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Via Electronic Submission & First-Class Mail

Mr. Stanley M. Spruiell
Air Permits Section (6PD-R)
Environmental Protection Agency
Attn: Docket ID Nos.: EPA-R06-OAR-2005-TX-0025;
EPA-R06-OAR-2006-0133; EPA-R06-OAR-2005-TX-0032
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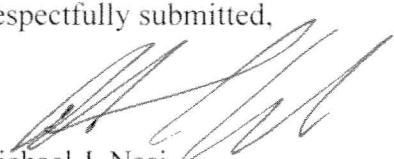
Re: Docket ID No. EPA-R06-OAR-2005-TX-0025; Approval and Promulgation of Implementation Plans; Texas; Modification of Existing Qualified Facilities Program and General Definitions; 74 Fed. Reg. 48,450 (Sept. 23, 2009)
Docket ID No. EPA-R06-OAR-2006-0133; Approval and Promulgation of Implementation Plans; Texas; Prevention of Significant Deterioration, Nonattainment NSR for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit; 74 Fed. Reg. 48,467 (Sept. 23, 2009)
Docket ID No. EPA-R06-OAR-2005-TX-0032; Approval and Promulgation of Implementation Plans; Texas; Flexible Permits; 74 Fed. Reg. 48,480 (Sept. 23, 2009)

Comment of the Gulf Coast Lignite Coalition

Dear Mr. Spruiell:

On behalf of the Gulf Coast Lignite Coalition, we respectfully submit the attached comments on the September 23, 2009 proposed U.S. Environmental Protection Agency (EPA) disapproval of elements of the Texas State Implementation Plan (SIP). As described fully in the attached comments, GCLC believes that the proposed disapproval is unwarranted because the Texas SIP, as implemented by the Texas Commission on Environmental Quality (TCEQ) meets or exceeds Federal Clean Air Act (FCAA) requirements. Should you have any additional questions, please do not hesitate to contact me.

Respectfully submitted,


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Attachments

cc: Attached List

COMMENTS OF THE GULF COAST LIGNITE COALITION

INTRODUCTION

The Gulf Coast Lignite Coalition (GCLC) is a coalition of entities that own or operate lignite and coal-fired power plants and surface mines within the states of Texas, Louisiana and Mississippi. Coalition membership represents a vast majority of the lignite mining and lignite-fired electrical generation industry in Texas, Louisiana and Mississippi. In Texas alone, these industries represent over \$10 billion in annual expenditures and over 33,000 permanent jobs.

GCLC acknowledges that, as recognized by the Texas Commission on Environmental Quality (TCEQ), some changes to the language in the Texas rules could be made to improve clarity and transparency. However, the Texas State Implementation Plan (SIP), as implemented by the TCEQ, meets or exceeds Federal Clean Air Act (FCAA) requirements and formal SIP disapproval is inappropriate. The EPA should look beyond immaterial differences in the rule provisions and focus on the positive results that Texas has been able to achieve under the Texas Clean Air Act (TCAA) and the State's accompanying submittals to alter the Texas SIP. EPA has a history of focusing on results, and, as such, we would ask that EPA continue that practice and not choose to alter course during a time when the regional and national economy are the most vulnerable.

As discussed fully below, the Texas SIP, including the programs that the EPA has proposed to disapprove, have met the goals established in the FCAA by being protective of the public health and welfare in one of the nation's most productive states. Texas' power, fuel, chemical and manufacturing production exceeds that of any other state, and the Texas power industry is the bedrock for this production capacity. Texas producers are able to achieve this high level of output, while still emitting fewer emissions per megawatt than the vast majority of states in this country. The variety of Texas air permitting programs protect the environment and ensure that Texas meets the letter intent of FCAA, while also preserving economic growth and job creation for a growing economy and population—this should be encouraged, not restricted.

Many Texas permittees have relied on the numerous provisions that fall within the Texas "SIP gap"; in some cases, these provisions have been awaiting EPA action for 15 years prior to the EPA's recent proposed disapproval. The EPA's Federal Register notices in no way acknowledge this burden for which the EPA itself is responsible. As a direct result of EPA's approach, there is a real potential for increases in compliance costs and uncertainty while the regulated community grapples with business decisions that must be made in a new legal environment where the validity of long-standing air authorizations is in question. The net result of a continuation of EPA's approach will be restrained, delayed, and possibly even cancelled business investment while power plants (and other Texas industries) try to predict their compliance responsibilities.

The EPA's approach in threatening to disapprove multiple programs could result in effectively punishing the regulated community by forcing it to go through additional expensive and environmentally unnecessary permitting processes. This outcome is the result of the EPA's apparent focus on form over substance in this instance—and several misunderstandings about the

nature of the Texas air permitting program. GCLC understands that the EPA must uphold its obligation to enforce the Clean Air Act, but GCLC respectfully requests that the EPA take a collaborative, not combative, approach with Texas. This approach will limit the uncertainty that threatens jobs and the otherwise healthy economic development of Texas, which provides products that play such a key role to the economic vitality of our nation.

DISCUSSION

1. Texas' Public Participation Program is Robust and Meets or Exceeds All Federal Public Participation Requirements.

GCLC first offers comments on Texas' public participation program, as the public participation issues are implicated throughout the three above-referenced Federal Register notices. GCLC considers these comments timely and appropriate given EPA's preamble statement that directs the public to read the three pending notices and the November 2008 public participation package "in conjunction" with each other.

In 1999, the Texas Legislature enacted HB 801, which created a new cross-media public notice and participation process for environmental permitting in Texas. The elements of this program are robust and fully compliant with federal requirements. In fact, this process exceeds the requirements of the federal rules in almost every respect.

First, notice of all applications is published in a newspaper of general circulation in the area where the new project will be located.¹ This notice triggers a 30-day public comment period. During this period, the public may file written comments and, depending on the type of permit being applied for, request a public meeting or a contested case hearing. However, the public—even parties not residing in the State—may make comments on an air permit application, and the TCEQ is obligated to respond to these comments.² Note that EPA's preamble statement that only affected persons are allowed to comment and trigger a response obligation by TCEQ reflects a fundamental misunderstanding of the Texas program. Based on the level of public interest, public meetings are also provided for in the Texas rules. It is important to recognize that the "public meeting" component of the state program is equivalent to the "public hearing" component of the federal program.

The Texas program goes well beyond the notice and meeting process contemplated by the EPA's own rules and allows "affected persons" to have the right to request a contested case hearing. The state "hearing" component exceeds the federal requirements by providing for a trial-type contested case hearing. If granted "affected person" status, the protestant will become a party to an administrative proceeding. In this proceeding, the permit applicant has the burden of proof for demonstrating that its permit fully complies with all aspects of applicable Texas and federal statutes. As a party to this proceeding, a protestant has the legal authority to challenge evidence and arguments put forth by the applicant. The proceeding is held before an Administrative Law

¹ 30 TEX. ADMIN. CODE §§ 39.201, 39.601, 116.130.

² See 30 TEX. ADMIN. CODE § 55.156(b)(1).

Judge, who makes a recommendation to the TCEQ Commissioners, who have the final authority to decide on these issues. Again, by providing for this trial-type contested case hearing process, the Texas public participation process goes well beyond federal requirements, which require only that interested parties have the ability to participate in a notice and comment period.

GCLC understands that the TCEQ is working with the EPA to address many of the concerns that the EPA has advanced, and GCLC supports these efforts. However, GCLC believes that, as a part of these negotiations, the EPA is attempting to impose requirements that go beyond its own regulations. For instance, the EPA argues that Texas' SIP violates 40 C.F.R. § 51.161(a) and (b) because the Texas program in certain situations does not require a second round of notice after the draft permit has been prepared and the TCEQ has made an initial decision on the application. However, the Texas program complies with the technical requirements of EPA's regulations. The EPA's rules only provide that the "public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval."³ The EPA's regulations do not require notice to be issued of this public information, only that it be made available to the public. Under the Texas program, this information is made available to the public. Furthermore, Texas also satisfies the "minimum requirements" set forth at 40 C.F.R. § 51.161(b). This is the kind of semantic distinction we hope EPA can move beyond to resolve these issues immediately.

In sum, the public participation process is robust and effective. Every state is given the flexibility under the FCAA to meet the minimum requirements of that Act and tailor additional requirements to fit its needs. By failing to recognize the sufficiency of the current public participation process, EPA has triggered some discussions in Texas about whether the Texas public participation process should simply mirror the federal system, which would mean the elimination of the Texas contested case hearing process—an outcome the environmental community has long opposed. By resolving semantic differences and eliminating uncertainty about the status of the Texas SIP as soon as possible, EPA will minimize the need for the State of Texas to have that debate.

2. Texas' Definition of "Best Available Control Technology" Is Consistent With Federal Regulations.⁴

Texas' February 1, 2006 submittals revised sections of the Texas PSD SIP removing references to the federal definition of BACT as defined in 40 C.F.R. 51.166(b)(12).⁵ TCEQ staff has indicated that this was an unintentional removal of the provision. It will be addressed in rulemaking that is scheduled for the January 13, 2010 TCEQ agenda. This should resolve EPA concerns regarding the Texas PSD program.

³ 40 C.F.R. § 51.161(a).

⁴ EPA proposed to disapprove a separately referenced definition of BACT in the Qualified Facilities proposed disapproval. The definition of BACT, although codified here in 30 TAC 116.10 (General Definitions) is virtually identical to the BACT provisions found in 30 TAC §116.111, as analyzed in this section. This definition, as applied by the TCEQ, meets all federal requirements for major source BACT determinations.

⁵ See 30 TAC § 116.160(a).

The Texas BACT assessment process is legally valid as it has been and continues to be in full compliance with FCAA requirements. This is particularly important for those entities that were subject to a BACT analysis and received PSD permits under the February 2006 submittal rules and for those entities who continue to be subject to BACT analysis. Texas has a three-tiered BACT approach that has been previously approved by the EPA. This policy, as demonstrated in the TCEQ guidance document “Evaluating Best Available Control Technology (BACT) in Air Permit Applications,” outlines BACT policy in the state. Drafted in April 2001, it has been the primary guidance document for both permittees and protestants for BACT assessment. It predates the Texas February 2006 submittals by almost five years and continues to be the primary guidance document regarding BACT after the submittals; BACT has been consistently applied by the TCEQ before and after the submitted changes to Chapter 116 of Title 30 of the TEXAS ADMINISTRATIVE CODE.

The EPA in the proposed disapproval cites Section 165 of the FCAA, which provides that “no major emitting facility . . . may be constructed [or modified] in any area which this part applies unless—(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part . . . (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter.”⁶ TCEQ’s three-tier approach to BACT meets the above requirements, ensuring that facilities receiving PSD permits in the state conform to the requirements of Section 165 of the FCAA and are required to utilize the Best Available Control Technology.

Furthermore, EPA has voiced its support for Texas three-tier approach during negotiations with TCEQ over these issues. While responding to TCEQ submittals, the EPA on October 27, 2008 stated that it “agreed with many” of the statements made by TCEQ defending their BACT program in a June 13, 2008 letter.⁷ TCEQ statements included that, to its understanding, the three-tiered approach is an acceptable and approved approach by the EPA. If the EPA did have concerns with that assessment, the EPA had the opportunity to voice them at that time or since Texas (and other states) began using this type of three-tiered approach.

In light of the above facts, GCLC fundamentally disagrees with EPA’s letter, dated November 12, 2009, response to TCEQ comments, stated that the EPA does “not believe that all existing major NSR permits meet CAA BACT requirements.”⁸ TCEQ’s approach to BACT analysis already meets federal requirements. The BACT requirements of the Texas SIP submittal, as part

⁶ 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, 74 Fed. Reg. 48,467, 48,472 (Sept. 23, 2009).

⁷ Letter from Carl E. Edlund, Director, EPA Multimedia Planning and Permitting Division to Mark Vickery, Executive Director, Texas Commission on Environmental Quality, (Oct. 27, 2008) *available at* http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/epa_response_10_27_08.pdf.

⁸ Letter from Gina McCarthy, EPA Assistant Administrator, to Mark R. Vickery, Executive Director, Texas Commission on Environmental Quality, (Nov. 12, 2009) *available at* http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/from_epa_11_12_09.pdf.

of the 2006 NSR Reform, are consistent with Federal requirements, and any additional concerns will be addressed in TCEQ's proposed rulemaking on the issue. GCLC urges EPA's immediate action to affirm the sufficiency of the TCEQ rulemaking as resolving this issue in order to eliminate further uncertainty about the status of the Texas program and the sufficiency of existing permits and pending BACT reviews.

3. The Pollution Control Project Standard Permit Is Consistent With All Federal Regulations and Is Appropriate Under EPA's NSR Review Reform Regulations.

The EPA is incorrect in proposing that the Texas submitted Pollution Control Project (PCP) Standard Permit (30 TAC § 116.617) is overly broad⁹ and that the elements of case-by-case additional authorizations, source-specific reviews, and source specific technical determinations warrant the minor NSR SIP case-by-case permit process under 30 TAC § 116.110(a)(1).¹⁰ The foundation for EPA's argument is that, according to the proposed disapproval, "a Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit."¹¹

The EPA's basis in narrowly defining a Standard Permit to one source category is not found in the FCAA or EPA rules. TCEQ's PCP Standard Permit meets the requirements of the FCAA. Section 110(a)(2)(C) is the primary provision of the FCAA governing EPA approval of standards permits, and states that each SIP shall "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 [PSD] and D [nonattainment NSR]." Since standard permits are made unavailable to authorize new major sources and major modifications subject to Parts C and D, the PCP Standard Permit does not run afoul of the FCAA. Furthermore, the PCP Standard Permit satisfies EPA's requirements for minor NSR programs found at 40 C.F.R. § 51.160. Finally, as an additional element above and beyond federal requirements, the Executive Director of the TCEQ maintains an ability to prevent the permit from being approved if the ED determines there are health effects concerns or the potential to exceed NAAQS.¹² GCLC urges EPA to affirm the sufficiency of the TCEQ PCP Standard Permit process to eliminate further uncertainty about the status of the Texas program and the sufficiency of existing or pending Standard Permits.

⁹ 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, 74 Fed. Reg. at 48,476.

¹⁰ *Id.*

¹¹ *Id.*

¹² 30 TEX. ADMIN. CODE § 116.617(a)(3)(b).

4. Texas' Flexible Permitting Program, as Administered, Is Consistent With Federal Permitting Requirements, and the Texas SIP Requires Only Minor Clarifying Amendments.

The EPA's Federal Register notices and correspondence with the TCEQ ignore the fact that the Texas Flexible Permitting Program has had a significant impact in improving air quality in Texas. The program, initially implemented in 1994, was successful in bringing many major sources out of grandfathered status and into the Texas permitting program. Since that time, the Flexible Permitting Program has provided Texas with an opportunity to achieve real reductions in emissions from the facilities that hold these permits, as can be measured by the significant improvements in air quality in Texas' Nonattainment areas.

Although GCLC's members do not currently rely on this permitting program, we believe it has served the State well. It is therefore in the interest of the EPA and the TCEQ to resolve any remaining issues and eliminate uncertainty as soon as possible.

CONCLUSION

Based on all of the issues set out above, GCLC is concerned that the EPA has injected uncertainty into the Texas regulatory framework without any promise of additional environmental protection. Uncertainty will lead to increased costs to suppliers of electricity, fuels, and products, which will in turn lead to increased prices for consumers across the country during a time when American consumers are economically vulnerable and Texas is working to create jobs and provide affordable and reliable electricity for a growing population. We remain hopeful that EPA will avoid this outcome by working to resolve these issues without the need for SIP disapproval. GCLC appreciates the opportunity to file these comments and welcomes participation in processes in the future to informally resolve the issues addressed in this comment.

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