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January 26, 2009

VIA Federal eRulemaking Portal:
http://www.regulations.gov

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

Re: Comments of the BCCA Appeal Group on EPA's Proposed Limited Approval and Limited Disapproval of Texas' State Implementation Plan Submittal Docket ID No. EPA-R06-OAR-2007-0209; 73 *Fed. Reg.* 72,001 (Nov. 26, 2008)

Dear Mr. Spruiell:

Baker Botts L.L.P., on behalf of the BCCA Appeal Group appreciates the opportunity to submit the attached comments on the Environmental Protection Agency's ("EPA's") November 26, 2008 proposal to issue simultaneous limited approval and limited disapproval of Texas' state implementation plan ("SIP") submittals relating to public participation requirements for air quality permitting. The BCAA Appeal Group is comprised of members from the energy industries with the common interests of achieving the goals of clean air and a strong economy for Texas. The BCAA Appeal Group consists of: Air Products, LLC; Celanese Chemicals, Ltd.; Conoco Phillips Company; The Dow Chemical Company; Dynegy, Inc.; Entergy Texas, Inc.; Exxon Mobil Corporation; Lyondell Chemical Company; Texas Petrochemicals LP; and Valero Refining-Texas, L.P.

If you have any questions concerning these comments, do not hesitate to contact me.

Sincerely,

Jim Rizk

Enclosure

January 26, 2009

BCCA APPEAL GROUP COMMENTS ON EPA PROPOSED LIMITED APPROVAL/LIMITED DISAPPROVAL OF TCEQ PUBLIC PARTICIPATION SIP SUBMITTAL

Docket ID No. EPA-R06-OAR-2007-0209; 73 *Fed. Reg.* 72,001 (Nov. 26, 2008)

The BCCA Appeal Group ("the Group") submits the following comments in response to the proposed simultaneous limited approval and limited disapproval ("LALD") of Texas' state implementation plan ("SIP") submittals relating to public participation requirements for air quality permitting issued by the U.S. Environmental Protection Agency ("EPA") and published in the *Federal Register* on November 26, 2008. The Group is comprised of members from the energy industries with the common interests of achieving the goals of clean air and a strong economy for Texas. The Group consists of: consists of: Air Products, LLC; Celanese Chemicals, Ltd.; Conoco Phillips Company; The Dow Chemical Company; Dynegy, Inc.; Entergy Texas, Inc.; Exxon Mobil Corporation; Lyondell Chemical Company; Texas Petrochemicals LP; and Valero Refining-Texas, L.P.

I. Summary

The Group strongly supports full approval of existing Texas public notice provisions. The Group strongly objects to EPA's proposed action that purports to strengthen an existing approved SIP, but calls for additional changes to avoid sanctions. It would be arbitrary for EPA to take an action that would trigger a sanctions clock when the rules comprising the public participation elements of the Texas SIP have been fully approved by EPA. Such a result would be unreasonable and inconsistent with the fundamental principle that states are primarily responsible for the attainment and maintenance of national ambient air quality standards ("NAAQS") through state-designed implementation plans.

The Texas permitting program is comprehensive and protective of public health. Moreover, Texas public participation requirements are robust and, in many ways, exceed federal requirements. For example, federal rules do not require several aspects of the Texas program including:

- an early first notice period;
- second notice for most projects where requested;
- sign-posting;
- mailed notice;
- bilingual notice;
- written response to comments;
- opportunity for a contested case hearing; and
- opportunity to file a request to overturn a permit authorization.

While not federally required, nor included in most other approved state programs, these requirements demonstrate the commitment of the Texas Legislature and the Texas Commission on Environmental Quality ("TCEQ") to effectively involve the public in air permitting actions.

For example, EPA recently recognized the benefits of providing early notice in its flexible permit rulemaking where it explained:

> During the permitting process, permitting authorities could consider making the permit application available to the public soon after receipt. We found in pilot permits that early outreach to the community, rather than waiting until the draft permit was prepared, was an effective public participation strategy.

EPA, Operating Permit Programs; Flexible Air Permitting Rule (Final Rule, released January 13, 2009) (*available at:* http://www.epa.gov/nsr/documents/20090113flex.pdf).

In its prior approval actions, EPA determined that public participation elements of the Texas SIP complied with applicable federal requirements for approval. The pending public participation SIP submittal package strengthens provisions in the existing and approved SIP and exceeds federal requirements. EPA has not changed the applicable federal requirements governing SIP approval of public participation requirements in the time since EPA's prior approval of the Texas program. Accordingly, EPA's proposed limited approval, limited disapproval is arbitrary and would create an unprecedented disincentive for states to improve existing, approved program requirements. Because Texas' SIP submittal strengthens approved SIP requirements, the submittal necessarily meets approval requirements and should be fully approved.

II. Structure of Proposal

EPA's proposed simultaneous LALD would incorporate Texas' entire SIP submittal relating to public participation requirements for air quality permitting into the Texas SIP and would make the submittal federally enforceable. EPA is also proposing a limited disapproval of certain sections of the submittal as inconsistent with the federal requirements and such "inconsistent" sections will also be incorporated and federally enforceable. EPA has acknowledged that the submittal strengthens the existing public participation requirements, which were previously fully-approved. If the current submittal functions to strengthen the existing, fully-approved public participation requirements and such submittal is to be incorporated in its entirety, the result is essentially an approval.

Any action other than full approval by EPA would be inconsistent with the principle that states have the primary responsibility for developing plans for the attainment and maintenance of the NAAQS. For example, the Fifth Circuit recently explained:

> Although EPA is required to approve SIPs that provide for the timely attainment and subsequent maintenance of primary and secondary ambient air standards as well as satisfy other CAA general requirements, see 42 U.S.C. § 7410(a)(3), the EPA has no authority to question the wisdom of a State's choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. §7410(a)(2).

Clean Coalition v. TXU Power, 536 F.3d 469, 472 (5th Cir. 2008). Rather, the proper test for determining whether a SIP revision can be approved is whether the plan interferes with the

attainment of the NAAQS (*i.e.* that the plan does not make air quality worse). *Galveston-Houston Assoc. for Smog Prevention v. EPA*, 289 Fed.Appx. 745, 754 (5th Cir. 2008). Because the current SIP submittal functions to strengthen the existing SIP, such submittal does not raise interference concerns and should be fully approved.

EPA also proposes sanctions and the development of a federal implementation plan ("FIP"). Neither action is appropriate in this case. Texas submitted its revisions on December 15, 1995, July 22, 1998, and October 25, 1999. It has taken EPA over ten years to address these submittals, yet it seeks to impose sanctions upon Texas for "inconsistent" sections of a SIP submittal that "as a whole, strengthen the SIP compared to the corresponding provisions in the existing [fully approved] SIP." 73 *Fed. Reg.* 72,001, 72,009. Accordingly, the effect of EPA's LALD should be an approval, and sanctions and FIPs are not authorized for approvals. It is arbitrary and unreasonable for EPA to take the position that "inconsistent" sections of the SIP submittal would be federally enforceable, yet EPA would still seek to impose sanctions or a FIP.

III. Substance of Asserted Deficiencies

A. Minor NSR Public Participation

1. Notice and Comment on State's Analysis (Second Notice) Should Not be Contingent on Request for a Contested Case Hearing

EPA Comment:

- *The Texas Commission on Environmental Quality ("TCEQ") rules do not require public notice and opportunity for comment on the State's analysis of the effect of the construction or modification (Texas' "second notice") unless there is a request for a contested case hearing.*
- *"EPA has concluded that the burden of requesting an evidentiary administrative hearing based solely on the information in the permit application does not provide the public with the minimum public information required by 40 CFR § 51.161(a) and (b)."*
- *EPA is also concerned that limitations on who can request a public hearing impermissibly limit the ability for the public to have second notice.*

BCCA Appeal Group Response:

TCEQ's rules provide for publication and opportunity to comment on the draft permit in all federally significant projects, and in cases where a public hearing is requested. EPA has recognized the broad discretion states have in defining the elements of minor NSR programs. EPA recently explained:

> The minor NSR program is part of each state's "state implementation plan" (SIP) and is designed to ensure that the construction or modification

> of any stationary source does not interfere with the attainment of the NAAQS. Aside from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs. The implementing regulations, which are found at 40 CFR 51.160 through 51.164, also are stated in very general terms. As a result, SIP approved minor NSR programs can vary quite widely from state to state.

EPA, Operating Permit Programs; Flexible Air Permitting Rule (Final Rule, released January 13, 2009) (*available at:* http://www.epa.gov/nsr/documents/20090113flex.pdf). Moreover, EPA has specifically recognized the ability to limit public participation in cases where the public does not express interest. For example, EPA approved Alaska's "fast track" procedure where the 30-day comment period is not mandatory. *See* 72 *Fed. Reg.* 45,378 (August 14, 2007). Rather, under the "fast track" procedure, the public must request the comment period during a 15-day window.

More importantly, TCEQ's pre-House Bill ("HB") 801 public participation requirements, codified at 30 TAC §§ 116.130 - 116.137, are still on the books and have been approved by EPA. *See* 40 C.F.R. § 52.2270(c); 60 *Fed. Reg.* 49,781, 49,785 (Sept. 27, 1995) (as initially codified at 30 TAC § 116.10(a)(1)); 67 *Fed. Reg.* 58,597 (Sept. 18, 2002) (as recodified at 30 TAC §§ 116.130-137). The pre-HB 801 provisions required notice for non-major applications in essentially the form of initial notice under the current rules. For applications subject to *major* NSR review, they specified that "the application shall state a preliminary determination to issue or deny the permit and require the applicant to conduct public notice of the proposed construction."

Under post-HB 801 rules, 30 TAC §§ 39.418 - 39.419(e) require non-PSD applicants to publish Receipt of Application and Notice of Proposed Construction and, if a hearing request is received, publish a subsequent Notice of Application. Because the post-HB 801 regime contains a second opportunity for public notice, the post HB-801 regime represents a strengthening of the public participation requirements for non-PSD applications. A SIP approval of a strengthening change raises few non-interference issues. Similarly, a SIP disapproval of the HB 801 change would leave the pre-801 notice regime adequate for federal SIP purposes.

Finally, concern about limitations on who can request a second comment period are misplaced. While it is true that a contested case hearing may only be *granted* to persons determined to be an affected person under state regulations, there is no limitation on who can *request* a contested case hearing. Moreover, TCEQ does not even make a ruling on whether a party is an affected person until after the second comment period would have closed. As a result, TCEQ rules regarding who can be granted a contested case hearing do not affect the scope of individuals that can request a hearing and thus trigger a second comment period.

2. TCEQ's Threshold-Based Exemptions from Public Participation Requirements Do Not Meet Minimum Requirements

EPA Comment:

- *Section 39.403(b)(8) excludes permit amendments authorized by 116.116(b) from any public participation requirements, unless the change involves a modification resulting in an increase in allowable emissions of at least 250 tons per year ("tpy") of CO or NOx or 25 tpy of other air contaminants.*

- *EPA is concerned that this provision may be construed to apply to major modifications subject to PSD or NNSR permitting requirements and "has concluded that 39.408(b)(8) fails to provide the minimum public participation requirements of 51.161."*

BCCA Appeal Group Response:

EPA's concerns are misplaced because TCEQ rules do not provide for such a broad exclusion from public notice requirements. In particular, 30 TAC § 39.402 provides additional instances (beyond those in 30 TAC § 39.403) in which public notice requirements are triggered for permit amendments. That rule, which addresses amendments authorized under 30 TAC § 116.116(b) (relating to Changes to Facilities) or amendments under 30 TAC § 116.720(a) (relating to Applicability for flexible permits), requires that modifications comply with public participation requirements in TCEQ rules. The rule expressly provides that public participation requirements are required for an amendment exceeding "a new major stationary source or major modification threshold." The primary exclusion from the public participation requirements under 30 TAC § 39.402 is limited to situations in which the total emission increase from all of the facilities to be authorized are below the following *de minimis* levels: 50 tpy CO; 10 tpy of SO2; 0.6 tpy of lead or five tpy of NOx, VOC, PM, or any other air contaminant.

3. Notice and Comment on State's Analysis (Second Notice) Should not be Limited to an Increase in Allowable Emissions or the Emission of an Additional Air Contaminant

EPA Comment:

- *Section 39.419(e)(1)(c) does not require second notice for amendments, modifications, or renewal applications for a minor or major source unless the change would result in an increase in allowable emissions or would result in the emission of an air contaminant not previously emitted.*

- *EPA asserts that "sources required to obtain a permit under 40 CFR 51.160(a) are subject to the public participation requirements of 40 CFR 51.161" which includes a requirement for*

notice and comment on the state's analysis and proposal to approve or disapprove the permit.

BCCA Appeal Group Response:

EPA has recognized that minor NSR programs can exclude sources and modifications with minor or no net increases in allowable emissions from public participation requirements. In its Indian Country proposal, EPA provides a methodology for determining the increase in allowable emissions from a physical or operational change based on net increases in allowable emissions. *See* 71 *Fed. Reg.* 48,696, 48,729 (Aug. 21, 2006 (proposed 40 CFR § 49.153(b))). EPA explains:

> "We believe that determining emissions changes in terms of changes in allowable emissions typically will be easier and more straightforward for the minor sources subject to this program. * * * This approach is consistent with section 173(a)(1)(A) of the Act, which requires new and modified major sources to obtain offsets based on allowable emissions. * * * Finally, we understand that many State minor NSR programs use an allowable-to-allowable test."

Id. at 48,713. Under EPA's proposal, net allowable emission increases less than specified minor NSR thresholds are subject to an administrative revision process, which does not provide for **any** public participation. *Id.* at 48,743 (proposed 40 CFR § 49.159(f)(2)).

4. References in TCEQ Rules Should be to Sections in the Texas SIP

EPA Comment:

- *Section 39.403(b) (Applicability) refers to two Texas Clean Air Act Provisions: section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit).*
- *"For clarity and for approvability into the SIP, we recommend that section 39.403(b) be revised to refer to the corresponding sections of the Texas SIP."*

BCCA Appeal Group Response:

EPA's request to substitute references to the Texas SIP for references to the Texas Health and Safety Code is not supported by any statutory or corresponding implementing regulations of the CAA. The current references are sufficient to illustrate applicability and do not require substitution. Requiring a rulemaking to make such a change would impose a burden with no real benefit.

B. Major NSR Public Participation

1. Opportunity for Public Hearing Should Not be Discretionary

EPA Comment

- *Section 55.154 provides the Executive Director ("ED") with discretion to hold a public meeting if the ED determines that there is a significant degree of public interest in the application.*
- *"In contrast, the CAA [and 40 CFR 51.166(q)(v)] provides for the opportunity of interested persons to request a public hearing and public notice of that opportunity" without regard to ED discretion.*

BCCA Appeal Group Response:

Because TCEQ rules provide interested persons with an opportunity to request a public hearing and public notice of that opportunity, the Texas submittal does satisfy the requirements in 40 CFR § 51.166(q)(v). TCEQ rule 30 TAC § 55.154 provides that a public meeting shall be held if there is a determination of significant interest. A public meeting shall also be held if requested by certain members of the legislature or "when a public meeting is otherwise required by law." These requirements provide applicants with the "opportunity" to seek a public meeting required by 40 CFR § 51.166(q)(v).

TCEQ rules also provide that the text of the public notice for a permit must provide a brief description of procedures by which the public may participate, including "how to request a public meeting." 30 TAC §39.411(b)(5). If a public meeting is held, notice of that meeting is also subject to public notice requirements under Chapter 39 of TCEQ's rules. 30 TAC § 55.154(e).

Aside from the fact that the Texas rules meet the requirements in 40 CFR § 51.166(q)(v), EPA may also approve SIP provisions that are different, but at least as stringent as EPA provisions. EPA determined this to be the case when it previously approved Texas' Prevention of Significant Deterioration ("PSD") program. 57 *Fed. Reg.* 28,093 (June 24, 1992). In its proposed approval of that program, EPA explained:

> "The state has excluded Section 40 CFR 51.166(q), PSD permit public participation, from its Regulation VI. However, the TACB has fulfilled the requirements for public participation by (1) the existing State regulation and (2) imposing additional procedures in the SIP supplement entitled 'Revision to the Texas State Implementation Plan for Prevention of Significant Deterioration of Air Quality'."

54 *Fed. Reg.* 52,823, 52,826 (December 22, 1989). TCEQ's pending SIP revision strengthens existing public participation requirements by including additional public notice requirements, including an opportunity for an evidentiary contested case hearing. In light of the fact that the PSD public participation requirements have been approved as equivalent to the requirements in

40 CFR § 51.166(q), it only stands to reason that the strengthened revision to the program is also fully approvable.

2. Public Notice for PSD Permits Should Include Information Regarding Increment Consumption

EPA Comment:

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

BCCA Appeal Group Response:

EPA has recognized that the public participation requirements of the Texas SIP do require that a copy of the public notice contain information regarding the degree of increment consumption. The preamble to EPA's proposed LALD provides:

> "EPA's final approval of the Texas PSD program (57 FR 28093, June 24, 1992) included a supplemental document that provided an enforceable commitment from Texas to implement the requirements of 40 CFR 51.166(q)(iii) (state the degree of increment consumption in the public notice) and 51.166(q)(iv) (mail notice to affected agencies). **The supplement remains a part of the Texas SIP.** See 40 CFR 52.2270, EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP."

73 *Fed. Reg.* 72,001, 72,012 (November 26, 2008) (emphasis added). Thus, the supplement that formed the basis of EPA's original approval of Texas' PSD public participation requirements remains part of the Texas SIP. Consequently, EPA's apparent preference that this provision be codified in a rule does not constitute a valid basis for disapproval of this **unchanged** element of the Texas program.

3. Submitted Rules do not Require Notice to Be Mailed to All Required Government Officials

EPA Comment:

- *"For a new or modified source subject to PSD, the revised rules do not require a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian*

Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv)."

BCCA Appeal Group Response:

Similar to the preceding response above, the Texas SIP does require that a copy of public notice be sent to required officials. Because the supplement, forming the basis of the EPA's original approval of Texas' PSD public participation requirements, remains part of the Texas SIP, EPA's apparent preference for this provision to be in a rule does not constitute a valid basis for limiting approval of this **unchanged** element of the Texas program.

4. Response to Comments Should be Made Available Prior to Final Action on PSD Permit

EPA Comment:

- *"For a new or modified source subject to PSD, the rules do not require that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii).*

BCCA Appeal Group Response:

TCEQ rules provide that "before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comments, whether or not withdrawn." 30 TAC § 55.156(b)(1). TCEQ rules further require that the ED file its response to comments as soon as possible, but within 60 days of the end of the comment period. *Id.* § 55.156(b)(3) Finally, TCEQ rules require (after the response to comments are filed) that the chief clerk mail the ED's response, along with instructions for requesting reconsideration or a contested case hearing, to all persons who submitted comments, requested to be placed on a mailing list, or timely filed a request for a contested case. *Id.* § 55.156(c).

These requirements are more stringent than those specified in 40 CFR §§ 51.166(q)(vi) and (viii). First, sections 51.166(q)(vi) and (viii) seem to require only that the comments be made available prior to a final decision and do require development of a response to comments. The information developed by TCEQ, while more time intensive, provides useful information to the commenter in determining whether further review or challenge is warranted. Second, TCEQ rules provide certain commenters with administrative review options not available under federal rules. These include the ability to request reconsideration and/or a contested case hearing. Finally, the sufficiency of TCEQ's requirements is evidenced by the fact that EPA previously approved TCEQ's PSD public participation requirements.

5. Submitted Rules Should Contain a Definition of "Final Appealable Decision"

EPA Comment:

- *"For a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision of a PSD permit. We request further information about how and when the commenters are informed of the Agency's final decision, access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review."*

BCCA Appeal Group Response:

The wording of EPA's concern does not appear to assert an approval deficiency. Accordingly, BCCA Appeal Group defers to the TCEQ to provide further information about how commenters are informed of the Agency's final decision, access to response to comments, and timing for judicial appeal.

Further, while EPA discusses the absence of "final appealable decision" in TCEQ's SIP submittal, it does not point to any rule requirement requiring such a definition. Absent such a rule, we do not believe that the absence of such a definition constitutes a deficiency requiring less than full approval. This is supported by the fact that the currently approved Texas PSD regulations do not contain such a definition either.

C. Public Participation Requirements for a Plant-Wide Applicability Limit ("PAL")

1. Notice and Comment Requirements for PALs Are Inconsistent with Federal Requirements

EPA Comment:

- *EPA asserts that the Texas PAL public notice requirements are insufficient because:*
  - *1) they do not require applicants to provide public notice and comment on the State's analysis (second notice) unless a contested case is requested and*
  - *2) there are not provisions which address renewal or increase to a PAL.*

BCCA Appeal Group Response:

EPA appears to misread TCEQ's rules, which do, in fact, require public notice and comment on the State's analysis. TCEQ rule 30 TAC § 116.194 specifies which sections of Chapter 39 (Public Notice) are required for PAL permits. Section 116.194 indicates that PAL permits are subject to TCEQ's "second notice" provision (30 TAC § 39.419 - Notice of

Application and Preliminary Decision), but excludes TCEQ's "first notice" provision (30 TAC § 39.418 - Notice of Receipt of Application and Intent to Obtain Permit). Because the notice of application (first notice) provision is excluded, the provisions in section 39.419 exempting "second notice" when there has been no hearing request in the first notice period are inapplicable. As part of 30 TAC § 39.419, TCEQ is required to publish notice of the State's analysis.

Likewise, TCEQ rules do address public notice requirements for renewals and amendments to PALs. Section 116.192(a) provides:

> Any increase in a plant-wide applicability limit (PAL) must be made through amendment. Amendment applications . . . are subject to the public notice requirements under §116.194 of this title (relating to Public Notice and Comment).

Similarly, 30 TAC § 116.196 (Renewal of a Plantwide Applicability Limit) provides "the proposed PAL level and a written rationale for the proposed PAL level are subject to the public notice requirements in § 116.194 of this title (relating to Public Notice and Comment)."

2. Submittal Does Not Include a Requirement to Address Material Comments

EPA Comment:

- *"For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5)."*

BCCA Appeal Group Response:

EPA appears to misread TCEQ's rules, which, in fact, require that the agency address all material comments before taking final action on the permit. TCEQ rule 30 TAC § 155.156 requires that:

> "If comments are received, the following procedures apply to the executive director. (1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes."

This provision satisfies EPA's requirement in 40 CFR §§ 51.165(f)(5) and 51.166(w)(5) that "the reviewing authority must address all material comments before taking final action on the permit."

3. Public Notice Applicability Section of Rules Does Not Include PALs

EPA Comment:

- *"The applicability section in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194."*

BCCA Appeal Group Response:

Public notice requirements for PALs are specified by a separate rule that is independent of the applicability provisions in Chapter 39 of TCEQ's rules. Specifically, 30 TAC § 116.194 provides:

> "Applications for initial issuance of plant-wide applicability limits under this division are subject only to §§39.401, 39.405, 39.407, 39.411, 39.419, 39.420, and 39.601-39.605 of this title (relating to Purpose; General Notice Provisions; Mailing Lists; Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearings, or Notice and Comment Hearing; Text of Public Notice; Notice of Application and Preliminary Decision; Transmittal of the Executive Director's Response to Comments and Decision; Applicability; Mailed Notice; Newspaper Notice; Sign-Posting; and Notice to Affected Agencies, respectively)."

30 TAC § 116.194.

D. Public Participation Requirements for Flexible Permits

1. Notice and Comment on State's Analysis (Second Notice) Should Not be Contingent on Request for a Contested Case Hearing

EPA Comment:

- *"For initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, the rules do not require 30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR 51.161."*

BCCA Appeal Group Response:

As discussed in section III.A.1, above, the Texas minor NSR notice and comment provisions are approvable whether it be for individual or flexible permits.

2. Public Participation Requirements for Incorporation of PSD and NNSR Terms into a Flexible Permit Are Inconsistent with Federal Requirements

EPA Comment

- *"When PSD and NNSR terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit, the rules do not require public participation consistent with 40 CFR 51.161 and 51.166(q)."*

BCCA Appeal Group Response:

TCEQ rules provide robust public participation requirements for flexible permits. Initial issuance of or an amendment to a flexible permit requires the applicant to publish notice when the application is determined to be administratively complete. 30 TAC § 116.740. Applicant is also required to publish a second notice when the draft permit is released in cases where there is a request for a hearing during the first notice period or when the application involves issuance of a new PSD or NNSR permit or permit amendment. *Id.* In addition to these public notice requirements, the SIP-approved Title V revision process involves a separate notice and comment for minor or significant permit revisions that would encompass many of the issues over which EPA has expressed concern. 30 TAC §§ 122.312 and 122.320.

Public participation requirements associated with PSD are required only when a project constitutes a new "major stationary source" or a "major modification" triggering PSD. 40 CFR § 51.166(7)(i). Both of these defined terms require an increase in emissions above specified threshold levels. Moreover, the term major modification requires a physical change in, or change in the method of operation of a major stationary source. Unless modification or incorporation of PSD or NNSR terms constitutes a major stationary source or major modification, such actions do not trigger PSD public participation requirements. Any suggestion by EPA that a change to a condition of a PSD permit requires PSD notice requirements is without any legal support in EPA regulations or guidance.

In fact, as noted above, EPA recognized in its Indian Country proposal that minor NSR programs can exclude sources and modifications with minor or no net increases in allowable emissions from public participation requirements. Under EPA's proposal, net allowable emission increases less than specified minor NSR thresholds are subject to an administrative revision process, which does not provide for **any** public participation. *Id.* at 48,743 (proposed 40 CFR § 49.159(f)(2)).

* * *