November 23, 2009

By Electronic Filing and Electronic Mail

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

Re: Comments on EPA's Proposed Disapproval of Various Texas SIP Amendments - EPA Docket ID Nos. EPA-R06-OAR-2006-0133; EPA-R06-OAR-2005-TX-0032; EPA-R06-OAR-2005-TX-0025

Dear Mr. Spruiell:

Bracewell & Giuliani LLP, counsel to the Electric Reliability Coordinating Council (ERCC), appreciates the opportunity to submit comments on the three proposals referenced above. ERCC is a group of companies that are committed to providing reliable and affordable power to American consumers and businesses. Its members include electric utilities, mining, and transportation companies, and it focuses its public education and advocacy efforts on major legislative and regulatory issues arising under the Clean Air Act, as well as issues related to coal ash and climate change policy. ERCC member companies provide electricity to millions of consumers and have spent billions of dollars in achieving beneficial environmental goals over the last decade.

As a technical matter, the United States Environmental Protection Agency (EPA) is simply proposing to disapprove certain revisions to the Texas State Implementation Plan (SIP) that the State of Texas would like to make. As a practical matter, however, these proposals (the "Proposed Disapprovals") have sent a signal that EPA may want to dismantle the comprehensive permitting program that Texas has developed and successfully implemented over the last decade – a program that has achieved substantial emission reductions while providing a fair and predictable regulatory framework that is protective of human health and the environment.

These recent EPA proposals to disturb long-standing state rules have created enormous uncertainty -- not only in Texas but in other parts of the country as well. This type of uncertainty has a chilling effect on much-needed economic investment and makes it even more difficult for companies to create jobs and provide for economic growth. We urge EPA and the Texas Commission on Environmental Quality (TCEQ) to work together to resolve any legitimate

concerns regarding public health or welfare in a way that removes this uncertainty as soon as possible – and minimizes any uncertainty in the meantime.

As discussed below, EPA's concerns about the Texas permitting program are largely misplaced. Given the substantial improvements in air quality that have been achieved in Texas over the last decade – in large measure because the State has been implementing the permitting programs now under dispute – it is hard to believe that these programs could actually be shown to interfere with Texas's ability to achieve the national ambient air quality standards (NAAQS). Most, if not all, of EPA's concerns can be resolved through simple clarifications to the Texas programs – for example, by making it clear that the Texas programs do not supersede federal permitting requirements for new major sources and major modifications.

We urge EPA to work with the TCEQ to ensure than any clarifications or changes are made and approved expeditiously. TCEQ has laid out an effective framework for resolving EPA's approval concerns, and ERCC supports these on-going efforts. We also believe that EPA must keep the following points in mind:

(1) The state program has created an incentive for companies to install pollution controls and implement other pollution reduction measures by giving them additional operational flexibility and reducing permitting delays. These incentives are important, fully consistent with the Clean Air Act, and should be maintained.

(2) EPA should take immediate steps to reassure companies that have projects already in the permitting process that they can continue under the current program. If companies believe that EPA's actions may be applied retroactively to projects that have already applied for permits, there is a substantial risk these projects will be put on hold, which will stifle much needed economic activity and cause irreparable harm.

(3) EPA should also affirmatively recognize and reaffirm the validity of permits already issued. Any retroactive application of the Proposed Disapprovals to already-issued permits would create crippling uncertainty and manifestly unjust revocation of properly-obtained government authorizations. If the Agency believes that any such permits may need to be revised, then there must be a fair and predictable prospective process for making those revisions without causing undue harm to companies that relied, in good faith, on the only program in place – the program that has been successfully implemented by TCEQ.

I. EPA Has Failed to Demonstrate that the Proposed Revisions Interfere with Texas' Ability to Achieve the NAAQS

Unlike many other states, Texas state law requires that all air emissions from stationary sources receive authorization from the state. TX HEALTH & SAFETY CODE § 382.0518(a). Because of this absolute requirement for authorization of air emissions, together with the numerous and varied emission sources that must be authorized across the state in rural, urban, industrialized, agricultural, ozone attainment and nonattainment areas, Texas has developed an extensive program to meet the permitting and resource challenges. See 30 T.A.C. § 116.110(a), which lists the required authorizations for all new sources and modifications.

Texas' minor source program must also meet the statutory Texas Clean Air Act requirement for authorization of all emissions. As EPA recently stated in its final Flexible Air Permitting Rule, states have discretion under the Federal Clean Air Act to implement the state minor source program as long as it does not

> interfere with 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… As a result, SIP-approved minor NSR programs can vary quite widely from State to State.

Operating Permit Programs; Flexible Air Permitting Rule; Final Rule, 74 Fed. Reg. 51,418 at 51,421 (Oct. 6, 2009).

Based upon those EPA-adopted principles that the state SIP must not interfere with attainment and that state flexibility is inherent in the NSR minor source permitting program, we respectfully request that EPA re-evaluate and withdraw the Proposed Disapprovals. As discussed below, not only has Texas air quality shown dramatic improvement because the very measures proposed for disapproval have been in place, but the Proposed Disapprovals fail to recognize that the measures under review are similar to other approved state minor NSR programs.

A. EPA's Proposed Disapprovals Do Not Meet Congress' or the Courts' Documented Standards for SIP Disapproval

The Clean Air Act grants EPA the authority to disapprove a SIP revision if such revision "would interfere with any applicable requirement concerning attainment and reasonable further progress." 42 U.S.C.A. § 7410(l). Both legislative history and court interpretations tie EPA's determination of a revision that "interferes" with a state SIP to the ability of the SIP provision to achieve the National Air Ambient Air Quality Standard. *See* S. Rep. No. 101-228, at 9, 1990 U.S.C.C.A.N. 3385, 3395, "The requirement that the States … submit [SIPs] to EPA for review

allows for federal oversight of the States' efforts to achieve and maintain the required level of air quality"; See also *Train v. NRDC*, 421 U.S. 60, 79 (1975) stating that "EPA's most basic responsibility in reviewing air quality plans under the Act is to determine whether "the ultimate effect of a State's choice of emission limitations is compliance with [NAAQS]." EPA suggests that somehow this burden is placed on the State submitting a proposed SIP program. This is simply incorrect. If EPA were to actually promulgate the Proposed Disapprovals, it must explain how the state programs it is disapproving interfere with compliance with the NAAQS. Without such findings and justifications, EPA's proposed disapproval would be arbitrary and capricious.

Applying this review standard to both initial plans and SIP revisions, courts have recognized that "in each instance the Agency must measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of specified emission modifications." *Hall v. United States EPA*, 273 F.3d 1146, 1158 (9th Cir. Cal. 2001) citing *Train v. NRDC*, 421 U.S. 60 at 93 (1975). In other words, "EPA's analysis must 'rationally connect[]' its approval of particular plan revisions before it to its assessment of an area's prospects for meeting current attainment requirements. *Hall v. United States EPA*, 273 F.3d 1146, 1161 (9th Cir. Cal. 2001) citing *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001). Likewise, EPA must "rationally connect" any proposed SIP disapproval with an interference to achieving the NAAQS. The Proposed Disapprovals fail to make that connection; rather, Texas air quality data demonstrates a consistent and strong improvement in air quality despite a growing population and economic development.

B. Far from Interfering with NAAQS Achievement, the State's Rules have Significantly Reduced Statewide Emissions

The proposed SIP revisions subject to disapproval have been submitted for EPA review on a staggered basis since 1994.[1] Since that time, the Texas' permitting program has implemented substantial emission reductions that have led to dramatic improvements in air quality. These improvements can be demonstrated by reviewing both the records of emission reductions, and more importantly, the reductions measured by Texas ambient air quality monitors:

[1] The Proposed Disapprovals report that the state provisions subject to the proposed actions were submitted to EPA for review during the following time periods: Flexible Permits (Nov. 29, 1994 to Sept. 11, 2000); Qualified Facilities (various provisions from March 13, 1996 to Sept. 4, 2002); PCP Standard Permit (February 2, 2006); and Chapter 116 Rule Revisions (February 1, 2006).

Emission Reductions

Houston Galveston Brazoria Ozone Precursor Emission Reductions. Despite population growth, vehicle and industrial expansion in the Houston-area, the largest and only severe ozone nonattainment area in the state, a key ozone-forming pollutant-- nitrogen oxide-- has been reduced by 57%, to 475 tons per day, since 2000. Point sources alone have reduced the bulk of the NOx reductions in the Houston area by over 500 tons per day during the same time period.

Electric Generating Units Emission Reductions. Electric Generating Units in Texas have consistently been below the nation's average emission in lb/mmBtu for Sulfur Dioxide, Nitrogen Oxides and Carbon Dioxide. (Data from the Acid Rain Score Card (1995 – 2002) and Clean Air Markets Division Database (2003 – 2006).)

Electric Generating Units Emissions Rank Among the Lowest in the Country. As of 2008, EPA's Acid Raid Database reported that Texas' EGUs had the 9th lowest emission rate state average in the nation for NOx and the 19th lowest emission rate for SO2 in the nation. (EPA Acid Rain Database, 2008.)

Monitored Ozone NAAQS Reductions[2]

Houston-Galveston-Brazoria Area Ozone Reductions. 2009 data places the Houston-Galveston region's 8-hour design value at 84 ppb, below the 85 ppb 8-hour NAAQS standard. That level represents a 25 percent reduction in from the 1994 design value of 110 ppb, the year of the first SIP proposal.

Dallas-Fort Worth Ozone Reductions. The Dallas area currently meets the one-hour ozone standard of 125 ppb and the 2009 8-hour design value currently measures 86 ppb, just slightly above the 85 ppb 8-hour standard.

Beaumont Port Arthur Ozone Reductions. The Beaumont Port Arthur area meets both the eight-hour and one-hour ozone standards and has since 2007.

Statewide Ozone Reductions. The HGB, Dallas and BPA areas have all seen declining ozone design values consistently since at least 2003.

As demonstrated by this snapshot of emission reductions and improving ozone data, it is clear that the revisions submitted and implemented over the course of the past decade have not

[2] *Update of Air Quality in Texas*, presented by Susana Hildebrand, P.E., TCEQ Chief Engineer, to the TCEQ Commissioners at a Oct. 29, 2009 Work Session.

interfered with ozone attainment. Quite the contrary, the specific programs have improved air quality, do not interfere with NAAQS attainment, and otherwise meet the requirements of Title I of the Clean Air Act and therefore should be approved.

II. EPA's Proposed Disapprovals are Not Rationally Supported by Case Law and are Inconsistent with the Clean Air Act.

In addition to EPA's failure to assess the single most important factor in the Texas permitting program, the promotion of continued air quality improvement, the Proposed Disapprovals are also inconsistent with case law and the Clean Air Act. Because Congress placed the primary responsibility for developing SIPs upon the states, permitting programs among states can vary greatly. It is left EPA to determine if the respective state SIP satisfies the minimum statutory criteria required by the CAA. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), *rehearing denied* 429 U.S. 873 (1976); *Train v. NRDC*, 421 U.S. 60 (1975); *Florida Power and Light Co. v. Costle*, 650 F.2d 586 (5th Cir. 1979.) Most recently the 5th Circuit recognized that "the EPA has no authority to question the wisdom of a State's choice 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)." *CleanCOAlition v. TXU Power*, 536 F.3d 469, 472 Fn.3 (5th Cir. Tex. 2008).

EPA has also recognized the State's role in crafting minor source NSR programs. EPA's stated goal was to "establish a flexible preconstruction permitting program for minor stationary sources…in order to create a more level regulatory playing field." *Proposed Rules* 17 Fed. Reg. 48700/3 (August 21, 2006). This proposal also recognizes that "outside of Indian Country there is a great variation among State minor NSR permitting programs." *Proposed Rules* 17 Fed. Reg. 48700/3 (August 21, 2006). The following sections demonstrate Texas' respective permitting programs are based upon the recognized Minor Source NSR flexibility and consistent with prior EPA approvals of other state SIPs.

ERCC has performed limited research of other SIP-approved programs throughout the United States. It is incumbent on EPA to thoroughly review other state programs it has approved to ensure that Texas industries are not placed at a competitive disadvantage from industries in other states. As described below, EPA is proposing to disapprove Texas programs that are more stringent than or consistent with other state programs and EPA's own proposal for minor sources on tribal lands. EPA's Proposed Disapprovals are inconsistent with EPA's long-standing policy to allow States flexibility in developing permitting programs to address minor modifications. It is not clear that EPA has invoked its SIP consistency process, but it must do so in this instance given this deviation from national policy. See Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, *State Implementation Plan (SIP) Consistency Process*, dated April 4, 10, 1996. EPA's Proposed Disapprovals could have dramatic impact on industries in Texas. EPA should solicit comments from all EPA Regions on whether the proposed actions are inconsistent with other State SIPs and compare the stringency of the Texas programs to those of

other States. ERCC is confident that EPA will realize that the Texas programs are consistent and possibly more stringent than other permitting programs throughout the United States.

A. The Pollution Control Project Standard Permit Meets the State Minor Source Program Requirements (EPA-R06-OAR-2005-TX-0032)

The statutory basis for the minor source program is section 110(a)(2)(C) of the Act, which provides for the enforcement of the emission limitations in 110(a)(2)(A). This provision provides the state with great discretion to establish Minor Source permitting programs. Pollution Control Project (PCP) authorizations are not unique to Texas and provide an efficient authorization to allow pollution reduction measures to proceed quickly and without burdening the limited resources of the state permitting staff. Additionally, EPA's concern that the PCP Standard Permit is too broad is misplaced and fails to recognize the regulatory restrictions in place, not to mention the benefits that allow efficient emission reduction projects to proceed in the state.

There are at least two states with pollution control exemptions from the definition of modification, which allow pollution control projects to proceed with significantly fewer limitations than the Texas PCP imposes.

Ohio. EPA has approved Ohio's state definition of "Modification" that excludes pollution control or pollution prevention projects that the executive director has determined environmentally beneficial. OHIO ADMIN. CODE 3745: 31-01 (VV) (iv). 68 Fed. Reg. 2909 (January 22, 2003) (EPA effective date, March 10, 2003).

Oregon. Pollution control projects that are determined by the Department to be environmentally beneficial are not considered major modifications. OR. ADMIN. R. 340-200-0020(66)(d)(B) (July 1, 2001) (EPA effective date, March 24, 2003).

Neither one of the above referenced programs limits the pollution control exemption from permitting by a category of pollution control techniques or industrial sources. In fact, both SIP-approved provisions fail to provide any guidance for an application, executive director review, recordkeeping or monitoring requirements. Ironically, it seems that the Texas PCP program is highlighted for disapproval because it placed too much emphasis on the requirements and limitations of the PCP program. This attention to detail should not unfairly subject the authorizations to disapproval where other, broader, PCP authorizations are approved. The Texas PCP program actually has more safeguards than the Oregon and Ohio programs. Moreover, those programs seem to apply to the definition of "major modification" as used in the states' major NSR programs, which is a much more important aspect of the regulations than the minor modification program. Texas' PCP program is solely a minor modification program. It appears

that EPA is proposing to apply to Texas a vastly more stringent approach that is designed to judge Texas in a way that EPA has not proposed for any other state.

EPA approved the general Standard Permit regulations in the Texas SIP, which are the bases for the PCP program currently under review. (30 T.A.C. Chapter 116, Subchapter F Sections 601-606; 610-611; 614; 615 ("Standard Permit General Provisions")). *Approval and Promulgation of State Implementation Plans, Texas*, Final Rule, 68 Fed. Reg. 64543 (Nov. 14, 2003); 40 C.F.R § 52.2270(c). The state PCP Standard Permit meets the Standard Permit General Provisions and therefore has been approved by EPA. There is now no rational basis to disapprove this particular Standard Permit program, especially when it is more stringent than programs EPA has approved in other states.

The following chart outlines the key factors that EPA discussed in the approval of the Standard Permit General Provisions. The right hand column delineates how the PCP Standard Permit meets these factors.

	EPA's SIP approval for the Texas Standard Permit General Provisions	**PCP Standard Permit Provisions**
1.	Major modifications must meet 30 T.A.C. § 116 Subchapter B for NSR requirements (30 T.A.C. § 116.610(a)(2) and (b));	PCP requires compliance with 116.610. See 30 T.A.C. 116.617(b)(1)(C).
2.	Any source must comply with all applicable federal NSPS; NESHAP; and TCEQ rules and regulations (30 T.A.C. § 116.610(a)(3) - (6));	PCP requires compliance with 116.610. See 30 T.A.C. 116.617(b)(1)(C).
3.	The applicant must submit a registration of emissions to limit a source's PTE (30 T.A.C. § 116.611);	PCP requires compliance with 116.611. See 30 T.A.C. § 116.617(b)(1)(D).
4.	The applicant must comply with recordkeeping requirements which require each source subject to a Standard Permit to maintain records sufficient to demonstrate compliance with all conditions of the applicable Standard Permit (30 T.A.C.	PCP requires compliance with 116.611. See 30 T.A.C. 116.617(b)(1)(F); see also 30 T.A.C. § 116.617(2), regarding registration requirements.

	§ 116.615); and	
5.	Public Notice provisions, including a 30-day notice and comment provision for the Standard Permit (30 T.A.C. § 116.603).	The PCP Standard Permit was published in the Texas Register for public comment. See 31 Tex. Reg. 515 (January 27, 2006) for the final rule.

Because the PCP Standard Permit was promulgated in strict accordance with EPA's SIP-approved Standard Permit program, EPA has no basis to now second-guess and retract its previous approval, which was properly promulgated under the SIP-approved program.

Furthermore, in no way is the PCP Standard Permit similar to the Pollution Control Projects exclusions to major NSR promulgated by EPA in its 2002 NSR Reform Rules. 67 Fed. Reg. 80186 (December 31, 2002), vacated in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005). Unlike the vacated EPA rule, the Texas PCP Standard Permit does not exempt from major New Source Review requirements those pollutants that may actually increase as a result of the installation of a pollution control device. Nowhere in the PCP Standard Permit program does such an exclusion exist, and EPA has not identified any provision in the PCP program that would run afoul of the D.C. Circuit's opinion on this issue. The PCP Standard Permit is a minor modification program and within the discretion of the State of Texas' authority to address such modifications.

B. Texas BACT Meets Federal SIP Standards and the Cited Deficiencies are not Sufficient to Propose Disapproval of the Entire PSD Program in Texas (R06-OAR-2005-TX-0032)

EPA's proposal to disapprove the of Texas's NSR program is based upon the Agency's proposed disapproval of Texas' SIP revision that deletes the reference to the PSD definition of "best available control technology" ("BACT"). 74 Fed. Reg. 48467, 48472 (Sept. 23, 2009). Texas has an adequate and legally defensible definition of BACT, which is allowable under case law, EPA guidance and rulings from the Environmental Appeals Board. Contrary to EPA's statements in the Proposed Disapprovals, States have flexibility in their definition of BACT and implementation of BACT as long as the statutory factors in the BACT definition are present in the state's analysis.

EPA has made no finding that Texas' BACT definition is contrary or less stringent than the Federal definition of BACT. Accordingly, there is no legitimate substantive concern. Nonetheless, EPA is proposing the drastic action of disapproving the entire Texas PSD program. Such a disapproval would also discard all the benefits of the 2002 NSR Reform Rules. EPA would place Texas permittees at a severe disadvantage to all other permittees throughout the country that have the benefit of the 2002 NSR reforms rules. At a minimum, EPA should not

disapprove the entire PSD program and should simply work with Texas to address its concerns relating to the BACT definition.

The proposed deficiencies fall far short of demonstrating an interference with achieving the national standard. In addition, TCEQ has already committed to remedy the superficial deficiencies identified by EPA. Letter from Mark R. Vickery (TCEQ) to Lawrence E. Starfield (EPA Region 6) (June 5, 2009), *available at* http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/tceq_airpermitting_epa.pdf. See also *Hall v. United States EPA*, 273 F.3d 1146, 1160 (9th Cir. Cal. 2001) stating that EPA must consider anticipated revisions in determining whether the State will achieve attainment.

The mere removal of a reference to the federal definition of BACT does not create a permitting deficiency or interfere with attainment. The mere statement that the Texas BACT definition differs from the federal regulation fails to explain how it interferes with the state SIP. Many States have BACT definitions in their EPA-approved SIPs that do not conform, word for word, to the BACT statutory language. See Connecticut - CONN. AGENCIES REGS. § 22a-174-1 (EPA effective date, February 27, 2003); Maine - 06-096 ME. CODE R. § 100-17 (EPA effective date, November 21, 2007); New Hampshire – N.H. CODE ADMIN. R. ANN. ENV-A: §101.13 (EPA effective date, August 14, 1992); and Oklahoma – OKLA. ADMIN. CODE § 252:100-1-3 (EPA effective date, January 7, 2000).

Both EPA's and Texas' BACT definitions require the consideration of technical limitations, such as energy and environmental concerns, as well as the economic reasonableness of the emissions limitation, in order to determine BACT. *Compare* 40 C.F.R. 51.166(b)(12) *with* 30 T.A.C. § 116.111(2)(C). Further, both processes address the same fundamental concepts as expressed in the Clean Air Act. The key question is whether the "state permitting program provides a framework for adequate consideration of regulatory criteria and consistency within the PSD program." *In re ConocoPhillips Co.*, PSD Appeal 07-02 slip op. at 30 (EAB June 2, 2008) (quoting *In re Cardinal, FG Co*, 12 E.A.D. 153 at 161 (EAB 2005).

Given the apparent equivalency of the result in applying the federal and Texas approaches to BACT analysis, it is unclear what basis EPA has to identify the "BACT Definition" as an issue sufficient to disapprove the SIP revision. To the extent EPA is asserting that the TCEQ staff was required to follow the exact "top down" approach to BACT analysis, such an argument has already been disclaimed by EPA and the Environmental Appeals Board and rejected by the U.S. Supreme Court. As stated by EPA when it actually approved the Texas PSD program in 1992,

> "The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those

> pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that the mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act." 57 Fed. Reg. 28095 (June 24, 1992) (Exhibit ED-16).

During this same approval promulgation, EPA expressly confirmed that the State of Texas is not required to follow the EPA "top down" approach to BACT. *Id*. at 28095-6. Likewise in the case of *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 476 n. 7 (2004), the U.S. Supreme Court wrote: "Nothing in the act or its implementing regulations mandates top-down analysis."

The ability to deviate from the top-down analysis is also supported by the Environmental Appeals Board, which has recognized in prior rulings the permitting authority's ability to vary from the NSR review manual as long as all regulatory criteria are considered and applied appropriately. *ConocoPhillip*s, PSD Appeal 07-02 slip op. at 30 (EAB June 2, 2008) (citing *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121 at 129-30 n. 14, 135 n.25.)

Absent a showing from EPA that the Texas definition of BACT somehow inescapably leads to failure to consider and apply the appropriate regulatory criteria, or inexorably leads to the NAAQS are not being protected, EPA must defer to the State's authority under the Clean Air Act to address air quality issues. In fact, as explained above, Texas' air quality has substantially improved. Furthermore, Texas' BACT definition has resulted in some of the most stringent pollution control emission rates in the United States. EPA has not identified one instance where application of Texas' BACT definition resulted in less pollution control than if EPA's 5-step top down analysis was used. The issue that EPA has identified is non-substantive and solely one of semantics. There is no reasonable basis for EPA to disapprove Texas' BACT definition.

C. <u>The Qualified Facility Program Satisfies the Minor NSR Permitting Requirements (EPA-R06-OAR-2005-TX-0025).</u>

The qualified facility program meets the requirements of 40 C.F.R part 51 subpart I as a legally enforceable, protective of air quality, minor source authorization that was subject to public notice and comment. In place since 1996, this minor source program has provided regulatory incentives to implement pollution reduction measures at existing facilities. While EPA's proposed disapproval focuses on textual questions that allegedly fail to limit the program to minor modifications, it does not provide any evidence that this authorization is actually used for major modifications or in fact interferes with air quality improvements.

Contrary to the purpose of the Clean Air Act, discontinuance of this program could deter or delay many pollution reduction measures because the cost and resources associated with a full notice and comment case-by-case permit would outweigh the economic benefits of the additional

controls. Upon further review and consideration, EPA should determine that the qualified facility program satisfies the federal Clean Air Act requirements for a state minor source program and retract the SIP disapproval and finally approve this SIP revision.

1. *The Qualified Facility Program is Limited to the State Minor Source Program*

The qualified facility program mandates compliance with 40 C.F.R. §§ 51.165 and 51.166, which requires any new major source or major modification to be permitted under PSD or NNSR requirements, by clearly stating that any change authorized by the qualified facility program shall not "limit the application of otherwise applicable state or federal requirements." TEX. HEALTH & SAFETY CODE § 382.0512(c). TCEQ regulations support this limitation by requiring that qualified facility changes must be documented minor source modifications. See 30 T.A.C. § 116.117(a)(4) which requires compliance with NNSR and PSD regulations; see also 30 T.A.C. § 116.117(d) stating that "Nothing in this section shall limit the applicability of any federal requirement." EPA's dismissal of Section 116.117(a)(4) as a recordkeeping provision is unjustified. 74 Fed. Reg. 48450, 48457/1. This qualified facility regulatory reference to the PSD and NNSR programs requires the regulated entity to document that the change is in compliance with the federal major source permitting programs and in compliance with state and federal law.

2. *The Qualified Facility Program is Protective of Air Quality*

The minor source qualified facility projects are limited in application and only authorized if the change does not result it 1) a net increase in allowable emissions of any air contaminant; and 2) the emission of any air contaminant not previously emitted. 30 T.A.C. § 116.116(e). The use of the qualified facility authorization is further restricted by the requirement that any facility eligible for the qualified facility minor source change must have received a preconstruction permit, which requires BACT review, within the past 10 years or uses pollution controls as effective as the BACT in effect 120 months before the change occurs. 30 T.A.C. § 116.10 (11)(E).

Like the qualified facility program, EPA's proposed Indian Country minor source program is based upon an increase of allowable and not actual emissions. EPA stated that the use of allowables in the minor source program was based upon discretion provided "in defining [modification] as [EPA] thinks best for the minor NSR program." 71 Fed. Reg. 48701/2 (August 21, 2006). The EPA-developed minor source program also utilized emission rates in lieu of air quality impacts to determine exemptions from the minor source definition of modification because "applicability determinations based on projected air quality impacts would be excessively complex and resource intensive." *Id.* at 48701/3. Texas' qualified facility program protects and improves air quality by limiting the use of this authorization to minor source modifications and providing incentives to implement emission reductions.

3. *The Qualified Facility Program is Enforceable*

In addition to the statutory and regulatory project emission thresholds and limitations discussed above, the regulations include enforceable registration and recordkeeping requirements. Documentation must be maintained for all qualified facility changes that describes the change, demonstrates compliance with the qualified facility program as well as state and federal law. 30 TAC § 116.117(a). TCEQ regulations also require that, at a minimum, an annual submission is made to the agency documenting any qualified facility changes not incorporated into a facility permit. 30 T.A.C. § 116.117(b). Additional notification and review requirements are imposed to assure appropriate state review and oversight of the qualified facility changes:

- Pre-change qualification and approval is required for certain BACT determinations or where a MAERT is not available. 30 T.A.C. § 116.118
- Pre-change qualification and approval required for certain intra-plant trading authorizations. 30 T.A.C. § 116.117(4).
- Pre-change notification if a change will affect compliance with a permit condition. 30 T.A.C. § 116.117(3).

EPA's general comments questioning the proper permit application or registration for qualified facility authorization are unclear given the minor source nature of the program and its function as an exemption from a preconstruction permit. 74 Fed. Reg. 48450, 48462. The Program adequately imposes recordkeeping, reporting, notification and approval regulations to satisfy the minor NSR enforceability requirements.

4. *The Qualified Facility Program was subject to Public Review*

Finally, the public review requirements have also been met. Although authorized by statute, the implementing regulations were subject to notice and comment. Proposed on 20 Tex. Reg. 8308 (October 10, 1995) finalized on 21 Tex. Reg. 1569 (February 27, 1996). EPA, in fact, commented on the proposed rule and agreed that it "adequately addresses the applicability of major sources and major modifications with respect to PSD and NA permitting requirements" 21 Tex. Reg. 1569 (February 27, 1996).

D. <u>The Texas Flexible Permit Program is Consistent with Federal NSR (EPA-R06-OAR-2005-TX-0032)</u>

EPA should approve the Texas flexible permit program because it is consistent with the Federal NSR programs. Texas' flexible permit program is a permitting "bubble" program that consolidates all emission limitations into a single permit and in no way allows circumvention of

major NSR permitting as suggested by EPA. The concepts embedded in the flexible permit program have been part of the NSR program for many years and were upheld as consistent with the Clean Air Act by the U.S. Supreme Court in *Chevron v. NRDC*, 467 S.C. 837 (June 25, 1984). Texas' flexible permit program is actually more stringent than EPA's interpretation of the NSR program upheld by the Supreme Court.

In defining a source for purposes of PSD permitting, EPA defined a "modification" as a significant new increase in emissions at a source. See 45 Fed. Reg. 52676, 52747 (August 7, 1980). EPA later promulgated a plantwide definition of the term stationary source where it stated:

> Since the PSD definition defines 'source' in the essence as a plant, only new increases occurring at the entire plant need a PSD permit. For example, if a plant increased emissions at one piece of process equipment, but reduced emissions by the same amount at another piece of process equipment at the plant, then there would be no net increase in emission at the plant, and therefore no modification to the 'source.'

46 Fed. Reg. 50766 (October 14, 1981). The question before the Supreme Court was "whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.' *Chevron*, 467 U.S. at 838. EPA's decision to allow States to issue these types of permits was upheld by the Court. EPA is now proposing an about-face that would ignore the discretion it gave States in the 1980's and that was upheld in the same case that EPA's relies upon so heavily in its defense of its own rulemakings to this day. As matter of fact, EPA's approved SIP for the State of Oregon includes a very similar and possibly less stringent program than Texas' flexible permit program. Oregon implements a program called the Plant Site Emission Limit (PSEL) program. The PSEL program could be less stringent that the Texas' Flexible Permit program in that the term "major modification" in the Oregon SIP is triggered only where there is an increase in the PSEL by an amount equal to or more than the significant emission rate over the netting basis. OR. ADMIN. R. 340-200-0020(66)(a) (July 1, 2001) (EPA effective date, March 24, 2003). Once again, ERCC calls for EPA to perform a detailed analysis of approved SIP programs throughout the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Texas flexible permitting program is explicit in that any new source or major modification to a source must go through major NSR and the Flexible Permit must be altered. 30 T.A.C. § 116.805. When a flexible permit is issued for a new source or major modification, all PSD requirements must be fulfilled, including installation and operation of BACT. The fact that at the end of the day, the emission rates are reflected in a "bubble" permit is of no consequence

and is consistent with applicable statutory and regulatory requirements under the Clean Air Act. EPA concludes that the flexible permit program does not incorporate emissions limitations and other requirements of the Texas SIP, including monitoring, recordkeeping, and reporting requirements. This conclusion is false. The emission limits and other requirements in the flexible permit program are derived from underlying Texas SIP programs, whether it is a PSD or a minor source authorization. The use of flexible permits is a well-established regulatory tool under the Clean Air Act and EPA should allow Texas, like other states, to exercise its discretion in development of its air permitting programs in this manner.

III. EPA Should Recognize the Validity of Permits issued under the Texas Permitting Program and Refrain from Taking Enforcement Actions To Address EPA Concerns

EPA has expressed in the past that it may consider addressing its concerns with the Texas permitting program through enforcement actions. Any such enforcement initiative would create grave uncertainty by questioning past projects that were permitted in good faith and by stalling pending projects, which would seriously hinder job creation in Texas. To avoid these consequences, EPA should issue a statewide enforcement discretion for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority in Texas.

EPA should adhere to its own guidance on enforcement during pending SIP revisions. Michael S. Alushin and John Rasnic, *Revised Guidance on Enforcement During Pending SIP Revision*, March 1, 1991. There is recognition that EPA has the ability to bring enforcement actions alleging violations of approved SIP provisions during review of SIP revisions. *General Motors Corp. v. United States*, 496 U.S. 530 (June 14, 1990). EPA guidance, however, explains certain criteria for EPA to consider in whether to bring enforcement actions during a SIP review process. EPA must consider the following factors:

1. Need for injunctive relief;
2. For purposes of penalty-only cases, period of noncompliance in comparison to the length of Agency delay;
3. Probability that the proposed SIP revisions will be approved; and
4. Existence of a collateral suit compelling Agency action on the proposed SIP revisions indicating prejudice, and the degree of prejudice to potential Defendants.

Applying these factors to the pending proposed Texas SIP disapproval justifies statewide enforcement discretion. First, enforcement actions brought by EPA would not require any injunctive relief, as there is no evidence or demonstration that the proposed Texas SIP provisions excuse major NSR. As discussed above, the proposed SIP programs provide sufficient protections of air quality and have resulted in valid permitting of minor modifications and major sources.

Second, to the extent that EPA may consider penalty-only cases, EPA's substantial delay in addressing the SIP programs presents a great decree of prejudice to sources, and implicates due process concerns. Sources have been authorized under these programs, in some cases well over a decade ago, yet EPA only recently started to comment adversely on permits and the permitting program. Furthermore, complying with the proposed SIP provisions for the past 10-plus years has not created any economic benefit to sources in Texas or presented any environmental harm. The programs have actually improved air quality in the State and have resulted in the installation of pollution controls throughout the State that have benefitted, not harmed, the public health and welfare.

Third, EPA cannot justify enforcement on these SIP issues based on the probability that the proposed SIP revisions would be disapproved, because as discussed herein the law does not support disapproval. The SIP revisions before EPA are reasonable and consistent with case law and other EPA approved-SIPs throughout the country. Any EPA action to disapprove these long-standing lawful programs would be counter to furthering air quality progress in Texas. The proposed SIP revisions programs appropriately implement the statutory requirements by placing regulatory burdens on sources, such as emission limitations, recordkeeping and reporting requirements, and enforcing mandates to comply with state and federal laws. The proposed revisions to the Texas SIP are lawful, and were reasonably expected by TCEQ to be approved by EPA. EPA's Proposed Disapprovals were unexpected, untimely, manifestly unjust and prejudicial to one state, and are therefore not properly justified.

Finally, because of the uncertainty and prejudice to Texas industries caused by EPA's unreasonable delay in addressing these Texas SIP programs, the BCCA Appeal Group has commenced a collateral suit compelling EPA action. Under EPA guidance, this lawsuit demonstrates actual prejudice from EPA's delay on the SIP provisions. *Revised Guidance on Enforcement During Pending SIP Revision* at 5. Given the years of EPA's delayed response and years of sources being permitted in good faith under the Texas programs, EPA would have unclean-hands in any enforcement action to address these SIP issues. Sources that have operated in compliance with the only applicable regulations on the books -- the Texas SIP programs -- should not be prejudiced as a result of EPA's inaction.

Furthermore, EPA's involvement with the Texas SIP is a regulatory function and is not an appropriate opportunity for enforcement. EPA enforcement should adhere to EPA's guidance against commingling enforcement and regulatory actions. See Memorandum from Gary S, Guzy, General Counsel, to Steve A. Herman, *Due Process Considerations Raised by Agency "Commingling" of Enforcement and Regulatory Functions*, September 21, 1999.

While EPA may be tempted to address enforcement on a case-by-case-bases, most, if not all, of Texas' sources are in the same position. One enforcement action against a particular

source for failure to comply with the Texas SIP regulations in place prior to the SIP Revisions at issue would impose regulatory uncertainty and an inconsistent application of federal enforcement. EPA should recognize that the SIP issues are best addressed through consistent, programmatic solutions and not patchy litigation. The Proposed Disapprovals present unique issues in that the prejudice against Texas industries would be so significant. Given the amount of prejudice and the impact any one enforcement case could have in the State of Texas, EPA should provide statewide enforcement discretion and commit to not bring enforcement actions against sources that have been in good-faith compliance with state authorizations over the years.

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We believe that EPA's concerns about the Texas permitting program are largely misplaced, and that most, if not all, of them can be resolved through simple clarifications to the Texas programs. EPA proposals to disturb long-standing state rules have created enormous uncertainty, which is having a chilling effect on much-needed economic investment. We urge EPA and the TCEQ to work together to resolve any issues in a way that removes this uncertainty as soon as possible – and minimizes any uncertainty in the meantime.

Thank you for thoughtful consideration of these comments. If you have any questions regarding this submittal, please contact me at (202)828-5852.

Very truly yours,

Bracewell & Giuliani LLP

/s/ Jeffrey R. Holmstead

Jeffrey R. Holmstead