TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 23, 2009

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

Attn: Docket ID No. EPA-R06-OAR-2006-0133

Re: Title 40 Code of Federal Regulations Part 52
Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit

Dear Mr. Spruiell:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to respond to the U.S. Environmental Protection Agency's request for comments in the notice of proposed rulemaking published in the September 23, 2009, edition of the *Federal Register* entitled: *"Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit."*

Enclosed, please find TCEQ's detailed comments relating to EPA's action referenced above. If you have comments or questions concerning the enclosed comments, please contact Mr. Steve Hagle, P.E., Director, Air Permits Division, Office of Permitting and Registration, (512) 239-5721 or shagle@tceq.state.tx.us.

Sincerely,

Mark R. Vickery, P.G.
Executive Director

Enclosure

Texas Commission on Environmental Quality Comments on Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit Docket ID No. EPA-R06-OAR-2006-TX-0133

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed action referenced above. TCEQ's comments are detailed below.

I. TCEQ's 2005 Submittal

A. Anti-backsliding (Section V.A., 74 *Federal Register* 48472)

As EPA discusses, the anti-backsliding issue associated with the status of the requirements for compliance with the 1-hour ozone National Ambient Air Quality Standard (NAAQS) with the implementation of the 8-hour ozone NAAQS was delayed by litigation that took several years to become final. TCEQ adopted changes to 30 Texas Administrative Code (Tex. Admin. Code) § 116.12(18)[1] in June, 2005, prior to the resolution of the litigation. After the *South Coast* decision,[2] EPA subsequently stated it would conduct rulemaking to address the 1-hour ozone NAAQS requirements.[3] The TCEQ commits to work with EPA to ensure that the rule is revised to comply with current law.

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[1] Specifically, Footnote 6 to Table I in the definition of "major modification" at 30 Tex. Admin. Code § 116.12(18).

[2] *South Coast Air Quality Mgmt. Dist., v. E.P.A.*, 472 F.3d 882 (D.C. Cir. 2006).

[3] (1) Robert Myers memorandum October 3, 2007 New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase 1 Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS); (2) EPA satellite broadcast regarding 2008 revised 8-hour ozone NAAQS in which EPA staff indicated that four different rule projects to address the *South Coast* decision were in process (April 21, 2008); (3) Notice regarding determination of attainment for Delaware, District of Columbia, Maryland and Pennsylvania, noting that "[s]tates must continue to meet the obligations for 1-hour NSR . . . currently, EPA is developing two proposed rules to address the Court's vacatur and remand with respect to these three requirements. We will address in this proposed rule how the 1-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the Court) apply where EPA has made a determination that the area attained the 1-hour ozone NAAQS by its attainment date." 73 *Federal Register* 22896, 22897 (April 28, 2008); (4) Notice regarding finding of attainment for the Chicago/Gary/Lake County nonattainment area which states "a separate NSR policy is being developed" regarding implementation of the *South Coast* decision." 73 *Federal Register* 38353, 38354 (July 7, 2008); (5) EPA proposed rule to revise the Phase I rule to implement the South Coast decision re: classifications and removal of exceptions to anti-backsliding, which states "EPA plans to issue a separate proposed rule providing further guidance on how the ... the 1-hour NSR requirements apply as a result of the Court's vacatur. 74 *Federal Register* 2936, 2941 (January 16, 2009); and (6) EPA direct final rule to determine attainment of the 1997 8-hour ozone standard for the Ventura County nonattainment area in California. EPA reiterated its intention to issue a separate proposed rule providing further guidance on how the ... the 1-hour NSR requirements apply as a result of the Court's vacatur. 74 *Federal Register* 25153, 25154 (May 27, 2009).

II. TCEQ's 2006 Submittal

A. NSR Reform Rulemaking

1. Missing References in the PSD Program (Section IV.B. 74 *Federal Register* 48472)

EPA expressed concern related to the lack of a specific definition of best available control technology (BACT) in TCEQ rule; and the absence of a requirement contained in 40 Code of Federal Regulations (CFR) § 52.21(r)(4) concerning PSD review should the relaxation of an enforceable limitation specifically cause a source to become a major source. Although these references are currently missing from 30 Tex. Admin. Code § 116.160, in its permitting actions, the TCEQ does not circumvent federal New Source Review (FNSR) requirements and does not allow a control technology review to be conducted that results in a technology that is less than BACT defined in federal rule. TCEQ agrees that if a project becomes a major source through the relaxation of an enforceable limitation, PSD review is required, and TCEQ complies with that requirement in its permitting actions. The missing references are oversights, and will be corrected at the next available rulemaking opportunity.[4]

2. Major NSR

a. Applicability (Section V.B., 74 *Federal Register* 48473)

TCEQ revised the rule[5] to clarify and implement the EPA interpretation that the applicability date is the date of permit issuance, as well as provide for the possibility of new nonattainment areas. We agree that this new bifurcated structure is unclear. The TCEQ commits to work with EPA to comply with current rule and practice.

b. Definition of "facility" (Sections V.B. and VI.B, 74 *Federal Register* 48473 and 48475)

EPA specifically solicited TCEQ to comment on EPA's interpretation of Texas law and the Texas NSR SIP with respect to the term "facility" as this is critical to EPA's understanding of the

[4] TCEQ plans to propose rulemaking regarding the federal definition of BACT at its January 13, 2010, Commission meeting.

[5] 30 Tex. Admin. Code § 116.150 (a).

Texas Permitting Program.[6] The definition of the term "facility" is one of the cornerstones of the Texas Permitting Program under the Texas Clean Air Act. TCEQ appreciates the opportunity to address this point as its interpretation of Texas law differs from that of EPA as discussed below. In addition, to provide clarity and consistency, TCEQ will provide similar comments here and in regard to Docket ID No. EPA-R06-OAR-2005-TX-0025 and Docket ID No. EPA-R06-OAR-2006-TX-0032.

As stated by EPA, it understands that the state uses a "dual definition for the term facility." Under the Texas Clean Air Act[7] and TCEQ rule,[8] "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility." A facility may constitute or contain a stationary source -- a point of origin of a contaminant.[9] As a discrete point, a facility can constitute but cannot contain a "major stationary source" as defined by federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application.

Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to part of a "stationary source"; TCEQ translates "emissions unit" to mean "facility"[10] which is at least as stringent as federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC code)." The federal definition of "major stationary source"[11] is not equivalent to the state definition of "source."[12] A "major stationary source" can include more than one "facility" as defined under Texas law – which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit.

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[6] Docket ID No. EPA-R06-OAR-2005-TX-0025

[7] Tex. Health & Safety Code § 382.003(6).

[8] 30 Tex. Admin. Code § 116.10(6).

[9] Tex. Health & Safety Code § 382.003(12).

[10] 30 Tex. Admin. Code § 116.160 (c) (3) "The term 'facility' shall replace the words 'emissions unit' in the referenced sections of the CFR."

[11] 40 CFR § 51.166 (b)(1)(i)(a).

[12] Tex. Health & Safety Code § 382.003(12).

The above interpretation of the term "facility" has been consistently applied by the TCEQ and its predecessor agencies for more than 30 years. The TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.[13]

While Texas law does not directly refer to the two steps allowing deference enunciated by Justice Stevens writing for a unanimous Court in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*,[14] Texas law and judicial interpretation recognize *Chevron*[15] and follow similar analysis as discussed below.

The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[16] Further, Texas courts construe the text of an administrative rule under the same principles as if it were a statute.[17] Texas administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference.[18] The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent.[19] "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[20] This is particularly true when the rule involves complex subject

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[13] Tex. Gov't Code § 311.011(b).

[14] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S 837, 842-43 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

[15] *Phillips Petroleum Co. v. Tex. Comm'n on Envtl. Quality*, 121 S.W.3d 502, 508 (Tex.App.–Austin 2003, no pet.), which cites Chevron to support the following. "Our task is to determine whether an agency's decision is based on a permissible interpretation of its statutory scheme."

[16] *Reliant Energy, Inc. v. Public Util. Comm'n,* 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex.1994)).

[17] *Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n,* 36 S.W.3d 635, 641 (Tex.App.-Austin 2000, no pet.).

[18] *Id.*

[19] *Id.*

[20] *Udall v. Tallman,* 380 U.S. 1, 17 (1965).

matter.[21] Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[22]

In summary, TCEQ translates "emissions unit" to mean "facility." Just as an "emissions unit" under federal law is construed by EPA as part of a major stationary source, a "facility" under Texas law can be part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

c. Inclusion of Startup, Shutdown, and Malfunction (SSM) Emissions in the Definition of "Baseline Actual Emissions" (Section VI.B. 74 *Federal Register* 48475)

EPA points out that the use of "baseline actual emissions" must include SSM emissions. The TCEQ includes maintenance, startup and shutdown emissions in the development of "baseline actual emissions" to the extent that the permit reviewer can verify that these emissions occurred, were properly quantified and reported as part of the baseline, and were creditable. Otherwise, startup and shutdown, as well as maintenance, emissions are treated as unauthorized and, as such, have a baseline actual emission rate of zero. Further, the TCEQ does not authorize malfunction emissions. The TCEQ has concerns about crediting a major source with an emission associated with malfunctioning of equipment when the source determines baseline actual emissions. The TCEQ is concerned that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of FNSR applicability.

EPA has approved the exclusion of malfunction emissions from the baseline calculation in other states' rules.[23] TCEQ considers the

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[21] *See Equitable Trust Co. v. Finance Comm'n,* 99 S.W.3d 384, 387 (Tex.App.-Austin 2003, no pet.).

[22] *Reliant Energy, Inc. v. Public Util. Comm'n,* 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex.1994)).

[23] EPA has approved the omission of the phase "malfunction emissions" from the definition of "baseline actual emissions" as adopted by three states, based on its analysis that such an exclusion is acceptable for finding that the rules are at least as stringent as the federal rule. *See* proposed proposal approval of rules submitted by Florida, 73 *Federal Register* 18466, 18470-71, (April 4, 2008), final rule approval 73 *Federal Register* 36435 (June 27, 2008); proposed approval of rules submitted by South Carolina, 73 *Federal Register* 52031, 52035 (September

exclusion of malfunction emissions from baseline actual emissions to be at least as stringent as the federal rule. TCEQ is willing to work with EPA to clarify the inclusion of startup and shutdown emissions when determining baseline actual emissions.

d. Definition of "baseline actual emission rate" (Sections VI.A. and VI.B. 74 *Federal Register* 48474 - 48475)

The TCEQ does not use a rate that differs from the FNSR requirement. The TCEQ definition of "actual emissions"[24] includes the modifier "average," and "actual emissions" are included in the definition of "baseline actual emissions rate."[25] In practice, the TCEQ contends that a reading of the entire definition, including parts (a) - (d), results in an average emission rate being used to establish a baseline actual emission rate. This is because to determine an actual emission rate in tons per year from a consecutive 24 month period requires averaging the emissions over 24 months to obtain an annual emission rate (an average annual emission rate).

The TCEQ is willing to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a federally regulated new source review pollutant.

3. Plantwide Applicability Limitation (PAL) Program (Section VI.A. 74 *Federal Register* 48474 - 48475)

a. Missing and Unclear PAL Requirements

EPA commented that the TCEQ rules do not include provisions for PAL re-openings; requirements concerning the use of monitoring systems (and associated definitions); and a provision which limits applicability of a PAL only to an existing major stationary source. In addition, the current TCEQ rule, concerning emissions to be included in a proposed PAL, does not require that all facilities at a major source, emitting a pollutant for which a PAL is being requested, be included in the PAL. EPA also commented that a

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12, 2007), final rule approval 73 *Federal Register* 31369 (June 2, 2008); and proposed approval of rules submitted by Georgia, 73 *Federal Register* 51606, 51609 (September 4, 2008), final rule approval 73 *Federal Register* 79653 (December 39, 2008).

[24] 30 Tex. Admin. Code § 116.12(1)

[25] 30 Tex. Admin. Code § 116.12(3)

PAL can include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code. Notwithstanding the "lack of explicit limitation," i.e., defining facility to equal emissions unit; that is how the rule is applied and that will be addressed in rulemaking.

b. Public Participation

The TCEQ will address EPA's concerns regarding public participation for PALs in a separate rulemaking regarding public participation for the NSR permitting program at its December 9, 2009, Commission agenda.[26]

B. Pollution Control Projects (PCP) Standard Permit (74 *Federal Register* 48476)

The TCEQ PCP Standard Permit has been used to implement control technologies required by regulatory changes, statutory changes, and/or EPA consent decree provisions. As such, control devices may be applied to numerous different facility types and industry types, ranging from storage tanks to fired units. TCEQ understands EPA's comments and will work with EPA to develop an approvable authorization(s) that will achieve the same goals and emission reductions.

III. TCEQ's Plan to Correct Deficiencies

The TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all EPA comments and propose changes to the rules proposed for disapproval.

The TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- re-adopt the missing sections of the PSD Program (EPA's definition of BACT, and addressing relaxation of an enforceable limitation);

- clarify references for major stationary sources and major modifications to EPA rules for nonattainment and maintenance area definitions and removing rule language indicating that the 1-hour thresholds and offsets are not effective unless the EPA promulgates rules, and clarifying the applicability of nonattainment permitting rules;

[26] As discussed in 74 *Federal Register* 48480, in Section V.F., at 48490-91.

- clarify the definition of baseline actual emission rate, and clarify the inclusion of maintenance, startup, and shutdown emissions when determining baseline actual emissions; and

- add missing items and clarify the existing requirements to obtain and comply with a PAL to meet FNSR requirements.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised program will ensure protection of the NAAQS, and demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.

In addition, and as noted, TCEQ will address EPA's concerns regarding public participation in a separate rulemaking action.[27]

[27] As discussed in 74 *Federal Register* 48480, in Section V.F., at 48490-91.