



TEXAS CHEMICAL COUNCIL

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November 23, 2009

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

RE: Docket ID No. EPA-R06-OAR-2005-TX-0032
Docket ID No. EPA-R06-OAR-2006-0133
Docket ID No. EPA-R06-OAR-2005-TX-0025

Dear Mr. Spruiell:

On behalf of the Texas Chemical Council (TCC), please find enclosed comments on the following three proposals issued by the U.S. Environmental Protection Agency (EPA) in the *Federal Register* on September 23, 2009:

- Docket ID No. EPA-R06-OAR-2005-TX-0032: Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits.¹
- Docket ID No. EPA-R06-OAR-2006-0133: 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.²
- Docket ID No. EPA-R06-OAR-2005-TX-0025: Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Modification of Existing Qualified Facilities Program and General Definitions.³

¹ 74 Fed. Reg. 48480-48495 (September 23, 2009).

² 74 Fed. Reg. 48467-48478 (September 23, 2009).

³ 74 Fed. Reg. 48450-48467 (September 23, 2009).

TCC is a statewide trade association representing over 70 chemical manufacturers with more than 200 Texas facilities. Our industry has invested more than \$50 billion in physical assets in the state and pays over \$1 billion annually in state and local taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs to Texans across the state. TCC member companies manufacture products that improve the quality of life for all Americans. The products manufactured in Texas account for 60 percent of the U.S. chemical production, which go into millions of consumer products. Chemicals are the state's largest export with over \$30 billion each year.

TCC has a keen interest in ensuring that the Texas air permitting programs are ultimately approved by EPA as our member companies utilize or are subject to the permitting programs and requirements that EPA is proposing to disapprove through its rulemakings. Thank you in advance for consideration of these comments. Please do not hesitate to contact me at (512) 646-6403 or wisdom@txchemcouncil.org if you need additional information.

Yours respectfully,



Christina T. Wisdom
Vice President & General Counsel

Comments of the Texas Chemical Council
Docket ID No. EPA-R06-OAR-2005-TX-0032
Docket ID No. EPA-R06-OAR-2006-0133
Docket ID No. EPA-R06-OAR-2005-TX-0025
Proposed on September 23, 2009
74 Fed. Reg. 48450 – 48495

I. INTRODUCTION

In three proposals that were published in the *Federal Register* on September 23, 2009, the U.S. Environmental Protection Agency (EPA) proposed to disapprove numerous Texas Commission on Environmental Quality (TCEQ) State Implementation Plan (SIP) revision submittals which date back 15 years ago to 1994. The effect of such widespread disapproval could be to nullify existing Texas air permitting programs such as the state Flexible Permits and Qualified Facilities Programs and certain state-issued Standard Permits, in addition to threatening the viability of the state's existing Prevention of Significant Deterioration (PSD) program and New Source Review (NSR) Reform initiatives. EPA stated that all three actions should be read together "because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the National Ambient Air Quality Standards (NAAQS) and to protect the health of the communities where these sources are located."¹

It would be irresponsible and short-sighted for the programs to be analyzed in a vacuum, apart from a thorough and detailed analysis of the dramatic improvements that have occurred in air quality in Texas over the past 15 years, particularly in the Houston-Galveston-Brazoria (HGB) nonattainment area, where the majority of TCC members operate. With regard to the NAAQS for ozone, it is important to first highlight the contributors to nitrogen oxide (NO_x) emissions in the area. In the HBG nonattainment area, 55% of NO_x emissions come from on and off-road mobile sources, 35% are from point sources, and 10% are from area sources.² Notwithstanding the chemical industry's lesser role to mobile sources in the contribution of NO_x emissions in the HGB nonattainment area, TCC member companies have worked with other industrial partners to invest more than \$3 billion since 2001 to achieve an 80 percent reduction of NO_x from point sources. A critical factor in this accomplishment is TCEQ's commitment to reduce emissions through a robust air permitting process. For example, the Flexible Permits Program allows for voluntary and mandatory permitting requirements for previously grandfathered facilities. This program has resulted in over 260,000 tons of reductions in actual emissions from otherwise

¹ 74 Fed. Reg. at 48483.

² Data received from TCEQ's 2009 HGB NOx Emissions Inventory.

unregulated grandfathered facilities either through the addition of controls or the shutdown of these facilities.³ Additionally, in the HGB nonattainment area, the design values for both the 1-hour and 8-hour ozone standards have been dropping steadily between 1999 and 2009 from 203 parts per billion (ppb) to 127 ppb, and from 118 ppb to 84 ppb, respectively.⁴ Similar improvements have been obtained in all parts of Texas. Decreases in air emissions of this magnitude in the midst of rapid population growth are remarkable accomplishments in improved air quality that must not be ignored.

Furthermore, the Houston area has the most extensive air monitoring network in the country. By 2008, almost all the monitors in Houston were in attainment with the 0.08 parts per million (ppm) 8-hour ozone standard. With regard to emissions of volatile organic compounds (VOCs), in 2008 no monitors in Harris County were above the long-term effects screening level for benzene, and all monitors in the Houston area showed a decrease in average benzene concentrations from 2005-2008.⁵ The TCEQ also maintains an Air Pollutant Watch List (APWL), which is a list of areas in Texas where specific pollutants are measured at levels of concern. The purpose of the APWL is to heighten public awareness in areas of concern for interested parties, encourage efforts to reduce emissions, enable TCEQ to most effectively manage its resources and assist in the review of air permits. Currently, there are 12 APWL areas in 11 Texas counties. Over the past two years, six pollutants have been removed from the APWL, and seven more pollutants in five APWL areas are proposed to be removed later this year. Again, improvement in air quality of this magnitude in a state with increasing population and a sound economy is an impressive achievement to say the least.

II. THE FLEXIBLE PERMITS PROGRAM

In the proposed rule, EPA proposes disapproval of the Texas Flexible Permits Program for failure to meet the requirements for a substitute Major NSR SIP revision. In addition to the program's alleged failures to protect Major NSR SIP requirements, EPA states that it cannot find that the program, as a Minor NSR SIP program, will ensure protection of the NAAQS and noninterference with the Texas SIP control strategies and reasonable further progress (RFP).

TCC supports full approval of the state's Flexible Permits Program. Contrary to EPA's allegations, the Texas Flexible Permits Program is a robust, legally defensible program that is intended to add operational flexibility through the use of emission caps, certain control technology and other operational practices to achieve emission reductions with the ultimate goal

³ TCEQ Update of Air Quality in Texas, presented by Susana Hildebrand, P.E., TCEQ Chief Engineer, October 30, 2009.

⁴ Id.

⁵ Id.

of having a well-controlled facility after the final cap is implemented. To that end, a Flexible Permit is an alternative to the traditional Minor NSR authorization⁶ and is not a mechanism used to determine federal NSR applicability, such as PSD or nonattainment. The Program does not allow new stationary sources to construct without a Major NSR permit if a determination is made that one is necessary.

As clearly stated in TCEQ's Flexible Permits Program rules, if a facility applying for a Flexible Permit is located in a nonattainment area, the facility shall comply with all applicable requirements concerning nonattainment review.⁷ Likewise, if a facility applying for a Flexible Permit is located in an attainment area, the facility shall comply with all applicable PSD requirements.⁸ Federal applicability determinations are conducted according to federal rules and requirements, including determining baseline emissions, the project emissions increase, and the net emissions increase. Under the Program, Best Available Control Technology (BACT) is used to establish the applicable caps,⁹ and the review includes a NAAQS analysis if PSD is triggered.¹⁰ Additionally, the review includes lowest achievable emissions rate (LAER) control technology and the use of offsets if nonattainment review is triggered.¹¹ The Flexible Permits Program transparently requires that an NSR applicability determination be made, and the Program is not structured to circumvent Major NSR SIP requirements.

EPA has also noted the following specific issues with the Texas Flexible Permits Program. TCC's response follows each of the noted concerns.

- **EPA states that the Program is inconsistent with the intent that Flexible Permits will only apply to minor sources, existing grandfathered sources and to minor modifications. In light of that analysis, EPA examined the program as an equivalent to a Major NSR Program and determined that it was an inadequate equivalent. EPA also stated that there are no provisions in the Program that require a Major NSR applicability determination prior to construction and/or modification.¹²**

First, the federal Clean Air Act and the corresponding regulations are virtually silent on specific direction to the states as to how each state's minor NSR program is to be constructed

⁶ 30 TAC § 116.710(a).

⁷ 30 TAC § 116.711(8).

⁸ 30 TAC § 116.711(9).

⁹ 30 TAC § 116.716(a)(1).

¹⁰ 30 TAC § 116.161.

¹¹ 30 TAC §§ 116.150(e)(1)-(4), 116.151(c)(1)-(4).

¹² 74 Fed. Reg. at 48482.

and implemented.¹³ That said, states are given significant flexibility in the implementation of such programs. Notably, EPA recently recognized the importance of this necessary flexibility in the federal Flexible Air Permitting Rule.¹⁴ In Texas, for example, this flexibility has served as the cornerstone for a successful air permitting program that has resulted in tremendous environmental benefit.

TCEQ rules allow for the use of a Flexible Permit for minor source facilities at a major source site. TCEQ rules state that “[a] person may obtain a flexible permit which allows for physical and operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110... A person may obtain a flexible permit under §116.711 of this title for a facility, group of facilities, or account *before any actual work is begun...*”¹⁵ A review of §116.110 (under Subchapter B, New Source Review Permits) lists the Flexible Permit as one of many permitting options required *before work is begun on a facility*, and notably, the Flexible Permit is listed among the other minor source permitting options, such as Permits by Rule and Standard Permits. As noted above, §116.711 requires that facilities are subject to nonattainment and PSD review as applicable. It is clear that TCEQ’s rules do not intend for the Flexible Permits Program to serve as an equivalent to a Major NSR Program. It is also evident that TCEQ rules require a Major NSR applicability determination prior to construction and/or modification.

- **EPA states that the Texas definition of “modification” is not clearly at least as stringent as the definition of “modification” in EPA’s Major NSR SIP rules. EPA believes that the state has failed to submit a demonstration showing how its use of “modification” is at least as stringent as the federal definition of “modification.”¹⁶**

TCEQ rules provide two separate “modification” definitions. Briefly, a “major modification”¹⁷ is a project action that triggers federal NSR review (PSD or Nonattainment). In contrast, the TCEQ’s minor source program uses the definition of “modification of an existing facility”¹⁸ to determine if a proposed change triggers minor NSR review, and the

¹³ CAA § 110(a)(2)(C); 40 CFR §§ 51.160-51.164.

¹⁴ 74 Fed. Reg. 51418-51440 (October 6, 2009).

¹⁵ 30 TAC §116.710(a) (emphasis added).

¹⁶ 74 Fed. Reg. at 48488-48489.

¹⁷ 30 TAC § 116.12(18), defined as “a physical change or change in the method of operation of a major stationary source that causes a significant project emissions increase of a federally regulated new source review pollutant, and a significant net emissions increase of a federally regulated new source review pollutant which triggers federal review, such as PSD or nonattainment review.”

¹⁸ 30 TAC § 116.10(11), defined as “a physical change or change in the method of operation of a facility which causes an increase in the amount of any air contaminant emitted by the facility into the atmosphere or results in an emission of any air contaminant not previously emitted.”

scope of the change is not limited to pollutants that are federally regulated. TCEQ has explicitly stated that the Flexible Permits Program rules and the definition of “modification of an existing facility” do not act as a shield for federal NSR permitting.¹⁹ Again, the Program requires a review of federal NSR applicability steps.²⁰ For projects that trigger federal review, all required demonstrations, such as BACT, de minimis/NAAQS modeling, increment modeling, and toxicological modeling are conducted. For projects that trigger nonattainment review, LAER and offsets are required.²¹ It is therefore difficult to ascertain how EPA can allege that the state’s definition of “modification” is not at least as stringent as the federal definition.

- **EPA is concerned that the definition of “account” may result in an emissions cap that could apply to multiple major stationary sources, thus circumventing Major NSR preconstruction review.²²**

EPA notes that the Texas SIP defines the term “account” to “include an entire company site, which could include more than one plant and certainly more than one stationary source... Accordingly, under a Flexible Permit, a single emissions limitation in the emission cap could apply to major stationary sources, and if emissions remain below the emissions limitations in the emission cap, Major NSR preconstruction review is not triggered.”²³

Under TCEQ’s rules, the term “account” means “all sources that are aggregated as a site.”²⁴ Under Texas law, the term “source” means “a point of origin of air contaminants, whether privately or publicly owned or operated.”²⁵ When analyzed, it is clear that the term “account” could not include more than one plant or more than one stationary source as EPA has interpreted the Texas definitions. An account is clearly limited to the source or site.

Furthermore, the Program does not circumvent Major NSR preconstruction review. A Flexible Permit is a Minor NSR permit authorization that is utilized in some cases to cover minor source facilities at a major source site. Where facilities or pieces of equipment are authorized under a PSD and/or Nonattainment permit, those federal requirements still apply.

¹⁹ Letter from Richard Hyde, Director, TCEQ Air Permits Division to Jeff Robinson, Chief, EPA Air Permits Section, August 30, 2007.

²⁰ 30 TAC § 116.711(8) and (9).

²¹ Letter from R. Hyde to J. Robinson, August 30, 2007.

²² 74 Fed. Reg. at 48489.

²³ Id.

²⁴ 30 TAC § 101.1(1).

²⁵ TEX. HEALTH & SAFETY CODE § 382.003(12).

No facilities located at the source are exempt from federal permitting requirements, including Major NSR preconstruction review where applicable.

Flexible Permits usually contain two emissions caps – an initial emissions cap and a final emissions cap. The initial emissions cap is the starting point prior to any physical or operational changes and is based on the controls in place at the time the Flexible Permit is first issued. The final emissions cap applies after all control upgrades have been put into place and is based on the application of BACT to all facilities contributing to an emissions cap.²⁶ Additionally, interim caps are sometimes utilized, which provide emissions limits at various stages between the implementation of the initial emissions cap and the final emissions cap.

Flexible Permits also use individual emissions limitations for each pollutant not covered by an emissions cap for facilities covered by the Flexible Permit.²⁷ Individual emissions limitations may also be used in conjunction with the emissions cap when it is necessary to ensure protection of the NAAQS. Specific emission limits that an individual facility cannot exceed may also be established to ensure that federal permitting requirements are not circumvented.²⁸ Finally, all Flexible Permits require permit holders to comply with state and federal rules, regulations and commission orders, and conditions as precedent to the granting of the permit.²⁹

- **EPA states that the Flexible Permits Program fails to adequately show how emissions increases are calculated for the entire major stationary source if the source is subject to two different permitting regulations – the state Flexible Permits Program regulations and federal Major NSR SIP regulations.³⁰**

In the proposal, EPA remarks that not all emission points, units facilities, major stationary sources, minor modifications to an existing major stationary source, and so forth, at a site are required to be included in the source's Flexible Permit. Notably, EPA acknowledges that this is not *per se* inconsistent with the Clean Air Act and EPA's Major NSR SIP requirements.³¹ However, EPA expressed its concern that the Program fails to explain how physical and operational changes that occur under a Flexible Permit emissions cap are evaluated for Major NSR applicability.

²⁶ Letter from R. Hyde to J. Robinson, August 30, 2007; *see also* 30 TAC § 116.716(a).

²⁷ 30 TAC §§ 116.715(b) and 116.716(b).

²⁸ 30 TAC § 116.715(c)(1) and (d).

²⁹ 30 TAC § 116.715(c)(10).

³⁰ 74 Fed. Reg. at 48489.

³¹ Id.

Again, the permitting authorization method used at a source does not exempt any of the facilities located at that source from federal permitting requirements. If a source has a flexible permit that does not contain all the facilities located at that source and a project within the flexible permit triggers netting, all facilities (under the cap and outside the cap) at the source are evaluated to determine whether a net significant emissions increase at the source has occurred. If the resulting net emissions increase is significant, federal NSR is triggered.³²

- **EPA is concerned that the Flexible Permits Program would authorize existing allowable, rather than actual emissions, to be used to determine applicability in violation of the Clean Air Act and the Major NSR SIP requirements.³³**

Flexible Permit emission caps are based on allowable emissions. The final emission caps are based on the application of BACT at the time the Flexible Permit is created. In many situations, the application of BACT to the facilities subject to the emission cap results in an allowable that is lower than the pre-change actual emissions. If netting is required, and the netting analysis reveals an emissions increase, then the project is considered a major modification and the appropriate federal NSR program is triggered.³⁴

When TCEQ is evaluating emissions increases on a project level, the Program requires the use of actual baseline emissions to determine whether a project will result in an increase that triggers NSR applicability.

- **EPA is concerned with the adequacy of the recordkeeping, reporting, tracking and monitoring requirements of the Flexible Permits Program.³⁵**

TCEQ's Flexible Permits Program rules contain recordkeeping requirements and also specify that additional requirements may be specified in special conditions attached to the Flexible Permit.³⁶ Generally, these special conditions may include compliance stack testing, periodic stack testing, continuous emissions monitoring (CEMS) where appropriate and other parametric monitoring requirements, along with recordkeeping to ensure that the permit holder can comply with the emission caps and BACT.³⁷ Because there is a significant

³² Letter from R. Hyde to J. Robinson, August 30, 2007.

³³ 74 Fed. Reg. at 48490.

³⁴ Letter from R. Hyde to J. Robinson, August 30, 2007.

³⁵ 74 Fed. Reg. 48490.

³⁶ 30 TAC §§ 116.715(c)(6) and (d).

³⁷ Letter from R. Hyde to J. Robinson, August 30, 2007.

difference in the types of sources that apply for a Flexible Permit, it is difficult for the TCEQ to implement rulemaking to incorporate every type of recordkeeping, monitoring and tracking requirements that may apply. Attempting to incorporate these variable components into one comprehensive rule could severely limit TCEQ's ability to adequately implement these requirements.

- **EPA finds that the public participation aspects of the Flexible Permits Program are inadequate.³⁸**

TCEQ Executive Director Mark Vickery has already indicated to EPA that he will present to the commission in December 2009 a proposed public participation rulemaking as permitted under existing statutory authority to address EPA's concerns.³⁹ That said, any future changes in the public participation aspects of the Program should apply prospectively and should have no effect on existing permits.

- **Under Minor NSR source review, EPA states that the Flexible Permits Program lacks the specific procedures necessary to determine how the source or state will calculate the emissions cap, determine the coverage of a Flexible Permit, and establish individual emissions limitations for each site. Furthermore, EPA is not clear on what the process is and how the emissions cap is adjusted for the addition of new facilities. Finally, EPA states that the Program needs more detailed monitoring, recordkeeping and reporting requirements to ensure that the emission caps and/or the individual emission limitations are enforceable.**

The Flexible Permit is an optional alternative permitting tool that may be used by a source to authorize a facility, group of facilities or an entire account site (i.e., a source). There is nothing in the Flexible Permits Program that shields a source from federal permitting requirements. The emission caps are based on the application of BACT and reviews of the modeling/health effects data. The monitoring, testing and recordkeeping tools are used to help ensure that a minor source does not become a major source. For control technology protection, the Flexible Permit rules state that the existing level of control may not be reduced for any facility, and the emissions from all facilities contained in a Flexible Permit are included in either an emission cap or an individual emission limitation.⁴⁰

³⁸ 74 Fed. Reg. at 48491.

³⁹ Letter from Mark Vickery, TCEQ Executive Director to Gina McCarthy, Assistant Administrator, EPA Office of Air and Radiation, October 23, 2009, p. 3.

⁴⁰ Letter from R. Hyde to J. Robinson, August 30, 2007.

III. NSR REFORM

In the proposed rules, EPA is proposing disapproval of submittals from TCEQ to revise the Texas Major and Minor NSR SIP. Specifically, EPA has expressed concerns with Texas rules as they relate to PSD Review, Nonattainment Review, plantwide applicability limitations (PALs) and state-issued Standard Permits for Pollution Control Projects (PCPs).

TCC supports full approval of the state's NSR reform SIP submittals. EPA's specific concerns and TCC's responses are below:

- **With regard to PSD review, EPA disapproves of the state definition of BACT. EPA also disapproves of the state's rules because they do not strictly comply with Clean Air Act requirements that a facility may not be constructed unless it will comply with BACT limits.⁴¹**

EPA states that “the State PSD SIP must both require BACT and apply the federal definition of BACT (or one that is more stringent) to be approved.”⁴² In a recent letter to EPA, Mr. Vickery committed to EPA that TCEQ will address the definition of BACT through an upcoming rulemaking.⁴³ Although TCC believes that the state's application of BACT is consistent with federal requirements as explained in detail below, we support this TCEQ initiative to update the definition of BACT. That said, any future changes in the BACT definition should apply prospectively and should have no effect on existing permits.

EPA's proposal to disapprove this rule is based in part on false distinctions between what it refers to as “PSD BACT” and “Minor NSR BACT.” Assuming such distinctions, EPA concludes that the Texas rules fail to clearly apply the “PSD definition of BACT” to all actions subject to PSD, and conversely fails to delimit the minor NSR definition to activities triggering only minor NSR. But there are no distinctions, legal or practical, in Texas BACT reviews.

Texas law does not create two different types of permits, one called a minor NSR permit and one called a PSD permit. There is only one kind of pre-construction permit described in the Texas Clean Air Act, a “preconstruction permit” under Texas Health & Safety Code § 382.0518. The issuance of all such permits is conditioned on use of “best available control technology”:

⁴¹ 74 Fed. Reg. at 48472.

⁴² Id.

⁴³ Letter from M. Vickery to G. McCarthy, October 23, 2009.

“(b) The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:

- (1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and
- (2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.”⁴⁴

One can search the entire Texas Clean Air Act—which is the sole authority under which TCEQ can issue any permits—and find no mention of PSD at all; again, the governing law establishes the need for BACT for *all* permits, major or minor. And the governing statute does not define BACT beyond its own terms, leaving substantial degrees of freedom for TCEQ to compel the best available control technology. TCEQ’s implementing rules also do not further define BACT at all, either, other than to emphasize the need for giving “consideration … to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.”⁴⁵

Texas accomplishes the PSD reviews required by Part C of Subtitle I of the federal Clean Air Act by including various applicability provisions in its rules, but the only effect of “triggering” PSD review is to require an increment analysis (the “significant deterioration” review) for all preconstruction permits for PSD projects. Again, BACT reviews are universal, and do not depend on triggering PSD. (This is one of the great strengths of Texas’s permitting program, not a weakness). The nature of the BACT review doesn’t change depending on whether the application triggers PSD: TCEQ determines BACT using its 3-tiered process regardless of the size of project under review.

EPA is conditioning its approval on TCEQ adoption of precisely the same definition of BACT that EPA has chosen. But EPA has no foundation for that condition as further outlined in the five following points.

⁴⁴ TEX. HEALTH & SAFETY CODE § 382.0518(b).

⁴⁵ 30 TAC § 116.10(3).

1. EPA May not Condition Approval of Texas's Permitting Programs on Adherence to Specific Definitions

SIP approval of a PSD program is conditioned on accomplishing some very general statutory objectives, as outlined in Section 165(a) of the federal Clean Air Act, including mechanisms to ensure that each proposed major source or modification is subject to the best available control technology.⁴⁶ Congress expressly left the particulars to each state.⁴⁷ Not even EPA's rules describing its expectations for approvable SIPs mandate adoption of the exact definitions: Variations are allowed "if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects" as those adopted by EPA.⁴⁸ TCEQ of course has made that demonstration in its various SIP submittals over the years, but mostly by decades of actual BACT determinations made pursuant to its definition. EPA has not identified even one TCEQ BACT determination that yielded an inadequate result because of the different definitions.

In fact, EPA has agreed that the TCEQ BACT review process is perfectly adequate. When EPA granted Texas's PSD program complete SIP approval in 1992, EPA accepted complete exclusion of the federal control technology review provisions (codified at 40 CFR 52.21(j)):

" [B]ecause the [Texas Air Control Board] claimed that the Texas Clean Air Act and the existing State regulations have provisions for application of BACT as stringent as the Federal requirements in reviewing the permit applications. The EPA review of the Texas Clean Air Act and Regulation VI (Sections 116.3(a)(3) through 116.3(a)(5)) have indeed revealed that existing TACB permit requirements meet the provisions of the Federal PSD regulations... "⁴⁹

The final rule approving the Texas PSD program affirmed that incorporation of the federal control technology review provision "not necessary for approval of the Texas Program."⁵⁰

2. Definitions Do Not Determine Stringency

The stringency of BACT determinations are not determined by definitions, anyway. Even the far wordier "federal definition" is but a litany of factors that go into what is inevitably a

⁴⁶ CAA § 165(a)(4); 42 U.S.C. § 7475(a)(4).

⁴⁷ CAA § 101(a)(3); 42 U.S.C. § 7401(a)(3).

⁴⁸ 40 CFR § 51.166(b).

⁴⁹ 54 Fed. Reg. 52823, 52824-25 (Dec. 22, 1989).

⁵⁰ 57 Fed. Reg. 28093-94 (June 24, 1992).

highly discretion-laden determination. A more “specific” definition, it may truly be argued, has the effect of being less stringent, because it limits the factors to be considered. Absent a definition of BACT beyond its own self-description, TCEQ is free to be even stricter than the wordier federal definition. Again, the proposed disapproval fails to identify even one determination that (a) depended on the definition applied, and (b) yielded a determination less strict than would resulted from application of the “federal definition.”

3. EPA Itself Does Not Follow the “Federal Definition”

EPA is in a difficult position to insist on word-for-word adoption when it does not itself follow the federal definition. The definition EPA would impose on the states is not the one that Congress prescribes. The following shows the changes needed to the EPA rule in order to conform it to the statute:

(12) *Best available control technology* means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

Which federal definition would EPA like Texas to follow, the one in its rule or the one in its governing statute? In what way does either “federal definition” necessarily require BACT determinations any more strict than the Texas definition?

4. The Proposed Disapproval Draws on Distinctions Without Differences

The definition is designed to identify relevant factors that go into what is ultimately a highly discretion-laden determination. No matter the definition, the objective is the same. And no matter the definitions, the resources consulted for each BACT determination are the same. In Texas, for example, all BACT determinations are made using its 3-tier process, which elaborates in detail how TCEQ makes the determinations. All reviews are based on consideration of national determinations codified in the RACT/BACT/LAER Clearinghouse. EPA has agreed that this process yields results equivalent to its top-down approach, which itself is not compelled by any definition. In both cases, responsible agencies make discretionary determinations based on aggressive efforts to ensure that new technologies are applied when they become available to new sources. Pharisaical parsing over definitions does not accomplish sound BACT determinations, which instead result from good faith efforts by responsible regulators.

5. To the Very Extent There Were Differences in Result Based on Definition, EPA Would be Prohibited from Disapproving the Definition

EPA presumes without proof a difference in result arising out of TCEQ's BACT definition. But, regardless, EPA cannot elect to approve the broader reach of the Texas program (e.g., application of BACT to all sources), but disapprove what it perceives to be a lesser definition of BACT. States are the primary architects of their implementation plans, and EPA is not free to change the state's choices by selective approvals of interrelated elements.⁵¹

⁵¹ An unbroken line of cases, starting with *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), holds that the Clean Air Act, placing in the states the “primary responsibility” for protecting air quality, does not allow EPA change the stringency of the plan as developed by the state; EPA may only approve or disapprove what the state submits. In one case rejecting EPA’s decision to approve a sulfur dioxide limit but not the averaging conventions that were part of the rule, Judge Posner offered words that counsels against using the SIP machete with which EPA proposes to hack apart Texas’s air quality permitting program:

... nothing in the Act or in any cases we have found suggests that the EPA, when asked to approve a revised plan, can, without pausing to decide whether a limitation in the plan that its authors may have thought critical to its soundness has any merit at all, approve the plan minus the limitation. The plan might be vastly better with than without the limitation, and the agency cannot determine that without examining the limitation. Even if it is not vastly better, section 110(a)(3)(A) requires the Administrator to approve a revised plan, limitations and all, if he determines that it meets the requirements of the Clean Air Act; and he cannot make that determination if he refuses to evaluate the limitations.

Accordingly, the extent to which EPA would make any substantive changes in TCEQ's permitting program by selectively disapproving its BACT definition is the very extent to which it is forbidden to disapprove it. EPA must either accept the permit program or reject it in its entirety, and not cut it to pieces so that it looks like a ransom note.

- With regard to Nonattainment Review, EPA disapproves the state rules because they require affirmative regulatory action by the EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone nonattainment areas.⁵²

EPA points to the D.C. Circuit Court decision in *South Coast Air Quality Management District v. EPA*, where the court vacated federal rules that waived obligations under the revoked 1-hour standard for NSR.⁵³ EPA states that the effect of this portion of the court's ruling is to restore major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone standard.⁵⁴ In response to the court's ruling in *South Coast*, EPA has stated on numerous occasions that it would go forward with rulemaking to implement the 1-hour ozone requirements.⁵⁵ Therefore, it is reasonable for TCEQ to understand that some EPA action is necessary before it proceeds with appropriate rule changes to reinstate the major nonattainment NSR applicability thresholds and emission offset requirements, and this is not a rational basis upon which to justify disapproving the state's rules.

- Also with regard to Nonattainment Review, EPA disapproves of the Texas rule submissions because they are not clear as to when and where an NSR applicability determination applies.⁵⁶

EPA states that the Clean Air Act and NSR SIP rules require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located *on the date of issuance* of the Major NSR permit. TCEQ rules state that the nonattainment NSR requirements apply on the permit issuance date for all facilities located in a nonattainment

1984); see also *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 781 (3d Cir. 1987) ("Because the states have primary responsibility for achieving air quality standards, the EPA has limited authority to reject a SIP.").

⁵² 74 Fed. Reg. at 48473.

⁵³ 472 F.3d 882 (D.C. Cir. 2006), reh'g denied 489 F.3d 1245 (2007).

⁵⁴ 74 Fed. Reg. at 48473.

⁵⁵ 73 Fed. Reg. 22896, 22897 (April 28, 2008); 73 Fed. Reg. 38353, 38354 (July 7, 2008); 74 Fed. Reg. 2936, 2941 (January 16, 2009); 74 Fed. Reg. 25153, 25154 (May 27, 2009).

⁵⁶ 74 Fed. Reg. at 48473.

area on the effective date of the rules.⁵⁷ For those facilities located in areas that are designated nonattainment areas after the effective date of the rules, the nonattainment NSR requirements apply the day the application is administratively complete. The day the application is determined to be administratively complete occurs prior to the issuance date of the permit. Therefore, the state's rules are more stringent than the federal rules in this regard.

- **EPA states that it has many concerns with TCEQ's implementation of the federal PAL program. First, EPA disapproves the Texas SIP submittals because they fail to limit applicability of a PAL only to an existing major stationary source.⁵⁸**

Federal rules state PALs are available only for existing major stationary sources because they are based on a source's actual emissions.⁵⁹ TCEQ rules specify that any application for a PAL permit or a PAL permit amendment must include calculations of the baseline actual emissions with supporting documentation.⁶⁰ A new stationary source would not have this documentation to submit. It is clear that the state's rules limit the applicability of a PAL to an existing major stationary source.

- **Second, EPA rejects the state's PAL SIP submittals because there are no provisions that relate to PAL re-openings, nor is there a mandate that failure to use a monitoring system that meets the federal requirements renders the PAL invalid.⁶¹**

A PAL issued under state rules is effective for 10 years.⁶² The state's rules provide for the revalidation of the data used to establish the PAL pollutant at least once every five years.⁶³ There are also regulatory procedures in place for the amendments or alterations of a PAL.⁶⁴ Finally, the state's rules specify that a source's PAL monitoring system that utilizes a CEMS to monitor PAL pollutant emissions must comply with applicable specifications found in 40 CFR Part 60, Appendix B.⁶⁵

⁵⁷ 30 TAC § 116.150(a)(1).

⁵⁸ 74 Fed. Reg. at 48474.

⁵⁹ 40 CFR §§ 51.165(f)(1)(i) and 51.166(w)(1)(i).

⁶⁰ 30 TAC § 116.182(2).

⁶¹ 74 Fed. Reg. at 48474.

⁶² 30 TAC § 116.186(b)(7).

⁶³ 30 TAC § 116.186(b)(9).

⁶⁴ 30 TAC § 116.192.

⁶⁵ 30 TAC § 116.186(c)(2)(B)(1).

- **Third, EPA disapproves the Texas SIP submittals because the Texas rules provide for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. According to EPA, inclusion of all the emissions units subject to the enforceable PAL limit is essential. EPA states that the Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the entire major stationary source and therefore appears to be less stringent than the federal rules.⁶⁶**

TCEQ's PAL rules clearly state that "the plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities included in the PAL."⁶⁷ The PAL program is not comparable to the Texas Flexible Permit Program, which may apply to only certain facilities at a source.

- **Fourth, EPA rejects the public participation aspect of the state's PAL program.⁶⁸**

TCEQ Executive Director Mark Vickery has already indicated to EPA that he will present to the commission in December 2009 a proposed public participation rulemaking as permitted under existing statutory authority to address EPA's concerns.⁶⁹ That said, any future changes in the public participation aspects of the Program should apply prospectively and should have no effect on existing permits.

- **EPA also states that the term "baseline actual emissions" does not require the inclusion of emissions resulting from startups, shutdowns and malfunctions. Further, definition omits reference to the "average rate."⁷⁰**

TCEQ does not regulate malfunction emissions. Rather, TCEQ is in the process of authorizing maintenance, startup and shutdown (MSS) emissions for chemical plants. Under TCEQ's rules, baseline actual emissions include emissions events or emissions historically exempted under 30 TAC Chapter 101 to the extent they have been authorized or are being authorized.⁷¹ These emissions include MSS emissions to the extent they are verifiable. MSS emissions that are not verifiable are treated as unauthorized and have a baseline emissions rate of zero. Therefore, it appears that in this regard, the state's program is at least as stringent as the federal program.

⁶⁶ 74 Fed. Reg. at 48474.

⁶⁷ 30 TAC § 116.186(a).

⁶⁸ 74 Fed. Reg. at 48474.

⁶⁹ Letter from Mark Vickery, TCEQ Executive Director to Gina McCarthy, Assistant Administrator, EPA Office of Air and Radiation, October 23, 2009, p. 3.

⁷⁰ 74 Fed. Reg. at 48475.

⁷¹ 30 TAC § 116.12(3)(E).

The rate TCEQ uses to determine baseline actual emissions is not inconsistent with federal rules simply because the term “average” is omitted. A complete reading of the Texas rules reveals that an average emission rate is being used to determine the baseline actual emission rate.⁷²

- **EPA states that the definition of the term “facility” is not clear.⁷³**

Specifically, EPA notes that “[t]he submitted NNSR non-PAL rules do not explicitly limit the definition of ‘facility’ to an ‘emissions unit’ as do the submitted PSD non-PAL rules.⁷⁴ Under the state’s statutes and rules, the term “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.”⁷⁵ The definition of “facility” is so broad that it requires every possible source of air contaminants to obtain some type of approval from TCEQ.

Under the state’s definitions for the Title V Federal Operating Program, the state similarly defines the term “emissions unit” as “a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.”⁷⁶ Thus, the term “facility” is equivalent to the term “emissions unit.”

- **Finally, EPA expressed concerns with the state’s Standard Permit for PCPs.**
Specifically, EPA states that the PCP Standard Permit is not limited in its applicability to a single category of industrial sources, but to a broad class of pollution control techniques at all source categories. According to EPA, an individual Standard Permit must be limited to a single source category. EPA also expresses its concern that the rules allow for the TCEQ Executive Director to exercise his discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements.⁷⁷

The Standard Permit is a minor NSR permitting tool. Similar to all other minor NSR permitting programs, the state has wide discretion in its implementation of the program.

⁷² 30 TAC § 116.12(3).

⁷³ 74 Fed. Reg. at 48475.

⁷⁴ Id.

⁷⁵ 30 TAC § 116.10(6); TEX. HEALTH & SAFETY CODE § 382.003(6).

⁷⁶ 30 TAC § 122.10(8).

⁷⁷ 74 Fed. Reg. at 48475.

There is no federal requirement that limits the use of a Standard Permit to a single source category. The only statute that governs EPA approval of the Standard Permit as a SIP revision is the following general obligation under 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...”⁷⁸

EPA does not and cannot question that TCEQ’s minor NSR program, including the Standard Permit for PCPs, provides for the regulation of any stationary source as necessary to assure that the NAAQS are achieved. Furthermore, Parts C (PSD) and D (nonattainment NSR) are not implicated because PCP Standard Permits are expressly made unavailable to the major sources and major modifications that are subject to Parts C and D. Finally, there is also no EPA rule that governs approvable Standard Permits. EPA’s proposed disapproval fails to identify a plausible reason why the PCP Standard Permit fails to meet federal requirements.

Moreover, the discretion provided to the TCEQ Executive Director under the state’s rules is intended to provide the Executive Director the flexibility to refuse to authorize a Standard Permit in those cases where he determines there are health effects concerns or the potential to exceed the NAAQS.⁷⁹ The discretion granted the Executive Director in this respect is an important permitting tool that is necessary to effectively protect the environment and is not a sound basis for disapproval of this minor NSR permitting tool.

IV. QUALIFIED FACILITIES

Finally, EPA has proposed to disapprove revisions to the SIP submitted by TCEQ that relate to the Modification of Existing Qualified Facilities because the Program does not meet the NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision. EPA also expresses general concern that it is not clear that the Qualified Facilities Program is intended to apply only to minor sources.

TCC supports full approval of the Texas Qualified Facilities Program. Similar to the Flexible Permits Program, the Qualified Facilities Program is not intended to shield a source from major

⁷⁸ CAA § 110(a)(2)(C); 42 U.S.C. § 7410(a)(2)(C).

⁷⁹ 30 TAC § 116.617(3)(B).

NSR permitting requirements. Similar to the Flexible Permits Program, the Qualified Facilities Program is a robust, federally enforceable program. Authorized by the Texas Clean Air Act,⁸⁰ the state's Qualified Facilities Program promotes flexibility and allows sources to make certain types of changes without triggering federal NSR permitting requirements. If federal NSR is triggered, a facility cannot be a qualified facility. The definition of a qualified facility makes it clear that a qualified facility is an existing facility.⁸¹ Under TCEQ's rules, a qualified facility may make a physical change in or change the operation of that facility as long as the change does not result in a net increase in allowable emissions of any air contaminant and does not result in the emission of any air contaminant not previously emitted. Additionally, the facility must be using equipment at least as effective as the BACT required by the commission.⁸²

EPA outlined the following concerns with the state's Qualified Facilities Program, and TCC's responses follow:

- EPA states that the Qualified Facilities Program is not clearly limited to Minor NSR, the Program has no regulatory provisions clearly prohibiting the use of the Program to circumvent the Major NSR SIP requirements, and the Program does not require that first an applicability determination must be made whether the construction or modification is subject to Major NSR.⁸³

TCC views this criticism as lacking merit. The Qualified Facilities Program is a minor NSR program. TCEQ's rules clearly require sources making changes under the Program to submit specific documentation, including "sufficient information as necessary to show that the project will comply with §116.150 and §116.151 of this title (relating to Nonattainment Review) and §§116.160-116.163 of this title (relating to Prevention of Significant Deterioration Review) and with Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA §112(g), 40 CFR Part 63))."⁸⁴ Furthermore, TCEQ's rules also state that nothing in the rules governing the Program shall limit the applicability of any federal requirement.⁸⁵

⁸⁰ TEX. HEALTH & SAFETY CODE § 382.0512 (2009).

⁸¹ 30 TAC § 116.10(16).

⁸² 30 TAC § 116.10(11)(E).

⁸³ 74 Fed. Reg. at 48451-48452.

⁸⁴ 30 TAC § 116.117(a)(4).

⁸⁵ 30 TAC § 116.117(d).

- In the proposal, EPA requests comment on “whether its understanding of Texas law is correct for the definition of ‘facility.’”⁸⁶

According to EPA, “the State uses a ‘dual definition’ for the term ‘facility.’ It is our understanding of State law, that a ‘facility’ can be an ‘emissions unit,’ i.e., any part of a stationary source that emits or may have the potential to emit any air contaminant. A ‘facility’ also can be a piece of equipment, which is smaller than an ‘emissions unit.’ A ‘facility’ can be a ‘major stationary source’ as defined by Federal law. A ‘facility’ under State law can be more than one ‘major stationary source.’”⁸⁷

Under the state’s statutes and rules, the term “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.”⁸⁸ The definition of “facility” is so broad that it requires every possible source of air contaminants to obtain some type of approval from TCEQ.

Under the state’s definitions for the Title V Federal Operating Program, the state similarly defines the term “emissions unit” as “a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.”⁸⁹ Thus, the term “facility” is equivalent to the term “emissions unit” for purposes of the Qualified Facilities Program.

- EPA criticizes the Qualified Facilities Program because it does not include a requirement to make Major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source.⁹⁰

TCEQ’s rules state that in order to make a change at a qualified facility, the owner or operator must demonstrate that the change does not result in a net increase in allowable emissions of any air contaminant previously authorized under state minor source review.⁹¹ Persons making changes to a qualified facility must comply with all requirements relating to documentation and notification of changes to Qualified Facilities and rules relating to pre-

⁸⁶ 74 Fed. Reg. at 48455.

⁸⁷ 74 Fed. Reg. at 48455.

⁸⁸ 30 TAC § 116.10(6); TEX. HEALTH & SAFETY CODE § 382.003(6).

⁸⁹ 30 TAC § 122.10(8).

⁹⁰ 74 Fed. Reg. at 48459.

⁹¹ 30 TAC § 116.116(e)(1).

change qualification.⁹² Furthermore, the rules state that the existing level of control may not be lessened for a qualified facility.⁹³ The program is not circumventing any federal requirements for major stationary sources.

- **Under the Qualified Facilities Program, EPA also proposes to disapprove the definition of BACT.⁹⁴**

EPA states that “the State PSD SIP must both require BACT and apply the federal definition of BACT (or one that is more stringent) to be approved.”⁹⁵ In a recent letter to EPA, Mr. Vickery committed to EPA that TCEQ will address the definition of BACT through an upcoming rulemaking.⁹⁶ Although TCC believes that the state’s application of BACT is consistent with federal requirements as explained in detail below, we support this TCEQ initiative to update the definition of BACT. That said, any future changes in the BACT definition should apply prospectively and should have no effect on existing permits.

EPA’s proposal to disapprove this rule is based in part on false distinctions between what it refers to as “PSD BACT” and “Minor NSR BACT.” Assuming such distinctions, EPA concludes that the Texas rules fail to clearly apply the “PSD definition of BACT” to all actions subject to PSD, and conversely fails to delimit the minor NSR definition to activities triggering only minor NSR. But there are no distinctions, legal or practical, in Texas BACT reviews.

Texas law does not create two different types of permits, one called a minor NSR permit and one called a PSD permit. There is only one kind of pre-construction permit described in the Texas Clean Air Act, a “preconstruction permit” under Texas Health & Safety Code § 382.0518. The issuance of all such permits is conditioned on use of “best available control technology”:

“(b) The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:

(1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology,

⁹² 30 TAC § 116.116(e)(4).

⁹³ 30 TAC § 116.116(e)(8).

⁹⁴ 74 Fed. Reg. at 48463.

⁹⁵ Id.

⁹⁶ Letter from M. Vickery to G. McCarthy, October 23, 2009.

considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and
(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.”⁹⁷

One can search the entire Texas Clean Air Act—which is the sole authority under which TCEQ can issue any permits—and find no mention of PSD at all; again, the governing law establishes the need for BACT for *all* permits, major or minor. And the governing statute does not define BACT beyond its own terms, leaving substantial degrees of freedom for TCEQ to compel the best available control technology. TCEQ’s implementing rules also do not further define BACT at all, either, other than to emphasize the need for giving “consideration … to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.”⁹⁸

Texas accomplishes the PSD reviews required by Part C of Subtitle I of the federal Clean Air Act by including various applicability provisions in its rules, but the only effect of “triggering” PSD review is to require an increment analysis (the “significant deterioration” review) for all preconstruction permits for PSD projects. Again, BACT reviews are universal, and do not depend on triggering PSD. (This is one of the great strengths of Texas’s permitting program, not a weakness). The nature of the BACT review doesn’t change depending on whether the application triggers PSD: TCEQ determines BACT using its 3-tiered process regardless of the size of project under review.

EPA is conditioning its approval on TCEQ adoption of precisely the same definition of BACT that EPA has chosen. But EPA has no foundation for that condition as further outlined in the five following points.

1. EPA May not Condition Approval of Texas’s Permitting Programs on Adherence to Specific Definitions

SIP approval of a PSD program is conditioned on accomplishing some very general statutory objectives, as outlined in Section 165(a) of the federal Clean Air Act, including mechanisms to ensure that each proposed major source or modification is subject to the best available control technology.⁹⁹ Congress expressly left the particulars to each state.¹⁰⁰ Not even EPA’s rules describing its expectations for approvable SIPs mandate adoption of the exact

⁹⁷ TEX. HEALTH & SAFETY CODE § 382.0518(b).

⁹⁸ 30 TAC § 116.10(3).

⁹⁹ CAA § 165(a)(4); 42 U.S.C. § 7475(a)(4).

¹⁰⁰ CAA § 101(a)(3); 42 U.S.C. § 7401(a)(3).

definitions: Variations are allowed “if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects” as those adopted by EPA.¹⁰¹ TCEQ of course has made that demonstration in its various SIP submittals over the years, but mostly by decades of actual BACT determinations made pursuant to its definition. EPA has not identified even one TCEQ BACT determination that yielded an inadequate result because of the different definitions.

In fact, EPA has agreed that the TCEQ BACT review process is perfectly adequate. When EPA granted Texas’s PSD program complete SIP approval in 1992, EPA accepted complete exclusion of the federal control technology review provisions (codified at 40 CFR 52.21(j)):

“[B]ecause the [Texas Air Control Board] claimed that the Texas Clean Air Act and the existing State regulations have provisions for application of BACT as stringent as the Federal requirements in reviewing the permit applications. The EPA review of the Texas Clean Air Act and Regulation VI (Sections 116.3(a)(3) through 116.3(a)(5)) have indeed revealed that existing TACB permit requirements meet the provisions of the Federal PSD regulations...”¹⁰²

The final rule approving the Texas PSD program affirmed that incorporation of the federal control technology review provision “not necessary for approval of the Texas Program.”¹⁰³

2. Definitions Do Not Determine Stringency

The stringency of BACT determinations are not determined by definitions, anyway. Even the far wordier “federal definition” is but a litany of factors that go into what is inevitably a highly discretion-laden determination. A more “specific” definition, it may truly be argued, has the effect of being less stringent, because it limits the factors to be considered. Absent a definition of BACT beyond its own self-description, TCEQ is free to be even stricter than the wordier federal definition. Again, the proposed disapproval fails to identify even one determination that (a) depended on the definition applied, and (b) yielded a determination less strict than would resulted from application of the “federal definition.”

¹⁰¹ 40 CFR § 51.166(b).

¹⁰² 54 Fed. Reg. 52823, 52824-25 (Dec. 22, 1989).

¹⁰³ 57 Fed. Reg. 28093-94 (June 24, 1992).

3. EPA Itself Does Not Follow the “Federal Definition”

EPA is in a difficult position to insist on word-for-word adoption when it does not itself follow the federal definition. The definition EPA would impose on the states is not the one that Congress prescribes. The following shows the changes needed to the EPA rule in order to conform it to the statute:

(12) *Best available control technology* means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

Which federal definition would EPA like Texas to follow, the one in its rule or the one in its governing statute? In what way does either “federal definition” necessarily require BACT determinations any more strict than the Texas definition?

4. The Proposed Disapproval Draws on Distinctions Without Differences

The definition is designed to identify relevant factors that go into what is ultimately a highly discretion-laden determination. No matter the definition, the objective is the same. And no matter the definitions, the resources consulted for each BACT determination are the same. In Texas, for example, all BACT determinations are made using its 3-tier process, which elaborates in detail how TCEQ makes the determinations. All reviews are based on consideration of national determinations codified in the RACT/BACT/LAER Clearinghouse. EPA has agreed that this process yields results equivalent to its top-down approach, which

itself is not compelled by any definition. In both cases, responsible agencies make discretionary determinations based on aggressive efforts to ensure that new technologies are applied when they become available to new sources. Pharisaical parsing over definitions does not accomplish sound BACT determinations, which instead result from good faith efforts by responsible regulators.

5. To the Very Extent There Were Differences in Result Based on Definition, EPA Would be Prohibited from Disapproving the Definition

EPA presumes without proof a difference in result arising out of TCEQ's BACT definition. But, regardless, EPA cannot elect to approve the broader reach of the Texas program (e.g., application of BACT to all sources), but disapprove what it perceives to be a lesser definition of BACT. States are the primary architects of their implementation plans, and EPA is not free to change the state's choices by selective approvals of interrelated elements.¹⁰⁴ Accordingly, the extent to which EPA would make any substantive changes in TCEQ's permitting program by selectively disapproving its BACT definition is the very extent to which it is forbidden to disapprove it. EPA must either accept the permit program or reject it in its entirety, and not cut it to pieces so that it looks like a ransom note.

¹⁰⁴ An unbroken line of cases, starting with *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), holds that the Clean Air Act, placing in the states the “primary responsibility” for protecting air quality, does not allow EPA change the stringency of the plan as developed by the state; EPA may only approve or disapprove what the state submits. In one case rejecting EPA’s decision to approve a sulfur dioxide limit but not the averaging conventions that were part of the rule, Judge Posner offered words that counsels against using the SIP machete with which EPA proposes to hack apart Texas’s air quality permitting program:

... nothing in the Act or in any cases we have found suggests that the EPA, when asked to approve a revised plan, can, without pausing to decide whether a limitation in the plan that its authors may have thought critical to its soundness has any merit at all, approve the plan minus the limitation. The plan might be vastly better with than without the limitation, and the agency cannot determine that without examining the limitation. Even if it is not vastly better, section 110(a)(3)(A) requires the Administrator to approve a revised plan, limitations and all, if he determines that it meets the requirements of the Clean Air Act; and he cannot make that determination if he refuses to evaluate the limitations.

Indiana & Michigan Electric Co. v. U.S. Environmental Protection Agency, 733 F.2d 489, 491 (7th Cir. 1984); see also *Concerned Citizens of Braddock v. EPA*, 836 F.2d 777, 781 (3d Cir. 1987) (“Because the states have primary responsibility for achieving air quality standards, the EPA has limited authority to reject a SIP.”).

- EPA proposes to approve the definitions of “grandfathered facility,” “maximum allowable emissions rate table,” and “new facility.”¹⁰⁵

TCC supports EPA’s approval of these definitions in the Texas rules.

V. CONCLUSION

In conclusion, TCC supports full EPA approval of the Texas Flexible Permits Program, the Texas Qualified Facilities Program and the SIP submittals related to NSR Reform. The SIP revisions submitted to EPA by TCEQ over the last 15 years serve as a critical component to a robust and legally-enforceable Texas air permitting program. Texas should not be punished for EPA’s failure to uphold its legal obligation to evaluate and approve the state’s SIP revision submittals within the statutory period outlined in the federal Clean Air Act. Throughout the proposed disapprovals, EPA offers little or no legally justifiable reason to disapprove these Texas air permitting programs. This is unfortunate given the enormity of EPA’s proposed action and the impact that it will have on this country’s largest industrial state. The SIP revision submittals related to these programs are at least as stringent as the applicable federal requirements and should be fully approved.

¹⁰⁵ 74 Fed. Reg. at 48463.