review compliance test reports for PSD sources. See 48 FR 6023 (February 9, 1983). Texas has also been delegated partial authority for the Visibility Protection New Source Review (NSR) program under the Federal PSD program within 40 CFR 52.21(p), which was revised to incorporate the visibility protection SNR requirements of 40 CFR 51.307 on July 12, 1985. See 51 FR 40072 (November 4, 1986).

On December 11, 1985, October 28, 1987, February 18, 1988, and September 29, 1988, the Governor of Texas submitted PSD SIP revisions to EPA for approval. The October 28, 1987, submittal also included revisions to meet the requirements of the stack height regulation under the Act (40 CFR 51.100). The TACB stack height regulation, Regulation VI, Section 116.3(a)(14), has been reviewed and approved by the EPA and published under a separate action. See 53 FR 47189 (November 22, 1988).

The State's Regulation VI requires review and control of air pollution from new facility construction and modification and allows the TACB to issue permits for stationary sources subject to this regulation. Section 116.3(a)(13) of the TACB Regulation VI incorporates by reference the Federal PSD regulations (40 CFR 52.21) as they existed on August 1, 1987, which include revisions associated with the July 1, 1987, promulgation of revised National Ambient Air Quality Standards for particulate matter (52 FR 24872) and the visibility NSR requirements noted above. The State explicitly excluded several sections of the Federal PSD regulation not necessary for approval of the Texas program. The reasons for these exclusions were discussed in the proposed approval notice of December 22, 1989 (54 FR 52823). Other requirements necessary for an approvable PSD SIP revision, such as enforcement by Texas of EPA-issued PSD permits, were adopted by the TACB in its General Rules. Also, the public participation requirements of the Federal PSD regulations are met by the existing SIP-approved section 116.10 of Regulation VI and the PSD Supplement as adopted by the TACB on July 17, 1987.

In developing its PSD SIP, the TACB conducted a complete public participation program pursuant to 40 CFR 51.102, and the final revisions were adopted by the Board on July 29, 1985, July 17, 1987, December 18, 1987, and July 15, 1988. In today's final action, it should be noted that EPA is not taking action on the following amendments: (1) Amendments to Sections 116.1, 116.2, and 116.10 of Regulation VI as adopted on July 26, 1985 by the TACB and submitted by the Governor on December 11, 1985; (2) amendments to section 116.10 of Regulation VI as adopted on July 17, 1987 by the TACB and submitted by the Governor on October 26, 1987; (3) amendments to sections 116.5 and 116.10 as adopted by the TACB on December 18, 1987 and submitted by the Governor on February 18, 1988; and (4) amendments to Sections 116.1 and 116.10 as adopted by the TACB on July 15, 1988 and submitted by the Governor on September 29, 1988. EPA will be taking separate action on the above amendments and other pending SIP revisions to Regulation VI at a later date.

The EPA has reviewed and evaluated the PSD SIP submittals based on the criteria specified in the Federal regulations at 40 CFR 52.21, 40 CFR 51.166, and the Act. The EPA's review also included other relevant SIP-approved TACB regulations and the Texas Clean Air Act. A discussion of this evaluation, as of that date, is included in EPA's proposed approval notice of December 22, 1989 (54 FR 52823). This evaluation has continued through the public notice and comment process.

Public Comments

The EPA received comments from the Texas Utility Service, Texas Chemical Council, American Paper Institute, National Forest Products Association, MacMillan Bloedel, Inc., Champion International Corporation, Utility Air Regulatory Group, International Paper and the law firm of Brown, Maroney and Oaks Hartline, on behalf of a variety of Texas industrial and manufacturing companies. All of the commenters supported EPA's final approval of the Texas PSD SIP. The commenters objected, however, to certain language in the preamble of the proposed notice. A summary of the significant public comments and EPA's response is narrated below.

Comment 1: The commenters expressed concern with the preamble language in the proposal notice, suggesting that final approval would require that the State follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations as well as EPA's operating policies and guidance. The commenter contended that such a condition would be unlawful, unnecessary, unreasonable, legally untenable, and would improperly limit the State's flexibility. These commenters argued that the State has primary responsibility for implementation once the SIP is approved and thus the State should be making decisions, not EPA. Also, if EPA

wants to condition the PSD SIP approval on commitments to comply with any interpretations, policies, and guidance issued by EPA, EPA must reduce those interpretations, policies and guidance to rules, thereby giving the public opportunity to review and comment before EPA's final decision. If TACB fails to adopt any of these, once reduced to a rule, EPA can issue a SIP call pursuant to section 110(a)(2)(H).

Response 1: The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act. As clarified herein, EPA's intent is merely to place the State and the public on notice of EPA's longstanding views that the Agency must continue to oversee the State's implementation of the PSD SIP. The language in question is neither a part nor a condition of EPA's approval of the Texas PSD SIP, and it has no binding effect. Rather than creating new rights or obligations, it advises the public of EPA's role in overseeing the obligations that already exist by operation of the applicable statutory and regulatory provisions.

The issuance of PSD permits and other actions by the State in the administration of the PSD program must conform to the requirements of the Act, applicable EPA regulations, and the SIP. See sections 167 and 113, 42 U.S.C. 7477 and 7413 (EPA's enforcement authority in overseeing State implementation). In making judgments as to what constitutes compliance with the Act and regulations issued thereunder, EPA looks to (among other sources) its policy statements and interpretive rulings in effect at the time of EPA's action regarding those statutory and regulatory requirements. EPA's approval of a state PSD program or some portion of it does not divest the Agency of its duty to continue a vigorous oversight and enforcement role under sections 167 and 113. For example, section 167 provides that EPA shall take whatever enforcement action may be necessary to prevent construction of a major stationary source that does not conform to the requirements of the PSD program. Thus, the purpose of the preamble language in the proposal notice was to advise Texas and the public of EPA's view that approval of a state's PSD program does not bar EPA from deciding whether the state's action in implementing its SIP conforms to the Act's PSD requirements.

Following SIP approval, then, EPA remains as the congressionally designated agency with primary responsibility to reasonably interpret the applicable Federal law under the Act, and to base its enforcement actions on those interpretations. If EPA determines that a state-issued permit does not conform to the Act's PSD requirements, EPA will decide whether to sue the state and/or the source for declaratory and injunctive relief. See, e.g., section 113(a)(5); 55 FR 23547 (notice of clarification regarding approval of Kentucky PSD SIP).

EPA acknowledges that states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases. Consequently, EPA's continuing oversight role under the Act leaves Texas and other states with considerable discretion to implement the PSD program as they see fit.

As noted in the proposed approval of Texas' program, EPA may not fundamentally change the requirements set forth in its own regulations or approved SIPs in the guise of new interpretations or policy statements. The creation of new rights or obligations can only be effected through enactment of legislation or promulgation of regulations or approval of SIP revisions, which usually must be preceded by revisions to the regulations in 40 CFR parts 51 and 52, in accordance with applicable rulemaking procedures. Second, EPA's interpretations often are intended in whole or in part to guide only EPA regional offices, and in such instances they have no implications whatsoever for a state's administration of its program. PSD–SIP approved states remain free to follow their own course, provided that state action is consistent with the letter and spirit of the SIP, when read in conjunction with the applicable statutory and regulatory provisions.

Comment 2: Another major concern was whether EPA may use section 167 of the Act to challenge State-issued PSD permits. The commenters contended that EPA already has authority under the Act to review permit applications, file written comments, present oral testimony, challenge the State's decision in the State court, take enforcement powers in the State under section 113(a)(2), or issue a SIP revision call under section 110(a)(2)(H) of the Act. The commenters stated that the EPA does not have the authority under sections 167 and 113 of the Act to sue a permittee for violating the Act.

Response 2: The EPA intends to continue its close working relationship with the State and, through informal consultation and formal comments on draft permits, to resolve any issues regarding the adequacy of PSD permits. However, as discussed above, approval of the Texas PSD program does not divest EPA of its enforcement authority. If a final permit is issued that in EPA's view still does not reflect consideration of the relevant factors, EPA may view the permit as inadequate and may consider enforcement action under sections 113 and 167 against the State and/or company to address the permit deficiency. However, in defending against such an enforcement action, a party is free to assert that EPA has not reasonably interpreted the underlying statutory and regulatory provisions.

Comment 3: Another allegation is that EPA has improperly included certain provisions in the Texas PSD SIP mandating implementation of the "Top-Down" methodology for determining BACT for PSD permits. The commenters contend that the "Top-Down" approach is inconsistent with the requirements of the Act and that EPA can not legally require that Texas follow this approach. Most commenters also stated that EPA has exceeded its statutory authority in implementing the "Top-Down" BACT approach, and they believed that this policy and guidance should be subject to appropriate rulemaking, public review and comment.

Response 3: It is not necessary to resolve the legal issues relating to the top-down approach to BACT. As discussed below in response to Comment 4, EPA agrees that the TACB letter of September 5, 1989, does not mandate the State follow a top-down approach to BACT. In addition, the commenters procedural concerns are being addressed. In 1989, industry groups petitioned EPA to conduct rulemaking to rescind the top-down policy and initiate a rulemaking on BACT determinations based on similar concerns. The EPA denied this request, explaining that the top-down approach was not at variance with, nor a revision of, the PSD regulations, and that no rulemaking was required. Litigation was commenced, resulting in a judicial settlement agreement. See 56 FR 34202 (announcing proposed settlement). In so doing, EPA has agreed to issue a proposed rule to revise or clarify the regulations defining BACT, see 40 CFR 51.166(i) and 52.21(i), and to clarify EPA policy regarding BACT determinations. EPA has decided as a matter of policy to

conduct this rulemaking in order to facilitate greater public participation concerning the issue. The proposed rule is currently being developed.

Comment 4: One commenter noted that the TACB's letter, dated September 5, 1989, can not reasonably be interpreted as a legal requirement that the State follow the EPA's present and future new source review interpretations, policies and guidance, including the BACT "Top-Down" approach, because it only commits Texas to implement properly-established EPA requirements and legally-binding EPA decisions. The commenter said that the Clean Air Act specifically requires that, if at all, any such change in EPA policy for BACT determinations be accomplished through notice and comment rulemaking, and that the EPA first prepare an economic impact assessment.

Response 4: In certain circumstances, EPA's approval of a SIP revision through notice-and-comment rulemaking procedures can serve to adopt specific interpretations or decisions of the Agency. For example, a state may commit in writing to follow particular EPA interpretations or decisions in administering the PSD program. As part of the SIP revision process, EPA may incorporate that State's commitment into the SIP by reference. This process has been followed in today's action. Of course, EPA agrees with the commenter that the Agency must act reasonably in construing the terms of a commitment letter, so as to avoid approving it in a manner that would contravene the state's intent in issuing the letter in the first place. Moreover, the State commitment must be consistent with the plain language of the applicable statutory or regulatory provisions at issue. Similarly, EPA cannot unilaterally change the clear meaning of any approved SIP provision by later guidance or policy. Rather, as stated in the proposed approval notice, such fundamental change must be accomplished through the SIP revision process.

Consistent with the terms of the TACB letter dated September 5, 1989, EPA views that letter as a commitment on the part of the TACB to "implement EPA program requirements * * * as effectively as possible," and as a commitment "to the implementation of the EPA decisions regarding PSD program requirements." EPA agrees, however, that the TACB letter need not be interpreted as a specific commitment by the State to follow a "Top-Down" approach to BACT determinations.

Comment 5: Two commenters indicated that if EPA plans to revise 40 CFR 52.2303 for anything other than approval of the Texas PSD SIP program, then EPA should have provided the public with that additional language in the proposal.

Response 5: The EPA's revision today of 52 CFR 52.2303 makes only the pertinent State's submittals part of the SIP. Nothing outside of those State submittals is made part of the Texas PSD SIP.

Comment 6: Two commenters stated that the proposed approval notice did not indicate a transition policy for pending permits.

Response 6: The EPA Region 6 Office will transfer, on the effective date of this final action, all of the pending PSD permit applications to the State of Texas for review and issuance of final PSD permits. The EPA has no authority to issue PSD permits in the State of Texas upon the effective date of this rulemaking unless Indian lands or docked vessel emissions are involved. All of the PSD permits (other than those for Indian lands and for sources with docked vessel emissions) that will be issued on or after the effective date of this final action must be issued by the TACB, not EPA.

Final Action

EPA is today taking final action to approve the following as part of the Texas PSD SIP: (1) TACB Regulation VI, § 116.3(a)(13) as adopted by the TACB on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988 and submitted by the Governor on December 11, 1985, October 26, 1987, and September 29, 1988, respectively; (2) the PSD Supplement as adopted by the TACB on July 17, 1987 and submitted by the Governor on October 26, 1987; (3) TACB General Rule, Section 101.20(3) as adopted by the TACB on July 26, 1985 and submitted by the Governor on December 11, 1985; and (4) the TACB commitment letters submitted by the Executive Director on September 5, 1989 and April 17, 1992. In addition, the existing SIP-approved Regulation VI and the Texas Clean Air Act are part of the Texas PSD SIP that is being approved today in this final rule.

This final approval is based on review and evaluation of the Governor's submissions of December 11, 1985, October 26, 1987, February 18, 1988, and September 29, 1988, the existing SIP-approved TACB regulations and Texas Clean Air Act, the TACB's September 5, 1989 letter, and the July 17, 1987 Texas PSD SIP Supplement. Thus, as of the effective date of this rule, the public and PSD applicants should be aware that the TACB will have direct authority, except as limited below, to issue and enforce the PSD permits in most areas of Texas. All PSD requests, reports, applications, and such other communications for affected facilities in Texas, in areas outside of Indian lands, should be sent directly to the Texas Air Control Board, 12124 Park 35 Circle, Austin, Texas 78753. Sources located on the Federally designated Indian lands in the State of Texas should submit the information specified above to the Chief, Region 6 Air Programs Branch, U.S. Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202. The PSD delegation agreement of April 23, 1981, additional authority dated December 28, 1982, and addendum dated August 21, 1988, shall remain in effect for major new sources and major modifications to existing sources for which applicability determinations would be affected by dockside emissions from vessels. Under this agreement, the TACB has administrative, technical review, and public participation authority for the PSD permit applications associated with dockside vessel emissions, while EPA retains final permit approval and enforcement authority regarding such sources, as well as oversight of the State's final authority to determine PSD applicability. All of the inquiries, requests, and PSD applications (except the permit final approval and enforcement issues) related to emissions from docked vessels should be directed to the Texas Air Control Board at the address above.

Also, Texas' incorporation by reference of 40 CFR 52.21 includes § 52.21(p), part of which constitutes the Federal visibility NSR rules for major new sources and major modifications in attainment areas. Accordingly, EPA is also approving this SIP revision as meeting the requirements of 40 CFR 51.307 with respect to visibility NSR in attainment areas.

Today's final approval allows the TACB to issue PSD permits for a subclass of municipal incinerators (municipal waste combusters). Section 305 of the 1990 Clean Air Act Amendments, Public Law 101-549, amended section 169(1) of the Act by expanding the list of major emitting facilities that are subject to PSD requirements if they emit or have the potential to emit one hundred tons per year or more of any regulated pollutant This list now includes municipal incinerators capable of charging more than fifty tons of refuse per day. Under prior law, only municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day were subject to the 100 tons-per-year

major source threshold for PSD applicability. EPA interprets this statutory change as being immediately effective.

In contrast to the treatment of lowered new source review applicability thresholds in certain other provisions of the 1990 Amendments, Congress did not grant states a period of time to develop SIP revisions to implement this change before making it effective. Compare, for example, new CAA sections 182(c), lowering major source thresholds for major sources in serious ozone nonattainment areas to fifty tons per year, and new section 182(a)(2)(C)(i), granting states two years from enactment to submit revised SIPs reflecting changes in new source review permitting requirements for nonattainment areas before the lowered thresholds become effective even absent a state submission, with section 165(a)(1), which flatly states that no "major emitting facility" may be constructed in a PSD area without a PSD permit.

The statutory change regarding the applicability threshold for municipal incinerators is simple and straightforward. It does not require any corresponding procedural or substantive change to the PSD permitting process in Texas or any other state. Accordingly, EPA believes it would be unnecessary and unreasonable to prohibit construction of the subclass of facilities in question pending a change in the threshold tonnage levels of applicable PSD regulations. However, because Texas's SIP consists largely of the incorporation by reference of the Federal PSD regulations at 40 CFR 52.21 as it existed on September 29, 1988, and since the definition of "major emitting facility" in those regulations at that time expressly did not include municipal incinerators charging fifty tons of refuse per day, the TACB by its letter of April 17, 1992 committed that TACB will review the municipal incinerators in accordance with the 1990 CAAA and will use the fifty-ton threshold for PSD applicability. This interpretation of the purpose and effect of the Texas plan is a part of today's SIP approval action. In contrast, EPA believes that in those states where it directly or by delegation implements the PSD program under § 52.21, it has authority to interpret its regulations in light of the statutory change to section 169(1) enabling the issuance of PSD permits to the sources in question rather than applying the prohibition on construction in section 165(a)(1). Because, as noted above, the statutory change in question is simple and straightforward, and because it would serve no purpose to prohibit construction of the sources in question pending a further SIP revision, EPA believes that it has good cause within the meaning of 5 U.S.C. 553(B)(3)(B) to find that an opportunity to comment on this aspect of today's action would be unnecessary and contrary to the public interest.

The EPA has reviewed the submissions by Texas for conformance with the provisions of the 1990 CAAA, Public Law 101-549. The EPA has determined that certain statutory changes have immediate effect on the Texas PSD SIP being approved today, although none of them require additional changes to the terms of the SIP at this time. These statutory changes include the revised applicability threshold for certain municipal incinerators, discussed above in this notice. The other statutory changes that are being addressed in this notice are discussed below.

Section 193 of the 1990 CAAA revised sections 162(a) and 164(a) of the Clean Air Act to specify that the boundaries of areas designated as Class I must conform to all boundary changes at such parks and wilderness areas made since August 7, 1977 and any changes that may occur in the future. Prior law was unclear on this point. However, EPA interprets the current regulations at 40 CFR 52.21 as being able to accommodate these statutory changes, and no regulatory revisions are necessary at this time in order to implement these changes. For a discussion of EPA's policy regarding the implementation of the boundary change, please consult the memorandum entitled "New Source Review Program Transitional Guidance," from John S. Seitz, Director, Office of Air Quality Planning and Standards, March 11, 1991. In addition, the TACB letter of April 17, 1992 committed the TACB to interpret the PSD regulations in a manner consistent with the changes in sections 162(a) and 164(a) of the Act as interpreted by EPA.

Section 403 of the 1990 CAAA revised section 169(3) of the Act to specify that "clean fuels" should be considered in a BACT analysis, and to provide that a source utilizing clean fuels or any other means to comply with the BACT requirement shall not be allowed to increase above levels that would have been required under section 169(3) prior to the 1990 Amendments. EPA has interpreted the new statutory language regarding clean fuels as merely codifying present practice under the Act, under which clean fuels are an available means of reducing emissions to be considered along with other approaches in identifying BACT-level controls. See the letter from William G. Rosenberg, Assistant Administrator, to Henry Waxman, Chairman, Subcommittee on Health and the Environment, U.S. House of Representatives, October 17, 1990. Accordingly, EPA believes that no regulatory revisions are necessary in order to implement these statutory changes. In addition, in its letter of April 17, 1992, the TACB has committed to interpreting the revised language in section 169(3) in a manner consistent with EPA's interpretation.

With respect to all of the statutory changes discussed in today's rule, EPA plans to undertake national rulemaking in the near future to adopt clarifying changes to its regulations. Upon final adoption of those regulations, EPA will call upon states with approved PSD programs, including Texas, to make corresponding changes in their SIPs.

The EPA has reviewed this request for revision of Texas' Federally-approved State Implementation Plan for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. As discussed above, the EPA has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

Under 5 U.S.C. 605(b), I certify that this final SIP approval will not have a significant economic impact on a substantial number of small entities (46 FR 8709).

This final rulemaking is issued under the authority of sections 110, 160-169, and 301 of the Clean Air Act, 42 U.S.C. 7410, 7470-7479, and 7601.

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen-dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Dated: May 21, 1992.

William K. Reilly,

Administrator.

Title 40, part 52 of the Code of Federal Regulations is being amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart SS—Texas

2. Section 52.2270 is amended by adding paragraph (c)(73) to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

(73) Revisions for Prevention of Significant Deterioration (PSD) are: Regulation VI—Section 116.3(a)(13) as adopted by the Texas Air Control Board (TACB) on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988 and submitted by the Governor on December 11, 1985, October 28, 1987, and September 29, 1988, respectively; the PSD Supplement as adopted by the TACB on July 17, 1987 and submitted by the Governor on October 26, 1987; General Rules—Section 101.20(3) as adopted by the TACB on July 26, 1985 and submitted by the Governor on December 11, 1985; and the TACB commitment letters submitted by the Executive Director on September 5, 1989 and April 17, 1992. Approval of the PSD SIP is partially based on previously approved TACB regulations and State statutes.

(i) *Incorporation by reference.*

(A) Revisions to the TACB Regulation VI (31 TAC chapter 116)—Control of Air Pollution by Permits for New Construction or Modification: Rule 116.3(a)(13) as adopted by the TACB on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988.

(B) Revision to TACB General Rules (31 TAC Chapter 101)—Rule 101.20(3) as adopted by the TACB on July 26, 1985.

(C) TACB Board Order No. 85–07, as adopted on July 26, 1985.

(D) TACB Board Order No. 87–09, as adopted on July 17, 1987.

(E) TACB Board Order No. 88–08, as adopted on July 15, 1988.

(F) The following portions of the PSD Supplement, as adopted by the TACB on July 17, 1987: 1. (2) Initial Classification of areas in Texas, pages 1–2; 2. (3) Redesignation procedures, page 2; 3. (4) plan assessment, pages 2–3; 4. (6) Innovative Control Technology, page 3; and 5. (7) Notification, (a) through (d), page 4.

(ii) *Additional material.*

(A) The PSD Supplement as adopted by the TACB on July 17, 1987.

(B) A letter dated September 5, 1989, from the Executive Director of the TACB to the Regional Administrator of EPA Region 6.

(C) A letter dated April 17, 1992, from the Executive Director of the TACB to the Division Director of Air, Pesticides and Toxics Division, EPA Region 6.

* * * * *

3. Section 52.2303 is revised to read as follows:

§ 52.2303 Significant deterioration of air quality.

(a) The plan submitted by the Governor of Texas on December 11, 1985 (as adopted by the TACB on July 26, 1985), October 28, 1987 (as revised by the TACB on July 17, 1987), and September 29, 1988 (as revised by the TACB on July 15, 1988) containing Regulation VI—Control of Air Pollution for New Construction or Modification, § 116.3(a)(13); the Prevention of Significant Deterioration (PSD) Supplement document, submitted by the Governor on October 26, 1987 (as adopted by the TACB on July 17, 1987); and revision to General Rules, Rule 101.20(3), submitted by the Governor on December 11, 1985 (as adopted by the TACB on July 26, 1985), is approved as meeting the requirements of part C, Clean Air Act for preventing significant deterioration of air quality.

(b) The plan approval is partially based on commitment letters provided by the Executive Director of the Texas Air Control Board, dated September 5, 1989 and April 17, 1992.

(c) The requirements of section 160 through 165 of the Clean Air Act are not met for Federally-designated Indian lands. Therefore, the provisions of § 52.21 (b) through (w) are hereby adopted and made a part of the applicable implementation plan and are applicable to sources located on land under the control of Indian governing bodies.

(d) The requirements of section 160 through 165 of the Clean Air Act are not met for new major sources or major modifications to existing stationary sources for which applicability determinations would be affected by dockside emissions of vessels. Therefore, the provisions of § 52.21 (b) through (w) are hereby adopted and made a part of the applicable implementation plan and are applicable to such sources.

[FR Doc. 92–14684 Filed 6–23–92; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 100

RIN: 0905–AD25

Vaccine Injury Compensation; Calculation of Cost of Health Insurance

AGENCY: Public Health Service, HHS.

ACTION: Final rule.

SUMMARY: Subtitle 2 of title XXI of the Public Health Service Act (PHS), as enacted by the National Childhood Vaccine Injury Act of 1986, and as amended, governs the National Vaccine Injury Compensation (NVIC) Program. The NVIC Program, administered by the Secretary, provides that a proceeding for compensation for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition with the United States Claims Court. In some cases, the injured individual may receive compensation for future lost earnings, less appropriate taxes and the "average cost of a health insurance policy, as determined by the Secretary." This final rule sets out the amount to be deducted from the award of compensation which reflects the average cost of a health insurance policy.

DATES: This regulation is effective on July 23, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas E. Balbier, Jr., Director, Division of Vaccine Injury Compensation, 6001 Montrose Road, room 702, Rockville, Maryland 20852; telephone number: 301 443–6593.

SUPPLEMENTARY INFORMATION: On June 28, 1991, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the Federal Register (56 FR 29608), a Notice of Proposed Rulemaking (NPRM) to establish regulations for the National Vaccine Injury Compensation Program (NVIC) to set out the method for determining the amount to be deducted from the award of compensation which would reflect the average cost of a health insurance policy. The public comment period on the proposed regulations closed on August 27, 1991.

Appendix 4

W-4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

Air Quality Planning
From Office of Jody Henneke
Route to Edward Sam
cc NOV 15 1994
NOV 03 1994

OCT 31 1994

Ms. Jodena N. Henneke
Director
Air Quality Planning Division
Office of Air Quality
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, TX 78711-3087

Re: Comments on Proposed Regulation for Flexible Permits

Dear Ms. Henneke:

We have reviewed the proposed revisions to Regulation VI to incorporate provisions for issuing flexible permits. We had earlier provided comments to the permits program on August 19, 1994. Several of our comments were addressed in the proposed regulatory changes. We thank you for reviewing and considering these comments. On the basis of our review of the proposed revisions, we have comments and items of concern that should be addressed in the public record prior to adoption. Our comments and items of concern are as follows:

General Comment

Item 1. The development of these revisions to Regulation VI has occurred at the same time as activities of the New Source Review (NSR) Reform Subcommittee, which is reviewing recommendations to reform the national NSR regulations. Many of the recommendations under consideration by this national subcommittee are similar to the revisions under consideration for Regulation VI. We want to advise you that it may be necessary to revise your regulations in the future to be consistent with the final regulations resulting from the NSR reform subcommittee. We encourage you to continue your coordination efforts of the national subcommittee to assure consistency between the State and national regulations. This will minimize the need for further revisions of Regulation VI following the adoption of Federal regulations.

Section 116.711. Flexible Permit Application

Item 2. **Paragraph (1). Protection of Public Health and Welfare.** The requirement to protect public health and welfare should be expanded to address that there will be no exceedance of the national ambient air quality standards (NAAQS) and prevention of significant deterioration (PSD) increments. This should also include requirements to address other air quality impacts which must be addressed under the Federal Clean Air Act (CAA), including but not limited to, impacts on air quality related values in Class I areas.

Section 116.718. Significant Emissions Changes

Item 3: This Section appears to specify that a proposed increase is significant if such increase exceeds the previous permit allowable by a significant amount (the potential to potential test). The public record should address how this will satisfy the requirement of §116.711(1) which requires a demonstration that public health and welfare will be protected. The protection of public health and welfare should address that the increase will not cause or contribute to an exceedance of the NAAQS or PSD increment. Also, the public record should consider using a lower baseline for determining significant increases whenever air quality modeling which has been conducted in the area has included emissions which are less than the allowable emissions.

In closing, you are again advised that the national NSR reform regulations have not been promulgated. Our comments represent our concerns that you should consider for the period prior to the promulgation of these national regulations. Following the final promulgation of these national regulations, it may be necessary to revise the State regulations to ensure consistency between the State and national rules and regulations.

We appreciate the opportunity to review and provide comments on these proposed revisions. If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

Thomas H. Diggs

Thomas H. Diggs
Acting Chief
Air Programs Branch (6T-A)

Appendix 5

Attachment D

APR 11 2006

Mr. Steve Hagle
Special Assistant
Air Permits Division (MC-163)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State Implementation Plan (SIP) Revisions for Flexible Permits

Dear Mr. Hagle:

This letter is a follow-up to our meeting in Austin on October 12, 2005, and subsequent discussions concerning revisions to the Texas SIP related to Flexible Permits, Subchapter G of Chapter 116 of Title 30 of the Texas Administrative Code (30 TAC). We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements or identify changes you will make to address our concerns. We will review and take action on these rules prior to taking final action on your New Source Review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

Originally Signed
by David Neleigh

David Neleigh
Chief
Air Permits Section

Enclosure

Spruiell/ss:6PD-R:x7212/4/6/06\Comments.Fp.wpd(Spruiell #2 Disk)

Comments on Texas SIP revisions, Subchapter G, Chapter 116, Flexible Permits

1. **General Comment**

We understand that the Flexible Permit rules apply to major and minor sources and that the rules are designed to provide an exemption from minor NSR requirements if sources do not exceed an allowable emissions cap. In general, the allowable emissions cap assumes Best Available Control Technology (BACT) emission rate plus up to 9% for all units under the permit. Partial Flexible Permits are allowed. We reviewed the Flexible Permit rule as it applies to major sources for consistency with Federal major NSR regulations and 40 CFR 51.160 and 51.161. Texas adopted the Flexible Permit rules prior to finalization of Federal NSR Reform regulations. The final Federal regulations measure emissions increases which result from a modification at existing major sources using the baseline actual-to-projected actual applicability test. The final rules also provide an exemption from the definition of major modification for sources with an actual Plantwide Applicability Limit (PAL). The Court in *New York v. EPA*, 413 F.3d 3, (D.C. Cir. June 24, 2005) struck down provisions of the regulations that provided for exemptions from major NSR applicability that were not based upon actual emissions. The Court held that the NSR modification requirement, which incorporates by reference Clean Air Act (Act) § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions." Therefore, many of our comments relate to how Flexible Permits are consistent with Federal major NSR requirements.

We have reviewed the Flexible Permit rules as they apply to minor sources and minor modifications for consistency with 40 CFR 51.160 and 51.161.

2. **Voiding of Existing SIP-approved Permits**

The Texas Commission on Environmental Quality (TCEQ) has stated that all existing permits applicable to the permittee are voided upon issuance of a Flexible Permit. The Flexible Permit becomes the controlling authority for the site, as explained at 10 TexReg 7336:

> The applicant for a flexible permit may combine existing permitted facilities, grandfathered facilities, and new facilities into the flexible permit. The flexible permit will then become the controlling authorization for all facilities included in the permit, replacing any existing permits that may have been applicable to all or part of these facilities.

The rules provide for initial issuance of a flexible permit "as an alternative to obtaining a new source review permit" where the source triggers major NSR requirements. We understand that the resulting BACT or Lowest Achievable Emission Rate limits are not enforceable at the new or modified source. Nonattainment NSR (NNSR), prevention of

> significant deterioration (PSD) or air quality, minor NSR permits, and permit application representations incorporated by reference into the permits previously issued under the Texas SIP are voided upon issuance of the Flexible Permit. We also understand that these permits are voided without public participation in many cases.
>
> Please explain the legal authority under which TCEQ voids existing federally enforceable NNSR, PSD, and minor NSR permits.
>
> Title I of the Act requires permitting authorities to establish in permits source specific terms and conditions necessary for sources to comply with the requirements of the PSD and NSR programs of parts C and D of the Act. EPA's long-held position is that these permits must remain in effect because they are the legal mechanism through which the underlying PSD or NSR requirements become applicable, and remain applicable, to individual sources.[1] 40 CFR 70.1 requires that each title V source permit assures compliance with all applicable requirements, including any term or condition of any preconstuction permit issued pursuant to programs approved or promulgated under title I of the Act. Amendments to PSD or NSR or minor NSR permits must be made in accordance with the SIP and approved permitting programs. Terms and conditions of construction permits are permanent and remain effective unless changed using title I procedures or a new construction permit is issued. The Federal PAL rule provides a procedure, including public participation, for the elimination of permit limits that were taken to avoid applicability of major NSR applicability and are replaced by a PAL. Federal NSR regulations do not provide for a blanket elimination of emission limits at individual units. Operational flexibility under Federal regulations and policy can be obtained by preapproving future modifications or by setting an actual PAL in order to avoid major NSR netting.

The preamble to the final PAL rule provides:

> Can a PAL Eliminate Existing Emission Limitations? An actuals PAL may eliminate enforceable permit limits that a source may have previously taken to avoid the applicability of major NSR to new or modified emissions units. Under the major NSR regulations at §§52.21(r)(4), 51.166(r)(2), and 51.165(a)(5)(ii), if you relax these limits, the units become subject to major NSR as if construction had not yet commenced on the source or modification. Should you request a PAL, today's revised regulations allow the PAL to eliminate annual emissions or operational limits that you previously took at your stationary source to avoid major NSR for the PAL pollutant. This means that you may relax or remove these limits without triggering major NSR when the PAL becomes effective. Before removing the limits, your reviewing authority should make sure that you are meeting all other regulatory requirements and that the removal of the limits does not adversely impact the National Ambient Air Quality Standards (NAAQS) or PSD

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[1]See EPA Memorandum from John Seitz, to Robert Hodanbosi, dated May 20, 1999.

increments. We are not taking a position on whether compliance with requirements contained in a PAL permit could serve to demonstrate compliance with certain pre-existing requirements on individual units. The reviewing authority may assess on a case-by-case basis whether any streamlining would be appropriate in the title V permit consistent with part 70 procedures and our existing policies and guidance on permit streamlining.

See also the Federal PAL rule:

> 40 CFR 52.21(aa)(1) - Applicability, "(iii) Except as provided under paragraph (aa)(1)(ii)(c) of this section, a major stationary source shall continue to comply with all applicable Federal or State requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL."

The same requirement is found in 40 CFR 51.165(f)(1)(iv) and 51.166(w)(1)(iii).

The EPA has also addressed supersession of existing NSR permit requirements by title V permits. See May 20, 1999, letter to Robert Hodanbosi:

> It is the Agency's view that title V permits may not supersede, void, replace, or otherwise eliminate the independent enforceability of terms and conditions in SIP-approved permits. To assure compliance with "applicable requirements" such as SIP-approved permits and conditions, title V permits must record those requirements, but may not eliminate their independent existence and enforceability under title I of the Clean Air Act (i.e., may not supersede them).

See also White Paper for Streamlined Development of part 70 permit Applications, Lydia Wegman, July 1995, (White Paper #1) which recommends an efficient procedure for revising NSR permits during title V review to eliminate obsolete or environmentally insignificant terms in NSR permits. See also, Approval of Wisconsin Construction Permit Permanency SIP Revision 71 FR 9934, April 28, 2006, and Notice of Deficiency for Clean Air Act Operating Program in Wisconsin, 69 FR 10167, March 4, 2004.

Our review of the Flexible Permit rules indicates that the voided NSR permits are federally enforceable terms and conditions which may be revised only through approved SIP procedures.

3. Definition of Modification

Please distinguish between the definition of "major modification" at 30 TAC 116.12(11) in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review

Definitions, and the definition of "modification of an existing facility" at 30 TAC 116.10(11) of Subchapter A, General Definitions. The definition of "modification of existing facility" states:

> Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:
>
> a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

Under the current Texas SIP, a permit amendment is required in order to vary from any representation or permit condition if the change will cause: (A) a change in the method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in the emission rate of any air contaminant.

Please clarify whether the exemptions from the requirement to obtain a permit amendment in the submitted definition of "modification of an existing facility" apply to significant project emission increases or significant net emission increases at major sources or major modifications. Please explain how exemptions in the definition of "modification of an existing facility" relate to major modifications. We believe these definitions as written are vague and may be interpreted to provide an exemption to major NSR applicability.

4. Consistency with Federal Major NSR Requirements

Because Flexible Permits become the controlling authorization for major sources and authorize the source to make modifications without a permit amendment as required by the current SIP, the rules, as they are applicable to major sources, must be consistent with Federal NSR requirements and the PAL rule. We note that the rules eliminate permitting vehicles necessary to demonstrate netting for major sources. We have identified the following list which discusses some of the inconsistencies between the Flexible Permit rules and Federal regulations. Please provide information to explain how the following requirements are met under the Flexible Permit rules:

A Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. The Flexible Permit emission cap is based upon allowable emissions rather than actual emissions. There are no regulatory requirements that the cap be set below actual emissions. The rules do not ensure that the emissions cap will be set at a level that does not trigger major NSR applicability for major sources or major modifications based upon the baseline actual to projected actual calculation in the State's NSR rules. Please explain how the flexible permit rules are inconsistent with the Federal PAL rule at 40 CFR 52.21(aa)(6).

C. The rule allows an implementation schedule to install required BACT controls which may last for many years. The rule also allows sources to increase the emission cap for sources that "fail to install the additional control equipment as provided by the implementation schedule." How does the rule ensure that the emission cap is set below actual emissions during these periods? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(6) and (11). Please explain whether a Flexible Permit always assumes current BACT in calculating the emission cap.

D. The Flexible Permit authorizes modifications that do not exceed the emission cap. NSR compliance is required only upon initial issuance of the permit. Please explain how the rule ensures that modifications subject to major NSR and the public participation requirements of Part 51 are reviewed. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(5) and (11); and 51.161.

E. For sources without a PAL, major NSR applicability must be determined by monitoring actual emissions on a unit by unit basis (rather than by compliance with the emissions cap) consistent with TCEQ's major NSR rules for baseline actual to projected actual emissions calculations. Please explain how the rule ensures that major sources determine major NSR applicability on a unit by unit basis. Our review indicates that the monitoring requirements from the Flexible Permit rule at §116.715(c)(6) requires " information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction." Please explain how the rule provides for monitoring, recordkeeping and reporting necessary to determine project emission increases and to enforce major NSR requirements on a unit by unit basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d), and (f); 52.21(aa)(12) through (14).

F. Please explain how the public participation requirements of Part 51 and the PAL rule are met by the Flexible Permit rules. Under Chapter 39 of the TAC,

initial issuance of and amendments to flexible permits are exempt from public notice requirements unless the action involves new construction or a modification that results in emissions increases above Texas' permits by rule limits (250 tons per year (tpy) of carbon monoxide, 250 tpy of nitrogen oxides, 25 tpy of volatile organic compounds, sulfur dioxide , or particulate matter less than 10 micrometers, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen and oxygen). These provisions are inconsistent with Federal requirements which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP. Please explain how the Flexible Permit rules are consistent with 40 CFR 51.161 and 52.21(aa)(5) and (11).

G. The Flexible Permit rules allows sources to exclude units at a facility from the permit. Federal rules do not allow for partial PALs. Note that the Federal PAL rule requires that all units at a facility must be subject to the plantwide limit. See 40 CFR 52.21(aa)(6)(i) through (ii). Emission increases and decreases at all units at the facility must be considered to determine major NSR applicability. How does the Flexible Permit provide that increases and decreases are quantified, determined to be contemporaneous, and made practically enforceable for sources that are not subject to a PAL? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d) and (f).

H. There is no requirement in the Flexible Permit rules that startup, shutdown and malfunction emissions must be included in determining compliance with the emission cap. This is inconsistent with the Federal PAL rule. Please explain how the Flexible Permit rules can ensure that non-routine emissions are not masked by the emission cap. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(7)(iv).

I. There is no requirement in the Flexible Permit rules that compliance with the emission cap is determined on a 12-month rolling average, as required by the Federal PAL rule and EPA policy. We have reviewed Flexible Permits that base compliance on a calendar basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a). Please explain how enforcement of Flexible Permits on a calendar year basis is enforceable as a practical matter.

J. There is no requirement in the Flexible Permit rules that the owner or operator

must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average for each month. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a) and 52.21(aa)(7)(vi).

K. There is no requirement in the Flexible Permit rules that monitoring to determine compliance with the cap must be based upon continuous emissions monitoring systems, continuous emissions rate monitoring systems, predictive emissions monitoring system, continuous parameter monitoring system, or emission factors, or an equivalent method as approved by the permitting authority, as is required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(12)(ii)(a) through (d).

L. There are no requirements in the Flexible Permit rule for semi-annual reports or deviation reports as required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(14)(i) through (ii).

M. The record retention requirement in the Flexible Permit rules is for two years. This is inconsistent with the Federal PAL rule and title V which require five year recordkeeping. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(13)(ii).

N. Are short-term limits under the emission cap required by the Flexible Permit rules? Please explain how short-term limits are calculated and how they ensure attainment and maintenance of the NAAQS. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(1)(iii).

O. The Flexible Permit emission cap may be increased by 9% of total emissions, called an Insignificant Emissions Factor. The Flexible Permit rule in § 116.718 states, "An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of state new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility." Please explain how this definition is distinguishable from the terms "significant" and "insignificant" used elsewhere in your rules. We believe these terms must be clearly distinguishable to facilitate compliance and enforcement of the rules. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(b)(23) and 52.21(aa)(6)(i).

5. Minor Sources

We have reviewed the Flexible Permit rules as they apply to minor sources for

consistency with 40 CFR 51.160 and 51.161.

A. Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. Please explain how the revisions meet the requirements of 40 CFR 51.161, which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP.

Appendix 6

Attachment E

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAR 1 2 2008

Mr. Dan Eden
Deputy Director
Office of Permitting, Remediation, and Registration (MC 122)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711

Dear Mr. Eden:

At the conclusion of our meeting on July 23, 2007, the U.S. Environmental Protection Agency (EPA) agreed to provide the State with a thorough listing of clarifications that would be needed for Federal approval of Texas' Flexible Permit rules. We appreciate your letter of August 30, 2007, providing information about the Flexible Permit program. The two purposes of this letter are to transmit EPA's comments on the measures necessary for Federal approval of the Flexible Permit rules and to request a response as to whether the Texas Commission on Environmental Quality (TCEQ) will recommend adoption of those measures. The EPA also notified all Flexible Permit holders of our concerns by letter dated September 25, 2007.

The enclosed analysis includes the comments from all EPA offices with review responsibilities. We would appreciate knowing whether all rule revisions and clarifications are acceptable by the end of March. If TCEQ commits to propose the necessary revisions to the Flexible Permit program, we request that TCEQ work with EPA in partnership to share draft revisions of the Flexible Permit rules during the rule development process. If the revised regulations address our concerns, we believe we could propose approval of the Texas Flexible Permit program.

We are willing to meet with you and members of your staff to discuss the necessary revisions and recommendations detailed in the enclosure. Should new facts or information become available during our discussions of the revisions, we will attempt to work with TCEQ to reach a mutual decision about whether the revisions, or any other additional revisions identified during our discussions, are necessary for the proposed

approval of the rules. If you have questions or need clarification of any of the revisions detailed in the enclosure, or if you would like to arrange a meeting to discuss the revisions we believe are necessary to propose approval of the Texas Flexible Permits program, please feel free to contact me at (214) 665-8014 or you may contact Jeff Robinson, Air Permits Section Chief, at (214) 665-6435.

Sincerely yours,

Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division

Enclosure

ENCLOSURE

Introduction: The EPA has reviewed the Texas Flexible Permit Program State Implementation Plan (SIP) revision and many Flexible Permits issued under those rules. We understand that the aim of the Texas Flexible Permit Program is to establish an aggregated Best Available Control Technology emission limit for a group of individual facilities within a stationary source. This would enable an owner or operator of the source to operate those facilities with less technical and administrative effort than would be required under air permits which impose unit-specific mass emission limits. We have reviewed these provisions of your rule for consistency with 40 Code of Federal Regulations (CFR) Part 51. We have identified concerns related to public participation and air quality analysis for initial issuance and modifications which increase the site wide cap..

Unlike flexible permit programs in other States, the Texas Flexible Permit Program is not limited to minor sources. Because the program applies to major sources, we have reviewed these provisions for consistency with your approved Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR) rules. We identified concerns related to applicability of your major NSR program requirements and for ensuring that any project that would be a major new stationary source or major modification is reviewed to ensure compliance with the permitting requirements applicable for such project. We also identified problems with how major NSR netting will be accomplished under a Flexible Permit. We also believe changes are required to the State's preliminary analysis to incorporate existing major NSR permit requirements into the Flexible Permit.

Other major concerns identified below relate to practical enforceability of an emission limitation cap which applies to a very large number of emission sources. We believe changes are required for monitoring, recordkeeping, reporting and testing, as well as considerations for sub-caps or bubbles applied to smaller groups of units. We have also identified changes necessary to ensure that all Flexible Permit terms and conditions remain enforceable after modifications authorized under the permit are made. We believe changes that conflict with terms and conditions of the Flexible Permit require a permit amendment, rather than an alteration or Permit by Rule (PBR) authorization.

RULE REVISIONS AND CLARIFICATIONS

I. Establishing the Flexible Permit Emission Cap.

A. Addition of 9% of total emissions to the Flexible Permit emission cap

Delete Section 116.716(d)[1] from Subchapter G. As submitted, the rules are unclear as to whether adjustments to the emissions cap or individual emission limitation by an "insignificant emissions factor" could cause or contribute to a violation of a NAAQS or, perhaps, trigger major NSR requirements.

B. Best Available Control Technology (BACT) Determinations

1. Revise Section 116.711(3) to indicate that current BACT technology will be required, consistent with Section 116.716(a)(1). For example,

> (3) Best available control technology (BACT). The proposed facility, group of facilities, or account will utilize current BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis.

2. Revise Section 116.716 to require that any BACT or lowest achievable emission rate (LAER) control technology and the related mass emission rates in major NSR permits which are incorporated into the Flexible Permit remain enforceable and shall be retained or appropriately streamlined through a SIP-approved NSR permit revision process as described below.

3. Are BACT determinations under Section 116.716 required to be based on the State or Federal definition? Please clarify the definition of BACT and which definition applies (i.e., when is a source required to use the State definition versus the Federal definition.....PSD, minor NSR, etc.).

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[1] Section 116.716 (d) states:

> Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.

C. Emission Limitations

1. Add a provision to Subchapter G to state that a Flexible Permit will contain, at a minimum, an annual emission limitation in tons per year, based on a 12-month rolling average (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant regulated under the Flexible Permit. Revise Section 116.715(c)(6),[2] Recordkeeping, to clarify that emission cap and individual emission limitation calculations shall, be based, at a minimum, on a 12-month rolling basis (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant at the source. The rule should also be written broad enough to require more stringent limitation periods when necessary (e.g., during the ozone season).

2. Add a provision to Section 116.715(c)(6) to state that a Flexible Permit will include a short-term emission limitation cap (or other reasonable cap or reasonable time period with monitoring and recordkeeping that ensures practical enforceability) for each pollutant regulated under the Flexible Permit that is enforceable as a practical matter. See Number I under Implementation Issues for further information concerning practical enforceability.

3. Add a provision to Section 116.715 that emission calculations for purposes of compliance with emission caps include emissions resulting from maintenance, startup, and shutdown (MSS).[3]

4. Please explain how TCEQ will ensure that emission limitations adopted pursuant to 40 CFR 52.21(r)(4), incorporated into the Texas SIP at Section 116.160(a), will not be relaxed by the Flexible Permit process.

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[2] For example, Section 116.715(c)(6), the third sentence could be revised as follows: This information shall include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operation hours.

[3] For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: ". . . scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could have been avoided through better scheduling for maintenance or through better operation and maintenance practice."

II. Identification of modifications authorized by Section 116.718, Significant Emission Increase[4] and Major NSR applicability.

The rule is vague as to what modifications are authorized by Subchapter G. Section 116.710 states: A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Amendments and Alterations). Section 116.718 grants an exemption from "state new source review" for operational or physical changes which result in an emission increase. "State new source review" is not defined. Section 116.711 requires sources to demonstrate compliance with major NSR requirements at the time of initial issuance or amendment. However, the rule does not require such a demonstration for modifications that are authorized by Subchapter G. The following changes are intended to ensure that a major new stationary source or a significant increase in emissions from a major stationary source is reviewed to ensure compliance with the permitting requirements applicable for such projects.

A. Revise Section 116.718 or provide a definition of "state new source review." Such definition must exclude authorization of modifications, or a series of modifications, which trigger major NSR applicability. The rule should note that the Flexible Permit does not authorize projects to be segregated into smaller projects which are physically or economically dependent on one another in order to avoid major NSR applicability.

B. Include a provision in Section 116.710, Applicability, to clarify the scope of the rule, such as: Any facility or group of facilities, which constitutes a new major stationary source or a major modification as defined under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6 of this title (relating to Nonattainment Review and Prevention of Significant Deterioration Review) must meet the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.

C. Revise Section 116.711 to provide that any application for an initial flexible permit or for an amendment to a flexible permit must include all information (including calculations) which demonstrates that the proposed project will not be a major stationary source or major modification as used

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[4] Section 116.718 states: An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of State new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.

D. Revise Section 116.711(13) to require the permittee to comply with any representations in the permit application of the underlying permits that are incorporated into the Flexible Permit (as required under §116.116(a)(1) in the approved SIP), unless those requirements are specifically amended by the permitting process as described below. Revise Subchapter G to clarify that authorization of future changes under the Flexible Permit may not include changes subject to major NSR unless the permit undergoes the major NSR process and is incorporated into the amended Flexible Permit.

III. Removal of terms and conditions of existing permits.

The permit application and the State's preliminary analysis, including the air quality analysis, must ensure that all terms and conditions of existing permits remain enforceable unless such terms and conditions are superseded or subsumed by the flexible permit conditions through proper streamlining procedures as described below. Texas should revise Section 116.711(13), Application content, to require the permittee to identify terms and conditions (including representations in permit applications) in existing permits which will be superseded or subsumed under the Flexible Permit. Furthermore, any such term or condition of an existing permit (including representations in the applications) which will be superseded or subsumed by the flexible permit must be accompanied with a demonstration that the revision will not violate applicable portions of the control strategy and will not interfere with attainment or maintenance of the ambient air quality standards as required under 40 CFR 51.160.

IV. Public Participation Requirements.

A. For initial issuance of a Flexible Permit or an Amendment to the Flexible Permit that increases the emission limitation(s)

Revise Chapter 39[5] and Sections 116.721 (Flexible Permit Amendments) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality

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[5] Section 39.403(b) states: As specified in those subchapters, Subchapters H - M of this chapter apply to notices for: . . .

(8) applications for air quality permits under THSC, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), *initial issuance of flexible permits under Chapter 116, Subchapter G of this title* (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10 of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10 of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Permitting by Rule) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

Note that emission quantities defined in §106.4(a)(1) are: (1) Total actual emissions authorized under PBR from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO_2) or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

Note also that Region 6 has not approved Chapter 39 into the Texas SIP. We informed TCEQ in 2006 that certain provisions may not be approvable, but we have received no response to our letter. Our comments stated: We interpret §§39.403(b)(8) (A) and (B) to state an amendment of a flexible permit and/ or an NSR permit under §116.116(b), is not required to comply with public participation requirements of Chapter 39 unless the action involves an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_x; or 25 tpy of VOC or SO_2 or inhalable PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. Please provide a rationale for how exemptions from these requirements are consistent with 40 CFR 51.160 and 51.161 and address issues raised in previous comments.

and its proposed approval or disapproval.[6]

A. Amendment of a Flexible Permit

1. We recommend a revision to Section 39.403 (Public Notice Applicability) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality and its proposed approval or disapproval, for amendment of a Flexible Permit for the following types of changes:

   a. Changes that result in a significant net increase in actual emissions resulting from a physical or operational change, (i.e., changes which trigger major NSR applicability),

   b. Changes that require netting to avoid major NSR applicability,

   c. Changes to the method of control,

   d. Changes in the character of emissions authorized under the existing permit,

   e. Changes to ambient air quality impacts,

   f. Changes which decrease the frequency or stringency of monitoring, type of monitoring, recordkeeping, and/or reporting.

2. At a minimum, revise Section 116.721, Amendments and Alterations, as follows:

   a. Revise Section 116.721 to require that amendments and alterations must comply with the existing Flexible Permit cap unless the permit is amended, subject to public participation requirements, including 30-day notice and comment period on the draft permit and the State's preliminary analysis, which includes the State's analysis of

[6] See 40 CFR 51.161 for public participation requirements for minor and major new sources and modifications. Please note that other Federal actions have required similar minimum public participation requirements. See the Federal Plantwide Applicability Limit (PAL) rule, which establishes a sitewide emission limitation, requires public participation equivalent to Part 51.

the effects on ambient air quality and its proposed approval or disapproval.

b. Revise Section 116.721(a) to change "will result in a significant increase in emissions" to "will result in a significant net increase in actual emissions" and define the term "significant" consistent with the definition of "significant" at 40 CFR 51.165(a)(1)(x) and 51.166(b)(23).

c. Revise Section 116.721(c) to require a permit amendment for changes that vary from permit terms and conditions related to a change in throughput or a change in feedstock.

d. Section 117.721(d) allows Flexible Permit holders to obtain a PBR in lieu of a permit amendment or alteration. We understand that PBRs are used in Texas to authorize narrow categories of emission sources, such as a storage tank. We recognize that these PBRs may be appropriate for Flexible Permit holders where the new emission source does not cause an exceedance of the emission cap(s). However, EPA has consistently expressed concerns about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit. Please acknowledge that a source cannot vary from a Flexible Permit term or condition or permit application representation under a PBR.

e. The EPA also has concerns about how modifications authorized under a Flexible Permit at sources subject to Title V are incorporated into a Federal Operating Permit (FOP). Please explain how the FOP is amended to incorporate modifications authorized by a Flexible Permit and whether further public participation is required to amend the FOP.

V. Monitoring, Recordkeeping, Reporting and Testing (MRRT)

A. Monitoring

The monitoring requirements in the Subchapter G, Section 116.715(5) are vague. Revise this provision to require each flexible permit to contain specific requirements for monitoring compliance with the emission cap and with individual emission limits. Provide guidance on appropriate

monitoring for individual units under the Flexible Permit. See further discussion of minimum MRRT requirements on page 10-12.

B. Recordkeeping

Revise Section 116.715(a)(6) recordkeeping to require retention of compliance records for five years and to require a copy of the Flexible Permit application, amendments, and any permit application incorporated by reference into the Flexible Permit to be maintained at the site. See further discussion of minimum MRRT requirements on page 10-12.

VI. We recommend revision of Section 116.715 to state that an exceedance of the Flexible Permit cap is a violation of the permit, subject to enforcement action and, for major sources, reportable as an FOP deviation. To ensure practical enforceability of the permit and consistency with 40 CFR 51.211 and 51.212, we strongly recommend that the State require semi-annual reporting of exceedances of the Flexible Permit cap.

VII. Major NSR Netting.

Because all units at a site may not be subject to a Flexible Permit and because all units under the Flexible Permit may not have a unit specific emission limitation, the rule should contain provisions on how to conduct major NSR netting at the site for units in the Flexible Permit and for units outside the Flexible Permit. Revise the rule to provide requirements for major sources subject to major NSR netting to determine the net emissions increase under Subchapter B with the following minimum considerations for Flexible Permits:

A. Emission increases and decreases must be considered on a site wide basis under a site wide or partial Flexible Permit.

B. Emission increases resulting from a physical change or change in the method of operation of any emission unit which were authorized by the Flexible Permit must be considered where the unit's projected actual emissions exceed the baseline actual emission rate.

C. A decrease in emissions at a unit under the Flexible Permit is creditable if the unit's baseline actual emissions exceed the unit's new level of emissions, meets all the criteria of 40 CFR 51.165(1)(1)(vi) and 51.166(b)(3), and the decrease is made practically enforceable by permanently removing the unit from the Flexible Permit cap and establishing a new enforceable unit specific emission limitation.

D. The Flexible Permit cap must be adjusted downward by the amount of that unit's contribution to the cap.

VIII. Air Quality Analysis.

Revise Section 116.711(10) to require an air quality analysis for initial issuance of all Flexible Permits or amendments which increase the Flexible Permit cap to ensure that the proposed flexible permits will not violate the approved control strategy and will not interfere with attainment and maintenance of the NAAQS (as required under 40 CFR 51.160(a)) or the PSD increments (under 40 CFR 51.166(a)).

IX. Maintenance, Startup, and Shutdown (MSS) emissions.

The potential to emit should include emissions that occur during maintenance[7], startups, and shutdowns (MSS). The MSS emissions should be subject to BACT, and reviewed in the air quality analysis for all emission units under the Flexible Permit. Revise Section 116.711, Flexible Permit Application, to require information related to startup, shutdown and maintenance emissions, including adequate monitoring and recordkeeping. We understand that Texas is incorporating these emissions into permits, including existing Flexible Permits. We recommend that new Flexible Permits include a review of MSS emissions and include appropriate monitoring, recordkeeping, and reporting.

X. Implementation Schedule for Additional Controls.

We understand that TCEQ provides an implementation schedule for Flexible Permit holders to install control technology required by the permit. The schedule may be up to 10 years. Section 116.717 states:

> If a facility requires the installation of additional controls to meet an emission cap for a pollutant, the flexible permit shall specify an implementation schedule for such additional controls. The permit may also specify how the emission cap will be adjusted if such facility is taken out of service *or fails to install the additional control equipment as provided by the implementation schedule.*

[7] For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: ". . . scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation."

We recommend that TCEQ delete this italicized phrase and insert new regulatory language to require a permit amendment for sources that fail to install control equipment required by the permit. Please confirm that failure to install control equipment required by the Flexible Permit would be a violation of the permit. Please confirm that BACT/LAER control technology that is required under major NSR must be operational at start of operation and is not subject to this implementation schedule.

XI. Other Suggested Changes.

A. §116.711(2) – provides for measuring the emissions of air contaminants "as determined by the director." Texas should revise this provision to establish a replicable standard rather than granting discretion to the director – e.g., "measurement and frequency sufficient to demonstrate on-going compliance with specified emission limitations."

B. §116.716(a)(1) – Define the term "maximum expected capacity."

C. §116.715(b) – Define the term "multiple emissions cap."

D. §116.716(c) – The rule is vague concerning how the emission cap will be adjusted for the addition of new facilities. Texas should amend the permit to adjust the cap for new facilities. Texas' rules should be clear on the process.

E. §116.721(c)(1) – Texas needs to add an additional exception "or conflicts with an existing permit limit." There may be permit limits expressed as throughput limits or feedstock requirements and this paragraph appears to authorize changes in a source's obligations to comply with those terms without a permit amendment or alteration.

IMPLEMENTATION ISSUES

I. Practical Enforceability of Flexible Permit Emission Cap.

A. What is practical enforceability?

The TCEQ must consider whether a Flexible Permit emissions cap is truly and practically enforceable. The EPA guidance states that practical enforceability for an emission limitation which applies to a unit or small group of units is achieved if the permit's provisions specify:[8]

1. A limitation and the emissions unit(s) at the source subject to the limitation;

2. The time period for the limitation (e.g., hourly, daily, monthly, and/or annual limits such as rolling annual limits); and

3. The method to determine compliance, including appropriate monitoring, recordkeeping, reporting, and testing.

B. However, where EPA has established emission limitations for large groups of emissions sources subject to a site wide cap, additional requirements were considered to ensure practical enforceability. For example, the Federal PAL rule, which requires only long-term (ton per year) emission limitation(s), sets minimum requirements for MRRT in return for increased operational flexibility.[9] The EPA's proposed Flexible Air Permitting Rule requires MRRT equivalent to the PAL rule for groups of units.[10] The EPA also evaluated appropriate MRRT mechanisms where emission limits applied to a group of units or the permit allowed for increased operational flexibility to ensure that regulatory requirements were met in its study of flexible permits.[11]

C. The EPA has reviewed Texas Flexible Permits in which one short-term (lb/hr) emission limitation is applied to hundreds of dissimilar emission

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[8] See memorandum, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," signed by John Seitz and Robert Van Heuvelen, January 22, 1996, at 5-6 and Attachment 4, available on the Web as http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/pottoemi.pdf. More detailed guidance on practical enforceability is contained in the memorandum.

[9] See 67 *Federal Register* (FR) 80186

[10] See 72 FR 52206 (September 2007) for the proposed Federal Flexible Air Permitting Rule

[11] See *Evaluation of Implementation Experiences with Innovative Air Permits, Summary Report*, prepared by Office of Air Quality Planning and Standards and OPEI, at www.epa.gov/ttn/oarpg/t5/memoranda/iap_eier.pdf.

units. Because emissions units can vary in size and type or operation as well as having widely different regulatory, monitoring, and compliance requirements, EPA has serious concerns that such a short-term limit can be practically enforced. An approvable Flexible Permit Program must:

1. Set minimum replicable standards for MRRT equivalent to the PAL rule or demonstrate how MRRT in the revised Flexible Permit rule is at least as stringent as those requirements.

2. Address how the number of units and the potential to emit (PTE) of units subject to a single emission limitation under a cap is reasonable and practically enforceable. The revised Flexible Permit rule (and guidance) should address how this determination is made. One approach would be to adopt emission limitation sub-caps for related groups of units that are vented to a common control device or where a group of similar emission units have common operations, monitoring, recordkeeping, reporting and testing. Another approach is to require more effective MRRT requirements for significant emission units that have the potential to emit pollutants in amounts in excess of threshold levels. For example, units with PTE greater than major source thresholds would require more stringent MRRT than sources with PTE greater than major NSR significant thresholds, but less than major source thresholds.

3. Demonstrate that required control technology achieves the level of emissions reductions required under the applicable BACT or LAER requirements. MRRT of pollution control equipment must be sufficient to determine compliance with the mass emission unit or work practice requirements adopted in conjunction with BACT or LAER. The MRRT should also demonstrate that the capacity range demonstrated to achieve BACT or LAER for the control device was not exceeded (absent a monitoring system demonstrating compliance with BACT or LAER at that level).

II. Preliminary Analysis.

A. Rationale for BACT determinations

The State's preliminary analysis must include a rationale for the BACT determination for each unit under the Flexible Permit, in addition to any analysis provided in the Flexible Permit application.

B. Tracking of major NSR terms of conditions in existing permits incorporated into the Flexible Permit

The State's preliminary analysis must provide a true crosswalk that identifies each term and condition in an existing permit that will not be incorporated into the Flexible Permit and a rationale for removing the term or condition. Also see item II.B above and item III under **RULE REVISIONS AND CLARIFICATIONS.**

C. Process for superseding or subsuming permit application representations in existing permits

Because Texas uses a streamlined approach to NSR permitting which incorporates permit application representations as enforceable terms and conditions of a permit, those representations must be carried forward in the Flexible Permit, or the permittee in its application and the State in its preliminary analysis must provide a rationale for why those representations may be eliminated. See White Paper #1, White Paper for Streamlined Development of Part 70 Permit Applications, 1995 for additional details. Any change of modification to any term or condition must be authorized as described in item III under **RULE REVISIONS AND CLARIFICATIONS.**

D. Identification of approved physical or operational changes authorized by the Flexible Permit

The Flexible Permit should identify the types of physical or operational changes that are authorized by the permit and the expected time of construction for pre-approved construction activities.

III. Re-issuance of Existing Flexible Permits under a SIP-approved Permit Rule.

We recommend that existing Flexible Permits be reissued under a SIP-approved rule to ensure the permits are federally enforceable and enforceable as a practical matter. If TCEQ revises a Federal Operating Permit (Title V) permit which contains a Flexible Permit which was not issued under a SIP-approved rule, those Flexible Permits are considered State-only requirements in the Federal Operating Permit and should be designated as such. The reissuance of permits should be further discussed by TCEQ and EPA, and a mutually agreed schedule should be developed to address how and when such permits can be reissued under federally approved SIP provisions. Until such time as Flexible Permits are issued under a SIP-approved program, the existing federally approved SIP requirements remain effective.

IV. When Texas revises the Flexible Permit SIP submittal to address the revisions, we strongly recommend that TCEQ withdraw the earlier SIP submittals relating to Flexible Permits.

Appendix 7

Attachment C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

September 25, 2007

Re: Flexible Permit Number

Dear :

The Environmental Protection Agency, Region 6 (EPA) and the Texas Commission on Environmental Quality (TCEQ) have been working together to address the complex issues related to air quality in the State of Texas. One of the areas that we have been focusing on is the development of a federally-approvable flexible permit rule. Although TCEQ has state-approved flexible permit rules in Title 30 of the Texas Administrative Code, Chapter 116, Subchapter G (30 TAC 116.710 et seq.), EPA has not approved these rules into the implementation plan for the State of Texas (Texas SIP). Consequently, permits issued under these flexible permit rules reflect Texas state requirements and not necessarily the federally-applicable requirements.

The purpose of this letter is to clarify that you, as owner or operator of sources included in a TCEQ flexible permit, are obligated to comply with the federal requirements applicable to your plant, in addition to any particular requirements of your flexible permit.

_____ was issued Flexible Permit Number 39142, under 30 TAC 116.710 et seq. We recognize that the flexible permit is the State permitting vehicle for certain operational requirements at your plant. However, unless and until such time as the Texas flexible permitting rules become part of the Texas SIP, you must continue to comply with applicable federal requirements, including those in the Texas SIP. This includes all terms and conditions of permits approved under the Texas SIP. An example of what is meant by the reference to "federal requirements" is the emission control limitations (e.g., lbs/MMBtu) and destruction efficiencies together with the associated monitoring and recordkeeping provisions contained in state or federal permits issued under SIP-approved rules.

Enclosed is a list of Frequently Asked Questions regarding this letter and the federal and state permitting programs. Should you have further questions or inquiries, please contact Raymond Magyar of my staff at (214) 665-7288, or Rick Bartley in the Office of Regional Counsel at (214) 665-8046.

Sincerely yours,

John Blevins
Director
Compliance Assurance and
Enforcement Division

Enclosure

cc: Steve Hagle, Assistant Director, Air Permits Division
Texas Commission on Environmental Quality

Frequently Asked Questions
EPA's Fair Notice Letter regarding TCEQ's Flexible Permits

Q1: Purpose of Letter: What is the purpose of the letter?

Response: The purpose of the letter is to remind owners and operators of sources of their obligation to comply with all federal and state air permitting requirements. Both EPA and TCEQ expect sources to operate in compliance with all federal and state air permitting requirements. EPA may enforce the provisions of any permit issued to a source under a SIP-approved process, and it is not bound by changes made to those permits by non-SIP approved mechanisms, such as the current Texas flexible permit provisions. EPA also understands that some emission units covered by flexible permits may no longer be operating in the same manner as they had under previous SIP permits or that new emission units may be covered by a flexible permit that have not previously been permitted under any SIP-approved permitting program. Owners and operators must continue to meet their obligations under the federal Clean Air Act, including the requirement to comply with all federal programs such as the NSPS, NESHAP, PSD, non-attainment NSR, and SIP-approved permits. In particular, the letter reminds the recipient that EPA has not approved the Texas flexible permit rules and, consequently, Texas issued flexible permits are not federally-approved and are not federally-enforceable. More precisely, changes to SIP-approved permits may only be accomplished through SIP-approved procedures, and the flexible permit mechanism is not yet a SIP-approved process to effect changes to a SIP permit.

Q2: Timing of Letter - Why the Sudden Interest? I've had my flexible permit for over 10 years now, why is EPA suddenly concerned about my flexible permit?

Response: TCEQ and EPA both agree that it is now time to focus resources on ensuring that all major sources with the State of Texas have federally-enforceable, SIP-approved permits. The two agencies are working together to develop a flexible permit rule that can be approved as part of the Texas SIP. Both TCEQ and EPA have been aware of issues related to the flexible permit rule and have worked over the last several years to address various permitting issues as part of EPA program revisions, including permit streamlining within the context of Title V, the federal PAL program and NSR reform. Because TCEQ is committed to ensuring the continuing success of its efforts to maintain and improve the air quality of Texas, EPA is providing its assistance to ensure that sources are also meeting their federal obligations under the Clean Air Act. One way for EPA to assist Texas in its efforts is to ensure that there are no adverse air quality impacts associated with the implementation of the flexible permitting rules prior to EPA action on the program.

Q3: Compliance with "legacy permits": EPA's letter states that it expects our facility to comply with the SIP-approved permit conditions and terms that existed prior to issuance of our flexible permit. What does that mean for my facility?

Response: EPA maintains that SIP permits issued to a source remain effective until amended, modified, or revoked in accordance with the SIP-approved methods for effecting such permit changes. This means that all SIP permit conditions and terms, including any representations upon which the SIP permit was issued, are not, and have not been, superceded, voided, or replaced by the terms, conditions, or permit application representations associated with a flexible permit. Owners and operators of sources included in a TCEQ flexible permit should review their previously issued SIP permits ("legacy permits") to ensure that they are complying with those terms, conditions, and representations. To the extent that such conditions, terms and representations were rolled over into the flexible permit, then there should be no issue associated with compliance obligations and the source should simply continue to comply with those requirements. However, EPA understands that there may be some instances where specific terms, conditions, or representations made in the legacy permits have been "modified" or "changed" by the flexible permit. Therefore, in accordance with EPA's policy entitled "Revised Guidance on Enforcement During Pending SIP Revisions," (http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/enf-siprev-rpt.pdf) dated March 1, 1991, EPA will assess its enforcement options on a case-by-case basis.

Q4: New Units Not Covered by a SIP Permit: I was issued a flexible permit for a new source (site) or a new or amended flexible permit for a change to a source (site) that involves construction of a new unit. Is the source operating in violation of federal requirements since it obtained authorization for those emissions in a non SIP-approved permit?

Response: To the extent that the modification followed the federally-approved review requirements *but for* the inclusion of those requirements in a SIP-approved permit, EPA will look to the 1991 guidance referenced above in determining whether or not to bring an enforcement action for failure to effect changes to the source in accordance with approved SIP procedures. As previously mentioned in response to Q2, EPA's focus will be to ensure that the source is not creating any adverse air quality impacts as a result of its operations under the flexible permit. In addition, if there is a need for changes to the monitoring, record-keeping, or reporting requirements to ensure no adverse air quality impacts, then an EPA enforcement action to effect those changes may be appropriate under the circumstances.

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Appendix 8

Facilities Under Consent Decree in Texas

Refinery	Capacity, BPD	% Regional Capacity	Date Lodged	Date Entered	NOx reductions tons per year	SO2 reductions tons per year
Koch Corpus Christi, TX	288,000	3.45	12/22/00	4/25/01	1450	140
Motiva Port Arthur, TX	285,000	3.41	03/21/01	8/22/01	1300	7560
Shell Deer Park, TX	333,000	3.99	03/21/01	8/22/01	1550	9020
Marathon Texas City, TX	72,000	0.86	05/11/01	8/28/01	986	616
BP Amoco Texas City, TX	437,000	5.24	01/19/01	8/31/01	4152	3811
Citgo Corpus Christi, TX	156,000	1.87	10/06/04	2/27/05	874	1352
Phillips/Conoco Borger, TX	146,000	1.75	01/27/05	12/5/05	1132	8900
Phillips/Conoco Sweeny, TX	247,000	2.96	01/27/05	12/5/05	428	467
Valero Corpus Christi, TX	88,400	1.06	06/16/05	11/23/05	165	800
Valero CC East (old Coastal), TX	100,000	1.20	06/16/05	11/23/05	835	838
Valero Houston, TX	83,000	0.99	06/16/05	11/23/05	400	3300
Valero/UDS (McKee) Sunray, TX	158,000	1.89	06/16/05	11/23/05	717	2141
Valero Texas City, TX	213,000	2.55	06/16/05	11/23/05	410	1020
Valero/UDS Three Rivers, TX	90,000	1.08	06/16/05	11/23/05	101	190
ExxonMobil Baytown, TX	562,500	6.74	10/11/05	12/13/2005	3260	211
ExxonMobil Beaumont, TX	348,500	4.18	10/11/05	12/13/2005	3508	13114
Total, Port Arthur TX	232,000	2.78	05/01/07	7/12/07	200	800
Premcor/Valero, Port Arthur TX	260,000	3.12	08/16/07	11/20/07	499	0
Totals		49.12			21967	54280

From John Jones, EPA R6, 7-7-2010

Appendix 9

Recent Engine Standards - EPA				
Engine standard	**Implementation Date**	**Annual VOC reduction by 2030**	**Annual NOx Reduction by 2030**	**Annual PM reduction by 2030**
Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder	Dec-09		1.2 million tons, or 80% compared to the current limits applicable to these engines	143,000 tons or 85% compared to the current limits applicable to these engines
Locomotive engines and marine compression-ignition engines	Jun-08		800,000 tons	27,000 tons
New Nonroad Spark-Ignition Engines, Equipment, and Vessels	Sep-08	600,000 tons	130,000 tons	5,500 tons
Heavy Duty Highway Rule	Jan-07		2.6 million tons compared to the current limits	109,000 tons

Appendix 10

TEXAS CLEAN AIR FACTS

Revised 8-17-2012

Are we making progress? You decide.

	Texas Rank 2000	Texas Rank 2009
NOx emissions	1	1
SO_2 emissions	5	3
CO_2 emissions	1	1
VOC* emissions	1	1
Particulate emissions (PM_{10})	2	1
Emissions of toxic chemicals	1	4
Mercury emissions from power plants	**	1

*Volatile organic compounds

** EPA did not report mercury emissions from power plants before 2000, so a comparable ranking is not available.

Rankings are based on publicly available data culled in 2000 and 2010. In all cases, the most current data for each year were used.

Other dubious distinctions

1 State rank for emissions of benzene and 1,3-butadiene (EPA TRI, 2008 emissions)

7 Houston area's rank among the most ozone-polluted metro areas in US (ALA, 2006-2008)

12 Number of US nonattainment counties with greater percentage reduction in ozone than Harris County, TX – 1990-2009 (EPA Air Data)

13 Dallas/Fort Worth area's rank among the most ozone polluted metro areas in US (ALA, 2006-2008)

15 State rank for air emissions of toxic chemicals from electric utilities (EPA TRI, 2008 emissions)

40 Number of states with greater percent reductions in total NOx emissions than Texas – 1996-2008 (EPA, NEI)

68 Number of US nonattainment counties with greater percentage reduction in ozone than Dallas County, TX – 1990-2009 (EPA Air Data)

129 Number of US nonattainment counties with greater percentage reduction in ozone than Tarrant County, TX – 1990-2009 (EPA Air Data)

NOTE: Most recent data available used in all cases for 2009 rankings

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Appendix 11

2009 Annual Report on the Air Pollutant Watch List Areas in Texas

Prepared by
Toxicology Division
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Texas Commission on Environmental Quality

February 17, 2010

Table of Contents

Executive Summary

The Toxicology Division (TD) of the Texas Commission on Environmental Quality (TCEQ) routinely reviews and conducts health effects evaluations of ambient air monitoring data from across the state. For the limited areas (less than 7% of the monitoring network in 2008) that have concentrations of pollutants above the TCEQ's comparison values (air toxics and metals) or 30-minute state regulatory standards (sulfur dioxide and hydrogen sulfide), the pollutant and area are put on the Air Pollutant Watch List (APWL). The APWL is a list of chemicals that have been monitored at or above the TCEQ's comparison values or standards and the associated areas of potential sources of those chemicals. Only consistently monitored decreases in concentrations will allow the chemical and/or area to be removed from the APWL. Although a chemical may be removed from the APWL, it can be added again at any point, should concentrations begin to increase above a level of concern.

The APWL allows the TCEQ to concentrate its resources on those areas of greatest concern and encourage emissions reductions. In the past, the APWL was mainly directed to TCEQ staff and industry. However in June 2009, due to increased legislative interest, the TD began notifying legislators whose districts are in an APWL area two weeks prior to any proposed or final changes to the APWL area. In addition to this change in notification process, several changes to the APWL were proposed in 2009, including the removal of nine air contaminants from six areas which, in some cases, resulted in the removal of the entire area from the APWL.

Recent Changes to the APWL:

- Removals effective June 2009
  - Beaumont, Jefferson County – hydrogen sulfide
  - Port Neches, Jefferson County – 1,3-butadiene
  - Milby Park area, Houston, Harris County – 1,3-butadiene
- Removals effective January 2010
  - Beaumont, Jefferson County – benzene
  - Lynchburg Ferry area, Houston, Harris County – benzene
  - Texas City, Galveston County – acrolein, butyraldehyde, and valeraldehyde
  - Corpus Christi, Nueces County – benzene
- Chemicals proposed for addition or removal but not adopted
  - Milby Park area, Houston, Harris County – addition of styrene
  - Bastrop, Bastrop County – removal of hydrogen sulfide

Background

The Texas Commission on Environmental Quality (TCEQ) establishes Air Pollutant Watch List (APWL) areas statewide to focus Agency investigations, enforcement, permitting, and monitoring resources on specific areas of concern. In addition to internal Agency notification, the APWL is posted on the TCEQ Web site (http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL.html) to notify industry, public officials, and local residents of the TCEQ's analysis of air quality data collected statewide.

The TCEQ Toxicology Division (TD) constantly reviews ambient air monitoring data from approximately 75 monitoring sites across the state and extensive data collected during mobile monitoring projects throughout the state. Monitored concentrations of pollutants are compared to TCEQ's health- and welfare-protective comparison values, including Effects Screening Levels (ESLs) and Reference Values (ReVs) or, collectively, air monitoring comparison values (AMCVs). The current list of target analytes and their respective AMCVs can be found on the TD Web site at http://www.tceq.state.tx.us/implementation/tox/AirToxics.html. Interestingly, by the end of 2008 (the last full year's worth of data), only 21 of the 75 stationary monitors in Texas monitored concentrations of any chemical above its short- or long-term AMCV, and only five of these monitors indicated a potential health or welfare concern.

If long-term monitored concentrations of pollutants are above the long-term AMCV or if there are frequent exceedances of the short-term AMCV, the TD recommends that the pollutant and the area of potential sources of the pollutant be added to the APWL. As of June 2009, this recommendation process was amended to include advanced notification of the recommendation for legislative officials whose districts are in the proposed area. Once the legislative officials are notified, a 30-day public comment period is opened. Notification of this comment period is put on the APWL Web site and individuals signed up for the TD listserv are sent notifications via email. After the close of the comment period, all comments and any additional monitoring information are re-evaluated. Following a final notification to legislative officials, the pollutant and/or area is placed on the APWL.

An area's listing on the APWL results in more stringent permitting of local industry, prioritized investigative efforts on behalf of TCEQ investigators and monitoring staff, and increased efforts to work with industry to address air quality concerns through pollution control technology and, in some cases, increased monitoring and notification. Through enhancing the TCEQ and industry's awareness of pollutants of concern and their sources, the air quality has been dramatically improved in six APWL areas, and nine pollutants were removed in 2009 and January 2010.

The process of removing a chemical and/or area from the APWL is similar to the addition process. In order to be eligible for removal from the APWL, long-term monitoring in these areas must show a decreasing trend and/or mobile monitoring must show that levels of pollutants are no longer at a level of potential concern. In addition, the TD takes into account industry efforts to control or reduce emissions of the pollutant of concern that could have contributed to the

monitored decrease in ambient concentrations. Legislators whose districts are in these areas are notified of the proposal to remove these pollutants from the APWL and the public is given a 30-day comment period. The public comment period consists of posting relevant data on the APWL Web site along with the public comment form. Those signed up for the TD listserv are notified of the update via email. After all comments and any additional monitoring data are reassessed, a final notification is provided to legislative officials prior to the final removal of the chemical and/or area.

Although a pollutant and/or area may be removed from the APWL, it does not necessarily indicate that monitoring in the area will stop. Mobile monitoring trips are scheduled each year and are dependent on a number of variables, including funding level, complaints, TCEQ regional office investigations, etc. and are not solely based on the area's presence on the APWL. Stationary monitors in former APWL areas may be moved to another location where higher levels of air pollution are suspected, though the monitor may also stay at that location indefinitely. If future mobile or stationary monitoring indicates concentrations of a removed chemical are rising above a level of potential health concern, the TD would recommend that the pollutant and/or area be re-listed on the APWL.

The APWL areas that were active as of January 2010 are noted in Figure 1 below and are listed in Table 1. Those pollutants and/or areas that were removed from the APWL by January 2010 are listed in Table 2. Details concerning these areas are described in the text below. Although the information provided is not intended to be a thorough review of the status of these APWL areas, this information was considered during the re-evaluation of these areas.

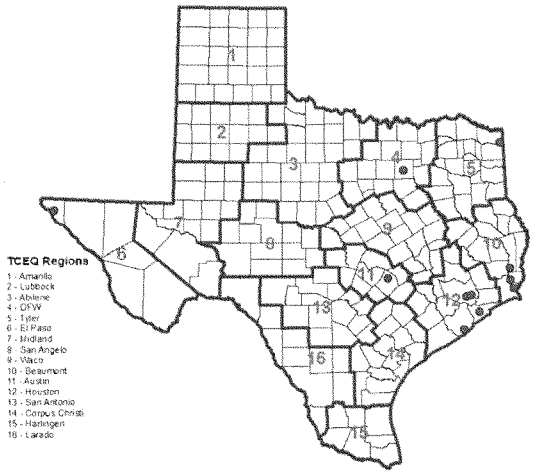


Figure 1. Active Air Pollutant Watch List areas in January 2010.

Table 1. Active Air Pollutant Watch List areas and pollutants in January 2010.

County	City	TCEQ Region	Year Added	Pollutant of Interest	Status*
Dallas	Dallas	4	2004	Nickel	Improvement
Bowie and Cass	N/A	5	1999	Hydrogen sulfide	Improvement
El Paso	El Paso	6	2004	Hydrogen sulfide	Continued watch
Jasper	Evadale	10	2003	Hydrogen sulfide	Continued watch
Jefferson	Beaumont	10	2003	Sulfur dioxide	Continued watch
Jefferson	Port Arthur	10	2001	Benzene	Continued watch
Bastrop	Bastrop	11	2007	Hydrogen sulfide	Continued watch
Brazoria	Freeport	12	2005	Arsenic, cobalt, nickel, vanadium	Continued watch
Galveston	Texas City	12	2001	Propionaldehyde	Continued watch
			2003	Benzene	Continued watch
			2004	Hydrogen sulfide	Continued watch
Harris	Lynchburg Ferry area	12	2002	Styrene	Improvement
Harris	Galena Park	12	2000	Benzene	Improvement

* Improvement status indicates that monitoring data suggest a downward trend in ambient concentrations and/or there have been a decrease in the number of odor complaints in the area. Continued watch status indicates that there is insufficient monitoring data to determine a trend, or that monitoring data are not suggesting a decreasing trend in concentration.

Table 2. Pollutants removed from the Air Pollutant Watch List from January 2009 to January 2010.

County	City	TCEQ Region	Year Added	Pollutant of Interest	Year Removed
Jefferson	Beaumont	10	2002	Hydrogen sulfide	2009
Jefferson	Beaumont	10	2004	Benzene	2010
Jefferson	Port Neches	10	1996	1,3-Butadiene	2009
Galveston	Texas City	12	2001	Acrolein, butyraldehyde, and valeraldehyde	2010
Harris	Lynchburg Ferry area	12	2002	Benzene	2010
Harris	Houston (Milby Park area)	12	1999	1,3-Butadiene	2009
Nueces	Corpus Christi	14	1998	Benzene	2010

Areas Currently on the APWL

Region 4 – Dallas/Fort Worth

APWL0401 – Nickel in Dallas

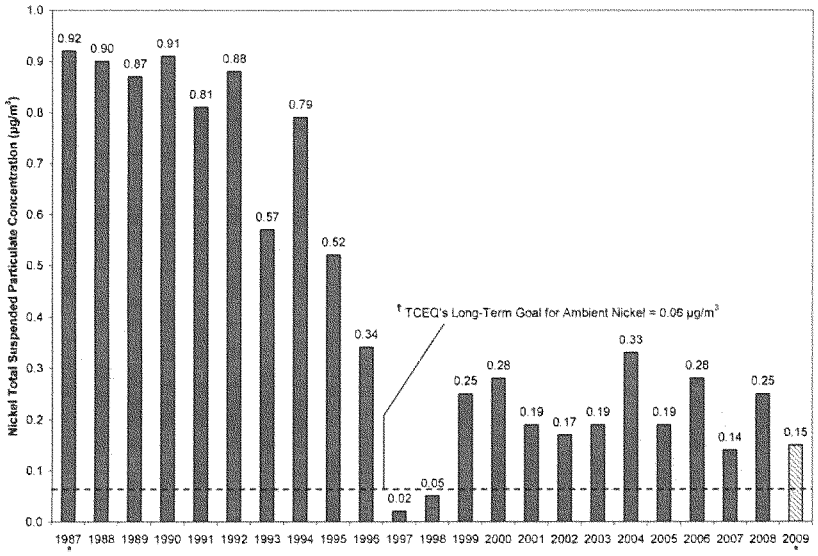
Elevated annual average nickel levels have been detected at the Morrell monitoring site since 1987, as shown in Figure 2. From 1987 through 1994, the annual average nickel total suspended particulate (TSP) concentrations ranged from approximately 0.6 to 0.9 $\mu g/m^3$; over the interim long-term AMCV of 0.015 $\mu g/m^3$ for respirable particles (i.e., particulate matter less than 10 µm in size, or PM_{10}). Beginning in 1995, the annual average nickel TSP concentrations decreased and have stabilized in the range of 0.1 to 0.3 $\mu g/m^3$ from 1998 through 2008. The reductions in annual nickel levels first observed in 1995 are attributed to actions taken by Dal Chrome Co. Inc., which is an automotive chrome bumper recycling facility located upwind from the Morrell site. Although nickel TSP concentrations have been significantly decreased since monitoring began, the annual average concentrations are still over the interim long-term AMCV of 0.015 $\mu g/m^3$ for respirable particles.

There are two issues to consider when evaluating the nickel TSP data collected at the Morrell monitoring site. First, because TSP incorporates all particle size fractions, including those that are too large to inhale, the exceedances of the AMCV based on PM_{10} do not necessarily indicate that nickel is a health concern in this area. In addition, further investigation into available toxicity values for nickel indicated that the risk factor published in United States Environmental Protection Agency (USEPA) 1999 National-Scale Air Toxic Assessment is a more up-to-date assessment of nickel than the interim AMCV. Therefore, this risk factor (0.06 $\mu g/m^3$) was used as the goal for ambient nickel in ambient air. Currently, the long-term comparison value for nickel is under review by the TD.

Second, the air monitoring data from the monitoring site are representative of total nickel concentrations and do not indicate the specific forms of nickel in the air. The form of nickel determines how potentially toxic nickel concentrations are and what effects they might have on the body. For example, metallic nickel is considered to be a non-carcinogenic form of nickel. The USEPA risk factor of 0.06 $\mu g/m^3$ currently used as the ambient air goal conservatively assumes that 65% of total nickel emissions are in a form that may cause cancer. Using this risk factor from the USEPA is extremely conservative, since it is likely that much less than 65% of the total nickel in the air is in a carcinogenic form. Previous investigations in the Morrell area have indicated that Dal Chrome is the predominant source of nickel emissions in the vicinity of the Morrell monitoring site and this facility mainly emits metallic nickel (considered to be a non-carcinogenic form of nickel) from its grinding operation.

In order to address the issue of particle size at the Morrell site, a special one-year monitoring study began in 2009 at the Dallas-Morrell site. As mentioned above, only TSP samples have historically been collected at this site. In April 2009, however, a new monitor capable of collecting inhalable $PM_{2.5}$ was co-located with the TSP monitor and has been set to the same sampling schedule. The study, in part, will identify the percentage of inhalable $PM_{2.5}$ out of TSP.

The study will not be able to differentiate the species of nickel in the ambient air due to analytical method constraints, but will provide valuable information necessary to better assess the risk of adverse health effects in this area.



* Incomplete sampling year.
† TCEQ's long-term goal for ambient nickel is based on a risk factor published in the United States Environmental Protection Agency 1999 National-Scale Air Toxic Assessment.

Figure 2. Annual average nickel concentrations in total suspended particulate (TSP) samples at the Dallas-Morrell monitor, 1987-2009. Annual averages are based on every-sixth-day 24-hour canister data. Data from 2009 only include the January to March period.

Nickel will continue to be monitored and assessed at the Dallas-Morrell site and the area will remain on the APWL. The TCEQ will continue to monitor and encourage nickel reductions.

Region 5 - Tyler

APWL0501 – Hydrogen Sulfide near Domino in Bowie and Cass Counties

In 1998-1999, an Environmental Protection Agency (EPA) air monitoring study measured concentrations of hydrogen sulfide (H_2S) that frequently exceeded its odor threshold and the 30-minute state regulatory standard for H_2S near the International Paper Company (IP) in Domino, Texas. A TCEQ mobile monitoring trip in August 2001 near IP measured persistent concentrations of H_2S above its odor threshold, and staff reported rotten egg odors which are characteristic of H_2S, although concentrations above the state regulatory standard were not

measured. In September 2009, TCEQ Small Business and Local Government Assistance (SBLGA) staff conducted air sampling using a Jerome H_2S analyzer. Although not directly comparable to the 30-minute standards, survey measurements using the Jerome H_2S analyzer indicated one instantaneous H_2S concentration above the standard. Staff also reported odors from sources in addition to IP (e.g., animals). Based on the results from the 2009 investigation, TCEQ continues to support efforts to reduce H_2S levels in this area.

This area will remain on the APWL and is currently being reassessed based on recent surveys and investigations of H_2S.

Region 6 – El Paso

APWL0601 – Hydrogen Sulfide in El Paso

Elevated hourly H_2S levels have been detected at the El Paso Lower Valley Sounder monitoring site since monitoring began in 2004. Due to the frequency and intensity of concentrations measured at this location, the TD has determined that H_2S has the potential for acute health effects and odors and placed this area on the APWL in 2004. In addition, numerous H_2S concentrations have been reported above the 30-minute state regulatory standard (see Table 3). Previous investigations have shown that the Juarez North Wastewater Treatment Plant in Mexico is the primary H_2S source. The Texas Department of State Health Services (DSHS) prepared a Health Consultation, dated December 28, 2005, which details the methods, findings, and conclusions of their evaluation of H_2S levels associated with the wastewater treatment plant. According to the DSHS, exposure to the measured levels could potentially cause adverse health effects (e.g., eye irritation, decreased lung function, headache) in sensitive individuals. For more information on the findings of this report, visit http://www.dshs.state.tx.us/epitox/consults/elpaso_juarez_final.pdf.

Table 3. Number of 30-minute exceedances of the hydrogen sulfide state regulatory standard and number of days with an exceedance at the El Paso Lower Valley Sounder monitoring site.

Year	Number of 30-minute exceedances	Number of days with at least one 30-minute exceedance
2004*	2865	90
2005	5196	184
2006	2855	138
2007	376	54
2008	630	56
2009	218	33

* Incomplete sampling year. The monitor was activated in August 2004.

Due to the monitored concentrations of H_2S in the El Paso area, the pollutant will remain on the APWL and the TCEQ will continue to monitor and encourage H_2S reductions.

Region 10 – Beaumont

APWL1001 – Hydrogen Sulfide in Evadale

Hydrogen sulfide was placed on the APWL in 2003 because of elevated levels detected during a 2003 mobile air monitoring trip. Additional mobile monitoring trips conducted annually within TCEQ Region 10 from 2003 through 2007, similarly detected elevated levels of H_2S. Several measured H_2S levels downwind of the Mead Westvaco paper mill in Evadale were in excess of the 30-minute H_2S state regulatory standard and were consistent with reports of odorous conditions by mobile monitoring personnel.

Due to the monitored concentrations of H_2S in the Evadale area, the pollutant will remain on the APWL and the TCEQ will continue to monitor and encourage H_2S reductions.

APWL1002 – Sulfur Dioxide in Beaumont

Sulfur dioxide (SO_2) levels at the former Carroll Street Park monitoring site frequently exceeded the TCEQ regulatory standard from 1997 to 2002 (see Table 4). In addition to this stationary monitoring, SO_2 levels were reported above the 30-minute state regulatory standard during annual mobile monitoring trips from 2003 through 2007. A member of the monitoring staff required medical attention for a burning sensation in the lungs while monitoring downwind of Chemtrade Logistics (formerly Peak Sulfur, Incorporated) during the 2003 mobile monitoring trip. Because of these concentrations, SO_2 was added to the Beaumont APWL in 2003. Although there have been fewer exceedances of the standard since this area was put on the APWL, there were several exceedances detected in 2006 and 2007. In order to place the monitor so that it best represents community exposure, the Carroll Street Park monitor was deactivated in 2008. The monitor is being moved to a nearby residential location and is expected to be activated at this new location in 2010.

The Beaumont – Lamar monitoring site, which is located immediately west of APWL1002 has indicated a downward trend in the number of exceedances of the 30-minute state regulatory standard since 2005. However, during two days in 2009, there were several exceedances of the 30-minute standard. A prompt investigation conducted by the regional staff indicated that these were due to accidental releases from the adjacent Chemtrade Logistics facility.

Table 4. Number of 30-minute exceedances of the sulfur dioxide state regulatory standard and number of days with an exceedance at the former Carroll Street Park and Beaumont Lamar monitoring sites.

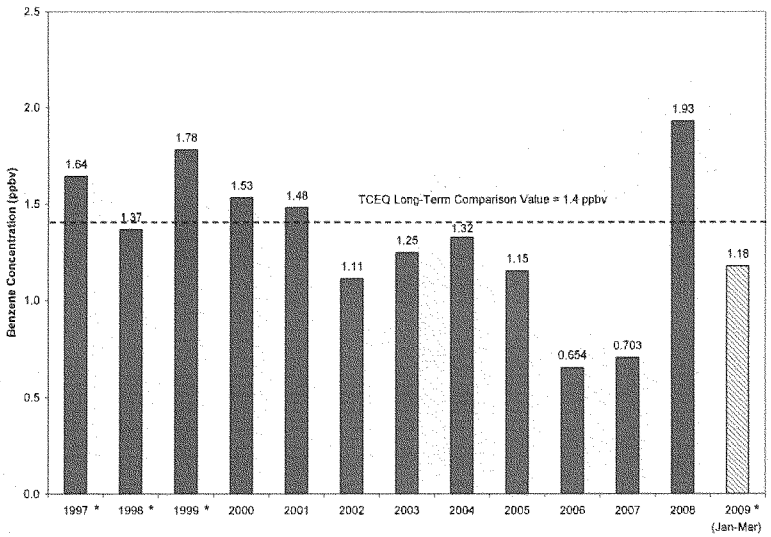
Monitor	Year	Number of 30-minute exceedances	Number of days with at least one 30-minute exceedance
Carroll St. Park	1997	2	1
Carroll St. Park	1998	12	3
Carroll St. Park	1999	16	3
Carroll St. Park	2000	0	0
Carroll St. Park	2001	4	1
Carroll St. Park	2002	13	2
Carroll St. Park	2003-2005	0	0
Carroll St. Park	2006	9	1
Carroll St. Park	2007	3	1
Carroll St. Park	2008*	0	0
Beaumont Lamar	1997	0	0
Beaumont Lamar	1998	3	1
Beaumont Lamar	1999-2002	0	0
Beaumont Lamar	2003	27	2
Beaumont Lamar	2004	21	1
Beaumont Lamar	2005-2008	0	0
Beaumont Lamar	2009	16	2

* Incomplete sampling year due to the monitor being deactivated.

This area will remain on the APWL and will be reassessed as new data are received from the new monitoring location in 2010.

APWL1003 – Benzene in Port Arthur

Benzene concentrations in the Port Arthur APWL have previously been considered elevated because, prior to 2006, the annual average benzene levels at the Port Arthur City Service Center monitor exceeded the previous long-term AMCV (1 ppb_v) in use at that time (see Figure 3). Annual average benzene levels in 2006 and 2007 dropped to 0.7 ppb_v, and annual average levels from 2002 to 2007 were below the current AMCV of 1.4 ppb_v. However, in 2008, the annual average benzene concentration for this site was 2.0 ppb_v and was above the current long-term AMCV. In response to these monitored levels, regional staff developed an aggressive source investigation plan to address the exceedance. In addition, the region requested that the August 2009 remote sensing flyovers be conducted in the specific areas identified in the investigation. Review of the data showed that the elevated annual average benzene concentration for the City Service Center was driven by two very high exceedance days (January 19 and October 15, 2008). The regional investigation indicated that the exceedances were due to single events on each of those days and not due to an increase in daily benzene emissions from the surrounding facilities. Specifically, the exceedance on January 19, 2008, was due to a spill from Flint Hills Resources, Inc. and the exceedance identified on October 15, 2008, was most likely due to start-up operations from Chevron Phillips after Hurricane Ike. For more information, see the document, *Port Arthur City Service Center, Continuous Air Monitoring Station (CAMS) 131.*



* Incomplete sampling year.

Figure 3. Annual average benzene concentrations at the Port Arthur City Service Center monitor, 1997-2009. Annual averages are based on every-sixth-day 24-hour canister data. Data from 2009 only include the January to March period.

Due to the elevated monitored concentrations of benzene in the Port Arthur area in 2008, the pollutant will remain on the APWL, and the TCEQ will continue to monitor and encourage benzene reductions.

Region 11 – Austin

APWL1101 – Hydrogen Sulfide in Bastrop

In February 2006 and March 2007, mobile monitoring trips measured H_2S levels downwind of Griffin Industries, located in Bastrop, Bastrop County, Texas, that exceeded the 30-minute state regulatory standard and odor threshold. These findings were consistent with the numerous odor complaints reported to the region over the years and with monitoring staff reports of intermittent strong odors observed throughout the sampling events. Due to TCEQ enforcement actions, Griffin has implemented corrective actions, which have resulted in a decline of odor complaints in this area. Subsequently, Griffin hired URS Corporation to monitor H_2S on December 10 – 11, 2008. All reported 30-minute average H_2S concentrations downwind of Griffin were below the H_2S net 30-minute state regulatory standard. The TD proposed the removal of H_2S from APWL1101 in September of 2009. However, during the 30-day public comment period, which ended on October 5, 2009, the TCEQ Austin regional office received several odor complaints from citizens. In addition, strong odors were confirmed by TCEQ staff during a follow-up investigation in the area near Griffin.

Due to this new information, the TD has determined that the H_2S is still a potential issue in this area. The area will remain on the APWL and the TCEQ will continue to encourage reductions.

Region 12 – Houston

APWL1201 – Arsenic, Cobalt, Nickel, and Vanadium in Freeport

Elevated levels of arsenic, cobalt, nickel, and vanadium were detected in one- and three-hour samples collected near Gulf Chemical and Metallurgical, Incorporated in Freeport during a November 2005 mobile monitoring trip. These levels could cause respiratory symptoms that are consistent with the reports of Freeport citizens, including eye irritation, burning and soreness of the throat, breathing difficulties, unpleasant odors, unpleasant tastes, headache, and nausea. Reports from citizens also note that the health symptoms, odors, and tastes frequently occur when winds are easterly (i.e., from the direction of Gulf) and during heavy, visible, nighttime emissions from Gulf. In addition, mobile monitoring personnel reported acidic and metallic odors, metallic tastes, and visible particulate emissions during the 2005 trip while near Gulf. A second mobile monitoring project was conducted in July 2007, and elevated levels of arsenic and nickel in particulate samples were measured downwind and on the fenceline of Gulf Chemical and Metallurgical, Inc. Regional investigators have conducted numerous investigations near this facility, including after-hours surveillance investigations. As a result, several compliance actions, including notices of violation and enforcement, have been issued for air and water violations. A subsequent mobile monitoring project was conducted in February 2009, though data from this project have not been completely evaluated at this time. Preliminary data from this report, however, indicate elevated fenceline levels of arsenic, nickel, and vanadium downwind of the facility.

Due to the monitored concentrations of these metals in the Freeport area, the pollutants will remain on the APWL and the TCEQ will continue to monitor and encourage reductions.

APWL1202 –Texas City

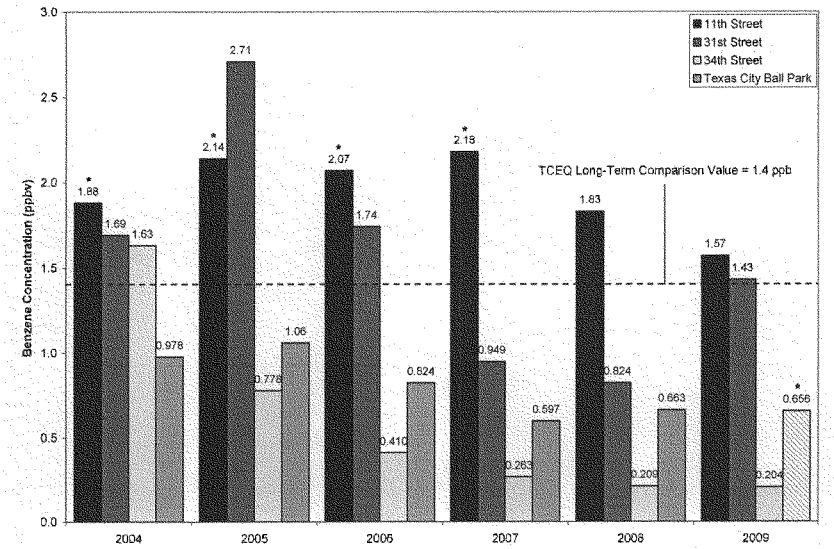
Benzene

Three stationary monitors in the Texas City area have historically detected annual ambient concentrations of benzene above the long-term AMCV (see Figure 4). Data from one of these monitors, the 34th Street monitor, has indicated a 73% decrease in annual average benzene concentrations from 2005 to 2008, and continues to remain below the long-term AMCV. The other two monitors are located closer to the industrial area in Texas City and are funded by BP North America Products, Incorporated (BP) and Marathon Petroleum Company (Marathon) through individual agreements with the TCEQ and/or EPA and US Department of Justice. The 31st Street monitor, funded by BP, has exhibited a 70% decrease in annual average benzene concentrations from 2005 to 2008; however, due to a leaking benzene storage tank discovered in May 2009 and a second emission event in September 2009, the average benzene concentration for 2009 is 1.43 ppb_v, just over the long-term AMCV. The 11th Street monitor, funded by Marathon, has consistently had annual average benzene concentrations above the long-term

comparison value since monitoring began in 2004. The average benzene concentration for 2009 is 1.57 ppb_v. Annual average benzene concentrations from these monitors have been highlighted in the Region 12 annual ambient air evaluations.

In addition to long-term stationary monitoring, elevated benzene levels have likewise been detected during mobile monitoring projects from 2001 to 2008, downwind of various facilities throughout the Texas City area. Some of the concentrations detected during these projects have exceeded the short-term AMCV and several detections could contribute to elevated long-term concentrations.

Not only have efforts been made to identify potential sources of benzene and monitor ambient levels, but regional investigators have also conducted focused benzene investigations and reconnaissance investigations in the Texas City area. In 2008, the Houston Regional Office issued 27 notices of enforcement and 10 notices of violation to facilities in Texas City.



* Incomplete sampling year.

Figure 4. Annual average benzene concentrations at the 11th Street, 31st Street, 34th Street, and Texas City Ball Park monitors, 2003-2009. Annual averages at the 11th Street, 31st Street, and 34th Street monitors are based on hourly autoGC data. Annual averages at the Texas City Ball Park monitor are based on every-sixth-day 24-hour canister data. Data from the Texas City Ball Park monitor for 2009 only include the January to March period. Not all 2009 data from the 34th Street monitor have been validated.

Due to the monitored concentrations of benzene in the Texas City APWL, the TCEQ will continue to monitor this area and encourage benzene reductions.

Hydrogen Sulfide

A 2004 mobile monitoring trip reported H_2S levels that exceeded the H_2S 30-minute state regulatory standard. These reported levels had the potential to cause short-term odor-related health effects downwind of Gulf Coast Waste Disposal Authority (GCWDA) and Valero. A member of the monitoring staff experienced nausea symptoms and also reported moderate odors downwind of GCWDA. A subsequent mobile monitoring project in 2008 did not detect any concentrations of H_2S above the regulatory standard.

In addition to mobile monitoring, long-term stationary monitoring for H_2S has been conducted at the Texas City and Texas City Ball Park sites from 2002-2004 and 2004-present, respectively (see Table 5). This limited monitoring data indicated a decreasing trend in H_2S concentrations until 2008. In 2009, however, there were 16 exceedances of the 30-minute regulatory standard at the Texas City Ball Park monitor.

Table 5. Number of 30-minute exceedances of the hydrogen sulfide state regulatory standard and number of days with an exceedance at the monitoring sites in Texas City.

Monitor	Year	Number of 30-minute exceedances	Number of days with at least one 30-minute exceedance
Texas City	2002*	1	1
Texas City	2003	42	1
Texas City Ball Park	2004*	69	3
Texas City Ball Park	2005-2008	0	0
Texas City Ball Park	2009	16	2

* Incomplete sampling year. The Texas City monitor was activated in January 2002 and was deactivated in February 2004. The Texas City Ball Park monitor was activated in February 2004.

Due to the monitored concentrations of H_2S in Texas City, the pollutant will remain on the APWL and the TCEQ will continue to monitor and encourage reductions.

Propionaldehyde

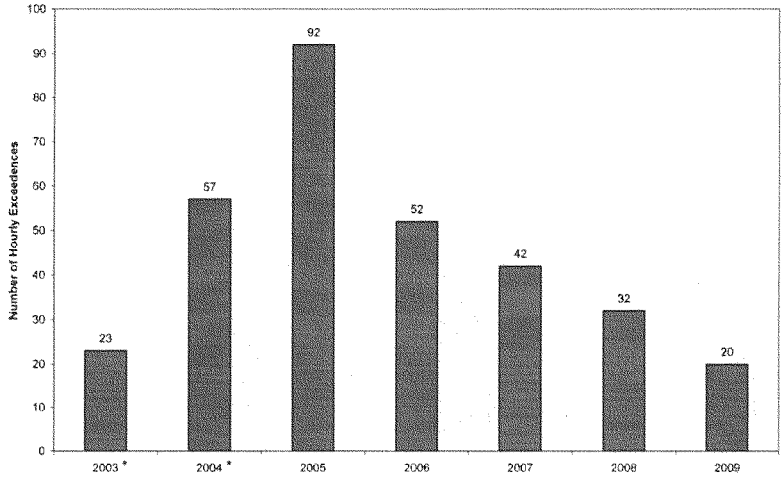
In 2000, five samples from a TCEQ mobile monitoring project detected concentrations of propionaldehyde above the odor-based AMCV. During the 2001 mobile monitoring project, three samples measured elevated levels of propionaldehyde downwind of Dow Chemical (formerly Union Carbide). Although no samples detected propionaldehyde above the AMCV in the 2004 project, three samples collected during the 2008 mobile monitoring project were above the AMCV. One of these samples was taken in a residential neighborhood.

Due to the monitored concentrations of propionaldehyde in the Texas City area during mobile monitoring projects, the pollutant will remain on the APWL and the TCEQ will continue to monitor and encourage reductions.

APWL1204 – Styrene in the Lynchburg Ferry area of Houston

Hourly styrene levels that exceed the odor threshold value have been reported at the Lynchburg Ferry air monitoring site with significant frequency since monitoring began at this location in 2003; however, concentrations appear to be on a downward trend since 2006 (see Figure 5). The odorous styrene concentrations have been highlighted in the 2003-2008 annual ambient air evaluations for Region 12.

In 2008, there were 32 hourly styrene concentrations reported above the odor-based AMCV of 25 ppb_v, with a maximum concentration of 494 ppb_v. When compared to the 92 odorous styrene concentrations reported for the Lynchburg Ferry site in 2005, which included a maximum concentration of 433 ppb_v, the 32 occurrences in 2008 represent a reduction of approximately 65%. Data from 2009 indicate further reductions in the frequency of exceedances, with a maximum concentration of 102 ppb_v. While there have been significant improvements in the frequency of styrene odor-based comparison value exceedances over the last four year period, the intensity of the reported styrene concentrations increased in 2008 (maximum reported concentration for 2008 is somewhat higher than those reported for 2005-2007).



* Incomplete sampling year.

Figure 5. Number of hourly exceedances of the styrene odor-based air monitoring comparison value at the Lynchburg Ferry monitor, 2003- 2009. Based on hourly autoGC data.

Due to the continued exceedance of the short-term odor-based AMCV, styrene will remain on the APWL and the TCEQ will continue to monitor and encourage reductions in the Lynchburg Ferry area.

APWL1206 – Benzene in Galena Park

Elevated annual average benzene concentrations have been detected at the Galena Park monitoring site since 1998 with the highest annual concentration of 1.97 ppb_v reported in 2005 (see Figure 6). The reported annual benzene concentrations from 1998 to 2007 exceeded the AMCV. However, the reported 2008 average benzene concentration based on every sixth-day 24-hour canister samples at the Galena Park site was 1.3 ppb_v, and is below the long-term, health-based AMCV (1.4 ppb_v) for the first time in several years.

The reduction in ambient levels of benzene at Galena Park represents a significant improvement in air quality and is likely the result of significant efforts in the area by TCEQ (e.g., focused agency resources, special investigations utilizing the latest technology, enhanced compliance and enforcement), along with the cooperation of industry (e.g., Emission Reduction Agreements (ERAs)). For example, this reduction in the annual benzene concentration may partially reflect the results of ERAs entered into in 2006 by TCEQ with several facilities identified during an earlier Find-and-Fix investigation (Kinder Morgan Terminals, Vopak Terminals, TEPPCO Pipeline) to reduce VOCs, including benzene. Focused investigations and reconnaissance investigations conducted by the Houston Regional Office staff have resulted in eight notices of enforcement and two notices of violation in 2008. The 2008 average concentration is approximately 35% lower than the 2005 annual average of 2.0 ppb_v. In addition, available preliminary 24-hour canister data for January through October 2009 suggest continued improvement in benzene concentrations. The January through October 2009 average for benzene of 0.8 ppb_v at the Galena Park site is approximately 33% lower than the average over the same period in 2008 (1.2 ppb_v). Annual benzene concentrations reported at the Galena Park monitoring site were highlighted in the 2003-2007 annual ambient air evaluations for Region 12.

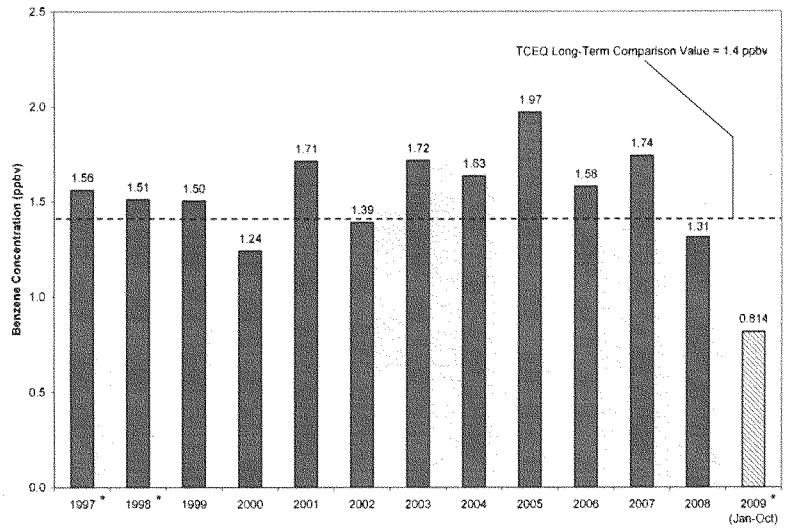


Figure 6. Annual average benzene concentrations at the Galena Park monitor, 1997-2009. Annual averages are based on every-sixth-day 24-hour canister data. Not all data from 2009 have been validated.

Concentrations of benzene in Galena Park will continue to be monitored to determine if the downward trend in 2008 continues. Currently, the pollutant will remain on the APWL and the TCEQ will continue to encourage reductions.

Pollutants and/or Areas That Have Been Removed from the APWL

Region 10 - Beaumont

APWL1002 –Beaumont

Hydrogen Sulfide (Removed June 2009)

Hydrogen sulfide was placed on the Beaumont APWL in 2002 due to detected concentrations above the TCEQ regulatory standard at the TCEQ former Carroll Street Park monitoring site (see Table 6). The number of days on which H_2S concentrations exceeded the 30-minute state regulatory standard decreased from two days in 2002 to one day in 2003. No exceedances were measured during 2005 through June 19, 2008, when the monitor was deactivated.

Table 6. Number of 30-minute exceedances of the hydrogen sulfide state regulatory standard and number of days with an exceedance at the former Carroll Street Park monitoring site.

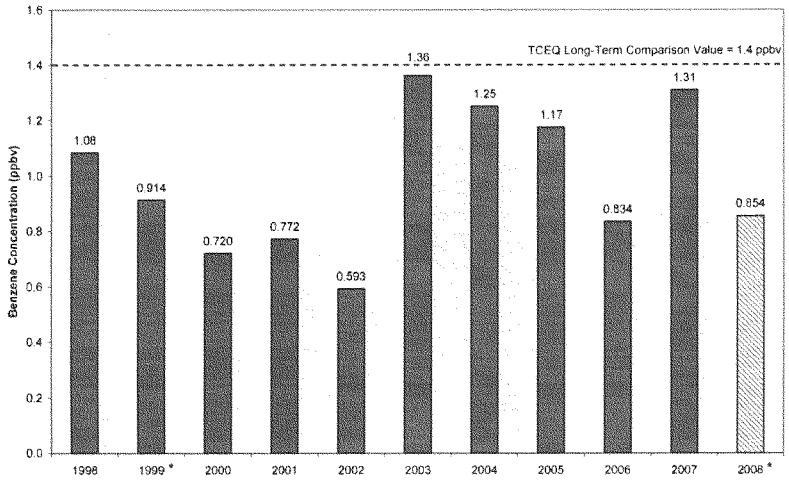
Year	Number of 30-minute exceedances	Number of days with at least one 30-minute exceedance
1999	46	2
2000	2	1
2001	1	1
2002	11	2
2003	3	1
2004	6	1
2005-2008*	0	0

* Incomplete sampling year.

Hydrogen sulfide was removed from this APWL in June 2009.

Benzene (Removed January 2010)

Benzene concentrations in the Beaumont APWL have previously been considered elevated because, prior to 2006, the annual average benzene levels at the Beaumont Carroll Street Park monitor exceeded the long-term AMCV of 1 ppb_v in use at that time (see Figure 7). In 2006, the annual average benzene concentration dropped to 0.8 ppb_v, only to increase to 1.3 ppb_v in 2007. However, in October 2007, the TD released a new assessment of benzene, which changed the long-term comparison value from 1 ppb_v to 1.4 ppb_v. Therefore, using the most up-to-date information on benzene, the long-term average benzene concentrations measured at Carroll Street Park have always been below a level of potential health concern. In 2008, this monitoring site was in the process of being relocated to a nearby residential area to allow for the expansion of the adjacent industrial facility.



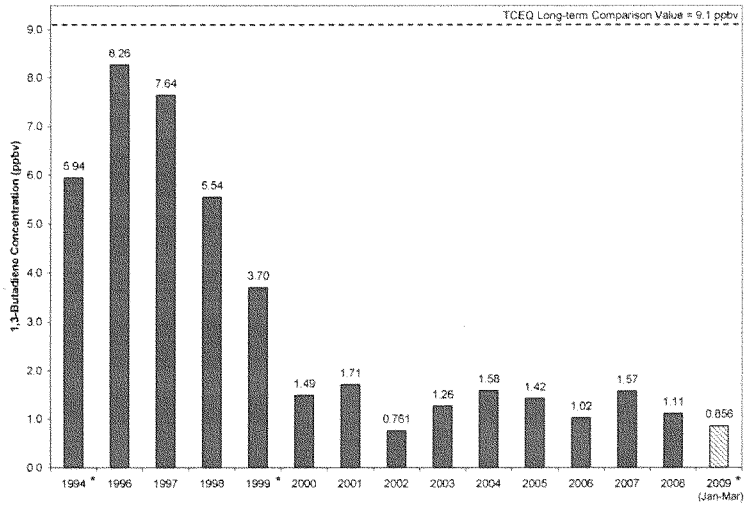
* Incomplete sampling year.

Figure 7. Annual average benzene concentrations at the Carroll Street Park monitor, 1998-2008. Annual averages are based on every-sixth-day 24-hour canister data. The monitor was deactivated in July 2008.

Benzene was removed from this APWL in January 2010.

APWL1004 – 1,3-Butadiene in Port Neches (Removed June 2009)

Annual average 1,3-butadiene levels from 1994 to 1998 at the Port Neches Merriman Street site exceeded the former long-term screening value of 5 ppb_v (see Figure 8) and levels at that time were thought to be a health concern. Beginning in 1996, annual average 1,3-butadiene concentrations indicated a more than seven year decline, due in part to several cooperative agreements between TCEQ and industrial sources such as Huntsman's C-4 facility/Texas Petrochemical's Port Neches Operations and ISP Synthetic Elastomers LP (formerly Ameripol Synpol). These agreements implemented a fence-line monitoring program that focused on 1,3-butadiene emissions. The monitoring system was instrumental in identifying otherwise obscure emission sources and activities with the potential to impact ambient concentrations at the fence-line and in the community. The program gave the industrial facility opportunities to successfully address such sources and ultimately lead to a reduction in 1,3-butadiene emissions to levels that are no longer a health concern. In addition, in August 2008, the TD released a new assessment of 1,3-butadiene, which changed the comparison value from 5 ppb_v to 9.1 ppb_v. Therefore, using the most up-to-date information on 1,3-butadiene, annual average concentrations at the Merriman Street site have consistently remained below the current AMCV and are well below levels that would be a health concern.



* Incomplete sampling year.

Figure 8. Annual average 1,3-butadiene concentrations at the Port Neches monitor, 1994-2009. Annual averages are based on every-sixth-day 24-hour canister data. Data from 2009 only include the January to March period.

Butadiene was removed from this APWL in June 2009.

Region 12 - Houston

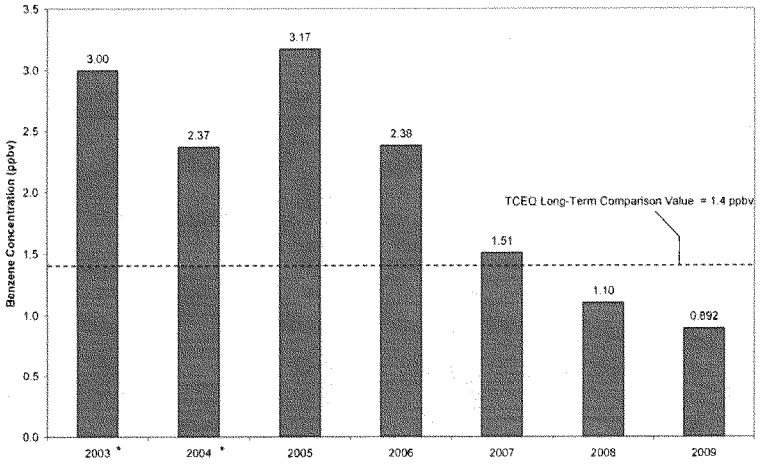
APWL1202 – Acrolein, Butyraldehyde, and Valeraldehyde in Texas City (Removed January 2010)

Concentrations of acrolein, butyraldehyde, and valeraldehyde were detected above their respective odor-based AMCV during mobile monitoring investigations in 2001. Follow-up mobile monitoring investigations in 2004 and 2008 indicated that concentrations of acrolein and valeraldehyde have remained below the odor-based comparison value since the 2001 investigation. The same mobile monitoring investigations detected a single, 1-hour exceedance of the butyraldehyde odor-based comparison value in both 2004 and 2008. In addition, the Galveston County Health District did not identify any citizen complaints relating to aldehyde odors in the Texas City area in 2008. Due to the apparent decrease in the frequency of exceedances of the odor-based comparison values, coupled with the decrease in odor complaints in the Texas City area, the TD has determined that ambient concentrations of acrolein, butyraldehyde, and valeraldehyde are no longer at a level that would be expected to cause nuisance odor conditions.

Acrolein, butyraldehyde, and valeraldehyde were removed from this APWL in January 2010.

APWL1204 – Benzene in the Lynchburg Ferry area of Houston (Removed January 2010)

Annual benzene concentrations in the Lynchburg Ferry area have been elevated above the long-term AMCV since 2003 (see Figure 9). Benzene levels have also been highlighted in the annual ambient air evaluations for Region 12 from 2003-2007. However, from 2005 through 2008, industries in the Lynchburg Ferry area and various divisions within the TCEQ have made considerable efforts to reduce benzene emissions. Industry initiatives in this area include signing emission reduction agreements with the TCEQ and implementing innovative strategies, such as forming the Monument Area Air Quality Focus Group and using an Environmental Monitoring Response System to automatically alert area industries when the monitor reads an elevated concentration so that investigations and processes changes can be made. In addition, the TCEQ has conducted frequent and thorough investigations of facilities in the area, which have led to a variety of corrective actions aimed at reducing benzene emissions. The TCEQ has also coordinated investigations with the industry monitoring group and the United States Coast Guard to identify and reduce benzene emissions from barges in the Houston Ship Channel. Because of the large collaborative effort to reduce emissions, monitored concentrations at this monitoring site have indicated an overall decrease in annual benzene concentrations of 65% from 2005 to 2008 and almost 72% from 2005 to 2009.



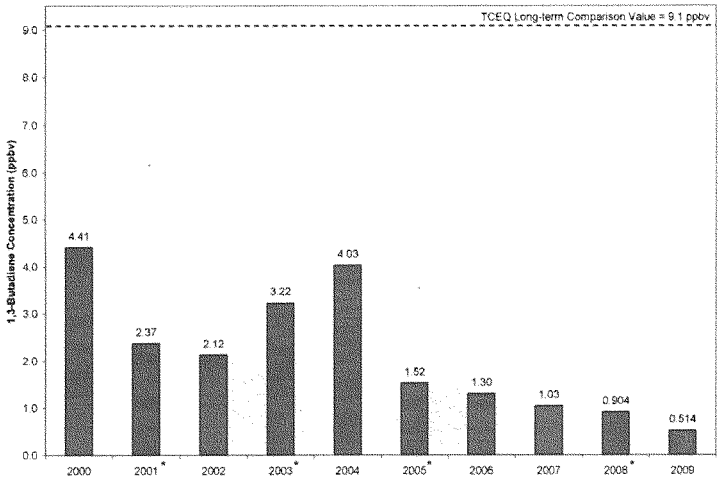
* Incomplete sampling year.

Figure 9. Annual average benzene concentrations at the Lynchburg Ferry monitor, 2003-2009. Annual averages are based on hourly autoGC data.

Benzene was removed from this APWL in January 2010.

APWL1207 – 1,3-Butadiene in Milby Park (Removed June 2009)

Annual average 1,3-butadiene concentrations at the Milby Park monitor were previously considered to be elevated. Although the annual averages were below the interim TCEQ comparison value, the concentrations were above the recommended long-term average concentration of 1 ppb from the USEPA's 2002 health assessment of 1,3-butadiene. The TCEQ has implemented a number of strategies in the Milby Park area to reduce 1,3-butadiene concentrations, including entering into voluntary ERAs with area companies. These agreements established specific timelines for facilities to implement additional controls, required the companies to install fenceline monitors and use the GasFindIR camera to identify leaks, and established a notification system that enabled the companies to immediately investigate their plant activities in response to elevated 1,3-butadiene levels monitored at Milby Park. The ERAs also resulted in substantial 1,3-butadiene emissions reductions that were incorporated into their air permits, making them enforceable. As a result of the actions in the Milby Park area, 1,3-butadiene levels at the Milby Park monitor are 87% lower in 2009 than in 2004 (see Figure 10). In addition, the TD released its own assessment of 1,3-butadiene in August 2008, which changed the long-term AMCV to 9.1 ppb. This assessment is a more up-to-date assessment of 1,3-butadiene toxicity and was peer-reviewed by world-renowned experts in the field of risk assessment. Therefore, because of the dramatic reductions in ambient concentrations of 1,3-butadiene at the Milby Park monitor and the TCEQ's updated AMCV, the TCEQ has determined that 1,3-butadiene is no longer considered to be a potential health concern in the Milby Park area.



* Incomplete sampling year.

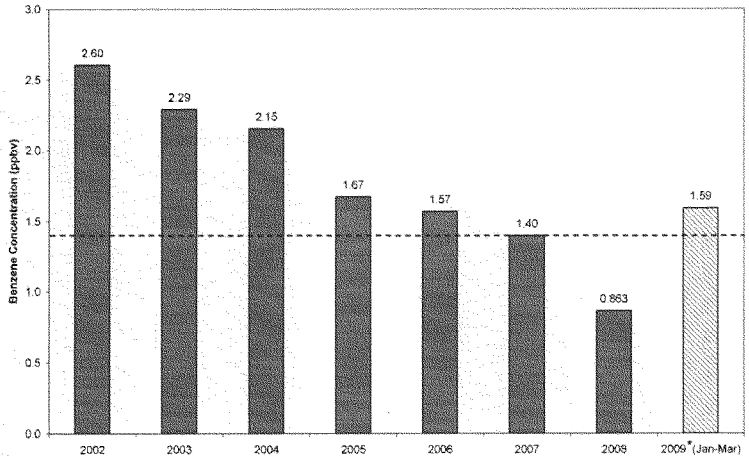
Figure 10. Annual average benzene concentrations at the Milby Park monitor, 2003-2009. Annual averages from 2000 to 2004 are based on every-sixth-day 24-hour canister data. Annual averages from 2005 to 2009 are based on hourly autoGC data.

Butadiene was removed from this APWL in June 2009.

Region 14 – Corpus Christi

APWL1402 – Benzene in Corpus Christi (Removed January 2010)

Benzene concentrations at the Huisache monitoring site had been elevated above the long-term benzene AMCV since monitoring began at the site in 1998 (see Figure 11). However, beginning in 2002, annual average benzene concentrations have indicated a seven-year downward trend, and the 2008 annual average benzene concentration of 0.86 ppb_v was below benzene's long-term AMCV of 1.4 ppb_v. Although the first quarter of 2009 appears to indicate increased benzene concentrations at the Huisache monitor, monitoring data from an industry-sponsored monitor located near the Huisache monitor indicate that benzene concentrations from March to September were much lower and would average out to be lower than benzene's long-term comparison value. Since the industry-sponsored monitor has historically been highly correlated with the TCEQ monitor, the TD expects to see the same trend at the Huisache monitor.



* Incomplete sampling year.

Figure 11. Annual average benzene concentrations at the Huisache monitor, 1998-2009. Annual averages are based on every-sixth-day 24-hour canister data. Data from 2009 only include the January to March period.

Benzene was removed from this APWL in January 2010.

Considered but Not Adopted

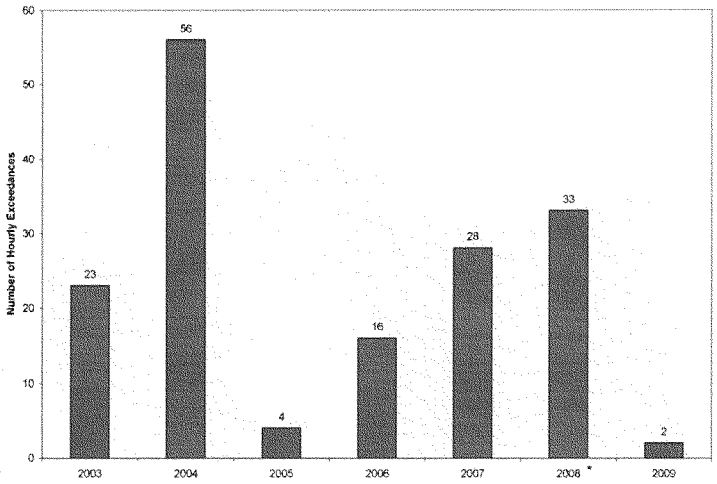
APWL1101 – Hydrogen Sulfide in Bastrop (Proposed August 2009)

The TD originally proposed the removal of H_2S and the Bastrop area from the APWL in August 2009. However, during the public comment period the TD was provided information regarding citizen odor complaints and an investigation by the Austin Regional Office. The information received indicated that H_2S is still a potential issue in this area. More detailed information is included on page 11 of this report.

The final decision to not remove H_2S from the Bastrop APWL was effective January 2010.

APWL1207 – Styrene in Milby Park (Proposed May 2009)

The TD originally proposed the addition of styrene to the Milby Park APWL because hourly styrene levels that exceed the odor threshold value were reported at the Milby Park air monitoring site with increasing frequency since 2005 (see Figure 12). The odorous styrene concentrations were highlighted in the 2003 through 2007 annual ambient air evaluations for Region 12. However, during the public comment period for this proposed addition, several factors were brought to the attention of the TD. Goodyear Tire and Rubber Company took steps during 2008 to address the source of the elevated styrene emissions detected at the Milby Park monitor. Specifically, they have altered operational practices, amended their permit to include a 25% reduction in allowable styrene emissions, and signed a voluntary emissions reduction agreement with the TCEQ. As a result of these efforts, there was only one exceedance of the odor-based effects screening level for styrene between July and December 2008 and the monitoring data available for 2009 show a consistent decreasing trend. Therefore, based on the proactive steps taken by Goodyear Tire and Rubber Company along with the downward trend in monitoring data for styrene, styrene will currently not be added to APWL1207; however, this area will continue to be monitored for improvement.



* Incomplete sampling year.

Figure 12. Number of hourly exceedances of the styrene odor-based air monitoring comparison value at the Milby Park monitor, 2003-2009. Data from 2003 to 2004 are based on every-sixth-day 24-hour canister data. Data from 2005 to 2009 are based on hourly autoGC data. Not all data from 2009 have been validated.

The final decision to not add styrene to the Milby Park APWL was effective June 2009.

Conclusions

Through proactive use of the APWL, the air quality in numerous areas in Texas has been greatly improved. Evidence of this improvement is apparent in the success stories mentioned in this report and the numbers of pollutants that have been removed from the APWL (see Figure 13). These successes, however, underscore the need for continued work in those areas that remain on the APWL.

As the TCEQ works to achieve emission reductions in these areas and additional monitoring data are collected and reviewed, the TD will reassess a chemical's listing on the APWL. Annual evaluations of monitoring data are provided on the TD Web site at http://www.tceq.state.tx.us/implementation/tox/regmemo/AirMain.html. The TD also maintains a list of interested members of the public, which receive an automatic email when updates are made to the Web site. To join this announcement list, members of the public should email join-tox@listserv.tceq.state.tx.us. In addition to these monitoring evaluations, the TD hopes to provide an updated annual APWL report, which will also be available online. During all stages of the APWL process, members of the public and/or organizations are encouraged to submit their recommendations for the addition and/or removal of chemicals from the APWL by submitting the online comment form found at http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/info.html.

Please contact the TD with any questions or comments regarding AMCVs, documents referenced in this report, or any other information in this APWL report via the toll-free main number at (877) 992-8370 or via email at tox@tceq.state.tx.us.

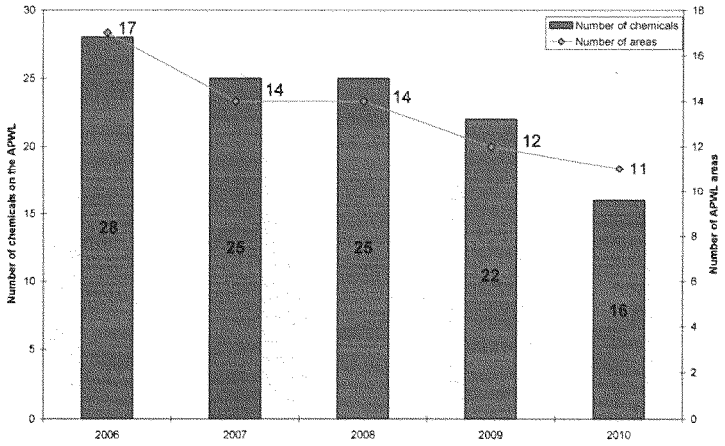


Figure 13. Number of chemicals on the Air Pollutant Watch List and number of areas on the APWL, 2006-2010.

Appendices 12 & 13

Booker Harrison - Re: Fwd: Re: EPA Endangerment Finding

From: Booker Harrison
To: Heinemann, Jackie
Date: 1/4/2010 10:18 AM
Subject: Re: Fwd: Re: EPA Endangerment Finding

Works for me.

>>> Jackie Heinemann 1/4/2010 10:07 AM >>>
Booker: Will you or someone from your section be in attendance at the briefing for Mark/Zak? I just need to confirm if 1/13 at 3PM will work for OLS staff who will attend.

Thanks.

Jackie

>>> Barbara Robinson 1/4/2010 9:52 AM >>>
Good morning, Jackie. Happy New Year to you too. Yes, 2009 just flew by.
Sorry, but the dates you suggest don't really work for Mark...would it be possible to schedule on Wed 1/13 at 3ish? I know it's Agenda day, but that looks to be the best I can offer for that week.
Please let us know.
Thanks,
Barbara

>>> Jackie Heinemann 1/4/2010 9:28 AM >>>
Barbara/Connie:

Hope all going well so far with your New Year. I still can't believe it is 2010.

Stephanie requested in the email below that I set up an internal briefing with Mark and Zak for the week of 1/11/10. Can you let me know a couple of times that look good for their schedules? I figure Booker may also attend, but will confirm who all from here will be there.

Here are some times that work well for Stephanie.

1/12 at 2PM
1/14 in PM
1/15 in AM

Thanks.

Jackie

>>> Stephanie Bergeron 12/30/2009 11:11 AM >>>
Jackie - can you set up briefing for week of 1/11?

John/Booker - can y'all track down deadline for challenging endangerment finding?

Thanks - SBP

Confidential/Attorney-Client Privileged Communication

>>> Zak Covar 12/30/2009 9:56 AM >>>
Please...this may be the one oag is interested in. Thanks
-----Original Message-----
From: Stephanie Bergeron
To: Covar, Zak <ZCovar@tceq.state.tx.us>
To: Vickery, Mark <MVICKERY@tceq.state.tx.us>

Sent: 12/30/2009 9:27:52 AM
Subject: Fwd: Re: EPA Endangerment Finding

I hedged on response as we have not discussed challenging endangerment finding, at least not to my knowledge, given all the other issues on our plate.

I can set upr briefing for y'all if you would like on this issue.

Thanks - SBP

Confidential/Attorney-Client Privileged Communication

>>> Stephanie Bergeron 12/30/2009 9:26 AM >>>
Hi Eric,

12:43 am?!

I do not have information for you at this time re: endangerment finding. But I will keep you posted on any developments after the new year.

And a happy New Year to you, as well!

SBP

>>> "Groten, Eric" < egroten@velaw.com > 12/30/2009 12:43 AM >>>
Good morning, all. Just a quick interruption to see whether y'all know if TCEQ/Texas is planning on petitioning for D.C. Circuit review of the endangerment finding?

I represent a national organization, Coalition for Responsible Regulation, Inc. and its members, which already has filed (in fact, we believe we were the first to file), and I'd like to begin the coordination process. Plus of course we would like to see State petitioners involved, and Texas is an obvious candidate. Any insights you can provide would be helpful, including the point of contact over at the Solicitor General's office, if you know who has this one.

With best wishes for a prosperous New Year,

Eric

Eric Groten
Partner
Vinson & Elkins LLP
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Austin, TX 78746-7568
Tel 512.542.8709
Home 512.284.7029
Fax 512.236.3272

Appendix 14

statesman.com

Lawyer representing Texas in environment and health suits has ties to industries

David Rivkin, a prominent conservative attorney, has lobbied for energy companies.

By **Asher Price**
AMERICAN-STATESMAN STAFF

Published: 9:49 p.m. Sunday, Feb. 27, 2011

A prominent Washington lawyer long connected to conservative causes is helping craft legal strategy for the State of Texas as it fights federal proposals on health care and environmental regulation.

The lawyer, David Rivkin , is working for free, but his firm, Baker Hostetler , represents at least one major health care company and several oil and gas companies, including ExxonMobil, that have pushed for lighter regulations.

Rivkin, 54 , worked as a paid lobbyist for at least one energy company through 2008. That fall, he ended a contract with Georgia-based Southern Co. , which has most of its operations in the Southeast, according to records with the Center for Responsive Politics , which tracks money in government.

As an attorney, he represents, among others, the Edison Electric Institute , a trade organization whose members serve more than 90 percent of the customers in the investor-owned segment of the electric utility industry, in a case on the consequences

of greenhouse gases.

Rivkin did not respond to requests for comment.

At a hearing of the Texas House Environmental Regulation Committee last Wednesday about the ongoing court cases between Texas and the federal Environmental Protection Agency, state Rep. Lon Burnam, D-Fort Worth , asked Deputy State Attorney General Bill Cobb about what kind of outside legal representation the state had sought.

Cobb told Burnam that Rivkin, who was already working with Texas and other states to fight federal health care reform, had "expressed an interest to be involved in our greenhouse gas litigation and volunteered his time to the State of Texas."

"Most of the work is done in-house, but we're grateful for the work of experts who live and work in D.C. and practice in front of those courts on a daily basis," Cobb said.

The attorney general's office does not seek outside help very often, spokesman Jerry Strickland said.

In one case, Texas is challenging the EPA over its greenhouse gas regulations. The state is the only one to refuse to comply with the new rules, which are the first attempts by the agency to regulate the emissions scientists say contribute to global climate change.

The state has a handful of challenges to the new greenhouse gas rules pending in the D.C. federal District Court.

The state says that the rules will cost jobs and are based on faulty science and that the EPA is overreaching its authority: Typically, the federal government delegates environmental permitting powers to state governments.

The EPA, in turn, has accused the Texas Commission on Environmental Quality of renegade behavior and said it would take over the regulation of greenhouse gases at large industrial facilities and refineries, mostly along the Gulf Coast.

"State officials in Texas have made clear that they have no intention of implementing this portion of the federal air permitting program," Al Armendariz , the Dallas-based regional administrator for the EPA, wrote in an open letter in December.

Efforts by Texas to delay a federal takeover of greenhouse gas permitting in the only state where the EPA has committed to such a move have failed.

History shapes outlook

Rivkin was born in the Soviet Union. He earned degrees from Georgetown and Columbia universities in the mid-1980s and got his start in the Reagan White House.

He rose to associate general counsel in the Department of Energy during the first Bush administration, and at the same time he served as special assistant for domestic policy to then-Vice President Dan Quayle .

Rivkin continues to be involved in high-profile causes: He is representing former Defense Secretary Donald Rumsfeld in a suit by al Qaeda operative Jose Padilla , who claims he was tortured while in custody.

Between 2001 and 2008, Rivkin lobbied on behalf of Southern Co., according to records at the Center for Responsive Politics. While it is impossible to track exact figures for how much individual Washington lobbyists are paid, in 2008 Southern Co. paid Baker Hostetler $190,000 for its lobbying work. Between 2001 and 2008, when Rivkin lobbied for Southern and worked at Baker Hostetler, Southern paid the firm $2.99 million.

According to federal campaign finance records kept by the center, last year Rivkin sprinkled $10,260 to 10 Republican candidates for federal office around the country.

"He's a very well respected lawyer who has talents in constitutional law," said Bill McCollum , the former Florida attorney general who partnered with Rivkin to spearhead a fight against the health care law.

On the grounds that it exceeds Congress' constitutional authority, at least 20 states, including Texas, are challenging the requirement that virtually all Americans obtain health insurance or pay a fine.

McCollum also used to work at Baker Hostetler, which counts among its clients Cardinal Health, an Ohio-based company that lobbied against parts of the health care law.

"You want an experienced attorney on that kind of matter," he said, adding that Rivkin handled oral arguments and attacks on the individual mandate portion of the law.

Rivkin, who has written for the Wall Street Journal and appeared on Fox News , was helpful in arranging media opportunities, McCollum said.

"David Rivkin has connections in Washington and the world," he said.

In an article in National Review Online in 2004, Rivkin wrote about how his personal history had shaped his policy outlook .

"I grew up in the Soviet Union, where the individual's interests were always subordinated to the whims of the state, and where the government was the law," he wrote.

At the committee meeting Wednesday, Cobb suggested that the two lawsuits had grown personal for attorneys.

"I know the attorneys donate their personal time to cases for causes they believe in," Cobb said. "There are some of us who believe that health care litigation and greenhouse gas litigation are some of the most important lawsuits that will be decided within our lifetime.

"There are, not surprisingly, attorneys lining up outside the door to donate their services to the State of Texas. In these trying economic times with the budgetary crisis facing the Legislature, we're happy to accept their services."

asherprice@statesman.com; 445-3643

Find this article at:

http://www.statesman.com/news/local/lawyer-representing-texas-in-environment-and-health-suits-1286848.html

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Appendix 15

statesman.com

Texas sues to stop EPA from regulating greenhouse gases

Perry and Abbott say rules would be based on bad science and put jobs at risk.

By **Asher Price**
AMERICAN-STATESMAN STAFF

Published: 7:31 p.m. Tuesday, Feb. 16, 2010

Texas fired off another salvo in a struggle with Washington over environmental regulation Tuesday, filing a suit in federal court to prevent regulation of greenhouse gases.

Gov. Rick Perry and Attorney General Greg Abbott are trying to get the federal Environmental Protection Agency to back away from a finding last year that greenhouse gases are a threat to public health. The finding sets the stage for regulation of the gases, which scientists have linked to global warming.

The Texas officials say curbs on greenhouse gases such as carbon dioxide could cost state businesses and homeowners and jeopardize jobs. Texas leads the nation in carbon emissions. And they argue that the EPA had based its finding on faulty science.

Carbon regulations would amount to "sweeping mandates and draconian punishments," said Perry, "undoing decades of progress, painting entrepreneurs as selfish and destroying hundreds of thousands of jobs in the process."

At least one other state — Alabama — has also filed suit in federal court, and Virginia is also asking the EPA to reconsider its stance. Some businesses and the U.S. Chamber of Commerce have filed similar suits.

Referring to recent controversies about findings by a U.N. panel of scientists, Abbott said the science on which the EPA based its finding was laced with "cover-ups, and the suppression and destruction of scientific evidence."

Among the controversies were e-mails from some climate scientists indicating that scientific journals that publish work by global warming skeptics should be shunned.

Abbott said that the international panel of scientists was "an unelected body pushing a political agenda," and in a petition for reconsideration filed with the EPA, says the "previously private e-mail exchanges among top (U.N.) climatologists reveal an entrenched group of activists focused less on reaching an objective scientific conclusion than on achieving their desired outcome."

On Tuesday, Texas also filed a similar petition for review with the U.S. Court of Appeals for the District of Columbia Circuit.

Texas scientists have forecast longer, more severe droughts and flooding along the Gulf Coast as the climate changes. State climatologist John Nielsen-Gammon , a professor of meteorology at Texas A&M University, said he was not consulted by the governor's office or the attorney general's office before the filing.

Environmental groups struck back.

Tom Smith , head of the Texas office of nonprofit watchdog Public Citizen, said the "overwhelming evidence" is that the globe is warming. (In a suit of its own, Public Citizen is trying to force Texas to regulate greenhouse gases.)

"There's always a debate about how fast, how soon, how bad," he said about climate science. But he said focusing on controversial scientists is "like saying that because a few kids fail school, the entire system is flawed."

Environmental groups say that a cap on carbon emissions would force states to invest in renewable power, such as wind and solar, creating new jobs.

The endangerment finding spun out of a 2007 U.S. Supreme Court ruling that the EPA had the authority to regulate greenhouse gases.

At least 16 states have banded together in a filing in support of the endangerment finding.

As he had done previously, Perry said Washington should look to Texas for ways to solve energy and environmental issues. He cited the state's "all-of-the-above approach," which encourages the construction of coal-fired power alongside wind turbines. Texas leads the country in wind power. About 6 percent of energy on the state electric grid last year was produced by wind, according to the Electric Reliability Council of Texas, which operates the grid.

Tuesday's actions are the latest sign of a profound rift between the Obama administration's EPA and Texas government officials and regulators about how to address environmental and energy issues.

Already, the EPA has threatened to take over the state's air permitting program that regulates emissions of industrial facilities. The federal agency has questioned whether the program has enough public participation and said it gives too much leeway to polluters.

asherprice@statesman.com; 445-3643

Find this article at:

http://www.statesman.com/news/texas-politics/texas-sues-to-stop-epa-from-regulating-greenhouse-245086.html

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Appendix 16

TEXAS CLIMATE NEWS

March 21, 2011 | A magazine about climate & sustainability

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- Feature Stories
- TCN Journal
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TCN Journal
[February 24, 2010]
A&M scientists back EPA finding on dangers of greenhouse gases

After Texas Attorney General Greg Abbott formally challenged the federal conclusion that greenhouse gases are harmful pollutants, the Houston Chronicle's Eric Berger asked if he had consulted with any of Texas' own "eminent climate scientists" before filing petitions that dismiss scientific conclusions about global warming as the product of "colluding and scheming."

[redacted] Abbott replied that he had not done so: "Not yet and here's why. At this stage we're not focused on, nor need we be focused on, needing to prove anything from a scientific basis ourselves."

Actually, it seems highly doubtful that the attorney general will want to consult members of Texas A&M University's Department of Atmospheric Sciences – a respected academic body in the field of climate science – if he's looking for Texans with the appropriate scientific expertise to help him make his legal case.

After Abbott filed Texas' petitions against the U.S. Environmental Protection Agency's "endangerment finding" regarding carbon dioxide and other heat-trapping gases, key members of the A&M department's faculty told the Washington-based Wonk Room blog that the department as a whole stands by the EPA's conclusion about greenhouse gases and by the principal conclusions of the international scientific body on climate change that Gov. Rick Perry's office, announcing Abbott's petitions, said had been "discredited."

Kenneth P. Bowman, who heads the A&M department, sent Wonk Room this statement:

"I believe that (the) EPA finding is based on good science, as do all of my colleagues in the Atmospheric Science Department here at Texas A&M."

John Nielsen-Gammon, a professor in the department and the Texas state climatologist, wrote to the blog:

"[It is] apparent that if atmospheric concentrations of the six greenhouse gases continue to rise due to human influence, the earth would eventually reach a point where there would be massive disruptions of ecosystems, changes in sea level, decreases in air quality, and so forth that would, in particular, substantially harm the public welfare of those generations forced to experience them. So anthropogenic increases of greenhouse gas concentrations clearly present a danger to the public welfare, and I agree with the EPA's findings in that sense."

Wonk Room blogger Brad Johnson asked Nielsen-Gammon about "specific risks relevant to Texas" from greenhouse emissions and received this reply:

"Potential Texas vulnerabilities include sea level rises, droughts, floods, estuarine ecosystems, and agricultural productivity. The possible adverse economic impact of future greenhouse gas emission control strategies on Texas industries also represents a risk associated with global warming."

Abbott's petitions, which he filed on behalf of Perry and other top state officials, particularly targeted for heavy criticism the Intergovernmental Panel on Climate Change. The IPCC is the world's most authoritative scientific body on the subject but has come under accelerating criticism in recent months over leaked or stolen emails and revelations of a few errors in its voluminous 2007 reports on global warming.

Andrew Dessler, another professor on the A&M department's faculty and author of "The Science and Politics of Global Climate Change," published by Cambridge University Press, told Wonk Room:

"I, along with all the other faculty in the department, agree with the main conclusions of the IPCC."

In late 2007, the 23 members of A&M's atmospheric sciences facultyunanimously endorsed the IPCC reports issued that year with a joint statement. It included the assertion that manmade climate change "brings with it a risk of serious adverse impacts on our environment and society."

Asked by Wonk Room if recent attacks on the IPCC's credibility have prompted any revision of that position by the Atmospheric Sciences faculty, Dessler replied that "the department stands by its (2007) statement. You can quote me on that."

Contacted subsequently by Texas Climate News, Dessler declined to elaborate further.

Another professor in the A&M department, Gerald North, told the Agence France-Presse news service at the annual meeting of the American Academy for the Advancement of Science last weekend in San Diego that climate science is "quite healthy" despite recent critiques tied to the IPCC's troubles.

"It's easy (to) vilify scientists, but scientists cannot go into the gutter and turn the attacks the other way," AFP quoted North as saying. "But the climate science paradigm is in fact quite healthy. We just have a lot of challenges about how we communicate."

– Bill Dawson

[Disclosure: Gerald North was an editor of The Impact of Global Warming on Texas, to be published by University of Texas Press. The book was commissioned by the Houston Advanced Research Center, publisher of Texas Climate News. The introduction was written by Bill Dawson, editor of Texas Climate News.]

Image credit: Texas A&M University

Recent

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- [TCN Journal]
  Texans play lead roles in GOP attack on climate regulations in Congress
- [TCN Journal]
  Advocates spotlight wind power's performance during rolling blackouts
- [TCN Journal]

Appendix 17

Climate Change Statement

We, the faculty of the Dept. of Atmospheric Sciences of Texas A&M, agree with the recent reports of the Intergovernmental Panel on Climate Change that:

1. It is virtually certain that the climate is warming, and that it has warmed by about 0.7 deg. C over the last 100 years.
2. It is very likely that humans are responsible for most of the recent warming.
3. If we do nothing to reduce our emissions of greenhouse gases, future warming will likely be at least two degrees Celsius over the next century.
4. Such a climate change brings with it a risk of serious adverse impacts on our environment and society.

- Kenneth Bowman
- Sarah D. Brooks
- Ping Chang
- Don Collins
- Don Conlee
- Andrew Dessler
- Robert Duce
- Craig Epifanio
- Rob Korty
- Mark Lemmon
- Shaima L. Nasiri
- John Nielsen-Gammon
- Gerald North
- Richard Orville
- Leo Panetta
- R. Saravanan
- Gunnar W. Schade
- Courtney Schumacher
- Russ Schumacher
- Istvan Szunyogh
- Thomas Wilheit
- Ping Yang
- Renyi Zhang

Appendix 18

WHAT STARTS HERE CHANGES THE WORLD
THE UNIVERSITY OF TEXAS AT AUSTIN

Climate Systems Science

Reality of Human Influence on Global Climate

We, the members and colleagues of the Jackson School of Geosciences program in Climate Systems Science, agree with the scientific assessment presented in reports by the Intergovernmental Panel on Climate Change that

1. Warming of the climate system is unequivocal, as is now evident from observations of increases in global averaged air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.

2. Most of the observed increase in global averaged temperatures since 1950 is very likely due to the observed increase in greenhouse gas concentrations from human activity.

3. Global warming and sea level rise will continue for centuries due to the time scales associated with the climate system, even if greenhouse gas concentrations were to be stabilized.

4. These anticipated changes in regional and global climate could have severe adverse impacts on the environment and society.

For more information about the JSG program in Climate Systems Science click here.
Jay Banner
Donald Blankenship
Rose Came
Ginny Catania
Kerry Cook
Robert Dickinson
Rong Fu
Lindsey Gulden
Kelly Hereid
Seungbum Bryan Hong
Charles Jackson
Xiao Yan Jiang
Shao Ping Lu
Guo-Yue Niu
Jud Partin
Terry Quinn
Jessica Rasmussen
Enrique Rosero
Nicole Smith-Downey
Hua Su
Fred Taylor
Michael Tobis
Ned Vizy
Zong-Liang Yang

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Supplemental Materials

Clean Air Act (CAA) – Greenhouse Gas (GHG) Regulation Timeline

- 1990 – (May) Intergovernmental Panel on Climate Change (IPCC) First Assessment Report confirms the scientific basis for climate change

- 1992 – (Oct) President Bush signs the **Rio Treaty on the Environment**, which commits the United States to reduce its GHG emissions to 1990 levels by the year 2000

- 1999 – (Oct) EPA is petitioned to regulate global warming pollution under the CAA

- 2003 – (Aug) EPA denies the petition on the grounds that the CAA does not give it the authority to regulate carbon dioxide and other GHGs "for climate change purposes"

- 2003 – (Oct) Environmental groups, joined by a dozen states and three cities, challenge that decision

- 2005 – (July) Federal appeals court for the D.C. Circuit vote 1-1-1 upholding EPA's position (one justice cited lack of standing)

- 2007 – (Apr) **Massachusetts vs. EPA**: the Supreme Court rules that GHGs meet the standard of an air pollutant under the CAA, and are thus subject to regulation by EPA

- 2007 – (Dec) EPA Administrator Johnson emails a finalized endangerment report to the White House Office of Management and Budget, but to avoid moving ahead with the formal regulatory process – thus making the documents public – the Bush Administration refuses to open the email detailing the EPA report

- 2008 – (July) EPA Administrator Johnson releases a final Advanced Notice of Proposed Rulemaking (ANPR) concerning GHG regulation

- 2009 – (Dec) *Reaching the same conclusion as her Bush Administration predecessor,* EPA Administrator Jackson signs two distinct findings regarding GHGs under section 202(a) of the CAA: Endangerment Finding and Cause or Contribute Finding related to finalizing the GHG standards for light-duty vehicles

- 2010 – (Apr) *Following the requirements of* ***Massachusetts vs. EPA*** *and the CAA,* EPA finalizes the Light-Duty Vehicle Greenhouse Gas Emissions Standards, which encompass pollution-control regulations for carbon dioxide for automobiles and small trucks

- 2010 – (May) EPA issues the final GHG Tailoring Rule, which smoothes implementation of the Prevention of Significant Deterioration (PSD) program provisions to the largest stationary sources of global warming pollution — stationary power plants, large factories and other industrial facilities

- 2010 – (Dec 1) EPA releases State Implementation Plan (SIP) Call Rule for GHG emissions; EPA finds that PSD permitting regulations in 13 states do not meet CAA requirements because their programs currently do not cover GHG emissions; EPA requires those states to change their laws and submit those changes as a part of a revised SIP for review and approval; EPA's SIP Call Rule gives these 13 states up to one year to change their laws; Texas alone, among all other states, refuses to cooperate with EPA's efforts to apply GHG requirements in the PSD program and thus does not select a SIP submittal date; EPA assigns Texas a SIP submittal date of December 1, 2011

- 2010 – (Dec 30) EPA rescinds part of the SIP because the state did not meet the minimum requirements of the CAA and issues Texas the following: Error Correction Rule, Partial Disapproval and Federal Implementation Plan, which provides federal authority for issuing PSD permits covering GHG emissions

- 2011 – (Jan 2) The requirement that the largest sources of GHG emissions obtain PSD permits takes effect across the United States

The CHRISTIAN SCIENCE MONITOR

Is EPA greenhouse-gas plan a job killer? History might offer clues.

EPA plans to regulate greenhouse-gas emissions in the US have some industries forecasting an economic 'train wreck.' But several economists say history does not support that view.

By Mark Clayton, Staff writer / March 2, 2011

Jobs versus the environment.

It's a political debate that goes back decades and is again ramping up as Republican lawmakers square off with the Obama administration over whether to prohibit the Environmental Protection Agency from regulating greenhouse gases under the Clean Air Act of 1990.

Critics of the new EPA regulations are claiming that the measures will undermine the weak-as-a-kitten economic recovery, perhaps leading to a million or more lost jobs in coming years. But a cadre of economists trying to puncture that widely held view – which they call a persistent "myth" – are turning to history in an attempt to show that the impact of environmental regulations is far more positive than negative.

The argument against new laws was on display in congressional hearings Tuesday. Mike Carey, president of the Ohio Coal Association, told a House panel that the EPA greenhouse-gas regulations that were set to take effect this month – but were delayed by the agency Tuesday – are a looming "train wreck" for the economy.

Citing three independent studies, he said the regulations would mean "77 percent of all coal mining jobs in America disappear by 2030." A further study by the American Council for Capital Formation, a Washington think tank, found that legal and other uncertainties caused by EPA greenhouse-gas regulations could result in a loss to the economy of as much as $75 billion and 1.4 million jobs by 2014, Mr. Carey added.

History's lessons

But history throws doubt on claims of massive job losses from air-pollution regulation, say economists who have studied the issue for years.

"Experience since the 1970s – from air-pollution controls to appliance-efficiency standards to auto fuel-economy rules – makes clear that well conceived and executed carbon regulation will not only stimulate technological innovation but can be implemented cost effectively and in many cases lead to actual decreases in the purchase, installation, and operating costs of key technologies," Dan Reicher, executive director of

The CHRISTIAN SCIENCE MONITOR

the Steyer-Taylor Center for Energy Policy & Finance at Stanford University, told the committee.

China, Germany, Japan and others are all now committed to controlling carbon emissions through various means and "have grown a massive clean energy industry – measured in the trillions of dollars and millions of jobs – that was once led by the US," Dr. Reicher said.

The US Clean Air Act offers insight into the impact of environmental regulations on the economy, says Eban Goodstein, director of the Bard Center for Environmental Policy. It did reduce jobs in certain industries, but that has been outweighed by health benefits and new jobs in non-polluting industries, he suggests.

He argues that industry groups arrive at their alarming economic figures by using economic models that are overly sensitive to energy prices. "They do it – not by looking at layoffs in a particular industry – but by postulating economywide layoffs due to higher energy costs," Mr. Goodstein adds. "There's just no evidence."

Widespread predictions of massive job losses preceded EPA's move in the early 1990s to curb sulfur-dioxide emissions from power plants. Layoffs did follow – about 2,000 people per year, mostly coal miners, says Goodstein. At the same time, manufacturing jobs related to pollution-control equipment increased.

1 percent of GDP

Other economists say any negative impact from new greenhouse-gas regulations would be similarly small – on the order of less than 1 percent of gross domestic product.

"It doesn't have a big impact on the economy or jobs," says Dale Jorgenson, a Harvard University economist. "That's not to say you can't find specific cases where someone imposed a reduction of gas emissions and it didn't affect someone's jobs. These kinds of regulatory changes do reconfigure the economy."

He suggests that the cap-and-trade bill abandoned by Congress last year would have been a more efficient way to maximize gain and minimize loss from greenhouse-gas regulations. But the EPA's across-the-board measures are no job killer, Mr. Jorgenson says.

Spokespeople for coal and other industries reliant on fossil fuels "are simply presenting a point of view intended to affect legislation," he says. "They think Congress cares about jobs most right now, so they are coming up with stories about huge job losses they think will resonate. I wouldn't say there is any academically respectable support for that view."

Texas Digest: Climatologist says Texas getting hotter; ties examined between Houston officials, contractor

COMPILED FROM WIRE REPORTS

Published: 11:19 p.m. Tuesday, Oct. 5, 2010

HOUSTON

Ties of officials, contractor examined

Dealings between Houston City Council members and a security contractor have drawn scrutiny from the Harris County district attorney's office.

Prosecutors issued a subpoena to City Attorney David Feldman for information on possible unethical conduct by unidentified council members and "inappropriate contact" between them and Elite Protective Services.

The Sept. 7 subpoena also demanded any information on ordinance violations by city officials who used their positions for financial benefit, the Houston Chronicle reported Tuesday.

Feldman said the city has complied with the subpoena and provided all relevant documents. He declined to comment further.

The city hired Elite in 2009 as a subcontractor through a minority business program to work under two major contracts worth more than $66 million. The primary contractor, Florida-based Wackenhut, hired Elite to perform 15 percent of the work under one contract and 12.5 percent of the work under the other, the newspaper reported.

WEATHER

Climatologist: Texas getting hotter

Triple-digit temperatures will be the norm in Texas within a few decades, and 115-degree heat won't be surprising, according to the state climatologist.

Texas A&M University atmospheric sciences professor John Nielsen-Gammon said recently that models he's analyzed show temperatures rising as much as 1 degree each decade, meaning that by 2060, temperatures around the state would be 5 degrees higher than now.

Every region of the state will become warmer, although East Texas is expected to be less affected than the rest, he said.

Temperatures have been rising since the 1970s, which was the coldest decade in Texas' recorded history, he said.

Two unusually warm summers — in South Texas in 2009 and North Texas this year — are signs of what's ahead, he said.

A recent A&M news release said the heat could bring water shortages, more severe droughts, crop failures and more difficulty controlling air pollution.

The New York Times
Green
A Blog About Energy and the Environment

MARCH 18, 2011, 1:25 PM

Delay in Coal Pollution Rules Took Toll in Lives

By JOHN COLLINS RUDOLF

A tough new pollution standard for power plants proposed this week by the Environmental Protection Agency will cost utilities at least $10 billion, and several companies have already signaled that they will close aging coal plants rather than upgrade to meet the new standards. The new rules require major reductions in mercury, arsenic and other hazardous emissions.

Associated Press A generating plant in Thompsons, Tex.

Yet while industry may howl over the costs, the utilities can hardly be surprised: the pollution controls have been in the works since at least 1990, when President George H.W. Bush — with broad bipartisan support in both houses of Congress — signed into law sweeping amendments to the Clean Air Act requiring the E.P.A. to take aggressive steps to identify and curb major sources of hazardous air pollution, including emissions from power plants.

That it would take more than 20 years for federal regulators to finally propose toxic emissions standards for the power industry is testament to both the slow wheels of bureaucracy and the clout of the nation's utility and coal interests, which bitterly — and for years, successfully — fought the controls, even as other industries bowed under.

Former E.P.A. officials involved in the development of the power plant regulations in the 1990s and 2000s acknowledged that the long delay in controlling toxic emissions from power plants had taken a toll in human lives.

"This is long-unfinished business," said John Bachmann, who retired as associate director for science and policy for the E.P.A.'s Office of Air Quality Planning and Standards in 2007, after more than 30 years with the agency. "We've lost some opportunities, and it's cost thousands of lives."

During the Clinton administration, Mr. Bachmann said, a Congressional mandate to develop controls for mercury and other toxic pollutants from power plants was initially set aside so that the agency could focus on curbing industry emissions of nitrogen and sulfur oxides, which cause acid rain, through an ultimately successful cap-and-trade program.

"The whole idea was to hit these guys hard on acid rain and figure out what to do about the rest of the stuff later," he said. "The thing got put off on purpose by a political

calculus."

In the mid-1990s, when the agency at last began developing standards for mercury — then identified as the power plant emission of greatest concern — they were met by stiff resistance by industry groups, which financed and publicized independent studies and reports casting doubt on the public health threat of mercury contamination.

"They put a whole lot of money into campaigns to make mercury look innocuous," said Philippe Grandjean, a professor at the Harvard School of Public Health and expert on mercury pollution.

The industry campaign found willing ears in Congress, which responded to a comprehensive 1998 report by the E.P.A. conclusively linking mercury emissions from power plants to cognitive harm in developing fetuses by demanding an independent study by the National Research Council — one that would take another two years to produce.

That study, delivered to Congress in July 2000, yielded yet another damning verdict on mercury, which was clearly seen to pass from contaminated fish to humans and cause harm to fetuses. In the report's wake, even industry groups seemed to wave the flag of surrender.

"We wanted this issue about mercury to be settled based on the best science available, and that's essentially what the academy has done," Paul Bailey, vice president for environmental affairs at the Edison Electric Institute, the utility industry's largest trade group, said at the time.

"We expect the E.P.A. to decide that they are going to regulate mercury from us," he said. "What we're focused on is working with them to fashion a program that makes sense."

In December 2000, the E.P.A. listed power plants as sources of hazardous air pollution under the Clean Air Act, a critical and largely irreversible step on the path toward setting standards for pollution controls.

Yet while the die was seemingly cast for regulation of mercury and other toxic emissions, under the incoming George W. Bush administration, the effort to control power plant pollution would again falter.

During Mr. Bush's first term, legislation was developed to create a cap-and-trade program for mercury, similar to the program that had successfully reduced acid rain pollution in the 1990s. But despite Republican control of both houses of Congress and the White House between 2002 and 2006, the legislative effort on mercury failed.

With the threat of legal action by states and environmental groups looming, top E.P.A. officials took the unorthodox step of reversing the Clinton administration's December

2000 listing of power plants as sources of hazardous air pollution. The delisting allowed the agency to implement the industry-favored cap-and-trade program for mercury through administrative fiat.

But even before the decision was made, E.P.A. attorneys warned top officials that the move was in all likelihood illegal and would almost certainly be reversed in the courts.

"The lawyers basically advised them that they were going to lose," Mr. Bachmann said. "It was wishful thinking, and it didn't work."

Indeed, within months of the decision a coalition of states and environmentalists sought to overturn the decision through a federal lawsuit. In February 2008, a federal judge ruled in the groups' favor, giving the E.P.A. three years to develop the pollution standards in accordance with federal law.

On Wednesday, the agency met their court-ordered deadline, issuing the proposed rules. The regulations are expected to be made final by the end of the year, and utilities will then have three or four years to comply. By the E.P.A.'s calculus, the pollution controls will prevent 17,000 premature deaths and 11,000 heart attacks per year once fully implemented.

For clean air advocates, the release of the rules is a milestone. But for some they will have come too late.

"This could have been done 20 years ago," Mr. Bachmann said. "These delays, as they've mounted up, have had a cost in people dying sooner. And it's not trivial."

statesman.com

Texas environmental keeps soft touch in regulating industry

Legislative review likely to air what observers say are major issues lingering since 2003 audit.

By **Asher Price**
AMERICAN-STATESMAN STAFF

Updated: 1:30 a.m. Sunday, Nov. 7, 2010
Published: 10:51 p.m. Saturday, Nov. 6, 2010

In the seven years since the state auditor issued a report highly critical of the Texas Commission on Environmental Quality, little has changed.

The agency's coziness with industry and its reliance on weak penalties continue unabated, abetted by state lawmakers. And its laissez-faire regulatory style has led to an unprecedented threat by the Environmental Protection Agency to take over the state's permitting of industries that pollute the air.

In the latest example of the sort of emission "events" that have concerned critics, a BP refinery in Texas City — the company's largest in the world — pumped 500,000 pounds of toxic chemicals in the air, including cancer-causing benzene, after a piece of equipment broke. Rather than taking the expensive step of shutting down production to make repairs, engineers tried for 40 days to burn the chemicals off.

That incident led to a state lawsuit against BP — the second filed by Texas Attorney General Greg Abbott in as many years.

Though Texas leads the nation by some pollution counts, the environmental commission's official mission ("protect our state's human and natural resources consistent with sustainable economic development") makes for a difficult balancing act.

The agency will come under review in December by the Legislature's Sunset Advisory Commission, which regularly evaluates state agencies to determine whether they should continue to exist.

No one expects the commission to be eliminated — with 3,000 employees and a $466 million budget, it is the second-largest environmental department in the world, after the EPA. But the sunset process may spotlight some of the practices that have come under fire from critics.

Fines are 'peanuts'

In the 580-page self-evaluation form it sent the sunset commission, the state environmental agency trumpets the record number of civil cases it brought in 2009. It beefed up its participation in criminal enforcement against polluters, paying for a special environmental prosecutor at the Travis County district attorney's office. It also followed the advice of an internal committee in making some of its procedures more efficient and increasing the number of fines.

But it has failed to follow through on recommendations to toughen its compliance policies and penalties, which the 2003 state auditor's report said are too small to be effective against polluters.

"Companies are not going to comply if it's cheaper to violate the law," said Wendy Wagner, who teaches environmental law at the University of Texas. "You're really not zapping them enough to get them to come into compliance in the future. You're actually doing the opposite, if they act as rational profit maximizers."

Agency Chairman Bryan Shaw counters, "The TCEQ has a robust enforcement process that works well."

Indeed, the 1,756 administrative penalties it issued last year are the highest ever. But those penalties amount to less than $8,000 each, on average — small change for the multibillion-dollar companies that the state regulates and that the agency counts among its "customers" in official literature.

For years, the agency has resisted raising fines and penalties for habitual polluters. The Legislature, for its part, still caps the agency's administrative penalties at $10,000 for each violation per day, regardless of severity.

"While ($10,000) is a huge penalty for Joe's Dry Cleaners or the local Sack and Pack gas station, it's peanuts to a global petrochemical company when otherwise facing possible plant shutdown for noncompliance," Larry Soward, then a commissioner, said at a conference of environmental lawyers in 2009.

That figure is a fraction of the federal government's cap ($37,500 , which can be levied in addition to a state penalty) as well as those set by neighboring and similar-size states.

Louisiana has a statutory maximum of $32,500, according to Jean Kelly, a public information officer for the Louisiana Department of Environmental Quality . In California, the Air Resources Board can fine a corporation up to $1 million per day per violation.

"Where's the teeth?" asked Walter James, a Texas-based environmental lawyer who writes the Environmental Crimes Blog . "I don't think (the TCEQ has) been doing enough enforcement. That's a pure function of (the philosophy) of TCEQ, which is looking more for cooperation and compliance than sticks."

Tougher penalties might have changed BP's decision in April and May to continue refinery operations after a fire broke out on a crucial device that traps toxic chemicals. Instead, the company burned the gases in a smokestack, in the process belching 17,000 pounds of benzene, a potent carcinogen; 37,000 pounds of nitrogen oxides, which can contribute to respiratory problems; 186,000 pounds of carbon monoxide; and 262,000 pounds of other gases over 40 days, according to a final report from the company.

The attorney general, acting on a referral from the environmental commission, is seeking a judgment of up to $25,000 per day per violation. (The amount the attorney general can seek in fines from a judge is higher than the administrative penalty environmental commissioners can levy.) But that total penalty is likely to pale in comparison to the $10 billion sought in a separate, class-action lawsuit filed on behalf of residents who breathed the toxic chemicals.

BP, a repeat violator of federal and state environmental and safety laws — a 2005 explosion at the Texas City refinery killed 15 workers — was fined $662,650 by environmental commission in 2009, putting it in the midrange of the largest fines assessed by the agency that year. Meanwhile, its parent company earned profits of more than $16 billion.

"You can't solely rely on people willing to comply, and you have to have an effective hammer if they don't," said Soward, now a paid consultant for Air Alliance Houston, a coalition of environmental groups. "It's still one-sided at this point."

Almost meekly, the agency's staff has suggested that the Legislature increase the maximum penalty for severe violations. "The TCEQ has been limited under the current statutory maxima to appropriately address violations of short duration but that result in a significant impact to the environment or public health," the self-evaluation report to the sunset commission notes on Page 483.

The upshot, environmentalists say, is that violating environmental rules and paying weak penalties will persist as standard business practice among some companies.

Paul Sarahan, who represents industries and utilities at the Fulbright & Jaworski law firm, disputes that notion. "I have never encountered a client who said or in any way indicated by their actions that the cost of enforcement was a cost of doing business," said Sarahan, who worked at the environmental commission from 1994 to 2005 .

Soward, however, said it's "common sense" that if a business were trying to decide on a course of action, it would look at all the costs.

"Do I think corporate managers sit around saying it's always cheaper to violate? No. But in particular circumstances, if it costs half a million dollars to shut down a unit as opposed to paying a $10,000 fine? That's a no-brainer."

Tough measures scuttled

The commission is not alone in its reluctance to crack down on polluters; the Legislature has hobbled the agency at every turn.

Take the issue of compliance history, which the agency considers when assessing fines against polluters. A history of failure to comply with state law can result in greater penalties.

In 2007, state Rep. Dennis Bonnen, R-Angleton , at the time chairman of the House Environmental Regulation Committee , wrote a proposal that protects repeat violators, by removing from their compliance record those violations "due to the same root cause from two consecutive investigations" within five years. It became law as part of a wide-ranging air bill.

The legislation had the support of key industry groups and companies that were also pressing the environmental commission to abandon an effort to revamp its penalty policy.

One of the penalty issues was whether to use an obscure, but key, regulatory approach termed speciation. Basically, speciation holds a polluter responsible for each type of chemical released during a violation; this is the approach used by the EPA. By contrast, the state treats multiple chemical emissions as a single violation, punishable with a single penalty.

In the spring of 2007, John Sadlier, head of the agency's Office of Compliance and Enforcement talked with David Preister, an attorney in the natural resources division at the state attorney general's office, about whether commission could speciate. "He said the commission can speciate if it wants to," Sadlier remembers. "It's certainly not prohibited in law."

In fact, the state attorney general's office itself speciates environmental violations. And Bill Cobb, special assistant and senior counsel to the attorney general, said "no polluter has challenged the legal filings" that speciate.

On July 24, 2007, the environmental agency's executive director, Glenn Shankle, issued a memo that instructed its Office of Compliance and Enforcement to speciate because it would "provide an appropriate deterrent effect."

During that period, pollution events by a half-dozen companies were parsed this way, leading to higher penalties.

For example, with speciation, the assessed penalty for unlawful air pollution at a Shell Oil refinery in Harris County on July 19, 2007, was $40,000. Because of "poor operations practices" 41,000 pounds of sulfur dioxide had been released into the atmosphere, exceeding levels protective of human health or the environment, according to investigators, as well as tens of thousands of pounds of carbon monoxide and other pollutants. Had the environmental commission not speciated, according to Bryan Sinclair , head of enforcement, the penalty would have been $10,000.

But the speciation method was soon squashed. In March 2008, in advance of a commissioners' workshop on penalty policy, Shankle met with Pam Giblin and Matt Kuryla, Baker Botts lawyers representing the Texas Industry Project, a group of about 50 chemical, oil and gas, and utility companies, according to his records.

And in May, the agency's commissioners decided to abandon the tougher measures.

"I'm going to be uncomfortable approving speciated findings until I get some additional comfort here,"

Shaw said .

"We've never finished that discussion," Sadlier said.

Shankle left the agency that summer, and by 2009, he was lobbying for some of the same companies Giblin represented. He did not return calls for comment.

How Texas stacks up

Gov. Rick Perry, who selects the agency's three commissioners, has railed against more stringent environmental regulations handed down by Washington, arguing that they will handcuff business.

Companies and their lawyers argue that Texas is tough enough on polluters.

Compared with other states, "Texas is not egregiously short on (the enforcement) front," said Tracy Hester, a University of Houston law professor who represents industries for Bracewell & Giuliani and who until recently chaired a committee on environmental crimes and enforcement at the American Bar Association.

But several studies that compare spending by states on enforcement suggest otherwise.

One, by the Environmental Council of the States, a Washington nonprofit , compared environmental spending between fiscal 2005 and 2008 and found that Louisiana, another state with a large petrochemical industry, spent a significantly higher portion of its budget on compliance issues than Texas did.

A 2009 Notre Dame Law Review article comparing 15 states found that Texas spends less on environmental programs than all but one on a per capita basis. The authors, examining the years 2000 to 2003, found that Texas spent an average of $14.72 per capita on environmental programs; Florida, the only other Gulf Coast state in the study, spent $30.75 per capita.

The authors concluded that state environmental spending is strongly associated with effective compliance.

"The data indicates that Texas is one of the worst-performing states in terms of sources being in compliance with permit requirements," said Victor Flatt, one of the co-authors .

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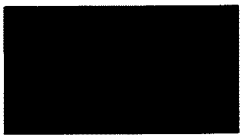
Find this article at:

http://www.statesman.com/news/statesman_focus/texas-environmental-keeps-soft-touch-in-regulating-industry-1027420.html



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Attacks on EPA Led by Group that is Linked to Owner of Largest Private U.S. Coal Reserves

December 21, 2010 | Posted by **Vickie Patton** in Greenhouse Gas Emissions, Policy

EDF General Counsel Vickie Patton reveals how the state of Texas and Big Coal are prime movers behind a legal campaign attacking EPA's greenhouse gas pollution cuts for smokestacks and tailpipes.

On December 10, the Court of Appeals for the District of Columbia rejected a request that it stay the Environmental Protection Agency (EPA) from implementing some common sense rules to curb greenhouse gas emissions.

Environmental Defense Fund (EDF) and its allies worked for months to help defeat that request. Our allies included the Attorneys General of 19 states, numerous business organizations, and other environmental groups like Natural Resources Defense Council, the Sierra Club, and Earthjustice.

The attempt to shackle EPA was supported by the Coalition for Responsible Regulation, the state of Texas, and powerful groups like the National Petrochemical and Refiners Association. They are the prime movers behind a legal campaign to invalidate every national greenhouse gas pollution control measure that has been adopted to date.

Last year, in December 2009, an attorney representing the Coalition for Responsible Regulation sent an email to Texas government officials. EDF obtained that email [PDF] through the Texas Open Records Act. The email encouraged a legal challenge to EPA authority under the Clean Air Act, and requested that Texas and the Coalition:

"begin the coordination process"

But who, or what, is the Coalition for Responsible Regulation? It appears to be closely linked to the largest private owner of coal reserves in the country.

The Coalition's purpose, according to its articles of formation, is:

"To pursue such administrative and judicial avenues as appropriate to ensure that the Clean Air Act is properly applied to greenhouse gases."

But "properly applied," in this instance, means NOT applying our clean air laws to greenhouse gas pollution.

State records show that all three members of the Coalition's board of directors share the same Houston address as the Quintana Minerals Corporation – though none of the Coalition's incorporating papers mention the company. Bloomberg Businessweek says that one of those members, Charles H. Kerr, has been an executive with the Quintana Minerals Corporation since 1983.

Quintana Minerals is owned by Corbin Robertson Jr. and his family. It is the nation's largest private holder of coal reserves.

Robertson is a contributor to Texas politicians like Gov. Rick Perry, Attorney General Gregory Abbott and U.S. Rep. Joe Barton (who memorably apologized to BP for the White House's investigation of the Gulf oil spill) — politicians who are committed to hobbling an EPA that uses rigorous science to regulate harmful pollution.

According to the Washington Post, Robertson has also joined forces with H. Leighton Steward (a well-known climate change denier) to campaign against climate science through two peculiarly named pressure groups — "CO2 is Green" and "Plants Need CO2."

The Appeals Court ruling on December 10 temporarily freed EPA to fulfill its mandate, under the Clean Air Act, to protect human health and the environment by cutting harmful forms of pollution. EPA will start by limiting greenhouse gas emissions from new power plants and factories on January 2.

Also, EPA's clean car standards will require lower emissions from new automobiles, which will get better mileage as a result. The new standards will cut America's oil consumption and help the auto industry grow. American automakers, in their own filing to the court, said the attempt to stop EPA from implementing their new standards:

"would result in tremendous hardship" to the entire industry.

But sensible EPA actions like these are under continuing legal (and, with the new Congress, legislative) threat from the Coalition and its allies.

In fact, Texas has already jumped to the Fifth Circuit Court of Appeals, in New Orleans, to again ask for an immediate stay on implementation of EPA's greenhouse gas rules. EDF and its allies are moving quickly to oppose this request.

Mr. WHITFIELD. Thank you, Mr. Marston.

Ms. White, you're recognized for 5 minutes.

STATEMENT OF KATHLEEN HARTNETT WHITE

Ms. WHITE. Thank you. I, also, would like to add I was chairman and commissioner of the Texas Commission on Environmental Quality for 6 years previously, and I've observed comments—my comments, in part, come from observing EPA actions over 25 years. And this is not business as usual.

On March 4th an editorial in the Wall Street Journal referred to an—EPA's unprecedented regulatory spree. And I—I very much agree that I have never observed in the 40-year history of EPA what is going on now. Not merely issues like greenhouse gas regulations which get, appropriately, most of the headlines but the number of major rules now with billion-dollar impacts at EPA's own estimate and not merely million-dollar impacts, all of which have an effective date which may converge in the very near future, like 2012 to 2015. And part of the written testimony that I submitted has a time line, which shows the magnitude of these rules.

So, I want to offer to this hearing something a little different, which, because of confines of time, will be very brief. It's highlights of 10 of these I call "mega-major rules." And as an alarm bell that most people would view from a source which has no vested interest in the issue, the National Electric Reliability Council, NERC, on the basis of an analysis of only four of these rules, NERC concluded there's a risk of loss of up to 77 gigawatts of electricity in this country by 2015. Other studies, one done by Credit Suisse and others have found that those are actually conservative numbers and that perhaps 100 gigawatts of U.S. electricity could be lost.

On the State level, for those NERC numbers means a risk of a loss of about 5700 megawatts of Texas electricity. This is a growing, growing State, our population and economically. ERCOT, Electric Reliability Outfit in Texas, projected this State needs up to 183,000 megawatts of electricity by 2020 to meet demand at that time. So, if—I think that it is fair to say from what most of you, as disinterested sources, the magnitude of impact of the EPA rules that are coming down the pike now is something we have never experienced.

As many have said here before, I would also like to draw attention to the extraordinary record of economic improvement in Texas. This city, Houston, Texas, home of the Nation's petrochemical complex, with a Gulf climate that is—uniquely enhances ozone formation, did what almost no one would predict on the basis of what was really a statewide effort. Everybody worked, in my opinion. The State legislature, the Texas Commission on Environmental Quality, industry invested billions, State and local government, voluntary groups. It's really an extraordinary. The day when I was chairman that we finalized the plans for Dallas—in 2007 for Dallas and Houston, I believe it was no more than two weeks later EPA proposed a significant change in that standard. So, the goal post continually goes over.

But for reasons of very little time, just let me go very quickly through the ten rules coming down the pike, either adopted, proposed, or amended. Of course, EPS's greenhouse gas regulation.

The Clean Air Transport Rule, which in EPA's own estimate would cost about—the private sector about 7 billion.

The Cooling Water Intake Structure Rule would impact about 444 electric-generating plants. That's 30 percent of the national capacity, with potential costs of 64 billion. That rule would be to prevent fish "impingement" and has no real human health impact.

The Coal Combustion and Residual Rule, affecting the units of disposal of fly ash, bottom ash, and residuals after coal combustion. The EPA has not decided whether they may classify those materials now used as valuable materials in road materials, in drywall, and other things. EPA may classify them as solid waste or either hazardous waste. The estimate on the cost of compliance if solid waste is 43 billion and if it's hazardous waste, perhaps 80 million.

We proposed just last week what is called the "Utility Maximum Achievable Control Technology Rule." It's probably the whopper of them all. A 900-page rule to control emissions of mercury and hazardous air pollutants have cost estimates of over 100 billion.

The NERC report, that this risks perhaps 15 gigawatts of electric utilities.

And then all the new ambient air quality standards. Never has EPA taken on changes in four of the national standards for four criteria pollutants: Ozone, PM, sulfur oxides, and nitrogen oxides.

The ozone proposal would, pending and could be finalized at any time, according to congressional research service, would increase the number of non-attainment counties in the Nation from about—from currently about 85 to 650 of the approximately 3,000 counties in the country. For Texas that might mean going to eight or twelve non-attainment counties, including Brewster County, Texas, which is about the most sparsely populated part of the country.

I won't go into particulate matter but now, because of rule changes several years ago, actually country dust is not immune to control measures under a particulate standard. And the EPA has even mentioned that no-till days may be something that Texas farmers face in the future.

Utility Boiler Rule, one of many of these rules that have the intense opposition from organized labor, the United Steel Workers, their numbers claim that rule risks 700,000 U.S. jobs.

And then the Portland Cement Rule could have a remarkably broad impact. It impacted 165 of the 181 Portland Cement kilns. It was interesting to learn that we import now about 20 million tons of cement from—importing cement seems to be quite a challenge—but from China. And this rule has estimates of increasing that—that number to 50 million tons of imported cement.

At this time of our struggling economy and high unemployment, I think it's really important that U.S. Congress really looks at the magnitude of all these rules, and what they mean. A kind of potential impact which has at EPA, I don't think has ever—could ever have had in the past.

I think—and one quickly. Science is at the root of all this. And I think maybe everyone here that testifies wants good, rigorous sound science to ground our standards for environmental protection. I believe we need actually legislative reform to set really clear criteria to the science that EPA legally uses to base its standards.

Thank you, sirs.

[The prepared statement of Ms. White follows:]

EPA's GHG and Clean Air Act Regulations: A Focus on Texas' Economy, Energy Prices, and Jobs

By

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Summary Overview

Texas stands in the cross-hairs of EPA's unprecedented and heavy-handed regulatory onslaught. For Texas, the nation's leading fossil fuel producer, highest energy user, and economically most successful state, EPA is using a particularly heavy-hand. EPA issuance of an automatically effective Federal Implementation Plan in December 2010 to revoke key state permitting authority was the first such action in EPA history. Texas is now the nation's leading industrial and manufacturing state and thus will be disproportionately impacted by EPA's greenhouse gas (GHG) regulation and the many other major rules to take effect in the next three years. Never in its 40-year history has EPA promulgated—at the same time—so many costly new regulatory dictates. The rules on track to go into effect in the next three years could cost more than $1 trillion and result in hundreds of thousands of jobs lost.

The 10 EPA rules examined in this testimony are: 1) GHG regulation; 2) NAAQS for four criteria pollutants; 3) Ozone NAAQS; 4) PM NAAQS; 5) Clean Air Transport Rule; 6) Cooling Water Intake; 7) Coal Combustion Residuals; 8) Utility MACT; 9) Industrial Boiler MACT; and 10) Portland Cement Kiln Maximum Achievable Control Technology (MACT) Standards.

These regulations involve huge costs with few measurable environmental benefits. Many of the rules in question are aimed at electric generation and are particularly threatening to coal-fired generation. The National Electric Reliability Council (NERC) and four other studies conclude that four EPA rules risk the forced retirement of 76-100 gigawatts (GW) of electric capacity by 2015.

The possibility of losing up to 10 percent of the country's current 1,010 GW of electric generating capacity should be a wake-up call. The NERC study estimated that the four EPA rules risk 5,775 MW of existing capacity in Texas. ERCOT projects Texas needs 18,000 MW of additional capacity to avoid shortfalls in 2020. Texas may face the daunting challenge of adding 23,775 MW of electric generation within the ERCOT region by 2020. Events in Japan now make the planned addition of 5,000 MW of nuclear generation in Texas more uncertain. When basic electric reliability is in doubt, the economy suffers. Higher electric rates, power outages, job loss, and the relocation of energy-intensive Texas industries would be unavoidable under EPA's regulatory plan.

Neither this country nor Texas is in the midst of an environmental downturn. In the last two decades, major environmental improvements have been achieved. And Texas is ahead of most states. We sit in Houston, Texas—home of the nation's massive petrochemical complex. Houston achieved the still legally-binding federal ozone standard for the last two years.

Recommendation: Passage of the REINS Act. Strategic amendments to the CAA and other enabling statutes: Set clear, minimum criteria for scientific rigor and risk assessment. Limit EPA's discretionary authority. Re-enforce that states' decision-making authority under the CAA. Coordinate rules in multi-pollutant regulatory programs. Modify citizen lawsuit provisions. Transfer U.S. emission control technologies to developing nations across the world.

The Texas Economic Record

The Texas economy has been out-performing the national economy for over ten years and was less impacted by the recent recession than other states. According to the Bureau of Economic Analysis, the Texas economy grew 70.4 percent from 1999-2009 while the U.S. grew at a rate of 52.4 percent. Over this same period Texas employment grew by 19.5 percent compared to 7.6 percent for the nation as a whole.

Economic Growth Comparisons, 1999-2009

	U.S.	California	Texas
Population Growth	10.0%	10.3%	20.5%
Growth in Nominal GDP	52.4%	56.3%	70.4%
Growth in Personal Income	53.9%	53.0%	76.0%
Growth in Per Capita Income	39.9%	38.7%	46.0%
Total Employment Growth	7.6%	5.6%	19.5%
Growth in Small Business Employment	38.5%	28.2%	48.2%

Source: U.S. Bureau of Economic Analysis

As a recent TPPF study noted, Texas is the energy bread-basket of the U.S. Texas accounts for more than half of U.S. domestic production of oil and gas. Long the energy giant, Texas has now become the leading industrial and manufacturing state. Texas' manufacturing and energy production amounts to almost 15 percent of total industrial activity in the U.S., measured in dollar terms. Affordable, reliable, abundant energy has driven the growth of the Texas industrial sector. Manufacture of chemicals, plastic, petroleum products, metals, and machinery demands high volumes of energy. The affordability of energy and predictability of EPA rules is key to the economic competitiveness of Texas.

The Texas Environmental Record

Texas prosperity, cutting-edge science, targeted regulation, innovation, and broad cooperative efforts drove the dramatic improvements in Texas air quality. The Houston region,

home of the nation's massive petrochemical complex and once vying with Los Angeles as the most ozone polluted city in the country, has met the federal ozone standard still in effect for the last two years. This is a colossal accomplishment that took industry's investment of billions of dollars. The state, through the legislature and the Texas Commission on Environmental Quality (TCEQ), used cutting-edge science to develop strict but targeted controls, market mechanisms, and the generous incentives of the Texas Emission Reduction Program.

Texas also has outpaced many other states in the use of advanced pollution control technology at coal-fired power plants. As a result, sulfur dioxide (SO2) and nitrogen oxide (NOx) emission rates from power plants in Texas are among the lowest in the nation and continue to fall. SO2 emissions have fallen 33 percent and NOx emissions have been reduced by 76 percent since 1990.

EPA's Regulatory Onslaught

In its 40 year history, EPA has never simultaneously promulgated so many major environmental rules with converging effective dates, massive compliance cost, stringency challenging or beyond existing technological controls, and weak, speculative science. EPA has also asserted more aggressive control over state authorities, particularly in Texas. EPA's invalidation in June 2010 of TCEQ's highly successful Flexible Permit Program stands out as an environmentally counter-productive assertion of federal control. TCEQ's performance-based flexible permit program helped Texas achieve major reduction in ozone levels.

Since creation of the program 16 years ago, TCEQ issued over 120 flexible permits with no formal EPA opposition. Now EPA has not only disapproved the state rules but informed all the Flexible Permit holders that they are in violation of federal law. The legal authorization of over a hundred permits held by major Texas industries is now in limbo. EPA's response to date is to

allow permit holders to admit violation of federal law in a "voluntary" audit and enforcement decree involving financial contributions to "community organizations." Such regulatory uncertainty freezes business decisions and thus job creation.

Ten Mega-Major New EPA Rule Initiative

Assessment of the current EPA's regulatory impacts on Texas must include consideration of the multiple rules now adopted, proposed or planned. Many of these rules will be adopted in 2011 and will have convergent effective dates beginning in 2012. Full implementation is in the 2013-2016 timeframe with the highest impacts in 2015.

This testimony briefly reviews 10 of the major rules with direct impact on the Texas economy, workforce and energy prices. The 10 rules covered are:

1. GHG Regulation under the Clean Air;
2. New National Ambient Air Quality Standards for Ozone, Sulfur Oxides, Nitrogen Oxides and Particulate Matter (PM);
3. Ozone NAAQS;
4. Particulate Matter NAAQS;
5. Clean Air Transport Rule (CATR);
6. Power Plant Cooling Water Intake Rule (CWIS);
7. Coal Combustion Residual Rule;
8. Electric Utility Maximum Achievable Control Technology Standards(MACT) for Mercury (Hg) and Hazardous Air Pollutants (HAPs) (Utility MACT Rule);
9. Industrial Boiler MACT; and
10. Portland Cement Kiln Maximum Achievable Control Technology (MACT) Standards.

1. Greenhouse Gas Regulation under the Clean Air Act (CAA)

EPA's GHG initiative consists of six rules rushed over 12 months to an automatic effective date of January 2, 2011. To reach this date, EPA ran roughshod over basic restraints of the Administrative Procedures Act and rewrote the black letter language of the CAA. Because EPA concluded that regulation of GHG under the CAA would be absurd—increasing a current permitting universe of 12,000 to 6 million—EPA "tailored" the law to cover only large sources. EPA didn't bother to estimate the costs involved because the agency deemed its "tailoring" to be a "deregulatory" action. These initial rules are only the first phase of what ultimately would be mandatory regulatory reduction of 80 percent of carbon dioxide—a level not seen since the late 1890s. To decrease push-back from Congress, EPA claims its initial GHG rules will require modest measures to increase energy efficiency based on Best Available Technology but EPA retains the authority to dictate requirements on a case by case basis including forcing fuel switching. EPA will substantially up the regulatory ante with issuance of emission limits known as New Source Performance Standards within the year.

Constrained by the Texas constitution's non-delegation doctrine, Texas is the only state in the country refusing to comply with EPA's automatic effective date of January 2, 2011 for GHG regulation. EPA responded with immediate revocation of the state's permitting authority through imposition of a Federal Implementation Plan (FIP), a commandeering action never before taken by EPA. Permit applications for any expanded or new sources covered by the Tailoring Rule now must apply to TCEQ and also to EPA for the GHG portion of the permit. EPA indicates that even permits for voluntary installation of major emission control technology for real pollutants may be subject to EPA GHG permits. TCEQ has estimated over 160 construction projects in Texas may

trigger EPA's GHG permitting thresholds. Texas and over 20 states are challenging EPA's GHG rules in federal court.

The state of Texas' resolute refusal to acquiesce to EPA's unlawful demands is noble and justified by the Clean Air Act, Administrative Procedures Act, and the Texas and U.S. constitutions. However reluctantly, to comply with EPA's legally rogue process is to accept the exercise of federal power without basic restraints of law.

The American Council of Capital Formation estimates this first phase of EPA GHG regulation will decrease business investment in America in 2011 between $97-$290 billion. Much of that capital investment, and the businesses and jobs they would have created, will now move overseas, to places without environmental constraints.

2. Clean Air Transport Rule (CATR)

EPA's purpose is to reduce the interstate transport of power plant emissions of sulfur dioxide and nitrogen oxides to help 32 states attain federal ozone and fine particulate matter standards. Oddly, the targeted states have rarely violated the 24 hour fine particulate standard—less than one-half percent of the time from 2007-2009. EPA's always modest estimate of the cost of compliance is $7 billion. EPA's always fantastically speculative estimate of monetized health benefits, based on "statistical lives" not lost, is $111-$294 billion annually. None of the studies on which EPA relies to make conclusions about the health effects of particulate levels establish a causal connection between PM levels and health effects. EPA's approach is to assume that hospital visits or death resulting from a respiratory or cardiological conditions were caused by air quality independent of lifestyle or patient history.

Compliance dates for CATR begin as early as 2012. Originally adopted under the Bush administration as a kind of cap and trade system, the Obama EPA not only tightened the emission caps but also nominally disallowed trading of the previously banked emission credits, rendering the utilities' billion dollar investments worthless. And so goes the market-oriented "trading" part of cap and trade. Many of the large power plants impacted—particularly in Texas—already have installed state of the art emission controls. The new rules' tighter limits may be unfeasible and will yield marginal benefits. Major utilities conclude the rule will force early, abrupt retirement of some coal-fired power plants.

3. Power Plant Cooling Water Intake Structure (CWIS) Rule

Many coal, nuclear, oil and gas steam power plants use cooling systems that withdraw surface water to condense steam, allow cooling in holding ponds and then return the water back to the surface water body. EPA plans to require far costlier closed-cycle technology like cooling towers for all steam-generating power plants to replace the cooling ponds and other site-specific facilities water now authorized by state agencies. EPA's new one-size-fits-all performance standards may cost an estimated $64 billion, impact 444 plants (30 percent of the existing U.S. electric generating capacity), and reduce net generation up to 4 percent. The new requirements would force major retrofits of those 444 plants. There are no human health impacts involved. EPA's concern is "impingement" mortality of fish and "entrainment" of their eggs and larvae, reduction of which according to EPA's dictated methods may cost $64 billion and jeopardize electric reliability.

4. Coal Combustion Residual Rule

This rule covers fly ash, bottom ash, boiler slag and synthetic gypsum—all valuable residuals after coal combustion. EPA proposed a rule June 2010 but has not yet decided whether

the fly ash remaining after coal-fired generation should continue to be recycled as a commercially valuable material in cement, road surfacing, and dry wall or whether EPA should mandate disposal as a solid or hazardous waste. Estimated compliance costs are approximately $43 billion if EPA classifies as a solid waste and over $80 billion as a hazardous waste. These costs do not reflect the lost revenue from sale of the residuals, a recycling that reduces electric rates, and the purchase price of road and building materials. Adoption of this rule is expected in late March 2011.

5. Electric Utility Maximum Achievable Control Technology Standards for Mercury and Hazardous Pollutants (Utility MACT)

Under a Consent Decree to finalize by November 2011, EPA recently proposed a 900 page regulation to impose formidable new emission limits on mercury (Hg) emissions by 91 percent and to control a wide range of metals and gases listed as hazardous air pollutants (HAPs). EPA, however, has not identified many health benefits from this rule alone.

The power sector already has reduced mercury emissions by 40 percent. A full account of the quicksilver issue is beyond this testimony but perhaps some context. Human exposure to mercury typically occurs from consumption of fish tissue in which mercury has accumulated—after airborne elemental (or oxidized) mercury (from natural or man-made sources) enters water bodies and becomes methyl mercury.

Mercury is a naturally occurring metal in the earth's crust that cannot be created or destroyed and is found in organic and inorganic forms. Mercury emissions from U.S. coal-fired power plants account for only about 1 percent of the global atmospheric pool. And 60 percent of the power plant-associated mercury is the non-soluble elemental mercury that enters the global atmosphere. NASA research has shown that 50 percent of mercury deposited in U.S. waters originates from man-made sources in Asia.

After a major study in 1998 and again in 2005, EPA found that the levels of non-mercury hazardous air pollutants from power plants did "not pose hazards to human health" and thus direct regulation was not warranted. And the studies included projections of HAP levels in 2010 (wrongly) assuming far more coal-fired power plants than in fact came on line. The emission controls now in place to reduce criteria pollutants such as ozone, PM, and SOx also reduce mercury and HAPs. The overwhelming majority, approaching 99 percent, of the non-mercury metal HAPs already have or can be replaced. The baghouses and electro-static precipitators, already installed on many EGUs, have a removal efficiency of 99 percent. In the 2004 preamble to EPA's Clean Air Mercury Rule (CAMR) , EPA concluded that acid gas HAPs do not pose a health risk. EPA's new Utility MACT rule, however, will directly regulate these HAPs.

The electric power industry estimates that compliance with this questionably justified Utility MACT rule would cost around $100 billion while EPA estimates $10 billion. The power industry estimates the combined costs of the other new rules aimed at power plants will reach $200 billion by 2020. This is almost three times the money invested in all environmental controls during the last 20 years. The rule will impact approximately 1,300 electric generating units and require a wide range of extremely expensive control technologies—if the heightened standards can be met. Coal-fired generation will be the hardest hit. Texas lignite coal which fuels one-third of coal generation in Texas may not be able to meet these standards. NERC conservatively estimates this rule could force premature retirement of 15 GW of U.S. generating capacity.

6. New National Ambient Air Quality Standards (NAAQS) for Criteria Pollutants: Ozone, Sulfur Oxides, Nitrogen Oxides, and Particulate Matter (PM)

Adoption, implementation, and compliance with a new NAAQS is extremely complicated, involving a lengthy technical and administrative process to develop State Implementation Plans for

the pollutant. Individual regulatory control measures must be developed for each pollutant even though controls for one pollutant (ozone) yield reductions of several other criteria pollutants. In a report on the inefficient, costly, prolonged SIP process, the National Academy of Science concluded that EPA should develop multi-pollutant programs rather than require SIPS for each pollutant. EPA's plans to revise the NAAQS for four of six criteria pollutants at the same time underlines the need for reform of the SIP process. State and local governments spend millions on the development of SIPs to address EPA administrative requirements instead of on effective actions to reduce pollution.

7. New Ozone NAAQS

To date, regulatory programs to meet the federal ozone standards have cost business, state, and local government far more than any other EPA regulatory program. As soon as states approach one standard, EPA strengthens the standard. Each time the goalposts get moved, the scientific justification gets flimsier. In January 2010, EPA reversed the ozone standard adopted less than two years earlier by reinterpreting existing data. According to the Congressional Research Service, EPA's proposal for a standard as low as 60-70 parts per billion (ppb) would increase the number of federally shackled non-attainment counties from 85 currently to as many as 650 of this country's 3,000 counties. A federal ozone standard as low as 60 ppb could mean as many as 12 non-attainment areas in Texas. Yet, the state lacks legal authority to control the remaining emission driving ozone formation—mobile sources such as tailpipe exhaust. After imposing strict controls on stationary industrial sources of ozone emissions, mobile—not industrial—sources now drive ozone formation. Regulation of mobile sources through engine and fuel standards is a pre-empted federal authority. EPA needs to accept responsibility for the mobile source emissions that are beyond state control.

Unions for Jobs and the Environment commented that the proposed standard "would lead to significant job losses during a period of high unemployment." EPA estimated implementation costs up to $90 billion. Many toxicologists and physicians challenge EPA's justification for an ozone standard lower than the current 85 ppb.

8. New Particulate Matter 2.5 (PM) NAAQS

At enormous expense, EPA may regulate country dust— now called "coarse particulate matter." Is this one infinitely wealthy country or what! EPA has long regulated PM 10 (particles of 10 microns or less) as a criteria pollutant but exempted country dust until a standard change in 2006 that also included a standard for fine particulate matter (particles of 2.5 microns or less). EPA now may set a new standard twice as strict as the current one. EPA even speaks of having "no-till" days for farmers. It looks like public health will demand paving or watering every country road in the United States. EPA's rules for Portland Cement and fly ash will make that pavement much more expensive. *See below.*

9. Maximum Achievable Control Technology (MACT) for Industrial Boilers (Utility MACT)

The four inter-related rules under this heading may lead to the most job loss among all EPA's current rulemakings. Adopted in February 2011 with minor cost-saving modifications, the regulation imposes the maximally stringent emission limits and monitoring requirements on a range of potentially hazardous air pollutants from 200,000 boilers and heaters used by industries, manufacturers, mining, refining, as well as commercial boilers in malls, laundries, apartments, restaurants, hotels, hospitals, and universities.

In contrast to emission controls based on Best Available Commercial Technology—or well-established and commercially-used technology—the new EPA rule dictates the Rolls Royce technology supposedly based on the "best performing" units in existence. Yet, many of the

businesses identified as the "best performing" claim the emission limits—set at barely detectable levels—are not achievable. The United Steel Workers and other unions claim the rule could send 700,000 current U.S. jobs to other countries. The pulp and paper industry contends that this rule will force closure of 30 mills and end 17,000 U.S. jobs. Letters from 62 Senators and 177 House members urged EPA to reconsider the rule. EPA decided to delay adoption but an environmental plaintiff challenged in court and won.

10. Portland Cement Kiln Maximum Achievable Control Technology (MACT) Standards

Essential to the economy, the U.S. cement industry competes with exported cement from China, which produces cement at far less cost and with far fewer, if any, environmental restraints. Finalized September 2010, EPA's harsh new dictates will bind 165 of the 181 Portland cement kilns operating in the U.S. Many in the cement industry argue that no cement kiln in the U.S. has ever actually achieved the level of control EPA now mandates as MACT. The Portland Cement Association finds that up to 18 plants may close, increasing the currently imported 20 million tons of cement from China to 48 million imported tons. Even EPA admits the rule will decrease U.S. cement production by 8-15 percent. This is an example of an EPA regulation that will not only cost enormous numbers of American workers their jobs, but which will actually be worse for the global environment in the long run, by moving industrial production to the countries that are the world's most profligate polluters.

Recommendations

The CAA and other federal environmental statutes should be strategically amended to establish more rigorous scientific procedures and standards, to require multi-pollutant regulatory coordination, and to reaffirm the CAA's original vision of cooperative federalism. The CAA clearly stipulates that EPA will set national environmental standards and then the states will make

the decisions on how to implement and attain the standards. This division of authority has been eroded over the years and in the last 24 months discarded all together. EPA treats Texas as a branch of the federal government. EPA has steadily enlarged the required contents of the State Implementation Plans required for all criteria pollutants such as ozone to include every state rule vaguely related to air quality. EPA does not need approval authority for programs like the Texas Flexible Permit Program. The state is responsible for attaining the federal air quality standards as measured at air quality monitors. What regulatory controls and permitting mechanisms the state utilizes to attain those standards should be fully within the state authority and not subject to EPA micro-management and approval authority.

EPA's regulatory initiative to suppress fossil fuels puts the Texas economy—and the recovering national economy—at great risk. There are no energy sources capable of broad commercial deployment in the foreseeable future that can approach the energy density, sophisticated use, distribution, and affordability of fossil fuel resources. EPA's multi-pronged regulatory assault is too much, too fast and is not sufficiently justified by science.

Mr. WHITFIELD. Thank you, Ms. White.

And how long were you the chairman of Texas Commission on Environmental Quality?

Ms. WHITE. Yes. I was chairman for 4 years and the commissioner for 2 years.

Mr. WHITFIELD. And did you deal with this issue on the flexible permits during your tenure?

Ms. WHITE. It never really came up in a sharp way. No. I remember—I remember the good news about it in the time—an era where there was far more easy cooperation with EPA. So, we——

Mr. WHITFIELD. What were the years that you were the chairman?

Ms. WHITE. I was—2001 to 2007.

Mr. WHITFIELD. And during that time, there was never a significant issue over this?

Ms. WHITE. I dealt with the regional administrator on a regular basis and there was never a time when this issue was ever raised——

Mr. WHITFIELD. And did you feel that Texas' flexible permit program worked and accomplished——

Ms. WHITE. I did very much and I thought it was a way of actually getting more emission reductions from many of the facilities by using a very creative and targeted method that still allows them to vary it—vary production in parts of their unit, but ultimately to get more emission reductions.

Mr. WHITFIELD. Now, Mr. Griffin, does your company have a flexible permit or——

Mr. GRIFFIN. No. We have an NSR, New Source Rule.

Mr. WHITFIELD. OK. And you're in compliance, as far as you know?

Mr. GRIFFIN. Yes, we are. And I would comment on that and you heard Dr. Shaw talk about flexible permit as a tool. And I have operated at plants that had a flexible permit. We don't have it at the current plant that I have. It's single source; but, you know, the way I would look at it is if you had two stacks like this and they could total 20, it really doesn't matter if 18 is coming out of here and 2 out of here or 10 and 10. It's a bubble over the plant and it gives that plant manager absolutely the skill to work with his engineering team and reduce the overall emissions.

My particular plant, it isn't the tool for my plant. But, again, we have 130 petrochemical plants that are all a little bit different.

Mr. WHITFIELD. Well, in preparation greenhouse gas emission regulations, does your company emit enough greenhouse gases that you would be over 100,000——

Mr. GRIFFIN. We would be below that level, sir.

Mr. WHITFIELD. You——

Mr. GRIFFIN. My particular plant.

Mr. WHITFIELD. OK. So, if the Tailoring Rule determined to be invalid, then you would be included at that point. And are you taking the steps now to address that issue?

Mr. GRIFFIN. No, I'm not.

Mr. WHITFIELD. OK. Now, Mr. Marston, let me ask you a question. Did you support the EPA's Tailoring Rule?

Mr. MARSTON. Yes.

Mr. WHITFIELD. And do you think that it's a—that it will withstand court challenge?

Mr. MARSTON. Yes.

Mr. WHITFIELD. And you say that because why?

Mr. MARSTON. Because the EPA has a lot of authority to interpret its own statute and the lawyer—the APA—or, first off, let's go to Massachusetts versus EPA.

Mr. WHITFIELD. Well, no. I don't want to get into that. I just want to know about the Tailoring Rule.

Mr. MARSTON. OK.

Mr. WHITFIELD. And you think it's valid, though? In other words, you are willing stand——

Mr. MARSTON. Yes.

Mr. WHITFIELD. OK. OK. Ms. White, I had noticed that EPA proposed in the Federal Register an audit program for Texas' flexible permit holders accompanied by consent agreement and final order. That was basically an enforcement decree. And, although, it was labelled as voluntary, the audit agreement to allow continued operation, it's my understanding is not subject to negotiation. It requires, number one, an admission of violating Federal law.

Are you familiar with that?

Ms. WHITE. Yes, I am.

Mr. WHITFIELD. And then, also, it's my understanding, mandates payment by the company to a community project. And I'm not aware of anything in the Clean Air Act that gives EPA authority to say, "You're going to pay a fine and I want you to make it to this community project."

Now, you've been involved in these issues much longer than I have. Am I correct in my——

Ms. WHITE. I think you are correct and I think that is what I will call "rulemaking by enforcement action," which is adding something which is not—which EPA is not authorized as an EPA action in formal rule.

I—I—your comment about the audit, I think, is a very important one. As a former regulator, I feel the flexible permit issue is really about rule language and terms between TCEQ and EPA, yet EPA chose to interpret that to mean all of the facilities who are in legal compliance with their State-issued flexible permit are violating Federal law and subject to enforcement offers a voluntary audit but it is an enforcement consent decree is what it is, requiring acknowledgement of violating Federal law.

Mr. WHITFIELD. OK. Well, thank you. My time has expired, and I recognize the gentleman, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Let me just ask, that issue of payment to a community project in lieu of a fine has been around for, it seems like, decades and you weren't aware of that while chair of TCEQ? Because I know a lot of my industries have done that and we've had a win-win. One, they recognized their wrong but we also had some benefits in our community.

Ms. WHITE. Those are what we call in Texas, "supplemental environmental project." That's an option to the enforcers sometimes that has various criteria. And on the Federal level there also are those. This was—and I won't remember the exact language in the

proposed EPA audit, which I have read, but it just—it binds the person who signs the audit of a community project, but I believe would be determined by members of the community and not by—I mean, the supplemental environmental project that the State of Texas uses as well as EPA. They're very orderly and as far as what kind of project for this and what open-ended——

Mr. GREEN. Oh, I thought that that was a shock to you that that program was available because I know a number of companies have—some of the companies have benefited from the public relations efforts that we worked on. I submitted some statements and some letters into the record. And one was when you were chair of TCEQ, to Steve Hagle, who was a special assistant.

Ms. WHITE. He was in the Air Quality Permitting Control Program. I'm not sure of his exact position at the time.

Mr. GREEN. And we have a letter dated in April of '06 to him expressing the concern and follow-up on a meeting in '05 and it seemed like in your testimony that you weren't aware of the disagreement between the EPA and TCEQ and the State of Texas on the flex permits.

Ms. WHITE. It was—in the 6 years I was in the office, it was never brought to my attention, and I recall this specifically because right after I left, I remember I heard about EPA had expressed concern about the program.

Mr. GREEN. Well, we have a copy of a letter that was sent, I guess, to every flexible permit holder that was dated September of '07 and this letter is April 11. And understand, I know TCEQ is a big agency, and—but there were correspondence or was correspondence between TCEQ and EPA prior to January of 2009.

Let me go back. Mr. Griffin, I want to welcome you here. I appreciate it. I'm glad we were able to work it out to get an invitation to the East Harris County Manufacturers. I've worked with you and you've worked with our office for years. And it's great—on Port security, on air quality, on quality of life. It's amazing. And you represent a great bunch of companies that not only provide a tax base and employees' jobs but also just a resource in our community to work with.

I'd like to ask you about the deflexing issue and the company's perspective. And I may have talked with you. I've talked with a lot of companies along this channel about my concern that deflexing may slow down some of the things they have to do because any given day, at any given minute, whether it's from Rhodia that's the closest petrochemical plant to downtown all the way out to ExxonMobil in our district, there are things going on and they need to have the ability to get permits and to expand their business. I know right now you go over the Beltway 8 bridge, and there's a Shell plant, a huge expansion there.

Have you and any of the companies had problems getting permits under the deflexing on any of the plant expansions?

Mr. GRIFFIN. Yes. You know, certainly—you know, the issue with permitting, it's a very, very arduous process. You know, if you've looked at air permits, they write volumes and volumes. And I like to use the terminology we have so many calories to spend a day and we can optimize the process and we can grow our business or we can yet take another spin at permits. These permits worked.

They work, the results are there, and we're held accountable. You know, I often get asked about the TCEQ. You can probably tell by my accent, I was not born and raised in Texas.

Mr. GREEN. Stay around awhile, you'll get our accent.

Mr. GRIFFIN. Yes, sir. I'm working on it. But I have operated plants in Illinois and Ohio. And what I would tell you about the TCEQ is they're tough but fair and these permits work.

Mr. GREEN. Yes, but—well, since the battle between TCEQ and EPA—and I know plants now are having to get their permits through the EPA. Has there been a problem at any of those plants, that you know of, because we've asked our plant managers and anyone else, including our new members, that we want to know if there's a problem because the last thing we want to do is shut down the biggest petrochemical complex in the country.

Has there been any—have you heard of any problems or anything?

Mr. GRIFFIN. Yes, I don't have exact examples to share with you today, but I'll go back to our membership and get some more definition on that.

Mr. GREEN. Great. And you know how to get ahold of me——

Mr. GRIFFIN. Yes, sir. You've been very accessible. Thank you.

Mr. GREEN. Ms. White, let me go back to you. In December 2002 the EPA finalized its reform of New Source Review regulations and did not include flexible permit programs but did include plantwide applicability limits called "PALs." They're provisions that allow caps under an actual emission-based concept, not in an allowable-based concept such as Texas' flex permit. And yet in February 2006, Texas adopted a separate PAL in its New Source Review regulations and retained its flexible permit regulations.

Shortly thereafter, the EPA forwarded a letter to TCEQ informing Texas of EPA's concerns with the flexible permit rule and its reasons why it does not consider the current flexible permit rule to be approvable as a SIP provision. Then in February of 2007, the EPA additionally met with TCEQ where they discussed concerns with the flexible rule.

Did TCEQ respond to this? And, again, this was under your watch as chair, I guess. When did you actually leave in 2007, I guess?

Ms. WHITE. August.

Mr. GREEN. August. OK. So, it was during that time. I have some other questions that, Chairman, I would like to submit to you on what happened and how far back this disagreement goes with the TCEQ.

Mr. WHITFIELD. Thank you very much.

Mr. Barton, you're recognized for 5 minutes.

Mr. BARTON. Thank you. Mr. Chairman, I just want to read a Tweet that came out not 2 minutes ago from Mr. Armendariz. He—he didn't have the time to come to a formal field hearing of your subcommittee and Mr. Green's subcommittee, but he is in Houston. This is what he Tweeted out about—oh, about 45 minutes ago.

"Fantastic morning so far in Houston with Juan Parras"—and I apologize if I don't get the pronunciations right—"Matthew T., Hilton K. and others at the EJ Encuentro. I am humbled by their dedication."

So, he is here in Houston.

Mr. WHITFIELD. In Houston?

Mr. BARTON. He's in Houston. He's just not at the formal hearing of the Energy and Power Subcommittee.

Mr. GREEN. Well, Mr. Chairman, I think we've got the boss here that will testify next.

Mr. BARTON. Well, that's good and I'm glad that she's here. And I give her credit for that.

Mr. Marston, before I ask my formal questions, are you any kin to Ed Marston?

Mr. MARSTON. I'm not. A lot of people ask me that. But my father is Dale Marston, who was in the oil business for 37 years.

Mr. BARTON. OK. Well, Mr. Ed Marston is a good friend of mine, and I thought maybe you were related to him in some way.

Mr. MARSTON. I've heard good things about him. I don't know him.

Mr. BARTON. OK. You talk about the State officials basically telling lies and doing illegal actions, if I heard what you said correctly.

Mr. MARSTON. Well, I do think that there's been lies from Texas officials and it's in my testimony and I'll describe lots of those.

Mr. BARTON. All right. Can you give the committee even one letter where EPA has rejected a flexible permit here in Texas?

Mr. MARSTON. Well, certainly the letters in 2007——

Mr. BARTON. No. Can you give us a copy where they rejected a letter?

Mr. MARSTON. Well, they've only——

Mr. BARTON. So, the answer is "no"?

Mr. MARSTON. No. You're asking a question——

Mr. BARTON. I'm asking a question. I want a straight answer.

Mr. MARSTON. It does not have an answer to it——

Mr. BARTON. Is there an existing copy, that you're aware of, the rejection letter of a flexible permit here in Texas—flexible air permit in Texas?

Mr. MARSTON. Until Texas lost the power over its permitting and never—never corrected the flex permit, there was no authority and no process——

Mr. BARTON. Now, that's—so, there is no rejection letter?

Mr. MARSTON. I'm sorry, sir?

Mr. BARTON. There is no rejection letter?

Mr. MARSTON. Well——

Mr. BARTON. I want to read something from the appendix that you sent. This is your—your information——

Mr. MARSTON. Yes, sir.

Mr. BARTON [continuing]. That you provided to this committee.

Mr. MARSTON. OK.

Mr. BARTON. This—this is the signed by Mr. John Blevins, who is the Director of Compliance, Assurance, and Enforcement Division of the United States Environmental Protection Agency in Dallas, Texas. So, this is a letter——

Mr. MARSTON. Yes, sir.

Mr. BARTON [continuing]. That he signed and you provided to the committee.

Mr. MARSTON. What was——

Mr. BARTON. It says——

Mr. MARSTON. What——

Mr. BARTON. Listen, listen. I'm going to read this. You submitted it. I'm going to read it. And then you can tell me——

Mr. MARSTON. My only question——

Mr. BARTON [continuing]. If this was a rejection letter.

Mr. MARSTON. OK.

Mr. BARTON. OK? TCEQ and the EPA both agree that it is now time—this is in 2007—that it is now time to focus resources on ensuring that all major sources with the State of Texas have federally enforceable State Implementation Plan-approved permits. The two agencies are working together—are working together to develop a flexible permit rule that can be approved as part of the Texas State Implementation Plan. Both TCEQ and the EPA have been aware of issues related to the flexible permit rule and have worked over the last several years to address various permitting issues as part of EPA's program revisions including permit streamlining within the context of Title V, the Federal PAL program, and the New Source Review reform. Because TCEQ is committed to ensuring the continued success of its efforts to maintain and improve the air quality of Texas, EPA is providing its assistance to ensure that the sources are also meeting their Federal obligation under the Clean Air Act.

Does that sound like they're rejecting the Texas flexible permitting program?

Mr. MARSTON. Well, sir, you're reading part of the letter, but it told you——

Mr. BARTON. I'm reading what you provided to the committee.

Mr. MARSTON. I don't think you read the entire letter, sir.

Mr. BARTON. There is not one letter on the record where TCEQ has had a flexible permit rejected. There are letters—and some of them boilerplate—that seem to be just put a different date and—and various intermediary officials have—have questioned some parts of it. But there is not until this year a rejection of even one permit.

Mr. MARSTON. May I answer your question?

Mr. BARTON. Now, I want to ask Ms.—you were the chairman of Texas Council of Environmental Quality——

Ms. WHITE. Yes.

Mr. MARSTON. May I answer your question?

Mr. BARTON. I think you have failed to answer my question because you can't answer it, sir.

Mr. MARSTON. Will you let me answer?

Mr. BARTON. I'm going to ask her. Did you, as your authority as chairman of the Texas Council of Environmental Quality ever receive a rejection letter?

Ms. WHITE. No.

Mr. BARTON. Did you ever have a discussion with a senior official at the EPA in Dallas or in Washington where you were told that they were going to reject the flexible permitting program in Texas?

Ms. WHITE. No.

Mr. BARTON. Were you ever briefed by your staff of such a concern at the Federal level?

Ms. WHITE. No, I was not. It was not brought to my attention and in my many, many conversations and interaction with the

former regional administrator, the issue of flexible permits never were brought up.

Mr. BARTON. OK. Well, Mr. Chairman, time is expired, but I have asked the Attorney General of Texas, I have asked the chairman of the Texas Council of Environmental Quality, I have asked the commissioners of the Texas Council of Environmental Quality repeatedly to give me documentary evidence where the Federal EPA officials in Dallas or in Washington have done what Mr. Marston claims they have done and they have repeatedly told me, admittedly, not under oath, we haven't asked them to put their hand on a Bible, that that's never happened. There have been normal discussions about tweaking the program and things of this sort, but there has never been a rejection not only of the whole program but of a specific permit within the program.

I yield back.

Mr. WHITFIELD. Mr. Gonzalez, you're recognized for 5 minutes.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. I want to thank the members for taking time to be here today. We do appreciate your testimony today.

Again, areas that we can agree on and that is when you have a Federal Government working with another other form of identity, they should be partners. There should be reasonable timelines and there are going to those that at are issue. And they should, as far as possible and with these days of camaraderie come politely with solutions and answers to whatever the problems may be.

Now, the way I see, the only thing missing here is you have two differences of opinions as to what the problem is. For one party the problem exists. For the other party, it does not. So, maybe that's why things have come to a screeching halt.

And, Ms. White, what years were you with the TCEQ?

Ms. WHITE. From fall 2001 to August of 2007.

Mr. GONZALEZ. All right. So, that would be the time period. And I know that you may have not been specifically involved in the ongoing questioning of the flexible permit protocol and requirements in the State of Texas, but there is no doubt that the record is replete, whether it was with Clinton or whether it was the Bush Administration, now the Obama Administration about the efficiencies of the flex permitting process in the State of Texas.

But I'm going to ask you because I want to go back to the simple question because I think we're all going to talk about this because we just are ignoring what is the obvious.

Do you believe that greenhouse gases are an air pollutant? And then the question is to Ms. White who has the most experience in this in the years that you served at State level.

Ms. WHITE. I will answer you in my opinion legally. Under the Supreme Court that—the 2007 Supreme Court ruling, under the language of the Federal Clean Air Act, carbon dioxide or other greenhouse gases might fit under that.

Mr. GONZALEZ. Do you think——

Ms. WHITE. I am not——

Mr. GONZALEZ. Massachusetts versus EPA, now it's a Supreme Court of the United States—it ends there. It doesn't matter what we have to say, the legislative branch or the executive branch.

That's the way our founding fathers said it should be and it's served us well.

Did it not find that greenhouse gases are an air pollutant? Can we agree on that?

Ms. WHITE. It said under the broad, broad language in the Federal Clean Air Act, carbon dioxide and—and carbon dioxide and oxygen is—as something in the ambient atmosphere could be determined a pollutant.

Mr. GONZALEZ. OK.

Ms. WHITE. Could be determined a pollutant. That's a legal decision—in a legal decision that EPA——

Mr. GONZALEZ. How about carbon dioxide that comes out and is inhaled by cars? Did they establish that as an air pollutant?

Ms. WHITE. I don't think—I don't think——

Mr. GONZALEZ. And I don't want to be—I think General Abbott could have better addressed some of these things, but I used up all my time and then additional time.

But I do believe that General Abbott did acknowledge that Massachusetts versus EPA did establish carbon dioxide are a greenhouse gas or greenhouse gases as air pollutants. Now, I know what the General is saying. He's saying, "Yes, Charlie, but only those that are emitted from the tailpipes of cars." And that sounds fairly reasonable except that I believe—and I think where this is going to end up, I'm not the lawyer for this and I'm surely not going to be the judge—but once you identify that as an air pollutant, it becomes regulated under the EPA, does it not?

Ms. WHITE. Not—no, it doesn't. There's—and—and the Attorney General referred to this. The EPA—and this is the most important for most people and for our country—in deciding the importance whether it is a pollutant that endangers human health. And that is the legal decision that EPA makes as the so-called endangerment finding. And that was the decision the Court left to EPA.

Mr. GONZALEZ. And EPA—and I know you are going to argue with the manner in which it has arrive at that determination and the timeline and the process. What if the timeline and the process and the reasoning is basically found to be valid? Would you still believe that greenhouse gases are air pollutants?

Ms. WHITE. I really—it doesn't matter to me what you call them. I do not believe that carbon dioxide endangers human health.

Mr. GONZALEZ. All right. That's my whole point. Now, the other point I want to make in my last few seconds is the same arguments that we've had today—and, believe me, I believe that this so prosperous a nation the we can even do better—because we have under the Clean Air Act and we did it and we have under the Clean Water Act. The same arguments that are here today, that's it's all going to be [inaudible] in jobs are—were advances at that time. There's no doubt that we learned lessons and we were more efficient about doing it.

I think we can still do it. This is the United States of America. We're not some other Third World country. We're not someone else out there that doesn't have the history that we have, the pride, innovation, and the creativity that this country has.

With that, Mr. Chairman, I will yield back.

Mr. WHITFIELD. Well, thank you, Mr. Gonzalez. And I want to thank the panel very much for being with us this morning. We do appreciate your testimony and we look forward to working with you.

Mr. BARTON. Mr. Chairman, before—before we let this—I want Mr. Marston to be given every opportunity, if he wants to take advantage of it, to try to answer my question. My time ran out. So, I didn't——

Mr. WHITFIELD. OK.

Mr. BARTON. I wasn't able to give him that, and I don't want him to walk away——

[Simultaneously speaking.]

Mr. BARTON. I don't want him to go away and say he wasn't given a chance to answer his question.

Mr. MARSTON. I am a very proud Horned Frog.

Mr. WHITFIELD. So, would you like to respond, Mr. Marston?

Mr. MARSTON. Well, I do think those—the letters in 2006 and 2008 gave fair notice to the TCEQ and the permit did not meet the legal standard. They tried working with the agency for a long time. They were hopeful they could work out an agreement. In the end, the agency made some minor modifications but never made enough to meet the Federal Clean Air Act.

Sadly, we're in that predicament because they wouldn't go further. Texas has a program that's unique among the States and they're in this predicament because they have a program that's different than everybody else, it doesn't follow the requirements of the Clean Air Act.

Mr. WHITFIELD. OK. Thank you all very much. And we look forward to working with you as we move forward.

Mr. WHITFIELD. At this time we'll call up the witness on the third panel, and I saw that she came. That's Ms. Gina McCarthy, who is the Assistant Administrator for Air and Radiation, United States Environmental Protection Agency.

And, Ms. McCarthy, we appreciate your joining us here today in Texas and we look forward to your testimony. We were disappointed that Mr. Armendariz was not able to be with you but he did send a letter saying that he was attending another event here in Houston. So, we're delighted you're here and appreciate your coming down from Washington.

And at this time, I'd like to recognize you for your 5-minute opening statement.

STATEMENT OF GINA McCARTHY, ASSISTANT ADMINISTRATOR, OFFICE OF AIR AND RADIATION, ENVIRONMENTAL PROTECTION AGENCY

Ms. MCCARTHY. Thank you, Chairman Whitfield, Ranking Member Green, Members of the Committee, I'm pleased to be here in Houston to discuss how EPA is implementing the Clean Air Act to protect our locale.

I bring Al's regrets. I'm sure he would have loved to have been here if he didn't have a prior speaking engagement.

Air pollution threatens human health. It contributes to asthma attacks, other bronchial disorders, nervousness, and developmental problems, cancer, and even death. The very young as well as the

elderly are especially vulnerable. Every citizen in every State, including Texas, has the right to the health protection provided by America's Clean Air Act.

For 40 years the Act has reduced air pollution for all of us to breathe easier. In the last year alone, programs implemented pursuant to the Clean Air Act Amendments of 1990 are estimated to have reduced premature mortality risks equivalent to saving over 160,000 lives, preventing millions of cases of respiratory problems, including bronchitis and asthma, and enhanced productivity by preventing 13 million lost workdays.

In 2000 Houston's air quality was worse than Los Angeles'. Today Houston is meeting the '97 ozone air quality standard. Why? New Federal and State pollution control regulations. These include tighter Federal standards on passenger vehicles and diesel truck emissions, and vigorous enforcement of Clean Air Act requirements focussed on the largest polluters.

However, few of the Federal emission control standards that gave us these huge gains in public health were uncontroversial when they were issued. They were adopted amidst claims that they would be bad for the economy and bad for the employment.

It is terrifically misleading to say that enforcement of the Clean Air Act has cost jobs. That claim is simply untrue. Enforcement of the Clean Air Act has saved lives and allowed economy to grow. Families should never have to choose between a job and healthy air. They're entitled to both, and the Clean Air Act has delivered on both.

In contrast to doomsday predictions, history has shown that we can clean up pollution, we create jobs, we grow our economy all at the same time. In the 40 years since the Act passed, the Gross Domestic Product of the U.S. grew by more than 200 percent. In fact, some economic analysis suggests that the economy is billion of dollars larger today than it would have been without the Clean Air Act.

One of the important benefits of the Clean Air Act is that it ensures equal public health protection nationally. Unfortunately, the Texas air permitting program does not ensure the same level of public health protection to its citizens that other States provide. And citizens in Texas have time and again asked EPA to rectify this problem. For example, the Texas program allows changes to occur at industrial facilities without adequate public notice, allows increases in actual emissions to go unchecked. It doesn't ensure the enforceability of the permit requirements.

Unfortunately, the Texas State Government rules simply trust industrial sources to take action to protect public health without giving the citizens of Texans the ability to verify the results. No other State allows this. Instead, they ask for inherent enforceable permits that provide flexibility to industry. Even in Texas fewer than 10 percent of the major air pollution sources have these so-called flexible permits.

These flexible permits failed to comply with Clean Air Act requirements to protect public health. EPA has been raising issues with Texas' permits since the 1990s. The problem worsened last decade when the Texas Government failed to take action to adjust their flexible permit program as other States did to keep it in line

with the rules of the agency and with court cases that clearly said that the permit needed to be—the permit system needed to be adjusted.

Then in 2006, 4 years ago, under then President Bush, EPA wrote a letter to the State of Texas outlining our concerns with the air permitting program and the failure of State Government to fix these programs.

In 2007 EPA sent letters to every one of these flexible permit holders, letting them know that they had to worry about being in compliance both with their flexible permit and with EPA's Clean Air Act to ensure that they had a federally enforceable permit.

We continue to work hard with representatives in industrial facilities, Texas officials, and other concerned citizens to fix this Texas air program. Our regional office in Dallas has long consulted with the Texas Government and citizens in efforts to achieve a State program that meets the necessary obligations under our Nation's Clean Air Act. I have personally come to Texas to try to work through these problems with the State, industries, environmental groups, and other stakeholders, as have other EPA officials and members of my staff.

Our goals are rules that meet the minimum requirements of Federal law and clean air permits that are understandable to the public, that are enforceable by their regulators, that are legally valid, and that protect public health to the full extent that the Clean Air Act requires.

A more recent problem has also arisen and that is really unique to Texas. And that unlike all other States, Texas' State Government is refusing to cooperate with EPA to address greenhouse gases in its permitting processes. It has forced EPA actions to prevent industry from being placed in an untenable position of having an obligation to obtain a legally valid permit addressing greenhouse gases before starting major construction, but when they have no way to obtain such a permit.

In January, that's why EPA stepped up and hopefully temporarily began to issue and be responsible for greenhouse gas permitting in the State of Texas. Without that action, sources could not obtain legally required permits, projects could not go forward, and economic and jobs would really suffer. Some try to emphasize this recent disagreement between the State and EPA as if for decades EPA has not had to work with the State year after year to push and prod to get Texas to do what the Clean Air Act requires. This is simply not the case. But what is unique about greenhouse gas permits is that Texas has decided that it would simply not do what the Clean Air Act required and, in addition, it would take action to sue EPA and the Federal Government to ensure that we could not do what the Clean Air Act required.

It's time for this bickering to stop. It's time for us to work together to find a common ground to deliver an effective Clean Air Act program, one that the Texas State Government can clearly implement, one that will meet legal obligations, one that would be amenable to the State, one that would provide clear public health protection, that is cost effective and that the people in this State deserve to have delivered to them in accordance with the laws of Congress.

We pledge to keep trying to work with Texas leaders in the spirit of partnership and not adversarial politics to achieve these goals. Thank you very much.

[The prepared statement of Ms. McCarthy follows:]

Opening Statement of Gina McCarthy
Assistant Administrator for Air and Radiation, United States Environmental Protection Agency
Hearing on EPA's Greenhouse Gas Regulations and Clean Air Act Regulations:
A Focus on Texas' Economy, Energy Prices and Jobs
Houston, Texas
Subcommittee on Energy and Power
Committee on Energy and Commerce
United States House of Representatives

Chairman Whitfield, Ranking Member Rush, and members of the Committee, thank you for inviting me to testify on this crucial subject.

I am pleased to be here in Houston to discuss how EPA is updating its existing Clean Air Act programs to protect public health, and doing so in common sense ways that provide businesses both the flexibility and the certainty they need to grow. That is the approach we are taking in addressing greenhouse gas emissions. That is also why we have stepped in on a limited basis to ensure that Texas industry can obtain the valid permits they need to continue to expand and provide jobs here in Texas.

Air pollution can pose a number of threats to human health. Those include asthma attacks, other bronchial disorders, nervous system and developmental problems, and in some cases cancer and death. The very young as well as the elderly are especially vulnerable.

Every citizen in every state has the right to the health protections provided by America's Clean Air Act. And that includes all Texans.

For 40 years, the nation's Clean Air Act has made steady progress in reducing the threats posed by pollution and allowing us all to breathe easier. In the last year alone, programs implemented pursuant to the Clean Air Act Amendments of 1990 are estimated to have reduced premature mortality risks equivalent to saving over 160,000 lives; spared Americans more than 100,000 hospital visits; and prevented millions of cases of respiratory problems, including bronchitis and asthma.[1] They also enhanced productivity by preventing 13 million lost workdays; and kept kids healthy and in school, avoiding 3.2 million lost school days due to respiratory illness and other diseases caused or exacerbated by air pollution.[2]

However, few of the emission control standards that gave us these huge gains in public health were uncontroversial at the time they were developed and promulgated. Most major rules have been adopted amidst claims that that they would be bad for the economy and bad for employment.

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[1] USEPA (2011). *The Benefits and Costs of the Clean Air Act from 1990 to 2020.* Final Report. Prepared by the USEPA Office of Air and Radiation. February 2011. Table 5-5. This study is the third in a series of studies originally mandated by Congress in the Clean Air Act Amendments of 1990. It received extensive peer review and input from the Advisory Council on Clean Air Compliance Analysis, an independent panel of distinguished economists, scientists and public health experts.
[2] Id.

Some may find it surprising that the Clean Air Act also has been one of our country's best economic investments. In contrast to doomsday predictions, history has shown, again and again, that we can clean up pollution, create jobs, and grow our economy all at the same time. Over that same 40 years since the Act's was passed, the Gross Domestic Product of the United States grew by more than 200 percent.[3] In fact, some economic analysis suggests that the economy is billions of dollars larger today than it would have been without the Clean Air Act.[4]

It is terrifically misleading to say that enforcement of the Clean Air Act leads to overall job losses. It doesn't. Families should never have to choose between a job and healthy air. They are entitled to both.

When discussing overall impacts on employment, it is important not to overlook the new technologies and industries that can be driven by pollution control standards. For example, EPA vehicle emissions standards directly sparked the development and application of a huge range of automotive technologies that are now found throughout the global automobile market. The vehicle emissions control industry employs approximately 65,000 Americans with domestic annual sales of $26 billion.[5] Likewise, the environmental technologies and services industry employed 1.7 million workers in 2008 and led to exports of $44 billion of goods and services, larger than exports of sectors such as plastics and rubber products.[6] In fact, the world market for environmental goods and services is worth over $700 billion, a size comparable to the aerospace and pharmaceutical industries.[7] Jobs also come from building and installing pollution control equipment. For example, the U.S. boilermaker work force grew by approximately 35 percent, or 6,700 boilermakers, between 1999 and 2001 during the installation of controls to comply with EPA's regional nitrogen oxide reduction program.[8] Over the past seven years, the Institute for Clean Air Companies (ICAC) estimates that implementation of just one rule – the Clean Air Interstate Rule Phase 1 – resulted in 200,000 jobs in the air pollution control industry.[9] Similar

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[3] Bureau of Economic Analysis, National Economic Accounts, "Table 1.1.5. Gross Domestic Product," http://bea.gov/national/index.htm#gdp

[4] Dale W. Jorgenson Associates (2002a). *An Economic Analysis of the Benefits and Costs of the Clean Air Act 1970-1990. Revised Report of Results and Findings*. Prepared for EPA.

[5] Manufacturers of Emissions Control Technology (http://www.meca.org/cs/root/organization_info/who_we_are)

[6] DOC International Trade Administration. "Environmental Technologies Industries: FY2010 Industry Assessment. http://web.ita.doc.gov/ete/eteinfo.nsf/068f3801d047f26e85256883006ffa54/4878b7e2fc08ac6d85256883006c452c/$FILE/Full%20Environmental%20Industries%20Assessment%202010.pdf U.S. International Trade Statistics U.S. Census Bureau (2010)

[7] Network of Heads of the European Environment Protection Agencies. 2005. "The Contribution of Good Environmental Regulation to Competitiveness." http://www.eea.europa.eu/about-us/documents/prague_statement/prague_statement-en.pdf

[10] Peter Darbee, chairman, president and CEO,PG&E Corp.; Jack Fusco, president and CEO, Calpine Corp.; Lewis Hay, chairman and CEO, NextEra Energy, Inc.; Ralph Izzo, chairman, president and CEO, Public Service Enterprise Group, Inc.; Thomas King, president, National Grid USA,; John Rowe, chairman and CEO, Exelon Corp.; Mayo Shattuck, chairman, president and CEO, Constellation Energy Group; Larry Weis, general manager, Austin Energy , "We're OK With the EPA's New Air-Quality Regulations," Letter to the Editor, Wall Street Journal, December, 8, 2010.

[10] Peter Darbee, chairman, president and CEO,PG&E Corp.; Jack Fusco, president and CEO, Calpine Corp.; Lewis Hay, chairman and CEO, NextEra Energy, Inc.; Ralph Izzo, chairman, president and CEO, Public Service Enterprise Group, Inc.; Thomas King, president, National Grid USA,; John Rowe, chairman and CEO, Exelon Corp.; Mayo Shattuck, chairman, president and CEO, Constellation Energy Group; Larry Weis, general manager, Austin Energy ,

effects have been recognized by the electric power industry as well. In an Op-Ed in the Wall Street Journal, eight major utilities that will be affected by our greenhouse gas pollution standards said, "Contrary to claims that EPA's agenda will have negative economic consequences, our companies' experience complying with air quality regulations demonstrates that regulations can yield important economic benefits, including job creation, while maintaining reliability."[10]

The first greenhouse gas rule issued under pre-existing Clean Air Act authority demonstrates how regulation can make sense for our economy. Last April, EPA and the Department of Transportation completed harmonized standards under the Clean Air Act and the Energy Independence and Security Act to reduce greenhouse gas pollution and improve fuel economy for new cars and light trucks.[11] The vehicles sold in model years 2012-2016 will save us 1.85 billion barrels of oil while reducing greenhouse gas emissions by 962 million tons.[12] These rules were supported by both the auto workers and the auto manufacturers, who recognize that the standards provide for certainty, drive technological innovation, and help American automakers stay competitive in a global marketplace where fuel efficiency increasingly matters. They will also save consumers money by reducing the price of gasoline at the pump and by saving the average buyer of a 2016 model year vehicle $3,000 over the lifetime of the vehicle, as upfront technology costs are offset by lower prices at the pump.

The regulatory focus on improved efficiency is not unique to motor vehicles. EPA is also focusing on energy efficiency as the method of meeting greenhouse gas permit requirements for power plants, refiners and other large industrial facilities that are building new facilities or making major modifications at existing facilities. A group of 11 power companies observed that: "EPA has proposed a reasonable approach focusing on improving the energy efficiency of new power plants and large industrial facilities."[13] This focus on energy efficiency should promote measures that reduce both emissions and long-term costs for facilities.

And make no mistake. Texas has been a part of the Clean Air Act's success.

For example, in 2000, the number of bad air days in Houston exceeded those in Los Angeles. Today, Houston's ozone levels have decreased so that the area is currently meeting the 1997 ozone air quality standard. This progress was the result of adopting new federal and state pollution-control regulations under the Clean Air Act, including tighter federal standards on passenger vehicle and diesel truck emissions, and vigorous enforcement cases focused on the

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"We're OK With the EPA's New Air-Quality Regulations," Letter to the Editor, Wall Street Journal, December, 8, 2010.

[10] Peter Darbee, chairman, president and CEO,PG&E Corp.; Jack Fusco, president and CEO, Calpine Corp.; Lewis Hay, chairman and CEO, NextEra Energy, Inc.; Ralph Izzo, chairman, president and CEO, Public Service Enterprise Group, Inc.; Thomas King, president, National Grid USA,; John Rowe, chairman and CEO, Exelon Corp.; Mayo Shattuck, chairman, president and CEO, Constellation Energy Group; Larry Weis, general manager, Austin Energy , "We're OK With the EPA's New Air-Quality Regulations," Letter to the Editor, Wall Street Journal, December, 8, 2010.

[11] 75 Fed. Reg. 25,324, *et seq.*(May 7 2010).

[12] *Id.* At 25,347 (Table I.C.2-2).

[13] November 15th, 2010 statement by the Clean Energy Group Clean Air Policy Initiative. (http://www.mjbradley.com/news_20101115_00.html).

largest polluters. The state regulations were adopted for the State Implementation Plan for ozone. These regulations included an 80% reduction in nitrogen oxide emissions from Houston industry and the substantial reductions due to the Texas Emissions Reduction Program, the largest state diesel retrofit program in the country.

Unfortunately, however, some important portions of the Texas state government program have not fared as well in meeting their legal obligations. We at the U.S. Environmental Protection Agency welcome the leadership of state governments. In fact, the Clean Air Act mandates state control of certain clean-air programs, but only as long as those programs meet national clean-air standards and procedures. If they do not, under the Clean Air Act as established by Congress, EPA is required to take action.

I want to reiterate, as we have done for many months, that we have a strong preference for states implementing clean air permitting programs for sources within their boundaries. Due to the Texas state government's refusal to cooperate with EPA to address greenhouse gases in its permitting process, something on which no other state has refused to cooperate, it was necessary for EPA to step in on a limited basis to issue the greenhouse gas portion of permits to ensure that businesses can continue to grow and that steps will be taken to control harmful carbon pollution. Without EPA's action, sources could not obtain legally-required permits, projects could not go forward, and economic growth and jobs would suffer.

As Regional Administrator Al Armendariz said when EPA recently disapproved sections of the state permitting program, we did so to "improve our ability to provide the citizens of Texas with the same healthy-air protections that are provided for citizens in all other states under the Clean Air Act."

One of the important benefits of the Clean Air Act is that it ensures equal public health protection nationally. Unfortunately, the Texas state government air permitting program is not currently ensuring the same level of public health protection to its citizens that other states are providing to their citizens.

For example, the Texas program allows changes to occur at industrial facilities without any notice to the public or EPA, allows increases in actual emissions to go unchecked, and does not include sufficient monitoring and recordkeeping to ensure the enforceability of permit requirements. As President Reagan famously said, it is important to "trust but verify." The Texas state government rules have allowed some industrial sources to say "trust us" to take actions to protect public health without giving EPA, Texas or citizens the ability to verify whether any particular pollution unit is complying with the requirements of the Clean Air Act. No other state allows this. In fact, most industrial sources in Texas do not follow this approach. Fewer than 10 percent of the major air pollution sources in Texas have "flexible" permits that fail to provide EPA, Texas, and the public the ability to verify that they are meeting Clean Air Act requirements to protect public health.

Even when there is a difference of opinion about implementation of the law, we work closely with the state to resolve it, as we have here in Texas. Our office in Dallas long has consulted with the Texas government and citizens in efforts to achieve a state program that meets the

necessary obligations under our nation's clean air program. I have personally come to Texas to try to work through these problems with the State, industry, environmental groups and other stakeholders, as have other EPA officials and members of my staff.

The Agency, both at headquarters and in the region, has been raising issues with Texas since these rules were first adopted in the 1990s and is now working intensively with representatives of industrial facilities and Texas officials to fix this flaw. Four years ago, under President Bush, EPA notified the State of Texas of its concerns with the Texas air permitting program. The failure of the state government to fix these programs, as EPA requested, resulted in lawsuits by industry to force EPA to take action on these programs, which we have been doing the last two years. Our goals are to ensure that rules are in place that meet the minimum requirements of federal law, and that clean air permits are issued that are understandable to the public, enforceable by the regulators, and in compliance with the law as established by Congress.

Some try to emphasize a disagreement between the state and EPA. But it is clear that the time is now for Texas state officials and the EPA to work together to find common ground for an effective clean-air program – one that meets its legal responsibilities, protects the health of Texans, and allows for economic growth and jobs. Every Texan has that right. We pledge to keep trying to work with Texas' leaders in a spirit of partnership and not adversarial politics to achieve those goals.

Mr. WHITFIELD. Ms. McCarthy, thank you for your testimony.

And, you know, one of the reasons Congress is getting really interested in this Clean Air Act and wants to reassert ourself is primarily because there is so much animosity about the whole issue. And you, in your opening statement, talk about how Texas has filed a lawsuit to prevent you from doing your job. I asked Lisa Jackson at our last hearing to provide us with the total number of lawsuits pending against the EPA today. She hasn't had enough time to do that yet. But I would ask you to do that. And I will tell you that Columbia Law School did do an analysis and they presented us with 290 pages of current lawsuits pending against EPA.

So, you're probably involved in one of the most—agencies that has more lawsuits than any other part of the Federal Government. And that's one of the reasons we want to try to revisit the Clean Air Act, itself.

I would ask you—one of things I find puzzling, as a layman, is that if you—in your testimony, you said that Texas had done a good job on its ambient air quality standards and ozone and it's really cleaning up and meets the 1997 standards. Well, if you have a flexible permit program that sets an overall emission cap over one particular industry that allows maybe one machine in there to exceed limits but another one to emit below limits and the overall comes within the regulated limit, why is that a problem?

Ms. MCCARTHY. Well, not all flexible permits are alike, Mr. Chairman. And, so, the agency worked very hard over the course of the past——

Mr. WHITFIELD. Well, excuse me for interrupting. But are you—you're saying, then, that not all of these permits that—that have—some of these permits, they exceed their limit overall. They exceed the overall limit?

Ms. MCCARTHY. I'm saying that fundamentally the provisions of the Clean Air Act are not complied with in the way that the State of Texas has designed its program.

Mr. WHITFIELD. Ma'am, could you tell me the specific legal authority under the Clean Air Act that gives you the authority to say that the flexible permit is illegal?

Ms. MCCARTHY. Actually, the—the Federal Government has the ultimate authority to ensure Clean Air Act compliance.

Mr. WHITFIELD. OK.

Ms. MCCARTHY. We—we essentially enter into contracts with States about how they can co-regulate with us.

Mr. WHITFIELD. But is there a specific——

Ms. MCCARTHY. There is a specific——

[Simultaneously speaking.]

Ms. MCCARTHY. We have actually noted——

Mr. WHITFIELD. Is there is specific section of the Clean Air Act that gives you the authority?

Ms. MCCARTHY. I actually would have to come back and tell you what the specific section is, Mr. Chairman, but we have noticed our decision to disapprove the flexible air permits.

Mr. WHITFIELD. Well, would you do that for me, just to——

Ms. MCCARTHY. Sure.

Mr. WHITFIELD. And provide that?

Ms. MCCARTHY. Sure.

Mr. WHITFIELD. Thank you. Now, in the testimony before one of the panels here today before you, one of the witnesses said that other States have similar flex permits. Is that true?

Ms. MCCARTHY. No, no.

Mr. WHITFIELD. No, that's not true?

Ms. MCCARTHY. No, that's not. Although other States use flexible permits, EPA has developed a flexible permit program that we call our "PAL permit," which is similar to what you're describing. It is in no way similar to Texas. Texas is missing—really consistently missing fundamental principles under the Clean Air Act discounting enforceability——

Mr. WHITFIELD. OK. But what EPA does——

[Simultaneously speaking.]

Ms. MCCARTHY [continuing]. Enforceability——

Mr. WHITFIELD. EPA does allow flexible permitting?

Ms. MCCARTHY. Absolutely. Absolutely.

Mr. WHITFIELD. But you're saying that in Texas, they do not enforce it——

Ms. MCCARTHY. That's correct.

Mr. WHITFIELD. They do not enforce it?

Ms. MCCARTHY. We have issued rules——

Mr. WHITFIELD. Tell me the three things they don't do in Texas that bothers you.

Ms. MCCARTHY. They don't require emissions to be calculated by actual emissions. They look at emissions based on what they assume that the plant could generate running 24 hours, 7 days a week, which we call——

Mr. WHITFIELD. OK. And what else?

Ms. MCCARTHY. They don't provide transparency. They don't provide enforceability, they don't provide reporting, they don't provide monitoring of the climate. So, they are unforceable under Federal law.

Mr. WHITFIELD. OK. And the other States that have similar flexible permits, they do all of those things that you say?

Ms. MCCARTHY. That's correct.

Mr. WHITFIELD. Now, if that's true, why did it take the EPA 16 years to take some action?

Ms. MCCARTHY. Well, let me try to clear that up. The actual—the—Texas proposed this permit—this flexible permit back in 1994. Actually '92, then it was approved in '94. During that process we were looking at piloting different types of flexible permits. We actually wrote the State a letter and said you're going way out in front of this. We haven't yet developed our own rules about that——

Mr. WHITFIELD. Look, I'm running out of time.

Ms. MCCARTHY. OK.

Mr. WHITFIELD. So, let me just—so, basically——

Ms. MCCARTHY. Well, let me——

Mr. WHITFIELD. Let——

[Simultaneously speaking.]

Ms. MCCARTHY. Let me look at my——

Mr. WHITFIELD. So, initially——

Ms. MCCARTHY. Let me say that we put them on notice.

Mr. WHITFIELD. Initially, you all worked with them and over time, you just felt like it was not——

Ms. McCARTHY. No. We put them on notice when they developed it that they might have to adjust it.

Mr. WHITFIELD. OK.

Ms. McCARTHY. The rules—they did not adjust themselves to the rules that were enacted.

Mr. WHITFIELD. OK.

Ms. McCARTHY. And they did not adjust themselves in court cases that told them that the way in which they were calculating emissions in their permits were——

Mr. WHITFIELD. Now, let me ask this one final question——

Ms. McCARTHY. Yes, sir.

Mr. WHITFIELD [continuing]. Since my time has expired, too. We were already talking about all of the lawsuits pending against EPA.

Ms. McCARTHY. Yes.

Mr. WHITFIELD. We know there's a lawsuit pending on the Tailoring Rule, correct?

Ms. McCARTHY. Yes.

Mr. WHITFIELD. And in your testimony, you had indicated that if the Tailoring Rule was invalid, that the permitting authorities would have to spend in the neighborhood of $24 billion to issue these permits. And the question I would have, if the EPA Tailoring Rule is determined to be invalid by the court, are you all—do you have a plan right now to deal with that?

Ms. McCARTHY. We do not believe that the Tailoring Rule will be invalidated. We believe it's consistent with Federal law.

Mr. WHITFIELD. But there is a pending court case?

Ms. McCARTHY. There are many; but there are—in every rule that we do, we have challenges.

Mr. WHITFIELD. So, you're not making any significant plans on this?

Ms. McCARTHY. We do not need to, no, sir.

Mr. WHITFIELD. Thank you.

Mr. Green?

Mr. GREEN. Ms. McCarthy, how long have you been with EPA?

Ms. McCARTHY. I have been with EPA since June of 2009.

Mr. GREEN. OK. So, it's relatively recent?

Ms. McCARTHY. Yes.

Mr. GREEN. Following up on what the chairman said, and I talked about it in my opening statement, in August of 2008, the Business Coalition of Clean Air, Texas Association of Business, and Texas Oil and Gas Association filed suit against the EPA to take action on pending permits related to the SIP actions and the flexible permits. In July of 2009, there was a settlement reached between you two on that lawsuit regarding that.

So, you know, this goes back to what the EPA was told and the agreed settlement by the parties was that EPA would enforce what you're trying to do now.

Ms. McCARTHY. Yes, that's correct. We were sued by citizens and industry, and it resulted in that settlement.

Mr. GREEN. And I know you testified that this started actually in 1992 and goes back. I'm looking at a timeline and in late 1994, Texas adopted its flex permit regulations. Did EPA notify them at that time that EPA wasn't through with their New Source Review

program and that their rules may be inconsistent so that was in late '94.

Now, October of '94 EPA sent a letter to—at that time TNRC Commission—TNRC expressing concerns regarding the proposed flexible permit and the SIP revision. We're talking about October 1994.

Ms. MCCARTHY. That's correct.

Mr. GREEN. This has been an ongoing discussion between whatever agency we call it in Texas and the EPA——

Ms. MCCARTHY. Yes.

Mr. GREEN [continuing]. Under at least three Presidents.

Ms. MCCARTHY. Yes.

Mr. GREEN. And I guess that's my concern. You know, I like the flexible permits. I didn't come to Congress until '93, but 20 years before that, I served in the legislature. And let me address Congressman Barton's concern. I remember in my 20 years in the legislature, we complained with the EPA on lots of issues, but we also recognized that they had the preemption right and over that 20 years, that was suggested many times that EPA could take over the permitting in Texas, I know between 1973 and 1993. And that's why the privacy of the Federal law is the issue here. And I know——

Ms. MCCARTHY. It is also the protection of the industries who are operating under the permits that may not protect them.

Mr. GREEN. Well—and that's my concern. And I don't know if you were here earlier, but at any given time any of the plants in our district are doing things that they need permits to do because they're expanding. We're fortunate. Most of those plants and our refineries have all expanded beyond the production of gasoline, but they need to have things going on. And they just can't have a battle between a Federal agency and a State agency or otherwise that would shut down the investment in our community.

So, frankly, I'm a little frustrated. I have some questions about the PAL program, but I'd also like—somewhere along the way, we have to get the attention and say, TCEQ and the State of Texas need to sit down. They may do it on the Attorney General's lawsuit that he's filed, but there is going to be a negotiated settlement not unlike what was done back in 2009 that's from the lawsuit filed in 2008. And that's what the hesitancy, I think, everyone has of doing anything. Because we have to deal with it.

And I just encourage you, as best you can, to sit down with TCEQ and the Attorney General under that lawsuit and see what we can come up with. But we already have a settlement on the earlier lawsuit in 2009.

Now, let me—I know the Chairman asked about the difference between the Texas flex permit and the plantwide applicability limits. Can you explain the difference between what the Texas flex permit does and the PALs? And why wouldn't Texas be able to fit under some of those plantwide applicability limits or PALs?

Ms. MCCARTHY. I—I mentioned this before, but let me try and be clear. The Federal PAL is based on actual emissions. The Texas Flexible Permits are based on allowable emissions. Essentially what this means is that in Texas, a plant could significantly in-

crease its pollution and not have to use the proper pollution control technologies.

Secondly——

Mr. GREEN. Well, we——

Ms. MCCARTHY. I'm sorry.

Mr. GREEN. Go ahead and finish.

Ms. MCCARTHY. The number of—the permit program in Texas fails to meet a number of provisions to ensure that the permit is enforceable and the process is open entry apparent to the public. And, finally, the permit process in Texas does not meet the requirements of the Clean Air Act.

Mr. GREEN. OK. When you show actual emissions, that's done by either—and we have fence-line monitors in so many of our plants already. We have so many monitors in East Harris County. That would be what we would need to find out, what was actually being emitted. Is that true? That's part of it?

Ms. MCCARTHY. The total emissions and what timetable. That is the currency of the Clean Air Act. That's right, actual emissions. What you can measure leaving the plant that can injure public health.

Mr. GREEN. So, we actually have some facts on the ground because I can tell you, I know, ExxonMobil, the biggest refinery in Texas and the country, actually, has fence-line monitoring right now. And I can go down—and I know Jim knows for sure, there's a whole bunch that in the last 10 years, even though it wasn't necessarily required, but they were doing it. So, they have the capability now to do that.

Mr. Chairman, you've been gracious; and I appreciate you letting me run over my time.

Mr. WHITFIELD. You say they have the ability for the actual emissions——

Mr. GREEN. I think they're measuring right now.

Mr. WHITFIELD. Actual emissions?

Mr. GREEN. Actual emissions.

Ms. MCCARTHY. We—we actually—we model those and we measure them directly, that's correct.

Mr. WHITFIELD. Mr. Barton, you're recognized 5 minutes.

Mr. BARTON. Thank you.

Well, first of all, thank you for showing up.

Ms. MCCARTHY. Thank you for having me.

Mr. BARTON. It's amazing to me that the lady from Connecticut can fly 1400 miles and our Region VI Administrator can come to Houston but can't come and actually appear before an official committee of the United States Congress.

Ms. MCCARTHY. He did send his regrets. He would have loved to have been here.

Mr. BARTON. Well, we will have an opportunity hopefully in the future to have him before our committee or subcommittee. But I am sincerely appreciative of your being here.

I listened to—I read your testimony. I listened to what you said in response to the chairman's questions and the ranking member's questions and I feel like I'm in some alternative universe. I have not reviewed comprehensively all the documentation that's gone back and forth between the EPA and the State of Texas since the

early '90s, but I have at least scanned most of the relevant documents. I have yet to find one that substantiates what you said in your testimony, that the Texas Flexible Permitting program is not transparent, it's not enforceable, it doesn't comply with the Clean Air Act.

Let's set aside for a minute—I know there's a debatable issue about whether the greenhouse gases are regulated under the Clean Air Act. I know that you have the Supreme Court decision and the endangerment finding, which I think the endangerment finding is very flawed; but I'll put that aside and just focus on the Clean Air Act and its amendments.

There are six criteria pollutants and the only one that Texas, unless you tell otherwise, is in noncompliance on is in some parts of the State, ozone. Do you agree with that?

Ms. MCCARTHY. Yes.

Mr. BARTON. So, which of these flexible permits—and Mr. Marston, I think said there were 70. I've been told there are 180. So, I don't know what the exact number is, but it's a finite number. Where in the Record do we have the documentation that they have been noncompliant in terms of their emissions being larger than allowed under the Clean Air Act? I don't find it.

Ms. MCCARTHY. Well, let me explain. We did put a public notice out. We explained the reasons why we were proposing this. There's a due process here. We put that out September of '09. We explained what was wrong with the process——

Mr. BARTON. Where—where—where do you substantiate and back up what you've just said, that they're in noncompliance?

Ms. MCCARTHY. It's in the notice. And any—any—and since that time any permit that has been a logic error——

Mr. BARTON. Can you—can you give the committee——

[Simultaneously speaking.]

Mr. BARTON [continuing]. An example of——

Ms. MCCARTHY [continuing]. We have objected——

Mr. BARTON [continuing]. A permit that is noncompliant?

Ms. MCCARTHY. I can get all of the permits since—that have been issued since October—I'm sorry—September of '09 that we have objected to. And there have been many. I'm now in the process of trying to be corrected, either by going to the State or EPA——

Mr. BARTON. And I'm—I'm not trying to be argumentative.

Ms. MCCARTHY. No, I'm trying to explain. There are many.

Mr. BARTON. I just—I don't see in the record where TCEQ or a particular company has knowingly and willfully violated the Clean Air Act on the regulated pollutants—again, separate greenhouse gas, which is a different debate that's—you know, your testimony would have one believe that we're some sort of an outlaw State and our regulatory authority kind of snubs its nose at the EPA and doesn't even require enforcement of the basic standards. Yet somehow our emissions are within the allowable, except for ozone. And, in that, even you admit we're making tremendous progress. It doesn't jive.

Ms. MCCARTHY. Well, I think we're confusing the actions that you take to address ozone with a permitting program that is solely

designed to mitigate additional emissions that contribute to air pollution.

Mr. BARTON. But ozone is part of that.

Ms. MCCARTHY. It is part of that. But the efforts that have been ongoing at the Federal level are through the State implementation planning process. And, then, what has been successful in reducing very high levels of pollution down to more manageable levels.

The permit process had nothing to do with that. That is not what contributed to that success. That is simply a way to try to make sure that you're not going to go back to fully emitting pollutants that will then bring you out of attainment with ozone standards.

Mr. BARTON. OK. My light's already on amber. Let me—I want to follow up with something that I asked the Attorney General.

Ms. MCCARTHY. OK.

Mr. BARTON. Because of the lawsuit that the State of Texas has against your agency, you filed an affidavit in Federal court on October the 28th of 2010 in which you—you've, obviously, under oath, say that the information you're giving in this affidavit is correct and la-tee-da, da, da. And in that affidavit at the very end and in the annex—the appendix that you add to it say that it is not the intent and you had no knowledge that EPA is going to revoke any existing permits until at least 2000—in December of 2011. Yet within a few months, if not a few days, your agency did exactly what you said they wouldn't do.

How do you reconcile that?

Ms. MCCARTHY. I believe that my statement was referencing the fact that we were taking action to try to work with 13 States that needed to make adjustments in their own State laws in order to provide an opportunity to greenhouse gas permitting. And what——

Mr. BARTON. This is—this is regarding directly the State of Texas.

Ms. MCCARTHY. Well, that——

Mr. BARTON. It says no permitting authority will be in place as of January 2nd, 2011. FIP cannot be promulgated until December the 2nd, 2011, at the earliest. It's specifically on Texas.

Ms. MCCARTHY. The particular issue that you're talking about is part of a larger effort to get 13 States into a position to either immediately regulate, to regulate afterwards, or to delegate back their——

[Simultaneously speaking.]

Mr. BARTON. Well, did you know at the time that you made this affidavit what the EPA was going to do with regards to Texas?

Ms. MCCARTHY. What I wasn't aware of is that the State of Texas prior to that had not made a statement either by the Governor or by the agency, itself, that it would simply refuse to regulate greenhouse gas permits, period.

Mr. BARTON. But this has nothing to do with greenhouse gases. We're talking about the State Air Quality permit.

Ms. MCCARTHY. I'm sorry. I'll have to look at it. I thought we referencing the greenhouse gas permitting process.

Mr. WHITFIELD. Gentlemen, the has time expired. Do you have another question, Mr. Green?

Mr. GREEN. No. I'm just interested because, again, I know Texas, starting in '92, '94, really, we had—sometimes they call them "loopholes" in Washington, sometimes they call them "opportunities" to be able to create a program that would make it easier and—and, you know, the EPA has been, it looks like from the records, we can't quantify what you're doing. But it's been going on so long that we just need to deal with it.

And we had one court case already that was an agreed judgment. Maybe we have to have another one to see what we need to do in Texas. But my concern is with the fight between Texas and EPA, I want to make sure Mr. Griffin's plants can still do what they need to be doing, producing the products—but, also, without being held up by our fight between two States and there are—the country and the State.

Ms. MCCARTHY. Congressman, I'm unaware of any business that has been interrupted as a result of our attempt to work with the State in resolving the issue.

Mr. WHITFIELD. Ms. McCarthy, I have one other question and one comment and then, I think, Mr. Barton has another question or a comment or two.

Under your SIP Call Rule, which was proposed in September 2010 and finalized in early December 2010, you all require Texas and other States to changes their laws and regulations by December 22nd, 2010, in order to comply with the new greenhouse gas permitting requirements. And, usually, when you do these change in the State implementation plans, you typically give States up to 3 years.

So, why in this instance did you give them, like, weeks to amend their State Implementation Plan?

Ms. MCCARTHY. Well, what we did was we worked with all of the States and we developed a process where we would either take over the permitting, ourself or else they would identify a phased approach where they would be able to provide opportunities to change their laws and then take back the permitting process. In the rule we gave a number of choices to States on how to do this. What we were unaware of is that Texas would choose neither to accept or reject our offer but simply to refuse to do the greenhouse gas permitting, period. Which forced our hands in order to protect the interests of the business here to be able to get permits in a timely way, to at least temporarily take that——

Mr. WHITFIELD. What I was told is that Texas made EPA aware of their position in August of 2010.

Ms. MCCARTHY. I am not aware of that.

Mr. WHITFIELD. We—I mean—well—oK. Let me just make a couple of other comments. One, would you please have your legal department provide us with a list of at least a number of lawsuits pending today against EPA and the actual budget amounts to defend those lawsuits in your budget.

And then, number two, just a legal analysis, maybe a two-page or so from your legal authorities on what the Federal authority is for your position on the flex plans—the flex permits.

Ms. MCCARTHY. All right.

Mr. WHITFIELD. Thank you. Mr. Barton?

Mr. BARTON. Isn't it Mr. Green's turn?

Mr. GREEN. Following up on what the Chairman said, could Texas, by Administrative Rule, change their—what it takes to statutory law changed by the legislature?

Ms. MCCARTHY. I believe it would take statutory change, but we will work with them in whatever they feel is legally appropriate.

Mr. GREEN. Because I know sometimes most States meet every year. The Texas legislature only meets every 2 years and most governors don't really want the legislature there. So, they don't call special sessions. And we've had that problem in the past. A good example is the State—Children's Health Care Program created in '97. Texas didn't go back in session until '99 and didn't have any law until 2 years later for the Children's Healthcare Program. And, you know, our legislature is only in session in the spring of every odd year, which is sometimes good.

Ms. MCCARTHY. We'd like nothing better in the world [inaudible] to phase approve legal authority to do it more quickly, we'll certainly be able to help you with that.

Mr. WHITFIELD. Mr. Barton, you're recognized.

Mr. BARTON. Madam Administrator, am I correct in that the disagreement between Texas and EPA on greenhouse gases is a separate issue than the disagreement between Texas and EPA on their flexible permitting program under the other terms of the Clean Air Act?

Ms. MCCARTHY. Yes.

Mr. BARTON. They're two separate issues?

Ms. MCCARTHY. Yes.

Mr. BARTON. OK. Now, you said in your testimony and you said in response to a question that Texas is not requiring monitoring of their flexible permitting program?

Did I hear you correct?

Ms. MCCARTHY. Not sufficiently providing an opportunity for enforcement under the Federal law.

Mr. BARTON. Now, I'm not familiar with all the plants here in the Houston area; but I have several cement plants, I have a General Motors assembly plant, I have some defense plants, I've got a coal plant—several coal plants, several natural gas power plants. I have a number of qualified facilities under the Clean Air Act in my district and I that almost—I think every one of those, they have continuous monitoring of their smokestacks?

Ms. MCCARTHY. They may very well. I'm not saying there is no monitoring, certainly; and I'm not implying that the businesses are doing anything inappropriate.

What I'm suggesting is that the permit that they're operating under doesn't provide sufficient detail for it to be enforceable under Federal law and to mutual compliance.

Mr. BARTON. I don't——

Ms. MCCARTHY. They simply don't have the recordkeeping requirements and in some cases, the monitoring necessary for us to measure actual emissions and to determine whether or not there are increased emissions when they're making and providing the changes, that the State allows to happen without public process and without permitting.

Mr. BARTON. Well, we just have a disconnect here because I'm, personally, familiar with several of the plants, again, in my con-

gressional district that have continuous monitoring for SO_2 and NOx and ozone. I'm aware in the Dallas-Fort Worth area and I assume here in the Houston area that you have these ozone monitors that are not plant-specific that are at locations around the community that continuously monitor and you're saying those are noncompliant with Federal law?

Ms. MCCARTHY. What I'm saying is that—that the flexible permit is based on what's allowable for emissions and not based on actual emissions. It is a critical issue under the Clean Air Act.

Mr. BARTON. But isn't that a resolvable issue without revoking all these permits that have been existence for 16—I mean, you've known about it for 16 or 17 years.

Ms. MCCARTHY. Well, we're kind of stuck between a rock and a hard place here. Because they were called "regulators," the region respectfully worked for many years to try to resolve the problem. We were, then, sued because we didn't take quick interim action. We were sued by citizens under petition, the new supervisor of the business community who was worried about the legality of their permits. We were then forced to take the type of action that is now raising your eyebrows. I understand this.

None of us want to be in this position. If we could sit down, we could easily resolve this problem. And, in fact, we are doing that. It's just—it's just we now do not have a flexible permit program under the State that the State and major industries can rely on to receive permits that will meet Federal requirements under the law.

Mr. BARTON. Well, I have a different opinion of our State regulators than Mr. Marston does. I think they're people of good conscious, and they want to enforce law—both the State and the Federal law and they want to work with our Federal officials at EPA. I also believe that our industry groups want a clean environment. I mean, they live in the same communities, they shop in the same shops, they have the same health interest as a regulator in Washington, DC.

And when I look at the record, I go back 16, 17 years—and, again, I've not looked at every document. I can't stand here and take an oath that I've read every document. But the documents that I have read really refer to kind of generic—I won't say "minor problems," but just general disagreements and uncertainty that they don't show what you just said. They don't say, "You're not monitoring. You're not doing it. You're not"—I don't see any of that.

And—and I would—you know, Mr. Green and I are not of the same political party, but we share the same general conclusion on this flexible permitting program that it ought to be able to be worked out. I don't see any irreconcilable issues here. If you need more monitoring, I have a pretty good feeling that the TCEQ people will agree to more monitoring.

If you need some more transparent paperwork process, if you need a different calculation methodology, I've not—and I've repeatedly pushed the State officials, you know, tell me the truth, the whole truth, and nothing but the truth about what's going on here.

So, is it—is it the Obama Administration's position that under no terms or conditions are they going to approve the flexible permitting program for existing facilities in Texas at all?

Ms. MCCARTHY. Absolutely not. In fact, Texas does take advantage of our PALs Program. We certainly can take care of the 10 percent of major sources that are using the flexible permit. We certainly can provide an opportunity to transform those permits into Federally enforceable, compliant permits.

Mr. BARTON. Well, if can——

Ms. MCCARTHY. And I'd much rather do that on a programatic level than individually. But right now we're working individually.

Mr. BARTON. If we can get some concrete issues that need to be addressed, I am sure that Chairman Whitfield and Chairman Upton, and Mr. Green, and Mr. Waxman and—I mean, whoever you want to be in the negotiations, can work with EPA in Washington and TCEQ in Texas and we can resolve this issue.

I mean, I just—I can't stress enough, Mr. Chairman, it is important that we have an environmental program Nationally and at the State level that every citizen has confidence in that's going to give us the best air quality and the best water quality that is obtainable in the modern era with the technology that's available.

Mr. WHITFIELD. I agree. It almost seems to me, from what you've said, that the objection is that in the flex permitting language, it does not say certain things; and, yet, we know that these industries around here we were just talking about, you didn't mention the difference between actual and what is allowed because it almost seems like the language in the permit needs to be changed to make sure that you're giving the information that you need.

Ms. MCCARTHY. Mr. Chairman, it's a much more fundamental issue than that because under the Clean Air Act, if you significantly increase your emissions, you're required to look at controls and modernize them.

So, what you're doing is providing—by basically casting in stone allowable, you are never going to operate those facilities from that point forward at an increased emissions——

Mr. WHITFIELD. And you're talking about individual sources of emissions within an industry, as well?

Ms. MCCARTHY. Or the entire facility.

Mr. WHITFIELD. Yes.

Ms. MCCARTHY. It's not that we're requiring unit by unit——

Mr. WHITFIELD. And you will have your legal department provide us with a two-page or so——

Ms. MCCARTHY. I will. And if I may, I am not indicating or trying to malign anybody at TCEQ. I've been met many of the commissioners and met with the staff. They're honorable human beings. I think right now we've made a lot of progress that we had to make since we had the noticed our disapprovals of their permit process being objected to permits. I wish we could do this in a little more gracious way so that it wasn't—so this disagreement wasn't so apparent. We are getting there. It's not easy, but I will pledge EPA's continued cooperation with TCEQ and we will get there.

Mr. WHITFIELD. Well, good. You know, I think there's something wrong when we've got a Government agency with 290 pages of lawsuits pending. Of course, I recognize that the law encourages the lawsuits and the law also gives Federal judges authority to reimburse the legal cost.

But we appreciate your time today. We look forward to continuing to work with you on a lot of issues. And we'll keep the record open for 30 days for any additional material or questions.

Mr. GREEN. I just want to thank South Texas Law School—I have a lot of friends and family who attended here—for allowing us this venue.

Mr. WHITFIELD. Yes, so do I. And I appreciate the staff for helping get this organized. And with that, we'll conclude this hearing.

[Whereupon, at 12:17 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 6, 2011

Honorable Ed Whitfield
Chairman, Subcommittee on Energy and Power
Committee on Energy and Commerce
House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Mr. Chairman,

It was an honor to testify before the Subcommittee on Energy and Power on March 24, 2011 in Houston, Texas. Pursuant to your request, enclosed are my answers to the questions you submitted on April 20, 2011.

I would also like to express my sincere appreciation for the time you and members of the Texas delegation took out of your schedules to prepare and conduct the field hearing. I hope the information and testimony provided at the hearing, along with my responses to your important questions, will serve to ensure that sound science and the word of law remain the basis for economic and environmental decision-making in the United States Congress, at the Environmental Protection Agency, and the great state of Texas.

Sincerely,

Bryan W. Shaw

Bryan W. Shaw, Ph.D.
Chairman

cc: The Honorable Bobby L. Rush, Ranking Member
The Honorable Joe Barton

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: www.tceq.state.tx.us

Subcommittee Chairman Ed Whitfield and The Honorable Joe Barton

1. **A 2007 Bush Administration letter was cited by both Ms. Gina McCarthy and Mr. Jim Marston to demonstrate that the TCEQ is wrong to support and defend the flexible permits program.**

   a. **In what context should the 2007 letter be considered by the Committee?**

   Ms. McCarthy and Mr. Marston fail to acknowledge the fact that such correspondence between regulatory agencies is a normal and healthy function of cooperative federalism. Their comments incorrectly equate inter-agency correspondence with an official, legal publication in the *Federal Register*.

   The 2007 letter, which the EPA calls its "fair notice" letter(s), stated that flexible permits were not federally enforceable, but only because the EPA had not acted on the 1994 State Implementation Plan (SIP) submittal. The 2007 letter did not explicitly say or imply that the flexible permitting rules were un-approvable. In a meeting with TCEQ staff, held prior to the release of the "fair notice" letters, the EPA explained the letters as a requirement in case it needed to take enforcement action against a particular company. In no way did the EPA communicate to the TCEQ that its "fair notice" letters were intended to tell companies their flexible permit was not supportable.

2. **The Texas Flexible Permit Program has been in use since 1994.**

   a. **Has the Texas Flexible Permit Program resulted in large emissions reductions?**

   Yes. Two examples include a coal and petroleum coke fired power plant that reduced 25,803 tons per year (tpy) SO2, 10,330 tpy NOx, 795 tpy PM/PM10 AND a petroleum refinery that reduced 920 tpy VOC, 4 tpy SO2, 844 tpy NOx, 38 tpy CO. Please see Attachment 1 for further graphical representations demonstrating quantifiable emission reductions from flexible permit holders.

   b. **Are the flex permits enforceable and/or protective of human health? In TCEQ's view, do these meet the requirements of the Clean Air Act? Please explain.**

   Yes, flex permits are enforceable, protective of human health, and meet the requirements of the Clean Air Act. This is because flexible permits have emissions limits and are enforceable through appropriate monitoring, testing, recordkeeping, and reporting requirements. During the technical review of flexible permits, off-property emission impacts are evaluated for compliance with the NAAQS and health effects screening levels.

The monitoring and recordkeeping requirements in Texas' flexible permits (similar to all permits) have evolved over time. However, the permits being issued today certainly contain sufficient monitoring, testing, recordkeeping, and reporting requirements to ensure compliance with the permit limitations and other requirements. The EPA has also reviewed many of these permits and their monitoring, testing, recordkeeping, and reporting requirements. Up until recently, the EPA commented on this matter only on occasion. In addition, and in direct response to the EPA's concerns, the TCEQ recently adopted a rule change that will make the flexible permit monitoring, testing, recordkeeping, and reporting requirements nearly identical to the requirements contained in the EPA's Plant-wide Applicability Limit (PAL) rules, which allow sources to establish site-wide caps for federal New Source Review (NSR) applicability.

Furthermore, the Texas rules reviewed by the EPA required sources to comply with federal NSR requirements. The TCEQ made this requirement even clearer when it adopted the new rules for flexible permits. In fact, some sources received federal NSR permits either at the time they obtained their flexible permit or subsequently, as a result of modifications made at the source which triggered federal NSR review. On countless occasions, the TCEQ has discussed this issue with the EPA, reminding the EPA that it reviewed those federal permits while the permits were pending, and that the EPA did not notify the TCEQ of any objections. To date, the EPA still fails to recognize that flexible permits have gone through federal NSR on many occasions. Below is a citation from the rules reviewed by the EPA (emphasis added):

> **§116.711. Flexible Permit Application.**
>
> Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. T he Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete. In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit information to the commission which demonstrates that all of the following are met.
>
> (1)...
>
> (8) Nonattainment review. <u>If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter.</u>
>
> (9) Prevention of Significant Deterioration (PSD) review. <u>If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review.</u>

See 30 Tex. Admin. Code § 116.711. Based on this rule language, the TCEQ challenges the EPA to demonstrate how the requirement to comply with federal NSR is not clear.

Regardless of whether the EPA accepts the TCEQ challenge, the TCEQ has since added additional language to these rules to provide further clarification that the applicant must conduct a federal NSR applicability analysis as part of an application for a flexible permit. This additional rulemaking was initiated to address the EPA's comments in the *Federal Register* and to further ongoing efforts to work cooperatively with the EPA.

c. What environmental benefits, if any, does Texas anticipate once companies de-flex? Or is there potential for the actual or authorized emissions to increase as a result of the de-flexing process?

The TCEQ believes that the flexible permit program led to quantifiable reductions of emissions. *See Attachment 1.* Consequently, the TCEQ does not anticipate any environmental benefits to companies de-flexing. In most cases, if the individual pounds per hour and tpy limits of a de-flexed permit are added together, the total will be higher than the flexible permit cap. In order to limit this potential increase, the TCEQ has worked with the flexible permit holders to establish caps that cover parts or all of the sites that will further limit the individual unit emission limitations to no more than the limits contained in the flexible permits.

d. Ms. McCarthy stated that air quality improvements in Texas were a result of Federal standards and not TCEQ permits. How do you respond to that statement?

The Texas flexible permit program was established as an alternative to the traditional minor NSR permitting program, and it is based on the Texas belief that only well-controlled facilities should be given additional operational flexibility. Unlike Texas, the federal permitting program has never established a mandatory or voluntary mechanism to require the permitting of grandfathered facilities. Since the Texas industrial base was in place well before either state or federal permitting requirements, many of Texas' largest sources, in terms of emissions, were grandfathered from state and federal permitting requirements.

Texas, not the EPA, eliminated grandfathered facilities by using flexible permits as one of our regulatory tools. This resulted in significant decreases in emissions. In fact, Gregg Cooke, a former Regional 6 Administrator, lauded the flexible permit program at the 2002 ribbon-cutting for the Lower Colorado River Authority's (LCRA) Fayette power plant. He stated,

Thank you Jeff [Saitis], Governor [Rick Perry], Mayor [Gus Garcia], Joe [Beale]. It's a pleasure to be here this morning on behalf of EPA Administrator Christie Todd Whitman. I am very pleased to be here this morning for a variety of reasons.

In Washington, we've had quite a fervent debate about controlling power plant emissions and what does that mean for the Clean Air Act. Well, as I take those issues down to Texas and try to how to see how to best do that, it is a great solace to me to come to a place like Austin, Texas where it appears from this announcement today that we're going to learn how to do that right and potentially become a model for the rest of the country.

Well, what does that mean as a result of this announcement? First, it's flexibility. Because, this facility is going to have the flexibility under one permit to reach certain limits. But flexibility doesn't mean that it's worse for the environment. Because in this permit, as contemplated, will also involve greater environmental performance. So, you can provide flexibility and state of the art performance at the same time. I submit that that is the model we should be looking for nationwide. And I hope at the end of the day to take this permit back to Washington and say, "This is the way we should do that."

Well, what does that mean for Central Texas? Well as you know Joe, before, and Mayor, before we had some recent floods, we had a lot of air days in Austin, even, that either came close or did violate the new eight-hour ozone standard here in Austin. And so lest we forget, we have a job to do here in Austin. It's not just Dallas and Houston that have issues with air quality, it's Austin as well. And so working with the Mayor and members of Central Texas Clean Air Force, and TNRCC, EPA has provided greater flexibility for Austin to control its own future in relation to meeting air quality mandates.

But, in order to do that, every single partner in that coalition are going to have to step up to the plate to reduce emissions if we're going to get there. This is, I submit, [is] the first tangible step that we can count on to reducing emissions in Central Texas, but yet doing so in a way that provides clean

> energy, and affordable energy, and reliable energy while providing for that flexibility. If indeed we can do all of that, we deserve here in Central Texas to take the mantle of being the most innovative municipality and entities in the country to meet air quality mandates. And EPA is proud to support that effort.

The charts contained in Attachment 1 show the reduction in emissions from sources with flexible permits since 1995. Although it is difficult to quantify which of these reductions result from each state or federal rule or permitting requirement, the TCEQ does believe that many of the reductions shown in these charts are a result of the Texas permitting process, including the flexible permits held by these sources. The citizens of Texas, the regulated community, and the TCEQ have made significant efforts to improve the state's air quality. If all it took to improve air quality was the setting of federal standards, then there would be no need for the many SIP submittals, permit modifications, and emission control strategies that have been developed by Texas and other states.

3. **It has been alleged that the TCEQ has not addressed the issues raised by the EPA as they relate to flexible permits. How do you respond to this charge? How would you describe the agency's response to these issues? Will your agency remain open to discuss possible solutions with the EPA and continue to engage in meaningful discussions with its federal counterpart in hopes of reaching an agreement?**

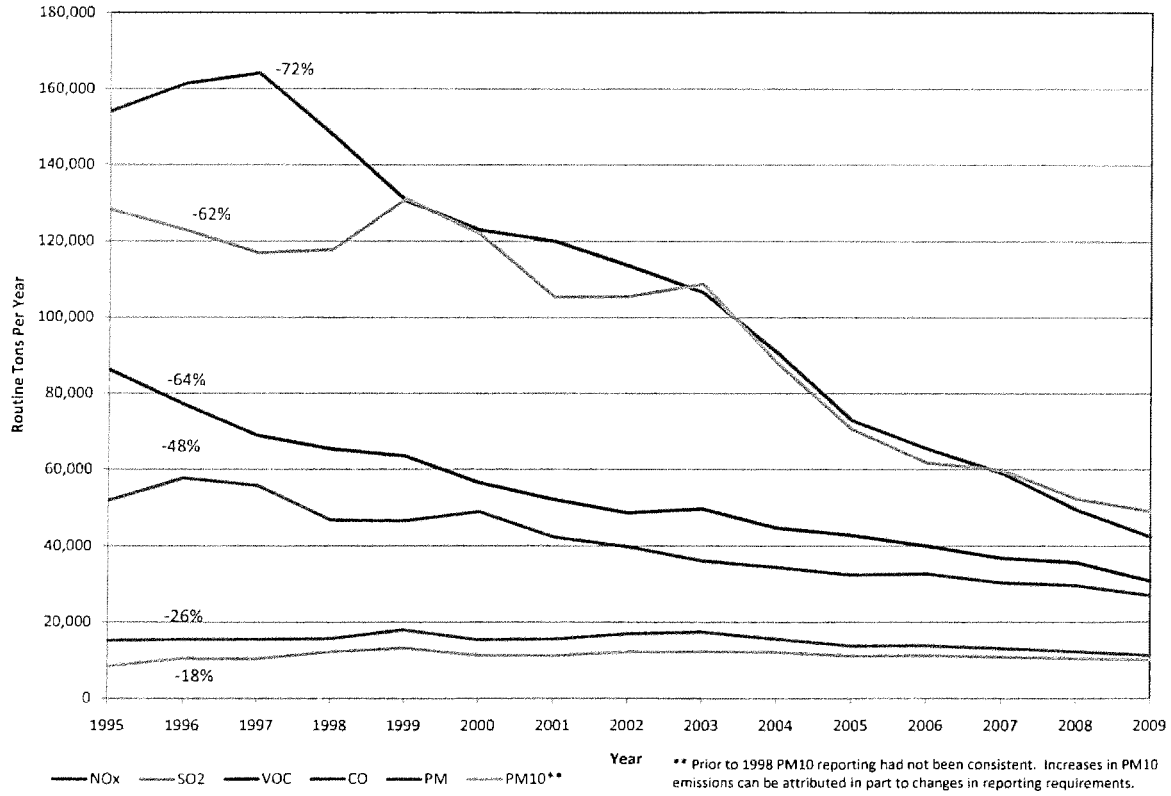
TCEQ has taken these issues seriously and responded to every letter sent by the EPA on this issue. *See Attachment 2.* TCEQ staff has also met with the EPA on numerous occasions since 2006, and made repeated attempts to correct EPA staff's lack of understanding of the flexible permit program. Most recently, the TCEQ adopted revised rules for flexible permits on December 14, 2010. These changes attempt to address the EPA's concerns, and clarify in rule, the way the TCEQ has been operating the flexible permit program for the last seventeen years. In its October 23, 2009 letter to Ms. Gina McCarthy, the TCEQ agreed to expedited rulemaking on all rules over which the EPA had expressed concern, which included flexible permits rules. In all cases, the TCEQ has met the agreement set forth in the October 2009 letter. To date, the TCEQ has received no feedback from the EPA on any of these rule packages.

The TCEQ will continue to work with the EPA in hopes of reaching an agreement that will recognize and affirm the legal validity of the flexible permit program and the rulemaking process of the TCEQ.

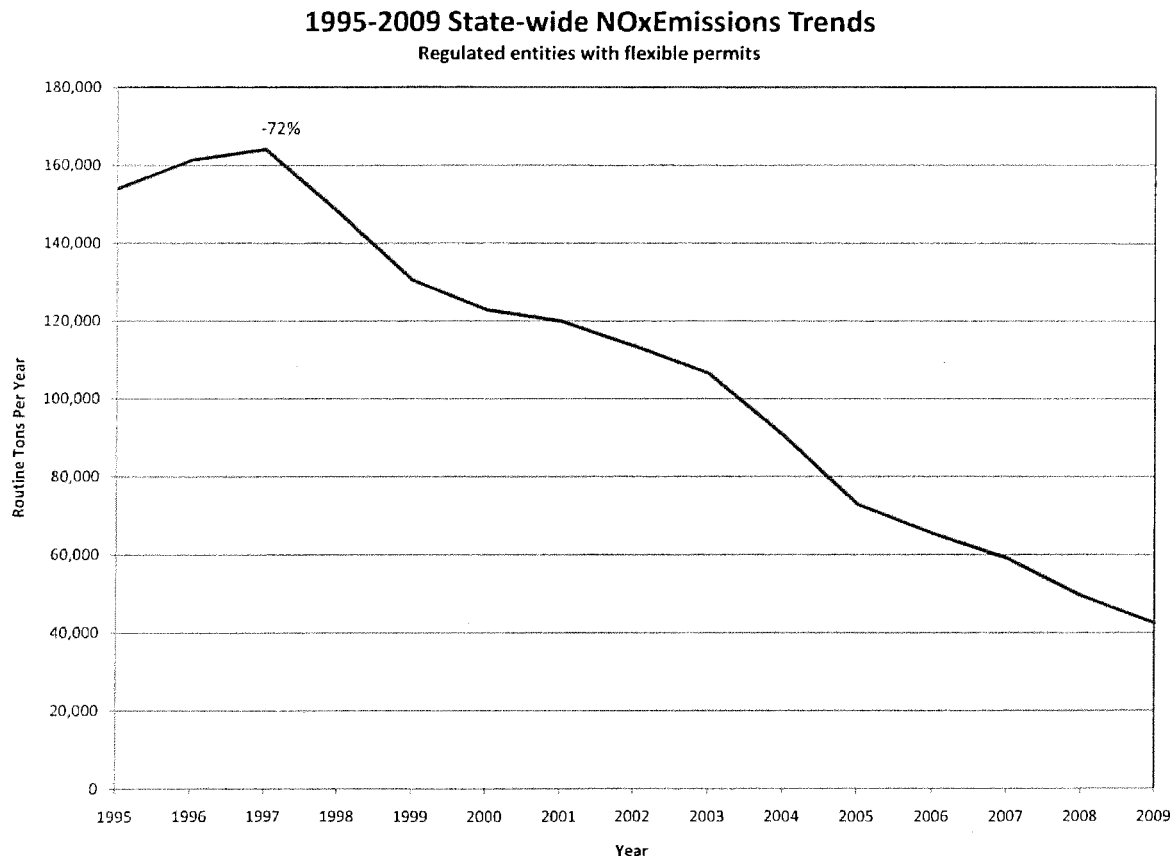
ATTACHMENT 1

1995-2009 State-wide Emissions Trends

Regulated entities with flexible permits

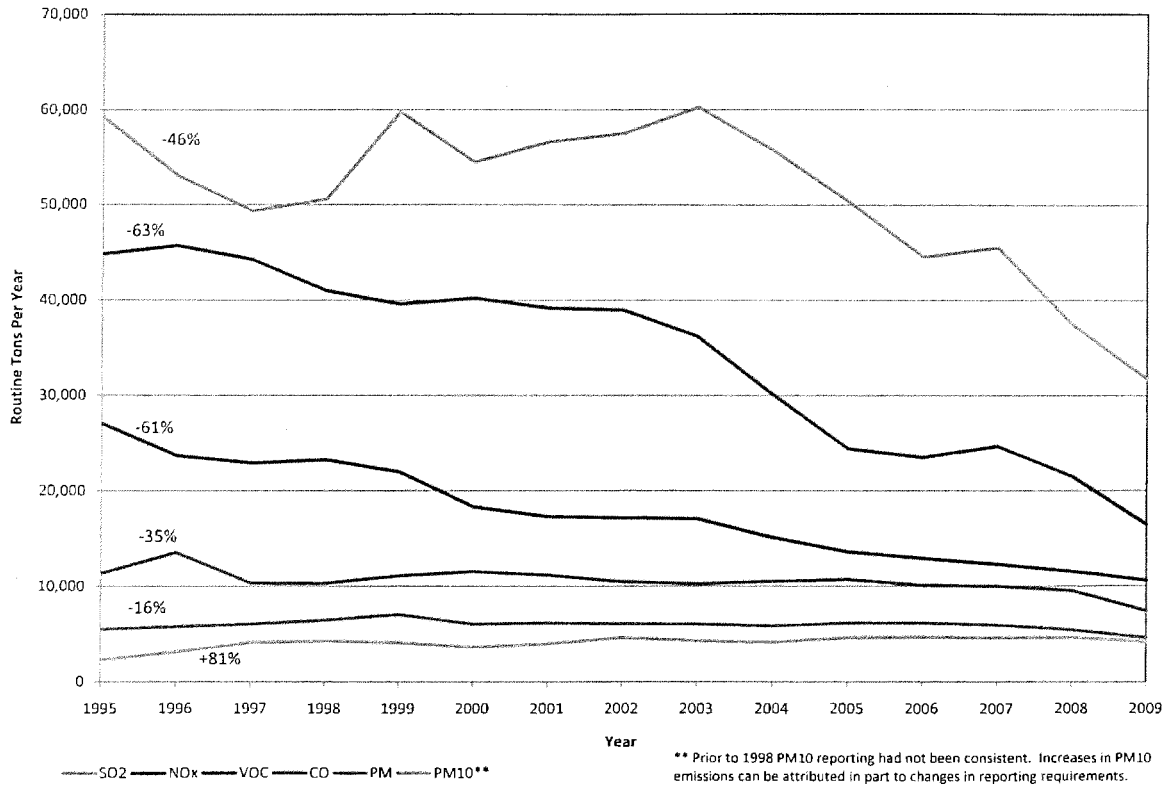


** Prior to 1998 PM10 reporting had not been consistent. Increases in PM10 emissions can be attributed in part to changes in reporting requirements.

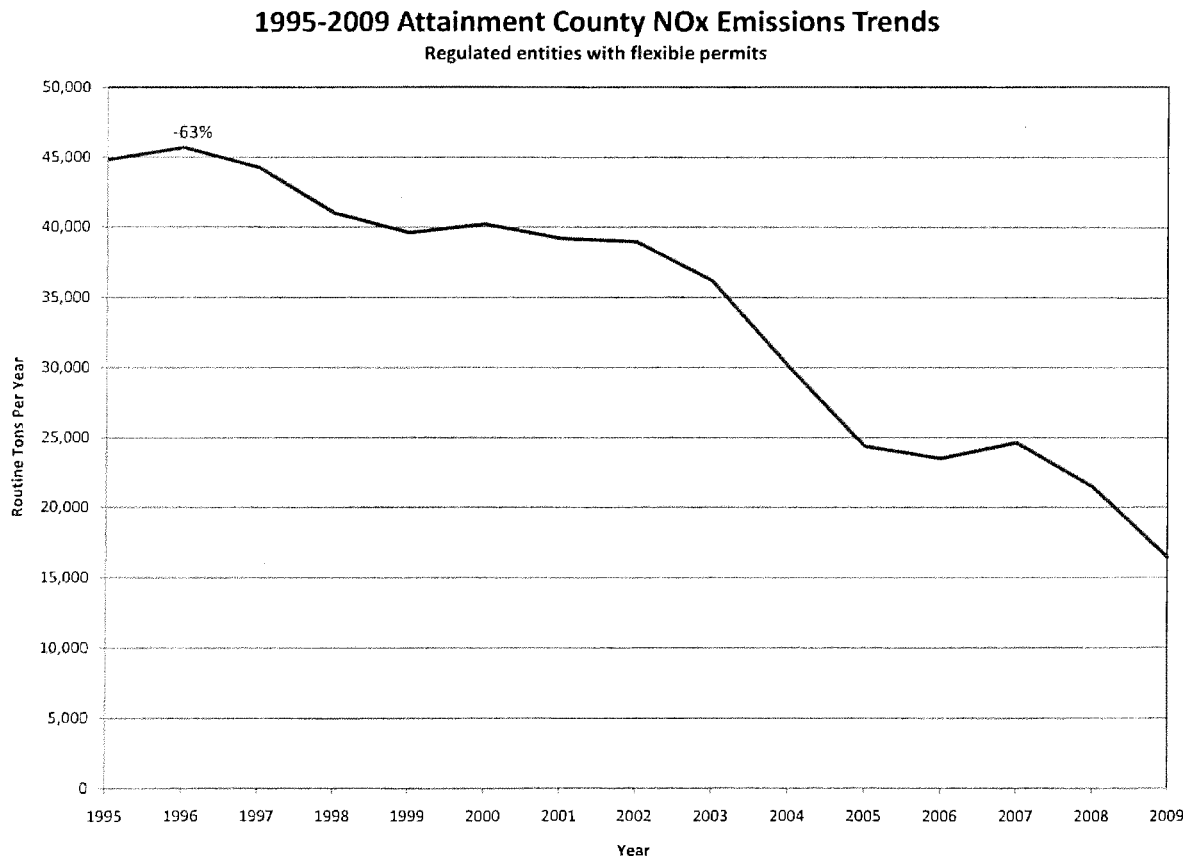

1995-2009 State-wide NOxEmissions Trends
Regulated entities with flexible permits
-72%
180,000
160,000
140,000
120,000
100,000
80,000
60,000
40,000
20,000
0
Routine Tons Per Year
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year

1995-2009 Attainment County Emissions Trends

Regulated entities with flexible permits

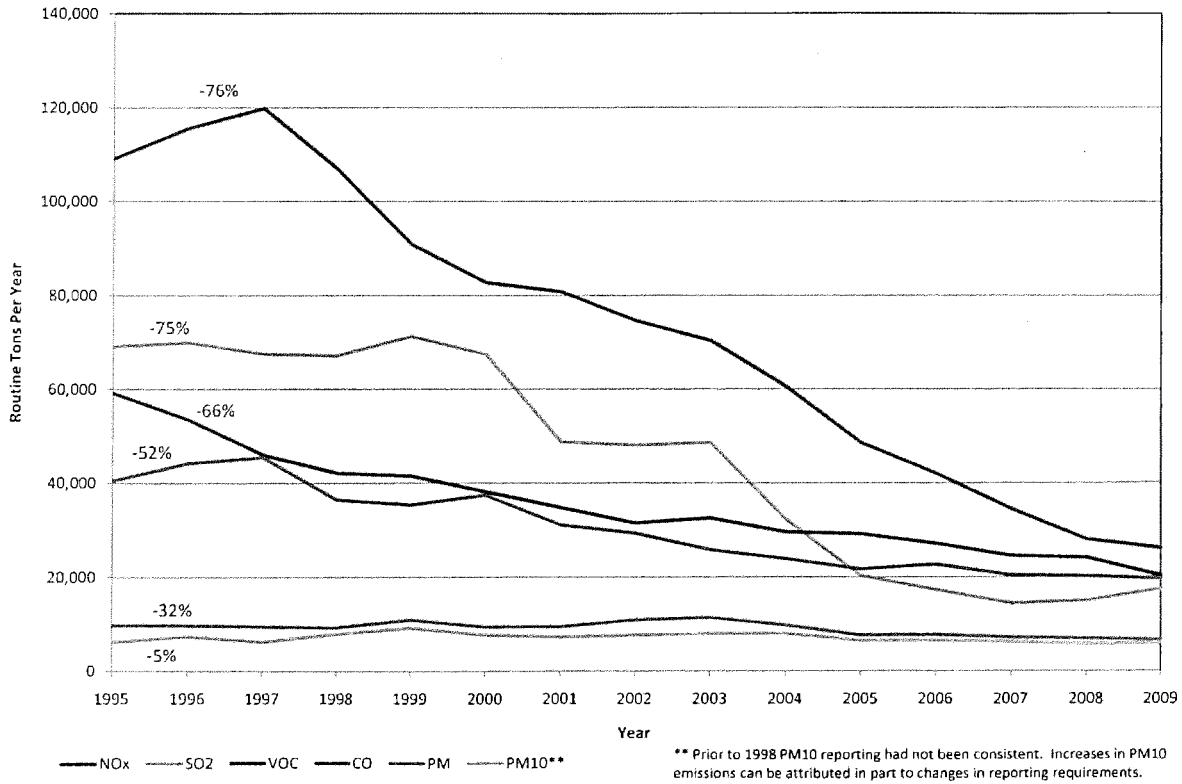


** Prior to 1998 PM10 reporting had not been consistent. Increases in PM10 emissions can be attributed in part to changes in reporting requirements.

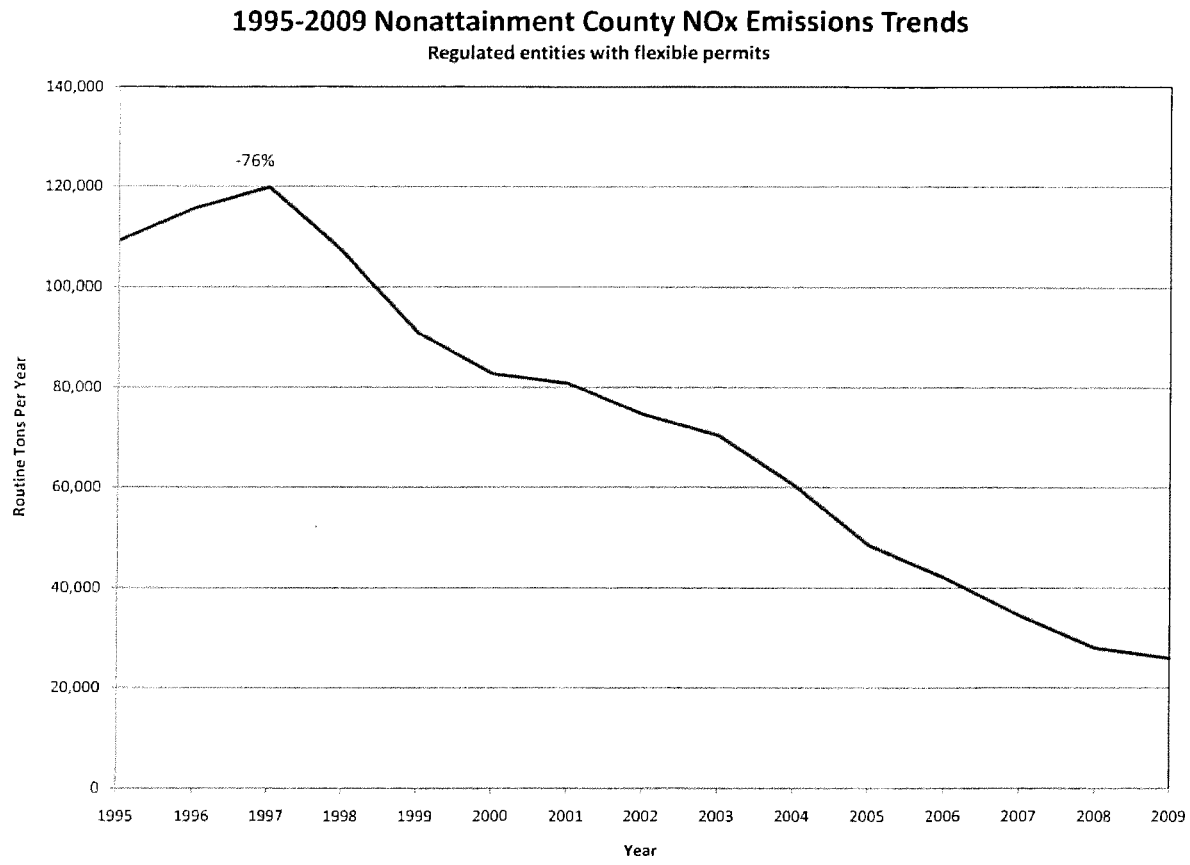

1995-2009 Attainment County NOx Emissions Trends
Regulated entities with flexible permits
-63%
Routine Tons Per Year
50,000
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year

1995-2009 Nonattainment County Emissions Trends

Regulated entities with flexible permits



** Prior to 1998 PM10 reporting had not been consistent. Increases in PM10 emissions can be attributed in part to changes in reporting requirements.


1995-2009 Nonattainment County NOx Emissions Trends
Regulated entities with flexible permits
-76%
Routine Tons Per Year
140,000
120,000
100,000
80,000
60,000
40,000
20,000
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year

ATTACHMENT 2

Attachment 2: Correspondence between EPA and TCEQ regarding Texas Air Permitting Program

- April 11, 2006 - Letter from EPA
- September 15, 2006 - EPA Qualified Facilities letter
- August 30, 2007 - Response from TCEQ
- March 12, 2008 - Letter from EPA
- March 31, 2008 - Response from TCEQ
- June 13, 2008 - Response from TCEQ - BACT
- June 13, 2008 - Response from TCEQ - PBR
- June 13, 2008 - Response from TCEQ - Public Participation
- June 13, 2008 - Response from TCEQ - Consolidation, Reissue and Amendment
- October 27, 2008 - Response to TCEQ's Letters From EPA Region 6
- June 5, 2009 - TCEQ Letter to EPA Region 6
- June 24, 2009 - EPA Region 6 Response Letter
- September 29, 2009 - EPA E-mail
- October 23, 2009 - TCEQ Response Letter
- October 30, 2009 - Letter from EPA - Seven Issues Re: State Implementation Plan (SIP)
- November 12, 2009 - Letter from EPA - Further SIP Discussion
- February 16, 2010 - Letter from EPA - Public Participation
- March 1, 2010 - Letter from EPA - Comments on Rule Project
- April 15, 2010 - Letter from EPA - Future Permitting Work
- May 14, 2010 - Letter from EPA - Flexible Permitting Issues, including BACT
- May 24, 2010 - Response from TCEQ - Response to EPA April 15, 2010 letter
- June 7, 2010 - Letter from EPA - EPA Region 6 Qualified Facilities rule comments
- June 10, 2010 - Letter from EPA - Title V Incorporation By Reference
- July 6, 2010 - TCEQ Letter to EPA - Voluntary 'De-Flex' Options"
- August 2, 2010 - Letter from EPA - EPA Region 6 Flexible Permitting rule comments
- August 9, 2010 - TCEQ Letter to EPA from Chairman Shaw

- August 9, 2010 - Letter from EPA to Commissioner Rubinstein
- August 30, 2010 - Letter from EPA to Chairman Shaw
- October 4, 2010 - TCEQ comments on permitting of greenhouse gas sources.
- November 1, 2010 - Letter from EPA - Alteration option for transitioning Flexible Permits.
- December 21, 2010 - Letter from EPA to Chairman Shaw regarding federal air construction and operating permits meeting Clean Air Act.
- March 18, 2011 - Letter from EPA - Title V Objections.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

APR 11 2006

Mr. Steve Hagle
Special Assistant
Air Permits Division (MC-163)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State Implementation Plan (SIP) Revisions for Flexible Permits

Dear Mr. Hagle:

This letter is a follow-up to our meeting in Austin on October 12, 2005, and subsequent discussions concerning revisions to the Texas SIP related to Flexible Permits. Subchapter G of Chapter 116 of Title 30 of the Texas Administrative Code (30 TAC). We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements or identify changes you will make to address our concerns. We will review and take action on these rules prior to taking final action on your New Source Review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

David Neleigh
Chief
Air Permits Section

Enclosure

APR 17 2006

Comments on Texas SIP revisions, Subchapter G, Chapter 116, Flexible Permits

1. **General Comment**

We understand that the Flexible Permit rules apply to major and minor sources and that the rules are designed to provide an exemption from minor NSR requirements if sources do not exceed an allowable emissions cap. In general, the allowable emissions cap assumes Best Available Control Technology (BACT) emission rate plus up to 9% for all units under the permit. Partial Flexible Permits are allowed. We reviewed the Flexible Permit rule as it applies to major sources for consistency with Federal major NSR regulations and 40 CFR 51.160 and 51.161. Texas adopted the Flexible Permit rules prior to finalization of Federal NSR Reform regulations. The final Federal regulations measure emissions increases which result from a modification at existing major sources using the baseline actual-to-projected actual applicability test. The final rules also provide an exemption from the definition of major modification for sources with an actual Plantwide Applicability Limit (PAL). The Court in *New York v. EPA*, 413 F.3d 3, (D.C. Cir. June 24, 2005) struck down provisions of the regulations that provided for exemptions from major NSR applicability that were not based upon actual emissions. The Court held that the NSR modification requirement, which incorporates by reference Clean Air Act (Act) § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions." Therefore, many of our comments relate to how Flexible Permits are consistent with Federal major NSR requirements.

We have reviewed the Flexible Permit rules as they apply to minor sources and minor modifications for consistency with 40 CFR 51.160 and 51.161.

2. **Voiding of Existing SIP-approved Permits**

The Texas Commission on Environmental Quality (TCEQ) has stated that all existing permits applicable to the permittee are voided upon issuance of a Flexible Permit. The Flexible Permit becomes the controlling authority for the site, as explained at 10 TexReg 733b:

> The applicant for a flexible permit may combine existing permitted facilities, grandfathered facilities, and new facilities into the flexible permit. The flexible permit will then become the controlling authorization for all facilities included in the permit, replacing any existing permits that may have been applicable to all or part of these facilities.

The rules provide for initial issuance of a flexible permit "as an alternative to obtaining a new source review permit" where the source triggers major NSR requirements. We understand that the resulting BACT or Lowest Achievable Emission Rate limits are not enforceable at the new or modified source. Nonattainment NSR (NNSR), prevention of

> significant deterioration (PSD) or air quality, minor NSR permits, and permit application representations incorporated by reference into the permits previously issued under the Texas SIP are voided upon issuance of the Flexible Permit. We also understand that these permits are voided without public participation in many cases.
>
> Please explain the legal authority under which TCEQ voids existing federally enforceable NNSR, PSD, and minor NSR permits
>
> Title I of the Act requires permitting authorities to establish in permits source specific terms and conditions necessary for sources to comply with the requirements of the PSD and NSR programs of parts C and D of the Act. EPA's long-held position is that these permits must remain in effect because they are the legal mechanism through which the underlying PSD or NSR requirements become applicable, and remain applicable, to individual sources.[1] 40 CFR 70.1 requires that each title V source permit assures compliance with all applicable requirements, including any term or condition of any preconstuction permit issued pursuant to programs approved or promulgated under title I of the Act. Amendments to PSD or NSR or minor NSR permits must be made in accordance with the SIP and approved permitting programs. Terms and conditions of construction permits are permanent and remain effective unless changed using title I procedures or a new construction permit is issued. The Federal PAL rule provides a procedure, including public participation, for the elimination of permit limits that were taken to avoid applicability of major NSR applicability and are replaced by a PAL. Federal NSR regulations do not provide for a blanket elimination of emission limits at individual units. Operational flexibility under Federal regulations and policy can be obtained by preapproving future modifications or by setting an actual PAL in order to avoid major NSR netting.

The preamble to the final PAL rule provides:

> Can a PAL Eliminate Existing Emission Limitations? An actuals PAL may eliminate enforceable permit limits that a source may have previously taken to avoid the applicability of major NSR to new or modified emissions units. Under the major NSR regulations at §§52.21(r)(4), 51.166(r)(2), and 51.165(a)(5)(ii), if you relax these limits, the units become subject to major NSR as if construction had not yet commenced on the source or modification. Should you request a PAL, today's revised regulations allow the PAL to eliminate annual emissions or operational limits that you previously took at your stationary source to avoid major NSR for the PAL pollutant. This means that you may relax or remove these limits without triggering major NSR when the PAL becomes effective. Before removing the limits, your reviewing authority should make sure that you are meeting all other regulatory requirements and that the removal of the limits does not adversely impact the National Ambient Air Quality Standards (NAAQS) or PSD

---

[1]See EPA Memorandum from John Seitz, to Robert Hodanbosi, dated May 20, 1999.

increments. We are not taking a position on whether compliance with requirements contained in a PAL permit could serve to demonstrate compliance with certain pre-existing requirements on individual units. The reviewing authority may assess on a case-by-case basis whether any streamlining would be appropriate in the title V permit consistent with part 70 procedures and our existing policies and guidance on permit streamlining.

See also the Federal PAL rule:

> 40 CFR 52.21(aa)(1) - Applicability, "(iii) Except as provided under paragraph (aa)(1)(ii)(c) of this section, a major stationary source shall continue to comply with all applicable Federal or State requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL."

The same requirement is found in 40 CFR 51.165(f)(1)(iv) and 51.166(w)(1)(iii).

The EPA has also addressed supersession of existing NSR permit requirements by title V permits. See May 20, 1999, letter to Robert Hodanbosi:

> It is the Agency's view that title V permits may not supersede, void, replace, or otherwise eliminate the independent enforceability of terms and conditions in SIP-approved permits. To assure compliance with "applicable requirements" such as SIP-approved permits and conditions, title V permits must record those requirements, but may not eliminate their independent existence and enforceability under title I of the Clean Air Act (i.e., may not supersede them).

See also White Paper for Streamlined Development of part 70 permit Applications, Lydia Wegman, July 1995, (White Paper #1) which recommends an efficient procedure for revising NSR permits during title V review to eliminate obsolete or environmentally insignificant terms in NSR permits. See also, Approval of Wisconsin Construction Permit Permanency SIP Revision 71 FR 9934, April 28, 2006, and Notice of Deficiency for Clean Air Act Operating Program in Wisconsin, 69 FR 10167, March 4, 2004.

Our review of the Flexible Permit rules indicates that the voided NSR permits are federally enforceable terms and conditions which may be revised only through approved SIP procedures.

3. Definition of Modification

Please distinguish between the definition of "major modification" at 30 TAC 116.12(11) in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review

Definitions, and the definition of "modification of an existing facility" at 30 TAC 116.10(11) of Subchapter A, General Definitions. The definition of "modification of existing facility" states:

> Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:
>
> a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

Under the current Texas SIP, a permit amendment is required in order to vary from any representation or permit condition if the change will cause: (A) a change in the method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in the emission rate of any air contaminant.

Please clarify whether the exemptions from the requirement to obtain a permit amendment in the submitted definition of "modification of an existing facility" apply to significant project emission increases or significant net emission increases at major sources or major modifications. Please explain how exemptions in the definition of "modification of an existing facility" relate to major modifications. We believe these definitions as written are vague and may be interpreted to provide an exemption to major NSR applicability.

4. Consistency with Federal Major NSR Requirements

Because Flexible Permits become the controlling authorization for major sources and authorize the source to make modifications without a permit amendment as required by the current SIP, the rules, as they are applicable to major sources, must be consistent with Federal NSR requirements and the PAL rule. We note that the rules eliminate permitting vehicles necessary to demonstrate netting for major sources. We have identified the following list which discusses some of the inconsistencies between the Flexible Permit rules and Federal regulations. Please provide information to explain how the following requirements are met under the Flexible Permit rules:

A Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. The Flexible Permit emission cap is based upon allowable emissions rather than actual emissions. There are no regulatory requirements that the cap be set below actual emissions. The rules do not ensure that the emissions cap will be set at a level that does not trigger major NSR applicability for major sources or major modifications based upon the baseline actual to projected actual calculation in the State's NSR rules. Please explain how the flexible permit rules are inconsistent with the Federal PAL rule at 40 CFR 52.21(aa)(6).

C. The rule allows an implementation schedule to install required BACT controls which may last for many years. The rule also allows sources to increase the emission cap for sources that "fail to install the additional control equipment as provided by the implementation schedule." How does the rule ensure that the emission cap is set below actual emissions during these periods? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(6) and (11). Please explain whether a Flexible Permit always assumes current BACT in calculating the emission cap.

D. The Flexible Permit authorizes modifications that do not exceed the emission cap. NSR compliance is required only upon initial issuance of the permit. Please explain how the rule ensures that modifications subject to major NSR and the public participation requirements of Part 51 are reviewed. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(5) and (11); and 51.161.

E. For sources without a PAL, major NSR applicability must be determined by monitoring actual emissions on a unit by unit basis (rather than by compliance with the emissions cap) consistent with TCEQ's major NSR rules for baseline actual to projected actual emissions calculations. Please explain how the rule ensures that major sources determine major NSR applicability on a unit by unit basis. Our review indicates that the monitoring requirements from the Flexible Permit rule at §116.715(c)(6) requires " information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction." Please explain how the rule provides for monitoring, recordkeeping and reporting necessary to determine project emission increases and to enforce major NSR requirements on a unit by unit basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d), and (f); 52.21(aa)(12) through (14).

F. Please explain how the public participation requirements of Part 51 and the PAL rule are met by the Flexible Permit rules. Under Chapter 39 of the TAC,

initial issuance of and amendments to flexible permits are exempt from public notice requirements unless the action involves new construction or a modification that results in emissions increases above Texas' permits by rule limits (250 tons per year (tpy) of carbon monoxide, 250 tpy of nitrogen oxides, 25 tpy of volatile organic compounds, sulfur dioxide , or particulate matter less than 10 micrometers, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen and oxygen). These provisions are inconsistent with Federal requirements which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP. Please explain how the Flexible Permit rules are consistent with 40 CFR 51.161 and 52.21(aa)(5) and (11).

G. The Flexible Permit rules allows sources to exclude units at a facility from the permit. Federal rules do not allow for partial PALs. Note that the Federal PAL rule requires that all units at a facility must be subject to the plantwide limit. See 40 CFR 52.21(aa)(6)(i) through (ii). Emission increases and decreases at all units at the facility must be considered to determine major NSR applicability. How does the Flexible Permit provide that increases and decreases are quantified, determined to be contemporaneous, and made practically enforceable for sources that are not subject to a PAL? Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(a)(2)(iv)(a) through (d) and (f).

H. There is no requirement in the Flexible Permit rules that startup, shutdown and malfunction emissions must be included in determining compliance with the emission cap. This is inconsistent with the Federal PAL rule. Please explain how the Flexible Permit rules can ensure that non-routine emissions are not masked by the emission cap. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(7)(iv).

I. There is no requirement in the Flexible Permit rules that compliance with the emission cap is determined on a 12-month rolling average, as required by the Federal PAL rule and EPA policy. We have reviewed Flexible Permits that base compliance on a calendar basis. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a). Please explain how enforcement of Flexible Permits on a calendar year basis is enforceable as a practical matter.

J. There is no requirement in the Flexible Permit rules that the owner or operator

must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average for each month. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(4)(i)(a) and 52.21(aa)(7)(vi).

K. There is no requirement in the Flexible Permit rules that monitoring to determine compliance with the cap must be based upon continuous emissions monitoring systems, continuous emissions rate monitoring systems, predictive emissions monitoring system, continuous parameter monitoring system, or emission factors, or an equivalent method as approved by the permitting authority, as is required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(12)(ii)(a) through (d).

L. There are no requirements in the Flexible Permit rule for semi-annual reports or deviation reports as required by the Federal PAL rule. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(14)(i) through (ii).

M. The record retention requirement in the Flexible Permit rules is for two years. This is inconsistent with the Federal PAL rule and title V which require five year recordkeeping. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(13)(ii).

N. Are short-term limits under the emission cap required by the Flexible Permit rules? Please explain how short-term limits are calculated and how they ensure attainment and maintenance of the NAAQS. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(aa)(1)(iii).

O. The Flexible Permit emission cap may be increased by 9% of total emissions, called an Insignificant Emissions Factor. The Flexible Permit rule in § 116.718 states, "An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of state new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility." Please explain how this definition is distinguishable from the terms "significant" and "insignificant" used elsewhere in your rules. We believe these terms must be clearly distinguishable to facilitate compliance and enforcement of the rules. Please explain how the Flexible Permit rules are consistent with 40 CFR 52.21(b)(23) and 52.21(aa)(6)(i).

5. Minor Sources

We have reviewed the Flexible Permit rules as they apply to minor sources for

consistency with 40 CFR 51.160 and 51.161.

A. Please explain how the revisions meet the requirements of 40 CFR 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under these rules will not result in (1) a violation of applicable portions of control strategy; or (2) interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

B. Please explain how the revisions meet the requirements of 40 CFR 51.161, which require modifications of existing sources to be subject to a 30-day notice and comment period and for the permitting authority to provide public information including the agency's analysis of the effect of the construction or modification on ambient air quality, including the agency's proposed approval or disapproval. These requirements apply to major and minor sources. Please provide a rationale for exemptions from these requirements and the current SIP.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

SEP 15 2006

Mr. Steve Hagle
Special Assistant
Air Permits Division (MC-163)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: U.S. Environmental Protection Agency (EPA) Comments on Texas' State Implementation Plan (SIP) Revisions for Modification of Existing Facilities and Qualified Facilities.

Dear Mr. Hagle:

This letter is a follow-up to our meeting on October 12, 2005, in Austin and subsequent discussions concerning your SIP revisions related to modification of existing facilities and qualified facilities. We have reviewed the rules and identified the items of concern that are described in the Enclosure. We request that you address these concerns and respond to us concerning how these rules meet Federal requirements for new and modified sources, or identify changes that you will make to address our concerns. We will review and take action on these rules prior to our final review of your new source review (NSR) Reform regulations.

If you have any questions, please call Mr. Stanley M. Spruiell of my staff at (214) 665-7212.

Sincerely yours,

David Neleigh
Chief
Air Permits Section

Enclosure

cc: David Neleigh (6PD-R)

Enclosure

Comments on Texas' Permit Regulations for Modification of Existing Facilities and Qualified Facilities

I. Revisions to 30 Texas Administrative Code (TAC) §§ 116.10, 116.116(e), 116.117 and 116.118.

A. The provisions for modification of existing facilities and for qualified facilities were submitted to EPA as revisions to the Texas SIP on March 13, 1996; July 22, 1998; and September 11, 2000. The revisions relating to these types of facilities are in 30 TAC §§ 116.10(9)[1], 116.116(e), 116.117, and 116.118. We reviewed these rules for consistency with 40 Code of Federal Regulations (CFR) part 51 and § 110 of the Clean Air Act (CAA).

B. These regulations provide that the following physical or operational changes at a facility are not modifications.

1. Under 30 TAC § 116.10(9)(A), a change at any facility that results in an insignificant increase in the amount of air contaminant emitted that is authorized by one or more Commission exemptions.

2. Under 30 TAC § 116.10(9)(B), a change at any facility that results in an insignificant increase at a permitted facility.

3. Under 30 TAC § 116.10(9)(E), a change at a qualified facility that does not result in a net increase in allowable emissions of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

a. Has received a preconstruction permit or permit amendment or has been exempted under Texas Clean Air Act (TCAA), § 382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur.

b. Uses, regardless of whether the facility has received a

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[1] The SIP revisions that we are discussing in this letter define the term "modification of existing facility" in 30 TAC § 116.10(9). In a later revision adopted by TCEQ on August 21, 2002, and submitted to EPA on September 4, 2002, this definition was redesignated to 30 TAC § 116.10(11). Because this term is designated 30 TAC § 116.10(9) in the SIP revisions discussed herein, we will refer to the definition as it formerly existed in 30 TAC § 116.10(9).

preconstruction permit or permit amendment or has been exempted under TCAA, § 382.057, an air pollution control method that is at least as effective as best available control technology that the Commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur.

4. Under 30 TAC § 116.116(e), a physical or operational change at a qualified facility is not a modification if it does not result in:

   a. A net increase in allowable emissions of any air contaminant; and

   b. The emission of any air contaminant not previously emitted.

II. General Comments

A. We have reviewed the rules for modification of existing facilities and qualified facilities as they apply to major sources for consistency with § 110(l) of the CAA and 40 CFR part 51, including our current major NSR regulations which measure an emissions increase at an existing facility using the "actual-to-projected-actual" applicability test. As you know, our regulations no longer provide for an exemption from major NSR applicability for Clean Units or Pollution Control Projects. The Court in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005) vacated the Clean Unit and Pollution Control Project provisions of 40 CFR parts 51 and 52. The Court also held that the major NSR modification requirement, which incorporates by reference CAA § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions." Therefore, many of our comments relate to how qualified facilities will determine NSR applicability consistent with the Federal requirements.

The qualified facility provisions allow some major sources to determine minor NSR applicability based upon allowable, rather than actual, emissions. This is a change from the current Texas SIP, which determines minor NSR applicability based upon actual emissions. While we understand that nonattainment new source review (NSR) and prevention of significant deterioration regulations of the Texas SIP have applicability statements for major modifications, we are concerned that the exemptions from the definition of "modification of an existing facility" may provide an alternative method to calculate an emission increase. Because we cannot approve a "Clean Units" type test which is based upon allowable emissions to determine NSR

applicability at major sources, we request further information below to clarify applicability of major NSR requirements at sources labeled as qualified facilities and to evaluate revisions to the definition of modification to allow minor modifications at major sources to be based upon allowable emissions.

Based on our initial review of the qualified facility rules, we believe, at a minimum, a minor modification at a major source which results in a significant actual project emission increase that would require a netting demonstration to avoid major NSR applicability cannot be authorized under the qualified facilities provisions. These modifications must be authorized through a permit amendment process consistent with 40 CFR part 51. In other words, any change subject to major NSR or any physical change or change in the method of operation of a major source associated with a project where the prospective actual emissions increases from such changes, considered by themselves, would be a significant increase of any NSR regulated pollutant, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and § 51.166(b)(23) and (39), must be authorized through a permit amendment. Also, any significant increase in actual emissions that results from a project that is authorized under the qualified facility provisions at a major stationary source must be subject to the netting requirements of 40 CFR § 51.165(a)(vi) and § 51.166(b)(3) in calculating a net emission increase. We will also evaluate changes to definition of modification of an existing facility that allow major sources to base minor NSR applicability on allowable, rather than actual, emissions as discussed in Section B below.

B. We have reviewed the rules for modification of existing facilities and qualified facilities as they apply to minor sources for consistency with 40 CFR part 51 and how changes to the existing SIP meet the requirements of § 110(l) of the CAA. We recognize that, under the applicable Federal regulations, States have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards (NAAQS). We have approved SIPs where a State exempts categories of changes from minor NSR altogether on *de minimis* grounds that are consistent with the exemption criteria set forth in *Alabama Power Co. v. Costle*, 626 F. 2d 323 (D.C. Cir. 1980) or *Alabama Power* (i.e., the change is trivial in size and of no importance in safeguarding ambient standards).

The qualified facility provisions allow some minor sources to determine minor NSR applicability based upon allowable, rather than actual, emissions. This is a change from the current Texas SIP, which determines minor NSR applicability based upon actual emissions. Because the qualified facility rules provide exemptions from the permitting requirements of 40 CFR § 51.160 and

§ 51.161, we will review the provisions based upon the *de minimis* exemption criteria set forth in *Alabama Power*. Because the qualified facility rules also relax requirements in the current Texas SIP, we will review the provisions to ensure that they meet the requirements of § 110(l) of the CAA. We request further information below on the applicability of minor NSR requirements at sources labeled as qualified facilities.

C. We also request further information on how the SIP distinguishes between the definition of "major modification" at 30 TAC § 116.12(11)[2] in Subchapter A, Nonattainment and Prevention of Significant Deterioration Review Definitions, and the definition of "modification of an existing facility" at 30 TAC 116.10(9) of Subchapter A, General Definitions. Our initial review indicates the definition of "modification of an existing facility" must be revised to exclude modifications at major sources which result in a significant actual project increase which requires a netting demonstration.

D. We have found no definition of "insignificant" as used in the qualified facility rule nor any demonstration that such insignificant increases are "de minimis" or "trivial" so as to satisfy the exemption criteria set forth in *Alabama Power*. We request further information on the application of this term to major and minor modifications.

III. Do 30 TAC §§ 116.10(9), 116.116(e), 116.117, and 116.118 meet the requirements of 40 CFR part 51, subpart I?

The State's SIP revision excludes certain categories of emission increases from the definition of modifications which are subject to permit review. The EPA is concerned that these provisions relax the current SIP, which provides that these types of changes are modifications that require a permit.

A. 30 TAC § 116.10(9)(A) - Insignificant increases authorized by Commission exemption.

1. This provision differs from the current SIP (30 TAC

[2]The current SIP defines "major modification" in 30 TAC § 116.12(11). In a pending SIP revision that TCEQ adopted January 11, 2006, and submitted to EPA on February 1, 2006, this term was redesignated to 30 TAC § 116.12(18). Because EPA has not yet approved this submitted SIP revision, we will refer to the citation in the current SIP.

§ 116.116(b)(1)[3]), because it provides that insignificant increases at exempted sources are not modifications.

2. The Act and Federal regulations have no exception for insignificant increases or increases that are below an existing level of allowable or authorized emissions.

3. There is no demonstration that the insignificant increases will meet the requirements of 40 CFR § 51.160(a) and (b).[4] Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. The rule does not define "insignificant" increases, nor demonstrate that such increases are "de minimis" or "trivial" so as to satisfy the exemption criteria set forth in *Alabama Power*.

5. The rule does not provide a definition of the term "commission exemption."

6. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

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[3] The current SIP at 30 TAC § 116.116(b) provides:

(b) Permit Amendments.

(1) ... the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

(A) a change in the method of control of emissions;

(B) a change in the character of the emissions; or

(C) an increase in the emission rate of any air contaminant.

[4] Under 40 CFR § 51.160(a) and (b), Texas must determine that such change will: (1) not result in a violation of applicable portions of the control strategy; or (2) not interfere with attainment or maintenance of a national standard; otherwise, the State must be able to prevent such construction or modification.

B. 30 TAC § 116.10(9)(B) - Insignificant increases at a permitted facility.

1. This provision differs from the current SIP (30 TAC § 116.116(b)(1)), because it provides that insignificant increases at a permitted facility are not modifications.

2. The Act and Federal regulations have no exception for insignificant increases at a permitted facility.

3. The rule allows an insignificant increase without a demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. The rule does not define "insignificant" increases nor demonstrate that such increases are "de minmis" or "trivial" so as to satisfy the exemption criteria set forth in *Alabama Power*.

5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

C. 30 TAC § 116.10(9)(E) - Net increases in allowable emissions at qualified facilities.

1. This provision differs from the current SIP (30 TAC § 116.116(b)(1)), because it provides that a change at a facility that is permitted or exempted is not a modification if it does not result in:

   a. A net increase in allowable emissions and

   b. In the emission of any air contaminant not previously emitted.

2. The Federal regulations do not exempt an increase at a unit because a decrease at another unit results in no net increase in allowable emissions.

3. The rule allows an increase above existing actual emissions and/or above existing permit allowable emission limitations without a

demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). Because the provision provides an exemption from existing SIP rules, the State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. There is no definition of the term "net increase in emissions." There must be criteria concerning:

   a. The emissions that are to be included in determining the net increase in emissions;

   b. How the individual increases and decreases will be determined; and

   c. How TCEQ ensures that decreases that are used in the netting are enforceable as a practical matter, or otherwise assures that the decreases are achieved and met on a continual basis.

5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

D. <u>30 TAC § 116.116(e).</u>

1. This provision provides that a physical or operational change may be made to a qualified facility if the change does not result in:

   a. A net increase in <u>allowable</u> emissions of any air contaminant; and

   b. The emission of any air contaminant not previously emitted.

2. The rule differs from the current SIP (30 TAC § 116.116(b)(1)), which does not provide these exclusions.

3. The rule allows increases above existing permit allowable without a demonstration that such increase will meet the requirements of 40 CFR § 51.160(a) and (b). The State must demonstrate that such change will not violate the applicable control strategy and will not interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change.

4. The rule has no definition of the term "net increase in emissions." There must be criteria concerning:

   a. The emissions that are to be included in determining the net increase in emissions;

   b. How the individual increases will be determined; and

   c. How TCEQ ensures that decreases that are used in the netting are enforceable as a practical matter or otherwise assures that the decreases are achieved and met on a continual basis.

5. The provision does not exclude modifications that result in an actual emission increase that triggers major NSR requirements.

IV. Recommended revisions to these rules.

We have identified the following changes that would address many of the concerns raised in our initial review of the rules for modification of existing facilities and qualified facilities. We will complete our review of the SIP revision based upon your response to this letter. We recommend that you consider, at a minimum, the following:

A. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the *de minimis* criteria established in *Alabama Power*.

B. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the requirements of § 110 of the CAA.

C. Identify how revisions to the definition of modification of an existing facility to allow minor NSR applicability based upon allowable, rather than actual emissions, meet the Federal requirements of Part 51 for major NSR applicability.

D. 30 TAC § 116.10(9)(A) and (B) must clarify that emission increases above allowable emission limitations are not authorized by the rule.

E. 30 TAC § 116.10(9)(A) and (B) must define "insignificant increase" in emissions, how the increase is calculated, and whether it is based upon allowable or actual emissions. These rules must further include a demonstration that such increases are "de minimis" or "trivial" so as to

satisfy the exemption criteria set forth in *Alabama Power*.

F. 30 TAC § 116.10(9)(A) and (B) and § 116.116(e) must clarify that significant project actual emission increases at major sources, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and 51.166(b)(23) and (39), are not authorized by these provisions, but must be authorized through a permit amendment.

G. 30 TAC § 116.10(9)(E) must clarify that significant project actual emission increases at major sources, as defined in 40 CFR § 51.165(a)(1)(x) and (xxvii) and § 51.166(b)(23) and (39), are not authorized by these provisions, but must be authorized through a permit amendment.

H. 30 TAC § 116.10(9)(A) (B) and (E) and § 116.116(e) must clarify that significant increases in actual emissions that are authorized under these provisions at major sources are subject to the netting requirements of 40 CFR § 51.165(a)(vi) and 51.166(b)(3) in calculating a net emission increase and must be authorized through a permit amendment.

I.. 30 TAC § 116.10(9)(E) and § 116.116(e) must include provisions explaining how a "net increase in allowable emissions" is quantified.

J. 30 TAC § 116.10(9)(E) and § 116.116(e) must include provisions to ensure that netting decreases are practically enforceable.

K. Because these provisions provide exemptions from existing SIP rules, the State must demonstrate that the revisions:

1. Will not violate applicable portions of the control strategy or interfere with attainment and maintenance of the NAAQS; otherwise, the State must be able to prevent such change as required under 40 CFR § 51.160(a) and (b); and

2. Will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Clean Air Act as required under § 110(l) of the CAA.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 30, 2007

Mr. Jeff Robinson
Chief, Air Permits Section
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mr. Robinson:

This letter is in response to the U.S. Environmental Protection Agency (EPA) letter dated April 11, 2006, and an email message from Mr. Carl Edlund dated June 12, 2007, regarding EPA's concerns regarding flexible permit rules in Title 30 Texas Administrative Code Chapter 116 (30 TAC Chapter 116), Subchapter G which were submitted to EPA as a revision to the Texas SIP in November 1994. This letter is arranged to respond to EPA questions and comments in the same order that they were presented in the letter, and includes responses addressing the approval issues included in the email.

DISCUSSION REGARDING TCEQ'S FLEXIBLE PERMIT

Before addressing EPA's specific comments, there are a few clarification points that we would like to make concerning the flexible permit program. It is important to note that the flexible permit is an alternative to the traditional minor New Source Review (NSR) authorization mechanism (*see* § 116.710(a)), and is not the mechanism that is used to determine federal NSR applicability (Prevention of Significant Deterioration [PSD] and/or nonattainment). § 116.711(8) and (9). Federal applicability determinations are conducted according to federal rules and requirements, including determining the baseline emissions, the project emissions increase, and the net emissions increase. In the Flexible permit program, best available control technology (BACT) is used to establish the cap(s), and the review includes a National Ambient Air Quality Standards (NAAQS) analysis if PSD review is triggered, and lowest achievable emission rate (LAER) control technology and use of offsets if nonattainment review is triggered.

As acknowledged by EPA in its letter, Texas adopted the flexible permit rules prior to finalization of federal NSR Reform, which included the Plantwide Applicability Limit (PAL). Flexible permits should not be confused with a PAL based on the fact that flexible permits have emission caps. While flexible permits issued by the Texas Commission on Environmental Quality (TCEQ) may or may not contain a federal PAL, most flexible permits do not contain a federal PAL. Furthermore, the mechanism for calculating a flexible permit emission cap is different when compared to the one used to calculate a PAL level. Since TCEQ's adoption of the NSR reform rules (effective February 1, 2006), the agency has developed PALs under these rules (30 TAC Chapter 116, Subchapter C).[1]

The flexible permit implemented in 30 TAC Chapter 116, Subchapter G, is a voluntary authorization mechanism that an applicant may choose to utilize in lieu of obtaining a "traditional" permitting authorization under 30 TAC Chapter 116, Subchapter B. § 116.710(a). These Subchapter G permits differ from those issued under Subchapter B primarily by adding flexibility features through the use of emission caps, certain control technology, and other operational flexibility to achieve emission reductions with the ultimate goal of having a well-controlled facility after the final cap is implemented.

Flexible permits typically contain an initial emission cap and a final emission cap. Emission caps are developed for specific pollutant emission categories, most commonly for sulfur dioxide (SO_2), nitrogen oxides (NO_x), particulate matter, carbon monoxide (CO), and volatile organic compounds (VOC). § 116.715(b). There also may be subcaps within a pollutant emission category, such as speciated VOC. The initial emission cap is the starting point prior to any physical or operational changes, and is based on the controls in place at the time the flexible permit is first issued. The final emission cap applies after all control upgrades have been put into place, and is based on the application of BACT to all facilities contributing to an emission cap. § 116.716(a). There are also situations where interim emission caps are used, providing emission limits at various stages of time between the initial emission caps and the final emission caps. § 116.717.

The time frame between the applicability of initial caps and final caps, generally referred to as the implementation period, can range from a few months to several years and is designed to allow for the installation of controls over a reasonable time period. The time frame for installation of controls is an important aspect of the flexible permit, and the development of the implementation period considers the number of control devices installed and the cost of those additional controls. In many situations, installing all of the control devices at once is cost prohibitive for the owner or operator

[1] Note: This Subchapter C in 30 TAC Chapter 116, was newly adopted as part of the NSR Reform rulemaking effective February 1, 2006. As part of that rulemaking, the rules in Subchapter C regarding Hazardous Air Pollutants were moved to Chapter 116, Subchapter E. The citations to Subchapter C within the Subchapter G rules have not been updated to reflect that those rules are now in Subchapter E.

requesting the permit. However, there are flexible permits which have been issued without the use of an implementation period where the caps are effective immediately upon issuance. If there are a number of years between the initial and final caps, interim caps may be used. Interim caps help protect the control technology representations concerning facilities which are upgraded prior to the final caps becoming effective. When an application for a new or amended flexible permit is reviewed, all facilities in the flexible permit are considered to be modified, and federal applicability requirements are applied to all emission caps contained within the permit. This includes the initial cap, any interim caps, and the final cap.

The flexible permit also allows for the use of individual emission limitations. §§ 116.715(b) and 116.716(b). Individual emission limits are used when it is necessary to ensure protection of off property impacts, such as control of air toxics, or to meet the NAAQS. Specific emission limits that an individual facility can not exceed may also be established to ensure that federal permitting requirements are not circumvented. § 116.715(c)(1) and (d).

Control technology flexibility is available under the flexible permit program for existing facilities to the extent that an applicant may over-control a facility beyond BACT requirements at one facility in order to not add additional controls at another facility, provided that the net sum of control technologies is equivalent to BACT being applied to each facility. § 116.711(3). Operational flexibility is available under the flexible permit to the extent that an owner or operator may vary throughput rates, charge rates, firing rates, etc., as long as control requirements are met and compliance with emission caps and/or individual emission limits is maintained. New facilities authorized through the flexible permit process must meet BACT at initial issuance of the permit or at such time they are authorized by the flexible permit through subsequent amendments. § 116.711(3). For new facilities, BACT shall be demonstrated for that individual facility or affected source. § 116.711(3).

Some very large emission reductions have been achieved through the flexible permitting program. Two examples of these reductions, expressed in tons per year (TPY) are:

coal and petroleum coke fired power plant:	petroleum refinery:
25,803 tpy SO_2	4,877 tpy SO_2
10,330 tpy NO_x	3,392 tpy NO_x
795 tpy PM/PM_{10}	880 tpy PM
	530 tpy VOC
	4,877 tpy CO

RESPONSE TO SPECIFIC ISSUES

2. Voiding of Existing SIP-Approved Permits

The EPA requested an explanation of the legal authority under which TCEQ voids existing federally enforceable nonattainment, PSD and minor NSR permits.

The EPA's understanding is correct that when a flexible permit is created and issued, it becomes the controlling permitting authority for those facilities included in the flexible permit, and existing authorizations (e.g., Chapter 116, Subchapter B permits, which may be a state permit with or without an accompanying PSD or Nonattainment permit, or Permits By Rule in 30 TAC Chapter 106) for the facilities are administratively consolidated into the flexible permit. Incorporating facilities into a flexible permit can include a consolidation of pieces of equipment (facilities) which were initially authorized under other types of authorizations. If existing facilities are located at a site for which a flexible permit is issued, and those facilities are not incorporated into a flexible permit, they remain authorized under their existing authorizations.

The underlying requirements, such as BACT and/or Nonattainment control technology requirements, are maintained under the flexible permit after consolidation, and may be updated to reflect a current control technology review. The flexible permit special conditions also contain other necessary conditions, such as requirements for monitoring, testing, recordkeeping, and reporting. § 116.715(c)(6) and (d). For flexible permits incorporating pieces of equipment that were previously authorized under an existing PSD and/or Nonattainment permit, the TCEQ identifies the special conditions initially contained in those federal permits with the appropriate notation (PSD), (NA), or (PSD and NA) in the conditions, so that the federal control and monitoring requirement contained in the original federal permit are not lost in the transition into the flexible permit. The permit representations are also carried forward into the flexible permit. The permit representations may be updated and/or revised if the owner or operator proposes changes to those representations. § 116.721. If changes to representations are proposed, those changes are reviewed, and monitoring and recordkeeping requirements, consistent with any proposed changes in representations, are then added to the special conditions of the permit. § 116.715(c)(6).

The existing permit number(s) are subsequently administratively consolidated (for controlling authority tracking purposes only). If existing facilities are located at a site for which a flexible permit is issued, and those facilities are not incorporated into a flexible permit, they remain authorized under their existing authorizations. If all facilities contained in those authorizations are incorporated into a flexible permit, the permit numbers pertaining to those pieces of equipment are consolidated into one state and one federal permit number for tracking purposes, and their original state and federal permit numbers are administratively cancelled for tracking purposes only.

For flexible permits which contain major sources authorized under existing PSD and/or Nonattainment permits, the PSD and/or Nonattainment permits are consolidated into the flexible permit for tracking purposes. The underlying PSD or nonattainment requirements remain applicable. The TCEQ does not void the PSD or Nonattainment authorizations of these sources. Further, there is no removal of control requirements, or reduction in the level of monitoring or testing. Rather, the TCEQ revises its tracking system to indicate that the new flexible permit number, and one each PSD or Nonattainment tracking number, as applicable, is used for tracking the controlling authority.

3. Definition of Modification

> The EPA requested TCEQ distinguish between the definitions of "major modification" in 30 TAC § 116.12(11) [now located in § 116.12(18)] and the definition of "modification of an existing facility" in 30 TAC § 116.10(11).

A "major modification" is a physical change or change in the method of operation of a major stationary source that causes a significant project emissions increase of a federally regulated new source review pollutant, and a significant net emissions increase of a federally regulated new source review pollutant which triggers federal review, such as PSD or nonattainment review.

A "modification of existing facility" is a physical change or change in the method of operation of a facility which causes an increase in the amount of any air contaminant emitted by the facility into the atmosphere or results in an emission of any air contaminant not previously emitted.

In summary, a major modification is a project action which triggers federal NSR review (PSD or Nonattainment). In contrast, the TCEQ's minor source program uses the definition of "modification of an existing facility" to determine if a proposed change triggers minor NSR review, and the scope of the change is not limited to compounds which are federally regulated.

> The EPA also seeks clarification whether the exemptions from the requirement to obtain a permit amendment in the definition of "modification of an existing facility" apply to significant project emission increases or significant emission increases at major sources or major modifications. The EPA also requests an explanation of how exemptions in the definition of "modification of an existing facility" relate to major modifications.

The flexible permit rules, and the definition of "modification of an existing facility" do not act as a shield for federal NSR air permitting. A review of federal NSR applicability steps is still required with a flexible permit. § 116.711(8) and(9). Significant project increases continue to trigger federal applicability evaluations, and significant net increases in emissions continue to trigger PSD or Nonattainment review. For projects which trigger federal review, all associated demonstrations,

such as BACT, de minimis/NAAQS modeling, increment modeling, and toxicological modeling review (off property air toxics modeling, also known as a Health Effects Review) are conducted. § 116.711. For projects which trigger nonattainment review, LAER and offsets are required. We do not agree that the definitions are vague. We also do not agree that our rules can be interpreted to provide an exemption to major new source review applicability. § 116.711(8) and (9). The definition of "modification of an existing facility," as described above, is used to determine if minor NSR review is triggered. The exemptions related to the definition of "modification of an existing facility" apply to minor NSR review criteria. The exemptions to the definition of "modification of an existing facility" should not be confused with requirements concerning "major modifications," which are reviewed according to federal rules.

4. Consistency with Federal Major NSR Requirements

Once a flexible permit is issued, it becomes the controlling authorization for those facilities contained within the scope of the permit; however, the rules do not eliminate the requirement to make a demonstration that a federal major modification has not occurred.

A. The EPA requested an explanation of how the requirements of Title 40 Code of Federal Regulations § 51.160 (40 CFR § 51.160) are met so TCEQ can determine that modifications authorized by the flexible permit rules will not result in (1) a violation of applicable portions of the control strategy; or (2) interference with attainment or maintenance of a national standard in Texas or a neighboring state.

The flexible permit rules do not exempt permit holders from complying with federal NSR requirements. All applicable requirements concerning Nonattainment review and PSD review must be complied with. § 116.711(8) and (9). The existing level of control may not be lessened for any facility [see § 116.711(3)], and computerized air dispersion modeling and/or ambient monitoring may be required by the commission's NSR Division to determine the air quality impacts from the facility, group of facilities, or account. § 116.711(10). For federal major projects and major modifications, the full range of PSD modeling and evaluation requirements are in place, including the significance analysis, NAAQS analysis (if required) and the increment analysis (if required). § 116.711(10).

B. The EPA commented that the rules do not require the cap be set below actual emissions and that the rules do not ensure that the cap will be set at a level that does not trigger major NSR applicability for major sources or major modifications based upon the baseline actual to projected actual calculation in the TCEQ's rules. The EPA requested an explanation of how the flexible permit rules are inconsistent with the federal PAL rule at 40 CFR § 52.21(aa)(6).

The EPA's statement that the flexible permit emission caps are based on allowable emissions is correct. The final emission caps are based on the application of BACT at the time the flexible permit is created. There is no requirement that a permit cap be less than the pre-modification actual emissions. In many situations, the application of BACT to the facilities subject to the emission cap(s) results in an allowable which is lower (in some cases considerably lower) than the pre-change actual emissions. If netting is required, and the netting analysis shows a increase has occurred, then the project is a major modification and the appropriate federal NSR program (PSD and/or Nonattainment review) is triggered. Flexible permits are not designed to avoid federal NSR permitting, and there have been numerous flexible permits issued over the years that have triggered federal review. The rule, in § 116.711(8) and (9), requires that each facility or group of facilities comply with all applicable PSD and Nonattainment permitting requirements of Chapter 116.

The federal PAL rule is an optional approach for managing facility-wide emissions without triggering federal NSR. Many flexible permits were issued prior to the EPA's final adoption of the PAL, and numerous companies have requested flexible permits while not opting to obtain a federal PAL (and have subsequently followed traditional federal NSR applicability steps). A company may choose to obtain a PAL in conjunction with a flexible permit, but the PAL is reviewed under the PAL rules in 30 TAC Chapter 116, Subchapter C.

C. The EPA asked how the flexible permit rules ensure that the emission cap is set below actual emissions during the implementation period. The EPA also requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(6) and (11). Finally, EPA requested whether a flexible permit always assumes current BACT in calculating the emission cap.

The flexible permit rules do allow for a phased implementation of controls. This implementation schedule may last for several years; however, it is not designed to avoid federal NSR. Where implementation schedules are used, the flexible permit will have multiple caps, including an initial cap (pre-modification) and a final cap (post-modification, after all changes and controls represented in the flexible permit application have been initiated). In numerous situations, there are also additional caps contained between the initial and final caps. If an emission cap (initial, interim, and final) based on allowable emissions exceeds the actual emissions by more than the appropriate significance level, federal NSR applicability requirements apply. § 116.711(8) and (9). If a facility included in the emissions cap is taken out of service prior to the scheduled installation of any required controls, the cap is reduced by removing the amount of pre-controlled emissions associated with that facility. § 116.715(c)(8). Section 116.720 provides that neither operational nor physical changes authorized by Subchapter G may result in an increase of actual emissions at facilities not covered by the flexible permit unless those affected facilities are authorized pursuant to § 116.110.

After the completion of the control schedule required by the flexible permit, if a facility subject to an emissions cap is shut down for a period longer than 12 months, the emissions cap shall be revised by reducing the emission cap by the amount that the shut down facility contributed to the original calculation of the emission cap. § 116.716©. The overall emissions cap must still be based on the application of BACT to all facilities contained within the cap at the time the permit was created. If the cap contribution is readjusted up for one set of facilities, to a pre-controlled representation level, reductions must be obtained at other facilities in order to comply with the emission cap. This adjustment is a change in permit representations and must be incorporated into the flexible permit via alteration. § 116.721. If such a change would result in a cap increase, this triggers an amendment to the flexible permit, and BACT and federal NSR applicability are re-evaluated. The flexible permit rules require that BACT be applied when estimating the final emission caps.

For existing facilities being authorized under a flexible permit, the rule allows for "control flexibility," where an existing facility can be over-controlled so there is no need to increase the levels of control on another existing facility, as long as the sum result of emissions from the facilities involved is equivalent to the emissions with BACT being applied to all facilities contributing to the emission caps. § 116.716(a). Section 116.711(3) of the flexible permit rule also contains an anti-backsliding provision which prohibits an owner or operator from reducing the level of control at an existing facility.

In addition, it is important to note that the flexible permit rules require that BACT evaluations and a review of federal NSR applicability, via a permit amendment, be conducted in situations where there is a change in the method of control, a change in the character of the emissions, or a significant increase in emissions (i.e., increasing the emissions cap or an individual emission limit) § 116.721. Section 116.711(3) also requires that BACT be demonstrated for any individual facility which is either new construction, or triggers Federal Clean Air Act § 112(g) "case by case" maximum achievable control technology reviews. In general, there in no relaxation of monitoring, testing, and/or recordkeeping requirements associated with any of the facilities contained within a flexible permit. As a practical matter, the level of monitoring, testing, and/or recordkeeping is typically increased when compared to authorizations existing prior to being included in a flexible permit.

Finally, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(6) and (11) is included.

D. The EPA requested an explanation of how the flexible permit rules ensures that modifications subject to major NSR and the public participation requirements of Part 51 are reviewed, and how the rules are consistent with 40 CFR §§ 52.21(aa)(5) and (11) and 51.161.

Flexible permits may authorize modifications of existing facilities which do not exceed the emissions cap after a flexible permit is issued. Such modifications may be handled as an alteration to the flexible permit, as opposed to the need to obtain a minor source permit amendment. § 116.721(b). Even if a change can be made to a flexible permit through the alteration process, this still does not negate the applicability of federal NSR rules. § 116.711. Federal netting is still required because a physical change is an action under federal rules which triggers the actual to potential test (or actual to future actual test, depending on the applicability mechanism chosen), unless the particular site also contains a PAL and the emission changes are within the PAL limits. If the result of the applicability analysis indicates that a Federal NSR permitting program is triggered, the holder of the flexible permit must obtain the required authorization (which would require BACT, modeling/protectiveness, public notice, etc.). Changes are subject to the notice provisions in the current Texas SIP.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(5) and (11) is included.

E. The EPA requested an explanation of how 30 TAC § 116.715(c)(6) provides for monitoring, recordkeeping and reporting necessary to determine project emission increases and to enforce major NSR requirements on a unit by unit basis. The EPA also requested an explanation of how the flexible permit rules are consistent with 40 CFR §§ 52.21(a)(2)(iv)(a) - (d) and (f), and 52.21(aa)(12) - (14).

As the EPA stated in its comment, the flexible permit rules require that owners and operators implement monitoring requirements and the gathering of information sufficient to demonstrate continuous compliance with the flexible permit emission caps and individual emission limits. § 116.711(2) and (14). Flexible permits contain special conditions which require compliance stack testing, periodic stack testing, continuous emissions monitoring (where appropriate) and other parametric monitoring requirements, along with record keeping requirements to help ensure that the permit holder can comply with the flexible permit caps and BACT. § 116.715(d). There is a significant difference in the types of sources which request a flexible permit, ranging from petroleum refineries and large chemical plants to local gasoline distribution terminals to lime production facilities. As discussed in the commission's adoption preamble, "[t]he commission believes that engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing are all appropriate methods to demonstrate compliance with the emission cap or individual emission limits. The commission intends to require appropriate methods and in some cases continuous emissions monitoring system (CEMS) may be required to ensure compliance with all caps and emission limitations." 19 Tex. Reg 9362. Considering the wide variety of industrial source types which can request, and have received, a flexible permit, specific

and detailed monitoring, testing, and record keeping requirements in rule language could limit the TCEQ's ability to adequately implement these requirements. This is particularly true for sources where different or additional requirements may be necessary to ensure compliance with permitting limits and requirements.

If an owner or operator submits an application for a project which contains a physical change, this initiates the actual to potential (or actual to future actual) test. This is independent of whether the project increases the emissions cap, or not. Federal rules apply regardless of the existence of a flexible permit, e.g. see § 116.711(4) - (6), (8), (9), and (11). If the flexible permit emission cap covers all facilities located at a plant site (or source), the actual to potential test is applied to the entire range of facilities contributing to the cap for that specific compound (unless a PAL is in place, in which procedures will follow those outlined in 40 CFR § 52.21(aa) and in the rules 30 TAC Chapter 116, Subchapter C, effective February 1, 2006[2]). If a flexible permit covers only a portion of the facilities located at the plant site (or source), the actual to potential test is applied to all facilities which may be affected by a project, including those external to the flexible permit emission caps, so that an accurate determination of project emission increase and net emission increase (if necessary) can be made. If the actual to potential emissions increase is significant, netting is performed. If the net emissions increase is significant, federal NSR is triggered. § 116.711(8) and (9). The permit holder also has the option of placing an individual emission limit on the facilities within the permit undergoing a physical change. In this way, an owner or operator can have a federally enforceable individual emission limit, set below the netting trigger (if a company chooses to do so). § 116.716(b). This approach is consistent with the requirements of 40 CFR § 52.21(a)(2)(iv).

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no further explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(12) - (14) is included.

F. The EPA requested an explanation of how the public participation requirements of Part 51 and the PAL rule are met by the flexible permit rules. Specifically, EPA requested TCEQ provide a rationale of exemptions from notice, specifically, initial issuance of and amendments to flexible permits (unless the action involves new construction or a modification that results in emissions increases greater than the limits found in 30 TAC § 106.4), stating that these provisions are inconsistent with federal requirements to provide a 30-day notice and comment period for modifications, including the agency's review and proposed approval or disapproval. The EPA requested an explanation of how the flexible permit rules are consistent with 40 CFR §§ 51.161 and 52.21(aa)(5) and (11).

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[2] See Footnote 1.

Flexible permit applications for new construction must comply with the public participation requirements in Chapter 39, which also meet the existing public participation requirements in the SIP.[3] § 116.740. If the proposed project is federal NSR major (either a major source in and of itself, or a major modification to an existing major source), federal public notice requirements are also triggered. If as a result of an amendment, the proposed emissions will exceed the public notice trigger levels prescribed in Chapter 39, public notice is initiated. Likewise, if an amendment results in the construction of a major source in and of itself, or a major modification to an existing major source, federal public notice requirements are also triggered. These public notice requirements are consistent with the public participation portion of the approved Texas SIP. In addition, for flexible permits which contain a PAL, the applicant requesting the PAL for its source is also required to publish notice of its intent to obtain a PAL.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(5) and (11) is included.

G. The EPA asked how does a flexible permit provide that increases and decreases are quantified, determined to be contemporaneous, and made practically enforceable for sources that are not subject to a PAL. The EPA also requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(a)(2)(iv)(a) - (d) and (f).

Federal permitting rules apply to all facilities located at a source (property), regardless of whether all of the facilities at the source are authorized by a flexible permit. If a source has a flexible permit which does not contain all facilities located at that source, and a project within the flexible permit triggers netting, all facilities (under the cap and outside of the cap) at the source within the contemporaneous period are evaluated to determine if a net significant emissions increase at the source has occurred. If the resulting net emissions increase is significant, federal NSR is triggered. Flexible permits should not be considered as a shield to federal permitting requirements, and the applicability steps and requirements contained in 40 CFR § 52.21(a)(2)(iv)(a) - (d) and (f) are applicable to flexible permits.

H. The EPA requested an explanation of how the flexible permit rules can ensure that non-routine emissions are not masked by the emission cap, and how the rules are consistent with 40 CFR § 52.21(aa)(7)(iv).

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[3] Although the rules in Chapter 39, originally adopted in 1999, have not been approved into the Texas SIP, they contain the same minimum notice requirements in the approved SIP.

Flexible permits are issued based on the representations made by the applicant requesting the permit. The TCEQ has not traditionally included emissions from maintenance, start-up, and shutdown (MSS) operations as a contribution to the emission caps. Where MSS is included, the company made a rational and technical argument that these emissions are actually periodic "normal" production emissions, and are not unplanned (unscheduled) emissions. For flexible permits which do incorporate MSS emissions, these emissions are generally contained within specific MSS Emission Caps. The MSS Emission Caps are separate and distinct from the emission caps estimated for emissions which occur during normal facility operations (and have their own set of monitoring and tracking criteria to ensure cap compliance). The TCEQ has not, and does not, intend to intentionally authorize malfunction (upset) emissions under any scenario. Unless MSS is specifically authorized by the flexible permit, these emissions are not authorized by the permit itself, and must be reported under the TCEQ rules in 30 TAC Chapter 101, Subchapter F regarding reporting of unauthorized emissions. Further, as discussed with EPA staff, TCEQ staff are currently working on proposed changes to authorize certain MSS emissions.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(7)(iv) is included.

I. The EPA requested an explanation of how enforcement of flexible permits on a calendar year basis is enforceable as a practical matter, and how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(4)(i)(a).

While most flexible permits require annual compliance to be established on a 12-month rolling average, there are limited situations where a calendar average may be used. Typically, a calendar basis is used until the first 12 months of operations have occurred, after which annual compliance is demonstrated on a 12-month rolling average. § 116.715(c)(6). There are occasions where a calendar basis will be used during the implementation period, converting to a 12-month rolling average after the final emission caps become effective. For permits which do utilize a calendar basis, the permit holder is still required to keep track of emissions and the emissions can not exceed the estimated emissions cap. An exceedance of the emissions cap is a violation of the permit. Continuous emissions monitoring, periodic monitoring and testing, and compliance stack testing are all tools which can be used to demonstrate compliance with the emission cap as discussed above in the response to issue 4.E.

Further, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(4)(i)(a) is included.

J. The EPA commented that there is no requirement in the flexible permit rules that the owner or operator must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average for each month. The EPA requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(4)(i)(a) and (aa)(7)(vi).

There is no specific requirement in the flexible permit rules that the owner or operator must convert monitoring data to monthly and annual emission rates based upon a 12-month rolling average. However, Texas flexible permits generally include the requirement to create and maintain emission cap compliance records, requiring that CEMs data, sampling data, firing rates, throughput, fill rates, etc., be used to perform emission calculations at least once every month in order to verify compliance with short-term and annual emission caps (with the annual compliance based on a 12-month rolling average). § 116.715(c)(6).

The TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), therefore no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(4)(i)(a) and (aa)(7)(vi)is included.

K. The EPA commented that the flexible permit rules do not contain a requirement that monitoring to determine compliance with the cap must be based on CEMs, continuous emissions rate monitoring systems (CERMs), predictive emissions monitoring systems (PEMS), continuous parameter monitoring systems, or emission factors, or an approved equivalent method as required by the federal PAL rules, and requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(12)(ii)(a) - (d).

There is no specific requirement in the flexible permit rules that monitoring must be based on CEMs, CERMs, PEMs, etc. However, as discussed above in the response to issue 4.E., monitoring requirements, many utilizing these types of monitoring methods, are contained within the Flexible Permit language via Special Conditions. § 116.715(d). Most of the flexible permits issued by the TCEQ do not contain PALs and are not subject to the requirements of § 52.21(aa).

L. The EPA commented that the flexible permit rules do not contain a requirement for semi-annual reports or deviation reports as required by the federal PAL rule, and requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(14)(i) - (ii).

The flexible permit rules do not specifically contain requirements to submit semi-annual reports or deviation reports as required by the PAL rules. Most of the flexible permits do not contain PALs. If a flexible permit is issued for a site subject to Title V, then those reports are submitted following Title V requirements.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(7)(iv) is included.

M. The EPA commented that the record retention requirement in the flexible permit rules is for two years, which is inconsistent with the federal PAL rule and Title V which require five year recordkeeping. The EPA requested an explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(13)(ii).

The original, and current, applicable section of the flexible permit rule regarding recordkeeping, § 116.715(c)(6) specifies a two-year time period of recordkeeping, and there are flexible permits which include this requirement. However, there are also flexible permits which contain a five-year record retention requirement. § 116.715(d). For those flexible permits which contain a PAL and/or are subject to Title V, the five-year record retention requirement contained in the federal rules, 40 CFR § 51.21(aa)(13)(ii) for permits which contain a PAL, and 40 CFR § 71.6(a)(3)(C)(ii)(B) for Federal Operating Permits, is the controlling factor (even in situations where a permit may require two years).

N. The EPA requested an explanation of how short-term limits are calculated and how they ensure attainment and maintenance of the NAAQS, and how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(1)(iii).

Short-term (pound/hour) emissions limits are included in all flexible permits as a practical matter. The short-term emissions are calculated for each facility contained within the flexible permit, and are based on the application of today's BACT at maximum expected operating rates. Many applications use the "reasonable maximum" approach, where short-term emissions are estimated on the actual capabilities of the equipment. As an example, if only five out of nine tanks can be filled at any one time, then the short-term emission rate will be based on the five worst case tanks filling at the same time (in place of using the short-term summary of all nine tanks filling at the same time, which is not physically possible). Short-term emission rates are used to conduct the required health effects evaluation and modeling analysis. § 116.711(10). Short-term emissions are also limited by emission caps, and are subject to monitoring requirements (where possible, and where it makes sense) and record keeping requirements. § 116.715(c)(6) and (d). Where necessary to protect against an unacceptable off property impact, short-term emission rates may be contained in an individual emission limit, setting the upper bounds for a specific facility that may not be exceeded.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(1)(iii) is included.

O. The EPA requested an explanation of how the definition of "insignificant emissions factor" in § 116.718 is distinguishable from the terms "significant" and "insignificant" used elsewhere in TCEQ's rules, stating that these terms must be clearly distinguishable to facilitate compliance and enforcement of the rules. The EPA also requested an explanation of how the flexible permit rules are consistent with 40 CFR §§ 52.21(b)(23) and 52.21(aa)(6)(I).

As stated in the preamble when the rules were adopted, one of the primary motivations behind development of Texas' flexible permit program was to provide incentives for companies to improve controls at grandfathered facilities while ensuring protection of human health and the environment. A fundamental premise of the rules was that additional flexibility would be given only to well controlled facilities. Section 116. 716(d) provides that the insignificant emissions factor may not exceed 9 percent. The rule does not allow installation of a level of controls that can be considered to be "BACT + 9 percent." Controls are proposed to meet the cap. § 116.711(14). Then, the proposed final controlled cap is evaluated for off property impacts, and the cap can be adjusted accordingly if the health effects review dictates lower emissions are necessary. The "Insignificant Emission Factor" in § 116.716(d) is intended to provide for operational flexibility. The use of the Insignificant Factor is optional, and is not included in all flexible permits. There are flexible permits where a factor less than 9 percent is used, or in some cases, the insignificant emission factor is not used at all. If an applicant chooses to include a 9 percent insignificant factor into the flexible permit, these emissions are considered to be the potential to emit and the entire emission rate, including the 9 percent insignificant factor, is used to determine federal NSR applicability. There are occasions where the TCEQ will not include a 9 percent insignificant emissions factor in a flexible permit, even in situations where an applicant requests that the factor be included. § 116.716(d). Examples of these situations include where there are issues about ensuring protectiveness of off property impacts (air toxics modeling), the predicted violation of a NAAQS, the predicted exceedance of an increment, or to protect the application of BACT (in certain situations).

The flexible permit rules state the following in § 116.718 of Subchapter G: "An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit <u>is insignificant, for the purposes of state new source review under this subchapter</u>, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from any new facility nor to the emission of an air contaminant not previously emitted by an existing facility." (Emphasis added) "Insignificant" is used in § 116.718 to define when a minor NSR amendment is required under the flexible permit program.

The intent of § 116.718 is to define what is meant by the term "significant increase in emissions" as mentioned in § 116.721. A significant emissions increase, as used in § 116.721, would be an emissions increase which exceeds either a emission cap or a individual emission limit. Emissions increases which do not exceed a emission cap or individual emission limit are considered to be

insignificant, according to § 116.718, and an insignificant increase alone does not trigger the requirement for a minor NSR permit amendment under the flexible permit rules. In summary, the insignificant emission factor as used in Subchapter G only applies to Subchapter G and does not affect federal NSR applicability.

In addition, because TCEQ distinguishes the flexible permit from the federal PAL (as discussed in detail elsewhere in this letter), no explanation of how the flexible permit rules are consistent with 40 CFR § 52.21(aa)(6)(i) is included.

5. **Minor Sources**

A. The EPA requested an explanation of how the flexible permit rules meet the requirements of 40 CFR § 51.160 to provide procedures that enable TCEQ to determine that modifications authorized under the flexible permit rules will not result in (1) a violation of applicable portions of the control strategy; or (2) interference with attainment or maintenance of a national standard in Texas or a neighboring state.

The flexible permit is an optional alternative permitting mechanism that may be used by an applicant to authorize a facility, group of facilities, or an entire account site (source). Even though the flexible permit is issued/approved under state authority, there is nothing in the rule or intent which should be considered as a shield from federal permitting requirements. The review of the flexible permit must ensure that the site is in compliance with all state and federal rules. §§ 116.711 and 116.715(10). The permit will contain monitoring, recordkeeping, and compliance determination tools to ensure compliance with permit emission limits and representations, as discussed above in the response to issue 4.E. The permit applicant is limited to the operational scope represented in its application. The emission caps are based on the application of BACT, and reviews of the modeling/health effects data. The monitoring, testing, and recordkeeping tools are used to help ensure that a minor source does not become major. For control technology protection, the flexible permit rules state that the existing level of control may not be reduced for any facility, and the emissions from all facilities contained in a flexible permit are included in either an emission cap, or an individual emission limit. §§ 116.711(3) and 116.716(a). These requirements, as implemented through the flexible permit program, are in compliance with 40 CFR § 51.160.

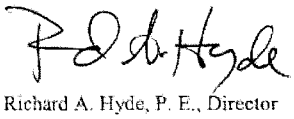
B. The EPA requested an explanation of how the flexible permit rules, as applied to minor sources, meet the public participation requirements of 40 CFR § 51.161, including a rationale for exemptions from these requirements and the current SIP.

Flexible permit applications for new construction must comply with the public participation requirements in Chapter 39. § 116.740. If as a result of an amendment, the proposed emissions will exceed the public notice trigger levels prescribed in Chapter 39, public notice is initiated. Flexible permits for minor sources also follow the public notice criteria contained in Chapter 39 of the TAC. Although the public participation requirements in Chapter 39 have not been approved as part of the Texas SIP, the requirements are essentially the same as the requirements contained in the version of Chapter 116 approved into the SIP.

CONCLUSION

The TCEQ appreciates the opportunity to provide this information and looks forward to discussing possible changes to TCEQ's rules to provide clarity and ensure approval as a revision to the SIP.

Sincerely,



Richard A. Hyde, P. E., Director
Air Permits Division
Office of Permitting, Remediation, and Registration
Texas Commission on Environmental Quality

JV/RAH/bs

cc: Stephanie Bergeron Perdue, Deputy Director, Office of Legal Services
John Sadlier, Deputy Director, Office of Compliance and Enforcement
Dan Eden, Deputy Director, Office of Permitting, Remediation and Registration

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAR 1 2 2008

Mr. Dan Eden
Deputy Director
Office of Permitting, Remediation, and Registration (MC 122)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711

Dear Mr. Eden:

At the conclusion of our meeting on July 23, 2007, the U.S. Environmental Protection Agency (EPA) agreed to provide the State with a thorough listing of clarifications that would be needed for Federal approval of Texas' Flexible Permit rules. We appreciate your letter of August 30, 2007, providing information about the Flexible Permit program. The two purposes of this letter are to transmit EPA's comments on the measures necessary for Federal approval of the Flexible Permit rules and to request a response as to whether the Texas Commission on Environmental Quality (TCEQ) will recommend adoption of those measures. The EPA also notified all Flexible Permit holders of our concerns by letter dated September 25, 2007.

The enclosed analysis includes the comments from all EPA offices with review responsibilities. We would appreciate knowing whether all rule revisions and clarifications are acceptable by the end of March. If TCEQ commits to propose the necessary revisions to the Flexible Permit program, we request that TCEQ work with EPA in partnership to share draft revisions of the Flexible Permit rules during the rule development process. If the revised regulations address our concerns, we believe we could propose approval of the Texas Flexible Permit program.

We are willing to meet with you and members of your staff to discuss the necessary revisions and recommendations detailed in the enclosure. Should new facts or information become available during our discussions of the revisions, we will attempt to work with TCEQ to reach a mutual decision about whether the revisions, or any other additional revisions identified during our discussions, are necessary for the proposed

approval of the rules. If you have questions or need clarification of any of the revisions detailed in the enclosure, or if you would like to arrange a meeting to discuss the revisions we believe are necessary to propose approval of the Texas Flexible Permits program, please feel free to contact me at (214) 665-8014 or you may contact Jeff Robinson, Air Permits Section Chief, at (214) 665-6435.

Sincerely yours,

Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division

Enclosure

ENCLOSURE

Introduction: The EPA has reviewed the Texas Flexible Permit Program State Implementation Plan (SIP) revision and many Flexible Permits issued under those rules. We understand that the aim of the Texas Flexible Permit Program is to establish an aggregated Best Available Control Technology emission limit for a group of individual facilities within a stationary source. This would enable an owner or operator of the source to operate those facilities with less technical and administrative effort than would be required under air permits which impose unit-specific mass emission limits. We have reviewed these provisions of your rule for consistency with 40 Code of Federal Regulations (CFR) Part 51. We have identified concerns related to public participation and air quality analysis for initial issuance and modifications which increase the site wide cap.

Unlike flexible permit programs in other States, the Texas Flexible Permit Program is not limited to minor sources. Because the program applies to major sources, we have reviewed these provisions for consistency with your approved Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR) rules. We identified concerns related to applicability of your major NSR program requirements and for ensuring that any project that would be a major new stationary source or major modification is reviewed to ensure compliance with the permitting requirements applicable for such project. We also identified problems with how major NSR netting will be accomplished under a Flexible Permit. We also believe changes are required to the State's preliminary analysis to incorporate existing major NSR permit requirements into the Flexible Permit.

Other major concerns identified below relate to practical enforceability of an emission limitation cap which applies to a very large number of emission sources. We believe changes are required for monitoring, recordkeeping, reporting and testing, as well as considerations for sub-caps or bubbles applied to smaller groups of units. We have also identified changes necessary to ensure that all Flexible Permit terms and conditions remain enforceable after modifications authorized under the permit are made. We believe changes that conflict with terms and conditions of the Flexible Permit require a permit amendment, rather than an alteration or Permit by Rule (PBR) authorization.

RULE REVISIONS AND CLARIFICATIONS

I. Establishing the Flexible Permit Emission Cap.

A. Addition of 9% of total emissions to the Flexible Permit emission cap

Delete Section 116.716(d)[1] from Subchapter G. As submitted, the rules are unclear as to whether adjustments to the emissions cap or individual emission limitation by an "insignificant emissions factor" could cause or contribute to a violation of a NAAQS or, perhaps, trigger major NSR requirements.

B. Best Available Control Technology (BACT) Determinations

1. Revise Section 116.711(3) to indicate that current BACT technology will be required, consistent with Section 116.716(a)(1). For example,

> (3) Best available control technology (BACT). The proposed facility, group of facilities, or account will utilize current BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis.

2. Revise Section 116.716 to require that any BACT or lowest achievable emission rate (LAER) control technology and the related mass emission rates in major NSR permits which are incorporated into the Flexible Permit remain enforceable and shall be retained or appropriately streamlined through a SIP-approved NSR permit revision process as described below.

3. Are BACT determinations under Section 116.716 required to be based on the State or Federal definition? Please clarify the definition of BACT and which definition applies (i.e., when is a source required to use the State definition versus the Federal definition.....PSD, minor NSR, etc.).

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[1] Section 116.716 (d) states:

> Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.

C. Emission Limitations

1. Add a provision to Subchapter G to state that a Flexible Permit will contain, at a minimum, an annual emission limitation in tons per year, based on a 12-month rolling average (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant regulated under the Flexible Permit. Revise Section 116.715(c)(6),[2] Recordkeeping, to clarify that emission cap and individual emission limitation calculations shall, be based, at a minimum, on a 12-month rolling basis (or other time period that is at least as stringent) that is enforceable as a practical matter for each pollutant at the source. The rule should also be written broad enough to require more stringent limitation periods when necessary (e.g., during the ozone season).

2. Add a provision to Section 116.715(c)(6) to state that a Flexible Permit will include a short-term emission limitation cap (or other reasonable cap or reasonable time period with monitoring and recordkeeping that ensures practical enforceability) for each pollutant regulated under the Flexible Permit that is enforceable as a practical matter. See Number I under Implementation Issues for further information concerning practical enforceability.

3. Add a provision to Section 116.715 that emission calculations for purposes of compliance with emission caps include emissions resulting from maintenance, startup, and shutdown (MSS).[3]

4. Please explain how TCEQ will ensure that emission limitations adopted pursuant to 40 CFR 52.21(r)(4), incorporated into the Texas SIP at Section 116.160(a), will not be relaxed by the Flexible Permit process.

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[2] For example, Section 116.715(c)(6), the third sentence could be revised as follows: This information shall include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operation hours.

[3] For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: ". . . scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could have been avoided through better scheduling for maintenance or through better operation and maintenance practice."

II. Identification of modifications authorized by Section 116.718, Significant Emission Increase[4] and Major NSR applicability.

The rule is vague as to what modifications are authorized by Subchapter G. Section 116.710 states: A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Amendments and Alterations). Section 116.718 grants an exemption from "state new source review" for operational or physical changes which result in an emission increase. "State new source review" is not defined. Section 116.711 requires sources to demonstrate compliance with major NSR requirements at the time of initial issuance or amendment. However, the rule does not require such a demonstration for modifications that are authorized by Subchapter G. The following changes are intended to ensure that a major new stationary source or a significant increase in emissions from a major stationary source is reviewed to ensure compliance with the permitting requirements applicable for such projects.

A. Revise Section 116.718 or provide a definition of "state new source review." Such definition must exclude authorization of modifications, or a series of modifications, which trigger major NSR applicability. The rule should note that the Flexible Permit does not authorize projects to be segregated into smaller projects which are physically or economically dependent on one another in order to avoid major NSR applicability.

B. Include a provision in Section 116.710, Applicability, to clarify the scope of the rule, such as: Any facility or group of facilities, which constitutes a new major stationary source or a major modification as defined under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6 of this title (relating to Nonattainment Review and Prevention of Significant Deterioration Review) must meet the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.

C. Revise Section 116.711 to provide that any application for an initial flexible permit or for an amendment to a flexible permit must include all information (including calculations) which demonstrates that the proposed project will not be a major stationary source or major modification as used

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[4] Section 116.718 states: An increase in emissions from operational or physical changes at an existing facility covered by a flexible permit is insignificant, for the purposes of State new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

under the applicable permitting requirements of Chapter 116, Subchapter B, Division 5 or Division 6.

D. Revise Section 116.711(13) to require the permittee to comply with any representations in the permit application of the underlying permits that are incorporated into the Flexible Permit (as required under §116.116(a)(1) in the approved SIP), unless those requirements are specifically amended by the permitting process as described below. Revise Subchapter G to clarify that authorization of future changes under the Flexible Permit may not include changes subject to major NSR unless the permit undergoes the major NSR process and is incorporated into the amended Flexible Permit.

III. Removal of terms and conditions of existing permits.

The permit application and the State's preliminary analysis, including the air quality analysis, must ensure that all terms and conditions of existing permits remain enforceable unless such terms and conditions are superseded or subsumed by the flexible permit conditions through proper streamlining procedures as described below. Texas should revise Section 116.711(13), Application content, to require the permittee to identify terms and conditions (including representations in permit applications) in existing permits which will be superseded or subsumed under the Flexible Permit. Furthermore, any such term or condition of an existing permit (including representations in the applications) which will be superseded or subsumed by the flexible permit must be accompanied with a demonstration that the revision will not violate applicable portions of the control strategy and will not interfere with attainment or maintenance of the ambient air quality standards as required under 40 CFR 51.160.

IV. Public Participation Requirements.

A. For initial issuance of a Flexible Permit or an Amendment to the Flexible Permit that increases the emission limitation(s)

Revise Chapter 39[5] and Sections 116.721 (Flexible Permit Amendments) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality

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[5] Section 39.403(b) states: As specified in those subchapters, Subchapters H - M of this chapter apply to notices for: . . .

(8) applications for air quality permits under THSC, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities*), initial issuance of flexible permits under Chapter 116, Subchapter G of this title* (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10 of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10 of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Permitting by Rule) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

Note that emission quantities defined in §106.4(a)(1) are: (1) Total actual emissions authorized under PBR from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO_2) or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

Note also that Region 6 has not approved Chapter 39 into the Texas SIP. We informed TCEQ in 2006 that certain provisions may not be approvable, but we have received no response to our letter. Our comments stated: We interpret §§39.403(b)(8) (A) and (B) to state an amendment of a flexible permit and/ or an NSR permit under §116.116(b), is not required to comply with public participation requirements of Chapter 39 unless the action involves an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_x; or 25 tpy of VOC or SO_2 or inhalable PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. Please provide a rationale for how exemptions from these requirements are consistent with 40 CFR 51.160 and 51.161 and address issues raised in previous comments.

and its proposed approval or disapproval.[6]

A. Amendment of a Flexible Permit

1. We recommend a revision to Section 39.403 (Public Notice Applicability) and 116.740 (Public Notice and Comment) to require 30-day public notice and comment on the draft permit and the State's preliminary decision, which includes the State's analysis of the effects on ambient air quality and its proposed approval or disapproval, for amendment of a Flexible Permit for the following types of changes:

   a. Changes that result in a significant net increase in actual emissions resulting from a physical or operational change, (i.e., changes which trigger major NSR applicability),

   b. Changes that require netting to avoid major NSR applicability,

   c. Changes to the method of control,

   d. Changes in the character of emissions authorized under the existing permit,

   e. Changes to ambient air quality impacts,

   f. Changes which decrease the frequency or stringency of monitoring, type of monitoring, recordkeeping, and/or reporting.

2. At a minimum, revise Section 116.721, Amendments and Alterations, as follows:

   a. Revise Section 116.721 to require that amendments and alterations must comply with the existing Flexible Permit cap unless the permit is amended, subject to public participation requirements, including 30-day notice and comment period on the draft permit and the State's preliminary analysis, which includes the State's analysis of

[6] See 40 CFR 51.161 for public participation requirements for minor and major new sources and modifications. Please note that other Federal actions have required similar minimum public participation requirements. See the Federal Plantwide Applicability Limit (PAL) rule, which establishes a sitewide emission limitation, requires public participation equivalent to Part 51.

the effects on ambient air quality and its proposed approval or disapproval.

b. Revise Section 116.721(a) to change "will result in a significant increase in emissions" to "will result in a significant net increase in actual emissions" and define the term "significant" consistent with the definition of "significant" at 40 CFR 51.165(a)(1)(x) and 51.166(b)(23).

c. Revise Section 116.721(c) to require a permit amendment for changes that vary from permit terms and conditions related to a change in throughput or a change in feedstock.

d. Section 117.721(d) allows Flexible Permit holders to obtain a PBR in lieu of a permit amendment or alteration. We understand that PBRs are used in Texas to authorize narrow categories of emission sources, such as a storage tank. We recognize that these PBRs may be appropriate for Flexible Permit holders where the new emission source does not cause an exceedance of the emission cap(s). However, EPA has consistently expressed concerns about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit. Please acknowledge that a source cannot vary from a Flexible Permit term or condition or permit application representation under a PBR.

e. The EPA also has concerns about how modifications authorized under a Flexible Permit at sources subject to Title V are incorporated into a Federal Operating Permit (FOP). Please explain how the FOP is amended to incorporate modifications authorized by a Flexible Permit and whether further public participation is required to amend the FOP.

V. Monitoring, Recordkeeping, Reporting and Testing (MRRT)

A. Monitoring

The monitoring requirements in the Subchapter G, Section 116.715(5) are vague. Revise this provision to require each flexible permit to contain specific requirements for monitoring compliance with the emission cap and with individual emission limits. Provide guidance on appropriate

monitoring for individual units under the Flexible Permit. See further discussion of minimum MRRT requirements on page 10-12.

B. Recordkeeping

Revise Section 116.715(a)(6) recordkeeping to require retention of compliance records for five years and to require a copy of the Flexible Permit application, amendments, and any permit application incorporated by reference into the Flexible Permit to be maintained at the site. See further discussion of minimum MRRT requirements on page 10-12.

VI. We recommend revision of Section 116.715 to state that an exceedance of the Flexible Permit cap is a violation of the permit, subject to enforcement action and, for major sources, reportable as an FOP deviation. To ensure practical enforceability of the permit and consistency with 40 CFR 51.211 and 51.212, we strongly recommend that the State require semi-annual reporting of exceedances of the Flexible Permit cap.

VII. Major NSR Netting.

Because all units at a site may not be subject to a Flexible Permit and because all units under the Flexible Permit may not have a unit specific emission limitation, the rule should contain provisions on how to conduct major NSR netting at the site for units in the Flexible Permit and for units outside the Flexible Permit. Revise the rule to provide requirements for major sources subject to major NSR netting to determine the net emissions increase under Subchapter B with the following minimum considerations for Flexible Permits:

A. Emission increases and decreases must be considered on a site wide basis under a site wide or partial Flexible Permit.

B. Emission increases resulting from a physical change or change in the method of operation of any emission unit which were authorized by the Flexible Permit must be considered where the unit's projected actual emissions exceed the baseline actual emission rate.

C. A decrease in emissions at a unit under the Flexible Permit is creditable if the unit's baseline actual emissions exceed the unit's new level of emissions, meets all the criteria of 40 CFR 51.165(1)(1)(vi) and 51.166(b)(3), and the decrease is made practically enforceable by permanently removing the unit from the Flexible Permit cap and establishing a new enforceable unit specific emission limitation.

D. The Flexible Permit cap must be adjusted downward by the amount of that unit's contribution to the cap.

VIII. Air Quality Analysis.

Revise Section 116.711(10) to require an air quality analysis for initial issuance of all Flexible Permits or amendments which increase the Flexible Permit cap to ensure that the proposed flexible permits will not violate the approved control strategy and will not interfere with attainment and maintenance of the NAAQS (as required under 40 CFR 51.160(a)) or the PSD increments (under 40 CFR 51.166(a)).

IX. Maintenance, Startup, and Shutdown (MSS) emissions.

The potential to emit should include emissions that occur during maintenance[7], startups, and shutdowns (MSS). The MSS emissions should be subject to BACT, and reviewed in the air quality analysis for all emission units under the Flexible Permit. Revise Section 116.711, Flexible Permit Application, to require information related to startup, shutdown and maintenance emissions, including adequate monitoring and recordkeeping. We understand that Texas is incorporating these emissions into permits, including existing Flexible Permits. We recommend that new Flexible Permits include a review of MSS emissions and include appropriate monitoring, recordkeeping, and reporting.

X. Implementation Schedule for Additional Controls.

We understand that TCEQ provides an implementation schedule for Flexible Permit holders to install control technology required by the permit. The schedule may be up to 10 years. Section 116.717 states:

> If a facility requires the installation of additional controls to meet an emission cap for a pollutant, the flexible permit shall specify an implementation schedule for such additional controls. The permit may also specify how the emission cap will be adjusted if such facility is taken out of service *or fails to install the additional control equipment as provided by the implementation schedule.*

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[7] For EPA's policy on compliance with SIP emission limitations during periods of maintenance, see Policy on Excess Emissions during Startup, Shutdown, Maintenance and Malfunction, from Kathleen Bennett to Regional Administrators, February 15, 1983: "... scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on excess emissions during periods of scheduled maintenance should be treated as a violation."

We recommend that TCEQ delete this italicized phrase and insert new regulatory language to require a permit amendment for sources that fail to install control equipment required by the permit. Please confirm that failure to install control equipment required by the Flexible Permit would be a violation of the permit. Please confirm that BACT/LAER control technology that is required under major NSR must be operational at start of operation and is not subject to this implementation schedule.

XI. Other Suggested Changes.

A. §116.711(2) – provides for measuring the emissions of air contaminants "as determined by the director." Texas should revise this provision to establish a replicable standard rather than granting discretion to the director – e.g., "measurement and frequency sufficient to demonstrate on-going compliance with specified emission limitations."

B. §116.716(a)(1) – Define the term "maximum expected capacity."

C. §116.715(b) – Define the term "multiple emissions cap."

D. §116.716(c) – The rule is vague concerning how the emission cap will be adjusted for the addition of new facilities. Texas should amend the permit to adjust the cap for new facilities. Texas' rules should be clear on the process.

E. §116.721(c)(1) – Texas needs to add an additional exception "or conflicts with an existing permit limit." There may be permit limits expressed as throughput limits or feedstock requirements and this paragraph appears to authorize changes in a source's obligations to comply with those terms without a permit amendment or alteration.

IMPLEMENTATION ISSUES

I. Practical Enforceability of Flexible Permit Emission Cap.

A. What is practical enforceability?

The TCEQ must consider whether a Flexible Permit emissions cap is truly and practically enforceable. The EPA guidance states that practical enforceability for an emission limitation which applies to a unit or small group of units is achieved if the permit's provisions specify:[8]

1. A limitation and the emissions unit(s) at the source subject to the limitation;

2. The time period for the limitation (e.g., hourly, daily, monthly, and/or annual limits such as rolling annual limits); and

3. The method to determine compliance, including appropriate monitoring, recordkeeping, reporting, and testing.

B. However, where EPA has established emission limitations for large groups of emissions sources subject to a site wide cap, additional requirements were considered to ensure practical enforceability. For example, the Federal PAL rule, which requires only long-term (ton per year) emission limitation(s), sets minimum requirements for MRRT in return for increased operational flexibility.[9] The EPA's proposed Flexible Air Permitting Rule requires MRRT equivalent to the PAL rule for groups of units.[10] The EPA also evaluated appropriate MRRT mechanisms where emission limits applied to a group of units or the permit allowed for increased operational flexibility to ensure that regulatory requirements were met in its study of flexible permits.[11]

C. The EPA has reviewed Texas Flexible Permits in which one short-term (lb/hr) emission limitation is applied to hundreds of dissimilar emission

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[8] See memorandum, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," signed by John Seitz and Robert Van Heuvelen, January 22, 1996, at 5-6 and Attachment 4, available on the Web as http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/pottoemi.pdf. More detailed guidance on practical enforceability is contained in the memorandum.

[9] See 67 *Federal Register* (FR) 80186

[10] See 72 FR 52206 (September 2007) for the proposed Federal Flexible Air Permitting Rule

[11] See *Evaluation of Implementation Experiences with Innovative Air Permits, Summary Report*, prepared by Office of Air Quality Planning and Standards and OPEI, at www.epa.gov/ttn/oarpg/t5/memoranda/iap_eier.pdf.

units. Because emissions units can vary in size and type or operation as well as having widely different regulatory, monitoring, and compliance requirements, EPA has serious concerns that such a short-term limit can be practically enforced. An approvable Flexible Permit Program must:

1. Set minimum replicable standards for MRRT equivalent to the PAL rule or demonstrate how MRRT in the revised Flexible Permit rule is at least as stringent as those requirements.

2. Address how the number of units and the potential to emit (PTE) of units subject to a single emission limitation under a cap is reasonable and practically enforceable. The revised Flexible Permit rule (and guidance) should address how this determination is made. One approach would be to adopt emission limitation sub-caps for related groups of units that are vented to a common control device or where a group of similar emission units have common operations, monitoring, recordkeeping, reporting and testing. Another approach is to require more effective MRRT requirements for significant emission units that have the potential to emit pollutants in amounts in excess of threshold levels. For example, units with PTE greater than major source thresholds would require more stringent MRRT than sources with PTE greater than major NSR significant thresholds, but less than major source thresholds.

3. Demonstrate that required control technology achieves the level of emissions reductions required under the applicable BACT or LAER requirements. MRRT of pollution control equipment must be sufficient to determine compliance with the mass emission unit or work practice requirements adopted in conjunction with BACT or LAER. The MRRT should also demonstrate that the capacity range demonstrated to achieve BACT or LAER for the control device was not exceeded (absent a monitoring system demonstrating compliance with BACT or LAER at that level).

II. Preliminary Analysis.

A. Rationale for BACT determinations

The State's preliminary analysis must include a rationale for the BACT determination for each unit under the Flexible Permit, in addition to any analysis provided in the Flexible Permit application.

B. Tracking of major NSR terms of conditions in existing permits incorporated into the Flexible Permit

The State's preliminary analysis must provide a true crosswalk that identifies each term and condition in an existing permit that will not be incorporated into the Flexible Permit and a rationale for removing the term or condition. Also see item II.B above and item III under **RULE REVISIONS AND CLARIFICATIONS**.

C. Process for superseding or subsuming permit application representations in existing permits

Because Texas uses a streamlined approach to NSR permitting which incorporates permit application representations as enforceable terms and conditions of a permit, those representations must be carried forward in the Flexible Permit, or the permittee in its application and the State in its preliminary analysis must provide a rationale for why those representations may be eliminated. See White Paper #1, White Paper for Streamlined Development of Part 70 Permit Applications, 1995 for additional details. Any change of modification to any term or condition must be authorized as described in item III under **RULE REVISIONS AND CLARIFICATIONS**.

D. Identification of approved physical or operational changes authorized by the Flexible Permit

The Flexible Permit should identify the types of physical or operational changes that are authorized by the permit and the expected time of construction for pre-approved construction activities.

III. Re-issuance of Existing Flexible Permits under a SIP-approved Permit Rule.

We recommend that existing Flexible Permits be reissued under a SIP-approved rule to ensure the permits are federally enforceable and enforceable as a practical matter. If TCEQ revises a Federal Operating Permit (Title V) permit which contains a Flexible Permit which was not issued under a SIP-approved rule, those Flexible Permits are considered State-only requirements in the Federal Operating Permit and should be designated as such. The reissuance of permits should be further discussed by TCEQ and EPA, and a mutually agreed schedule should be developed to address how and when such permits can be reissued under federally approved SIP provisions. Until such time as Flexible Permits are issued under a SIP-approved program, the existing federally approved SIP requirements remain effective.

IV. When Texas revises the Flexible Permit SIP submittal to address the revisions, we strongly recommend that TCEQ withdraw the earlier SIP submittals relating to Flexible Permits.

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

March 31, 2008

Mr. Carl E. Edlund, P. E., Director
Multimedia Planning and Permitting Division
U.S. Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mr. Edlund:

Thank you for your letter dated March 12, 2008, concerning the flexible air permitting program of the Texas Commission on Environmental Quality. Considering the number and complexity of the items you have raised, I want to let you know that we will be unable to respond by March 31, 2008 as requested.

Your letter raises broad issues that go beyond the scope of the flexible permit and will require discussion with our executive management. We remain committed to working with the U.S. Environmental Protection Agency (EPA) to reach an agreement on changes to our flexible permit rules and to obtain EPA's approval of those rules.

Sincerely,

Dan Eden

Dan Eden
Deputy Director
Office of Permitting, Remediation, and Registration

DE/JV/pl

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

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: Best Available Control Technology

Dear Mr. Starfield:

I'm writing in response to the letters from the U. S. Environmental Protection Agency (EPA) Region 6 and our ongoing discussions between EPA and the Texas Commission on Environmental Quality (TCEQ) staff regarding Texas' flexible permit program. This is to confirm our understanding of the agreements regarding three issues discussed in the June 3, 2008 conference call.

First, it is our understanding that the TCEQ's current 3-Tiered best available control technology (BACT) approach, including review of the Reasonable Available Control Technology/BACT/Lowest Achievable Emission Rate Clearinghouse and recently issued permits in Texas and other states is an acceptable and approved approach by the EPA. The TCEQ will work to ensure that the BACT review is adequately and correctly addressed within the Preliminary Determination Summary related to the specific major New Source Review (NSR) action under evaluation. We commit to maintain an open line of communication and dialogue with the EPA and will address any additional specific concerns EPA identifies with a pending major NSR permitting action.

Second, for amendments to flexible permits, the BACT review will be limited to those facilities which are being modified by that particular action. A BACT review is not required for facilities already authorized by that permit which are not the subject of that particular permit action.

Finally, we also understand that no separate permit amendment will be required concerning variations from permit terms and conditions related to changes in throughput and/or a change in feedstock as long as those changes are identified and included in the permit that is issued.

The concerns raised in your letters may have consequences for other parts of the NSR permitting programs in Texas and have the potential to affect both major NSR and minor NSR permit reviews. Therefore, we are submitting this letter to clarify and document our understanding of the issues discussed above.

We appreciate the opportunity to discuss and verify these concerns and look forward to reaching a position of clarity on the remaining issues related to flexible permits and TCEQ's NSR permitting 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

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: Use of Permits By Rule to Modify an Existing New Source Review Permit

Dear Mr. Starfield:

I'm writing in response to the letters from 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. This response addresses the use of Permits by Rule (PBR) as an authorization mechanism to modify an existing New Source Review (NSR) permit. The concerns expressed by the EPA are broader in applicability than the flexible permit program. The concerns have consequences for other parts of the NSR permitting programs in Texas and have the potential to affect both major NSR and minor NSR permit reviews. The issue of PBR use will need to be resolved before the concerns which are specific to the flexible permitting program can be addressed.

The Federal Rules provide flexibility for a state to develop its own minor NSR program. The PBRs are an authorization mechanism under Texas' Minor NSR program. The use of PBRs has been a long-standing authorization mechanism within the TCEQ's rules. Initially contained within Chapter 116 as "Standard Exemptions," these authorizations were later moved into their own chapter within the TCEQ's rules. They are now codified in Chapter 106 (since 1996) and are called Permits by Rule.

The PBRs implement §382.05196 (and previously §382.057) of the Texas Clean Air Act, which provides that certain types of facilities or changes within facilities which will not make a significant contribution of air contaminants to the atmosphere may be exempt from obtaining a construction permit or amending an existing construction permit if certain conditions are met. Significant contribution of air contaminants is described in Subchapter A (General Requirements) of Chapter 106, which is State Implementation Program approved. The specific conditions (the actual PBR language and requirements) are in Subchapters B – X.

New facilities or changes to facilities which make a significant contribution of air contaminants to the atmosphere are not eligible to use PBRs. The PBRs cannot authorize a new major source, nor can a PBR be used to authorize a major modification of an existing major source. Likewise, the PBRs cannot be used to authorize a new facility which is subject to case-by-case maximum available control technology reviews under Federal Clean Air Act §112(g).

The TCEQ, in some cases, has limited the use of PBRs when off property impact concentrations and the condition of the surrounding area (related to the pollutant of concern), warrant such a measure. These limitations are usually placed within the special conditions of an NSR permit and usually apply to the entire plant site. An example would be for benzene use in areas considered to be "watch areas."

For TCEQ to consider changing its rules, TCEQ needs EPA to provide a detailed legal basis for excluding PBR usage at major sources, using PBRs to modify existing NSR permits, or using PBRs to authorize limited categories of maintenance, startup, and shutdown emissions. Changes to TCEQ rules may require statutory changes which would need to be presented to the Texas Legislature.

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 the overall best available control technology approach, 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

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 (76th 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

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

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: Administrative Consolidation, Reissuance of and Amendment to Flexible Permits

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. This response addresses the issue of continuation of permit conditions when existing permits are administratively consolidated under a flexible permit or when a flexible permit is amended. It also addresses the issue of the reissuance of permits under the Texas State Implementation Plan (SIP) approved rules, which are concerns that are broader in applicability than the flexible permit program. The concerns raised in your letters may 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. These issues will need to be resolved before the concerns which are specific to the flexible permitting program can be addressed.

We understand your recommendation that, after rules for the flexible permit program have been approved as a revision to the SIP, all previously issued permits be reissued so that the permits are issued under a SIP approved permitting program. The EPA recommends further discussion of this topic, including how such permits can be reissued and development of a mutually agreed upon schedule for doing so.

In our discussion of permit consolidation, we made some progress on a piece of the administrative consolidation issue. We established an understanding that BACT is evaluated for each facility during the review of a flexible permit, including those facilities covered by the permits being consolidated. This BACT is expressed in the new flexible permit as a rate (e.g., lbs/MMBtu), and short- and long-term caps are established for all facilities under the flexible

permit. Additional discussion regarding amendments of permits under SIP approved permitting programs may also be necessary.

For TCEQ to consider changing its rules and reissuing permits after SIP approval of those rules, TCEQ needs EPA to provide specific federal legal authority to require such rules as well as amendment or reissuance of previously issued permits. We also need EPA to provide clear legal basis for any requirements which EPA finds necessary in order to consolidate legally issued permits into a single permit document, followed by the administrative discontinuance of the permit numbers for the consolidated permits. Sample rule language would also be helpful. Changes to TCEQ rules may require statutory changes which would need to be presented to the Texas Legislature.

Based on the June 3, 2008 conference call, we understand that EPA will select a flexible permit and perform a "cross-walk" of the permit requirements in previously issued permit(s) and the existing flexible permit and then schedule a conference call with TCEQ staff to step through the requirements. This discussion should facilitate a common approach for addressing EPA's practical enforceability concerns. 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 the overall amendment and reissuance issues, we can then begin to address concerns that are specific to the flexible permitting program as a whole. After we have reached an understanding regarding the overall amendment and reissuance issues, 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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

OCT 2 7 2008

Mr. Mark Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
Post Office Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

I am writing in response to the series of four letters, dated June 13, 2008, sent to me by former Texas Commission on Environmental Quality (TCEQ) Executive Director Glenn Shankle. Each letter relates to some aspect of the Texas flexible air permitting program, as established in Chapter 116, Subchapter G of Title 30 of the Texas Administrative Code. Region 6 appreciates the efforts of TCEQ to resolve issues related to the flexible air permitting program, as outlined in our letter of March 12, 2008, as well as the subsequent discussions between our offices on June 3, 2008. As TCEQ notes, many of the revisions necessary for approval of the flexible air permitting program are broader in applicability than that program and, indeed, may have consequences for other parts of the New Source Review (NSR) permitting programs in Texas. Region 6 agrees and commits to prioritizing our review of the proposed revisions to the Texas State Implementation Plan (SIP) to ensure that some of these broader issues may be addressed first. For example, Texas' proposed revisions to its public participation provisions cut across all air permitting programs. We think it makes sense to take action first on those provisions. Region 6 will also be moving forward and taking action on the other currently pending SIP revision submittals with broad air permitting program application, including major NSR reform, qualified facilities, standard permit for pollution control projects, and flexible permits.

At our August 29 meeting in Waco, we discussed some of the SIP submittals with you and your staff. The U.S. Environmental Protection Agency (EPA) will use those discussions to determine the most appropriate path forward in the near term for proposing action on the various SIP submittals. The actions that Region 6 proposes will be based upon whether or not the SIP submittals meet the requirements of the federal Clean Air Act and implementing federal regulations. Please note that proposed full approval of the SIP revision may not be an option in cases where it cannot be shown that the state-adopted rules are at least as stringent as federal requirements. In some cases, our air permitting staff has requested supplemental information and clarification of regulatory provisions to facilitate our review.

Region 6 will notify you of any deficiencies in the current record, and will afford you the opportunity to submit additional information prior to or during our public comment period on the proposed actions.

During the June 3, 2008, conference call, our staffs discussed the process by which terms and conditions of previously issued air permits and authorizations are incorporated into a flexible permit. EPA supports the adoption of the "cross-walk" process through a rule clarification so that the preliminary determination analysis and review process will include: 1) the identification of all permits, major and minor, that are being incorporated into the flexible permit; 2) a statement that all terms and conditions from underlying permits are incorporated into the flexible permit, or the specific identification of all terms or conditions that are being deleted, combined, modified, or added; 3) a rationale for all changes from existing terms and conditions contained in underlying permits; and 4) public participation for the analysis in accordance with the requirements in 40 CFR 51.161. We hope that we can work with you on such an approach. We can also discuss options for the re-issuance of existing flexible permits after the program revisions are approved.

Finally, Region 6 would like to work with you and your staff to develop a mutual understanding of how to resolve issues that cannot be addressed within the context of a specific rulemaking. For example, one of the June 3, 2008, letters relates to Best Available Control Technology (BACT) issues. Region 6 agrees with many of the statements in TCEQ's letter; however, a recent citizen groups' petition filed with EPA alleges that TCEQ is failing to properly implement the Texas PSD program, including the BACT requirements. The BACT determination process applicable to major sources must be consistent with the federal BACT requirements. Region 6 proposes that TCEQ clarify this point in its existing guidance, thereby ensuring proper implementation of the Texas air permitting program. With respect to your statement regarding changes in feedstock or throughput, such changes may not trigger permit amendment requirements provided those changes were previously identified and included in the terms and conditions of a SIP permit, the emissions associated with those changes were previously accounted for in the air quality impacts analysis, the changes are tracked by the source, and they are legally and practically enforceable. In addition, our discussions should address concerns related to the use of permits by rule to effect minor modifications at major stationary sources.

We look forward to continuing our efforts to work with you and your staff to resolve any remaining concerns related to flexible permits and TCEQ's NSR permitting process. Should I be able to assist you further, please call me at (214) 665-7200, or your staff may contact Jeff Robinson of my staff, at (214) 665-6435.

Sincerely,

Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division

cc: Dan Eden
Deputy Director
Office of Permitting, Remediation and Registration
Texas Commission on Environmental Quality

Richard A. Hyde, P.E.
Director
Air Permits Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 5, 2009

Mr. Lawrence E. Starfield
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202

Dear Mr. Starfield:

I am writing to continue the Texas Commission on Environmental Quality's (TCEQ's) desire to work with the U.S. Environmental Protection Agency (EPA) on the many outstanding issues related to Texas' air permitting program, we have developed a list of possible actions that the TCEQ and the EPA could work on collaboratively while EPA finalizes proposed notices on the pending rulemakings. The list includes changes to public participation, an overall programmatic issue for which TCEQ has filed formal comment with EPA in January 2009. The list also includes some changes to three additional specific air permitting program areas that are of particular importance to both agencies. As you are aware, we have had several meetings and correspondence that identified our options for bridging the perceived gaps in our permitting program. The following list serves as a reminder of the issues we have already identified and could serve as a comprehensive roadmap for eliminating these gaps. The TCEQ Executive Director would either propose the following to the TCEQ Commission (such as rulemaking) or initiate the following changes within the program, as appropriate.

Public Participation

- Update Best Available Control Technology (BACT) guidance to state that documentation of the application of BACT is located in the Preliminary Determination Summary and is available for review and comment during second notice for federal New Source Review (NSR) permits.

- Propose rulemaking and revision to the State Implementation Plan (SIP) to reflect the TCEQ's existing practice by:
    - Specifically identifying which applications are subject to public notice.
    - Requiring public notice for initial issuance of flexible permits.
    - Specifying that increment consumption, if required in the Prevention of Significant Deterioration (PSD) permit review process, is a required element of public notice.

- Specifying the public notice process for Plantwide Applicability Limit (PAL) applications.
- Specifying that notice must be provided to local air pollution control agencies and governments and to Federal Land Managers for projects that will affect Class I areas.
- Updating reference to require public notice for certain concrete batch plant standard permits.
- Clarifying rule references, such as definitions of APA (Texas Administrative Procedure Act) and SOAH (State Office of Administrative Hearings).

Qualified Facilities

- Clarify, in rule or guidance document, existing TCEQ practices of:
  - Applying netting during the technical review of a qualified facility by clarifying this in rule or guidance document.
  - Ensuring federal NSR requirements are met when triggered. If federal NSR is triggered, qualified claim will be denied.
  - Providing that emission limitations are based on a 12-month rolling average instead of a calendar average.

Flexible Permits

- Propose rulemaking to remove the insignificant emissions factor (i.e., 9 percent of total allowable emissions).

- Propose rulemaking and revision to the State Implementation Plan (SIP) to reflect the TCEQ's existing practice by:
  - Ensuring that terms and conditions of previously issued permits or more stringent terms and conditions (including additional testing, monitoring, recordkeeping and reporting requirements needed to ensure compliance with emission limitations) are added to the flexible permit.
  - Applying netting during the technical review of a flexible permit.
  - Ensuring federal NSR requirements are met if triggered.
  - Providing that emission limitations are based on a 12-month rolling average instead of a calendar average.
  - Requiring public notice for initial issuance of flexible permits.

NSR Reform

- Update BACT guidance to indicate that Texas is properly implementing the NSR program:
  - The TCEQ reviews RACT/BACT/LAER Clearinghouse (RBLC) data and recently issued permits as part of its BACT review of major sources and major modifications.
  - By including the RBLC and recently issued permit analyses, TCEQ's three-tiered approach is equivalent to EPA's top down approach as has been agreed to by EPA.

- Reconsider proposing rulemaking and revision to the SIP that references EPA rules for nonattainment and maintenance area definitions and removes rule language indicating that the one-hour thresholds and offsets are not effective unless the EPA promulgates rules.

- Propose rulemaking and revision to the SIP to reflect the TCEQ's existing practice by:
    - Applying netting as appropriate during the technical review of a permit by rule at a major source.
    - Providing that emission limitations are based on a 12-month rolling average instead of a calendar average.
    - Including EPA's definition of BACT.

- Document practice of tracking and certifying permit by rule sources to emission limits below major source thresholds by clarifying this in rule or guidance document.

Enclosed is a copy of the slides that EPA presented at the May 26, 2009 meeting. We cannot verify much of the information, and we would like to take this opportunity to respond to some of the slides that you presented at the meeting.

Flexible Permits vs. PAL

The first issue is the comparison of the Texas flexible permitting program to the EPA's PAL. There is a perception that these programs are similar and can be compared. As we have stated to EPA in many meetings and letters, this comparison is not accurate because of the different goals of the two programs. The federal PAL rule provides a procedure, which includes public participation, for establishing plantwide emission limits used to determine the future applicability of federal NSR (also called "Major NSR").

Texas' flexible permit program, which predates the PAL, establishes an emissions cap. An emissions cap is calculated using the maximum expected activity or operating level of a facility and the current BACT applied to each facility. In other words, the emissions cap is a potential to emit (PTE). These BACT emission rates are then summed together as an "emissions cap". Emission caps are generally calculated for each specific criteria pollutant and other pollutants as necessary or desired by the company obtaining the flexible permit. The emission caps allow the permit holder to over-control some facilities while not necessarily adding additional control to other facilities emitting the same pollutant. The existing level of control cannot be relaxed or reduced. The company obtaining a flexible permit is required to meet BACT as if it were applied to all facilities individually contributing to a particular emission cap. Although additional control technology may not be added to some facilities, over-controlling other facilities beyond current BACT results in an emission rate to the atmosphere which is equivalent to all facilities having BACT actually or physically applied.

Many companies have used the flexible permit as a means to have operational flexibility. In addition to flexible permits issued to chemical plants and refineries, a flexible permit was recently issued to the United States Department of Energy (Pantex). Also, many flexible permits

have resulted in actual emissions reductions. The flexible permit emission cap is not intended and not allowed to supersede or replace federal NSR requirements. Federal NSR concepts such as modification, major project, netting, and major modification still apply. Major project determinations are conducted on either a baseline actual to potential or baseline actual to projected actual (depending on how the permit applicant represents their comparison) for the facilities involved. If the project is a major project, contemporaneous netting is initiated, and the net is determined on a baseline actual to potential basis. If the contemporaneous net equals or exceeds the federal threshold for the pollutant and program under evaluation (PSD and/or Nonattainment), federal NSR is triggered.

Insignificant Emissions Factor

In addition, there seems to be some confusion concerning the 9 percent factor used in some of the flexible permits (also known as the insignificant emissions factor). Please note that the 9 percent factor, although allowed by the flexible permit rules, is included in the emission caps (and is not in addition to the emission caps). Also, any increased emissions resulting from a 9 percent (or less) factor are counted when determining federal applicability. Not all companies use the 9 percent factor in their flexible permit cap calculations. The concept of the insignificant emissions factor was explained, in detail, in the letter dated August 30, 2007, to Mr. Jeff Robinson [specifically Item 4(O) located on Page 15]. There is no basis to assert that the 9 percent cap would allow any modifications without undergoing a federal applicability review of any associated project.

The EPA also included slides regarding the Shell Deer Park, Exxon Mobil-Baytown, and Magellan plants, each of which contain facts and analyses that we simply cannot verify. Below we have provided a description of these issues, and as always, are willing to work with EPA to clarify any issues or questions that you may have with permitted operations within the State of Texas.

Shell Deer Park Refinery

First, in a combination of slides, EPA compared the Shell Deer Park flexible permit relating to potential projects that could represent significant operational changes without federal NSR; other slides reference the 2007 renewal of that permit.

The Shell Deer Park refinery was issued a flexible permit in 1995. The flexible permit has been amended three times (1999, 2004, and 2007) since the flexible permit was issued. This site does not have a PAL. In the 1999 amendment, Shell installed some new units, expanded some of its existing units, and authorized several grandfathered units. The flexible permit amendment project was PSD for nitrogen oxides (NO_x), carbon monoxide (CO), and particulate matter of 10 microns and smaller (PM_{10}). In part due to the reduction in emissions from the grandfathered units, this was not a major modification for volatile organic compounds (VOC), and therefore, nonattainment review was not triggered. The level of control for fugitive emissions in benzene service was increased by specifically monitoring flanges using a leak detection instrument (this is in addition to the monitoring that is normally conducted for piping fugitive components).

The permit was amended again in 2004 to address the production of ultra low sulfur diesel and resulted in modifications to several units at the plant. This flexible permit amendment triggered PSD for sulfur dioxide (SO_2) and CO. There was a 0.19 tons per year (tpy) increase in benzene emissions; however, there was also a 0.96 tpy decrease in VOC emissions. Federal review is based in changes in VOC, not benzene specifically. However, benzene is a VOC, and if the benzene changes alone equal or exceed the VOC significance level, federal NSR applicability would be triggered.

In the 2007 amendment, the benzene cap was actually reduced when compared to the 2004 authorized levels, contrary to your assertion that the benzene emissions were increased by 18 percent. The 2007 amendment also reduced NO_x. There was a 1,230 tpy NO_x reduction between 2004 and 2007. This permit amendment also contained emission limits required by Shell's consent decree with EPA. The EPA's slide presentation indicated that the NO_x cap was increased; however, our file research does not confirm this point. In addition to the permit amendment, the permitting action also included the renewal of the permit. In this same slide, you provided a bullet that describes "as you go permitting." The TCEQ does not understand the term "as you go permitting." In order to address this issue, the TCEQ recommends EPA review the Shell permit file along with a TCEQ representative to fully understand the permit history. Additionally, the TCEQ does not agree that state BACT process is less stringent than the federal BACT process for the Shell permitting actions or any other permitted operation in the State of Texas as discussed in prior meetings and correspondence.

Exxon Mobil Baytown Refinery

In another slide, EPA made comparisons regarding the Exxon Mohil Baytown refinery's flexible permit and what you perceive the PAL cap limits to be. The EPA stated that the EPA PAL VOC limit would be 3,098 tpy, and the flexible permit VOC limit is 6,245 tpy. The TCEQ could not determine the basis for the 3,098 tpy PAL cap represented by the EPA. The TCEQ file research shows that the Exxon Baytown Refinery was issued a flexible permit on March 30, 2000. The permit included a number of grandfathered (i.e., previously not permitted) facilities and large actual emission reductions that were obtained as a result of controlling these grandfathered facilities. On October 30, 2006, Exxon Mobil applied for a PAL. As a result of this application, a PAL was issued for several pollutants, including VOC. The PAL was calculated using baseline actual emissions plus 39 tpy (one tpy less than the significance level for the 8-hour ozone rules in place at the time the PAL was issued). At the time the PAL was issued, the final flexible VOC cap and the PAL were both set at 5,783.68 tpy. The flexible permit emissions cap was set equivalent to the baseline actual emission rate used to develop the PAL. At the time of PAL issuance, Exxon Mobil reduced its VOC emission caps from 6,238.84 tpy to 5,783.68 tpy. We are unable to find or develop a calculation method which yields the PAL limit of 3,098 tpy that the EPA presented in its slide.

Magellan Terminal

Lastly, EPA had a slide that discussed emissions from the Magellan Terminal. Emissions from the Magellan plant site are authorized through a combination of four NSR permits and several permits by rule (PBR). Magellan is currently authorized for a total of 447 tpy VOC. Emissions

Inventory data (Contaminant Summary Reports 2005, 2006, and 2007) was also reviewed. The total VOC emissions including scheduled MSS reported in each of these years are 665.1 tpy, 701 tpy, and 912 tpy, respectively. It appears that EPA compared emissions from a single permit to all plant wide actual emissions (104 tpy vs. 700 tpy). Permit Number 4850 is in the final stages of an amendment review. The amended permit will incorporate all remaining authorizations into this one document, and the total VOC allowable will increase to 861 tpy. Some of these emissions from the other permits are considered to be unauthorized until the pending amendment is approved. Federal review is being addressed for these emission changes, and the emissions are contained in the company's emission inventory. The pending permit amendment was subject to the public notice process, BACT analysis, and will be thoroughly evaluated with all applicable law prior to approval.

In addition, the plant site participated in the Self-Audit program. This self audit resulted in a Compliance Agreement to authorize emissions from tank landings through a permit amendment. Even though tank landing emissions are addressed for the facilities authorized in the current version of Permit Number 4850, tank landing emissions from the facilities located in the other permits at the plant site were not addressed. It is the tank landing emissions from these other facilities that are the subject of the currently pending permit amendment. The TCEQ is aware of the issues surrounding the Magellan operations and is working with the company to ensure that these operations will be in compliance with applicable law.

Except for EPA's notice in November 2008 regarding TCEQ's public participation rules, EPA has not provided the TCEQ with Federal Register notices which identify the specific deficiencies (and the legal bases for each) in the TCEQ rules that need to be addressed for EPA to approve TCEQ's air permitting rules. The TCEQ needs these notices to understand fully the deficiencies EPA has identified. The TCEQ appreciates the opportunity to discuss the programmatic concerns and looks forward to reaching a position of clarity on the remaining issues related to public participation, qualified facilities, flexible permits, and NSR reform. The TCEQ has made an attempt with this letter to describe possible collaborative efforts that can be undertaken with EPA. In addition, we have attempted to clarify possible errors or misunderstanding associated with the slides from the May 26, 2009 meeting.

Sincerely,

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

Enclosures

cc: Carl E. Edlund, Director, Multi-media Planning and Permitting Division
John Blevins, Director, Compliance Assurance and Enforcement Division

EPA/TCEQ Meeting Goals

- Review status of:
  - BCCA litigation
  - Petitions
- Summarize EPA's
  - Issues with TX permits SIP
  - Concerns regarding environmental and legal impacts
- Solicit TCEQ input on the potential for a collaborative approach to renovate the permitting program

Response to BCCA

- EPA has 30 Texas SIPs to act on (BCCA Litigation)
- BCCA agreement will call for action on 4 Texas SIPs this year
  1. Public Participation *(Proposed Dec; Final - November 2009)*
  2. Qualified Facility *(Propose June?; Final - March 2010)*
  3. Flexible Permit *(Propose June?; Final – June 2010)*
  4. NSR Reform *(Propose August?; Final – August 2010)*
- EPA cannot enforce the biggest Texas air permits; only directly enforce federal rules
- EPA proposed actions will disapprove in part the state's permitting program (with an option for Texas to correct before sanctions/FIP).

Texas Permit SIPs
Major Issues

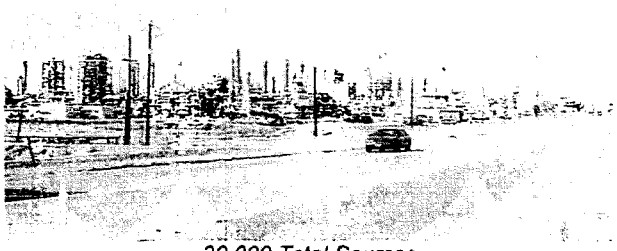
1. Public Participation – Limited public right to information, e.g., no right to comment unless the public files a formal hearing request. (Limited Approval/Limited Disapproval)

2. Qualified Facilities – Facilities are allowed to make permit modifications without formal review or public notice.

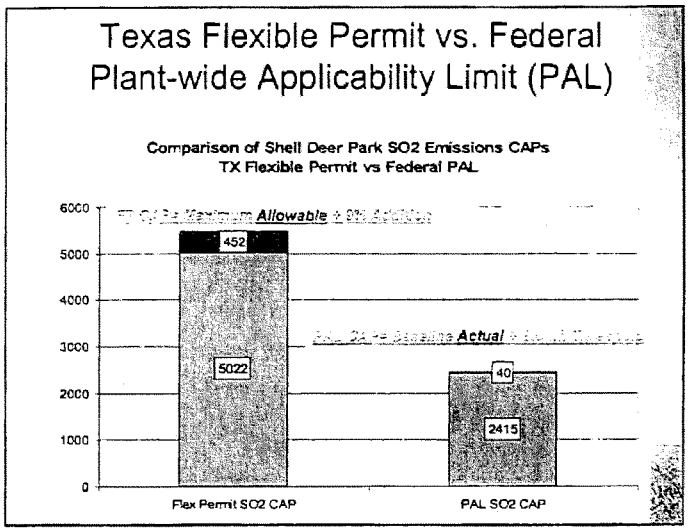
3. Flexible Permits – Allow emissions cap with poor accounting or record-keeping of individual emissions sources; federally unenforceable.

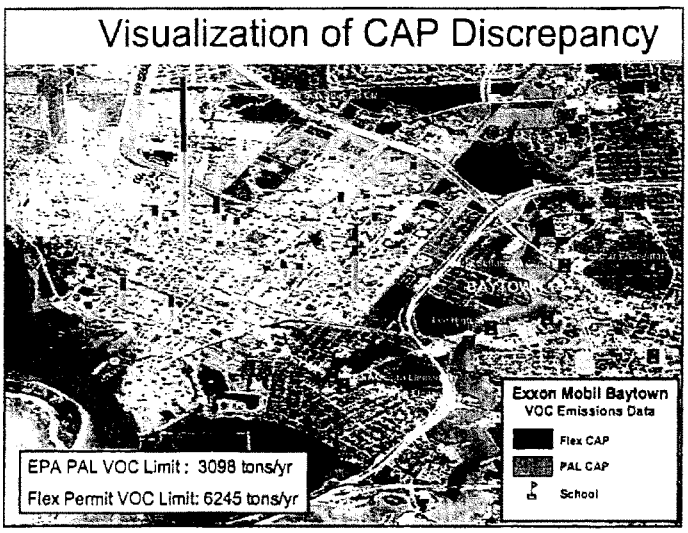
4. NSR Reform – Flexibility exceeds that allowed in current federal rules

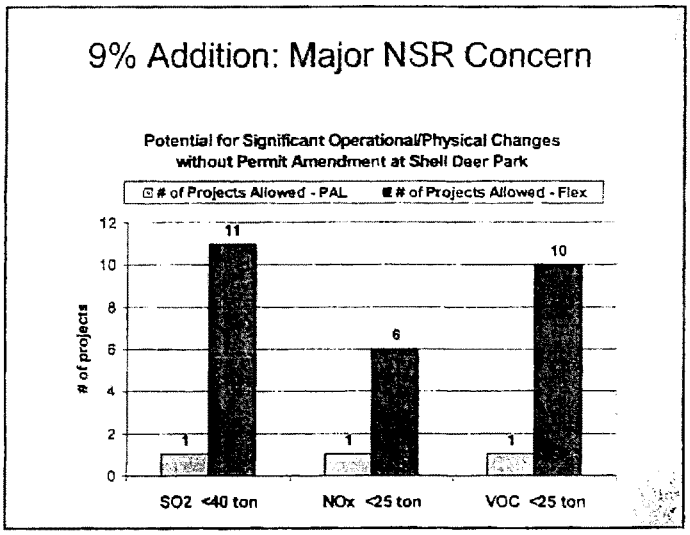
Environmental Impacts

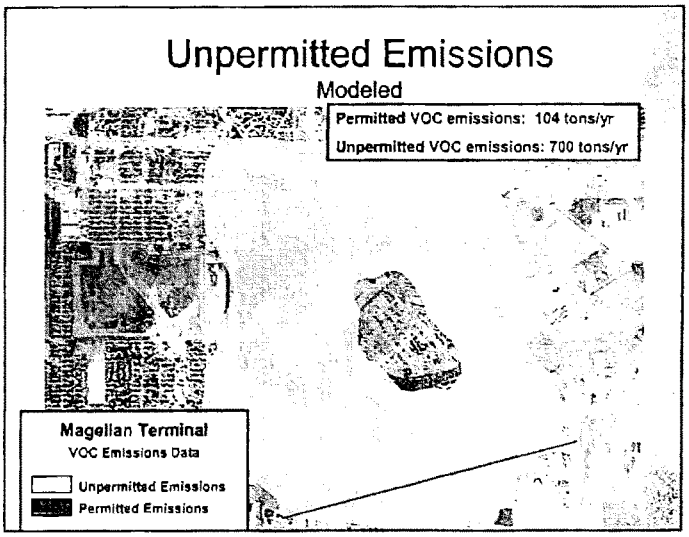


30,000 Total Sources
3,000 – 5,000 Qualified Facilties
1,461 Major Sources of Air Pollution
- *25 Petroleum Refineries*
- *160 Chemical Facilities*


Texas Flexible Permit vs. Federal Plant-wide Applicability Limit (PAL)
Comparison of Shell Deer Park SO2 Emissions CAPs
TX Flexible Permit vs Federal PAL
Maximum Allowable
Actual
6000
5000
4000
3000
2000
1000
0
452
5022
40
2415
Flex Permit SO2 CAP
PAL SO2 CAP


Visualization of CAP Discrepancy
EPA PAL VOC Limit : 3098 tons/yr
Flex Permit VOC Limit: 6245 tons/yr
Exxon Mobil Baytown
VOC Emissions Data
Flex CAP
PAL CAP
School


9% Addition: Major NSR Concern
Potential for Significant Operational/Physical Changes without Permit Amendment at Shell Deer Park
# of Projects Allowed - PAL
# of Projects Allowed - Flex
# of projects
12
10
8
6
4
2
0
11
6
10
1
1
1
SO2 <40 ton
NOx <25 ton
VOC <25 ton


Unpermitted Emissions
Modeled
Permitted VOC emissions: 104 tons/yr
Unpermitted VOC emissions: 700 tons/yr
Magellan Terminal
VOC Emissions Data
Unpermitted Emissions
Permitted Emissions

Shell Deer Park 2007 Flexible Permit Renewal

- Texas allowed for 18% increase in benzene emissions solely based on company's request
- Dropped BACT limit
  - Unit specific BACT limit replaced with Flex Cap
- As-you-go Permitting allowed
  - 1998 PSD permit
    - Less stringent State BACT used to set NOx limits on heaters
    - Shell agreed to offset increases under Flex Permit NOx Cap
  - 2007 Flex Permit
    - Shell reversed its 1998 position
    - TCEQ raised Cap to accommodate

Concerns

1. Transparency - Permits are a difficult-to-navigate because of facility cap, incorporation by reference and lack of unit specific controls
2. Public Participation - Inadequate public notice for minor and major NSR; large universe of facilities
3. Enforceability – Current PSD/NSR state permitting rules are not incorporated in the SIP; lack of adequate monitoring and compliance calculations; traded emissions reductions for pass on future enforcement
4. Community Concerns – Environmental Groups have petitioned EPA to withdraw permitting program; Houston Mayor White campaign against air toxics
5. Environment – Missed opportunities for pollution reductions

Potential for Collaboration

- EPA will need to propose action on the 4 major provisions
- Discussions will need to occur with the other stakeholders as actions are proposed.
- Can TCEQ:
  - Take action to prevent the widening of the SIP gap while repairs are under way?
    - Legal Patch?
    - Restrain from new qualified facility and flex permits?
  - Parallel process 'patch' as part of action on 3 SIP revisions
  - Adopt and submit revised packages before sanctions would take effect?
  - [?? withdraw NSR Reform SIP package ??]

PSD/NNSR 'Patch' description

- Texas incorporates by reference Federal PSD rules; this action would allow Texas to operate an air permitting program
- Texas revises NSR definitions so that state program meets federal requirements

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUN 2 4 2009

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commissioner on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Vickery:

Thank you for your letter of June 5, 2009, regarding unresolved issues related to the Texas' air permitting program. I appreciate your willingness to work collaboratively towards addressing the outstanding concerns.

We have tried to provide clarity on our concerns with your proposed State Implementation Plan (SIP) rules through a series of letters over the past years, including our communication to you of March 12, 2008, concerning Flexible Permits. Summaries of these communications are contained in our more recent letters to State Senator Kirk Watson and State Representative Lon Burnam, dated March 19 and April 7, 2009, respectively, of which you were sent copies.

You point out that EPA "has not yet issued Federal Register notices which identify the specific deficiencies (and the legal basis for each) in the TCEQ rules that need to be addressed for EPA to approve TCEQ's air permitting rules." As you are aware, we did propose limited approval/limited disapproval of your Public Participation SIP this past November. In a meeting in Austin on May 26, our senior Region 6 managers indicated that we anticipate issuing Federal Register proposals over the next couple of months identifying our concerns for possible disapproval of the Qualified Facilities, Flexible Permits, and NSR Reform SIPs.

We will, of course, continue working with TCEQ on these issues, but it is important to note that EPA is preparing to sign a Consent Decree with industry plaintiffs requiring action on the Texas permitting SIPs on a tight schedule; thus, this will limit the time available to informally resolve these issues.

You and I have already discussed the idea of my coming to Austin to discuss these issues with each of the Commissioners; I look forward to that opportunity. To the extent those contacts leave issues unclear or unresolved, we can discuss them in even greater detail once the Federal Register notices are published.

In addition, on May 28, 2009, the Administrator granted two citizen petitions which raised concerns about transparency, public participation and monitoring in TCEQ-issued Title V permits for the Citgo and Premcor facilities. The concerns raised in those actions may apply more broadly to other facilities as well, and thus we would hope to discuss those categories of concerns with you, as well as the SIP concerns.

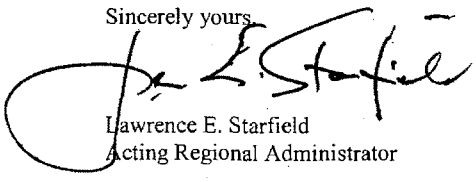
I appreciate your written response to the draft briefing materials our senior managers discussed during the May 26 meeting in Austin, and I especially value your willingness to explore resolution of issues that have been at an impasse for some time. The changes outlined in your June 5 letter provide a good foundation for our discussions, although I would be remiss not to point out that additional changes will be needed to fully address the programmatic and regulatory changes necessary for full EPA approval.

With specific regard to the draft power point slides shared at the Austin meeting, we acknowledge that it is difficult to make direct comparisons between the Texas permitting program and the federal regulatory system. Recognizing that we may not agree on the precise level of emissions described in the slides, our analysis strongly suggests that the Texas air permitting program authorizes emissions significantly above levels allowed by federally authorized permitting programs. We believe this is also supported by an analysis conducted by the City of Houston evaluating benzene emissions in similar states (see letter from Mayor White, dated September 29, 2008; copy is available at http://www.greenhoustontx.gov/reports/refiningpermitmatter.pdf).

It will be important in the coming months to work together to ensure that the Texas air permitting program is one that is transparent and understandable to the communities we both serve, and that meets the legal requirements of Federal as well as State law. Just as we made progress to reduce ozone pollution, I am confident we can accomplish this work in a manner that protects public health and the environment, while allowing Texas businesses to thrive.

Please call me anytime to discuss these issues, or have your staff contact Jeffrey Robinson at (214) 665-6435.

Sincerely yours,



Lawrence E. Starfield
Acting Regional Administrator

>>> <Edlund.Carl@epamail.epa.gov> 9/29/2009 8:05 PM >>>
Richard- When we discussed EPA's Federal Register proposals for air permitting SIPs (about September 10, I believe) I promised to send you some ideas that we at EPA had for moving forward. We appreciated the opportunity to have a teleconference with you and your staff on September 17, 2009 to discuss questions on our proposed actions; however, we didn't focus on 'path forward' in that call. I think that forward steps need to be part of our October 2, 2009 conference call and a definite a focus of the October 8, 2009 meetings with stakeholders. So, here are some ideas for action by TCEQ that we think could shape our reviews of proposed actions, give some pathways for resolving problems, stem the divergence between EPA and TCEQ rules, and clarify issues for all concerned. Most were mentioned in various forms in our prior discussions of issues before the federal register notices:

1. Issue a letter to Industry from TCEQ that would advise 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 the proposals. The letter would also remind sources remain subject to the currently approved SIP.

2. Establish a timeline to propose rule-making addressing all of the concerns raised in the federal register notices. We had also discussed emergency rule-making for re-establishing Prevention of Significant Deterioration [CFR 52.21].

3. Publish a strategy to reform existing permits should proposed disapprovals become final (this would address Flexible Permits, Qualified Facilities, PCP Standard Permits, etc).

4. 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. 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. Is there a way to start this voluntarily?

5. Increase 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 requirements. Copies of all underlying permits should be attached to or included with the draft Title V permit at notice.

6. Issue a schedule for correcting deficiencies identified in two Title V petitions granted by EPA in May, 2009 and incorporate corrections in new and re-issued Title V permits. .

7. Clarify the legal meaning of Texas minor source program terms in comparison to federal definitions. For example, the meaning of ?facility? and ?account? verses major or minor source, or facility in federal permit regulations. This may also help inform our review of whether Qualified Facilities and Flexible Permits are confined to minor sources.

Of course, if these ideas entail parallel processing of SIP revisions by EPA, we would need to discuss enforceable commitments for specific rule changes and mutually acceptable timetables. Also, we are eager to consider any proposals that TCEQ would want to be considered. Finally, I must say that the short timetable for final action by EPA contained in the EPA-BCCA consent agreement [we must finalize decisions on Public Participation before December, as you know] add a real sense of urgency to defining where we go in the next month.

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 omitted."

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 listserve 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

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[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 Agenda[8]

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)?

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[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.

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[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.

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[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

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[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.

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,

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
Buddy Garcia, TCEQ Commissioner
Carlos Rubinstein, TCEQ Commissioner
Lawrence Starfield, Acting Regional Administrator, U.S. Environmental Protection Agency Region 6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 30 2009

OFFICE OF
AIR AND RADIATION

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
Post Office Box 13087
Austin, Texas 78711-3087

Dear Mr. Vickery:

I am writing in response to your letter dated October 23, 2009, addressing seven issues about Texas State Implementation Plan (SIP) submittals, issues raised by Mr. Carl Edlund in a September 29, 2009 email.

Let me begin by saying, that I am encouraged by the Commission's response. It represents a sound attempt to provide a thorough and detailed response within the requested timeline. While we are still examining your letter, I want to express my appreciation for your stated commitment to move forward expeditiously on the various regulatory packages necessary to fix the deficiencies in the Texas permitting SIPs.

Although we have yet to complete a detailed analysis of your response, our review thus far suggests that additional information will be needed for us to understand fully the extent of your plans to address the public participation and Flexible Permit issues we have raised, as well as whether your proposed rulemaking schedule is compatible with the U.S. Environmental Protection Agency's (EPA's) litigation and rulemaking deadlines. We also note that your letter focuses predominantly on the Federal Register packages, which is understandable; however, it is equally important to address issues under Title V of the Clean Air Act relating to public accessibility to permitting information, and issues relating the compliance of existing permits with federal law. As our review progresses, we will be providing more detailed feedback, as well as answers to the questions you posed to EPA. We will be reaching out to you and your staff in the very near future in hopes that we can work together to address all of these issues.

As we discussed during our meetings in Texas on October 8th, we are committed to working with you, industry, environmental organizations, and community leaders in ensuring that Texas state law and its Federal state implementation plan properly reflect all of the requirements of the Clean Air Act. We recognize that it is in everyone's best interests to resolve all of these issues and provide certainty and transparency to the Texas citizens and industrial sources. Until that time however, we will review permits being issued and where appropriate, we will raise objections if they fail to meet the requirements of the Clean Air Act.

We look forward to working with you on these important issues.

Sincerely,

Gina McCarthy
Assistant Administrator

cc: Bryan W. Shaw, Chairman
Buddy Garcia, Commissioner
Carlos Rubinstein, Commissioner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 12 2009

OFFICE OF
AIR AND RADIATION

Mr. Mark R. Vickery, P.G.,
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

In my letter of October 30, 2009, I expressed my appreciation for the Commission's timely and detailed October 23, 2009 letter outlining your plans to address our concerns about State Implementation Plans (SIP) proposed by the Commission. We were particularly encouraged by your proposed schedule for rulemaking to correct the deficiencies in these SIPs identified in recent EPA Federal Register notices.

We have now completed a more detailed review of your letter. I have attached a response to your three questions as well as a detailed assessment of your proposed action plan. It identifies areas in which additional information is needed to fully understand the extent of the Texas Commission of Environmental Quality's (TCEQ) rulemaking actions, and areas in which important additional commitments will be necessary in addition to the steps you have already agreed to take.

My hope is that the Commission will work with the EPA staff to discuss and resolve quickly all of the issues identified in the attachment and our Federal Register notices. The Region 6 staff will be in touch to arrange a meeting. I am confident that working with you, industry, environmental organizations and community leaders, we will enhance the level of environmental protection provided by Texas State law and the Federal Clean Air Act.

Sincerely,

Gina McCarthy
Assistant Administrator

cc: Mr. Bryan W. Shaw, Chairman, Texas Commission on Environmental Quality
Mr. Buddy Garcia, Commissioner, Texas Commission on Environmental Quality
Mr. Carlos Rubinstein, Commissioner, Texas Commission on Environmental Quality

EPA Detailed Response to TCEQ Letter of October 23, 2009

Response to Questions

In your letter you pose three questions, stating that EPA's answers are critically important to resolving key deficiencies identified in the *Federal Register* notices (FRNs). Your first question is whether EPA would allow qualified facility permits and flexible permits to be used at major sources and, second, you ask whether EPA would conditionally approve flexible permit rules that establish source emission caps based on permit allowable emissions. These aspects of the qualified facility and flexible permits rules raise novel approaches to permitting that EPA has not specifically addressed in prior rulemakings. Nonetheless, we do not view the use of "allowable" emissions in regulations governing minor construction activities at minor or major stationary source to be prohibited *per se*. While we would like to provide assurances to TCEQ that we will approve a program based on allowable emissions for use at minor or major sources, we lack sufficient information to make this finding. We need to understand the other changes you will make to the regulations to address the concerns raised in our FRNs (e.g. modeling, enforceability, definitions) and understand the environmental effect of approving these programs into the SIP. In addition, any program a State submits to meet the requirements of Section 110(a)(2)(c) of the Clean Air Act (CAA) must regulate "the modification and construction of any stationary source as necessary to assure that national ambient air quality standards [NAAQS] are achieved." Any revision to the SIP also must comply with Section 110(l) and would not be approvable if it "would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act."

Importantly, TCEQ must explain how the environmental protection provided by each program assures protection of the NAAQS given the unique and important air quality concerns in Texas. TCEQ must also explain how the air quality protections provided in these new programs compare to the existing SIP-approved minor NSR program to assure that the program satisfies the provisions of Section 110(l) of the Clean Air Act (CAA). In essence, TCEQ will have to submit an environmental analysis of the new programs that explains the environmental benefits of the programs and compares this benefit to the existing SIP-approved programs. If TCEQ decides to continue such programs and perform the necessary demonstrations, it is very important that you coordinate such work with us to ensure that we can understand the purposes and goals of the program and assist in commenting on the methodology for the analyses. By working together, we can assure that you are addressing all of the issues raised in the FRNs.

The third question you pose relates to whether TCEQ's public participation rules are approvable if you provide a notice-and-comment hearing process for minor NSR draft permits. The addition of such a requirement to the minor NSR permit rules is a positive step toward the development of approvable rules, but it is not the only change needed to make your public participation rules approvable. Our November 26, 2009 FRN details the concerns that must be addressed before EPA can approve the public participation rule for the minor NSR program (see 73 Fed. Reg. 72009 to 72014), including: 1. the rule

does not provide an opportunity for public comment on the State's analysis of the effect of construction or modification on ambient air quality from new minor sources or minor modification identified under 40 CFR 51.160, including the State's proposed approval or disapproval; 2. Sections 39.403(b)(8) and 39.419(e)(1)(c) fail to provide the minimum public participation requirements of 40 CFR 51.161; and 3. Texas did not provide a demonstration of how the Chapter 39 and 55 rules for public participation for minor NSR sources regulated under the SIP meet the public participation requirements of 40 CFR Part 51.

Moreover, the November 2009 FRN also highlights necessary changes to the Texas PSD program including: 1. an opportunity for a public hearing; 2. the need for the public notice of a PSD permit contain the degree of increment consumption; 3. the need for a requirement to provide a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv) and CAA 165(d); and 4. the need for a requirement that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii) and to facilitate the appeals process. Additional detailed concerns are raised in the FRN related to plantwide applicability limits, flexible permits and other issues related to transparency of the permitting actions.

Seven Issues

I. Notice to Regulated Community

We appreciate your efforts to post a brief discussion of our FRNs on your website and to reference our September 25, 2007 fair notice letters. This should provide regulated entities with additional fair notice of their obligations to comply with the requirements of the Clean Air Act (CAA) and approved State Implementation Plan (SIP). we further ask that you include a copy of the fair notice letter on your website to ensure that any viewer can readily access the letter.

In the third item you propose to include on your website, you will advise regulated entities that any action taken on pending applications which are implicated in the FRNs may result in additional permitting or enforcement because of uncertainty about the future EPA action on the proposed disapprovals. It is very important for you to note on your website that sources remain obligated to apply for major or minor New Source Review (NSR) permits under the existing, approved SIP irrespective of any future action we take to approve or disapprove the SIP submittals. Obtaining a qualified permit or a flexible permit to comply with state regulations will not relieve regulated entities from the obligation to obtain the appropriate minor or major NSR permit to comply with Federal requirements. We ask that if you choose to issue flexible or qualified facility permits to satisfy state requirements that you make clear that a Federally-enforceable SIP-approved permit also may be required before beginning construction to comply with

Federal requirements in the existing, approved SIP. We also ask that you identify requirements emanating from qualified facility and flexible permits as State-only requirements in the Title V operating permits.

II. Timeline to Propose Rulemaking

We understand your explanation for not pursuing emergency rulemaking, and agree that TCEQ is setting an aggressive schedule for moving forward with regulatory changes. We would strongly urge you to make every effort to expedite adoption of the PSD BACT/40 C.F.R. 52.21 rulemaking. We believe that it is critical that you finalize that rule as early as possible to assure that major NSR permits meet CAA best available control technology (BACT) requirements. We appreciate the ambitious schedule you have set for the public participation rules. To achieve the goal of a final rule that meets federal CAA requirements, we strongly recommend a high level of interaction with EPA staff. Moreover, throughout your rulemaking process, it would be extremely helpful if TCEQ would maintain an open dialogue with Region 6 by, at a minimum, providing detailed outlines of proposed rules in the early drafting stages. This is absolutely necessary if there is to be any parallel processing on our part.

Even with a high level of interaction, there does not appear to be sufficient time between the TCEQ deadlines and the EPA Consent Decree deadlines. If EPA were to take the Texas actions into account, then we would need to re-negotiate our Consent Decree deadlines.

III. Reformation of TCEQ Existing Permits

We are encouraged that TCEQ identifies existing legal authority to fix existing permits. It is essential that you develop a plan for addressing existing permits using this legal authority. Even if we approve a flexible permit program and qualified facilities program into the SIP, our future action can not remedy any regulated entities' past reliance on these permits to avoid major or minor NSR permitting requirements. Moreover, we do not believe that all existing major NSR permits meet CAA BACT requirements given TCEQ State-BACT definition and case-by-case determination process. We ask TCEQ to work with EPA to devise a plan that will offer industry source(s) an opportunity to true-up their permitting and emission history so that when SIP-based federally-enforceable permit program is approved sources will be in the best position to obtain whatever permits are required.

Finally, EPA also would like to further discuss Footnote 9 of your letter with your staff. We do not agree that your current public participation process meets major NSR public notice requirements and would like to better understand your position on this issue. We are confident that working together we can implement a manageable plan for addressing existing permit deficiencies.

IV. Initiate Rulemaking to Address Public Participation Requirements

We are encouraged by your willingness to address public participation requirements and believe you propose some positive regulatory changes. Importantly, however, your letter does not contain a detailed outline of the scope of your rulemaking efforts and it will be important to coordinate your actions with Region 6 to assure that all public participation concerns identified in our FRN are addressed for all SIP-approved permitting regulations. EPA would also like to better understand how existing statutory authority precludes you from implementing a second public hearing before completion of final rule changes.

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

We appreciate your commitment to continue a dialogue with EPA on Title V transparency issues and understand that you may face resource constraints. Nonetheless, we believe that it is imperative that you take immediate steps to assure that your permit writers clearly show how proposed permits satisfy CAA Title V requirements when issuing new, revised or renewed Title V permits. We believe that responding to citizen comments and EPA objections on every Title V permit that incorporates a flexible or qualified permit and fails to explain how it meets all applicable requirements of the Act will be a much larger resource burden for the State. Accordingly, we ask TCEQ to re-evaluate its prioritization of this issue so that there is no further delay in assuring increased transparency of Title V permits.

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

We understand TCEQ's position is that our Title V objection Orders raise "complex programmatic issues," and that you are reluctant to commit to a specific schedule to resolve these objections. We encourage you to work as expeditiously as practicable to respond to the objections on the Premcor and Citgo permits, and to provide for public comment on new draft permits. Your positive action on these two permits can become a model for other permits, and can alleviate the need for many objections by EPA to Title V permits.

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

TCEQ's commitment to clarify that flexible permits and qualified permits may only be used to satisfy minor NSR permitting requirements represents a positive step toward developing approvable programs. However, EPA continues to believe that engaging in a meaningful discussion on the definitional differences between the State program and Federal requirements will improve everyone's understanding of Texas' regulatory intent, and assure that any objectionable differences are addressed in your rulemaking process. Only responding to the questions we raised in the FRNs in your comments on the rulemakings may not fully accomplish this goal. Accordingly, we would like to engage in further discussions with your staff on this issue.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

FEB 1 6 2010

Ms. Patricia Duron
Office of Legal Services (MC 205)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: EPA Comments on Rule Project Number 2010-004-039-LS

Dear Ms. Duron:

Thank you for providing us the opportunity to review and comment on the proposed revisions to the Texas Administrative Code (TAC) Title 30, Chapter 39, Public Notice, and the associated revisions to the Texas State Implementation Plan (SIP). This proposed rulemaking revises the public notice procedures for air quality permit applications to address EPA's November 26, 2008, proposed Limited Approval/Limited Disapproval rulemaking action (see 73 FR 72001).

In general, we are supportive of this proposed rulemaking but would like to provide the enclosed comments for your consideration. Please note that comments 1, 6-8, 10, and 13 must be addressed to our satisfaction before EPA can proceed with a proposed approval of the revisions to the Texas SIP. Additionally, we note that comment 14 is of high importance to EPA Region 6 and should be carefully considered before TCEQ proceeds with final adoption.

Please note that these comments do not constitute final determinations concerning approvability of the revisions to the Texas SIP. We are providing these comments to assist TCEQ in the development of regulatory language. We look forward to working with the TCEQ as you move forward in responding to these comments and finalizing the revisions to the Texas SIP. If you have any questions, please call Ms. Adina Wiley of my staff at (214) 665-2115.

Sincerely yours,

Carl E. Edlund, P.E.
Director
Multimedia Planning & Permitting

Enclosures

cc: See next page

cc: Ms. Janis Hudson (MC 173)
Texas Commission on Environmental Quality

Ms. Stephanie Bergeron Perdue (MC 218)
Texas Commission on Environmental Quality

Enclosure

1. The intent of the proposed new provision at 30 TAC 39.402(a)(2)(D) must be clarified. The proposal at 30 TAC 39.402(a)(2)(D) can be interpreted to exempt *all* minor New Source Review (NSR) permits from the public participation requirements. This is not acceptable for approval by EPA as a SIP revision. Alternately, the proposal could be interpreted as requiring public notice for any permit that does not qualify as a SIP-approved Permit by Rule (PBR) or Standard Permit (SP).

   If the intent of proposed 30 TAC 39.402(a)(2)(D) is to require notice for all permits except for SIP-approved PBRs and SPs, then this intent is acceptable under the Federal Clean Air Act (FCAA) and the SIP-approved PBR and SP rules. To meet this intent, the TCEQ must revise the rule so that it is clear that only PBRs and SPs are exempt from the public participation requirements. All other minor NSR, i.e., case-by-case, permits must be subject to the public participation requirements.

   If however, the proposed rules at 30 TAC 39.402(a)(2)(D) establish de minimis thresholds below which public notice is not required for permitting actions outside of the scope of SIP-approved PBRs and SPs, TCEQ must make further demonstrations to EPA (discussed below) on the validity of this approach before EPA can consider the approvability of the new provision.

   The intent of the proposed revision at 30 TAC 39.402(a)(2)(E) must also be clarified. It appears that the proposed rules establish a de minimis threshold below which public notice is not required for permitting actions on certain types of agricultural permits. The proposal could be interpreted as exempting from public notice *all* minor NSR permits for an "agricultural products handling" facility at which grain, seed, legumes, or vegetable fibers are handled, loaded, unloaded, dried, manufactured, or processed (as defined in section 382.020 of the Texas Clean Air Act). As proposed, this provision is not acceptable for approval by EPA as a SIP revision. Further demonstration, as discussed below, must be made to EPA on the validity of this approach before EPA can contemplate approvability of this new provision.

   While EPA agrees in principle that the public notice requirements at 40 CFR 51.161 provide for tailoring of the public participation process for less environmentally significant sources and modifications (see 60 FR 45530, 45548-49, August 31, 1995), TCEQ has not provided an analysis that demonstrates how these de minimis thresholds were established or that demonstrates how emissions below these levels will not cause or contribute to a violation of the applicable National Ambient Air Quality Standards (NAAQS) or Prevention of Significant Deterioration (PSD) increment. TCEQ must provide a demonstration as discussed below before EPA can consider approving an exemption from public notice requirements as described in the proposed rules.

In the August 31, 1995, proposed Federal Register Notice (FRN) cited above, EPA has described an acceptable tiering method for a minor NSR program. One important element is that the State rules include specific, objective, and replicable criteria for determining when a minor NSR permit is exempt from, or subject to less than, the full public participation requirements at 40 CFR 51.161. Limitations on the full public participation requirements for minor NSR permits should be categorized and consistent with the principles articulated by EPA in the August 31, 1995 proposed FRN. Therefore, the categorization of the types of minor NSR permits that a State can exempt from or subject to less than full public participation depends on the potential for environmental and public health concerns.

The public participation requirements at 40 CFR 51.161 must be interpreted in concert with the requirements at 40 CFR 51.160(e), which requires that each SIP must identify the types of sources subject to minor NSR. Therefore, in addition to identifying emission thresholds, the TCEQ must identify the types of minor sources and minor modifications that will be covered by these thresholds. Additionally, the State must also identify the source types covered, the anticipated source population and estimates of future growth, demonstrate that the identified sources and or changes are not environmentally significant, and demonstrate that the current emission levels and predicted future emission levels will not cause or contribute to a violation of the NAAQS or PSD increments in the applicable areas. The State's minor NSR public notice exemption process or public notice tiering process must be reasonable and adequate for the statutory and regulatory purposes of the minor NSR program and be consistent with the de minimis exemption criteria set forth in Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). For a full discussion of EPA's interpretation of tiering based on environmental significance, see 60 FR 45530, 45537-39.

The State must also submit an analysis that demonstrates how these exemptions from, and categories of, public notice requirements were established. The analysis must demonstrate how the exemptions and the types of public participation categories will not cause or contribute to a violation of the applicable NAAQS or PSD increments. EPA will not approve any public notice exemption thresholds without an extensive demonstration "that the situation is genuinely de minimis or one of administrative necessity." Ala. Power Co., 636 F.2d at 361 (D.C. Cir. 1979).

If the TCEQ chooses to pursue the development of permitting and public notice exemptions or tiering levels, we strongly encourage the TCEQ to work closely with the EPA. We also believe that the TCEQ should provide the opportunity for public review and comment on this analysis before it is submitted as a SIP revision.

2. We note that the definitions of 'new facility' and 'modification of an existing facility' referenced at proposed 30 TAC 39.402 have not been approved by EPA into the Texas SIP. Similarly, references to FutureGen permits at 30 TAC 39.402 have not been approved into the Texas SIP. Our comments on the proposed revisions to Chapter 39 do not reflect any intent or future action by the EPA to grant SIP approval to these definitions or the FutureGen permit program. These definitions and permit program will be evaluated for consistency with federal requirements separately from our action on the Chapter 39 proposal.

3. We also note that the proposed revisions to 30 TAC 39.402 include references to the multiple plant permit program at 30 TAC Chapter 116, Subchapter J. We have no record of receiving the multiple plant permit program as a SIP revision. Please clarify whether the multiple plant permit program has been submitted, or will be submitted, for EPA review.

4. Please explain the basis for excluding from public notice concrete batch plants without enhanced controls temporarily located in or contiguous to the right-of-way of a public works at 30 TAC 39.402(a)(8) and how this exclusion is consistent with the requirements of 40 CFR 51.161. Any exemption from public notice must be addressed through a demonstration of environmental significance as outlined in Comment 1 above. Additionally, these types of temporary facilities must go through the public participation process for initial construction.

5. We believe there is a typographical error in the last sentence at 30 TAC 39.411(e)(11)(A)(iii). This sentence should refer to the last publication of the Notice of Receipt of Application and Intent to Obtain Permit instead of the last publication of the Notice of Application and Intent to Obtain Permit.

6. We note that several of the proposed rule provisions address items contained in the Texas PSD Supplement (see attachment titled "Revision to the Texas State Implementation Plan for Prevention of Significant Deterioration of Air Quality), namely:
   - the inclusion of the anticipated degree of increment consumption in the public notice, as required under 40 CFR 51.166(q)(2)(iii); and
   - a copy of the public notice will be sent to any comprehensive regional land planning agency and to any other affected agencies, as required under 40 CFR 51.166(q)(2)(iv).

   If the TCEQ adopts the rules as proposed and revised per EPA's comments and submits these rules to EPA for approval as part of the Texas SIP, EPA believes that the State's SIP submittal request should ask EPA to remove the PSD Supplement from the Texas SIP for the duplicative items identified above. The remainder of the Texas PSD Supplement would remain in effect and enforceable in the Texas SIP.

7. To be approvable as a Prevention of Significant Deterioration (PSD) Public Participation SIP revision, the proposed rules for the Notice of Application and Preliminary Decision at 30 TAC 39.411(f)(3) must be revised to require that a copy or summary of all other materials considered in the preliminary determination be made available to the public consistent with the requirements of 40 CFR 51.166(q)(2)(ii).

8. To be approvable as a SIP revision, the proposed rules for the Notice of Application and Preliminary Decision at 30 TAC 39.411(f)(5) must be revised to require a minimum 30-day comment period, consistent with the requirements of 40 CFR 51.161(b)(2). Currently, the proposed preamble on page 26 states that the close of the comment period is never less than 30 days from the initial publication of the Notice of Application and Preliminary Decision, but this interpretation is not supported in the proposed regulatory text.

   From our own experiences commenting on permits, and from citizen complaints we have received, EPA is seriously concerned that TCEQ's proposed rules for providing notice of the comment period hinder public involvement. TCEQ has delegated the authority to publish notice to the applicant. Under the proposed revisions at 30 TAC 39.405(j), the applicant has up to 10 days from the date of the last newspaper publication to notify TCEQ that the public comment period has started. The public notice as proposed at 30 TAC 39.411(f)(5) also does not include a date specific to easily identify when the comment period closes. We believe it is impossible to adequately review and comment on a permit if you are unable to ascertain when the public comment period starts or ends.

   EPA recommends that TCEQ shorten the amount of time an applicant has to provide evidence of public notice from 10 days to 3 days. We also recommend that the published notices (both Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision) include a date specific to identify the end of the comment period. Further, we encourage TCEQ to maintain an up-to-date listing via the agency's website of all permits available for comment and the associated comment deadlines (start date, end date, deadlines for requesting meetings and/or contested case hearings, etc). EPA feels that by taking these actions TCEQ will greatly improve the transparency of the permitting program and encourage greater public involvement in the permitting process.

9. We believe that the proposed revision at 30 TAC 39.411(g)(1) should require that the additional material specified at 39.411(e)(15) should also be included in the text of the public notice. If TCEQ does not revise 30 TAC 39.411(g)(1) to add the reference to 39.411(e)(15), the TCEQ must submit a reply to EPA explaining why this information should not be included.

10. The proposed revisions at 30 TAC section 39.420(c)(2) provide that the Executive Director's decision and response to public comments will be posted on the

TCEQ's website. Electronic posting of the response to comments (RTC) does not clearly satisfy the requirement at 40 CFR 51.166(q)(2)(vi) that the permitting authority make available all comments for public inspection at the same location where the preconstruction materials were posted for projects subject to PSD. Additionally, electronic posting of the Executive Director's decision does not clearly satisfy the requirement at 40 CFR 51.166(q)(2)(viii) that the final determination be made available for public inspection at the same location where the preconstruction information and public comments were posted for projects subject to PSD.

a. 40 CFR 51.166(q)(2)(vi) requires that all comments be made available for public inspection. The proposed rules do not satisfy these requirements and therefore are not approvable as a PSD public participation SIP revision. The permitting authority may post the RTC as a substitute for posting all comments received only if the RTC includes each submitted comment in its entirety without any summarization or editing. If the TCEQ wishes to publish a RTC in place of making each individual comment available the proposed regulations must be revised to reflect that the RTC will include the exact submitted comment.

b. Both 40 CFR 51.166(q)(2)(vi) and (viii) require materials (all submitted comments and the final permit determination, respectively) to be made available at the same location where the preconstruction information was provided. Currently, the proposed rules do not satisfy these requirements; and therefore, are not approvable as a PSD public participation SIP revision. Electronic posting on the TCEQ website could possibly satisfy the requirement to post materials at the same location where preconstruction materials were made available if the TCEQ: 1) revises the regulations for Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision to state that all materials related to the permit are available at the same electronic location; and 2) verifies that at least one public location in the county where the source is proposed to locate has a public internet connection, i.e., the public library. Additionally, the TCEQ should maintain an accurate listing of the public locations in each county where public internet access is provided so that the public can easily find a location to access the electronic permitting information.

   Because electronic posting of air permitting information as the primary or sole means of making information available to the public is still a novel concept, we encourage the TCEQ to work closely with EPA to ensure that a system is developed that will satisfy the requirements of 40 CFR 51.166(q)(2). We believe it is possible that the creation of an on-line database similar to the Federal Docket Management System used by EPA where all materials associated with a specific permit (preconstruction, supplemental informational, air quality analysis, RTC, Executive Director decision, etc.) would be grouped by permit number and easily searchable by the public could satisfy the intent of the federal regulations. We note

that it is imperative that all materials associated with a specific permit be available electronically for electronic posting to be a viable substitute for the hard-copy posting requirements of 51.166(q)(2).

If the TCEQ is unable to provide all the materials required in 51.166(q)(2) in an electronic format then electronic posting of the RTC and final determination can only be considered a supplement to the federal requirements. In this event, the proposed rules must be revised to require the RTC and final determination be posted at the same location where the preconstruction information was made available.

11. Please verify that the citation at 30 TAC 39.420(e) to subsection (c)(3) and (4) of 39.420 is correct. We note that as proposed, 30 TAC 39.420 does not have a subsection (c)(3) or (c)(4).

12. Please verify that the citation at 30 TAC 39.420(h) to subsection (a)(4) is correct. If so, please explain why Future Gen permits would not need instructions for requesting a contested case hearing.

13. The proposed rules for notice of affected agencies at 30 TAC 39.605 do not provide notice to any comprehensive regional land use planning agency or State Land Manager as required in 40 CFR 51.166(q)(2)(iv) for projects that are subject to PSD review. While the Texas rules do not need to provide notice if no such entity exists, the TCEQ must review the intent of this provision and determine if another entity could be provided notice. EPA interprets this provision of the PSD regulations as requiring notice to be given to persons or entities fulfilling the responsibilities of a regional land use planning agency or a State Land Manager, regardless of the respective title.

    Texas has a Texas General Land Office that has the responsibilities for managing state lands; therefore, the Texas General Land Office must be provided the requisite notice for a State Land Manager. Additionally, the TCEQ must consider whether under Texas law the Texas Parks and Wildlife Department functions as a regional land use planning agency or State Land Manager. If the TCEQ determines that either the Texas General Land Office or Texas Parks and Wildlife Department does not function in the capacity of a State Land Manager or a regional land use planning agency, the TCEQ must submit to EPA a legal analysis to that effect. Otherwise, the proposed rules must be revised to provide notice to the appropriate affected agencies.

14. EPA is concerned about the July 1, 2010, compliance timeframe established in the proposed revisions. As written, the proposed rules would apply to air quality permit applications submitted on or after July 1, 2010. Assuming the full 90 days allowed under Chapter 116, section 116.114 are used to determine application completeness, permits could be issued through October 2011, without providing public notice consistent with federal requirements.

While EPA recognizes the need to provide adequate lead-time for the regulated community to comply with a proposed rule revision, we feel that the proposed compliance timeframe perpetuates the current problems with Texas's air permitting public notice process for an unacceptable amount of time. The TCEQ should revise the rule to apply to applications submitted on or after April 1, 2010.

Revising the timeframe to apply to applications submitted on or after April 1, 2010, will demonstrate to the EPA, the public, and the regulated community that the TCEQ is aggressively working to affect positive change in the air permitting program as requested by EPA at the October 2009 stakeholder meetings to improve transparency and encourage public involvement. As a further demonstration of good faith, TCEQ should implement and actively promote a voluntary program under which permit applicants can comply with the proposed public notice provisions effective immediately.

15. Also, in an effort to improve the transparency and public accessibility of the air permitting program, EPA recommends that TCEQ revise their provisions for establishing and maintaining public notice mailing lists. Currently the TCEQ chief clerk maintains lists for each specific permit action and a list for all permitting activities of all media within a specific county. We believe that expanding the mailing lists to include the option to sign-up for a mailing list on a specific company in a given county would better allow interested parties the ability to track and comment on upcoming permit actions.

REVISION TO THE TEXAS STATE IMPLEMENTATION PLAN FOR PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

The Texas Air Control Board (TACB) will implement and enforce the federal requirements for Prevention of Significant Deterioration of Air Quality (PSD) as specified in 40 CFR 51.166(a) by requiring all new major stationary sources and major modifications to obtain air quality permits as provided in TACB Regulation VI, Control of Air Pollution by Permits for New Construction and Modification. In addition, the TACB will adhere to the following conditions in the implementation of the PSD program:

1. Enforcement of permits issued by the Environmental Protection Agency (EPA).

   The TACB will be responsible for the enforcement of all conditions of PSD permits issued for sources in Texas by EPA prior to receipt of full delegation of authority to implement the PSD program.

2. Initial classification of areas in Texas.

   The TACB will recognize the following designations of areas in Texas for PSD purposes:

Class I Areas

a) Guadalupe Mountains National Park

b) Big Bend National Park

Class II Areas

All other areas in Texas which are not currently designated "nonattainment."

Class III Areas

None.

3. Redesignation procedures.

The TACB will follow the procedures specified in 40 CFR 51.166(g) in the redesignation of any area to a new classification.

4. Plan assessment.

The TACB will review the adequacy of the Texas PSD plan on an annual basis and within 60 days of the time information becomes available that an applicable increment may be violated. If the TACB determines that an increment is being exceeded due to the violation

of a permit condition, appropriate enforcement action will be taken to stop the violation. If an increment is being exceeded due to a deficiency in the state PSD plan, the plan will be revised and the revisions will be subject to public hearing.

5. Ambient monitoring requirements.

The TACB will follow the procedures of the federal ambient monitoring guidelines for PSD in the establishment of state ambient monitoring requirements and procedures. All ambient monitoring data used to fulfill the requirements of the PSD plan will meet the specifications of 40 CFR 58, Appendix B.

6. Innovative Control Technology.

The TACB will approve the use of innovative control technology by a Texas source only with the consent of the air quality agency of any adjacent state that may be impacted by the use of such technology.

7. Notification.

The TACB will ensure that additional notification procedures associated with the PSD permitting program in Texas are conducted as follows:

a) The degree of expected increment consumption from the source or modification will be included in the public notice, as required under 40 CFR 51.166(q)(2)(iii).

b) A copy of the public notice will be sent to any comprehensive regional land planning agency and to any other affected agencies, as required under 40 CFR 51.166(q)(2)(iv).

c) The permit applicant will be notified within 120 days of receipt of the application of the completeness of or deficiency in the application, as required under 40 CFR 51.166(q)(1).

d) A copy of each PSD permit application and any public notices relating to new or modified sources will be forwarded to the EPA Administrator when a Class I area is impacted, as required under 40 CFR 51.166(p)(1).

TEXAS AIR CONTROL BOARD
6330 HIGHWAY 290 EAST
AUSTIN, TEXAS

BOARD ORDER
NO. 87-09

WHEREAS, pursuant to Sections 3.09 and 3.10 of the Texas Clean Air Act, Section 5 of the Administrative Procedure and Texas Register Act, and Section 51.4 of Title 40 of the Code of Federal Regulations, the Texas Air Control Board, after proper notice, conducted a public hearing on April 16, 1987 for the purpose of considering proposed amendments to Texas Air Control Board Regulation VI and the State Implementation Plan for the Prevention of Significant Deterioration (PSD) of Air Quality; and

WHEREAS, the Texas Air Control Board duly circulated to interested persons, the Administrator of the Environmental Protection Agency, and all applicable local air pollution control agencies hearing notices of its intended action; and

WHEREAS, interested persons were invited to submit data, views, and recommendations on the proposed amendments, either orally or in writing, at the hearing; and

WHEREAS, copies of the proposed amendments were available for public inspection at the Board's Central Office and all of the Board's regional offices prior to the scheduled hearing; and

WHEREAS, data, views, and recommendations of interested persons were submitted to the Board at the hearing and were considered by the Board as reflected in the attached Summary and Evaluations, which are hereby incorporated and made a part of this Order; and

WHEREAS, the Board finds that said Summary is a summary of comments received from parties interested in the amendments and includes the names of all interested groups or associations offering comment on the amendments and their position concerning the proposed amendments; and

WHEREAS, Section 3.09(a) of the Texas Clean Air Act gives the Board authority to make rules and regulations consistent with the general intent and purposes of the Act and to amend any rule or regulation it makes; and

WHEREAS, adoption of these amendments will further the intent and purposes of the Texas Clean Air Act by establishing time limits for interested persons to request a public hearing on an application for a permit, special permit, or permit continuance; and

WHEREAS, adoption of these amendments will reduce the agency processing time required for most permit applications and will enhance federal approvability of the Texas State Implementation Plan for PSD and stack heights; and

WHEREAS, the Board finds that these considerations authorize adoption of the amendments appended to this Order; and

WHEREAS, the Board finds that the reasoned justification and factual bases for the amendments and the reasons why the Agency disagrees with party submissions and proposals are fully set out in the sections titled Evaluations in the attached Summary and Evaluations; and

WHEREAS, the Board hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the Board's legal authority;

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS AIR CONTROL BOARD THAT:

1. The amendments to Regulation VI and the PSD State Implementation Plan appended to this Order are hereby adopted and promulgated; and

2. The Executive Director is instructed to file a certified copy of this Order, together with the adopted amendments, with the Secretary of State pursuant to Article 6252-13a, V.T.C.S.; and

3. The Executive Director is instructed to transmit a certified copy of this Order together with such amendments to the Governor of Texas for submittal to the Administrator of the Environmental Protection Agency as proposed revisions to the State Implementation Plan pursuant to Section 110 of the Federal Clean Air Act, as amended.

PASSED AND APPROVED at the regular meeting of the Texas Air Control Board in Austin, Texas on this 17th day of July, 1987.

TEXAS AIR CONTROL BOARD

BY: ABSENT
John L. Blair, Chairman

Bob G. Bailey, Vice Chairman

Fred Hartman, Member

Otto R. Kunze, Ph.D., P.E. Member

R. Hal Moorman, Member

ABSENT
Hubert Oxford, III, Member

TEXAS AIR CONTROL BOARD

8330 HWY. 290 EAST
AUSTIN, TEXAS 78723
512/451-5711

JOHN L. BLAIR
Chairman
BOB G. BAILEY
Vice Chairman

ALLEN ELI BELL
Executive Director

FRED HARTMAN
D. JACK KILIAN, M.D.
OTTO R. KUNZE, Ph.D., P.E.
R. HAL MOORMAN
HUBERT OXFORD, III
WILLIAM H. QUORTRUP
DICK WHITTINGTON, P.E.

THE STATE OF TEXAS |
COUNTY OF TRAVIS |

Pursuant to Section 2.14 of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes, this is to certify that the attached are true and correct copies of revisions to Texas Air Control Board Regulation VI adopted on July 17, 1987, pursuant to 40 CFR, Section 51.104. Prior to the adoption of these revisions, a public hearing was held pursuant to 40 CFR, Section 51.102(a) and notice of this hearing was given which conformed to the requirements of 40 CFR, Section 51.102(d). I am the custodian of the records of the Board.

To certify which, witness my hand and the seal of the Texas Air Control Board, this the day of 1987.

Eli Bell
Allen Eli Bell
Executive Director

(SEAL)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAR 01 2010

RECEIVED
MAR 04 2010
OFFICE OF
PERMITTING & REGISTRATION

Ms. Patricia Duron
Office of Legal Services (MC 205)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: EPA Comments on Rule Project Number **2010-005-116-PR**

Ms. Duron:

Thank you for providing us the opportunity to review and comment on the proposed revisions to the Texas Administrative Code (TAC) Title 30, Chapter 116.160. In general, we are supportive of this proposed rulemaking, but we would like to provide the enclosed comments for your consideration.

Please note that our comments do not constitute final determinations concerning approvability of the revisions to the Texas SIP. We are providing these comments to assist TCEQ in the development of the regulations and to outline our expectations should these rules be approved into the State Implementation Plan (SIP). We look forward to working with the TCEQ as you move forward in responding to these comments and finalizing the revisions to the Texas SIP. If you have any questions, please call Jeff Robinson of my staff at (214) 665-6435.

Sincerely yours,

Carl E. Edlund, P.E.
Director
Multimedia Planning & Permitting

Enclosure

cc: Mr. Richard Hyde, TCEQ
Mr. Steve Hagle, TCEQ
Ms. Stephanie Bergeron Perdue, TCEQ

AIR PERMITS DIVISION
MAR 08 2010
RECEIVED

Enclosure

TCEQ Proposed Revision to 30 TAC 116.160 to Incorporate the Definition of BACT and Provisions for Permit Review Regarding PSD Review for Projects that Become Major Stationary Sources or Major Modifications Solely Because of a Relaxation of an Enforceable Limitation on the Source's or Modification's Capacity to Emit a Pollutant
Rule Project No. 2010-005-116-PR

Background.

On February 1, 2006, the TCEQ submitted amendments to 30 TAC 116.160 to EPA as a SIP revision to Texas PSD SIP. These amendments included removal of certain references to federal definitions and requirements regarding "best available control technology" or "BACT" as it relates to PSD, and the permit review regarding PSD review of projects that become major stationary sources or major modifications because of a relaxation of an enforceable limitation on the source's or modification's capacity to emit a pollutant. On September 23, 2009, EPA proposed disapproval of these revisions to the Texas SIP. *See* 74 FR 48467, 48472, September 23, 2009. TCEQ has proposed amendments to 30 TAC 116.160 to eliminate these deficiencies.

EPA Comments on the Proposed Changes.

TCEQ proposes to revise §116.160(c)(1)(A) to add a reference to 40 CFR 52.21(b)(12) – definition of "best available control technology." The reinstatement of this definition appears to satisfy the concerns at 74 FR 48472 concerning the removal of BACT from the currently approved PSD SIP.

TCEQ further proposes to revise §116.160(c)(2)(C) to incorporate the requirements of 40 CFR 52.21(r)(4) which relate to the PSD review of projects that become major stationary sources or major modifications because of a relaxation of an enforceable limitation on the source's or modification's capacity to emit a pollutant. The reinstatement of this requirement appears to satisfy the concerns at 74 FR 48472 concerning the removal of 40 CFR 52.21(r)(4) from the currently approved PSD SIP.

TCEQ further proposes to revise §116.160(c)(2)(A) to cross-reference 40 CFR 52.21(j), which implements the definition of BACT. Although TCEQ has not historically included this reference in its PSD rule, the proposed addition is proposed because it complements the reinserted definition of BACT. The addition of the 40 CFR 52.21(j) requirements appears to satisfy the concerns of a clear distinction between Minor NSR SIP BACT and PSD SIP BACT.

EPA Related Observations on TCEQ's Three Tier BACT Analysis Guidance Memorandum.

As you know, best available control technology is defined in the Federal Clean Air Act as "an emission limitation based on the *maximum degree* of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major

emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant."

Consequently, it is essential that the Texas PSD SIP, all applicable TCEQ guidance and forms, and most importantly, implementation of the Texas PSD SIP, on a permit-by-permit basis, demonstrate that each emissions limitation established as PSD BACT reflects the maximum degree of reduction, unless a rigorous site-specific analysis of energy, environmental, and economic impacts justifies a less stringent emissions limitation.

After the 1992 approval of the Texas PSD SIP (with TCEQ's BACT guidance memorandum), TCEQ issued its 2001-revised Three Tier BACT Analysis guidance memorandum. This guidance appears to have dropped the core criteria, in particular ensuring that the permit writers know to review the most stringent control technology (and associated emission limitation) and provide a detailed rationale if it were not selected.

It is our understanding that TCEQ staff has been instructed to conduct a thorough analysis of BACT, including the most stringent available control technology. However, we have ongoing concerns because TCEQ has not yet revised the Three Tier BACT analysis guidance to ensure its clarity. Also, the State committed in its PSD SIP revision submittal (that was approved in 1992) to implement BACT related decisions given through EPA Administrator orders responding to Title V operating permit petitions, the EPA Environmental Appeals Board (EAB), and Federal courts. We are concerned that the State may not be following through with this Texas PSD SIP commitment. Potential examples include BACT analysis based on cleaner fuels, Integrated Gasification Combined Cycle consideration, and BACT for PM2.5 emissions.

First, we request that the TCEQ revise its BACT guidance memorandum and take it through the SIP regulatory process for adoption and submittal to EPA for approval as a SIP revision to the Texas PSD SIP. We believe the appropriate time for such rulemaking is when TCEQ is proposing the NSR and NSR Reform regulatory changes. The TCEQ then would submit the revised BACT guidance demonstrating how case-specific BACT analyses will be implemented in Texas when your revised NSR and NSR Reform rules are submitted to EPA for revision of the State Implementation Plan.

Further, to ensure transparency of TCEQ's evaluation and implementation of the PSD BACT requirements, TCEQ's BACT analysis for each PSD permit application must detail how TCEQ arrived at its BACT decision and be included in the Preliminary Determination Summary document prepared by TCEQ permit writers. This Preliminary Determination Summary must accompany the draft PSD permit sent to public notice. This should include the technical and economic analyses prepared to support TCEQ's BACT determination.

In conclusion, we expect the TCEQ to fully implement any SIP approved BACT requirements in accordance will all Federal regulations, guidance, and policy, including any EPA Administrator orders responding to Title V operating permit petitions, EPA Environmental Appeals Board (EAB) decisions, and Federal court decisions.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 15, 2010

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

I am writing as a follow-up to our April 1 meetings concerning the Texas air permitting program. Regional Administrator Armendariz, Deputy Assistant Administrator McCabe, and I appreciated the opportunity to discuss these issues over the course of the day with you, Commissioner Rubinstein, Commissioner Garcia, and Chairman Shaw. We look forward to working with you to ensure that the State's air quality continues its trend of improvement, that the air permitting program complies with federal requirements in the Clean Air Act (CAA), that new permits do not draw federal objections, and that ongoing permitting actions afford appropriate public participation. We were pleased by the good exchange of ideas last week, and believe that we are on a positive path forward.

We have already begun working with your office to set up biweekly video conference calls. These will be very helpful to ensure effective and regular staff-to-staff communications and to track action items. The items for discussion are numerous, and many have action dates that are rapidly approaching. We would also like to invite you, the Commissioners, and staff to come to Dallas in May to continue the process of in-person dialogue.

Earlier staff-to-staff discussions brought forward a request for EPA to consider a priority list of permit holders. This appears to be a good idea, and we invite your thoughts on a priority list and a schedule for reviewing and revising permits, as described in the discussion paper we distributed at the meeting titled, "Prioritizing Permitting Work." We are aware of practical workload constraints and also want to ensure that the most urgent examples (both for permit holders and the public) are addressed.

One high priority category is that of flexible permits. During the meeting, we explained that although we have yet to make a final decision about the flexible permit SIP package, we have serious concerns about the program and believe it is prudent to begin planning to address the consequences of a potential EPA decision to disapprove the

program on or about June 30. In the event of final disapproval, we believe our joint efforts should be devoted to transitioning flexible permits to state-issued NSR/PSD and Title V permits that meet the requirements of the Act. This process should necessarily include some retrospective examination of the recent operational and emissions history profile of flexible permit facilities to account for any modifications that should have triggered federal requirements, and if necessary, to update controls and emission limits to assure that facility operations going forward are in compliance with the federal CAA and Texas requirements. Between now and June 30, in staff discussions, video conferences, and the in-person meetings, we should discuss the tools and possible impediments to addressing the collection of flexible permit holders. For example, if a Title V objection results in the need to reopen a permit, can TCEQ reopen underlying permits, create new limits, and then reopen the operating permit to get the new conditions listed? Are there multiple tools available to accomplish these tasks? Which of these steps could or should EPA lead or assist in?

We are eager to partner with TCEQ in this effort and offered several ideas at our recent meeting on how the permit rehabilitation process might proceed. First, we discussed a process to create unit-specific permit conditions for emission units lacking such conditions. We at EPA believe this is essential to ensure that permits meet the minimum federal requirements and are practically enforceable. We can pursue TCEQ's suggestion of entering into a Memorandum of Understanding for formalizing a consistent process. In general, we agree with your staff's position that a consistent process needs to be followed as we address issues from permit to permit. We invite your comments on the discussion paper we distributed at the meeting, titled "Broad methodology for creating unit-specific permit conditions in new permits," and we propose discussing this topic at the first scheduled video conference on April 16. We hope that such a process can be implemented expeditiously, if necessary as a result of EPA's decision on June 30.

In order to help craft a process to develop unit-specific requirements for flexible permits and to address incorporation by reference (IBR) and practical enforceability issues, we agreed to set up staff-level meetings to walk through a couple of pending permits. Motiva was one potential permit discussed, and Total is another candidate. I believe that working together on this task will significantly advance our efforts toward achieving permits that meet federal requirements. At Chairman Shaw's request, we also agreed to review an assessment by your staff of an example permit, perhaps Valero, to assess whether a current flexible permit meets federal PSD requirements and addresses practical enforceability concerns. I have asked staff to begin those discussions soon, and to meet in the coming weeks.

As EPA has evaluated the permitting and enforcement options available to transition flexible permits into SIP-approved permits, we have identified a number of potentially valuable tools. Our concept of a third-party audit program is one vehicle for developing new conditions for underlying permits, and doing so in an objective manner that provides a path forward for permit holders; we are very interested in your thoughts on that idea, and would invite feedback on the "Audit Concepts/Audit Process" discussion paper we distributed. We are particularly interested in your views about how a

federal audit program could be efficiently incorporated into a state permitting process, and whether additional areas of focus in the audit process would benefit state efforts.

In addition to the work to address concerns regarding flexible permits (FPs), as outlined above, we have asked the staff to follow-up on discussions of how to work out other site-specific permit objection matters (that is, non-IBR, non-FP), so that the rationale behind these objections can be clarified and resolved to everyone's satisfaction. Once the specifics of our non-IBR and non-FP concerns are clarified, TCEQ can begin implementing, as appropriate, the changes to future Title V permits, and numerous grounds for potential EPA objections would be resolved.

Addressing all permit objections promptly is essential, since a statutory time clock was triggered by the EPA objections. We believe that we may have the discretion to refrain from taking over those permits if TCEQ acts in the near-term to address the objections.

Our meetings also included discussions of the various State Implementation Plan rulemakings, and we are pleased that our staffs have worked together productively in the on-going discussions of the public participation and PSD/BACT regulations. Permit holders have approached EPA about the possible incorporation of the federal PAL program into a future Texas SIP. Because the federal PAL program is on the books, and its use is available to a permitting authority to supplement the core PSD/NSR programs, we can prioritize discussions with you about the PAL program if you wish. During the meeting, I believe that there was general agreement that robust communication between our staffs on rulemaking efforts, including early sharing of concepts and/or language, is productive to identify potential issues of concern.

I know that a revised Qualified Facilities program rulemaking was recently proposed by TCEQ, and from the meeting it is our understanding that rulemaking work is starting on a revised Flexible Permits program. Regional Administrator Armendariz indicated his appreciation for the benefits that a permit amendment process with the goals of the Qualified Facilities (QF) program could have to permitting authorities, and he has asked us to consider these benefits should the revised QF program be submitted to us for review as a SIP-package. Nonetheless, he and I are very aware of the work burden related to Title V permitting that is currently in front of the Region 6 staff, and we suspect that the combination of routine permitting work plus the additional concerns discussed at the meeting are probably keeping your own air staff busy. EPA will certainly review SIP-packages submitted to us for inclusion in the Texas SIP, but because of our Title V legal obligations, Dr. Armendariz and I have prioritized the Title V work for our staff. As a result, EPA may not be able to comment on the proposed QF and FP rules as they move through the state rulemaking process. If we can, we certainly will.

Enclosed is a list of the key action items that were brought forward during the meeting, with some suggested dates for follow-up. Please review the attachment and let's discuss the proposed action items and calendars during the upcoming conference call.

We appreciate your willingness to devote staff to the many issues before us, ensuring that progress is made as quickly as possible. We are confident that by working with industry, environmental organizations and community leaders, we will continue to enhance the level of environmental and public health protection provided by Texas State law and the Federal SIP.

Sincerely,

Lawrence E. Starfield
Deputy Regional Administrator

Enclosure

cc (w/encl.):
Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

31741
Mark

May 14, 2010

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MAY 18 2010
EXECUTIVE DIRECTOR

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

During our meeting in Austin on April 1, 2010, EPA shared three discussion papers on how a permit rehabilitation process might proceed for flexible permits to address the consequences of a potential EPA decision to disapprove the flexible permit SIP package. The discussion papers address: 1) Creating unit-specific permit conditions, 2) Permit prioritization, and 3) an Audit program.

At our joint April 16, 2010 video conference call, you requested our position on four questions related to these discussion papers. These questions deal with issues such as EPA's interpretation of federal requirements (applicability, BACT and netting) as well as the impact of new standards.

We appreciate the benefit of our bi-weekly video calls and see these as an opportunity to continue to discuss next steps. We hope the next call will give us the opportunity to discuss any questions you may have on our answers, and to discuss your response to the three papers. Thank you for your continued willingness to devote staff and your time to the issues before us, ensuring that progress is made as quickly as possible.

Sincerely,

Lawrence E. Starfield
Deputy Regional Administrator

Enclosure

cc: Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

- Will EPA require 2010 best available control technology (BACT) or lowest achievable emission rate (LAER) for restructured flexible permits?

In general, we have the following view of the appropriate date to consider of when BACT or LAER would apply in determining new unit-specific limits. We anticipate that BACT or LAER will be applied considering the time of major construction or major modification. However, if it is determined through an audit or during the restructuring of the flexible permit that a source circumvented or failed to obtain a major NSR permit before commencing construction of a major stationary source or a major modification as required by the approved State Implementation Plan (SIP) during the time frame when the source had a flexible permit, then we will require the emissions unit(s) that underwent a physical change or change in the method of operation to obtain a major NSR permit for any regulated NSR pollutants which exceeded significance levels as a result of the change. Consistent with EPA's policy, a source must apply current-day BACT or LAER to such emissions units.

- Will EPA require BACT for greenhouse gas emissions (GHGs) for permits restructured after January 2, 2011?

The assignment of unit-specific emission limits does not necessarily by itself result in the triggering of BACT requirements for GHG. GHGs are not currently a regulated NSR pollutant (63 FR 17019, April 2, 2010), and therefore, a source would not currently need to address GHG BACT. However, after the time GHGs become a regulated NSR pollutant, sources in all states undergoing new construction and modifications will need to address the applicability of the major NSR permitting requirements to GHGs in accordance with rules issued by EPA.

Once GHGs become subject to regulation for purposes of Title V, sources also must describe their GHG emissions to the extent necessary for the permitting authority to determine if there are any applicable requirements.

- What netting rules apply to evaluating whether modifications cause significant increases in emissions?

The federally approved rules that exist when a source undertakes a potentially major modification apply when determining if the change triggers major NSR permitting. In the case of Texas, the existing SIP-approved, major NSR program is the basis of the netting rules that apply to determine if past changes triggered major NSR.

- Will NAAQS compliance have to be addressed in permits being restructured?

We will not require modeling to show compliance with a NAAQS when the permitting authority restructures Title V permits to eliminate flexible permits and assure that the Title V permit properly incorporates all Federally applicable requirements for the source unless such modeling is otherwise required by EPA rules or guidance.

If a source going through the restructuring process is also obtaining a new major NSR permit, the source generally will have to model and show compliance for any of the NSR regulated pollutants covered by the new NSR permit, and as otherwise required by EPA rules or guidance.

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,

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

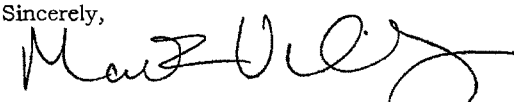
last October to establish a rulemaking schedule to address the *Federal Register* notices and did so on an expedited basis. The TCEQ has substantially adhered to this schedule with the exception of the proposed flexible permit rulemaking. The TCEQ is steadfastly focused on addressing the perceived deficiencies 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 or 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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

JUN 0 7 2010

Ms. Devon Ryan
Office of Legal Services (MC 205)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: EPA Comments on Rule Project Number 2010-006-116-PR

Ms. Ryan:

Thank you for providing us the opportunity to review and comment on the proposed revisions to the Qualified Facility Program at Texas Administrative Code (TAC) Title 30, Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, sections 116.10, 116.17, 116.111, 116.116, 116.117, and 116.118, and the proposed associated revisions to the Texas State Implementation Plan (SIP). This proposed rulemaking revises the existing Qualified Facility Program to address the concerns identified in our April 14, 2010, disapproval of the Program (75 FR 19468). We would also like to thank you for extending the comment period for this rulemaking to ensure adequate notice and comment was provided for the proposed associated revisions to the Texas SIP.

Please note that these comments do not constitute final determinations concerning approvability of the revisions to the Texas SIP. We are providing these comments to assist TCEQ in the development of regulatory language. Additionally, comments 4, 5, 7, 11, 12, 14, 15, 16, 17, 19, 24, 25, 26, and 27 must be addressed to our satisfaction before EPA can proceed with a proposed action on these potential revisions to the Texas SIP.

We look forward to working with the TCEQ as you move forward in responding to these comments and finalizing the revisions to the Texas SIP. If you have any questions, please call Ms. Adina Wiley of my staff at (214) 665-2115.

Sincerely yours,

Thomas H. Diggs
Associate Director for Air Programs
Multimedia Planning and
Permitting Division

Enclosures

Enclosure

1. The "Background and reason(s) for the rulemaking" section of the Executive Summary states that the Qualified Facility Program authorizes increases in actual emissions at facilities. This statement is inconsistent with our understanding that the Qualified Facility Program is designed to only allow increases in allowable emissions to net out against decreases in allowable emissions. Please revise this statement to accurately reflect the intent of the Qualified Facility Program.

2. EPA agrees with the statement in the 30 TAC Chapter 116 preamble that the revisions to 30 TAC sections 116.10(5)(F), 116.111(a)(2)(K), 116.116(b)(3), and 116.117(a)(4)(B) will not be submitted as SIP revisions. These sections all refer to section 112(g) of the CAA, which is not implemented through the SIP.

3. The 30 TAC Chapter 116 preamble at page 10, Notification of Changes at Qualified Facilities, states that the submission of PI-E forms has resulted in significant denials for changes under the Qualified Facility Program. The rule is unclear how TCEQ has the authority to deny Qualified Facility changes when there is no approval process required for the PI-E form. Does TCEQ have a set amount of time to review and respond to the PI-E form? If TCEQ does not respond within the appropriate time, does the facility have a default approval? Where do the rules contain such provisions?

   Also, the preamble statement referenced above is inconsistent with the rule language requirements at 30 TAC sections 116.116(c)(2) and 116.117(b). New 30 TAC section 116.116(c)(2) requires owners or operators to submit Form PI-E prior to making any changes to qualified facilities. However, 30 TAC section 116.117(b) requires the submittal of Form PI-E as part of the annual report. Further, the 30 TAC Chapter 116 preamble at page 8, Netting and Double Counting, implies that pre-change notification is only required when the intraplant trade moves emissions from the interior of a site to a point closer to the property line. Please explain how the PI-E form is used; is this form submitted pre-change or post-change? TCEQ should revise the regulatory language to be consistent with the intent expressed in the preamble, by clearly identifying the requirements for submittal of the PI-E form, requiring pre-change notification for all qualified facilities changes, and including an express procedure for TCEQ review and respond.

4. TCEQ must provide explicit regulatory language to define the term "facility" as it applies to the Qualified Facility Program. We recognize that TCEQ interprets "facility," as it applies to the Qualified Facility Program, to preclude inclusion of more than one stationary source. However, the lack of rule language clarifying the meaning of the term "facility," as it applies to this Program, makes this definition overly vague; and therefore, unenforceable. As we stated in our final disapproval of the Qualified Facility Program, Texas's rules apply the term "facility" in different ways without providing clarification in the rule language.

75 FR 19468, at 19489 (April 14, 2010). Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," but the Qualified Facility rules fail to make such a limitation. Compare 30 TAC 116.10(6) to 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. However, TCEQ did not include sufficient information in its proposed revisions to demonstrate that the lack of this explicit limitation in the submitted Qualified Facility revisions is at least as stringent as the revised definition in the PSD non-PALs definition. We recommend that TCEQ resolve this deficiency by adding a specific definition of the term "facility" to the Qualified Facility Definitions at 30 TAC 116.17 or provide in its revised Qualified Facility Rule a description of what a "facility" is under the Qualified Facility Program.

5. The 30 TAC Chapter 116 preamble at page 6 clearly indicates that the TCEQ uses the term "account" synonymously with EPA's use of "source." While this preamble statement is a step towards addressing our concerns identified in the final disapproval of the Qualified Facility Program, the TCEQ must also revise the Qualified Facility rule language to include this statement to improve clarity and transparency of the rule and to entirely address our concerns. See 75 FR 19468, at 19489-19490.

6. The portion of the definition of "allowable emissions" at 30 TAC 116.10(2)(C) relating to "qualified grandfathered facility" is proposed for deletion under 30 TAC section 116.10. However, we note that there continue to be references to actual emissions throughout the Qualified Facility rule language, see 30 TAC sections 116.116(e)(4)(C), 116.116(e)(9)(A), 116.116(e)(9)(C), 116.116(e)(9)(D). It is our understanding of the Qualified Facility Program that actual emissions were only used for qualified grandfathered facilities. Please confirm that this interpretation is correct. If our understanding is correct and actual emissions were only used for qualified grandfathered facilities, please remove all references to actual emissions from the proposed language. However, if our understanding is incorrect please explain how actual emissions are to be used in a program that is designed for netting of allowable emissions.

7. The proposed definition of "Best Available Control Technology (BACT)" at 30 TAC section 116.10(1) must be revised to more clearly indicate this definition is for any air contaminant or facility not subject to federal permitting requirements, as indicated by the rule preamble on page 12. We recommend that TCEQ use the following language to promote rule clarity:

> <u>State (or alternately, Texas)</u> Best available control technology (BACT) – An air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emission reduction can be achieved through technology such

as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice. This definition applies to any air contaminant or facility not subject to federal permitting requirements under Title I, part C, of the Clean Air Act (CAA). For air contaminants or facilities subject to the Title I, part C, CAA requirements, the definition of BACT at section 116.111(a)(2)(C), which requires BACT as defined in 40 CFR 52.21(b)(12), will apply.

8. Please explain why the definition of "qualified facility" has been retained in 30 TAC section 116.10 rather than recodified into the new 30 TAC section 116.17, Qualified Facility Definitions.

9. New 30 TAC section 116.17(2) provides that the allowable emissions for a permitted facility at new 30 TAC section 116.17(2)(A) would include the emission limit established in the permit or maximum allowable emissions rate table (MAERT) *and* any emission limit contained in representations in the permit application that was relied upon in issuing the permit. This section may provide an opportunity for double-counting and over inflation of the allowable emissions for a permitted facility. Please verify that emissions limits are only cumulative if the emission limits in the permit, MAERT, and permit application are separate, entirely unrelated limits in order to prevent double-counting.

10. Please explain what is meant by a "Special Exemption Facility" at 30 TAC section 116.17(2)(D). Is a special exemption facility exempt from the requirements to have an underlying 30 TAC Chapter 116 permit or authorization under 30 TAC Chapter 106 at 30 TAC section 116.116(e)(1)(A)? If so, what is the basis for the exemption?

11. New 30 TAC section 116.116(e)(1)(B) cross-references the major NSR netting requirements at 30 TAC section 116.12(20). The SIP-approved major NSR netting provisions are located at 30 TAC section 116.12(13). EPA is evaluating pending revisions to 30 TAC section 116.12 that substantively revise and renumber this section. 30 TAC section 116.12(20) must be approved before EPA could proceed with a proposed action on the revised Qualified Facility Program. Our comments on the proposed revisions to 30 TAC section 116.116(e) do not reflect any intent or future action by the EPA to grant SIP approval to the revisions to 30 TAC section 116.12.

12. New 30 TAC section 116.116(e)(2)(A) requires owners or operators to submit an application for a permit alteration for each permit issued under 30 TAC section 116.111 involved in the qualified facility transaction. The SIP-approved alteration provisions at 30 TAC section 116.116(c)(B)(iii) state that a permit alteration is "any change from a representation in an application, general condition, or special condition in a permit that does not cause an increase in the emission rate of any air contaminant." Therefore, the SIP-approved alteration process cannot be used to revise the permit for the facilities involved in the

qualified facility transaction that has the increase in allowables. To use permit alterations for the facilities with emission increases, the TCEQ must propose a revision to the permit alterations provisions.

13. There appears to be a typographical error in new 30 TAC section 116.116(e)(2)(D). We believe the sentence should read:

> No allowable emission rate ~~in~~ as defined in § 116.17 of this title (relating to Qualified Facilities Definitions) shall be exceeded.

14. Our final disapproval of the Qualified Facility Program determined that the program was deficient as a minor NSR program because it did not require participating facilities to have an underlying permit and an air quality impact analysis. See 75 FR 19468, at 19486-19487. New 30 TAC section 116.116(e)(2)(E) includes the following language: ". . . regardless of whether the facility has received a preconstruction permit or permit amendment. . . ." This section must be revised to accurately address this concern and to be consistent with the stated intent of the TCEQ, which is that a facility must have an authorization under 30 TAC Chapter 106 or 116 and air quality impact analysis in order to be "qualified" under the Program. See new 30 TAC section 116.116(e)(1)(A).

15. The interchange methodology at 30 TAC section 116.116(e)(5) is unapprovable for the sulfur dioxides and PM NAAQS. The term "sulfur compounds" used in the interchange methodology is broad enough to include hydrogen sulfide, which is a regulated NSR pollutant (see 40 CFR 52.21(b)(23)(i) and 52.21(i)(5)(i)), and requires a separate netting analysis from sulfur oxides. The interchange methodology also allows $PM_{2.5}$ to be interchanged with PM_{10}, which are two separate pollutants. For additional information see our final disapproval of the Qualified Facility Program at 75 FR 19468, at 19474.

16. 30 TAC section 116.116(e)(5)(E) requires an owner or operator to demonstrate that the change <u>will not</u> adversely affect ambient air quality, but 30 TAC section 116.117(a)(4) only requires an owner or operator to maintain sufficient information to show that the project <u>is not expected to</u> adversely affect ambient air quality. We interpret 30 TAC section 116.117(a)(4) as requiring a lesser degree of stringency in the analysis. Therefore, the TCEQ must revise 30 TAC section 116.117(a)(4) to require a demonstration consistent with 30 TAC section 116.116(e)(5)(E). Please also explain the replicable procedure that TCEQ will employ to determine the change will not adversely impact ambient air quality.

17. 30 TAC section 116.116(e)(8)(A) provides that a facility may utilize control methods that are as effective as BACT required at the time the control methods are implemented. It is our understanding of the Texas Clean Air Act that only State BACT can apply to a minor NSR program, including the Qualified Facility Program. Please confirm this understanding. Also, 30 TAC section

116.116(e)(8)(A) must be revised to explicitly provide that State BACT at 30 TAC section 116.10(I) applies. Please explain the replicable procedure that TCEQ will employ to determine the control method is as effective as State BACT.

18. The Chapter 116 preamble at pages 8-9 states that new 30 TAC section 116.116(e)(10) contains anti-backsliding provisions such that the existing level of control may not be lessened for a Qualified Facility. The preamble further explains that this anti-backsliding provision will be implemented for intraplant trades through revisions to the maximum allowable emission rate table (MAERT) for the participating facilities. The rule language at 30 TAC section 116.116(e)(10) does not require a change to the MAERT, nor can we find this provision elsewhere in the proposed rules. The TCEQ should revise the rule language to require MAERT revisions as explained in the preamble.

19. The annual report under 30 TAC section 116.117(b)(I) must be revised to address our concerns about the time lag between when the change is made and the TCEQ is notified. As noted in our final disapproval of the Qualified Facility Program, a six month report will better enable the TCEQ to monitor compliance with NAAQS, RFP or other control strategies. See 75 FR 19468, at 19482.

20. 30 TAC section 116.117(b)(1) should be revised to require reporting for changes to Qualified Facilities with intraplant trading.

21. TCEQ has deleted the provision for post-change notification (former 30 TAC section 116.117(b)(2)), but the revised regulations do not expressly require pre-change notification in all instances. As discussed above in Comment 3, we find that the proposed regulations governing notification requirements are vague. We strongly encourage TCEQ to expressly state that pre-change notification is required for all qualified changes. If TCEQ does not intend to require pre-change notification for all qualified changes, then we request that TCEQ further clarify timing and requirements for notification for all qualified changes contemplated under the Program.

22. New 30 TAC section 116.117(b)(2) requires pre-change notification if a physical or operational change at a Qualified Facility will affect compliance with a permit special condition. Please explain what constitutes a permit special condition. Does this mean that a facility can change and/or remove federally required monitoring, reporting, and recordkeeping requirements without public notice? Is it possible that a facility could modify special conditions established under federal Consent Decrees or enforcement actions? We recommend that TCEQ revise this provision to clarify its applicability.

23. We interpret 30 TAC section 116.118, Pre-change Qualification, as applying only to facilities that do not have an existing permit, i.e., qualified grandfathered facilities. Please explain the types of facilities that are covered under 30 TAC section 116.118. If these facilities are indeed qualified grandfathered facilities

please consider removing 30 TAC section 116.118. If these facilities are not qualified grandfathered facilities, we recommend clarifying 30 TAC sections 116.118(a)(1) and (a)(2) to improve clarity of the rule language.

24. The proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" identifies all of the Qualified Facilities in Texas. The TCEQ has created this supplemental document in an effort to show that these facilities will not adversely impact attainment or maintenance of the NAAQS, RFP, or any other applicable requirement of the Act. TCEQ makes the argument that Qualified Facilities net allowable emissions from existing permits that were issued under SIP-approved permit programs consistent with section 110(l) of the CAA. Therefore, the Qualified Facility Program by extension must demonstrate consistency with section 110(l) of the CAA. However, this analysis does not address the Qualified Grandfathered Facilities, which did not have underlying SIP-approved Chapter 116 permits or Chapter 106 authorizations. The proposed SIP supplement must be revised to identify which of these facilities were Qualified Grandfathered Facilities so that we can assess the impact of sources without permits on this Program. The TCEQ must also provide verification that each Qualified Grandfathered Facility is now covered under a SIP-approved Chapter 116 permit or Chapter 106 authorization.

25. The "Program Summary" portion of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to accurately reflect the requirements of new 30 TAC section 116.116(e)(1)(A), that a facility must have an authorization under 30 TAC Chapter 106 or 116 before it can become a qualified facility.

26. The "TCEQ Administration of the Qualified Facilities Program" portion of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to clearly indicate that the references to BACT are to State BACT. See comments numbers 7 and 17 above for additional information.

27. Appendix 4 – Senate Bill 1126 Guidance – of the proposed supplement to the SIP titled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126", must be reviewed and updated consistent with each of the concerns identified in our Qualified Facility disapproval notice and the proposed revisions to 30 TAC Chapter 116. EPA is unable to determine whether the revised Qualified Facility Program complies with section 110(l) of the CAA until TCEQ updates this guidance to correlate with the revised rules and submits the updated guidance to EPA.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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June 10, 2010

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Vickery:

This letter is to clarify EPA's position on the use of incorporation by reference (IBR) in the issuance of Title V permits by the TCEQ under the EPA-approved Texas Title V Program. EPA provides oversight of Title V programs across the country. TCEQ's use of IBR in Title V permits is more extensive than the practices in any other state. Whether using IBR for inclusion of Major or Minor New Source Review permits, EPA is concerned that these practices are contributing to ambiguous and unenforceable permits.

IBR of Major New Source Review Permits

EPA has objected to approximately 38 draft TCEQ Title V permits, and TCEQ's use of IBR of Major New Source Review (NSR) permits has been a consistent basis for objection. This issue was apparently debated by EPA and TCEQ staff at a meeting in Waco on April 22, 2010, and I want to make sure that EPA's position on this matter is clear.

A central purpose of the Title V program is to "enable the source, states, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." 57 *Fed. Reg. 32250,* 32251 (July 21, 1992) (EPA final action promulgating the Part 70 rule). Thus, the Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.[1] To accomplish this purpose TCEQ must restate the emission limitations and standards, including those operational requirements and limitations that assure compliance with all

[1] See *In the Matter of BP Products North America, Inc.*, Whiting Business Unit (October 16, 2009) (BP Whiting Order).

applicable requirements, from underlying Major PSD/Nonattainment NSR permits in the body of Title V permits.

EPA did not approve the use of IBR of Major NSR permits into Texas-issued Title V permits as a part of the Texas Title V program.[2] TCEQ's current use of IBR does not comply with the May 28, 2009 orders from Administrator Jackson regarding two Texas-issued Title V permit petitions.[3] Because the Texas permits use IBR of Major NSR permits so extensively, as a practical matter it is extremely difficult to tell what emission limitations and standards apply to particular emission sources. For members of the public, it can be virtually impossible. This is completely contrary to the goals of the Title V program articulated above. EPA will continue to object to Title V permits that use IBR for emissions limitations and standards found in Major NSR permits.

Given the large number of EPA objections to Title V permits that are yet to be resolved by TCEQ and TCEQ's continued use of IBR of Major NSR permits (which will lead to further objections by EPA), TCEQ must address this issue promptly.

IBR of Minor New Source Review Permits

In addition, we are also evaluating the TCEQ's implementation of IBR of Minor NSR permits and permits by rule (PBRs). In our approval of the Texas Title V Program, we were willing to allow TCEQ to list the number of the Minor NSR permits and PBRs together with a statement that the permit terms are included as applicable requirements. EPA balanced the streamlining benefits of incorporation by reference against the value of a more detailed Title V permit. See *Public Citizen*, 343 F.3d, at 460-61 (5th Cir. 2003).

More recently, the EPA Administrator warned TCEQ in the CITGO and Premcor Orders that EPA would be evaluating this practice of IBR of Minor NSR and PBRs to determine how well it is working.

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[2] Nor did the 5th Circuit's ruling, upholding EPA's discretion in allowing use by TCEQ of IBR for the terms in Minor NSR permits and permits by rule, address IBR for major NSR permits. *Public Citizen v. EPA*, 343 F.3d 449, at 460-61 (5th Cir. 2003). See also, 66 Fed. Reg. 63318, 63324 (Dec. 6, 2001).

[3] *In the Matter of CITGO Refining and Chemicals Company, L.P.*, West Plant, Corpus Christi, Texas, Petition No. VI-2007-01 (May 28, 2009)(CITGO Order) and *In the Matter of The Premcor Refining Group, Inc.*, Port Arthur, Texas, Petition No. VI-2007-02 (May 28, 2009)(Premcor Order).

> [W]hile EPA approved of the incorporation by reference approach for these types of permits, as discussed in a separate Title V order issued today (*In the Matter of the Premcor Refining Group, Inc.*, Port Arthur, Texas, Petition VI-2007-02 (May 28, 2009)) it is important that that TCEQ ensure that referenced permits are part of the public docket or otherwise readily available, and currently applicable, and that the title V permit is **clear and unambiguous as to how the emissions limits apply to particular emissions units**.

CITGO Order at FN 5. (Emphasis added.) See also, FN 3, Premcor Order.

We have continuing concerns that the exclusion of emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements on the face of the Title V permit by the use of IBR of Minor NSR and PBRs is contributing to ambiguous, unenforceable Title V permits. Particular issues of concern include, but are not limited to, PBRs that purport to modify Major NSR emission limits and that lead to the controlling limit not being reflected in the body of the Title V permit, failure of the TCEQ to make the currently applicable Minor NSR permits and PBRs readily available to the public, and the practical inability of EPA and the public to determine the applicable emission limitations and standards for each particular emissions unit. Based on a review of CAA Title V programs around the country, EPA is not seeing similar use of IBR by other states.

We believe the above identified problems should be corrected in your permitting process immediately and would be happy to work with you. We are continuing to evaluate your current Minor NSR practices and may identify other issues, concerns and remedies in the near future.

Sincerely,

Al Armendariz
Regional Administrator, Region 6

:c: Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 6, 2010

Mr. Lawrence Starfield
Deputy Regional Administrator
6RA-D
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75202-2733

Dear Larry:

In our recent videoconference calls with EPA Region 6 staff, the Texas Commission on Environmental Quality (TCEQ) committed to provide a description of options for companies voluntarily opting to "de-flex" from a flexible permit to a State Implementation Plan (SIP)-approved New Source Review (NSR) permit within TCEQ's existing regulatory framework. Further, at EPA's June 16, 2010 meeting with industry and environmental groups in Dallas, TCEQ staff provided a brief verbal overview of potential de-flex mechanisms. This letter serves to elaborate on the mechanisms described in recent discussions to allow for companies to voluntarily "de-flex" their permits.

Because 30 Texas Administrative Code (TAC) Chapter 116, Subchapter B, is State Implementation Plan (SIP)-approved, the TCEQ has focused on provisions for changing permits in Section 116.116, namely amendments and alterations. In addition, the TCEQ has looked to 30 TAC Chapter 116, Subchapter D, relating to renewals. (Subchapter D is also SIP-approved.) Finally, the TCEQ has looked at administrative orders as a potential mechanism.

It is important to note that Section 116.116, the amendment and alteration provision in Subchapter B, contemplates *changes* to facilities. In the de-flex context, there may not be any changes as contemplated in Subchapter B; however, the dialogue between the two agencies has been focused on existing regulatory mechanisms to restructure flexible permits with unit-specific emission limits, and if possible, caps. The TCEQ understands that EPA's position is that a separate rulemaking to establish a de-flex process is not an option. Accordingly, the agency has refined its review of potential de-flex mechanisms to essentially two options:

1) Permitting "Two-Step" –
Applications for an alteration and *amendment* under Subchapter B

Applications for an alteration (under Subchapter B) and *renewal* (under Subchapter D)

2) Permitting/Enforcement "Two-Step" – Application for an alteration under Subchapter B and Enforcement Order

Option 1

The permitting "two-step" de-flex option is a mechanism for companies to voluntarily and expeditiously restructure flexible permits to Subchapter B. The balance achieved with the two-step approach is a federally enforceable Subchapter B permit with unit-specific emission limits (as well as caps if appropriate) in a relatively short timeframe (approximately 45-60 days) followed by a permitting process which would allow for public participation.

In the first step, the summed emission units comprising the flexible permit cap would be apportioned on a unit-by-unit basis. Monitoring, reporting and recordkeeping requirements would be reviewed and updated as appropriate to ensure that the applicant can demonstrate compliance with the permit. Because there is no public participation requirement for an alteration, the alteration would include a condition requiring the permit holder to apply for an amendment or a renewal within a specific timeframe to allow for public review of the alteration as well as to conduct a "no circumvention" review of Major NSR requirements. The condition would also require that a copy of the application be submitted to EPA. TCEQ staff are reviewing the Title V condition which was agreed upon by Conoco Phillips and EPA as a template for an alteration condition.

Importantly, in the second step, the subsequent amendment or renewal application would be subject to public participation requirements under 30 TAC Chapter 39.

With regard to TCEQ's technical review and evaluation of the alteration application, the TCEQ would conduct its review in accordance with applicable provisions of 30 TAC Chapter 116, Subchapter B as further refined in EPA's May 14, 2010 letter addressing federal requirements applicable to the de-flex process, e.g., BACT, netting, etc.[1] *See* enclosed letter. Note that the alteration rule requires that "[a] request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with [BACT] requirements . . ." *See* 30 TAC Section 116.116(c)(4)

It is also important to note that if the criteria for a permit alteration are not met, the flex permit holder would be unable to avail itself of the "two-step" process. This in essence results in either an amendment (under Subchapter B) or a renewal application (under Subchapter D) as the mechanism for de-flexing.

Regarding Step 2 and public participation, it is important to note that state law sets forth specific public participation requirements for renewal applications. As reflected in the agency's recent public participation rulemaking preamble discussion, the renewal process is unique to state law. So, while the agency recently modified its public notice provisions to require notice of draft minor NSR permits to meet federal requirements, no changes were made to the renewal public notice provisions. *See* 30 TAC Section 39.419(e) and 35 *Tex. Reg.* 5205, June 18, 2010

To recap renewal application public participation requirements, if the application would not result in an increase in allowable emissions and would not result in an increase in the emission of an air contaminant not previously emitted, the commission may not seek further public comment or hold a

[1] TCEQ staff will clarify several items in the May 14, 2010 letter with EPA staff as part of the continuing dialogue on how to restructure flexible permits.

public hearing. *See* Texas Health and Safety Code (THSC) Section 382.056(g); 30 TAC Section 39.411(e)(11); and, 30 TAC Section 39.419(e). The TCEQ would apply its renewal rules if an applicant elected to pursue an alteration and renewal application process to de-flex its Subchapter G permit.

With respect to amendment applications, if a contested case hearing is requested 1) before the close of the 30-day comment period in response to the NORI for Minor NSR applications, or 2) before the close of the comment period [i.e., 30 days after final publication of second notice, Notice of Application and Preliminary Decision (NAPD) or the end of a public meeting held on the permit application) or within 30 days after the mailing of the Executive Director's response to comments for Nonattainment or Prevention of Significant Deterioration permit applications, if applicable, that hearing request will be considered by the commission (unless it is withdrawn)].[2] However, if the application would not result in an increase in allowable emissions and would not result in an increase in the emission of an air contaminant not previously emitted, the commission may not hold a contested case hearing. *See* THSC Section 382.056(g)

Option 2
Option 2 is similar to Option 1 -- the alteration would establish unit-specific emission limits while an administrative order under TWC Section 7.002 would require a no circumvention review of federal Major NSR requirements. If there was circumvention, there would be a technical requirement ordering the respondent to apply for proper authorization within a specific timeframe; the permit application process would include public participation. The enforcement order itself would allow for public input as set forth in TWC Section 7.075. A review of the unit-specific emission limits established in the alteration could also be covered by a technical requirement.

Similar to Option 1, with regard to TCEQ's technical review and evaluation of the alteration application, the TCEQ would conduct its review in accordance with applicable provisions of 30 TAC Chapter 116, Subchapter B as further refined in EPA's May 14, 2010 letter addressing federal requirements applicable to the de-flex process e.g. BACT, netting, etc.

Please do not hesitate to call me at (512) 239-5105 if you have questions. In addition, I encourage appropriate EPA staff to contact Richard Hyde, Deputy Director of the Office of Permitting and Registration at (512) 239-1317 or Stephanie Bergeron Perdue, Deputy Director of the Office of Legal Services, at (512) 239-0615, with questions regarding potential de-flex mechanisms.

Sincerely,

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

Enclosure: May 14, 2010 letter from Deputy Regional Administrator Lawrence Starfield

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[2] As discussed in TCEQ's October 23, 2009 letter to EPA, a request for a public meeting (or "hearing" in federal rules terminology) is distinct from Texas' contested case hearing process. TCEQ's recent air permitting public participation rulemaking addressed federal requirements for public meetings, including responding to all comments before an application is approved. *See* 30 TAC Section 55.156(b). These regulatory changes are effective June 24, 2010.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

May 14, 2010

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

During our meeting in Austin on April 1, 2010, EPA shared three discussion papers on how a permit rehabilitation process might proceed for flexible permits to address the consequences of a potential EPA decision to disapprove the flexible permit SIP package. The discussion papers address: 1) Creating unit-specific permit conditions, 2) Permit prioritization, and 3) an Audit program.

At our joint April 16, 2010 video conference call, you requested our position on four questions related to these discussion papers. These questions deal with issues such as EPA's interpretation of federal requirements (applicability, BACT and netting) as well as the impact of new standards.

We appreciate the benefit of our bi-weekly video calls and see these as an opportunity to continue to discuss next steps. We hope the next call will give us the opportunity to discuss any questions you may have on our answers, and to discuss your response to the three papers. Thank you for your continued willingness to devote staff and your time to the issues before us, ensuring that progress is made as quickly as possible.

Sincerely,

Lawrence E. Starfield
Deputy Regional Administrator

Enclosure

cc: Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

- Will EPA require 2010 best available control technology (BACT) or lowest achievable emission rate (LAER) for restructured flexible permits?

In general, we have the following view of the appropriate date to consider of when BACT or LAER would apply in determining new unit-specific limits. We anticipate that BACT or LAER will be applied considering the time of major construction or major modification. However, if it is determined through an audit or during the restructuring of the flexible permit that a source circumvented or failed to obtain a major NSR permit before commencing construction of a major stationary source or a major modification as required by the approved State Implementation Plan (SIP) during the time frame when the source had a flexible permit, then we will require the emissions unit(s) that underwent a physical change or change in the method of operation to obtain a major NSR permit for any regulated NSR pollutants which exceeded significance levels as a result of the change. Consistent with EPA's policy, a source must apply current-day BACT or LAER to such emissions units.

- Will EPA require BACT for greenhouse gas emissions (GHGs) for permits restructured after January 2, 2011?

The assignment of unit-specific emission limits does not necessarily by itself result in the triggering of BACT requirements for GHG. GHGs are not currently a regulated NSR pollutant (63 FR 17019, April 2, 2010), and therefore, a source would not currently need to address GHG BACT. However, after the time GHGs become a regulated NSR pollutant, sources in all states undergoing new construction and modifications will need to address the applicability of the major NSR permitting requirements to GHGs in accordance with rules issued by EPA.

Once GHGs become subject to regulation for purposes of Title V, sources also must describe their GHG emissions to the extent necessary for the permitting authority to determine if there are any applicable requirements.

- What netting rules apply to evaluating whether modifications cause significant increases in emissions?

The federally approved rules that exist when a source undertakes a potentially major modification apply when determining if the change triggers major NSR permitting. In the case of Texas, the existing SIP-approved, major NSR program is the basis of the netting rules that apply to determine if past changes triggered major NSR.

- Will NAAQS compliance have to be addressed in permits being restructured?

We will not require modeling to show compliance with a NAAQS when the permitting authority restructures Title V permits to eliminate flexible permits and assure that the Title V permit properly incorporates all Federally applicable requirements for the source unless such modeling is otherwise required by EPA rules or guidance.

If a source going through the restructuring process is also obtaining a new major NSR permit, the source generally will have to model and show compliance for any of the NSR regulated pollutants covered by the new NSR permit, and as otherwise required by EPA rules or guidance.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

AUG 0 2 2010

Mr. Michael Parrish
Office of Legal Services (MC 205)
Texas Commission of Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: EPA Comments on Rules Project Number 2010-007-116-PR

Mr. Parrish:

Thank you for providing us the opportunity to review and comment on the proposed revisions to 30 Texas Administrative Code (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification sections 116.13, 116.710, 116.711, 116.715-116.718, 116.720, 116.721, 116.730, 116.740, 116.740, 116.750, and 161.765 - Subchapter G Flexible Permits, and the proposed revisions to the Texas State Implementation plan (SIP). This proposed rulemaking revises TCEQ's flexible permit program rules in response to our June 30, 2010, disapproval of the program (75 FR 41312).

Please note that these comments do not constitute final determinations concerning approvability of the revisions to the Texas SIP. At this time, the only flexible permitting programs that have been established under federal rules are for major stationary sources and major modifications; they are the Plantwide Applicability Limits (PAL) in EPA's NSR reform rules, and those found in the *Operating Permit Programs; Flexible Air Permitting Rule* (74 FR 51418) published October 6, 2009. EPA cannot approve a SIP revision if it would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act. We are providing these comments to assist TCEQ in the development of regulatory language.

We look forward to working with the TCEQ as you move forward in responding to these comments and finalizing the revisions to the Texas SIP. If you have any questions, please call Mr. Stanley Spruiell of my staff at (214) 665-7212.

Sincerely yours,

Thomas H. Diggs
Associate Director for Air Programs
Multimedia Planning and
Permitting Division

Enclosure

Enclosure

1. Because TCEQ is proposing to delete the insignificant emissions factor in Subchapter G, the reference to it in the definitions of "Emission cap" and "Individual emission limitation" at 30 TAC 116.13, must be deleted.

2. Proposed 30 TAC 116.711(2)(M)((vii) must be revised as follows to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification:

   "(vii) if the flexible permit application includes facilities currently authorized by a Minor permit issued under Subchapter B of this chapter (relating to New Source Review Permits) the applicant shall identify any terms, conditions, and representations in the Subchapter B Minor permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit. The flexible permit application cannot include facilities currently authorized by a Major NNSR or PSD permit issued under Subchapter B of this chapter."

3. Proposed new 30 TAC 116.716(a)(2)(A) must be revised as follows to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification:

   "(2) emissions will be calculated for each facility within an emission cap as follows:

   (A) based on application of Minor best available control technology at expected maximum capacity;"

4. Proposed 30 TAC 116.716(a)(2)(B) must be revised to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification. As written, the introductory phrase, "if the permit is used to authorize" can be interpreted to allow PSD and NNSR major stationary sources and major modifications to be covered under a flexible permit.

5. Proposed new 30 116.716(a)(3) for NNSR major stationary sources and major modifications is not acceptable. As written, it can be interpreted that a nonattainment major stationary source or major modification can be covered under a separate emissions cap established under a flexible permit. No major stationary source or major modification can be authorized under a flexible permit. A major stationary source or major modification must be authorized under a PSD or NNSR SIP permit, as established in the SIP rules codified at 30 TAC 116.150 - 116.151 and 30 TAC 116.160, which EPA approved as meeting the requirements of Title I, Parts C and D of the Act and 40 CFR 51.165 and 52.166.

6. Proposed new 30 TAC 116.716(a)(4) must be revised to be clear that the emissions from facilities subject to PSD BACT and/or NNSR LAER cannot be included in the summation of the flexible permit's emission cap(s). Moreover, it must be clear that Minor NSR BACT determinations are required to be at least as stringent as the federal applicable requirement, e.g., SIP rule, NSPS, NESHAPS, and MACT. Please provide the

SIP rule that contains this requirement or submit the TCEQ rule for approval as a SIP revision.

7. Proposed new 30 TAC 116.718(b), second sentence, seems to exclude the holder of a flexible permit from having the documentation that a change is not a major modification if there is a PAL limit established for the pollutant. This makes no sense because a PAL is for Major NSR, not Minor NSR. Therefore, why is the holder of a Minor NSR Flexible Permit excluded from having this documentation? This sentence must be revised to ensure it is clear that a flexible permit cannot be used for a major stationary source or major modification.

8. Each individual unit covered under an emission cap must still meet at the very least, its specific emission limitation derived from a federal applicable requirement, e.g., a SIP rule, Minor NSR SIP BACT determination, NSPS, MACT, NESHAPS. A unit cannot violate its federal applicable requirement. An exception could be units that were previously grandfathered units not subject to any federal applicable requirement other than a Minor NSR SIP BACT determination made at the time of the issuance of the original flexible permit.

9. The TCEQ must delineate the definitions of "account," "facility," and "group of facilities" in Subchapter G. For example, proposed 30 TAC 116.711(2)(N) in Subchapter G uses "unit" for specification of the control technology for each unit to meet the emission cap and demonstration of compliance with all emission caps. The proposed Program contained in Subchapter G is not clear how a "unit" relates to the other terms contained in Subchapter G, "facility," "group of facilities," and "account."

   All four terms must be explained sufficiently so that it is clear why one (or more) is used in certain instances and not in other instances throughout Subchapter G. This is important to limit the boundaries of the emission cap to be an acceptable Minor NSR emission cap SIP program.

   Furthermore, proposed 30 TAC 116.716(a)(1) in Subchapter G provides for either a site-wide emission cap or a like-kind facilities cap. "Site" is defined in the Texas SIP as including "any property identified in the permit or used in connection with the regulated activity at the same street address or location." This definition is too broad and provides broad director discretion to delineate the boundaries of the site covered by the emission cap. Under this definition, a site-wide emission cap could cover all minor stationary sources and all minor modifications on the company's property.

10. For proposed 30 TAC 116.711(2)(M)(ii), (iv), and (vi), please explain why the identification does not include "in an account." Also, please explain why (ii) and (vi) should not require the identification of "each facility included in a 'group of facilities'."

11. Included together here are several comments regarding reference to "account" and "group of facilities". In 30 TAC 116.715(c)(7), last sentence, it must include a reference to "account." In 30 TAC 116.715(c)(10) it also must include a reference to "account." In proposed revised 30 TAC 116.716(d)(4) and in proposed new 30 TAC 116.718(c), they must include references to "account" and "group of facilities."

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 9, 2010

Alfredo Armendariz, Ph.D.
Regional Administrator
U.S. Environmental Protection Agency
1445 Ross Avenue Suite 1200
Dallas, Texas 75202-2733

Dear Dr. Armendariz,

I would like to take this opportunity to summarize the various activities that the Texas Commission on Environmental Quality (TCEQ) has undertaken over the past 10 months and to express concern about the direction that I perceive we are headed in the near future. Whether intended or not, I feel that we have lost some focus on the goals that the two agencies had agreed upon. Accordingly, I would like to ask that we realign our efforts to honor our past agreements.

On October 8, 2009, I met with you and representatives from Washington DC, and we agreed that the TCEQ would embark on a deliberate path to address the global issues that EPA has raised about our air permitting program. That meeting was followed up with a letter dated October 23, 2009, where we outlined this path in specific detail. The TCEQ has strived to meet every deadline and goal laid out in that letter.

The TCEQ has proposed and/or adopted rules regarding public participation, qualified facilities, and flexible permits and will propose rules regarding New Source Review (NSR) reform in just a few days (August 11, 2010). Agency staff has also entered into discussions with EPA related to our Title V permitting program in an attempt to increase transparency of new and re-issued Title V permits. The TCEQ has responded to approximately 26 of the 39 objection letters that have been filed against existing Title V permitting actions. In addition, TCEQ has submitted to you a proposal to address EPA's issues with Incorporation By Reference (IBR) and has conveyed that it is also working with industry representatives on other approaches to address your IBR concerns. Lastly, the TCEQ has submitted to you a proposal for companies to voluntarily "de-flex" existing flexible permits. The main goal of the "de-flex" proposal was, in a very quick time frame of approximately 60 to 90 days, to issue a permit with individual emission limits and to fully ground the revised permit within the State Implementation Plan (SIP) approved 30 Texas Administrative Code Chapter 116 Subchapter B rules of the agency. As an additional condition, the company would also be required to file an amendment to the agency where staff would review the application on a "look back" approach to reaffirm that there had

been no circumvention of both state and federal New Source Review that were in place at the time the permitted facilities were modified. To ensure transparency, the amendment application would be subject to our public participation rules where the public could review the alteration and amendment applications and TCEQ staff's evaluation of both steps of the "de-flex" process. The conceptual idea of this approach was to provide EPA with an enforceable federal permit with individual emission limits within 60 to 90 days and then to conduct the "look back" over a longer period of time while also involving the public.

I am sure you share our desire to resolve our issues and to allow Texas to continue down a path of improving the air quality of the state. However, I do have concerns that we are not focusing on our agreed-to path forward regarding rulemakings and that EPA has now changed its goals and is attempting to take the TCEQ down a different path. Regarding our rulemakings, it is time that we begin a meaningful dialogue on all of our rulemakings to ensure that the adopted rule packages will be supported and included into our SIP. We appreciate the written comments and the various discussions regarding these rules, but we must begin an aggressive schedule of dialogue between the agencies so that we can get our rules approved by your agency. It appears that our rulemakings have taken a back seat instead of the forefront. Looking back at our October 2009 agreements, the agency rulemakings were the focus of those agreements, and we should make every effort to continue that as our primary goal.

As I mentioned above we have also submitted responses to your Title V objections, and we will continue to modify our permits as needed to confirm that our Title V permits are consistent with the federal program. Except for your initial letter dated June 10, 2010 where you raised your concerns about IBR, we have only received one formal response to our objection responses [Southwest Public Service Company, Harrington Station Power Plant (Permit No. O15)], received July 2, 2010. In that response letter, two of the three issues that EPA objected to were resolved and the third issue (relating to IBR) has also been resolved due to further detailed discussions with EPA. We are making every effort to resolve these matters, but we need EPA to work with the TCEQ to seek final resolution on these responses so that we have a clear understanding on how we can move forward and continue our goal of issuing federal operating permits without EPA objections.

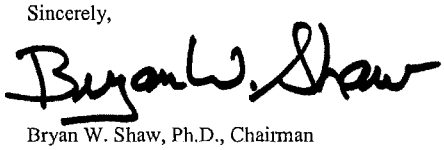
In regards to our "de-flex" proposal, you recently countered our proposal with an option using the Title V Federal Operating permit as the mechanism to require companies to "de-flex" their existing minor NSR Title I permit authorization. As you have been informed by TCEQ staff, this process will be quite lengthy taking up to two to five years for an applicant to obtain a federally enforceable permit. Additionally, this process will require the TCEQ to duplicate its resource efforts because the Title V permit will have to be revised twice: first to address EPA's concern with IBR of Major NSR provisions and then again after a permit has gone through the "de-flex" process. The TCEQ option to "de-flex" would have only required the Title V permit to be revised once. Notwithstanding the agency's workload issues, it is not acceptable for the TCEQ to agree that companies should be forced to forego a federally enforceable permit pursuant to SIP approved rules for years when existing rules provide a mechanism for this to occur within

months. The TCEQ would still require companies to address all other EPA expectations such as public participation and "look back."

The difference is that our proposal is more efficient for the companies, TCEQ and EPA. Our proposal provides for a federally enforceable permit with individual emission limits within 60 to 90 days, instead of two to five years. Next, the company would also be required to file an amendment where staff would review the application on a "look back" approach to reaffirm that there had been no circumvention of both state and federal law. As TCEQ staff has discussed with EPA, this part of our proposal is expected to take two to five years, but at least your agency has an enforceable permit with individual emission limits while we pursue this "affirmation process."

I think EPA's proposal will compel companies to determine their own solution to "de-flex" their permits under our existing SIP approved rules. Those solutions may not meet your expectations, and the TCEQ will be forced to evaluate these applications, as well. I suggest we meet as soon as possible to re-focus on the plan to address the global issues that EPA has raised.

Sincerely,



Bryan W. Shaw, Ph.D., Chairman
Texas Commission on Environmental Quality

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

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,

Al Armendariz
Regional Administrator

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
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Bryan W. Shaw, Ph.D.
Chairman
Texas Commission on Environmental Quality
Post Office Box 13087
Austin, TX 78711-3087

Dear Dr. Shaw:

Thank you for your letters of August 2, 2010, about new source review (NSR) permitting in Texas after January 2011, and of August 6, 2010, about Texas Commission on Environmental Quality (TCEQ) air pollution permits programs. Since my appointment as regional administrator on November 30, 2009, I have placed a high priority on resolving the air permitting and state implementation plan disagreements that have existed for many years between TCEQ and the U.S. Environmental Protection Agency (EPA).

In your August 6, 2010, letter you discussed issues related to state implementation plan (SIP) rulemakings, converting flexible permits, and incorporation by reference (IBR) in Title V operating permits. I feel each deserves a full response, so I will structure this letter in that manner.

SIP Rulemakings

As you know, EPA is subject to a consent decree and legal-settlement with industry litigants ("BCCA agreement") to act on a series of SIP packages, most of which were sent to EPA by TCEQ and its predecessor agencies long before you and I were in our current positions. While the BCCA agreement has put EPA under an aggressive workload schedule to act on Texas SIP revisions, acting on these SIP packages will provide clarity that is well overdue.

Spurred by the BCCA agreement, collaborative efforts between our two agencies to restore the core NSR program are underway. For example, EPA was pleased to be able to work with TCEQ on public-participation rules. I am encouraged by the positive direction of the revised rules. For instance, adding a notice and comment period on draft NSR permits once the technical review is complete will give all interested parties an improved opportunity to provide input. In addition, my staff was glad to participate in conference calls and meetings about TCEQ's recent work to reinsert the federal definition of best available control technology (BACT) into the TCEQ's prevention of significant deterioration (PSD) permitting rules. While reinsertion of a definition alone may not be sufficient to ensure that TCEQ processes comply with federal requirements, it is an

essential move in the right direction. The work on these two rule submittals is vital to help repair the core NSR permitting program at TCEQ. We look forward to working with the state as it moves to address additional issues with the core program, including the NSR Reform regulations.

I must contrast the work on these rules, which are focused on the core NSR permitting program of the TCEQ, to other rule submittals. On April 30, 2010, we finalized our disapproval of the Qualified Facilities submittal, and on June 30, 2010, we finalized our disapproval of the Flexible Permit submittal. Unlike public participation or the federal definition of BACT, the Flexible Permitting Program and the Qualified Facilities exemption are not required core elements of the federal Clean Air Act (CAA) or components needed for the approved elements of the Texas SIP to operate.

I know that TCEQ is considering a new state rule package, to create another "flexible" permit program. As noted in Assistant Administrator McCarthy's November 12, 2009, letter to Mark Vickery, among the requirements that would have to be met before the Agency could consider the approvability of a new flexible permit program are CAA Sections 110(a) (2) (c) and 110(l). Section 110 (a) (2) (c) of the Act requires that SIP programs have enforceable emission limitations and other control measures to meet attainment of the National Ambient Air Quality Standards (NAAQS). Section 110 (l) further requires that if a state submits any revision to its SIP (including alternative preconstruction permitting options), then it must demonstrate how this revision would not interfere with any applicable requirement concerning attainment, reasonable further progress (RFP), or any provision of the CAA.

A rigorous technical demonstration is required, as discussed in the November 12, 2009, letter to Mark Vickery. Obviously, because of the requirements of the CAA, EPA cannot guarantee that a new SIP submittal from any state, whether for a new flexible permitting program or for any other purpose, will obtain EPA approval, nor opine on how long approval could take if revisions to submittals are necessary.

While our primary concern is restoring the core NSR program in Texas, my staff sent preliminary comments on the new flexible permitting program draft state rulemaking to TCEQ on August 2, 2010, in which we identified some major concerns. We understand that TCEQ may eventually adopt a final rule and send it to EPA for evaluation and consideration for incorporation into the SIP. All SIP-approved states have the prerogative to propose changes or amendments to their SIPs, and EPA will perform a full evaluation of the new program if it is submitted to the Agency. I must be frank that the demonstration required for a new flexible permitting program to get approval will not be easy if the new program has common elements of – and/or is implemented in a manner similar to – the prior program that we just disapproved.

Our agencies also need to consider the connection, or lack thereof, between future "flexible" rulemaking and the current holders of flexible permits issued under the previous program. The 125 existing flexible permits that were issued under the previous program do not and will not have an automatic connection to any future "flexible"

permitting regime. Even if the state were to develop a flexible permit program that met federal requirements, and that program was approved into the SIP, sources would still have to transition their existing flexible permits into permits that complied with the federally approved program.

In your letter of August 6, 2010, you stated that you believed that we had lost focus on rulemaking as the primary goal for both agencies to reform TCEQ's air permit program. While rulemaking is an essential leg of the agreed pathway, reform of the current TCEQ permitting program is just as important. Indeed, in November 2009, Assistant Administrator McCarthy stressed the need to address both rulemaking and reform of the existing program. Since then, I have made it clear to you in our conversation on March 2, 2010, and in subsequent conversations that, in addition to rulemaking, reform of the current TCEQ permitting program is just as critical to give the business community and the public the regulatory certainty they require.

As a result, I believe that we should focus our collective resources on addressing the core Texas NSR program and assisting the 125 flexible permit holders' transition into that program. There are already approximately 1700 holders of regular (non-flexible) Texas NSR air quality permits, including many major refiners, utilities, chemical companies, and large federal facilities. In addition we also need to correct issues we have identified in our Title V permit objections, such as TCEQ's use of certain permits by rule (PBR), and the use of IBR.

Transitioning Flexible Permits

I want to thank Mr. Vickery and the dedicated members of your staff for submitting a proposal to us on May 24, 2010, on how to transition flexible permits. I committed to Mr. Vickery and to Commissioner Rubinstein that if a rigorous program was developed by the TCEQ, in consultation with EPA, then I do not intend to initiate permit objections, the reopening, revising, or revoking of permits, or requests for new federal permit applications for companies transitioning their permits in that process. The TCEQ proposal has initiated a lot of discussion within the Agency, and I know my staff has talked about its elements with their TCEQ counterparts on numerous occasions.

EPA has many concerns about using an "alteration" as a first step in any two-step process, including a lack of transparency and enforceability. We could spend many months of valuable time trying to work out a way that the use of an alteration in a two-step process might be acceptable to create interim permit limits, but there is no guarantee that it would be successful. We believe that better alternatives exist, and EPA and TCEQ staff is working on a process that establishes federally-applicable, unit-specific limits, allows for public comment, and gives regulatory certainty to permit holders. Those discussions seem promising, and we are committed to working with you to define such a process.

In parallel with that effort, EPA will soon issue a federal audit program that will allow flexible permit holders to determine the federally-applicable requirements for their

facilities, and simultaneously receive an enforcement covenant from EPA for any circumvention issues that are identified during the audit.

As I have told numerous industry stakeholders, my primary goal is to get good permits and to do so through processes that involve opportunities for public review and comment.

The most critical elements of good transitioned permits will be the unit-specific federally-applicable requirements, and determining these requirements will require an examination of the unit's operational and permitting history. This will be the core element of the federal audit program and I am encouraged that TCEQ has engaged us in a discussion of the kind of review that a TCEQ-led program should require from permit holders so that the process has EPA concurrence.

I sent a letter on August 9, 2010, to Commissioner Rubinstein, in which I outlined the steps I felt a proper permit transition should include. As we discussed during our meeting last Tuesday, EPA looks forward to continued dialogue on this issue with TCEQ.

Incorporation by Reference in Title V Permits

EPA has objected to an unprecedented number of TCEQ draft Title V operating permits, partly because for many of them TCEQ did not explicitly write all the federally applicable requirements in the Title V permits. Instead, the Executive Director's policy has been to only refer to the previously-issued NSR permits in a plain list of permit ID numbers, the process of IBR.

I want to make sure that EPA's position on this matter is clear. EPA expects that on the face of the Title V permit, TCEQ will list the applicable emissions limitations and standards including those operational requirements from underlying major NSR permits that assure compliance with all applicable requirements. IBR of these requirements is not appropriate, not by TCEQ nor by any other state agency. IBR of major NSR permits into TCEQ-issued Title V permits, without bringing emissions limits forward onto the face the permit, was not approved as a part of the Texas Title V program and does not comply with the May 28, 2009, orders from Administrator Jackson regarding two Texas-issued Title V permit petitions. EPA intends to continue to object to Title V permits that utilize IBR in this manner for major NSR permits. This is not a new message. In her October and November 2009 letters, Assistant Administrator McCarthy made it clear that while EPA would work with TCEQ on its SIP packages, the Agency would also continue to review permits and raise objections if those permits failed to meet the requirements of the CAA.

In your August 6, 2010, letter, you stated that TCEQ had responded to approximately 26 of the 39 objection letters, and that you had submitted a proposal to address IBR issues. However, as your staff is aware, those responses did not address our

IBR concerns. We have provided to TCEQ examples of Title V permits from several other state operating programs, including states within Region 6 such as Louisiana. These states do not use IBR for their major source permits in the manner TCEQ does, and the Agency is not objecting to Title V permits in these states on IBR grounds. It is unclear to me why TCEQ continues to send draft Title V permits to EPA, especially and including recent proposed draft permits for facilities that we have already objected to once, when those permits do not list the underlying requirements from major NSR authorizations, and instead use IBR.

In your letter, you wrote that the IBR issue with the Harrington Station Power Plant had been solved in discussions between TCEQ and EPA. After reviewing the matter with my staff, I agree that the issue with this applicant has been largely resolved. The resolution of the Harrington permit, however, has not led to resolution of IBR deficiencies for the remaining 1700 Title V permit holders. In fact, the Executive Director continues to issue Title V permits that do not comport to the Harrington model or resolve the IBR deficiencies. Likewise, TCEQ's responses to EPA's Title V objections on IBR do not follow Harrington or resolve the IBR deficiencies. It is worth noting that Harrington was only resolved because of several direct discussions between EPA and the permit applicant, as well as discussions between EPA, TCEQ, and the permit applicant. The applicant had to directly request that TCEQ include a non-IBR table of all the federally applicable requirements in a new permit because of its desire to get a federally-consistent permit.

I was also extremely concerned to see that in the new proposed draft Title V permit for the Citgo facility issued on August 13, 2010, TCEQ defended its use of IBR of major NSR permits. The issuance of the Citgo permit and the positions set out in that proposal represent a severe obstacle to continued progress on IBR issues, and I would urge you to reconsider them.

It is regrettable that IBR has become such a stubborn issue to resolve between our agencies. One of the clear goals of the Title V program was to provide regulatory agencies, permit holders, and the public with transparent and inclusive operating permits. Inappropriate use of IBR of underlying requirements undermines that key goal. If TCEQ would include additional narrative information like that provided in Louisiana permits, or detailed tables sorted by unit with appropriate monitoring, reporting, and recordkeeping, then we could quickly make progress and instead focus attention on the more difficult issues related to air permitting.

I would be remiss if I did not bring to your attention that, in light of the large number of EPA objections to Title V permits, TCEQ's practice of issuing permits inconsistent with what EPA approved in the Title V program (*even after* those concerns have been brought to TCEQ's attention in writing), and the recent development of EPA now beginning to request federal Title V permit applications for facilities in Texas, we now feel compelled to consider our CAA authorities related to programmatic deficiencies in the TCEQ Title V program.

Conclusion

The Clean Air Act has a long track record of success in its federal/state partnership structure. EPA is anxious to work with TCEQ on the matters outlined in this letter. TCEQ already has a core NSR program and an approved Title V operating permits program. Their proper legal underpinnings and correct implementation of these approved programs are cornerstones of a good EPA/TCEQ relationship. Where there are regulatory or implementation concerns with the core programs, solving these problems is of upmost priority for the Agency.

As you know, TCEQ and EPA staff have been meeting and communicating on a regular basis about TCEQ air permitting programs. I am encouraged that serious dialogue continues between our EPA and TCEQ colleagues and I look forward to continuing to work with you and your staff to address these important issues. Please contact me at (214) 665-2100 if you have any questions.

Sincerely,

Al Armendariz
Regional Administrator

cc: Mr. Mark Vickery
Executive Director, Texas Commission on Environmental Quality

Mr. Buddy Garcia
Commissioner, Texas Commission on Environmental Quality

Mr. Carlos Rubinstein
Commissioner, Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 4, 2010

Attn: Docket ID No. EPA–HQ–OAR–2010-0107
U.S. Environmental Protection Agency
Air and Radiation Docket and Information Center
1301 Constitution Ave., NW
Washington, DC 20460

Re: Proposed Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-7; and Proposed Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-8

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to respond to the U.S. Environmental Protection Agency (EPA) announcements of a public comment periods published in the September 2, 2010, edition of the *Federal Register* entitled: "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," and "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan"

Enclosed, please find the TCEQ's detailed comments relating to the EPA actions referenced above. If you have comments or questions concerning the enclosed comments, please contact John M. Minter, Environmental Law Division, Office of Legal Services, (512) 239-0663 or jminter@tceq.state.tx.us.

Sincerely,

Mark R. Vickery, P.G.
Executive Director

Enclosure

Texas Commission on Environmental Quality Comments on Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions,
Finding of Substantial Inadequacy and SIP Call,
Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-7
Federal Implementation Plan (FIP),
Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-8

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call and (SIP Call)[1] and Federal Implementation Plan (FIP)[2].

I. Background

EPA's rule to phase in PSD and Title V permitting of greenhouse gas (GHG) sources at thresholds significantly higher than statutorily allowed will become effective January 2, 2011. The proposed SIP Call identifies thirteen states, including Texas, that EPA represents lack authority to issue PSD permits in conformance with the Tailoring Rule's requirements. EPA proposes to find their respective SIPs "substantially inadequate" under Federal Clean Air Act (FCAA) section 110(k)(5) and calls on those states to submit SIP revisions to correct the inadequacy within 12 months of the rule becoming final. Absent such revisions, EPA will impose a federal implementation plan (FIP) – such as the one proposed in the FIP Rule – and will assume permitting authority for GHGs in those states.

Under the proposed SIP Call, a state may elect a deadline for submitting corrective SIP revisions that is shorter than the full 12 months. The proposal contemplates deadlines as short as three weeks. EPA explains that the purpose of establishing a shorter deadline is to ensure that a FIP is available to prevent a gap in PSD permitting. For example, rather than waiting a full year before EPA undertakes to federalize the

[1] 75 *Fed. Reg.* 53892 (September 2, 2010).
[2] 75 *Fed. Reg.* 53883 (September 2, 2010).

GHG permitting program, it may do so in a matter of weeks for those states that elect a shorter deadline.

The FIP that EPA proposes will apply federal PSD requirements found in Title 40 Code of Federal Regulations (CFR) § 52.21 to GHG emissions only. States that have a FIP imposed will remain the permitting authority for all other pollutants. EPA invites affected states to accept delegation of authority to implement that FIP, issuing GHG permits under federal law.[3]

II. General Comments

In EPA's rush to regulate GHG from stationary sources, it is expediting this SIP Call and FIP through at an unprecedented pace; with little time to deliberate the appropriateness or legality of these actions. In little more than one year, EPA has determined that a pollutant that has never been regulated before under the FCAA (or Act) should be done beginning January 2, 2011, without proper guidelines on what controls should apply and how states are to implement this program. EPA acknowledges that subjecting stationary sources of GHG to permit requirements according to the Act's specific thresholds is "absurd" yet EPA is on a course to do just that. TCEQ is concerned that the proposed SIP Call and FIP are merely additional elements of a scheme that short-circuits the statutory process for regulating major stationary sources.

In comments on EPA's Endangerment Finding, the Light-Duty Vehicle Rule, the Johnson Memo Reconsideration and the Tailoring Rule, TCEQ has consistently questioned the legality of EPA's iterative approach to regulating GHGs at major stationary sources. The basic purpose of the PSD program is to safeguard the maintenance of a National Ambient Air Quality Standard (NAAQS or Standard) in areas of the country designated for a NAAQS as attainment or unclassifiable.[4] EPA to date has not established a Standard for GHG, therefore PSD does not and should not apply. Congressional intent not to cover GHG under the Act is clear. Pursuant to the FCAA

[3] 75 *Fed. Reg.* at 53890.
[4] 42. U.S.C. § 7471, CAA § 161

major source thresholds are set at levels that make permitting such sources for GHG unfeasible.[5] Buildings with small boilers such as schools, apartment complexes, and office buildings are potentially subject to PSD permitting for GHG under the Act's statutory limits. Furthermore, SIP control strategies and corresponding permitting programs are structured to address pollutants affecting a localized and discrete area. GHG are uniform in concentrations throughout the environment. They do not lend themselves to be controlled through the CAA's SIP statutory and regulatory framework. EPA freely acknowledges that the regulation of GHG is irreconcilable with the FCAA's stationary source thresholds, and it relies on a series of invalid legal theories to support its re-writing of the express language of the statute to raise the GHG thresholds to levels it deems reasonable.[6]

Both the SIP Call and FIP are unlawful because the Tailoring Rule itself is unlawful. The Tailoring Rule is contrary to the express statutory commands of the FCAA and is subject to several challenges, including one by the State of Texas, in the United States Court of Appeals for the District of Columbia Circuit. If that Court stays implementation of the Tailoring Rule, EPA should immediately suspend the actions to which these comments are addressed.

III. Specific Comments

In the SIP Call proposal, EPA has compiled a "Presumptive SIP Call List" – a listing of states with SIPs that do not appear to apply PSD permitting to GHG sources (Table IV-1).[7] EPA requests information from these states about their authority, or lack

[5] "Major Emitting Facility" means a stationary source of air pollutants which emit or has the potential to emit 100 tons per year or more of any air pollutant if one of the sources listed in the definition, or any other source with the potential to emit 250 tons per year or more of any air pollutant. 42 U.S.C. § 7479(1), CAA § 169(1).

[6] EPA's flawed legal position on GHG regulation under the Clean Air Act is explained in detail in Texas's Motion for Stay of the Tailoring Rule. State of Texas' Motion for a Stay of EPA's Greenhouse Gas Tailoring Rule, *State of Texas et.al. v. United States Environmental Protection Agency*, Case No. 10-1222, United States Court of Appeals (D.C. Circuit), consolidated under *Southeastern Legal Foundation, Et. Al. v. United States Environmental Protection Agency*, Case No. 10-1131.

[7] 75 *Fed. Reg.* at 53899.

thereof, to regulate GHG under their respective PSD programs; about whether and when they will submit SIP revisions; and about the SIP Call deadline each state selects.[8]

In response to EPA's request for information, TCEQ refers EPA to correspondence from the Texas Attorney General to Administrator Jackson dated August 2, 19, and 30, 2010, attached hereto as Exhibits A – C. TCEQ reiterates that EPA's scheme to regulate GHG sources under the PSD program, including its aggressive schedule for doing so as outlined in the proposed SIP Call and FIP, are based on an impermissible interpretation of the FCAA. EPA cannot set different thresholds for GHG sources than those found in the Act, nor can it impose permitting through this program without first setting a NAAQS and determining the attainment status of every portion of the country.[9]

EPA attempts to make a case for a FIP for the presumptive SIP Call List in order to avoid a gap in PSD permitting for GHG sources after January 2, 2011. EPA proposes language that states such as Texas can use to request an earlier deadline for submission of a PSD SIP revision, so that a finding of substantial inadequacy and FIP can be imposed by EPA.[10] This suggestion puts TCEQ on a significantly earlier clock to implement a GHG permitting program that we do not believe is legally allowed under the Act, or face the potential loss of federal grant funds.[11] The SIP Call preamble even recognizes that not objecting to any earlier deadline "is contrary to the State's self-interest because an earlier deadline typically increases burdens...".[12]

Even if TCEQ were inclined to accept a premature FIP and request an earlier deadline for revising its SIP, TCEQ is not confident that a FIP will resolve the issue of

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[8] *See* 75 *Fed. Reg.* at 53896, 53901.

[9] In fact, the Center for Biological Diversity and 350.org have already petitioned EPA to complete a NAAQS for GHG. See *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act.* Dec. 2, 2009. http://www.biologicaldiversity.org/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap12-2-2009.pdf. There has been no response from EPA to date on this petition.

[10] 75 *Fed. Reg* at 53902

[11] See CAA § 179(a) (42 U.S.C. § 7509). "(a) For any implementation plan or plan revision required under this part *(or required in response to an finding of substantial inadequacy as described in section 7410(k)(5) of this title,* ..... unless such deficiency has been corrected within 18 month, after the finding...one of the sanctions referred to in subsection (b) shall apply,.... *In addition* to any other sanction applicable as provided under this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7409 of this title."

[12] 75 *Fed. Reg.* at 53902.

PSD permitting uncertainty. EPA's stated purpose of an early deadline is to impose a FIP as soon as possible to provide certainty to industry that permits for new construction and modifications can be issued under a PSD program.[13] However, EPA has yet to issue the long-awaited and much-discussed BACT guidance that permitting authorities must follow in order to issue these permits. This is guidance that EPA, in the final Tailoring Rule, assured states was forthcoming, would undergo notice and comment, and would "culminate in training courses for state, local and tribal permitting authorities."[14] Through the Clean Air Act Advisory Committee (CAAAC) process, EPA has solicited input from the many affected stakeholders from the CAAAC Climate Change Workgroup. TCEQ has participated in this workgroup and its development of report to aid EPA's development of BACT guidance from its inception in October 2009. What is clear from this workgroup is that consensus on the definition of BACT and even the scope of BACT review does not exist. While EPA has committed to taking the comments of these stakeholders into consideration in the development of BACT guidance, the final Phase II report has not been deliberated by the CAAAC in order to provide this report to the EPA. It is highly unlikely that EPA will be able to finalize any guidance that takes into account all the diverse concerns raised during the workgroup or during the promised comment period.[15] Assuming the guidance is available by January 2, 2011, the only certainty for state- or EPA-issued permits will be challenges disputing the BACT determination.[16]

Any forthcoming guidance will also be of limited usefulness until the control technology is proven: i.e., a source implementing BACT is built. Thus, on January 2 of next year, applicants may know where to submit their applications, but will not know what controls to propose or be subject to. Determining the appropriate "control" of

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[13] 75 *Fed. Reg.* at 53890 and 53901-53902.

[14] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 *Fed. Reg.* 31514, 31589 (June 3, 2010).

[15] *See* http://www.epa.gov/air/caaac/index.html, the next meeting is October 5 and 6, 2010: It is noteworthy to mention that the comment deadline for the SIP Call and FIP is October 4, 2010, thereby precluding permitting authorities to expand on concerns regarding the uncertainty of BACT for PSD GHG as part of these proposed rulemakings.

[16] One of the first proposed power plants to include enforceable GHG limits has already been challenged. *See* "Planned California Power Plant Would Include GHG Limits", *New York Times*, Feb. 4, 2010; Chabot-Las Positas Community College District Petitions U.S. EPA to Deny Calpine Power Plant Permit to Build Near College Campus, Press Release, April 2, 2010, http://www.clpccd.org/newsroom/documents/Final-PowerPlantReleaseintheEmailSmallerFileSize.pdf

carbon dioxide (CO_2) emissions, in particular, is challenging because CO_2 is a product of combustion. Energy efficiency, which has been discussed by the CAAAC workgroup as potential BACT for GHG emissions, measures may reduce the power demand, and thus the CO_2 emissions. However, questions regarding energy efficiency are anticipated concerning how broadly to examine energy efficiency at a plant or even at the demand-side of the source. Outside of eliminating the production of CO_2, there is not a clear control technology that would actually eliminate CO_2. CO_2 sequestration as a control technology option requires its own significant power demand, as much as 20% -30% increase at a coal-fired power plant. If a plant must be over-sized to accommodate this energy demand increase, other pollutants are increased as well. Where geologic sequestration is unavailable for a potential source, BACT options will be limited and even more uncertain particularly given the lack of guidance on this issue.

Industry should be particularly concerned by EPA's lack of resources and experience to issue these permits, which is made apparent by its request for states to take delegation of GHG PSD permitting under any imposed FIP. The result of all of this is that, even under a FIP, it is unlikely any construction of new major GHG sources or major modifications will commence in the foreseeable future.

The proposed SIP Call requests comment on EPA's interpretation of 'reasonable deadline' under FCAA section 110(k)(5).[17] EPA's proposed deadline of 12 months is not reasonable, and does not comport with the Act. Texas's PSD program is a SIP-approved program, and is subject to the requirements in 40 CFR Part 51. These regulations provide that if PSD provisions in a SIP are substantially inadequate, the plan must be revised within three years. More specifically, 40 CFR § 51.166(a) provides: "Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." The Tailoring rule amends section 51.166 and adds a new definition for "subject to regulation" to incorporate higher thresholds for GHGs, therefore section 51.166 applies.

[17] 75 *Fed. Reg.* at 53901.

EPA is improperly using its SIP Call authority in FCAA § 110(k)(5) when it should be following the procedures in 40 CFR § 51.166. EPA cannot reconcile this rule with what it is doing in the SIP Call under the guise of FCAA § 110(k)(5). The Texas SIP is not substantially inadequate to otherwise comply with the Act. EPA has not given ample time to determine inadequacy of the SIP. EPA calling on states to revise their SIPs "by reason of an amendment to this section," is not a substantial inadequacy. Therefore the federal PSD rules in Part 51 apply, and Texas and other state in Table VI-1 must be given up to 3 years to revise their SIPs.[18]

IV. Conclusion

EPA proposes this SIP Call and FIP as the solution to a problem of its own making. As we stated in our comments to the Tailoring Rule, and repeat here, EPA actions magnify the inappropriateness of regulating GHG under the FCAA and are a further attempt to alter the literal application of the Act. The proposals by EPA are an attempt to write policy that should be contemplated by Congress. EPA's actions exceed its administrative authority to execute the laws that Congress has written. The legally-flawed reliance on section 110(k)(5) as a basis for a SIP Call and lack of regulatory certainty on what constitutes BACT for GHG emissions, as well as the practical effect of no new major construction or modification under state-or EPA-issued GHG permits in the near future, compels TCEQ to urge the Administrator to withdraw these proposals.

[18] *See* Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), Final Rule, 73 *Fed. Reg.* 28231, May 16, 2008: EPA specifically said it was following the same process it did in NSR reform, interpreting the Act and its rules to give States 3 years when changes are made to NSR regulations citing to section 51.166; See also 2002 Major NSR reform: actions on State submittals up to 3 years after changes to rules; EPA stated CAA is silent on how much time to give states when revising SIPs for rule changes, not changes in NAAQS. 67 *Fed.Reg.* 80186, December 31, 2002.

ATTACHMENT

A

August 2, 2010

Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Mail Code: 1101A

By fax (202.501.1450),
email (jackson.lisa@epa.gov),
U.S. mail, and hand delivery

Dr. Alfredo "Al" Armendariz
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
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By fax (214.665.7113),
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Dear Administrators Jackson and Armendariz:

In order to deter challenges to your plan for centralized control of industrial development through the issuance of permits for greenhouse gases, you have called upon each state to declare its allegiance to the Environmental Protection Agency's recently enacted greenhouse gas regulations—regulations that are plainly contrary to United States law. 75 Fed. Reg. 31,514, 31,525 & 31,582 (June 3, 2010) (hereinafter, the "Tailoring Rule"). To encourage acquiescence with your unsupported findings you threaten to usurp state enforcement authority and to federalize the permitting program of any state that fails to pledge their fealty to the Environmental Protection Agency (EPA).

On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.

You have declared that EPA's decision to enact automobile tailpipe emission limits for greenhouse gases pursuant to Title II of the federal Clean Air Act renders such gases immediately "subject to regulation" for all purposes under that Act, including the

Title I Prevention of Significant Deterioration (PSD) preconstruction permitting program and the Title V operating permit program. Simultaneously, however, you recognize that permitting greenhouse gases under the Act is "absurd." In the Tailoring Rule, EPA states: "Here, we have determined, through analysis of burden and emissions data as well as consideration of extensive public comment, that the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 should be considered 'absurd results.'" 75 Fed. Reg. at 31,517. We agree.

In order to avoid the absurd results of EPA's own creation, you have developed a "tailoring rule" in which you have substituted your own judgment for Congress's as to how deep and wide to spread the permitting burden. Notably absent from your rules is any evidence that they would achieve specific results; in fact, you assiduously (and correctly) avoid ascribing what environmental benefit may be achieved by mandating permits to emit a uniformly distributed, trace constituent of clean air, vital to all life, that is emitted by all productive activities on Earth.

Instead of acknowledging that congressionally set emission limits preclude the regulation of greenhouse gases, you instead re-write those statutorily-established limits stating, "For our authority to take this action, we rely in part on the 'absurd results' doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs. We also rely on the 'administrative necessity' doctrine, which applies because construing the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would render it impossible for permitting authorities to administer the PSD provisions." 75 Fed. Reg. at 31,541-42.

Because of your view that greenhouse gases become "subject to regulation" on the first day it becomes illegal to manufacture a car not meeting the new tailpipe emission limits for greenhouse gases (on January 2, 2011), you insist that states may not issue permits after that date without considering greenhouse gas emissions. Your view is not enough. Applicable law provides to the contrary.

Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including, "any pollutant that otherwise is subject to regulation under the [federal Clean Air Act]." 30 TEX. ADMIN. CODE § 116.12(14)(D). The rules of the Texas Commission on Environmental Quality (TCEQ), like the EPA's rules, do not define the phrase "subject to regulation." In its Tailoring Rule, however, the EPA promulgated—without notice—a definition of the previously undefined term, "subject to regulation." This new definition (attached hereto) specifically relates to the regulation of greenhouse gases, spans several *Federal Register* columns, and is over 600 words in length. Specifically, in the EPA's first phase of greenhouse gas regulation, this new definition raises the PSD permitting threshold for new and modified "major" sources of other pollutants from 100 tons per year to 75,000 tons per year (tpy) of CO_2 equivalent (CO_2e) emissions.

In the Tailoring Rule you have asked TCEQ to report to you by August 2, 2010, whether it would "interpret" the undefined phrase "subject to regulation" in TCEQ Rule 116.12 consistent with the newly promulgated definition in EPA Rule 51.166, in all its specifics and particulars. That is, you have effectively requested that Texas agree to regulate greenhouse gases in the exact manner and method proscribed by the EPA.

In other words, you have asked Texas to agree that when it promulgated its air quality permitting program rules for pollutants "subject to regulation" in 1993, that Texas really meant to define the term "subject to regulation" as set forth in the dozens of paragraphs and subparagraphs of EPA Rule 51.166, first promulgated in 2010.

The State of Texas does not believe that EPA's "suggested" approach comports with the rule of law. The United States and Texas Constitutions, United States and Texas statutes, and EPA and TCEQ rules all preclude TCEQ from declaring itself ready to require permits for greenhouse gas emissions from stationary sources as you request.

We start with constitutional difficulties. As noted, Texas' stationary source permitting program encompasses all "federally regulated new source review pollutants," including "any pollutant that otherwise is subject to regulation under the [federal Clean Air Act]." 30 TEX. ADMIN. CODE § 116.12(14)(D). This delegation of legislative authority to the EPA is limited solely to those pollutants regulated when Texas Rule 116.12 was adopted (1993) and last amended (2006). As the Texas Supreme Court has explained, "The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act." *Trimmer v. Carlton*, 296 S.W. 1070 (1927). Thus, in order for Texas Rule 116.12 to pass constitutional muster, it must be limited to adopting by reference the definition of "subject to regulation" in existence when Rule 116.12 was last amended in 2006. In other words, Texas Rule 116.12 cannot delegate authority to the EPA to define "subject to regulation" in 2010 to include pollutants that were not "subject to regulation" in 2006.

For example, the Texas Solid Waste Disposal Act defines "hazardous waste" as "solid waste identified or listed as hazardous waste by the administrator of the Environmental Protection Agency under the federal Solid Waste Disposal Act." When this delegation of legislative authority was challenged, it was upheld by Texas' highest court, but only because the court found that "the reference to the federal act in section 361.003(15) adopts by reference the act and the regulations promulgated thereunder which were in effect on July 30, 1991, the date section 361.003(15) of the Texas Solid Waste Disposal Act was enacted . . ." *Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.—Austin 1998, pet. ref'd). As the *Elliott* court explained, "We acknowledge that section 361.003(15) may be read to say that the legislature has delegated to the EPA the power to define hazardous waste under the THSC [Texas Health & Safety Code] and that definition may change from time to time at the will of EPA without intervention or guidance from the legislature." The court noted, however, that "[s]uch a construction would in fact place in doubt the constitutionality of this provision," and therefore, the

court would "not construe, in this case, the adopting statute as attempting to adopt future laws, rules or regulations of the federal government." The same analysis applies here: TCEQ Rule 116.12 cannot delegate authority to the EPA to define "subject to regulation" in 2010 to include pollutants that were not "subject to regulation" in 2006.

In addition to constitutional limitations, the TCEQ is also precluded from adopting the EPA's newly promulgated definition of "subject to regulation" pursuant to the express terms of the Texas Government Code, which requires public notice of agency rulemaking. *See, e.g.,* TEX. GOV'T CODE § 2001.023 ("A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule."). Likewise, TCEQ rules mandate notice and an opportunity to be heard when substantive rules are enacted. *See, e.g.,* 30 TEX. ADMIN. CODE § 20.3. Like Texas law, federal law also requires notice and hearing before Texas can revise its State Implementation Plan (SIP). *See* Clean Air Act § 110(l); 42 U.S.C. § 7410(l) ("Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing."). When the TCEQ promulgated Rule 116.12 in 1993, or even when it last amended the rule in 2006, it had no intention of enacting a permitting program for greenhouse gases. Consequently, TCEQ had no reason to (nor did it) give public notice of any such intent. Obviously, Texans concerned with greenhouse gas permitting could not have known to participate and comment on the decision to require permits for pollutants "subject to regulation" in 2006, when the EPA first discovered greenhouse gases were "subject to regulation" in 2010. It should go without saying that the nearly infinite expansion of Texas' permitting programs to include greenhouse gases with no state-level rulemaking at all would not satisfy Texas or federal law requiring notice and an opportunity to be heard.

Perhaps more fundamentally, however, the EPA itself has not undertaken a proper rulemaking to require all SIPs to include the definition of "subject to regulation" it has just promulgated. This revision to EPA's Part 51 rules—which lay out the requirements for approvable SIPs—were preceded by no proposal whatsoever. Rather, this new requirement first appeared in the EPA's final notice announcing the "Tailoring Rule," and accordingly, has not been properly adopted. *See* Clean Air Act § 307(d)(1)(J); 42 U.S.C. § 7607(d)(1)(J) (requiring formal rulemaking procedures in order to establish any requirement under the PSD program).

And even if EPA provided proper notice and the opportunity to comment, EPA cannot lawfully adopt any rule that directly and immediately changes Texas' permit program in any respect—much less to expand the reach of the program so far as to be deemed "absurd." Clean Air Act Section 166(a) sets forth the SIP revision process for "other pollutants" under the PSD program. The only sensible interpretation of the Clean Air Act is one that requires the EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for greenhouse gases before the EPA can require PSD permitting of greenhouse gases. Thereafter, pursuant to the express terms of the Clean Air Act, states are provided with 21 months after EPA undertakes a proper rulemaking to add that new pollutant to their SIP. Clean Air Act § 166(b), 42 U.S.C. § 7476(b) ("Within 21 months after such date of promulgation such plan revision shall be submitted to the

Administrator"). EPA, however, has not developed a NAAQS for greenhouse gases, has not undertaken a rulemaking to promulgate corresponding regulations, and has not allowed any time for a state response.

In addition to circumscribing the statutory 21-month review and implementation process afforded the states, EPA is also circumventing the statutory one-year review and revision process afforded Congress, which specifically states, "Regulations referred to in subsection [166](a) of this section shall become effective one year after the date of promulgation." The purpose of this one-year delay is to allow Congress the opportunity to review (and approve or revise) new rules for "other pollutants" before states are required to implement them. 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007); *citing* H.R. Conf. 95-564, at 151 (1977), 1977 U.S.C.C.A.N. 1502, 1532. The path proposed by EPA painstakingly avoids such congressional oversight.

Even under normal SIP revision procedures (those not involving new pollutants), the EPA has failed to provide Texas a reasonable time to submit a plan revision. Clean Air Act Section 110 sets forth EPA's authority to direct the requirements for approvable SIPs. Section 110(k)(5) allows states up to 18 months after proper adoption of new SIP expectations before requiring their implementation by the states. *See* 42 U.S.C. § 7410(k) ("The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.").

Instead, EPA has demanded (in the absence of statutory authority) that Texas submit a schedule for the completion of statutory and rule revisions. But notwithstanding the above-referenced statutory requirements regarding SIP revisions, EPA has declared that it will "ensure" all sources of greenhouse gases will be permitted under the final Tailoring Rule on January 2, 2011, by moving "quickly to impose a Federal Implementation Plan (FIP) for PSD through 40 CFR 52.21." 75 Fed. Reg. at 31,526. The federal Clean Air Act, however, clearly does not authorize such bureaucratic nimbleness. To the contrary, before EPA can implement a FIP, Section 110(c)(1) specifically requires the EPA to first make a finding that a state has failed to make a required submission, such as a revision under Section 110(k)(5), and even then, a FIP is not effective until after the state is afforded additional time to correct the deficiency identified by EPA. EPA has shown no intention of following the Clean Air Act procedures or allowing states a reasonable opportunity to change their rules.

Each of these objections to EPA's demand for a loyalty oath from the State of Texas would suffice to justify our refusal to make one. Indeed, it is an affront to the congressionally-established judicial review process for EPA to force states to pledge allegiance to its rules (or forfeit their right to permit) on the final day by which states must exercise their statutory right to challenge those same rules. Texas will not facilitate EPA's apparent attempt to thwart these established procedures and ignore the law. In the event a court concludes EPA's actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised herein.

We object to adopting the EPA's definition of "subject to regulation" without directly raising any of our substantive objections to each of the four EPA rulemakings that collectively comprise your greenhouse gas control initiative. Those objections will be resolved in litigation now pending in the D.C. Circuit Court of Appeals. Given that you are unable to ascribe the benefits of your greenhouse permitting regime, it is difficult to see why you would refuse to stay the effectiveness of your greenhouse gas rules. We therefore ask you to stay the effectiveness of your rules until our challenge is resolved.

Sincerely,

Bryan W. Shaw, Ph.D.
Chairman
Texas Commission on Environmental Quality

Greg Abbott
Attorney General of Texas

ATTACHMENT

B

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2010

Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Application for a Stay of the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)

Dear Administrator Jackson:

The State of Texas hereby requests that you stay the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule") pending resolution of the State of Texas' petition for review of the Rule, which is currently pending in the United States Court of Appeals for the District of Columbia Circuit. *Perry v. EPA*, No. 10-1222 (D.C. Cir. filed Aug. 2, 2010). Texas' request that EPA stay the Tailoring Rule is independent of any other request that EPA reconsider or stay the Tailoring Rule, and the grounds set forth in this letter are in addition to those set forth in General Abbott and Chairman Shaw's letter to you of August 2, 2010.

Texas has an undisputed right to address air quality management resources issues, including newly-regulated pollutants, on a prospective basis. EPA may not step in unless and until the states have been given full and fair opportunity to do so. In contravention of these fundamental principles, the Tailoring Rule requires that Texas and other states reinterpret or revise their state implementation plans ("SIP") on or before January 2, 2011. If Texas does not do so, EPA has indicated that it will limit its approval of the Texas SIP and impose a federal implementation plan ("FIP"). Texas strongly disputes the legal and policy basis for the Tailoring Rule and EPA's assertion that it may adopt a FIP if Texas fails to revise immediately its SIP. In any event, it would not be possible for Texas to comply with EPA's unlawful and unprecedented deadline.

Texas' and the public's interests would be best served if the D.C. Circuit had the opportunity to review the Tailoring Rule before it went into effect. Texas should not be forced to choose between forfeiting the authority to operate its PSD program and spending significant resources, administrative and otherwise, to meet EPA's unlawful deadline. Moreover, EPA assiduously and correctly avoided ascribing any environmental benefit from the Tailoring Rule, so staying the Tailoring Rule until after Texas has had a full and fair opportunity to litigate its petition for review would likewise not adversely impact public health or welfare.

1. EPA's Requirement That Texas Reinterpret Or Revise Its SIP By January 2, 2011, Is Impracticable And Unlawful

The Tailoring Rule revises EPA's Part 51 Regulations, which set forth the requirements for approvable SIPs, despite EPA's failure to propose this change in its Notice of Proposed Rulemaking, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule Proposal"), 74 Fed. Reg. 55,292 (Oct. 27, 2009). In its haste to surreptitiously rewrite the Clean Air Act, EPA violated its own regulations: 40 C.F.R. § 51.166(a)(6) gives states, including Texas, three years to submit revised SIPs following EPA changes to the minimum standards for approvable SIPs:

> Amendments. (i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval **no later than three years after such amendment is published** in the *Federal Register*.
>
> * * *
>
> (iii) Any revision to an implementation plan that an amendment to this section required **shall take effect no later than the date of its approval and may operate prospectively**.

EPA even purported to bypass Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5), which unambiguously provides states with a minimum of 18 months to revise their SIPs following SIP call authorized by the Clean Air Act. *See* 75 Fed. Reg. at 31,583.

EPA's regulation allowing states three (3) years to revise their SIPs serves several purposes. First, it helps enforce the states' undisputed right to the first opportunity to address air quality management resources issues, including newly-regulated pollutants under the PSD and Title V programs, on a prospective basis. The Clean Air Act recognizes that "air pollution prevention . . . and air pollution control at its sources is the primary responsibility of States and local governments," not of EPA. Clean Air Act § 101(a)(3), 42 U.S.C. § 7401(a)(3). The Clean Air act "places primary responsibility on the states for [SIP] revision." *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 781 (3d Cir. 1987). EPA's role is limited. The Agency is not "a roving commission to achieve pure air or any other laudable goal," *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001), and its powers to revise SIPs are limited to those expressly enumerated in Clean Air Act § 110, *see Concerned Citizens of Bridesburg*, 836 F.2d at 797 n.12 Finally, 40 C.F.R. § 51.166(a)(6) reflects EPA's long-standing recognition that SIP revisions take significant resources, and that states (and EPA) have the responsibility to ensure ample opportunity for the public to participate in the SIP revision process.

EPA's threat to impose a FIP on Texas as of January 2, 2011, is similarly unlawful. *See* 75 Fed. Reg. at 31,526 (announcing EPA's intention to "ensure" all sources of greenhouse gases will be permitted under the final Tailoring Rule on January 2, 2011, by moving "quickly to impose a [FIP] for PSD through 40 CFR 52.21"). Clean Air Act § 110(c)(1) specifically requires that EPA first make a finding that a state has failed to make a required submission, such as a SIP revision, and then to allow the state additional time to correct any of EPA's perceived deficiencies. As described above, EPA may not consider a FIP until after the three-year period for SIP revisions described above and then only if Texas defaults in submitting a revision at the end of that three-year period.

Beyond being unlawful, EPA's deadline of January 2, 2011 for states to reinterpret or revise their SIPs is impracticable. As we explained at length in our letter of August 2, 2010, Texas would be unable to reinterpret its SIP to effect the Tailoring Rule. Instead, Texas would need to revise its SIP, a process that it would be difficult, if not impossible, to complete in the approximately five (5) months remaining before EPA's January 2, 2011 deadline.

2. A Stay Is Necessary To Preserve Texas' Ability To Operate Its PSD Program During The Pendency Of The Petition For Review

By imposing the unlawful five-month timetable for Texas to revise its SIP, the Tailoring Rule threatens Texas' ability to maintain its PSD program and issue permits to sources in its state. If EPA follows through on its threat to issue a FIP for Texas on January 2, 2011, Texas will lose its ability to operate its PSD program. EPA's attempt to use this deadline to allow the Agency to promulgate a FIP long before Texas could reasonably be determined to have defaulted on its obligations is contrary to EPA's past practice and state primacy. If EPA were not to implement a FIP on January 2, 2011, the Tailoring Rule would create a cloud on any permits issued by Texas between that time and the time at which EPA chose to act because of EPA's suggestion that any later adoption of the Tailoring Rule through a FIP or SIP revision would apply retroactively. In either case, the Tailoring Rule will adversely affect Texas' ability to manage its air quality resources and to ensure "that economic growth will occur in a manner consistent with the preservation of existing clean air resources." Clean Air Act § 160(3), 42 U.S.C. § 7470(3). Texas is confident that the D.C. Circuit will ultimately vacate the Tailoring Rule, but during the pendency of this suit, the Tailoring Rule's vitiation of Texas' statutory right to operate its permitting program will cause the State irreparable harm.

3. A Stay Will Serve The Public Interest By Allowing Meaningful Judicial Review Of The Tailoring Rule Before It Enters Into Force

Texas has petitioned the D.C. Circuit for review of the Tailoring Rule, as have numerous other petitioners. Texas and the other Petitioners will raise significant challenges to the Tailoring Rule's lawfulness as to the emission rate thresholds it sets for PSD and Title V applicability, EPA's plans to require SIP revisions or reinterpretations by January 2, 2011, and whether the Tailoring Rule is a logical outgrowth of EPA's Notice of Proposed Rulemaking. A stay is particularly apt given EPA's decision to predicate an economy-wide rule on the rarely-

appropriate "absurd results" doctrine, which EPA has invoked because, unlike every other regulated pollutant, EPA has purported to find that regulation of greenhouse gases under the PSD program would produce results plainly inconsistent with congressional intent. *See* 75 Fed. Reg. at 31,542 (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

While Texas and other States would be harmed if the Tailoring Rule were not stayed, no party would be harmed by staying the Rule. EPA has appropriately not represented that the Tailoring Rule would have any positive effects on public health or welfare. Staying the Tailoring Rule will not harm Texas' sister states. If another state is lawfully able to reinterpret its SIP to conform to the Tailoring Rule's requirements, it can do so without the Tailoring Rule's revisions to the Part 51 Regulations. In the event one of Texas' sister states revises its SIP to incorporate the Tailoring Rule, it can submit the revision for EPA's approval, subject to judicial review in the Court of Appeals where the state is located.

* * *

Texas strongly disputes the legal and policy basis of each of EPA's actions regulating greenhouse gases under the Clean Air Act, including the Tailoring Rule. Texas' objections will be resolved in litigation now pending in the United States Court of Appeals for the District of Columbia Circuit. In order to maintain the status quo regarding the proper allocation of powers between the States and EPA, and in light of EPA's inability to ascribe any public health or welfare benefits to the Tailoring Rule, EPA is obligated to stay the Tailoring Rule until Texas' challenge is resolved. Texas may seek immediate relief from the D.C. Circuit if EPA denies or fails to respond to this request on or before August 24, 2010.

Sincerely,

Jon Niermann
Assistant Attorney General

cc: J. Reed Clay, Jr., Office of the Solicitor General of Texas
David B. Rivkin, Jr., Baker & Hostetler LLP

ATTACHMENT

C

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2010

Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via Federal Express 0201 7938 6629 6184 and Facsimile (202) 501-1450

Re: Application for Stays of EPA's Endangerment Finding, 74 Fed. Reg. 66,496 (December 15, 2009); PSD Interpretive Rule, 75 Fed. Reg. 17,004 (April 2, 2010); and Light-Duty Vehicle Rule, 75 Fed. Reg. 25,324 (May 7, 2010)

Dear Administrator Jackson:

The State of Texas hereby requests that you stay the following three rules pending resolution of the identified petitions for review now before the United States Court of Appeals for the District of Columbia Circuit:

- Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (December 15, 2009) (the "Endangerment Finding"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1041 (D.C. Cir.);

- Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010) (the "PSD Interpretive Rule"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1128 (D.C. Cir.); and

- Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (the "Light-Duty Vehicle Rule"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1182 (D.C. Cir.).

Individually and collectively these three rules (the "GHG Rules") suffer serious legal infirmities and are unlikely to withstand judicial review. Texas would suffer significant and irreparable harm if the rules were to take effect before the Court can complete its review. And there is no harm in staying the rules; indeed it would serve public interest.

1. The GHG Rules are legally deficient.

Taken together, the GHG Rules will create the most burdensome regulatory regime in the history of the Clean Air Act ("CAA"), substantially affecting state regulatory agencies as well as

virtually every sector of the nation's economy. Yet the Environmental Protection Agency ("EPA") has imposed its scheme without any of the economic analysis required by statute, without quantifying the harm purportedly avoided by the new rules, and on a schedule so unreasonably short that it deprives Texas of its right under the CAA to take primary responsibility for the prevention and control of air pollution.

EPA would have the GHG Rules operate mechanically, and indeed arbitrarily, to regulate greenhouse gases ("GHGs") at stationary sources—without considering the effects of doing so. For example, EPA's Endangerment Finding is predicated on its unlawful delegation of its statutory responsibilities to a non-governmental, international entity that relied on questionable science to conclude that emissions for mobile sources contribute to GHG pollution endangering public health or welfare. The Endangerment Finding even purports to find that mobile sources "contribute" to pollution by certain GHGs that are not present in mobile source emissions. Moreover, the Endangerment Finding fails to articulate any meaningful criteria to support rational decision-making regarding the selection of regulatory requirements. EPA later relied on its flawed Endangerment Finding to regulate GHGs from mobile sources under its Light-Duty Vehicle Rule.

EPA's Light-Duty Vehicle Rule, which it promulgated jointly with the National Highway Traffic Safety Administration ("NHTSA"), controls GHGs from mobile sources by establishing new corporate average fuel economy ("CAFE") standards. Texas does not challenge NHTSA's CAFE standards, and asks that any stay be limited so as to allow the standards to take effect as scheduled. Nevertheless, EPA's mobile source controls are legally defective in four ways: (1) they are predicated on a deeply flawed Endangerment Finding; (2) they create a single standard for multiple pollutants, including pollutants not found in vehicle emissions; (3) they fail to quantify any health and welfare benefit to the rules; and (4) they fail to consider the costs or benefits caused by the triggering (under EPA's PSD Interpretive Rule) of stationary source regulation. To make matters worse, the Light-Duty Vehicle Rule imposes controls on January 2, 2011. Under EPA's unlawful interpretation of the CAA, this requires automatic and immediate regulation of GHGs at stationary sources—without opportunity for rational decision-making regarding the requirements to be imposed.

EPA's PSD Interpretive Rule violates the CAA and exceeds the EPA's authority because—as EPA itself admits—the Rule leads to an absurd result. Specifically, the Rule interprets the phrase "subject to regulation" found within the definition of the term "regulated NSR pollutant" to require that a pollutant be regulated under the PSD and Title V programs the moment that pollutant becomes subject to control under another provision of the CAA or its implementing regulations. In its preamble to the PSD Interpretive Rule, EPA anticipated that the Light-Duty Vehicle Rule would trigger PSD and Title V for GHGs on January 2, 2011, when GHG "controls" would become required on model year 2012 fleets. Yet EPA would not consider the effects of regulating GHGs at stationary sources either as part of its PSD Interpretive Rule or its Light-Duty Vehicle Rule, or for that matter, the Endangerment Finding.

In addition to deferring its examination of the "significant administrative challenges" posed by the GHG Rules and deferring—apparently indefinitely—any cost/benefit analysis or other review of the economic impacts of regulating GHGs at stationary sources, EPA's PSD Interpretive Rule, together with the Light-Duty Vehicle Rule, creates absurd results under the

CAA. Specifically, under EPA's construction, the rules require automatic regulation of GHGs at the CAA's statutory levels. These levels are so low that EPA has admitted them to be absurd in the context of GHGs. Alternative interpretations of the CAA, which do not entail such absurd results, have to date been ignored by EPA. For example, EPA could interpret the phrase "subject to regulation" to mean subject to regulation at the time of enactment, and thereby avoid regulating GHGs under a scheme that was not intended to regulate GHGs. And Title I of the CAA could be read to require a national ambient air quality standard ("NAAQS") for GHGs before PSD regulation is imposed, but EPA's PSD Interpretive Rule ignores this reasonable approach in favor of creating an admittedly nonsensical regulatory scheme.

Finally, EPA's PSD Interpretive Rule would trigger regulation at stationary sources without allowing the states a reasonable amount of time to revise their state implementation plans ("SIPs") to regulate GHGs. EPA has only recently issued a proposed SIP call and federal implementation plan ("FIP") for GHGs. Once they are final, they would require states to revise their SIPs by January 2, 2011, or face federalization of their permitting programs. This is contrary to the scheme established under the CAA requiring that states be allowed a reasonable time to revise their SIPs before suffering federalization of their air permitting programs. The hair trigger of EPA's PSD Interpretive Rule is one unnecessary cause of this emergency and compels EPA to issue an illegal SIP call and threat of federalization.

EPA purports to cure the incongruous regulatory scheme created by its GHG Rules with its Tailoring Rule, in which it rewrites the plain language of the CAA to change the emission rate applicability thresholds that Congress wrote into the PSD and Title V permitting programs. But EPA cannot create an absurd regulatory program and then capitalize on the unlawfulness of its actions to rewrite the Clean Air Act to accommodate its unlawful regulatory prerogatives. The Tailoring Rule is illegal and will not withstand judicial review; it is no cure at all for the irrational scheme of regulation necessarily imposed by the GHG Rules, which are the subject of this application. Moreover, the Tailoring Rule does not and cannot cure the numerous procedural deficiencies cited above. Even if it had, for example, provided an adequate economic analysis of the effect of regulating GHGs at stationary sources, post hoc rulemaking of this kind cannot cure the substantial procedural defects in the GHG Rules, which themselves provide the foundation for EPA's proposed regulation of GHGs under the PSD and Title V programs.

2. Texas will suffer irreparable harm if the GHG Rules are allowed to take effect pending judicial review.

Allowing the GHG Rules to take effect will upend the partnership between the federal and state governments envisioned in the CAA. Section 101(a)(3) of the CAA expressly provides that states shall have primary responsibility for the prevention and control of air pollution, and section 110, among others, vests this right in the states. Because the GHG Rules go into effect so quickly, EPA has threatened to federalize several of the states' air permitting programs, including Texas', pending appropriate revisions to their SIPs. This scheme denies Texas and similarly affected states their statutory right to determine how they will deploy their resources and craft their own air quality laws to manage newly-regulated pollutants. Likewise, EPA's scheme unnecessarily contravenes Congress's mandate that state and local governments retain primary responsibility for air pollution prevention and control.

Further, EPA's regulatory model harms Texas by requiring it to expend significant resources to hire and train personnel for a vastly expanded air permitting program in early 2011, despite the fact that Texas is facing severe economic pressures and is likewise forced to accommodate other EPA actions, including revised national ambient air quality standards. EPA's unreasonably abbreviated timeline does not allow Texas adequate time to meet EPA's demands. And, to the extent that Texas lack the resources to ramp up its air permitting program on such short notice, it is prevented from providing an essential government service. Without a stay, Texas and similarly affected states will be forced to choose between changing their permitting system or facing the federalization of their permitting program for failure to comply with rules they have challenged as arbitrary and capricious. Notably, these harms imposed on Texas will only be compounded by the cost to unwind GHG permitting when the court rejects EPA's scheme.

In addition, the questionable legal footing of the Tailoring Rule leaves Texas unsure of how to prepare for a situation in which they may experience the full regulatory avalanche triggered by the three GHG Rules. EPA's own estimates of the burdens on state and local authorities caused by the Endangerment Finding, Tailpipe Rule, and PSD Interpretative Rule justify staying these rules until judicial review is complete. EPA clearly recognizes the overwhelming burden that the GHG Rules would create for state and local permitting authorities in the absence of the Tailoring Rule, which Texas separately submits is unlikely to survive judicial review.

Further, the tremendous costs of implementing the required GHG permitting would be borne by Texas for the foreseeable future. Although the fees generated by the Title V sources and PSD programs are required to cover the cost of those respective programs, this does not happen automatically. Significant statutory and regulatory revisions will be required to bring Texas' fee regime into compliance with the requirements of the CAA. The cost of hiring and other implementation costs necessary to address GHG in stationary source permits in the unreasonably short timeline imposed by EPA would necessarily be borne by the State. And Texas will be unable to recoup these expenses.

Finally, the onerous and unnecessary expansion in CAA permitting programs imposed by the GHG Rules will cause Texas to suffer lost business investment. The chilling effect on the Texas economy flows from different factors. First, at present no one knows what best available control technology ("BACT") will apply to sources facing GHG regulation. Businesses will defer or cancel projects to avoid the risk and costs inherent in serving as the guinea pig for state permitting authorities, or EPA under a FIP, as they struggle to determine BACT for the source. At the same time, for those businesses willing to proceed, the lack of capacity to process permit applications will create a backlog of projects sitting in limbo, because state and local authorities will lack the resources to issue PSD and title V permits addressing GHG emissions and, in some cases, the legal authority to do so. Even if EPA implemented a FIP, businesses will face a similar backlog in applications. The chilling effect on investment will be compounded by the uncertain future of rules resting on troubled legal foundations. The CAA preserves state primacy because environmental controls are inextricably tied to fiscal, economic, and resource management issues that are central to its self-governance. This loss of investment and development, coming in the midst of a precarious economic environment and continuing through the course of this litigation, would cause substantial and immediate harm to Texas.

In short, unless the GHG Rules are stayed, EPA's GHG regulatory scheme will deprive Texas of its right to manage its air permitting program; cause expensive and unnecessary hiring, training, and, ultimately, firing of personnel to implement the requirements; and result in the denial of essential state air permitting services and the loss of business investment in Texas. These injuries are significant, immediate, and irreparable.

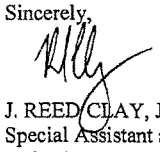
3. There is no harm in staying EPA's GHG rules, rather it serves the public interest.

In sharp contrast to the significant and irreparable harm that will be caused by the GHG Rules, no harm would be caused by a stay. Nowhere in its GHG rulemaking does EPA quantify or even specifically link the GHG reductions expected from the regulation of GHGs at stationary sources with the public health or welfare benefits of such reductions or ascribe any particular timeline to such GHG reductions, if any. Moreover, NHTSA's revised CAFE standards would remain in effect under the requested stays. Given the relatively short duration of any stay, and lack of environmental benefits ascribed to stationary source regulation, there is simply no harm in staying EPA's GHG rules. To the contrary, stays of the GHG Rules will serve the public interest, by providing greater regulatory certainty, avoiding government waste, and capturing the economic and environmental benefits of keeping industry in the United States.

* * *

In light of EPA's inability to ascribe any public health or welfare benefits to the GHG Rules, the significant and irreparable harm caused by allowing the GHG Rules to take effect during the identified judicial challenges, and the serious legal deficiencies described above in connection with the Endangerment Finding, the Light-Duty Vehicle Rule, and the PSD Interpretive Rule, the State of Texas strongly urges EPA to stay the imposition of each of these rules while the court considers Texas' pending petitions for review.

Sincerely,



J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

JRC/apw
c: File

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

NOV 0 1 2010

Mr. Mark R. Vickery, P.G.
Executive Director
Texas Commission on
Environmental Quality (TCEQ)
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Vickery:

This letter is a follow-up to questions raised at the stakeholder meeting in Austin on September 16, 2010, concerning a process to transition air pollution permits that include Flexible Permits (30 TAC Chapter 116, Subchapter G) to State Implementation Plan (SIP)-approved permits (30 TAC Chapter 116, Subchapter B). Specifically, questions were raised about a source's ability to utilize a permit alteration process under 30 TAC § 116.116 for this transition.[1]

For multiple reasons, EPA does not believe that the alteration process is an appropriate tool to create SIP-approved permits from non SIP-approved subchapter G permits. For permittees that attempt to use alterations for this purpose, EPA will still be obligated to consider use of its tools under Title V of the Clean Air Act and other authorities to ensure that facilities are holding permits that contain all federally applicable requirements.

If modifications, new units, increases in actual emissions, or additional pollutants were added to a plant since the last time its air pollution permits for units had SIP-approved limits, then the federally applicable requirements for these units or pollutants have to be added to a facility's permits through SIP-approved mechanisms that are authorized to make these kinds of *substantive* changes – not through alterations. For example, if a new unit was constructed during the pendency of the subchapter G flexible permit, and that unit was placed under the flexible permit cap without a unit-specific limit, then it never had a clear limit. The establishment of a new unit-specific limit now

[1] Under 30 TAC §116.116(c)(1), a permit alteration is defined as: (A) a decrease in allowable emissions; or (B) any change from a representation in an application, general condition, or special condition in a permit that does not cause: (i) a change in the method of control of emissions; (ii) a change in the character of emissions; or (iii) an increase in the emission rate of any air contaminant. If any change involves an increase in allowable emissions or a change in the method of control or the character of emissions or an increase in the emission rate of any air contaminant, the source would be required to obtain a permit amendment under 30 TAC 116.116(b).

would constitute a new (increased) allowable emission, and could not be accomplished through the alteration mechanism.

Moreover, the process of creating SIP-approved permits from non-SIP approved permits is not one that meets the narrow uses in the alterations definition. For example, it is not possible to determine whether there has been a "decrease in allowable emissions", "change from a representation", "change in the method of control", or "no increase in the emission rate" without first determining the SIP-appropriate federally applicable requirements for the plant as it exists today. This is not readily ascertainable, however, since most subchapter G permits contain a number of non-SIP-approved provisions.

As TCEQ has itself stated, the subchapter G flexible permit is a minor NSR authorization that EPA never approved into the Texas SIP. Nonetheless, the use of subchapter G has apparently changed the content of many TCEQ-issued SIP-approved permits and EPA-issued permits. These changes may have included replacing or eliminating unit-specific pound per hour (lb/hr) and ton per year (TPY) emission limitations with a site-wide cap, adding permit-by-rule authorizations without factoring those allowances into unit-specific emissions limits, and adding a 9% or other "de minimis" factor to emissions limits in flexible permits. The alteration provisions of the Texas SIP were not approved by EPA as a blanket restoration mechanism to add in lb/hr or TPY emissions for units that lack those SIP-approved conditions in their current permits, or to reinstate other conditions that were removed through non-SIP approved processes. The presence of such non-SIP approved provisions and changes reflected in existing subchapter G permits make it impossible to define a baseline of SIP-approved unit-specific requirements and then to compare those requirements to proposed new SIP-approved conditions. It is in that comparison that the appropriateness of alterations must be determined.

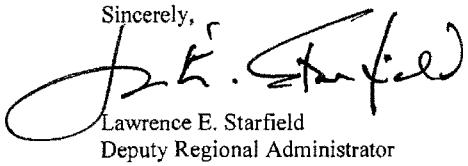
Further, for most flexible permit holders, unit-specific monitoring, recordkeeping and reporting (MRR) requirements – rather than compliance with a multi-unit cap – will need to be reestablished as the primary mechanism to demonstrate compliance. These changes in the method of demonstrating compliance would clearly constitute "changes in the method of control," and do not meet the narrow uses in the alterations definition. Changing permits in this way can only be done with prior EPA and public involvement, which is bypassed with the alteration mechanism.

We believe that other methods exist in state and federal rules for flexible permit holders to obtain SIP-approved permits. Most importantly, transitioning air pollution permits with flexible permits back into the SIP requires a careful analysis of permitting and operational history of units covered by the flexible permits in order to identify the federally applicable requirements. The alteration process does not provide for public notice and comment, nor does it allow for review by EPA. Given the need to evaluate the potential impact of past modifications and operational changes to establish the federally applicable requirements, we believe that a flexible permit transition process must include public participation opportunity and EPA review prior to the issuance of the SIP-approved permit by TCEQ.

For these and other reasons, EPA does not believe a permit alteration is an appropriate mechanism for determining the federally applicable requirements at plants holding flexible permits and transitioning to SIP-approved permits. As such, the use of alterations will not eliminate a permittee's uncertainty about EPA's obligations to consider Title V tools or other authorities to ensure that facilities are holding permits that contain all federally applicable requirements, and otherwise to enforce the Act.

EPA sincerely appreciates TCEQ's engagement with us to provide all permit holders with regulatory certainty. If you have any questions, please contact me at (214) 665-2100.

Sincerely,



Lawrence E. Starfield
Deputy Regional Administrator

cc:

Dr. Bryan W. Shaw, Chairman, TCEQ
Mr. Carlos Rubinstein, Commissioner, TCEQ
Mr. Buddy Garcia, Commissioner, TCEQ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

December 21, 2010

OFFICE OF
AIR AND RADIATION

Bryan W. Shaw, Ph.D., Chairman
Texas Commission on Environmental Quality
P.O. Box 13087 (MC 100)
Austin, TX 78711

Dear Dr. Shaw:

I am writing to notify you of certain actions that the U.S. Environmental Protection Agency (EPA) anticipates taking on or about December 23, 2010, to ensure that as of January 2, 2011, businesses in Texas will be able to obtain, in a timely way, federal air construction and operating permits meeting the requirements of the Clean Air Act.

As you know, the Clean Air Act allows states to implement certain elements of the federal Clean Air Act, one of which is the Prevention of Significant Deterioration (PSD) permitting program for major sources of federally regulated air pollutants. TCEQ has been implementing an EPA-approved PSD program since 1992. Beginning on January 2, 2011, greenhouse gases will become newly regulated air pollutants under the Clean Air Act. On December 10, the D.C. Circuit Court confirmed that EPA's greenhouse gas regulations shall remain in effect and enforceable pending completion of judicial review. Therefore, it is incumbent on EPA to take action now to ensure that permitting authorities have the ability to issue, and covered sources the ability to obtain, the necessary permits beginning on January 2. Specifically, the Act requires that sources emitting greenhouse gases over certain quantities must obtain a PSD preconstruction permit for their emissions of those pollutants. EPA has been in communication with most, if not all, state and local air permitting agencies, including the TCEQ, over the past year to ensure that those agencies will be in a position to issue PSD permits for greenhouse gases or, if not, a federal plan is in place so as to avoid delays for businesses wishing to build new or expand existing sources.

Earlier this month, EPA issued a final rule with a determination that the permitting programs for thirteen states, including Texas, are not adequate because they do not apply PSD to greenhouse gas emissions. "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 Fed. Reg. 77698 (Dec. 13, 2010). In that final rule, EPA also included a "SIP call" requiring these state agencies to revise their PSD state implementation plans (SIPs) to include greenhouse gases, and EPA established deadlines for the states to submit their revised plans. EPA gave each affected state an opportunity to select a deadline of up to 12 months to submit its revised plan. TCEQ did not select a deadline, and as a result, EPA was required to establish the default deadline of December 1, 2011. However, state

officials in Texas have made clear, in letters to EPA Administrator Lisa P. Jackson, in statements in the media, and in legal challenges to EPA's greenhouse gas rules, including the recent challenge to the SIP Call rule, that they have no intention of implementing this portion of the federal air permitting program. As a result, absent further action, certain industrial facilities in Texas that emit large amounts of greenhouse gases will not have available a PSD permitting authority when they become subject to PSD requirements on January 2, 2011. TCEQ has estimated that some 167 projects could be affected next year. Based on this information, EPA noted in the SIP Call rule "We are planning additional actions to ensure that [greenhouse gas] sources in Texas can be issued permits as of January 2, 2011." 75 Fed. Reg.77700.

The unwillingness of Texas state officials to implement this portion of the federal program leaves EPA no choice but to resume its role as the permitting authority, in order to assure that businesses in Texas are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects that will create jobs and otherwise benefit the state's and the nation's economy. To effectuate this promptly, so that there will be no period of time when sources are unable to obtain necessary PSD permits, EPA intends to promulgate a partial disapproval of Texas' PSD program and a Federal Implementation Plan, to take effect by January 2, 2011.

Although EPA will be the greenhouse gas permitting authority on January 2, 2011, I want to emphasize that EPA would prefer that TCEQ act as the permitting authority for greenhouse gas-emitting sources in Texas, as it does for all other sources. I would be pleased to discuss with you steps that TCEQ could take to address the inadequacy in its PSD program and take over the greenhouse gas permitting function, as soon as possible after January 2, 2011, either through a revision to the PSD SIP that EPA could approve expeditiously or through a delegation agreement.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

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RECEIVED
MAR 2 3 2011
OFFICE OF
PERMITTING & REGISTRATION

Mr. Richard Hyde, P.E.
Director
Office of Permitting, Remediation, & Registration
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Richard:

I know that TCEQ is looking at ways to resolve the objections that EPA has issued on numerous Clean Air Act Title V permits since October 2009. To assist, I asked our EPA staff to summarize the actions our agencies have taken over the last year to address objections in a small number of permits. The efforts to address objections over the last year have led to varied approaches that have either responded to, or altogether averted, some of EPA's objections.

We have collected these approaches on the enclosed Table in an attempt to offer examples and options to address the common objection issues that we have raised. These objections generally fall into 15 different categories and the table is structured to present the objection issue and a possible path forward. In addition, we have included a column identifying specific examples of successful approaches that have been put into practice. These examples and options in the Table are likely not the only way that any particular objection issue in a permit can be addressed; however, they might serve as viable approaches for many permits and for those companies seeking to address any outstanding case-specific objections from EPA.

We look forward to working with your office to discuss solutions that will allow Title V proposed permits to move forward. Our goal is to ensure that Title V permits comply with the Clean Air Act and to provide important certainty to industry. Please contact me if you have questions.

Sincerely,

Carl E. Edlund, P.E.
Director
Multimedia Planning & Permitting
Division

Enclosure

cc: Mr. Mark R. Vickery, P.G., Executive Director, TCEQ

Texas Title V Objections and Possible Approaches for Addressing EPA Objections [1]

Objection	Possible Approaches for Addressing EPA Objection
1. Objection to the incorporation of Flexible Permit into the Title V permit. Additional information must be provided by the applicant showing how the emissions authorized by the flexible permit meet the air permitting requirements of the federally-approved provisions of the Texas SIP. Furthermore, the Title V permit must include an additional condition specifically requiring the source to prepare and submit to TCEQ a written analysis of any future change/modification to ensure that minor and/or major new source review requirements under the federally-approved Texas SIP have not been triggered. Finally, the terms and conditions of the flexible permit, based upon the requirements of 30 TAC Chapter 116, Subchapter G must be identified as State-only terms and conditions, pursuant to 40 CFR § 70.6(b)(2). The permittee may meet these conditions by committing to transition from a Subchapter G permit to a SIP approved Subchapter B permit by following the steps outlined in the EPA approved transition documents .	**1) Flint Hills Example** Follow Flint Hills 4 Step Transition Process through the Air Permits program – See http://www.epa.gov/region6/6xa/pdf/10-20-10_entire_document_final-fhr_to_epa.pdf; or **2) Ineos Example** Follow Ineos 4 Step Transition Process through the Air Permits program. See http://www.epa.gov/region6/6xa/pdf/committment_letter_ineos_122110.pdf. **3) Follow Streamlined Enforcement Approach** (contains a Covenant not to sue, but is not as broad as the Audit) – no examples available.

1 Approaches proposed by TCEQ would be subject to EPA's review period and a petition opportunity under CAA sections 505(b)(1) and (2).

Objection	Possible Approaches for Addressing EPA Objection
2. Objection to the Incorporation of Permit Containing Changes under the Qualified Facilities (QF) Program into the Title V permit. TCEQ must revise the draft Title V permit to include a condition that specifically requires the source to prepare and submit to TCEQ a written analysis of any future change/modification to ensure that minor and/or major new source review requirements under the federally-approved Texas SIP have not been triggered.	1) To address the Title V objection, include a condition in the permit requiring facilities to address QF Exemptions upon Title V permit action. The condition must state that for each unit, the source will demonstrate that any use or uses of the QF Exemption did not circumvent NSR, and revise its SIP-approved permit to reflect all applicable emissions limitations resulting from QF changes. *2)* **Flint Hills (O1272) and Ineos Examples** Follow 4 Step Transition Process through the Air Permits program- See http://www.epa.gov/region6/6xa/pdf/10-20-10_entire_document_final-fhr_to_epa.pdf; or http://www.epa.gov/region6/6xa/pdf/committment_letter_ineos_122110.pdf; or 3) Follow Streamlined Enforcement Approach (contains a Covenant not to sue, but is not as broad as the Audit). – no example to date.
3. Objection to the incorporation by reference of PSD Permit. TCEQ must include the emission limitations and standards, including any operational requirements or limitations that assure compliance with all applicable requirements as specific provisions in the body of the permit, or conditions may be added to the Title V permit that reference the specific page number and permit condition for each individual applicable emission limitation terms or conditions that are necessary to ensure compliance with all applicable requirements and physically attach a copy of the PSD permits to the Title V permit. In light of the multiple NSR permits and PBRs that apply to a particular source, it is difficult to determine from the record which NSR limits are in fact applicable to the source.	**1) TOTAL (O1267), Chevron Phillips Cedar Bayou (O2113), and Southwestern Harrington (O15) Examples:** PSD permits that are incorporated by reference are attached to Title V permit in addition to the inclusion of a Federal NSR Permit Emission Summary Table into the Title V permit. This table lists all the emission limits currently included in the PSD permits. See White Paper, Number 2, March 5, 1996 at the following link http://www.epa.gov/ttn/caaa/t5/memoranda/wtppr-2.pdf.
4. Objection to Special Permit Condition Regarding Stationary Vents.	**1) Southwestern Harrington (O15) Example:** TCEQ revised the permit to list the stationary vent units in the permit as provided by the applicant. The draft Title V permit was revised to include a listing of all

Objection	Possible Approaches for Addressing EPA Objection
TCEQ must revise the draft Title V permit to list the specific stationary vents that are subject to the specified requirements of 30 TAC Chapter 111 and provide a legal and factual explanation in the Statement of Basis.	stationary vents subject to the requirements of 30 TAC Chapter 111 in the Unit Summary Table of the permit. In addition, TCEQ included the legal and factual basis for this requirement in the Statement of Basis for each stationary vent. 2) **TOTAL (O1267) Example:** TOTAL submitted a revised application with all stationary vents individually identified. Terms 3A and 3B that were the subject of the objection were removed from the permit. 3) **Garland P&L (O17) Example:** Permit lists all vents and applicable TAC Chapter 111 requirements for opacity.
5. Objection to the Adequacy of the Compliance Schedule in the Title V permit. TCEQ must revise the Title V permit to include a compliance schedule that meets the requirements of the 40 CFR § 70.6(c)(3) and 40 CFR § 70.5(c)(8). In addition, TCEQ must review the incorporated minor NSR permits to ensure that the CAA-related requirements of the Consent Decree have been appropriately incorporated therein.	1) **TOTAL (O1267) Example:** TCEQ revised "Compliance Schedule" permit language to require permittee to specify details ensuring that all NSR/PSD permits issued meet all requirements stipulated in issued Consent Decrees.
6. Objection to the Statement of Basis (SOB). The SOB must be revised to clarify the discussion of the process units covered by the Title V permit, the changes being made to FOP since its last revision or amendment, and the rationale for all monitoring for all the applicable requirements in the flexible permit, standard permits, and PBR authorizations. The SOB should include a discussion of whether or not the changes trigger the significant modification procedures set forth in 40 CFR § 70.7(e)(4) and the EPA-approved Texas Title V operating permit program requirements. TCEQ needs to make a full explanation and record available to the public explaining the permit. If a State uses a SOB approach, as Texas does, then that is the place it should be put placed for clarity. If a State uses another approach or document then this information should be made available in that kind of document.	A statement of basis should include, but is not limited to (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. 67 Fed. Reg 732 (January 7, 2002). See http://www.epa.gov/region07/air/title5/t5memos/txfrn.pdf. Additional guidance was provided in a letter dated December 20, 2001 from EPA Region V to the State of Ohio on the content of an adequate statement of basis. See http://www.epa.gov/region07/air/title5/t5memos/sbguide.pdf. 1) **Goodyear Tire (O1227) Example: SOB should be unique to each facility:** TCEQ clarified the SOB to include additional emission units and the following statement: "Please note that Unit IDs, F410E and F410F, previously used to identify the atmospheric vented vessels being demolished were reused to identify two of the three new closed pressure vessels." TCEQ stated this description states the changes made to the permit since its last revision and now includes all emission sources identified in the Title V

Objection	Possible Approaches for Addressing EPA Objection
	permit.
7. Objection to Special Condition for Failing To Identify Specific Compliance Option. The draft Title V permit must reference the specific compliance option selected by the permit holder that will be used to ensure compliance with the emission limitations for the individual emission sources regulated under the specified regulations. OR - The draft Title V permit must reference the specific regulatory Subpart that the individual emission units must comply with as specified under the regulations. Where the cited applicable requirement provides for different/ independent compliance options, the permitting authority generally should require that the part 70 permit contain (or incorporate by reference) the specific option(s) selected by the source. Alternatively, the permit could incorporate by reference the entire applicable requirement provided that (1) such reference is unambiguous in its applicability and requirements, (2) the permit contains obligations to certify/report compliance monitoring data reflecting the chosen control approach, and (3)the permitting authority determines the relevant purposes of title V would be met through such referencing. The alternative approach would not be allowable if changing from one compliance option to another would trigger the need for a prior review by the permitting authority or EPA (e.g. NSR), unless prior approval is incorporated into the part 70 permit (i.e., advance NSR). *White Paper 2 for Improved Implementation of The Part 70 Operating Permits Program,* Lydia Wegman, U.S. EPA OAQPS, March 5, 1996.	**1) TOTAL (O1267) Example:** TCEQ incorporated the following permit provision and accepted revised permit application representations which committed the applicant to submit compliance options within 90 to 120 days of permit issuance: "A citation listed on the Applicable Requirements Summary attachment, which has a notation [G] listed before it, shall include the referenced section and subsection for all commission rules, or paragraphs for all federal and state regulations and all subordinate paragraphs, subparagraphs and clauses, subclauses, and items contained within the referenced citation as applicable requirements" **2) Garland P&L (O17) Example:** Garland included information in Section E of the revised permit application (Table E-2) that provides sufficient information on the compliance options used under 40 CFR 60 Subpart GG. For example, the Applicable Requirements Summary Table in the permit drilled down to provide the specific type of monitoring, recordkeeping and reporting at 40 CFR 60.334(b), (c), or (j) as appropriate. **3) Occidental (O1240) Example:** TCEQ incorporated the applicable standards, monitoring and testing, recordkeeping, and reporting requirements, including test method options selected for emissions units subject to 40 CFR Part 63in Subpart EEE into the Title V permit Applicable Requirements Summary tables. As an example, the permit drilled down to levels of citation such as 63.1206(b)(5)(i)(B). The information was provided by the company.
8. Objection to the Permit Shield. The Title V permit renewal application must be revised to include all potentially relevant facts supporting a request for a determination of nonapplicability, and the SOB must be revised to provide an adequate	**1) TOTAL (O1267), Lockheed Martin (O1294), and Garland P&L (O17) Example:** • Remove permit shield provisions in the Title V permit, or; • The permit should provide more specificity for each individual emission unit. For example, when there is a construction date for which a permit shield applies, the permit

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discussion TCEQ's legal and factual basis for all determinations of nonapplicability for those requirements identified in the "Permit Shield" attachment to the Title V permit. Alternatively, Special Condition 30 and the "Permit Shield" attachment must be deleted from the Title V permit.	should list the facility's construction start up date. When a shield applies for tanks of a specific size, the permit should list the tank sizes of the units in question. Providing this information assures that TCEQ has analyzed the individual unit's applicability and that there is a record which provides information to an inspector why regulatory requirements do not apply.
9. Objection for Failure to Submit a Complete Application. The permit application must be revised to include all the information required by 40 CFR § 70.5(c). The permit package at public notice must include a copy of all the permit actions that incorporated by reference into the Title V permit.	40 CFR 70.5(c) lists all the emissions related information that shall be included in an application for a title V permit. **1) Garland P&L (O17) Example:** The resolution package submitted by the company appears to contain all the required elements of a complete Title V application. The original objection indicated that the emission rate in tons per year (TPY), identification and description of air pollution control equipment and compliance monitoring devices, and calculations for the basis of emissions were not included with the permit application available for public review. The crosswalk table included in the resolution package contains the emission rates in TPY. The compliance monitoring device used by Unit 4 is indicated in Section E. The resolution package does not show any calculations in the form of a mathematical formula, but enough information is given in the textual descriptions in Sections B through F to perform the calculations. The resolution package also included the mathematical formula used to calculate the emissions as stated in 40 CFR 70.8 (c)(3)(viii). Note: All underlying minor NSR permits being incorporated by reference into the Title V should be public noticed with the Title V permit.
10. Objection to Monitoring Requirements. The Title V permit must be revised to identify each storage tank covered by the Title V permit and to list the applicable monitoring and testing, recordkeeping and reporting requirements for each such tank.	This particular objection must be addressed on a case by case basis for each individual permit action. **1) ExxonMobil (O2715) Example:** TCEQ revised permit conditions to identify the specific NSR permit conditions that apply to each storage tank.
11. Failure to Identify Emission Units With an Applicable Requirement The Title V permit must be revised to identify each emission unit covered by the Title V permit and reference the specific emission limitations, applicable monitoring and testing, recordkeeping, and reporting requirements for each such unit.	This particular objection must be addressed on a case by case basis for each individual permit action. **1) Flint Hills (O1272) Example:** TCEQ revised permit conditions to identify specific monitoring, recordkeeping, and reporting for individual emission units subject to MACT requirements.
12. Failure to Include all Applicable Requirements	1) Revise the permit to identify all emission sources authorized by PBRs, and

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TCEQ must revise the draft Title V permit to identify each emission unit covered by the Title V permit and reference the specific emission limitations, applicable monitoring and testing, recordkeeping, and reporting requirements for each such unit, including the relevant and appropriate Permit by Rules (PBR) associated with each emission unit.	incorporate the specific monitoring, recordkeeping, and reporting requirements applicable to each of the emission units regulated by the PBRs.
13. Objection to General Recordkeeping Provision. TCEQ must revise the Title V permit to include a condition stating that records of monitoring data and supporting information must be maintained for a minimum of five years from the date of monitoring, notwithstanding the requirements of any other permit conditions or applicable requirements.	**Southwestern Harrington (O15), and Flint Hills (O1445) Example:** • TCEQ proposed including a five-year record retention requirement of 30 TAC §§ 122.144(l) into the Title V permit superseding any less stringent data retention schedule as follows: "In accordance with 30 TAC §§ 122.144(l), 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."
14. Objection to Recordkeeping Provision of Permit Condition 30.E.(ii). TCEQ must revise the draft Title V permit to include sufficient recordkeeping provisions – specifically, documentation of inspections, as necessary to comply with the requirements of 40 CFR § 70.6(a)(3)(ii)(A), including, but not limited to, the requirement to document all fugitive emissions, the date they were discovered, and the date they were repaired.	**1) TOTAL (O1267)/ Example:** • TCEQ incorporated the following language into the Title V permit: "Documentation of inspections must include all items specified in 40 CFR 70.6(a)(3)(ii)(A)." **2) Valero (O1253) Example:** • TCEQ incorporated the following language into the Title V permit: "The permit holder shall comply with the requirements of 40 CFR 70.6(a)(3)(ii)(A) and 30 TAC 122.144(l)(A)-(F) for documentation of all required inspections."
15. Objection to Special Condition for Failing to Meet Compliance Certification Requirements. TCEQ must amend the Special Condition to include all the requirements for	**1) Lockheed Martin (O1294) and ExxonMobil (O2715) Example:** Permit language added to address objection: "The permit holder shall certify compliance in accordance with 30 TAC 122.146. The permit holder shall comply with 30 TAC 122.146 using at a minimum, but not limited to,

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compliance certifications, as set forth in 40 CFR § 70.6(c)(5), including the identification of the methods or other means for determining the compliance status with each term and condition of the permit.	the continuous or intermittent compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information. The certification period may not exceed 12 months and the certification must be submitted within 30 days after the end of the period being certified."

EPA's Responses to Questions for the Record from March 24, 2011 Field Hearing Entitled "EPA's Greenhouse Gas and Clean Air Act Regulations: A Focus on Texas' Economy, Energy Prices, and Jobs"

1. **With regard to the Texas Flexible Permits Program, is it EPA's view that the Clean Air Act requires discrete emission limits for each individual source at a plant or facility? If yes, what is the specific legal authority under the Clean Air Act? Can you identify the specific provision(s) upon which EPA relies?**

EPA's disapproval of the Texas' Flexible Permits Program was not on the grounds that it failed to require individual source-specific emissions limits. Rather, this particular program was disapproved for violating several provisions of the CAA (as required under CAA § 110(a)(2)(A)-(C) and 40 CFR §§ 51.160(a) –(b)) including: the program was not enforceable; lacked sufficient monitoring, recordkeeping and reporting requirements; and failed to include any replicable methodology for calculating the emissions caps (see 75 FR 41312, at 41313-41343, July 15, 2010).

While EPA did not disapprove the flexible permit program on the basis that the permits lacked discrete emission limits for individual sources, it is correct that many of these permits did not contain such limits. There are numerous provisions of the CAA and its implementing regulations that require that the determination of an emissions limitation for an individual source must be expressed in various discrete ways. These include CAA § 110(a)(2)(A)-(C) and 40 CFR §§ 51.160(a) –(b), which require enforceable permitting programs; CAA § 504, which establishes provisions under Title V operating permits; and CAA §§ 165(a)(4) & 169(3) and 40 CFR §§ 51.166(b)(12) & (j),52.21(b)(12), and 52.21(j), which require the mandatory imposition of the Best Available Control Technology (BACT) under the Prevention of Significant Deterioration (PSD) program; and CAA § 173(a)(2) and 40 CFR §51.165(a) and (a)(1)(xiii), which require the mandatory imposition of the Lowest Achievable Emissions Rate (LAER) under the Nonattainment New Source Review program.

2. **In your testimony, you expressed a desire to work with the TCEQ to resolve the difference between the TCEQ and the EPA. Although they disagrced with EPA's opinions on their existing rules, the TCEQ did agree in a letter dated October 23, 2009, to work cooperatively with EPA and to do expedited rule making to revise their existing rules, on public participation, Prevention of Significant Deterioration (PSD) Best Available Control Technology (BACT) definitions, Qualified Facilities, flexible permitting and New Source Reform to resolve these differences. When these rules are formally submitted to the EPA, will EPA ensure that TCEQ obtains formal feedback on these rules within the allotted 18 month time frame as defined by law?**

EPA has on many occasions expressed its desire to work with the TCEQ to resolve differences between the agencies. The Clean Air Act defines a process by which states submit revisions to their SIPs to EPA once they have undergone reasonable notice and public hearing. EPA then has 18 months to review and take action on those proposals. Above and beyond these minimum requirements, EPA has strived to participate early on in the TCEQ rulemaking process during the public comment period on each of the recent TCEQ rule revisions. While these steps go beyond

the minimum requirements and create additional work for EPA, we are committed to working closely with TCEQ to reform its permitting programs. We believe that the engagement is valuable for both organizations. On several occasions, our comments during the state rulemaking processes identified specific items in the proposed rules that were unclear or inconsistent with federal requirements.

The first of these rule revisions formally adopted by TCEQ were rules to revise the public participation process in Texas. In November 2008, EPA proposed a limited approval and limited disapproval of the TCEQ's submitted public participation rules. TCEQ has since withdrawn the bulk of that submission, and on July 2, 2010, submitted a new public participation package for EPA's review. EPA, in turn, withdrew its prior proposed limited approval and disapproval on November 5, 2010 (75 FR 68291), and is reviewing the new package. TCEQ also moved forward to adopt a revised PSD BACT definition. EPA was supportive of the revision submitted by TCEQ on July 16, 2010, and formally approved this SIP revision through an expedited direct final action, two months later, on September 15, 2010 (75 FR 55978). In addition, we received the SIP submittal for the Qualified Facilities Rule revision from TCEQ dated October 5, 2010, and the New Source Reform rule, dated March 11, 2011. The TCEQ adopted revisions to its Flexible Permit Program on December 14, 2010, but has not submitted this SIP Revision to EPA to date. EPA will be under a Clean Air Act deadline to act on the submitted rules within 18 months after they are received and we are planning our work in order to meet this deadline.

3. With regard to EPA's greenhouse gas (GHG) permitting under the Clean Air Act's "Prevention of Significant Deterioration" program:

a. How long does EPA estimate it will take permitting authorities to make decisions about the "Best Available Control Technology" or "BACT" for particular projects?

EPA generally expects that the control technology decisions can be made in a few weeks for most projects. We will work with companies and the states to make control determinations as quickly as possible.

b. Is there a clearinghouse at EPA where information about permits and BACT determinations nationally is being collected?

Yes, the EPA's RACT/BACT/LAER Clearinghouse (RBLC) contains case-specific information on air pollution technologies and emission limits that reflect BACT decisions made in PSD permit actions. This information is provided by State and local permitting agencies and can be accessed at http://cfpub.epa.gov/RBLC.

c. Will EPA post information about greenhouse gas BACT decisions in one place for the public?

The EPA's GHG permitting website (http://www.epa.gov/nsr/ghgpermitting.html) contains information and guidance related to GHG permitting and BACT decisions for GHGs. This

website contains, among other things, EPA comment letters regarding state permitting actions that involve GHGs.

d. If EPA doesn't post that information for the regulated community, will there be a way for state permitting authorities, regulated entities and the public to find out what BACT determinations have been made?

See response to question 3(c).

4. Are all Prevention of Significant Deterioration (PSD) permit applications that were pending as of January 2, 2011 and meet the thresholds in the Tailoring Rule required to obtain GHG permits? Are such applicants required to update their pending permit applications? What process must those applicants go through to obtain GHG permits? Please explain your response.

Any PSD permit issued on or after January 2, 2011 needs to address GHG emissions, if the project will have GHG emissions increases of 75,000 tons per year of CO2 equivalent. Many companies who submitted applications prior to January 2, 2011, understood that their application would need to include BACT for GHG if they did not have a permit by January 2, 2011. Some applicants included a GHG BACT analysis so they did not need to update their application. Other applicants may have expected their permits to be issued prior to January 2, 2011, but the permits in fact were not issued by that date. In these cases, the applicant would need to provide their permitting authority with the necessary information and analysis in order to permit their GHG emissions. The EPA has made only one exception to this general requirement, in the specific case of the Avenal Energy Center in California. This exception was due to the particular circumstances of that permit. This EPA action has been challenged in federal court.

5. **In States where EPA is directly handling GHG permitting and/or has imposed a Federal Implementation Plan for GHG permitting:**

a. Will GHG permits issued by EPA be deemed final when they are issued?

All PSD permits issued by an EPA Regional Office become final and effective 30 days after they are issued. If a petition for review of a permit is filed with EPA's Environmental Appeals Board (EAB), however, the permit does not become final and effective until either: (1) the EAB issues a decision in the appeal finding no error with the permit; or (2) any errors identified by the EAB are corrected and, if the corrected permit is appealed, it is upheld by the EAB.

b. Will applicants who receive such permits be able to proceed with construction or will the permits be subject to an administrative appeals process?

Once their permit becomes effective, the applicant may proceed with construction.

c. What will be the administrative appeals process for those permits? How long is the EPA appeals process for GHG permits likely to take?

Within 30 days after issuance of a final decision on a PSD permit, any person who filed comments on that draft permit or participated in the public hearing may petition the EAB to review any condition of the permit decision. In the typical case involving PSD permits covering multiple pollutants, it usually takes the EAB around 5 months to issue a decision in an appeal.

d. Will the permits EPA issues be subject to citizen suits? How long could the litigation process take to complete for challenges to GHG permits?

The EAB functions as a less expensive, faster, and more expert substitute for judicial review. On average, the EAB decides air permitting appeals in just over five months from the filing an appeal, much faster than judicial cases are typically resolved. Once the EAB has reviewed a permit appeal, EAB decisions are seldom challenged in court and a permittee can be confident that its permit will withstand judicial review if appealed. Only four of the EAB's approximately 100 decisions regarding PSD air permits have been reviewed by a federal court, and none has ever been overturned.