TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 27, 2009

Mr. Stanley M. Spruiell
Air Permits Section (6PD-R)
Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Re: Docket ID No. EPA-R06-OAR-2007-0209

Dear Mr. Spruiell:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's Proposed Rule regarding Approval and Promulgation of Implementation Plans for Texas, specifically Revisions to Chapters 39, 55 and 116 which relate to Public Participation for New and Modified Sources published in the November 26, 2008 issue of the *Federal Register*.

TCEQ looks forward to continuing dialogue with EPA staff regarding resolution of issues regarding our air quality permitting program.

If you have questions regarding our enclosed comments, please contact Janis Hudson, Attorney, Environmental Law Division at (512) 239-0466 or jhudson@tceq.state.tx.us.

Sincerely,

Mark R. Vickery, P.G.
Executive Director

Enclosure

Comments by Texas Commission on Environmental Quality
EPA Docket ID No. EPA-R06-OAR-2007-0209

Background

On November 26, 2008, EPA published a notice in the Federal Register (Notice) proposing action on various public participation rules submitted by the Texas Commission on Environmental Quality (TCEQ) which were adopted or amended primarily in response to House Bill (HB) 801 (76th Texas Legislature, 1999). TCEQ appreciates EPA's understanding that overall programmatic issues, such as public participation, must be resolved prior to resolution on more specific aspects of TCEQ's air permitting rules submitted for approval into Texas' State Implementation Plan (SIP). Subsequent to action on the rules that this Notice addresses (rules submitted between December 1995 and October 1999), TCEQ adopted new and amended some existing public participation rules, as partially acknowledged in Footnote 1 of the Notice; those rule changes should also be addressed as part of the overall programmatic rules submitted to EPA.

TCEQ also appreciates that EPA has found that the rules contain some provisions that meet or exceed federal requirements, and strengthen the existing SIP, as described in Section III of the Notice. Although TCEQ acknowledges that some rule amendments may be necessary for clarification, the rules that are the subject of this Notice essentially meet federal requirements, do not result in any backsliding from the approved SIP, strengthen the SIP and should be approved.

The TCEQ,[1] when implementing HB 801, consolidated the public participation rules[2] for air permit applications with other agency permitting programs for the first time since the 1993 merger of the Texas Air Control Board (TACB), the Texas Water Commission and certain programs formerly administered by the Texas Department of Health into a new agency, the Texas Natural Resource Conservation Commission (TNRCC), per Senate Bill 2 (72nd Texas Legislature, 1st C.S. 1991).[3]

The TCEQ understood the Texas Legislature wanted notice to be provided early in the permitting process for a variety of permit programs, including other federal permit programs delegated to the state of Texas, such as the Texas Pollutant Discharge Elimination System (TPDES) and Resource Conservation and Recovery Act (RCRA) programs. At the time HB 801 passed, the TCEQ processed many more air quality

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[1] The agency was known as the Texas Natural Resource Conservation Commission at the time the rules that are the subject of this notice were adopted. In 2002, the agency name was changed to the Texas Commission on Environmental Quality. Regardless of the time period referenced, these comments refer to the agency's current name, unless otherwise noted.

[2] Although some of the rules, such as those in 30 Tex. Admin. Code Chapter 39, Subchapter K, were submitted in full, only those portions of other rules which are applicable to air permit applications, such as those in 30 Tex. Admin. Code Chapter 39, Subchapter H, were submitted. Based on meetings with EPA staff regarding other multi-media rules that were, in part, submitted as a revision to the Texas SIP, TCEQ staff understood that EPA would accept rule subsections as revisions to the SIP, and therefore did not segregate air quality public participation rules, such as in Chapter 39, Subchapter H.

[3] As part of the rule consolidation project, and to implement the changes effective September 1, 1999 in HB 801, some of the rules that are the subject of this notice are applicable only to applications received on or after September 1, 1999.

permit actions than any other permitting program. Texas has a more extensive permitting program, for both minor and major sources, than perhaps any other state in the country, not only because of the amount and variety of types of industry in the state, but also because of its extensive minor source permitting program, established in the 1970s.[4] That was acknowledged by the legislature when it maintained the requirement for notice for certain air permit applications. The agency's rule regarding notice of a minor source air quality permit application[5] did not specify precisely when the notice should be given, and, in practice, could be at any time from receipt of application by the agency to after preparation of the draft permit that was ready for issuance. HB 801, and the corresponding new rules, resulted in a more uniform notice time period for notice of the application for minor and major new source review (NSR) permit applications. Given the long history of a small number of contested case hearings on air permit applications, the legislature revised the public participation scheme which acknowledged the need for efficient processing of applications by establishing an early public participation process that would provide certainty to applicants whose applications were not subject to further notice, which was consistent with the existing state law and the agency's SIP-approved rules. The TCAA has long provided for exemptions from permitting, and authorizations that do not require notice. The agency's public notice rules have reflected this over the years. The Legislature essentially maintained existing and added additional notice requirements as a part of HB 801, as discussed below.

Prior to HB 801, TCEQ's rules regarding public participation that were approved into the Texas SIP required notice of application of minor source applications, notice of draft permit for Prevention of Significant Deterioration (PSD) and non attainment permit applications, sign posting, and opportunity for public comment and contested case hearing, and notification of the agency's final action.[6] Those rules, as well as the current rules, meet and, in part, exceed the federal public participation requirements. As indicated in a letter from TCEQ Executive Director Glenn Shankle to Mr. Larry Starfield of EPA Region 6 dated June 13, 2008, the TCEQ provided justification that TCEQ's public participation rules are approvable as a SIP revision. In the Notice, EPA acknowledges that some rule revisions strengthen the SIP.[7] In implementing the requirements of HB 801, the public participation rules relating to air permitting were clarified and strengthened as compared to the rules that previously applied and were approved into the SIP;[8] those are articulated in Section III of the Notice.

TCEQ acknowledges there were some additions to the public participation rules, such as referencing various types of permits (including flexible permits) or generic references that need additional specificity, that were not in the previously SIP approved rules. TCEQ maintains, however, that 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 did not constitute a relaxation of

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[4] As part of its permitting program, TACB first adopted public notification procedures in 1978.
[5] § 116.131(a), last amended effective July 8, 1998.
[6] Sections 116.130 – 116.134, 116.136 and 116.137 (which, for the most part, are approved into the SIP). 67 *Fed. Reg.* 58709, September 18, 2002 and 60 *Fed. Reg.* 49781 (September 27, 1995)
[7] 73 *Fed. Reg.* at 72007 (November 26, 2008).
[8] Sections 116.130 – 116.134, 116.136 and 116.137 (remain in effect for applications received prior to September 1, 1999. See § 116.111(b). The SIP approval excludes § 116.130(c).

the SIP, as prohibited by § 110(l) of the Federal Clean Air Act (FCAA).[9] TCEQ's rules meet federal requirements, although further clarification may be necessary to ensure certain rules sufficiently reflect federal public participation requirements for certain air quality permit applications. Therefore, the EPA should not disapprove, in any fashion, any of TCEQ's rules and subject the TCEQ to possible sanctions under FCAA § 179(b).[10]

The TCEQ's responses to specific provisions of the Notice are discussed below.

A. Response to Rule Deficiencies Discussed in Section IV of the Notice

1. Section IV.A. Regarding New or Modified Minor NSR Sources.

The Notice lists four specific deficiencies in certain Chapter 39 rules. The first deficiency is that § 39.419(e)[11] does not include a requirement for notice of draft permit and air quality analysis (notice of application and preliminary decision [NAPD], commonly referred to as "second notice") for new or modified minor NSR sources or minor modifications at major sources, as required by 40 CFR 51.161(a) and (b), unless a contested case hearing request is received and not withdrawn after the NAPD is published.

The second deficiency is that although a permit amendment is required where there is change in method of control of emissions, a change in the character of emissions or an increase in the emission rate of any air contaminant, no public participation is required unless the change is a new facility or modification of existing facility that results in 25/250 ton per year (tpy) increase,[12] citing § 39.403(b)(8).

EPA's third deficiency is that § 39.419(e)(1)(C) does not include a requirement for notice of draft permit and air quality analysis for any amendment, modification or renewal of a major or minor source if there is no increase in allowable emissions and no new air contaminants, or unacceptable compliance history.

TCEQ's primary concern with these three alleged deficiencies is that EPA interprets 51.161(a) and (b) to require Texas to provide notice of draft permit and air quality analysis of all proposed new or modified minor sources. TCEQ has two reasons why these rules are not deficient. First, if EPA intended that specific requirements apply to every minor NSR permit action, it must provide clear notice of that requirement so States can comply. Texas' public notice rules have been, for the most part, SIP-approved for many years and were written to meet both federal and state law. Those federal rules, now

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[9] 42 USC § 7410(l).

[10] 42 USC § 7509(b).

[11] All rules cited in this document are found in Title 30 of the Texas Administrative Code. Therefore, only the section numbers are used in the citations to specific rules.

[12] The text of the rule cites to "the emission quantities defined in § 106.4(a)(1) . . . and of sources defined in §106.4(a)(2) and (3) . . ." Subsection (a)(1) defines what is commonly referred to as the insignificant limits for which a permit by rule (PBR) can be claimed, that is, emissions that do not exceed 250 tpy of carbon monoxide or nitrogen oxides, or 25 tpy of any other air contaminant except carbon dioxide, water nitrogen, methane, ethane, hydrogen and oxygen. The sources defined in subsections (a)(2) and (3) are those excluded from qualifying for a PBR, which are new major stationary sources or major modifications subject to PSD or nonattainment NSR review.

codified at 40 CFR 51.160-51.164, have essentially not changed in the more than 35 years since they were adopted by EPA in 1973.[13] If EPA chooses to interpret those rules in a different way, then it should conduct rulemaking to provide opportunity for notice and comment on the changes, and then give states adequate time to comply. As discussed herein, Texas reasonably relied on the plain language of 40 CFR 51.160-51.164, and EPA's approval of most of the public notice rules that are predecessors to the rules that are the subject of this notice.

Sections 51.160-51.164 apply to all of the NSR permitting program, and, in particular, to the minor NSR permitting program. These rules were originally adopted prior to the creation of the PSD permit program in 1977, which has its own detailed public participation requirements in 40 CFR 51.166(q). Although 51.166(q) includes more requirements with greater detail regarding public participation for major sources, no similar rulemaking has been adopted by EPA for minor sources.[14] Because EPA has adopted only these few broad rules to implement the general requirement in the FCAA to have a minor NSR program,[15] and because EPA has failed to interpret those rules other than actions regarding a minimal number of recent SIPs submitted by states, States may rely on the broad language of 51.160-51.164. Further, EPA has not issued any guidance document that is available to the States.

Section 51.161, the basis for EPA's deficiency, cannot be applied without considering its purpose, which is to implement 51.160 by specifying requirements for public availability of information. Section 51.160 requires SIPs to include legally enforceable procedures that enable states to allow for construction and modification of sources that will not violate applicable portions of the control strategy nor interfere with attainment or maintenance of a national standard. The rule is very broadly written, and therefore provides states and local agencies wide latitude to determine the boundaries of which facilities will be subject to review. In 1973 when EPA adopted the predecessor rule[16] it stated that SIPs should address the "types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section." Notably, that language remains in the rule today, with the following addition, that "[t]he plan must discuss the basis for determining which facilities will be subject to review."[17] The plain, broad language of this subsection anticipates that some facilities will not be subject to review. It supports EPA's repeatedly stated position that 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), a primary component of these federal rules. In addition, EPA acknowledges that there is a great deal of variation among the states' minor NSR permitting programs. EPA has approved Texas' minor source permitting program rules that include a requirement that major source permitting requirements cannot be circumvented.[18] Therefore, that protection is in place, and Texas law provides for challenge of an agency action that is not protective of the NAAQS.[19]

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[13] 40 CFR 18.1. 38 *Fed. Reg.* 15834 (June 18, 1973).

[14] TCEQ is aware of the rules proposed in 1995, but never adopted by EPA. TCEQ does not find that proposal persuasive or legally controlling as to current interpretation of federal law.

[15] FCAA § 110(a)(2)(C), 43 USC § 7410(a)(2)(C).

[16] See footnote 13.

[17] 40 CFR 51.160(e).

[18] For example, see §§ 116.111(a)(2)(H) and (I) and 116.115(c)(2)(B)(ii)(II),approved as part of Texas'

With regard to the specific requirements of 51.161, only minimal specificity regarding the control strategy requirement of 51.160 is included. In subsection (a), the State is required to provide opportunity for public comment on information submitted by owners and operators. This subsection also states that the public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval. Subsection (b) prescribes three minimum requirements to satisfy the opportunity for public comment in subsection (a). The first requirement is notice by prominent advertising in the area affected. Clearly, since TCEQ rules require that the application be made available for inspection and copying in a public place in or near the municipality in which the proposed facility will be located, as well as the requirement to post signs and publish newspaper notice (including, for certain applications, in alternate languages) stating that this submitted application is available for review, the TCEQ not only meets but exceeds this requirement.[20] The second is that the public have a 30 day comment period, which can be extended by the executive director or if the close of a public meeting is more than 30 days from publication.[21] TCEQ also clearly meets this requirement.

The third requirement is that the public be able to comment on the state or local agency's analysis of the effect on air quality, which, according to 51.161(a), includes the agency's proposed approval or disapproval. It appears that the TACB, and subsequently the TCEQ, described this overall requirement as the opportunity to comment on the agency's preliminary decision. The agency reaches a preliminary decision when all regulatory analyses are completed indicating that, among other requirements, that the NAAQS will not be violated, and a draft permit is prepared. Therefore, the agency has completed its air quality analysis which includes a draft permit. In 1987, TACB proposed a revision to the rule language (in the rule since at least 1981) to exempt minor sources from the requirement to include in the notice an opportunity to comment on the agency's preliminary decision. The exemption was agreed upon by TACB and EPA Region 6 when a compromise was reached as part of that rulemaking.[22] The rule was revised to include in the notice the opportunity to comment on the agency's preliminary decision only for major sources regulated under FCAA, Title 1, Parts C and D,[23] and 40 CFR 51.165(b). Since added in 1987, it has remained in the SIP-approved rules.[24, 25]

SIP at 72 *Fed. Reg.* 41998 (August 28, 2007), and 71 *Fed. Reg.* 52664 (September 6, 2006). See also Chapter 106, Subchapter A, approved into the SIP at 68 *Fed. Reg.* 64548 (November 14, 2003). For full approval of Texas' minor NSR permitting program, see 40 CFR 55.2270 which includes, among other sections, §§ 116.10, 116.114; Chapter 116, Subchapter B, Divisions 1-4; and Subchapters D and F.

[19] Tex. Health & Safety Code § 382.032.

[20] The application filing instructions require the original application be filed with TCEQ central office and a copy be provided to the appropriate regional office and local air pollution control programs (and, where applicable, to EPA Region 6). See page 20 of the instructions, found at: http://www.tceq.state.tx.us/assets/public/permitting/air/Forms/NewSourceReview/10252.pdf)

[21] § 55.152(a)(1) and (6), and (b). § 55.152(a)(2) allows only 15 days for permit renewal applications, but renewals are a state law feature, not a federal law requirement.

[22] 12 *Tex. Reg.* 2575, 2576 (August 7, 1987).

[23] FCAA §§ 160-169b and 171–193, 42 USC 7470–7492 and 7501-7515.

[24] Starting in 1982, the original citation to Parts C and D was in § 116.10(a)(2)(f), § 116.10(a)(3)(F), and then in recodified and current § 116.132(a)(6).

Therefore, TCEQ relied on EPA's approval of its minor NSR notice rules as the new rules were adopted in subsequent years; the EPA continued to approve the latest version, § 116.132, as recently as 2002 and 2006.[26]

Even though TCEQ relied on the existing SIP approval as guidance for drafting the new sections in Chapter 39, the rules provide an opportunity to comment on the preliminary determination for minor NSR applications, as long as a hearing is requested. Second notice (NAPD) is required for applications which receive a timely request for contested case hearing, as discussed in more detail below in Section B.[27]

It is within this context that EPA should evaluate TCEQ's rules. TCEQ relied on EPA's prior evaluations of its public participation rules, which would have been reviewed for compliance with 40 CFR 51.160 and 51.161. After many years of these broadly worded rules as the only EPA interpretations of the FCAA's requirement for a minor source permitting program,[28] TCEQ adopted the rules at issue without any backsliding from previous SIP-approved rules. Therefore, it was rational and reasonable for TCEQ to adopt the rules that are the subject of this Notice. Without any other adequate notice of what States are required to do, EPA lacks legal authority to require additional specific elements when the broad criteria are met.

Second, if EPA is considering any disapproval of these rules based on recent interpretations regarding what an approvable minor NSR program consists of, then EPA should afford Texas deference as it has for other states in crafting their minor NSR programs. The notices of EPA action on other states' rules and proposed rules for Indian Country, discussed in the Notice at page 72008, should be considered as EPA evaluates TCEQ's rules. TCEQ agrees that the examples cited illustrate EPA's interpretation that states have "broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS," and that states have "significant discretion to tailor minor NSR requirements that are consistent with the requirements of Part 51." However, since all of the cited examples occurred after (2000-2007) the adoption of the TCEQ rules that are the subject of the Notice, TCEQ could not have the benefit of that information to consider when implementing HB 801.

The only other outstanding, general indication of public participation requirements that would apply to minor stationary sources and minor modifications can be found in EPA's proposed rules for permitting in Indian Country.[29] This proposed rule gives the first indication of how EPA interprets how project netting will be a part of the minor NSR permit program. Under this proposal, net emission increases less than specified minor NSR thresholds are subject to the administrative revision process, which does not include

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[25] The reference to 40 CFR 51.165(b) was not included in the new sections in Chapter 39; a rule amendment would be required to add this citation, if it is necessary.
[26] 67 *Fed. Reg.* 58709 (September 18, 2002) and 71 *Fed. Reg.* 12285 (March 10, 2006).
[27] The technical analysis, including the air quality analysis, is always available for public inspection upon completion by the permit reviewer. The notice could be revised to add this information.
[28] FCAA § 110(a)(2)(c), 43 USC § 7410(a)(2)(c).
[29] Review of New Sources and Modifications in Indian Country; Proposed Rule, 71 *Fed. Reg.* 48695 (August 21, 2006).

public participation.[30] This proposal illustrates that EPA is willing to approve a minor NSR program with exceptions to notice. TCEQ's minor NSR program, is, for the most part, is subject to more stringent technical permit requirements than other minor programs. Specifically, best available control technology and off-property impact requirements apply, and public notice is required for those authorizations that are not insignificant.

Because 51.160 allows states to determine which facilities will be subject to review, this exception should not be a basis for determining that § 39.419(e) is deficient, especially since EPA has indicated that exceptions to these specific requirements can be granted on the basis of an environmental significance showing by a State. EPA's analysis that concluded with finding these three deficiencies turn on whether 51.161(a) and (b) are met, without a full analysis of whether the rules meet 51.160. When EPA delegated authority to the states in 51.160, it gave the states the right to create a holistic approach in creating its permitting programs and how those programs would attain and maintain the NAAQS. Therefore, if States have discretion as to how to implement these minor source programs, and if Texas' current SIP-approved public participation rules were approved, TCEQ's new rules in Chapter 39, should also be approvable. Given EPA's ability to approve a wide variation of minor NSR permitting programs, EPA must find that Texas public participation rules as part of its minor NSR permitting program meet the federal minimum requirements.

EPA's fourth stated deficiency is that references to certain sections of the Texas Clean Air Act (TCAA) in § 39.403(b)(8) should be references to rules in the SIP to provide clarity and approvability. The TCEQ is unclear as to why this rule drafting is a deficiency for SIP approval. The citations are used to indicate the scope of the types of permits which are subject to these public participation rules and does not serve as a limitation as to enforceability of the Texas SIP. In addition, the Texas SIP includes submission of the legal authority under which the state implements federal and state permitting requirements which includes the part of the TCAA referenced in § 39.403(b)(8).

2. Section IV.B. Regarding Projects Subject to PSD

The Notice lists five omissions for notice of PSD permit applications.

(a) The rules do not include an opportunity for public hearing to appear and submit written or oral comment on the draft permit and air quality analysis regarding an application for a new or modified source subject to PSD, as required by 40 CFR 51.166(q)(v) and § 165(a)(2) of the FCAA.

TCEQ understands EPA's comment to mean that there is no precisely defined opportunity for a notice and comment style hearing on draft PSD permits. 40 CFR 51.166(q)(v) requires a state to provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations. As discussed above, Texas law provides opportunity for both contested

[30] *Id.* At 48743.

case hearings and public meetings. A timely request for a contested case hearing (as well as comments on the draft permit) can be made until the close of the notice period, which is at least 30 days after publication of the availability of the draft permit (the NAPD) for applications subject to second notice.[31] A public meeting can be requested in response to the notices.[32] Although § 55.152 does not specifically provide that a public meeting must be held after the draft permit is available for public review, the TCEQ's practice, when a meeting request is granted, is to generally conduct public meetings at that time in order to receive more meaningful input. Further, the comment period does not end prior to the date of a public meeting, and therefore the RTC responds to all written and oral comments received for the period of receipt of application until at least 30 days after NAPD is published and the public meeting is held, whichever is later. A person can request both a contested case hearing and a public meeting, as well as file comments at anytime during the public comment period.[33] EPA accepted Texas' contested case hearing process many years ago as a component of the public participation process for air quality permit applications, including PSD applications, which was long before state law added the public meeting opportunity requirement added by these rules. Therefore, TCEQ rules meet the specified federal requirement.[34]

(b) For a new or modified source subject to PSD, the rules do not require that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification, as required by 40 CFR 51.166(q)(iii) and § 165(a)(2) of the FCAA.

TCEQ acknowledges that the rules need to add this requirement. In practice, this information is included in the notice, resulting in no deficiency in the processing of PSD applications in Texas.

(c) For a new or modified source subject to PSD, the rules do not require public notice of a PSD permit be sent to state and local air pollution control agencies, the

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[31] § 55.152. The time can be longer in cases due to the date of alternate language publication or if a public meeting is held at the end of the publication period.

[32] § 39.411(b)(5) and (c)(6).

[33] See additional discussion in response to Section V.A. below.

[34] When EPA approved Texas' PSD permitting program, it specifically approved the public notice rules, stating "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 18, 1987." 57 *Fed. Reg.* 28093, 28094 (June 24, 1992). That version of 116.10 did not include a public meeting opportunity, although subsection (b)(1) provided that interested persons could submit comments, including requests for public hearing pursuant to TCAA § 3.271(c). This 1985 amendment, in § 116.10(a)(3)(J), was the first time the text of notice included the requirement for availability to request a hearing was included in the public notice rule, although contested case (evidentiary) hearings were available and held since at least 1978. TACB always considered all permit hearings to be evidentiary hearings under the Texas Administrative Procedure Act (APA), Tex. Gov't Code Chapter 2001, and its predecessor statute, the Texas Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. Art. 6252-13a. TACB procedural rules going back to 1976, including the last version revised in 1987 [31 Tex. Admin. Code § 103.11(3)] stated that notice of a permit hearing must be given as required by the TCAA and APTRA. Both the APTRA and the APA required notice of hearing, if a hearing was called. Note also that both the TCAA and APTRA were approved as statutes in the Texas SIP at 40 CFR 52.2270. In addition, the TACB adopted rules regarding hearings procedures, as the TCEQ now has in Chapter 80.

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, as required by 40 CFR 51.166(q)(iv) and § 165(a)(2) of the FCAA.

TCEQ acknowledges that the rules need to be amended to ensure that all federal and state requirements to notify certain persons and entities are included in the rules.

(d) For a new or modified source subject to PSD, the rules do not require the 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 § 165(a)(2) of the FCAA.

TCEQ understands, that by preparing a written response to comments that is provided to all interested persons, that this requirement is met in TCEQ rule,[35] although clarification to be sure it is fully understood may be necessary. When an RTC is required, the TCEQ provides the RTC prior to or at the time of final action on all PSD permit actions.[36] 40 CFR 51.161 requires that the comments be made available for public inspection. Although there is no specific federal requirement to provide a response to comments, there is limited value to accepting comments without a corresponding review of and response to comments; TCEQ assumes, therefore, that EPA interprets and implements its rules in this manner.[37] However, there is no specific deadline for EPA, or any agency implementing the PSD permitting program, to provide a response to comments prior to permit issuance. Therefore, with the addition to the rules in 1999 of the specific requirement to prepare a written response (commonly referred to as an RTC) to all commenters, TCEQ meets, and exceeds the language of the federal rules. The RTC is mailed to all commenters and interested persons on the mailing lists for applications. For permits issued by the Executive Director (which, by rule are uncontested), the RTC is mailed with notice of permit issuance. For permits issued by the commission (which concern contested applications), the RTC is provided prior to commission consideration of the requests for contested case hearing.

(e) There is no definition of "final appealable decision" for a PSD permit.

Although a State must include in its PSD permitting program authority for a challenge in state courts of permits issued by the agency, the TCEQ is unaware of any federal requirement for a definition of "final appealable decision," and no citation is provided in the Notice. Additionally, the TCEQ can find no requirement that state permitting programs provide legal advice or other direction for persons who wish to challenge the issuance of a new or amended PSD permit. Texas statutes provide an opportunity to challenge PSD permits issued by the TCEQ. For uncontested permits (those for which no requests for contested case hearing is received), persons who commented on the

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[35] § 55.156(c). In addition to this distribution of comments, the TCEQ's website for its Office of Chief Clerk provides the date that an RTC is filed, and anyone who has not received a copy can request one.
[36] § 55.156.
[37] Certain earlier versions of the Texas public notice rules mirrored the federal rules as to notification to applicant of the decision on the permit application. Later, the rule added the requirement that commenters be notified of the decision, but did not specifically require a written RTC be prepared and mailed to commenters. See § 116.137.

application are provided a copy of the RTC together with a letter from TCEQ explaining that a Motion to Overturn (MTO) can be filed for the commission's consideration, and stating an appeal may be filed in state district court in Travis County, Texas.[38] For contested permits, i.e., those for which a contested case hearing is requested and the permits are subsequently issued by the commission either after denial of all hearing requests or after a contested case hearing, the appropriate persons are notified that a Motion for Rehearing (MFR) of the commission's action can be filed.[39]

A person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. As noted above, the TCEQ has provided the EPA with the citations for its authority to administer the SIP-approved program and to adopt the necessary rules. For the issue of access to judicial review in particular, see TCAA, Tex. Health & Safety Code §§ 382.032 and 382.056(n). In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "[a]ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating Program includes TCAA § 382.032, which is the basic support for the Texas PSD permitting program, as well. The provisions of TCAA § 382.056(n) complement the authority in TCAA § 382.032, and prescribe the provisions for administrative review, not judicial review, of commission actions. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on TCAA § 382.032 in accord with Article III of the United States Constitution is also applicable for every action of the commission subject to the TCAA, including PSD permit decisions.

3. Section IV.C. Regarding PAL Applications

EPA also raises three issues regarding notice of Plantwide Applicability Limits (PAL) applications. First, there is no provision that PALs be established, renewed or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the state provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with certain Federal PAL rules. Second, there is no requirement that the State address all material comments before taking final action on a PAL for existing major stationary sources. Finally, the applicability in § 39.403 does not include PALS, despite a cross-reference to Chapter 39 in § 116.194.

The TCEQ acknowledges that the rules in Chapter 39 should be amended to provide clarification as to the precise requirements for notice of PALs; Chapter 39 was not open for revision at the time the PAL rules were adopted by the commission in January 2006. However, in practice, the agency generally requires applicants for PALs to comply with

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[38] See Attachment 1, which is an example of a form letter sent to commenters regarding issuance of uncontested air permit. Similar language is included in other form letters to commenters for other types of uncontested air permit actions.

[39] The MTO and MFR process also applies to minor NSR permits that are subject to notice.

the notice requirements for PSD permits, with the exception that there is no opportunity for a contested case hearing or request for reconsideration. PALs are subject to a notice and comment hearing. This includes notice of intent to obtain a PAL in the notice of application (if known). Notice of the draft PAL permit is required for initial issuance, all amendments and renewals. Also, an RTC is prepared to respond to any timely comments received on the PAL application or draft PAL permit.

4. Section IV.D. Regarding Flexible Permit Applications
EPA raised two issues regarding notice of a flexible permit.

(a) The rules do not require a 30-day notice and comment opportunity on the draft permit and air quality analysis for the initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap as required by 40 CFR 51.161.

TCEQ agrees with EPA's understanding of the rules. However, in practice, the TCEQ requires compliance with the first (Notice of Receipt of Application and Intent to to Obtain Permit, or NORI) and second (NAPD) notice requirements in §§ 39.418 and 39.419 as would be required for any other minor or major source permit application. The rules need to be amended to reflect the actual practice.

(b) The rules do not require public participation consistent with 40 CFR 51.161 and 51.166(q) where PSD and non-attainment NSR terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit.

Changes in PSD and non-attainment NSR permit terms and conditions for flexible permits are, in practice, subject to the same notice requirements as changes in these for other minor or major source permits. The rules need to be amended to reflect the actual practice.

B. Response to Analysis of whether Texas Minor NSR Public Participation Rules meet federal requirements for approval in Section V.A.

1. With regard to EPA's summary of the regulatory requirements[40] of the Notice, TCEQ is unaware of any federal rule, for which States had opportunity for notice and comment, that requires public notice for applications that involve limiting potential to emit (PTE) for synthetic minors or when netting is used to avoid major NSR review. TCEQ requests that EPA provide specific legal citation for this requirement.

In addition, TCEQ rules do not provide for a blanket exemption from public participation for all applications that involve limitations on PTE for synthetic minors or applications including netting analysis to avoid major NSR review. The TCEQ rules do provide for limited exemptions from public participation in accordance with the discretion provided by federal rules as discussed in Section A.1. of this response. Actions exempted from public notice may involve some PTE limitations and/or some applications with netting to avoid major NSR.

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[40] 73 *Fed. Reg.* 72001, 72008, Section V.A.1. (November 26, 2008).

2. EPA's conclusion that the requirement to request a contested case hearing to obtain the State's air quality analysis does not provide the public with the minimum public information required by 40 CFR 51.161(a) and (b).

In addition to TCEQ's response above regarding Section IV.A. of the Notice, TCEQ disagrees that the rules do not provide the public with the minimum required information. The added requirement to request a contested case hearing, which is not prohibited by federal rule, actually has two benefits. First, the public is provided the opportunity for a longer public notice period. EPA rules do not provide for notice of the application, and therefore provide only a 30-day notice of draft permit with an opportunity for a notice and comment hearing; this gives the public a very short window of time to become familiar with the application and a draft permit. By contrast, Texas' system provides notice early in the process, and requires nothing more within the first 30 days than to simply make a written request for a contested case hearing.[41] That simple act is hardly burdensome, and is a limitation only on minor NSR applications, not PSD or non-attainment permit applications.[42] While the application is under technical review, the public has the opportunity to study the application, prepare comments before or after the draft permit is available for public review, and determine whether to submit the comments and/or additional reasons for why they should be granted a contested case hearing. Diligence on the part of the public, under Texas minor source rules or EPA rules, is necessary during a 30 day period, and is not an overly burdensome or unreasonable requirement.

Second, requirement reduces the administrative burden for processing notices. Although there is fluctuation in actual numbers from year to year, the agency has seen a fairly consistent percentage of applications that receive requests for contested case hearings over the years, regardless of whether the application involves a PSD permit application for which a timely request can be received later in the process, both prior to and since the passage of HB 801. The percentage of contested matters is less than 5% of the applications required to comply with the public notice requirements in Chapter 39; TCEQ has approximately 14,000 NSR permits, and processes several thousand permit actions yearly. To require notice of this information would require that all of the applications be subject to notice required by §§ 39.419 and 39.603(b), not just those that receive hearing requests, or are PSD or non-attainment NSR applications.

Finally, although HB 801 and the corresponding rules provided more structure as to when notice of application must be provided, the opportunity to request a contested case hearing has not changed since approval of the public participation rules into the SIP.[43]

TCEQ is unsure whether EPA fully understands the process for requesting a contested case hearing and how that is linked to the opportunity to provide comments on the draft permit and air quality analysis for minor NSR permit applications. Although § 55.201(b)

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[41] See more discussion about requesting a contested case hearing later in this section.

[42] PSD and nonattainment applications are also subject to early (first) notice and requests for contested case hearings submitted in response to that notice are considered timely, but those requests are not necessary to trigger second notice.

[43] See footnotes 6, 34 and 47.

provides a list of who can request a contested case hearing, the rule does not prohibit interested persons who are not a member of any of the enumerated persons from filing hearing requests. Although not everyone can (or will) be granted a contested case hearing, the air quality analysis comment opportunity is available to anyone when the notice of draft permit and preliminary decision is published which is triggered by any timely contested case hearing requests received in response to the first notice (NORI) for minor source NSR permit applications. That information is available to any interested persons. Neither the commission nor an Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH) makes any determination of affected person, nor excludes any interested persons, before the second notice is published. Rather, all requests are considered by the commission at the end of the public participation period and briefing by the statutory parties and requestors. If a contested case hearing is granted by the commission, or the application is directly referred for hearing by the applicant, then a SOAH ALJ considers requests by anyone who appears in person stating that they are affected persons.[44] Therefore, the minimal requirement of anyone merely requesting a contested case hearing can result in lengthening the comment period and expanding the information on which comments can be submitted, and the public is not unduly or unreasonably burdened nor limited to initiate this process.

The TCEQ's early-in-time system is not too burdensome as compared to EPA's later-in-time scheme. The Texas Legislature, in directing the commission to implement this process, carefully considered the benefits and costs to the public of early participation versus the benefits and costs to later participation under the federal 30-day notice after draft permit scheme. This discretion was appropriately handed over to states by EPA in its rules, and approval of TCEQ's rules may not be unreasonably withheld by EPA at this juncture, or in the future. Therefore, EPA's concerns are unfounded, and TCEQ's rules meet the federal requirements.

3. EPA specifically requested comments on the issue of who shall publish notice (the state or the applicant), while acknowledging that the state has the authority to delegate that requirement. EPA expressed concern about the timely ability to determine the beginning and ending dates of the comment period.

TCEQ appreciates EPA's acknowledgment that the state has the authority to delegate the requirement to publish notice. The TCEQ and its predecessor agencies have implemented this requirement via delegation since 1978. Further, TCEQ rules include

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[44] At page 72010 of the notice, EPA cites to §§ 55.21(b) and 55.23. These rules do not apply to air applications submitted after September 1, 1999, nor to any earlier filed applications because these sections were not adopted under authority of the TCAA. Rather, for applications subject to the rules implementing HB 801, the applicable sections regarding requesting a contested case hearing and request by group or association are found in §§ 55.201 and 55.205. In addition, although an individual or group must demonstrate that they have a justiciable interest in the permit application to obtain status as a party in a contested case hearing, that process is after completion of first and second notices, any public meetings, and issuance of the Executive Director's RTC. (The RTC may not be available at time a hearing is called for applications directly referred to SOAH, but it is prepared as quickly as possible for those minimal number of applications.) Lastly, if the commission grants even a single request for a contested case hearing, the ALJ has authority to consider additional requests from persons who attend the preliminary hearing seeking party status.

requirements to ensure that notice is timely complied with.[45] The specific requirements to comply with all notice requirements and provide satisfactory proof of compliance satisfy, and go beyond, federal rules. In addition, while there may be additional ways to make information available to the public, such as how the TCEQ's website already includes text of notice within a day or so of it being provided to applicants for newspaper publication, the TCEQ has not identified any additional procedures that would assist persons in being more diligent about looking for newspaper notice and checking the TCEQ website. TCEQ finds it ironic that this concern is being raised only recently while over the past nine years the TCEQ has expanded the time of notice for some applications and made more information available on its website, actually providing to the public more (and more timely) information. Comments are timely if received at any time after the application is filed with the TCEQ until the close of the comment period, which is never less than 30 days from date of initial publication. The TCEQ makes every effort to include the actual date of the end of the comment period in the web database for contested items. And, both EPA and the general public can call the TCEQ with questions about the close of the comment period. The bottom line is that the TCEQ's current rules meet existing federal requirements, and any infrequent or non-existing delays due to mailing are not a reasonable or supportable basis for disapproval of TCEQ's rules.

C. Response to Section VI. Regarding Other Public Participation Concerns[46]

1. Section VI.A. Regarding Cross References to Rules Not in the SIP.

TCEQ will need to conduct further review and have further discussion with EPA as to how to address this issue.

2. Section VI.B. Regarding Use of Undefined Acronyms.

EPA notes that several sections use the acronyms APA, SOAH and WQMP, but are not defined in the rules submitted. TCEQ agrees that it appears that the first two are not defined in the submitted rules. APA is an acronym for the Texas Administrative Procedure Act, located in the Texas Government Code at Chapter 2001, and SOAH, is an acronym for the State Office of Administrative Hearings, the state agency that conducts the contested case hearings for the TCEQ. This could be clarified in a rule amendment. The third acronym is actually spelled out in § 39.401; WQMP stands for water quality management plans. Although no specific rules regarding WQMP are submitted for SIP approval, this acronym is used in the applicability rule.

3. Section VI.C. Regarding Cross Reference to Obsolete Provision for Permits by Rule for Concrete Batch Plants

TCEQ acknowledges that it has not amended the rules to update the references for authorizations for concrete batch plants.

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[45] §§ 39.405 and 39.605.

[46] TCEQ is generally not including responses to comments on individual rules that will be addressed in a later action by TCEQ (such as VI.D.)

4. Section VI.E. regarding Alternative Publication Procedures for Small Businesses

TCEQ will need to conduct further review and have further discussion with EPA as to how to address this issue.

5. Section VI.F. Regarding Relaxation of Sign Posting Requirements Under § 39.604

First, EPA has acknowledged that the sign posting requirements, in state rule since 1985, have no federal counterpart and exceed federal requirements. Both of the issues raised by EPA relate to text that is already part of a SIP-approved rule.[47] However, further discussion may be helpful due to reorganization of the text when it was adopted as new § 39.604 in 1999. First, in 1999, the term "thoroughfare" was replaced with "public highway, street or road" in subsection (c). As explained in the TCEQ's proposal for this rule change[48] and the adoption preamble,[49] these changes were made to clarify that a sign is not required to be posted on a waterway following TCEQ Air Rule Interpretation Memo R6-133.001. The memo addresses the issue of what is meant by the undefined term "thoroughfare." It analyzed Texas law and determined that the term "thoroughfare" means street or passage through which one can travel, a street or highway affording an unobstructed exit at each end into another street or passage. Given this interpretation, and the fact that agency staff historically had not considered rivers or any water body a public thoroughfare and therefore no applicant had been required to post a sign on the shore of a river or water body, the rule was amended.

Second, the rulemaking added the last sentence to subsection (c) which states "[t]his section's sign requirements do not apply to properties under the same ownership which are noncontiguous or separated by intervening public highway, street, or road, unless directly involved by the permit application." The sentence was and is located in subsection (e) of § 116.133, and was revised to replace the word "thoroughfare" and was relocated when the new rule was adopted.[50] The relocated sentence incorporates and compliments this clarification and ensures that the property that is the subject of the application has proper signage. TCEQ disagrees that this is a relaxation of the SIP.

In addition, TCEQ disagrees that the sign posting rule was further relaxed by the omission of the SIP-approved § 116.133(f)(1). The requirement to post signs in an alternate language, even if alternate language newspaper notice is waived, remains in the rule at § 39.604(e).[51] However, it appears that the rule submitted to EPA contained an incorrect cross reference (§ 39.703(d)(5)), which has been corrected in a subsequent rulemaking. TCEQ will need to conduct further review as to how to address this issue to ensure the correct version is submitted to EPA for the SIP.

D. Response to the on the "No Action" Sections in Section VII

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[47] See TCEQ's submission to EPA on August 31, 1993, and July 22, 1998. The text of these two issues were in § 116.133, as approved by EPA into the SIP. 71 *Fed. Reg.* 12285 (March 10, 2006)
[48] 24 *Tex. Reg.* 5303, 5309 (July 16, 1999)
[49] 24 *Tex. Reg.* 8190, 8218-19 (September 24 , 1999)
[50] Section 116.133 is SIP-approved. See footnotes 6, 8 and 47.
[51] *See* 24 *Tex. Reg.* 8190, 8249 (September 24 , 1999)

1. Section VII.A. regarding rules which implement FCAA § 112(g)

TCEQ understands that EPA interprets this part of the FCAA to be self-implementing and are carried out separately from the SIP, and therefore there is no reason for EPA to take action on these items.

2. Section VII.A. regarding rules which do not relate to air quality permits or to provisions that are not in the approved SIP

TCEQ will need to conduct further review as to how to address this issue to ensure the correct version is submitted to EPA for the SIP.

3. Section VII.A. regarding rules in Chapter 55

EPA is not taking action on certain rules in Chapter 55 that do not have any federal counterpart. Although TCEQ has not withdrawn its submission of certain rules in Chapter 55 which were included in the 1999 rules, TCEQ agrees that most of these do not have any federal counterpart and therefore should not be considered for action by EPA until EPA and TCEQ staff can have further discussion. Generally, all or parts of the four rules which EPA proposed to grant limited approval and limited disapproval,[52] were submitted to meet federal requirements. As discussed above, EPA's rules do not specifically require a response to public comment, although without such a response, the opportunity to submit comments is less effective. Therefore, the TCEQ understood that EPA interprets it rules to require a response to comments must be prepared and distributed to commenters. As also discussed above, the opportunity to request a public meeting which is typically conducted after the draft permit is prepared, together with the opportunity to request a contested case hearing satisfies the federal requirement to offer the opportunity to request a notice and comment hearing under the federal rules. Therefore, TCEQ understand that these rules are needed to meet federal requirements and that they also strengthen the SIP, and therefore should be fully approved as a revision to the SIP. If EPA's position, after consideration of these comments, is that the rules are not needed for the SIP, then TCEQ and EPA can have further discussion as to the next steps to take.

[52] §§ 55.150 (Applicability), 55.152, (Public Comment Period), 55.154 (Public Meetings) and 55.156 (Public Comment Processing)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

[name]
[street address]
[city/state/zip]

Re: Permit Number: [#####]
[Permittee name]
[plant/facility/project description
[city/county]
Regulated Entity Number: RN[##########]
Customer Reference Number: CN[##########]
Account Number: [AA-####-A]

Dear [name]:

This letter is your notice that the Texas Commission on Environmental Quality (TCEQ) Executive Director has issued final approval of the above-referenced application. According to 30 Texas Administrative Code (TAC) § 50.135 the approval became effective on [date], the date the TCEQ Executive Director signed the permit. Enclosed is a copy of the Executive Director's response to comments.

You may file a **motion to overturn** with the Office of the Chief Clerk. A motion to overturn is a request for the Commission to review the TCEQ Executive Director's decision. Any motion must explain why the Commission should review the TCEQ Executive Director's decision. According to 30 TAC § 50.139, an action by the TCEQ Executive Director is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

A motion to overturn must be received by the Chief Clerk within 23 days after the date of this letter. An original and 11 copies of a motion must be filed with the chief clerk in person, or by mail to the chief clerk's address on the attached mailing list. On the same day the motion is transmitted to the chief clerk, please provide copies to the applicant, the Executive Director's attorney and the Public Interest Counsel at the addresses listed on the attached mailing list. If a motion to overturn is not acted on by the Commission within 45 days after the date of this letter, then the motion shall be deemed overruled.

You may also request **judicial review** of the TCEQ Executive Director's approval. According to Texas Health and Safety Code § 382.032, a person affected by the TCEQ Executive Director's approval must file a petition appealing the TCEQ Executive Director's approval in Travis

County district court within 30 days after the effective date of the approval. Even if you request judicial review, you still must exhaust your administrative remedies, which includes filing a motion to overturn in accordance with the previous paragraphs.

Individual members of the public may seek further information by calling the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040.

Sincerely,

LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental Quality

LDC/MC/

Enclosure

cc: Air Section Manager, Region [# - city]