

I. INTRODUCTION

We are aware that the Environmental Protection Agency (“EPA”) is negotiating with the BCCA Appeal Group, Texas Association of Business and Texas Oil and Gas Association to develop a schedule for addressing outstanding Texas State Implementation Plan (SIP) submittals. We are also aware that EPA has issued its proposed action on Texas’ public participation rules, and plans to act on other Texas SIP submittals soon. While these actions are steps in the right direction, dealing with the outstanding SIP submittals will not address many of the issues raised in our petition.

A truly comprehensive look is necessary to understand how each individual rule interacts with the larger program. In addition, there are a number of programmatic problems, particularly relating to Texas use of off-permit methods to authorize emissions, which may not be addressed squarely in any one SIP-submittal, but these problems must be resolved in order to assure an adequate program. Because many of the flaws in the Texas program require legislative changes and the biennial session of the Texas legislature commences in January 2009, these issues must be addressed now.

II. ENVIRONMENTAL DEFENSE FUND

Environmental Defense Fund, a leading national nonprofit organization, represents more than 500,000 members. Since 1967, Environmental Defense Fund (EDF) has linked science, economics, law and innovative private-sector partnerships to create breakthrough solutions to the most serious environmental problems. Founded in 1990, EDF’s Texas office works for cleaner air, combats global warming, helps rare wildlife recover in Central Texas and restores healthy fisheries in the Gulf of Mexico. EDF’s Texas Office has been active on Texas air permitting issues, submitting comments on

rules, reviewing permits and working with EPA and Texas to bring the Texas air program into compliance with the federal Clean Air Act.

III. ARGUMENTS

A. Public Participation

EPA's recent public participation proposal provides an example of the difficulty in dealing with one piece of the Texas program without a comprehensive evaluation of the entire program. While we largely agree with EPA's assessment of the public participation rules it analyzed, the proposal fails to comprehensively evaluate whether Texas' whole program meets federal public participation requirements. There are a number of Texas rules that allow sources to authorize new emissions and emission increases without meeting minimum federal public participation requirements of Part 51. 40 CFR Part 51. These include: de minimis air contaminants, permits by rule, alterations, qualified facilities and standard permits. Some of these rules, such as those regarding alterations, have already been approved into the SIP despite their suffering from the same illegalities identified by EPA in the current SIP public participation proposal. These provisions should be removed from the SIP. Others, such as those regarding de minimis emissions, have never been submitted for SIP approval, yet are currently implemented by TCEQ. A true evaluation of whether Texas public participation requirements meet federal standards necessitates a review of the public participation requirements applicable to all minor and major permitting actions.

Additionally, the public participation rules provide a clear example of the need for legislative action in the upcoming session of the Texas Legislature, commencing this month, to address Texas' air program flaws. The Texas Commission on Environmental

Quality (“TCEQ”) has stated that changes to its public notice procedures require a change to the Texas Health and Safety Code §382.056.¹ In addition, changes must be made to sections, such as §382.0518(h), which exempts certain permit amendments from the public participation provisions of §382.056. If EPA finalizes its limited approval/disapproval of Texas’ rules, it will start an 18-month sanctions clock. If the public participation statutory issues are not addressed this legislative session, the sanctions clock will likely run before the Texas legislature meets again in 2011. Clear direction from EPA is, therefore, needed to inform TCEQ and the Texas legislature of the statutory changes required for full program approval.

B. Additional Legislative Issues

Attachment 1 is a list of sections of Texas statutory provisions that should be amended to address Texas permitting deficiencies. These sections involve public participation, variances/exemptions, standard permits and permits by rule, confidential information, criteria for granting air permits, the definition of modification, and enforcement issues. Some of these provisions should simply be deleted from the Health and Safety Code because they were adopted by the Texas legislature, but never implemented by TCEQ based on EPA’s objections as to their inconsistency with the CAA. Others, as discussed below, are being implemented despite their inconsistency with the CAA and approved SIP.

1. *De Minimis Emissions*: The Texas Health and Safety Code includes a number of provisions that allow TCEQ to exempt emissions from public notice, impacts review

¹ Texas Commission on Environmental Quality, Response to Recommendations City of Houston Benzene Action Plan, An Interim Report (May 27, 2008). See Attachment 2.

and other permitting requirements. One such provision exempts “de minimis air contaminants.” The Texas Health and Safety Code states:

[t]he commission may develop by rule the criteria to establish a de minimis level of air contaminants for facilities or groups of facilities below which a permit under Section 382.0518 or 382.0519, a standard permit under Section 382.05195 or 382.05198, or a permit by rule under Section 382.05196 is not required.

TEX. HEALTH & SAFETY CODE §382.05101.

TCEQ has adopted implementing regulations, which state, “registration or authorization prior to construction is not required” if: (1) a source is on TCEQ’s de minimis list (which is published on the web and subject to change), (2) the emission is identified in TCEQ’s rule as de minimis, or (3) the executive director makes a case-by-case determination that emissions are de minimis.” 30 Tex. Admin. Code §116.119.

These rules are not approved into the SIP, but TCEQ allows sources to use them to avoid SIP-approved NSR permitting and public participation. When the rules were adopted, TCEQ stated:

Throughout its comments on the revisions to Chapter 116, EPA asked the commission to analyze the adopted rules to determine how specific sections of these rules meet the provision of 40 CFR Part 51, Subpart I. ... The sections concerning de minimis facilities and sources and multiple plant permits were not submitted as a SIP revisions. ... If and when these sections are submitted as a SIP revision, the commission will address the EPA’s questions regarding the applicability of 40 CFR Part 51, Subpart I.

25 TexReg 8672 (Sept. 1, 2000).

TCEQ has not submitted these rules for SIP approval, and they appear to have fallen off EPA’s radar. They are yet another example of why a comprehensive review of Texas air permitting program, rather than merely review of Texas’ SIP submissions, is needed. EPA needs to ensure both that the Texas SIP meets Clean Air Act requirements

and that the program Texas *actually implements* is consistent with federal law. While some of the sources on TCEQ's de minimis list are truly small emissions, the exemptions have not been subject to an analysis of their effects on NAAQs compliance or to EPA review and approval, and do not meet the public participation requirements of Part 51. EPA should issue written notice to Texas, pursuant to 42 U.S.C. §7410(k)(5), that allowing sources to avoid compliance with SIP-approved permitting procedures through use of the de minimis rules is illegal pursuant to the Act and the Texas SIP. If Texas desires to exempt some truly de minimis emissions from SIP permitting rules, it should submit an express list of such emissions or activities for SIP approval, along with documentation that such exemptions will not jeopardize attainment or maintenance of the National Ambient Air Quality Standards.

2. *Permits-by-Rule and Standard Permits:* There are a number of Texas statutory provisions addressing permits by rule and standard permits. These include Texas Health and Safety Code §§ 382.051(b), 382.05195, and 382.05196(a). We have addressed the deficiencies with TCEQ's permits by rule (PBR) and standard permits in our original petition and in numerous filings with EPA Region 6. EPA should insist on changes to the above statutory provisions clarifying: (1) that standard permits and permits by rule cannot authorize emissions from major facilities and cannot be used to amend individual permits, and (2) that standard permits and permits by rule must apply to a specifically defined industrial source category.² Additional documentation supporting

² We use "facility," as defined by the Tex. Health and Safety Code, to mean "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment." TEX. HEALTH & SAFETY CODE §382.003(6).

the problems with permits by rule, and other non-permit, modification procedures, is discussed in section III.C below.

3. Permit Consolidation: The Health and Safety Code provides that TCEQ may “consolidate” into a single permit any permits, special permits, standard permits, permits by rule, or exemptions for a facility or federal source. TEX. HEALTH & SAFETY CODE §382.0511. TCEQ has adopted rules that require the “incorporation” of permits by rule and standard permits into a facility’s permit at such time as the permit is renewed or amended. 30 TEX. ADMIN. CODE §§ 116.116(d) & 116.615(3).

There is no description in the statute or rules of the public participation or impacts reviews required for such incorporations. TCEQ has adopted guidance explaining how it intends to proceed. See, Attachment 3 (TCEQ PBR and Standard Permit guidance). TCEQ’s procedures do not meet the requirements of 40 CFR Part 51. Sources can currently incorporate into their permits, at renewal, numerous PBRs authorizing emissions increases. Despite the fact that incorporation of these PBRs often effectively modify the existing individual permit, the public is provided with only 15 days notice under the TCEQ’s renewal rules. See Attachment 4 (Sample renewal including PBR incorporation). See also, Attachment 5 (TCEQ’s Response to Comments on Houston Refining renewal permit, Responses 5-9).

4. Confidential Documents: The Texas Health and Safety Code prohibits TCEQ disclosure to the public of any information “relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” TEX. HEALTH & SAFETY CODE §382.041 (emphasis added). It also prohibits TCEQ from disclosing such information to EPA unless EPA has entered into an agreement to treat

“information identified as confidential as though it had been submitted by the originator of the information with an appropriate claim of confidentiality under federal law.” *Id.*

This section unlawfully requires TCEQ to defer to an applicant’s or permittee’s determination of what constitutes confidential information. It limits public and EPA access to information, such as emissions data, that is public information under the federal Clean Air Act. It also purports to require EPA to agree to limits on public disclosure of information beyond those limits authorized by federal law. Further, in practice, this provision results in TCEQ referring any and all requests for information marked by the applicant as confidential to the Texas Attorney General’s (AG’s) office. Often a response from the AG’s Office as to whether information truly qualifies as confidential cannot be obtained until it is too late to use the information for its intended purpose. It is routine for companies to mark as confidential information regarding their calculations of emission estimates, therefore, preventing the public from determining whether such emissions are realistic. See Attachment 6 (Chevron PBR filing withholding PBR emission calculations as confidential).

5. Substantive Permitting Standards: The Texas Health and Safety Code states that TCEQ “shall” grant a permit or permit amendment if: (1) the facility will use at least the best available control technology, and (2) the agency finds no indication that emissions from the facility will contravene the intent of the Health and Safety Code, including protection of the public’s health and physical property. TEX. HEALTH & SAFETY CODE §382.0518(b). If TCEQ finds that a permit or amendment does not meet these standards, the Health and Safety Code requires it to “set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.” TEX.

HEALTH & SAFETY CODE §382.0518(d). If the applicant makes changes to meet the TCEQ's specific objections, "the commission shall grant the permit, permit amendment, or special permit." TEX. HEALTH & SAFETY CODE §382.0518(e). TCEQ interprets these provisions as prohibiting the denial of a permit and requiring issuance, even where all local, state and federal air pollution requirements are not met. These provisions were used by TCEQ to justify the granting of a permit to ASARCO's El Paso smelter over the objections of EPA and many others, and despite the fact that no PSD permit had been issued. See Attachment 7 (ASARCO Docket 2004-0049-AIR documents).

According to TCEQ, these provisions limit the agency's discretion to deny a permit or permit amendment for cause. This is clearly illegal. The Health and Safety Code should not require TCEQ to issue a permit. Instead, it should state that the commission may grant a permit if certain conditions are met, and the applicant demonstrates compliance with all applicable local, state and federal air pollution control requirements. Further, the provisions of §382.0518(d) and (e) allow an applicant to make significant changes to an application, and for parties to introduce significant new information into the record, without requiring compliance with minimum federal public participation, including 30-days notice and opportunity for public comment by the public at large.

C. Real Word Impacts: The Cedar Bayou Example

The permitting history of the Chevron Phillips Cedar Bayou plant provides a vivid, but not unique, example of the problems with Texas' air permitting program. Cedar Bayou has used a combination of individual permits, standard permits, permits by rule, qualified facility authorizations, and alterations to authorize emissions from its

facility. Many of these authorizations were issued without adequate public notice and in violation of the current Texas SIP. Furthermore, the resulting maze of authorizations is almost impossible to navigate, making it virtually impossible to identify the specific limits applicable to Chevron Phillips at any given point in time, much less to determine compliance with those limits.

The TCEQ's central registry database lists 53 active permits, standard permits and permits by rule for this facility. See Attachment 8 (TCEQ Air Permitting Action Summary). Many of the permits have been subject to numerous alterations, qualified facility authorizations, and amendments. To determine the applicable limits under each permit, the permit file must be obtained from TCEQ and each file must be reviewed in reverse chronological order to reconstruct the current version of the permit, or the version applicable at any particular point in time, in light of the various alterations, qualified facility authorizations or amendments. The files for some of Chevron Phillips authorizations are simply missing from TCEQ.

To further complicate matters, additional emissions are authorized through permits by rule, each of which may apply to more than one unit. Attachment 9 is a list developed by the Cedar Bayou plant of the PBRs applicable to the plant in 2004. According to TCEQ files, Cedar Bayou has filed for coverage under more than thirty PBRs within the last five years. Examples of these PBRs are included at Attachment 10.

Sample Unit EU 1592:

Cedar Bayou's Ethylene Unit (EU) 1592 is the source of many of the plant's startup, shutdown, maintenance and upset events. This unit is authorized by a PSD permit that, according to TCEQ files, has been modified over the past five years through

TCEQ’s alteration procedures seven times, through qualified facility authorizations seven times, and through amendment three times (with one amendment pending). Samples of these alterations and qualified facility authorizations are included at Attachment 11 and summarized below in Table 1. There was no public participation provided for the changes authorized through alteration or qualified facility authorization.

Table 1. EU 1592 Sample Alterations and Qualified Facility Authorizations

DATE	AUTHORIZATION TYPE	TCEQ DESCRIPTION OF CHANGES AUTHORIZED
3/19/03	Alteration	Replacing transfer line exchangers on cracking furnaces and changing permit allowable emission rates for furnaces to limit total emissions
3/21/03	Qualified Facility	
7/21/04	Alteration	List five additional safety relief devices in acetylene service
12/22/04	Alteration	Reflect the correct nitrogen oxide emission rate that was represented in earlier application submissions
11/23/05	Alteration	Add acceptable cooling tower monitoring method
5/11/07	Qualified Facility	Reallocate emissions between two flares and two cooling towers

Unit EU 1592 is also subject to more than a dozen permits by rule. Table 2 below lists some of the applicable PBR authorizations that require registration with TCEQ and that were found in the facility’s files. With one exception, the additional emissions below

were authorized through generic, non-facility-specific PBRs that are inconsistent with both Texas' approved SIP and EPA's guidance and prior SIP decisions.

Table 2. EU 1592 PBR Authorizations

DATE	PBR	APPLICANT'S EMISSION ESTIMATE	UNIT(S) COVERED
5/30/06	106.478 (Storage tank & change of service)	1.24 tpy VOCs	EU 1592
10/19/05	106.261 & 106.262 (Generic)	0.12 tpy VOCs	EU1592
8/10/05	106.261 & 106.262	2.76 tpy VOCs, 0.06 tpy CO, 0.04 tpy HAPs, .01 tpy NOx	Units NAOU 1797 & 1798, PAOU 1795 and EU 1592
6/15/05	106.261 & 106.262	0.07 tpy VOC	EU 1592
5/4/05	106.261	0.03 tpy VOC, 0.05 tpy NOx, 0.33 tpy CO	EU 1592 & ABU 1794
3/10/05	106.261 & 106.262	0.01 tpy	EU 1592
1/14/05	106.261 & 106.262	0.05 tpy VOC	EU 1592 & NAOU 1798
12/20/04	106.261 & 106.262	3.86 tpy VOCs	EU 1592
8/20/04	106.261 & 106.262	0.02 tpy VOCs	EU1592
12/15/03	106.261 & 106.262	No increase in annual, only in short term emissions due to increased pump rates at tanks	EU 1592
10/8/03	106.261 & 106.262	0.11 tpy VOC	EU 1592
9/26/03	106.262	0.03 tpy VOC	EU 1592
5/28/03	106.261 & 106.262	0.0181 tpy VOC	EU 1592
3/31/03	106.261 & 106.262	1.1 tpy VOC, 1.01 tpy NOx, 0.08 tpy CO	EU 1592 & Utilities Areas

In addition to those PBR authorizations identified above, there were PBR registrations in the files authorizing emissions increases at other units within the plant.

For example, on March 20, 2003, a section 106.261 PBR authorized 9.75 tpy of VOCs from “the newly found emissions of acetylene and dimethylformamide resulting from the storage of acetylene gas in the Acetylene Black Unit...” See, Attachment 12. Notations in TCEQ’s Technical Reviews indicate that sitewide emissions authorized through PBR frequently exceeded 250 tpy of CO or NOx and/or 250 tpy of VOCs, SO2 or PM10.³ See, Attachment 13.

A number of Cedar Bayou’s PBRs have been “consolidated” into the plant’s individual permits at renewal. These consolidations have effectively amended Cedar Bayou’s individual permits without public participation and without full impacts and federal applicability review. Furthermore, where such PBRs are consolidated into a permit, it is extremely difficult to determine how those authorizations affect the maximum allowable emission rates authorized in the permit’s Maximum Allowable Emission Rates Table (MAERT), to which units the emissions limits apply, and whether each PBR authorizes ongoing, or merely one-time, increased emissions. See, Attachment 14 (Permit 1504A and PSD-TX-748, effective 2/22/08, chart of PBRs at end of MAERT).

III. CONCLUSION

While taking action on pending Texas SIP submittals is a necessary step in addressing program deficiencies, it should be done in the context of a larger review of the whole Texas program. As the statutory provisions discussed above and the example of Cedar Bayou’s permitting history show, EPA will have to do more than merely act on pending SIP submissions. EPA should:

³ TCEQ’s rules state that if total emissions authorized by PBR from all facilities at an account exceed these thresholds, at least one facility at the account must have been subject to public notice and comment. 30 Tex. Admin. Code §106.4.

- (1) Determine which provisions of the Texas Health and Safety Code need to be amended to address program deficiencies and identify such provisions for TCEQ and the Texas Legislature;
- (2) Review the currently approved SIP, determine which provisions - such as the rules regarding alterations - were approved in error, and require TCEQ to amend such provisions and/or delete them from the SIP; and
- (3) Review the Texas air program as it is currently being implemented (which is notably different from the approved SIP), identify those program provisions - such as the de minimis provisions - that are inconsistent with the SIP and federal Clean Air Act, and require that Texas implement only approved SIP provisions.

In addition, EPA should clearly explain, in writing, Texas' obligations to adopt and implement a major and minor source air permitting program that is consistent with the federal Clean Air Act. There appears to be an erroneous assumption in Texas that the state can adopt and implement statutes and rules and that, as long as they are not submitted for SIP approval, the statutes and rules need not meet federal requirements.

Finally, EPA has not articulated a remedy for the *hundreds* of Texas air permits that have been issued under state rules that do not meet minimum federal standards. Correction of these permits will no doubt take years, and will likely require that TCEQ obtain additional funds and staffing. EPA should immediately develop a process and implementation deadlines for TCEQ to recall and amend these permits consistent with federal requirements.

ATTACHMENTS

- 1 Chart: Texas Health and Safety Code Air Permitting Issues
- 2 TCEQ response to City of Houston Benzene Plan
- 3 TCEQ PBR/Standard Permit Guidance
- 4 TCEQ Renewal of Cedar Bayou Permit 6517A w/ incorporation of PBRs (May 10, 2007).
- 5 TCEQ Response to Comments on Houston Refining Permit 2167 (Dec. 16, 2008).
- 6 Cedar Bayou PBR Registration with emissions calculations and summaries submitted as confidential (Feb. 23, 2000).
- 7 Documents re. ASARCO Incorporated renewal of Air Quality Permit No. 20345; TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593.
 - a. Agenda summarizing TCEQ action,
 - b. Commission Interim Order,
 - c. Chief Clerk database summary of action showing no public comment after issuance of Interim Order
- 8 TCEQ Air Permitting Action summary for Cedar Bayou
- 9 Cedar Bayou's list of applicable PBRs (2004)
- 10 Sample Cedar Bayou PBR registrations
- 11 Sample Cedar Bayou alterations and qualified facility authorizations
- 12 Cedar Bayou PBR registration (March 20, 2003)
- 13 Sample TCEQ Technical Analysis for Cedar Bayou PBR
- 14 Cedar Bayou Permit 1504A

ATTACHMENT 1

Texas Health & Safety Code Air Permitting Issues

Texas Health & Safety Code ⁴	Description	Problem
382.003(9)	Definition of modification	Inconsistent w/ federal Clean Air Act (CAA) definition.
382.004(b)	Construction before modification	Inconsistent w/ CAA requirement for permit prior to construction.
382.028(a)	Variances	Inconsistent w/ requirement for compliance with CAA and SIP and protection of NAAQS.
382.041	Confidential information	Inconsistent w/ CAA requirement that emissions data be public.
382.05101	De minimis air contaminants	Inconsistent w/ CAA requirements for minor NSR programs and public participation. Inconsistent w/ Texas SIP.
382.051(b), 382.05195, 382.05196(a)	Permits by rule (PBR) & standard permits	Inconsistent w/ CAA and SIP to extent PBRs and standard permits may be non-source category specific and apply to major facilities.
382.0511	Consolidation	Allows permit changes w/o CAA required public participation.
382.0512	Modification	Inconsistent w/ CAA definition.
382.0518	Requirement for permit issuance	(b) & (e) mandates permit issuance w/o ensuring all local, state and federal air pollution control requirements are met. Prohibits permit denial.
		(e) Fails to comply w/ CAA public participation requirements.
382.056	Public notice	Inconsistent w/ CAA public participation requirements for 30 days notice and comment.
382.057	Exemption	Inconsistent w/ requirement for compliance with CAA and SIP and protection of NAAQS.
TEX.WATER CODE 7.00251	Enforcement prohibition	Limits TCEQ authority to take enforcement action, in violation of CAA.

⁴ All sections are from the Texas Health and Safety Code, except as noted.