TEXAS ASSOCIATION OF BUSINESS

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November 23, 2009

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

RE: Proposed Disapproval of Revisions to the Texas SIP and Standard Permits for Pollution Control Projects (Docket ID No. EPA-R06-OAR-2006-0133)

Dear Mr. Spruiell:

Founded in 1922, the Texas Association of Business is a broad-based, bipartisan organization representing more than 3,000 small and large Texas employers and 200 local chambers of commerce.

On behalf of our members we offer the attached comments urging EPA to reconsider the proposed disapproval of Texas' NSR SIP submittal and the standard permit for pollution control projects. Please feel free to contact me at sminick@txbiz.org or 512-637-7707 if you have any questions or need further information.

Sincerely,

Steve Minick
Vice President for Government Affairs
Texas Association of Business

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TEXAS ASSOCIATION OF BUSINESS
COMMENTS ON PROPOSED DISAPPROVAL OF TEXAS' STANDARD PERMIT FOR POLLUTION CONTROL PROJECTS
Docket ID No. EPA-R06-OAR-2006-0133
74 *Fed. Reg.* 48,467 (September 23, 2009)

Founded in 1922, the Texas Association of Business (TAB) is a broad-based, bipartisan organization representing more than 3,000 small and large Texas employers and 200 local chambers of commerce. TAB is providing the following comments on the proposal by the Environmental Protection Agency (EPA) to disapprove the state implementation plan (SIP) submittals by the State of Texas related to New Source Review (NSR) reform as published in the *Federal Register* on September 23, 2009 [74 *Fed. Reg*. 48,467]. Although these comments are offered to that part of the proposed disapproval relating specifically to standard permits for pollution control projects, TAB is fully supportive of the comments provided to EPA in response to this and the other components of the NSR reform submittal subject to EPA's proposed disapproval from its member companies, local chambers of commerce or the Texas Industry Project.

TEXAS STANDARD PERMIT FOR POLLUTION CONTROL PROJECTS

Under Texas' air permitting program, every possible source of air contaminants is required to obtain some form of construction approval from the Texas Commission on Environmental Quality (TCEQ). The scope of this program far exceeds the federal requirements, applicable only to major sources. Texas has developed over time a variety of mechanisms for facility owners to obtain that approval. These mechanisms allow for balancing the procedure and depth of review and approval with such factors as facility type and complexity, magnitude and variability of emissions, and facility location. [Texas Clean Air Act §382.0518; 30 T.A.C. §116.110]

In 1993, the Texas Natural Resource Conservation Commission (TNRCC), TCEQ's predecessor agency, acted on recommendation of an advisory group to establish "a new category of new source review permits referred to as standard permits. The standard permit simplifies and accelerates the permit review process by establishing standardized conditions targeting a specific industry or type of facility." [18 *Tex. Reg*. 8145, Nov. 9, 1993]. As originally adopted, the new Subchapter F, related to Standard Permits, included general conditions for claiming any standard permit and then codified each of the adopted standard permits. The first two codified standard permits were "for emission control projects required by rule and voluntary emission controls projects," set forth as §§116.617(1) - (2), respectively. [19 *Tex. Reg*. 3055, 3063-3065, April 22, 1994]

At the time TNRCC proposed the standard permit rules and these specific standard permits for pollution control projects, it directly solicited EPA's comments, especially on the provision of the rule related to delaying netting calculations for emission increases (and decreases) associated with the installation of emission controls. This provision would reduce administrative burdens, but much more importantly, avoid the possibility of delaying needed emission reductions from the pollution control projects due to triggering PSD review. [18 *Tex. Reg*. at 8146, Nov. 9, 1993]

By the time TNRCC moved to act on its pending proposals, no formal written response or guidance had been received from EPA, however, TNRCC did consider informal communications

that supported deferral of pollution control project emission changes from netting, so that standard permits could be used while avoiding delays from triggering PSD review. [19 *Tex. Reg*. at 3056, April 22, 1994]. TNRCC adopted the pollution control project standard permit, applicable to both required and voluntary emission reduction projects, more than 15 years ago. TNRCC also included separate standard permits specific to certain VOC and NOx control projects in 30 T.A.C. Chapters 115 and 117, respectively. At no point during the consideration of this permitting mechanism or in the ensuing 15 years did EPA inform TCEQ or its predecessor or any of the many industrial facilities attempting to meet emission reduction obligations of its position taken in the proposed disapproval that "[a] Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." We are left to wonder why it took 15 years to arrive at this position or what new line of reasoning developed after 15 years to support it.

The pollution control project standard permit was re-evaluated a few years later, when TNRCC proposed to add a provision [§116.617(1)] to allow the TNRCC Executive Director to object to the use of a standard permit if he determined that there were significant health effect concerns with its application or the representations made in claiming it. [21 *Tex. Reg*. 11,742, Dec. 6, 1996]. The proposed rule changes also simplified the approach to emission netting by referencing the underlying federal standards. Again, EPA had no comment on any of these changes, and TNRCC adopted the relevant rule changes as proposed. [22 *Tex. Reg*. 4242, May 22, 1997]

The standard permit program was administered for another 8 years with no suggestion by EPA of any programmatic abuses and, more importantly, no examples given by anyone of unintended consequences. In fact, in what was considered as a clear signal of tacit approval and agreement (if not imitation) EPA in 2002 adopted PSD rules that expressly and comprehensively exempted pollution control projects from PSD review. [67 *Fed. Reg*. 80,185, 80,275-76, and 80,283-84, Dec. 31, 2002, and 40 C.F.R. §§52.21(b)(2)(iii)(h), 52.21(b)(32), and 52.21(z)]. EPA did so by defining "modifications" to exclude collateral emission increases associated with pollution control projects. After a 2005 D.C. Circuit Court of Appeals decision invalidated that portion of EPA's PSD reform rules [*New York v. EPA*, No. 02-1387 (D.C. Cir. June 24, 2005)], TCEQ immediately proposed to amend its rules to make clear that only collateral increases *below* PSD thresholds would be allowed under the standard permit for pollution control projects. [30 *Tex. Reg*. 6184, Sept. 30, 2005]

Thirteen years after Texas adopted its pollution control project standard permit, EPA did finally offer comments on it. Curiously, none of those comments sounded anything like the statement "[a] Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." Rather, EPA made various suggestions and asked various questions, to which TCEQ provided clear and complete responses.

For example, EPA suggested that TCEQ not make any changes until the outcome of litigation was settled, however, TCEQ correctly noted that the *New York* decision affected only PSD review, a subject not addressed in the state rule, and that litigation, appeals and interpretation of court decisions could take considerable time. The TCEQ decided, again correctly, that its authorization of significant and necessary projects to reduce air emissions could not justifiably

be delayed for the period of time required for EPA to reach some certainty in its interpretations. In fact, it should be clear at this point that the wait for certainty can be long, indeed, and the outcome still not certain. [31 *Tex. Reg*. 529, Jan. 27, 2006]

In comments on the 2005 proposed amendments to the pollution control project standard permit rule EPA asked questions about whether the increases resulting from projects could interfere with attainment or maintenance of NAAQS and how the pollution control project standard permit complies with the public participation requirements of 40 CFR §51.161. TCEQ answered those questions by directing EPA to the specific sections of the rule that directly addressed those issues. TCEQ similarly addressed another concern from EPA by acknowledging that any construction under the pollution control project standard permit is undertaken at the risk of the party claiming the permit. [31 *Tex. Reg*. 530-531, Jan. 27, 2006]. Nowhere in the EPA comments does one find a hint of any categorical disapproval of the pollution control project standard permit or support for EPA's announcement three years later that it could not approve even the concept of a standard permit for pollution control projects.

PROPOSED DISAPPROVAL HAS NO FOUNDATION IN RULE OR LAW

In spite of years of opportunity, and having never expressed any comments on the pollution control project standard permit that was not satisfactorily addressed, EPA now proposes to disapprove the this critical element of TCEQ's *minor source* permitting program. Rather than an analysis or even recitation of the legal basis for this decision, we have only the statement: "A Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." One searches for a reference to the statute or rule that supports these categorical statements about what a State permitting authority can or cannot do with "Standard Permits." Those references are not found. In fact, the applicable statutes and rules say nothing about "standard permits" at all, because they are mechanisms TCEQ created under authority granted by the Texas Clean Air Act. In the absence of any valid legal basis, the EPA proposal can only be considered to be arbitrary and capricious.

The pollution control project standard permit is consistent with applicable legal requirements

There is one statute that governs EPA approval of the standard permit as a SIP revision and that is the following general obligation under §110(a)(2)(C) of the federal Clean Air Act:

> Each [SIP] shall…
>
> (C) include a program to provide for … regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D…

EPA does not (and cannot) question that TCEQ's minor NSR program, including the standard permit for pollution control projects, "provides for the regulation of any stationary source as necessary to assure that national ambient air quality standards are achieved," and Parts C (PSD) and D (nonattainment NSR) are not implicated because the pollution control project standards

permits are expressly made unavailable to the major sources and major modifications that are subject to Parts C and D.

Nor is there any EPA *rule* that governs approvable standard permits. Consistent with the general obligation simply to have some form of minor NSR program in an approvable SIP [CAA §110(a)(2)(C)], as well as the overriding Congressional finding "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments..." [CAA §101(a)(3)], EPA's rule establishing the requirements for an approvable minor NSR program is quite basic and easily satisfied by the TCEQ minor NSR permits for pollution control projects. EPA's disapproval notice identifies no respect in which the pollution control project standard permit, as an element of TCEQ's minor NSR program, fails to meet this rule.

The following presents the complete text of the applicable EPA rule governing the review of a state's minor NSR program (40 C.F.R. §51.160), with observations inserted (in italics) about how TCEQ's minor NSR program (including the pollution control project standard permit under that program) satisfies each provision of SIP approvability:

§ 51.160 Legally enforceable procedures.

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in—

Section 382.0518 of the Texas Clean Air Act and 30 T.A.C. § 116.110 require each facility and modification to receive some form of review, whether permit-by-rule (PBR), standard permit, minor NSR permit, or full-blown NSR permit with PSD review. Failure to obtain the proper form of authorization is legally enforceable by the array of mechanisms available under the Texas Clean Air Act.

(1) A violation of applicable portions of the control strategy; or

Section 116.615(10) makes any use of any standard permit contingent on "[c]ompliance with rules. Registration of a standard permit by a standard permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the claiming of the standard permit."

(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.

Section 116.615(1) makes any use of any standard permit contingent on "protection of health and property of the public," and of course the standard permits for pollution control projects by definition are for pollution controls. In designing its minor NSR program, TCEQ has

reasonable determined that such projects are unlikely to have adverse environmental effects, and EPA has provided no reason to question that determination. Nonetheless, TCEQ has gone so far as to include a "safety valve" in the pollution control project standard permit, by which its use is prohibited for any pollution control project for which TCEQ's "executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director.." [30 T.A.C. §116.617(a)(3)(B)].

(b) Such procedures must include means by which the State or local agency responsible for final decision-making on an application for approval to construct or modify will prevent such construction or modification if—

Any use of the pollution control project standard permits requires registration with TCEQ, and the opportunity for TCEQ to challenge the claimed use of the PCP. [30 T.A.C. §116.617(d)(1)]

(1) It will result in a violation of applicable portions of the control strategy; or

In addition to the precise directive of Section 116.615(10) (conditioning any standard permit user on compliance with otherwise applicable provisions of TCEQ's control strategy), Sections 116.610(a)(3) & (4) specifically make use of any standard permit contingent on compliance with any applicable NSPS or NESHAP requirements.

(2) It will interfere with the attainment or maintenance of a national standard.

As noted above, Section 116.615(1) makes any use of any standard permit contingent on "protection of health and property of the public," and of course the standard permits for pollution control project by definition are for pollution control. In designing its minor NSR program, TCEQ has reasonable determined that such projects are unlikely to have adverse environmental effects, and EPA has provided no reason to question that determination. Nonetheless, TCEQ has gone so far as to include a "safety valve" in the pollution control project standard permit, by which its use is prohibited for any pollution control project for which TCEQ's "executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director…" [30 T.A.C. §116.617(a)(3)(B)].

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on—

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

Section 116.617(d)(2) of the pollution control project standard permit rule requires all of that information, and more:

(2) The registration must include the following:

(A) a description of process units affected by the project;

(B) a description of the project;

(C) identification of existing permits or registrations affected by the project;

(D) quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates;

(E) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and

(F) a description of how the standard permit will be administratively incorporated into the existing permit(s).

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

Section 116.615(10) of the TCEQ rules governing the use of any standard permit includes almost that exact language: "Registration of a standard permit by a standard permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the claiming of the standard permit."

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

Section 116.617(a)(2) limits the use of the pollution control project standard permit to the following projects:

(2) The project may include:

(A) the installation or replacement of emissions control equipment;

(B) the implementation or change to control techniques; or

(C) the substitution of compounds used in manufacturing processes.

The rule expressly excludes *the following:*

(3) This standard permit must not be used to authorize the installation of emission control equipment or the implementation of a control technique that:

(A) constitutes the complete replacement of an existing production facility or reconstruction of a production facility as defined in 40 Code of Federal Regulations §60.15(b)(1) and (c); or

(B) the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director; or

(C) returns a facility or group of facilities to compliance with an existing authorization or permit unless authorized by the executive director.

In TCEQ's various regulatory preambles over the years, it has made clear what this part of its SIP is intended to cover and accomplish, which is to streamline the authorization of emission reduction projects, a goal with which EPA cannot possibly disagree. This is especially true of emission reduction projects required by law. The question that should be very obvious is: How can the government both demand that a reduction occur and require permission to undertake the reduction through any but the most effective and streamlined process?

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in §51.102.

TCEQ's overall minor NSR program is quite specific about what modeling procedures are required, and under what circumstances. These are not at issue with the standard permit for pollution control projects.

Guidance Memos are no Basis to Interfere with a State's Minor NSR Program

We find no basis in law for EPA to disapprove the standard permit for pollution control projects, and EPA provides none. EPA instead simply asserts that it cannot approve Texas's standard permit for pollution control projects because "[a] Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." We must assume EPA's basis for this assertion is meant to be found somewhere in the EPA memos cited in a footnote that appears in this portion of EPA's disapproval proposal, although it is hard to be sure given the complete lack of any discussion by EPA about how the memos affect its proposed decision to disapprove the pollution control project standard permits. Given the enormous significance of the action EPA proposes - to disapprove years late a longstanding element of the air permitting program that has produced unprecedented emission reductions in the nation's largest industrial state, administered by the world's second largest environmental regulatory agency - EPA has an obligation to provide to the many stakeholders affected by that decision a clear and convincing explanation. That clear and convincing explanation is not to be found.

First, obscure memos written by long-departed mid-level EPA officials are not law, and cannot conceivably be used as an independent basis to deny approval of a SIP revision. Any EPA pronouncement that purports to be binding must be adopted through notice and comment rulemaking. [See *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)]. If EPA wants to make SIPs unapprovable if they have minor NSR programs that have "[a] Standard Permit [*not*] limited to a particular narrowly defined source category and…[that allow] site-specific determinations," then it must adopt a rule that says so.

Further, even if some memo could legally support EPA's position, neither the memos cited, or any other we are aware of, actually do say so. If one goes through the considerable effort to find the cited memos (none were linked in the Federal Register so that one could readily find them

and determine their relevance), one finds that they say nothing like "[a] Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." In fact, they don't speak to the requirements for an approvable minor NSR program under §51.160 at all.

A review of the cited memos reveals nothing to suggest any intent to fill in gaps or qualify any provisions in §51.160. In fact, there is not a single cite to §51.160, the EPA rule governing the review of a state's minor NSR program. That should surprise no one, for the simple reason that that is not the memos' purpose, regardless of how EPA has chosen to cite them. As their subject lines alone inform the reader, they are for the sole purpose of elaborating on EPA's consideration of mechanisms to limit potential to emit (PTE):

> Memo from Sietz to Regional Air Directors, "Approaches to Creating *Federally-Enforceable Emission Limits*" (Nov. 3, 1993)
>
> Memo from Seitz and Van Heuvelen to EPA Regional Air Directors, "Options for Limiting the *Potential to Emit (PTE)* of a Stationary Source under Section 112 and Title V of the Clean Air Act (Act)" (Jan. 25, 1995)
>
> Memo from Stein to Regional Air Directors, "Guidance on Enforceability Requirements for Limiting *Potential to Emit* through SIP and §112 Rules and General Permits" (Jan. 25, 1995)
>
> Memo from Seitz and Schaeffer, "*Potential to Emit* Guidance for Specific Source Categories" (Apr. 14, 1998)

A mechanism to limit PTE for the purpose of avoiding PSD review is a subject entirely different from whether a particular mechanism for authorizing the installation of emission controls is an appropriate element of a State's minor NSR program under CAA §110(a)(2)(C) and 40 C.F.R. §51.160.

Unfortunately, EPA's lack of any analysis as to how these memos influenced its proposal to disapprove the pollution control project standard permit requires commenters to speculate as to EPA's "reasoning":

- "Approaches to Creating Federally-Enforceable Emission Limits" (Nov. 3, 1993 Memo from John Seitz to Regional Air Directors): This is the chronological first of the cited memos, the beginning of an emerging series on EPA thinking with regard to the question of how source owners could limit their PTE for purposes of avoiding Title V or Section 112 major source status. As noted above, that is absolutely *not* the context in which EPA now cites the memo (as a basis for disapproving a component of TCEQ's minor NSR program). And we find nothing in this memo that would support the propositions for which it is cited. But, ironically, it does contain some statements to support our objections to EPA's pending proposal…

  The memo "encourage[s the states] to discuss program needs with their EPA Regional Offices. The OAQPS will work with them in addressing approvals." The public record reveals a unilateral effort by TCEQ to craft a minor NSR program (of which the pollution

control project standard permit is one small part) with little in the way of assistance or cooperation demonstrated by any EPA office.

Adding more irony is the following statement: "States have flexibility in their choice of administrative process for implementation. In some cases it may be adequate for a State to apply these limits to individual sources through a registration process rather than a permit. A source could simply submit a certification to the State committing to comply with the term of an approved protocol." Again assuming this memo were applicable to measures included within a minor NSR SIP, it would fully vindicate the function and application of TCEQ's process for claiming a pollution control project standard permit.

- The next chapter in EPA development of "Options for Limiting the Potential to Emit (PTE) of a Stationary Source under Section 112 and Title V of the Clean Air Act (Act)" is the January 25, 1995, Memo from John Seitz and Robert Van Heuvelen to EPA Regional Air Directors. Except to describe general permits as an option for limiting PTE for purposes of avoiding major source status under Section 112 and Title V, this memo contains nothing about what general permit can or cannot do, much less anything like the import EPA seeks to give it by its citation in the notice disapproving Texas's pollution control project standard permit.

- As an adjunct to the preceding statements of her colleagues on the program side of the Agency, Kathie Stein, then-Director of EPA's Air Enforcement Division, issued to the Regional Air Directors her own "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits" (Jan. 25, 1995). As does her program colleagues' memo of that same date, this one also addresses only the author's expectations for limits on PTE. Even if this memo were applicable and binding (neither of which is the case), neither would it set any "requirements" not fully satisfied by TCEQ's rule: In accord with the litany on page 10 of the Stein memo, the "general permit" does apply to a specific and narrow category of sources (pollution control projects); use of the permit requires notice to TCEQ; the permit includes verifiable limits (those set forth in the representations filed by the permit registrant); and use of the standard permit is at the risk of the user.

- EPA's next guidance on the subject of limiting PSD for Section 112 and Title V purposes comes three years later in a memo from John Seitz and Eric Schaeffer, "Potential to Emit Guidance for Specific Source Categories" (Apr. 14, 1998). Like its predecessors, this memo is "an information-sharing exercise" to identify for permitting authorities some options that EPA has identified for "creating PTE limits." By its very terms, "[t]*he policies set forth in this memorandum are intended solely as guidance, do not represent final Agency action, are not binding on any party, and cannot be relied upon to create any rights enforceable by any party*." Given the plain language of the memo, it is certainly unclear why and how EPA can cite it in support of a proposal to disapprove a SIP revision, which must depend on a finding that the SIP fails to meet an actual legal requirement

  Also, aside from its stated lack of legal effect, this memo - like the others - has no factual bearing on pollution control project standard permits. What it does is outline for the benefit of any interested state a way it might draft general permits for eight specific

source categories, not including pollution control projects. TCEQ has permits by rule in Chapter 106 for these types of sources, and many others. The memo might inform a discussion of them, but it says absolutely nothing relevant to EPA approval of a standard permit for pollution control projects.

- The last evidence from which we might derive some understanding of how EPA Region *6* has come to disapprove TCEQ's pollution control project standard permit is an EPA Region *7* white paper titled "Permit by Rule Guidance for Minor Source Preconstruction Permits" (Sept. 12, 2003). Ironically, instead of supporting any criticism of Texas's standard permit for pollution control projects, this memo actually reflects and supports many of our preceding comments.

  First, it affirms that "[d]ecisions on approvability of particular rules will be based on the statutory and regulatory requirements, including section 110, in particular section 110(a)(2)(C), and 40 CFR 51.160, which require the EPA to determine that the State has adequate procedures to ensure that construction or modification will not interfere with attainment of a National Ambient Air Quality Standard." EPA's citation of this memo only serves to highlight its complete failure to review Texas's program on the basis of these applicable laws.

  Next, it affirms that the rest of the very memos cited in that long footnote were "not intended to affect minor new source review programs," but to "provide insight into the process for devising potential-to-emit limits for small sources and creating generic potential-to-emit limits in prohibitory rules and general permits for numerous similar small sources in an industry."

  The Region 7 guidance is intended to alert the states as to that Region's expectations for permits by rule for "numerous similar small sources in an industry," not standard permits for pollution control projects. TCEQ has many such PBR's as a separate component of its minor NSR program, but those are not at issue in the present rulemaking. One would not expect a mechanism for authorizing hundreds of small boilers, for example, to meet the same criteria as a standard permit for emission control projects.

  Finally, even though the Region 7 guidance is both inapplicable (for many reasons) and nonbinding, Texas's pollution control project standard permit nonetheless satisfies its criteria for evaluating "general permits" in all relevant respects.

  1. Pollution control projects necessarily help with NAAQS attainment, and yet the rule allows TCEQ to reject a registration if it finds that "there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director…" [30 T.A.C. §116.617(a)(3)(B)];
  2. The sources covered (and not covered) are clearly delineated [§§116.617(a)(2) and (a)(3)];

3. The rule specifies that it is for reduction projects [§116.617(a)], and necessarily that any collateral increases must fall below major NSR thresholds [§116.610(b)];
4. The entire permit is in fulfillment of emission control objectives [§116.617(a)];
5. The rule specifies in detail the deadlines for registration with TCEQ [§116.617(d)];
6. The rule requires timely notification, and specifies the information that must be provided with the registration [§116.617(d)];
7. TCEQ provides acknowledgment of each registration, either by letter or by operation of law;
8. The rule allows TCEQ to deny coverage based on case-specific circumstances [§116.617(a)(3)(B)]
9. No mass balances are involved;
10. The standard permit rule requires recordkeeping sufficient to show compliance with the terms of the standard permit [§116.617(e)(2)];
11. The rule also addresses monitoring requirements [§116.617(e)(2)];
12. There is no once-out, always-out provision in the rule (nor is any justified by applicable law), but any violation of the terms of a standard permit is subject to the array of enforcement options available to TCEQ, and the consistent inability to meet the terms of the standard permit inevitably would require the source to undergo the more suitable permitting process.
13. Notification to TCEQ is required for any violation of the terms of the standard permit, at least if the pollution control project was authorized at a site that is subject to Title V permitting [30 T.A.C. § 122.145(2)].

It is with a sense of irony, then, that one reads the following invitation from Region 7: "States are encouraged to coordinate with the EPA at the earliest state of rule development." TCEQ of course has been trying for years, specifically asking for EPA comments from the very first proposal. And even with its belated proposal to disapprove the rules, EPA has failed to provide any meaningful comments.

EPA Actions on Other States' Programs Provide no Basis for Disapproval of Texas' Standard Permit for Pollution Control Projects

The last thread in EPA's citation of "authorities" are a series of Federal Register notices in which EPA has taken some action on other states' minor NSR programs. Again, despite the enormity of the action that EPA proposes, it offers absolutely no explanation of how these particular actions illuminate its proposal to disapprove Texas's standard permit for pollution control projects.

Even if these Federal Registers notices presented EPA's final decisions to disapprove identical provisions in the SIPs of all 49 other states, it would provide no valid authority for its proposal to do so in Texas: As noted above, and as recognized in several of the memos that EPA itself cites, only validly adopted EPA rules can define the legal basis for action to approve or disapprove a SIP. Invalid action on 49 other SIPs doesn't excuse number 50. And regardless of the lack of

their applicability, the absence of EPA analysis leaves us without any meaningful basis to comment on the extent to which these other states' programs were sufficiently similar to Texas's as to warrant consideration. Our own analysis reveals that they do not.

None of the referenced SIP revisions involved standard permits for pollution control projects at all and none involved disapprovals based on any failure to meet applicable legal requirements for minor NSR SIPs, or in fact disapprovals of any kind. Instead, they were simply EPA actions in which it applied the "criteria " of the above-discussed guidance memos on limiting PTE for some specific source categories in order to conclude that the state's suggested means of limiting PTE from those source categories were approvable. [61 *Fed. Reg*. 53,633 (Oct. 15, 1996), approving Knox County, TN, permits-by-rule for eight specific source categories under the criteria described in the January 15, 1995 memos); 62 *Fed. Reg*. 2587 (Jan. 17, 1997), approving Florida "exclusionary rules" to allow some specific source categories "to compute potential emissions based on actual emission or raw material usage"; 71 *Fed. Reg*. 5979 (Feb. 6, 2006), approving Wisconsin "general and registration permits" under the criteria of the previously cited guidance memos]. Prior applications of non-binding guidance memos on an unrelated subject to different programs to reach an opposite conclusion adds nothing to EPA's case for disapproving Texas's pollution control project standard permit rule.

No Evidence of Standard Permit Program Failure or Adverse Consequence

There is only one legal requirement for approval of Texas's standard permit for pollution control projects that hasn't been met, and that is EPA's obligation to have acted on the SIP submittal long before 2009. EPA has also failed to take advantage of the intervening period, during which time TCEQ has been authorizing pollution control project standard permits, to review the available records to determine negative consequences as a result of this "unapprovable" permitting mechanism or find some evidence that the standard permit for pollution control projects has somehow caused TCEQ's minor NSR program to fail to advance the goal of NAAQS attainment. But EPA offers not one example of a pollution control project standard permit that failed to protect public health or welfare, or that couldn't be enforced, or that didn't accomplish its valuable and necessary purpose of quickly but carefully authorizing emission reduction projects. EPA's inability or even lack of effort to do so says far more about the approvability of the program than a few unsupported paragraphs about allegedly unmet legal "requirements" say about its disapprovability.

The trade press reports that EPA is now undertaking investigations and file reviews to uncover actual abuses and failures of the TCEQ air permitting program. TCEQ and the regulated community have been waiting for a response from EPA on some parts of that program for 15 years - 14 years past the time that EPA should have been heard from. To undertake investigations or file reviews to try to find evidence of any deficiencies in Texas' air permitting program *after* publishing a proposal to disapprove that same program does not reflect well on EPA's legal and technical justification, its objectivity, or good faith in working with the State of Texas to ensure that no obstacles are placed in the way of proven measures to protect and improve our air quality.