1303 San Antonio Street, Suite 200
Austin TX, 78701
p: 512-637-9477 f: 512-584-8019
www.environmentalintegrity.org

July 26, 2010

Dr. Al Armendariz
Regional Administrator
USEPA REGION 6
1445 Ross Avenue
Suite 1200
Mail Code: 6RA
Dallas, TX 75202-2733
armendariz.al@epa.gov

via Electronic Mail and U.S. Mail

RE: Opposition to TCEQ's Proposed Two-Step Process for Flex Permits

Dear Regional Administrator Armendariz:

We are writing to express our concern with the TCEQ's efforts to sidestep meaningful reform of the State's air permitting program. We oppose TCEQ's proposed "Two-step" quick fix for illegal Flexible Air Permits, and we re-urge EPA to address the systemic flaws in the Texas air permitting program through an Implementation SIP Call.

I. EPA Should Not Allow the Texas "Permitting Two-Step" to Remedy Illegal Flexible Air Permits.

We recently became aware of a July 6, 2010, letter from Mr. Mark Vickery to Mr. Larry Starfield, which provides a general outline of a TCEQ-proposed "Permitting two-step" for companies to voluntarily restructure Flexible Air Permits into SIP-approved permits. TCEQ proposes two options, both of which are fraught with pitfalls and problems. These include lack of adequate public participation, new opportunities for sources to circumvent new source review, lack of practical enforceability of permit terms and conditions (including enforceable permit application representations), and lack of penalties for ongoing and past violations.

A. Alteration & Amendment Two-Step

One TCEQ option proposes an "Alteration & Amendment" two-step. One concern we have is the short (45-60 days) timeframe proposed by TCEQ. It is virtually impossible for a permit reviewer to reconstruct a permit history, comprehend the modifications, or analyze the key assumptions used in emission calculations, in such a short timeframe. For example, citizens and environmental groups have had difficulty simply obtaining many Flex Permit applications

from the TCEQ, and we have had to challenge inappropriate *confidential business information* designations, making it extremely difficult, if not impossible, to tell if a source made appropriate BACT (or LAER) assumptions when it obtained its original Flex Permit and subsequent amendments. Furthermore, TCEQ's suggestion that summed emission units can simply be "apportioned on a unit by unit basis" is arbitrary. Flex permit caps cannot be "de-flexed" without meaningful BACT/LAER analyses.

TCEQ's track record indicates that EPA oversight is needed. A third party review of a Flex Permit holder's operations (e.g., EPA's proposed audit process), public participation, and *current day BACT or LAER imposed on any source found to have circumvented new source review*, as required by EPA's longstanding enforcement policy, should be foundational elements of any plan to bring Texas Flex Permit holders back into compliance.

One of the major problems with Flex Permits is that the permits have allowed major sources to skirt NSR by making pollution control upgrades without any meaningful BACT implementation schedule. In other words, sources use Flexible Air Permits to put off installing BACT technologies for longer than the Clean Air Act would have allowed, because Flex Permits allow sources to install BACT anytime over the life of the permit. Thus, even sources that may have made pollution control upgrades should be required to pay penalties, or else they would be benefitting from their circumvention while the public may have been cheated out of cleaner air for years.

Another major problem with Flex Permits is that, while many sources set their emission caps purportedly based on BACT, it has become clear upon review of several Flex Permits that many emission rates were not based on the robust technology-forcing emission limits required by the Clean Air Act. Many Flex Permit caps are based on emission rates that are nowhere near BACT levels. This is especially true for units that are not covered by an EPA consent decree, or for pollutants that have received scant attention historically (e.g., particulate matter).

We are deeply concerned with TCEQ's suggestion that permit alterations can provide an adequate method to bring noncompliant Flex Permits into compliance with federal law. TCEQ allows alterations pursuant to 30 TAC 116.116, under emissions and operating scenarios for which EPA would require NSR/PSD permit review. Specifically, TCEQ allows alterations for changes to facilities that could cause emissions to increase, and only requires amendments for changes that *will*, in all operating scenarios, cause an emissions increase. This is TCEQ's longstanding interpretation of their rules. Despite what TCEQ rules may say on their face, the State of Texas has made it TCEQ's mission to streamline permitting to the point where TCEQ appears to encourage, if not aid and abet, circumvention of new source review.

Moreover, TCEQ routinely allows alterations when a modification could increase emissions as long as there is no increase in *allowable* emissions. This is yet one more way that TCEQ's implementation of its 30 TAC 116.116 rules fails to live up to federal requirements.

Citizens should enjoy the protections and promised pollution cleanup guaranteed by the Clean Air Act whenever a change could cause *actual* emissions to increase. TCEQ grants alterations based on no-increase-in-allowables, a practice that lets sources hide behind historically bad permitting decisions.

B. Permitting & Enforcement Two-Step

TCEQ also proposes a "permitting and enforcement" two-step approach. For many of the reasons described above, we oppose this option.

In addition, citizens, environmental, and public health groups have no faith whatsoever in TCEQ's enforcement process, which routinely promises violators a free pass in exchange for puny fines. In addition, TCEQ provides no opportunity for public participation in the enforcement process.

II. EPA Should Issue an Implementation SIP Call and Trigger Sanctions Clocks.

In reviewing several Flex Permits and Flex Permit applications, we have found many examples that appear to show TCEQ to be complicit, or at times apparently encouraging, as sources appear willing to circumvent new source review. We do not know whether the following excerpts and examples from TCEQ permitting files represent new source review violations, but they certainly raise red flags, and are representative of some of the concerns described above.

- "BP Products North America Inc is requesting a permit alteration per Subchapter G flexible permit for changes in representations regarding Fluidized Catalytic Cracking Unit No. 3 (EPN FCCU3) in order to improve unit reliability…. The plan will result in a slight increase in actual annual emissions but will not result in emissions above those currently referenced in the flexible permit…. Because there are no increases to the allowables in the MAERT, health effects and off property impacts are not needed." Permit Alteration and Technical Review, BP Texas City Refinery, Permit No. 47256.

- "The applicant [BP] proposes to pull out three heaters (102B, 104BA, and 104BB) from the VOC, NO_x, CO, SO_2, and PM_{10} caps and establish federally enforceable annual emission limitations… The purpose of establishing individual annual emission limitations is to ensure that the repairs will not trigger federal new source review. … When the flexible permit was issued in 2005, the final caps, which go into effect on July 13, 2010, were calculated based on all units meeting BACT. The three heaters associated with this project do not meet 2005 BACT, however other units under the cap have been over-controlled to be in compliance with

emission cap limits, specifically the NO_x cap. Since these units do not meet 2005 BACT, the proposed individual emission limits for some of the pollutants are greater than the calculated contributions to the final cap." Permit Alteration and Technical Review, BP Texas City Refinery, Permit No. 47256. (Alteration For Ultracracker Unit Turnaround Project And Tank 118 Replacement)

- "The Main South Flare is operating out of compliance with NSPS Subpart J because streams containing more than 162 ppm H2S have been combusted. It was originally authorized for emergency use only, but over time has turned into a process flare…" Source Analysis and Technical Review for Western Refinery, El Paso, Permit No. 18897, 5994, 18371, Project Nos. 109775, 109753, 105123, 110556

- "We understand that the only change involves operating the plant for additional hours. As a consequence, we have determined that your project requires neither permitting nor exemption from permitting since [Texas law] excludes this type of activity from our definition of modification." Letter from Ms. Victoria Hsu, Director NSR Permits Division to Ms. Brenda Keillor, Manager, Dow Chemical Company, Freeport (1997).

- "EPA commented that LCRA's request to burn a blend of petroleum coke and coal in the boilers should be considered a modification because pet coke was a new fuel. Since LCRA was seeking to establish a PAL and not undergo PSD review, LCRA agreed to withdraw the request to fire pet coke, with the understanding that once the PAL had been established, any other fuel, including pet coke could be burned as long as the PAL was not exceeded. LCRA anticipates that they will burn blended pet coke as a fuel source in the future." Flex Permit Source Analysis and Technical Review for LCRA Fayette initial Flex Permit, No. 51770/PSD-TX-486M3[1]

While EPA, the State, and citizens are mired in "de-flexing" a small (but admittedly significant) subset of Texas air permits, persistent and systemic air permitting problems remain unaddressed. Texas is failing to implement and enforce the SIP effectively. Examples of widespread problems include:

- Permits by Rule can be, and have been, used to effectively authorize emissions without conducting the NSR/PSD reviews and public notice required by the Act.

- Standard Permits, like PBRs, can be used to effectively authorize emissions without conducting the NSR/PSD reviews and public notice required by the Act.

[1] We understand that LCRA never chose to burn pet coke at this facility. Nonetheless, the technical document appears to be a clear example of TCEQ aiding and abetting circumvention.

- Flex Permits have been used to effectively authorize emissions without conducting the NSR/PSD reviews and public notice required by the Act.

- TCEQ has failed to enforce the "anti-backsliding" requirement[2] during implementation of the 8-hour ozone standard.

- Texas is issuing authorizations for planned SSM emissions *separately* from the source's other permitted emissions. Texas also allows these emissions to be authorized by PBRs without public notice.

- Texas issues PSD permits without fully considering ozone impacts in downwind areas; and Texas has established a de facto state policy that 5 pbb is the significant impact level ("SIL" or "de minimus level") for ozone.

- Texas routinely allows applicants to obtain PSD permits with BACT limits and control technologies established through a TCEQ "Tier I"-level analysis without any further analysis or documentation of control options and lower achievable emission levels.

- Texas issues Plantwide Applicability Limits ("PALs") to new major stationary sources, contrary to EPA's prohibition on PALs for new sources.

- Texas issues final permits and authorizes construction of new sources without requiring any mitigation of existing PSD increment violations, even when presented with evidence of existing PSD increment violations.

EPA should issue notice to Texas, pursuant to CAA § 113(a)(2), 42 U.S.C. §7413(a)(2), that the violations of the SIP are a result of the state's failure to enforce the SIP.

CAA § 113 (a)(2) ("State failure to enforce SIP or permit program") says:

> Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter ***are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively***, the Administrator shall so notify the State. (*Id*, Emphasis added.)

III. Conclusion

For the foregoing reasons, we oppose the TCEQ's proposed Two-step options that rely on alterations to "de-flex" existing noncompliant Flexible Air Permits, and we call on EPA to

[2] *South Coast v. EPA*, 489 F.3d 1245 (DC Cir 2007).

follow the Clean Air Act's requirement to issue an Implementation SIP Call in order to remedy persistent and widespread problems associated with the State's lax attitude toward air pollution permitting and enforcement. If you have any questions regarding this letter, please contact Ilan Levin, Environmental Integrity Project, at (512) 637-9479.

Sincerely,

James D. Marston
Director of the Texas Regional Office
Environmental Defense Fund

Tom "Smitty" Smith
Director of the Texas Office
Public Citizen

Karen Hadden
Executive Director
SEED Coalition

Matthew S. Tejada
Executive Director
Air Alliance Houston

Juan Parras
Director
Texas Environmental Justice Advocacy Services (T.E.J.A.S.)

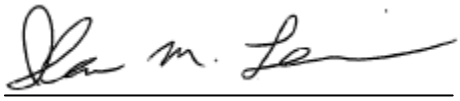
Suzie Canales
Director
Citizens for Environmental Justice

Neil Carman
Clean Air Program Director
Sierra Club, Lone Star Chapter

Bee Moorhead
Executive Director
Texas Impact

Robin Schneider
Executive Director
Texas Campaign for the Environment

Luke Metzger
Director
Environment Texas



Ilan Levin
Senior Attorney and Texas Program Director
Environmental Integrity Project

CC: Gina McCarthy *via Electronic Mail and U.S. Mail*
Assistant Administrator
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code:6101A
Washington, DC 20460
mccarthy.gina@epa.gov

Janet McCabe *via Electronic Mail and U.S. Mail*
Principal Deputy Assistant Administrator
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code:6101A
Washington, DC 20460
mccabe.janet@epa.gov

Larry Starfield *via Electronic Mail and U.S. Mail*
Deputy Regional Administrator
USEPA REGION 6
1445 Ross Avenue
Suite 1200
Mail Code:6RA
Dallas, TX 75202-2733
starfield.lawrence@epa.gov

Adam Kushner *via Electronic Mail and U.S. Mail*
Director of the Office of Civil Enforcement
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2241A
Washington, DC 20460
kushner.adam@epa.gov