



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAR 19 2009

The Honorable Kirk Watson
Texas Senate
Post Office Box 12068
Room E1.712
Austin, TX 78711

Dear Mr. Watson:

Thank you for your letter of February 24, 2009, concerning the Texas Air Permitting Program. The Environmental Protection Agency Region 6 is working with the Texas Commission on Environmental Quality to ensure strong stationary source air permitting programs in Texas that protect the ambient air quality.

My staff has provided the enclosed information regarding the concerns you raised in your letter. We expect to take actions in the next few months on several State Implementation Plans of interest to you. We invite your input during the comment period as we move forward on those rules.

We appreciate your interest in air quality issues in Texas. If you have further questions, please call me at (214) 665-2100, or your staff may contact Cynthia Fanning, Congressional Liaison, at (214) 665-2142 or Jeff Robinson, Air Permits Section Chief, at (214) 665-6453.

Sincerely yours,

A handwritten signature in black ink that reads "Lawrence E. Starfield".

Lawrence E. Starfield
Acting Regional Administrator

Enclosure

cc: Mark Vickery, Executive Director
TCEQ

Texas Air Permitting Information for Senator Kirk Watson

1. Does the Clean Air Act require EPA to review and approve or disapprove the rules Texas uses to permit both major and minor sources of air pollution?

Yes. The Clean Air Act (CAA or Act) in Section 110(a)(2)(c) requires State air permitting rules for major and minor sources to be approved as part of the State's Implementation Plan (SIP). States with an approved major New Source Review (NSR) program, such as Texas, are required to adopt rules that meet the Act's requirement and the Federal rules in 40 CFR Part 51.165 and 51.166. The rules should also be consistent with EPA policy and guidance. States may comply by incorporating the Federal rules by reference into their State Implementation Plan (SIP) or they may adopt and submit to EPA rules that are different than, but at least as stringent as, the Federal rules. Where the rules are different than Federal requirements, the State should demonstrate how the rules meet Federal rules with their SIP revision. Also, the CAA at Section 110(a)(2)(C) requires States to provide a minor NSR program in their SIP which conforms to EPA's implementing regulations at 40 CFR 51.160-51.164. Those rules must be submitted to EPA for review and approval into the SIP. We review the rules, through notice and comment rulemaking, for consistency with the CAA, 40 CFR Part 51, and EPA policy and guidance to determine whether the rules are approvable.

2. Is Texas currently implementing permitting rules that are not SIP approved?

Yes, States generally implement changes in State law immediately. Sources remain subject to both the State rule and the approved SIP until EPA approves the State rule into the SIP. Where the State revises the rule to strengthen the existing SIP rules, the source can usually demonstrate compliance with both rules. Where the State rule is less stringent or different than the approved SIP, sources must demonstrate compliance with both sets of rules. Under the CAA, EPA and citizen suits enforce only the approved SIP as Federal law, and as such, regulated sources remain subject to the requirements of the Federally approved SIP and subject to potential enforcement for violations of the SIP. See EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991.

3. Is Texas currently issuing permits pursuant to rules that are not SIP approved? If so, are those permits Federally recognized permits?

Yes, Texas is currently issuing permits pursuant to rules that are not SIP approved and thus may not necessarily represent Federal rules. Permits issued under State rules are not considered Federally enforceable applicable requirements of the CAA until EPA approves such rules into the SIP. State-only requirements should be identified as such in a Title V permit.

4. What are EPA's plans and possible timelines for acting to approve or disapprove those aspects of Texas' air permitting program that are not currently approved?

Region 6 has prioritized the pending Texas air permitting SIP revisions and plans to take action on a number of the rules in the coming months. Texas has asked the Region to address rules that have broad programmatic implications. We proposed limited approval/limited disapproval of the Texas Chapter 39 public participation SIP submission November 26, 2008. See 73 FR 72001. Region 6 plans to publish proposal of other pending Texas SIP rules this year. We intend to act on NSR permitting rules (qualified facilities, flexible permits, NSR Reform) and trading rules first.

5. If EPA disapproves a portion of the Texas program, what are the possible sanctions and timelines for those sanctions?

Where the SIP revision is submitted to satisfy a mandatory requirement of the CAA, final disapproval starts a sanctions clock and a Federal Implementation Plan (FIP) clock. Under section 179(a), if EPA disapproves a submittal of a requirement under the CAA, based on the submittal's failure to meet one or more of the elements required by the Act, the sanctions set forth in section 179(b) become applicable, unless the deficiency has been corrected within 18 months of disapproval. Section 179(b) of the Act and 40 CFR 52.31 of our regulations provide two sanctions available to the Agency: increasing the offset requirements and withholding highway funding. Moreover, the final limited disapproval would trigger a 24-month clock for EPA to adopt a FIP requirement under section 110(c) of the CAA.

Where the SIP submittal is not submitted to satisfy a mandatory requirement of the CAA, disapproval of the submittal does not impose section 179(b) sanctions or a FIP on the State.

Public Participation:

6. TCEQ has indicated in correspondence to EPA, and in its response to the City of Houston's Benzene Action Plan, that changes to TCEQ's rules regarding public participation will require statutory changes.¹ When does EPA anticipate finalizing its proposed limited approval, limited disapproval of Texas public participation rules, published 73 Fed.Reg 72001 (Nov. 26, 2008)?

¹ In a letter from Mr. Glenn Shankle, TCEQ Executive Director, to Mr. Larry Starfield, dated June 13, 2008, Mr. Shankle stated that changes to TCEQ's rules regarding public participation "may require statutory changes that would need to be presented to the Texas Legislature." Similarly, in response to the City of Houston's Benzene Action Plan, TCEQ stated, "changing the public notice procedures would require a change to the statute. See Texas Health and Safety Code Section 382.056(g)." TCEQ response to Recommendations, City of Houston Benzene Action Plan, An Interim Report (May 27, 2008).

The comment period on our proposed limited approval/limited disapproval of Texas' Chapter 39 public participation rules ended on January 26, 2009. We received numerous and significant comments. EPA is in the process of reviewing the comments and expects to take final action later this year.

7. If EPA finalizes a limited approval, limited disapproval, how long will Texas have to make changes to its public participation rules before sanctions apply?

If, after review of public comments, EPA finalizes limited disapproval of the public participation rule, we will identify the deficiencies that form the basis of the disapproval and state how the deficiencies fail to meet a mandatory requirement of the CAA. If EPA determines that the Texas rule fails to meet a mandatory Federal requirement, sanctions under section 179(b) of the Act and 40 CFR 52.31 of our regulations sanctions are applicable 18 months from the effective date of final disapproval. Moreover, final disapproval would trigger a 24-month clock to adopt a FIP requirement under section 110(c).

8. Must TCEQ finalize changes to Texas rules and submit those rules as a SIP revision before a sanctions clock would stop?

If the State submits an approvable rule revision during the sanction clock period, EPA may propose approval of the rule and take interim final action, effective upon publication, to stay the sanctions clock or defer the imposition of the sanctions. Final approval of the rule revision correcting the deficiency terminates the FIP clock.

9. Does EPA believe that statutory changes are necessary to address some of the deficiencies identified in its public participation Federal Register proposal?

Texas has informed Region 6 that statutory changes to the public participation rules may have to be presented to the Texas Legislature to resolve EPA's concerns. See attached letter from Glenn Shankle dated June 13, 2008, labeled Attachment A. We recommend that you present this question to TCEQ for a comprehensive answer.

Qualified Facilities

10. When does EPA anticipate acting on Texas' qualified facilities rules?

Region 6 anticipates publication of a proposal on the qualified facilities SIP revision in the next few months.

11. Has EPA notified Texas in writing of concerns regarding its qualified facility rules? If so, would you please identify and provide that correspondence?

Yes. See letter dated September 15, 2006, labeled Attachment B.

12. Does EPA anticipate that changes to the Texas statutory definitions of "modification" would be required before EPA could approve Texas' qualified facility rules?

EPA is reviewing the SIP submittal which implements the qualified facilities program established by Senate Bill 1126 of the 74th Texas Legislature. The bill adopted the definition of "modification of existing facility" which is implemented in section 116.10(11) to revise the criteria for determining whether a modification is subject to permitting requirements. The revision provides that sources may modify an existing facility without triggering the definition of "modification of an existing facility" if certain conditions are met. We have expressed concerns regarding this definition in correspondence to TCEQ (see Attachment B). EPA will act on this definition and other regulations relating to qualified facilities when we publish a proposed action on the qualified facilities SIP submittal in the coming months.

Flexible Permits:

13. When does EPA anticipate acting on Texas' flexible permit rules?

Region 6 anticipates publication of a proposal on the flexible permit SIP revision in the next few months.

14. Is it a violation of the Clean Air Act for sources to authorize emissions through flexible permits, rather than SIP-approved permit mechanisms, until such time as the flexible permit rules are approved into the Texas State Implementation Plan?

Sources remain subject to both the State rule and the approved SIP until the State rule is approved into the SIP. See our letter dated September 25, 2007, to flexible permittees, labeled Attachment C.

15. Has EPA notified Texas in writing of concerns regarding its flexible permit rules? If so, would you please identify and provide that correspondence?

Yes. See enclosed letters dated April 11, 2006, and March 12, 2008 labeled Attachments D and E, respectively.

16. Does EPA anticipate that changes to the Texas rules and/or statutes would be required before EPA could approve Texas' flexible permit rules?

We note that the flexible permit rule was not adopted pursuant to a legislative mandate. However, we recommend that you direct this question to TCEQ.

NSR Reform Rules

17. When does EPA anticipate acting on Texas' NSR Reform rules?

Region 6 anticipates publication of a proposal on the Texas NSR Reform SIP revision in the next few months.

18. Has EPA notified Texas in writing of concerns regarding its NSR Reform rules? If so, would you please identify and provide that correspondence?

Yes. See enclosed letter dated October 28, 2005, which is EPA's comments to TCEQ on its proposed revisions to adopt NSR Reform labeled Attachment F.

19. Does EPA anticipate that changes to Texas' rules and/or statutes would be required before EPA could approve Texas' NSR Reform rules?

We note that the Texas NSR Reform rules were not adopted pursuant to a legislative mandate. However, we recommend that you direct this question to TCEQ.

Permits by Rule:

20. Has EPA notified Texas in writing of concerns regarding its use of permits by rules? If so, would you please identify and provide that correspondence?

Yes. See enclosed letters dated June 17, 2002; February 3, 2006; March 30, 2006; November 16, 2007, and May 21, 2008, labeled Attachments G through K, respectively.

MSS Permits:

21. Has EPA notified Texas in writing of concerns regarding Texas' authorization of MSS? If so, would you please identify and provide that correspondence?

Yes. See enclosed letters dated June 17, 2002; February 3, 2006; March 30, 2006; November 16, 2007, and May 21, 2008, labeled Attachments G through K respectively.