

RECENT DEVELOPMENT

FLEXIBLE AIR PERMITS IN TEXAS: THE CURRENT GAP BETWEEN FEDERAL AND STATE REGULATIONS

Cooperative federalism controls the regulation of air pollution through the Clean Air Act (“CAA”). The federal government sets air quality standards and the state government administers air permits based on those standards. Through the process of cooperative federalism, many states create their own permit programs based on the CAA. States then submit these programs to the Environmental Protection Agency (“EPA”) for approval. The EPA will approve programs that comply with the CAA. States have a State Implementation Plan (“SIP”) that includes all of their permit programs approved by the EPA. Some states, such as Texas, are experimenting with new types of permit programs to give permit holders easier application and reporting requirements. These new permits often strain the process of cooperative federalism when states implement the permits before EPA approval. This delay is often referred to as a “SIP gap.” The EPA must determine whether new air permit programs comply with the CAA in a timely manner. Otherwise, regulated facilities are placed in an awkward situation of going forward with the state’s plan or risk falling behind competitively under the previously approved SIP.

The Texas Commission on Environmental Quality (“TCEQ”) regulates air permits in Texas. In an effort to minimize the administrative burden on permit holders, the TCEQ created a flexible permit program and requested a revision of the Texas SIP. While the EPA delayed approval of the proposed revision, the TCEQ passed rules promulgating the flexible permit program. Some facilities regulated under the CAA chose to rely on the new program and became flexible permit holders. Now, the EPA does not believe the flexible permit program meets CAA standards. In a letter to current flexible permit holders, the EPA

warned it may choose to exercise its enforcement authority against flexible permits that do not comply with the CAA and Texas' SIP. Permit holders are left to wonder if the EPA has authority to supersede the flexible permit program promulgated by the TCEQ, whether it will do so, and what options are available to them. This paper will discuss the factual background of flexible permits, the law as it currently stands, and the political ambiguity as it is exemplified by the actors from the EPA and the TCEQ. Finally, this paper will conclude with advice to industry, the only party injured by this SIP gap.

I. BACKGROUND OF FLEXIBLE PERMITS

Flexible permitting is an important development in environmental regulations. Flexible permits allow industry to avoid time-consuming permit renewals when there are minor modifications to facilities and pollutant streams. States allow flexible permits because the permits save state and industry resources, streamlining the permitting process. Flexible permit programs are often initiated by states. Even so, the programs must be requested in a state's SIP and approved by the EPA. In the past, states have had difficulties implementing permit programs. There have been many attempts to provide flexible permitting options, some even initiated by the EPA.¹ In September 2007, the EPA proposed a rule that would make flexible air permits available to operators.² These flexible permits would revise current Clean Air operating permits ("Title V permits") and New Source Review ("NSR") programs established in the CAA.³ The EPA's flexible permits would approve current operations and pre-approve operational changes

1. The EPA has promulgated a variety of programs in an attempt to ease permitting requirements, including the National Environmental Performance Track; Smart Permitting; the XL Project; and the Plant-wide Applicability Limit ("PAL"). Letter from Ali Mirzakhali, P.E., Administrator, Division of Air & Waste Management, Dept. of Natural Resources & Environmental Control, State of Delaware, to Air and Radiation Docket (Jan. 28, 2008) (on file with EPA). The PAL program may be seen as an alternative federal program or an optional addition to the TCEQ flexible permit program. TCEQ, CLEAN PLANT-WIDE APPL. LIMIT REF. DOC. (2003), http://www.tceq.state.tx.us/assets/public/permitting/air/memos/pal_memo1.pdf. Similar to flexible permits, PALs are based on Best Available Control Technology. *Id.* PALs allow enforcing agencies to regulate an entire facility as a whole instead of as individual units of pollutants. *Id.* Initial emissions limits would be set at the greatest actual emissions from a twenty-four hour period within the last ten years for all facilities within the PAL. *Id.* Modifications to facilities that could possibly result in significant emissions increases are still subject to federal permit review per pollutant. *Id.*

2. Flexible Air Permitting Rule, 72 Fed. Reg. 52,206 (Sept. 12, 2007).

3. EPA, FACTSHEET-FLEXIBLE AIR PERMITTING RULE (2007), <http://www.epa.gov/NSR/fs20070828.html>.

that may occur within the permit term.⁴ These flexible permits would enable operators to avoid the cumbersome task of applying for new or modified permits after each operational change, but only changes submitted at the time of the permit application would be included in the flexible permit and other CAA requirements would still apply.⁵

Instead of waiting for the EPA's flexible permit program discussed above, Texas tried to implement its own flexible permit program. There are several advantages to creating a pilot program that would appeal to the TCEQ. The TCEQ could establish a successful model and perhaps convince the EPA to create federal guidelines mirroring the Texas program. Additionally, the TCEQ is one of the largest state agencies regulating environmental compliance. By creating a flexible program, the TCEQ could save its resources to review major modifications to facilities instead of every minor modification that required new permit applications in the past.

Under the TCEQ flexible permit program, an operator of a facility may avoid NSR permit requirements or amendments to existing permits by obtaining a flexible permit.⁶ NSR applicability is a costly consideration in permit applications because of the associated technical requirements. Requiring a facility to use specific technology is generally more expensive than just establishing emission limitations. Modifications to existing facilities or permits to new facilities are instead handled by amending an operator's flexible permit.⁷ Emissions under flexible permits must comply with the CAA goal to protect the public health and welfare.⁸ Other provisions establish emissions caps and individual emissions limitations, allow permit alterations to avoid the Best Available Control Technology ("BACT") required in NSR permits, and require public notice and

4. *Id.*

5. *Id.* The proposed rule also authorizes the use of a new permit option, a Green Group. *Id.* Green Groups are emissions points channeled through the same emissions control device to meet a level suitable for national ambient air quality standards ("NAAQS") and other increments for visibility and air quality. *Id.* In order to obtain Green Group status, thereby avoiding further review of changes after Green Group approval, an emissions source must go through the major NSR permitting process. *Id.* All of the changes in the proposed rule revise mandatory program elements and require states to change their permit programs, such as changing major NSR programs to incorporate Green Groups. *Id.*

6. 30 T.A.C. § 116.710(a) (to be codified as 19 Tex. Reg. 9360).

7. *Id.*

8. *Id.* § 116.711. Facilities will use BACT and keep emissions within New Source Performance Standards ("NSPS") and National Emission Standards for Hazardous Air Pollutants. *Id.* For relevant facility locations, NSR and PSD requirements will be met. *Id.*

comments for all flexible permit applications and amendments.⁹

A SIP gap occurs when a state creates a program under state regulations, but the EPA has not approved the revision as part of the state's SIP.¹⁰ The EPA must approve or disapprove state rules based on the rules' compliance with the CAA.¹¹ The TCEQ has already issued over 140 flexible permits.¹² However, the permits are not yet approved by the EPA as part of the Texas SIP.¹³ The TCEQ flexible permits therefore constitute a SIP gap. If industry is looking for guidance, it will not find a championed strategy to deal with flexible permits in the realm of SIP gaps. Instead, industry will have to examine general law regarding SIP gaps and delayed agency action. The United States Congress, Supreme Court, and EPA have constructed the current legal framework to analyze the EPA's enforcement authority against permit holders who comply with a state program not yet approved by the EPA.

II. THE LAW OF DELAYED ENFORCEMENT: LEGISLATION, JUDICIAL OPINION, AND EPA PROCEDURE

The CAA authorizes the EPA to bring an enforcement action against any "person" who violates an applicable implementation plan or permit.¹⁴ The EPA has discretion, after thirty days notice, to issue an order to comply; issue an administrative penalty order; or bring a civil action against the person in violation.¹⁵ When a state fails to enforce a permit program, the EPA has the same three claims against a person from the time the EPA gives public notice of state noncompliance until the time the state satisfies the EPA Administrator ("Administrator") of future compliance.¹⁶ Flexible permit holders should remember

9. *Id.* § 116.740.

10. TITLE V TASK FORCE, FINAL REPORT TO THE CLEAN AIR ACT ADVISORY COMMITTEE 64 (2006).

11. EPA, LEVEL III GUIDELINES III-7 (1999), <http://earth1.epa.gov/region09/air/permit/titlev-guidelines/applicable-requirements.pdf>.

12. Letter from John Blevins, Dir., Compliance Assurance and Enforcement Div., EPA, to flexible permit holders (Sept. 25, 2007) (on file with EPA).

13. *Id.*

14. The Clean Air Act notes that "[t]he term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Clean Air Act §§ 113(a)(1), 302(e), 42 U.S.C.S. §§ 7413(a)(1), 7602(e) (West 2008).

15. *Id.* § 113.

16. *Id.* § 113(a)(2). If the Administrator finds such failure extends beyond the thirtieth day after such notice (ninety days in the case of such permit program), the Administrator shall give public notice of such finding. *Id.*

the EPA may initiate one of these enforcement actions if they do not meet the requirements specified in the Texas SIP.

In another layer of complication, the EPA failed to address the TCEQ's flexible permit program within the time period specified by the CAA. Under the 1990 amendments of the CAA, the EPA now has twelve months to approve or disapprove a SIP or SIP revision that meets minimum criteria.¹⁷ The Administrator may partially approve a SIP, issue a conditional approval if the state agrees to adopt specific enforceable measures, or require a SIP revision.¹⁸ The Administrator may issue sanctions in addition to its disapproval of a SIP.¹⁹ In regard to the TCEQ flexible permit program, the EPA did not take any of the above measures within the twelve-month time limit set by the 1990 Amendment. The EPA's authority to deny the permit program's inclusion in the Texas SIP is therefore in question.

The Supreme Court addressed the EPA's enforcement authority and statutory time limitations for SIP approval in *General Motors Corp. v. United States*.²⁰ In that case, General Motors Corporation ("GMC") requested additional time to install emissions controls imposed by the existing SIP.²¹ The EPA sent a notice of violation to GMC one year after GMC's request, filed an enforcement action two years after the request, and made a final decision to reject the SIP revision three years after the request.²² Justice Blackmun, writing for the majority, applied the Administrative Procedure Act ("APA") to the EPA and concluded the APA required the EPA to act "within a reasonable time."²³ A statutory remedy within the APA is available to permit holders for the EPA's "unreasonably delayed" response to Texas' proposed SIP revision.²⁴ However, this remedy is unlikely to succeed in court. According to Justice Blackmun, even if the EPA unreasonably delays in considering a proposed SIP revision, the EPA may enforce an existing SIP.²⁵ If a flexible permit holder challenges an EPA enforcement action for unreasonable delay, *General Motors* suggests the EPA will not be barred from enforcing the existing SIP despite the CAA's twelve-month

17. *Id.*

18. *Id.* § 110(k)(3)-(5).

19. *Id.* § 110(m).

20. *General Motors Corp. v. U.S.*, 496 U.S. 530 (1990).

21. *Id.* at 535.

22. *Id.*

23. *General Motors*, 496 U.S. at 539 (citing 5 U.S.C. § 555(b)).

24. *Id.* (citing 5 U.S.C. § 706(1)).

25. *Id.* at 540.

limitation on agency action and the APA remedy for unreasonable delay.

The EPA has its own guidance for enforcement against proposed SIP revisions.²⁶ The purpose of the EPA's Revised Guidance is to encourage enforcement during pending SIP revisions in light of *General Motors* and the CAA 1990 Amendment.²⁷ The Revised Guidance concludes *General Motors* lowers the EPA's threshold for bringing an enforcement action despite the twelve-month limitation set out by the CAA, which creates a likely statutory presumption of unreasonable delay.²⁸ The EPA recognizes two remedies for unreasonable delay: a diminution in penalties by degree of prejudice to the Defendant and citizen suits to compel agency action.²⁹

The Revised Guidance lists the following factors for EPA regional offices to consider when deciding whether to enforce a SIP after a twelve-month lapse: the need for injunctive relief in cases of ongoing noncompliance; the period of noncompliance compared to the period of agency delay; the probability that the proposed SIP revision will be approved; the existence of a collateral citizen suit compelling agency action on a proposed SIP revision; the degree of prejudice to the defendant for unreasonable delay; and the reasonableness standard explained in *General Motors* for pre-1990 amendment cases.³⁰ The EPA advises each region to make enforcement decisions on a "case-by-case basis."³¹ Flexible permits should be held to the same factor-based analysis if penalties are assigned.

The current legal framework surrounding the EPA's enforcement authority leaves the following questions unanswered:

1. Will the EPA decide that Texas' flexible permit program violates the CAA and bring enforcement actions against flexible permit holders?

2. Is there a remedy for flexible permit holders in light of the EPA's unreasonable delay?

26. EPA, REVISED GUIDANCE ON ENFORCEMENT DURING PENDING SIP REVISIONS (1991).

27. *Id.* at 1-2.

28. *Id.* at 2.

29. *Id.* at 2.

30. EPA, *supra* note 26, at 3-6. Additional factors include: whether notice and comment periods were extended; whether significant comments were received after the comment period ended; whether review by the Office of Management and Budget is pending or ongoing; whether negotiation is taking place; and whether the EPA has made special determinations, such as a determination of "reasonable further progress," that alter the equivalence of other factors. *Id.* at 6.

31. *Id.* at 9.

The best way to assess the likelihood of an EPA enforcement action is to examine the conduct of individual actors from the EPA and the TCEQ. Although the EPA and the TCEQ have not reached a consensus, their positions will give permit holders a hint regarding the best way to proceed.

III. CORRESPONDENCE BETWEEN THE EPA AND THE TCEQ

The EPA and the TCEQ have corresponded over discrepancies between Texas' flexible permit program and SIP requirements under the CAA. In its April 2006 letter to the TCEQ, the EPA explains its understanding of the TCEQ flexible permit program as follows: exemption from minor NSR requirements occurs if sources do not exceed an allowable cap, defined by BACT, and an additional nine percent for all units under the permit.³² One point of contention between the two agencies is that Texas adopted its flexible permit program prior to final federal NSR reform.³³ The final federal NSR reform measures emissions increases from a modification at existing major sources under an actual-to-projected applicability test.³⁴ Sources with Plantwide Applicability Limit permits or pre-approval are exempt from the definition of major modification under the federal NSR reform.³⁵ The TCEQ flexible permit program differs from the federal NSR reform by exempting modifications without the use of the Plantwide Applicability Limit program.³⁶

In its April letter, the EPA explains TCEQ flexible permits void existing permits as an alternative to NSR.³⁷ According to the EPA, Title I, unlike flexible permits, requires source-specific terms in order to comply with PSD and NSR requirements in parts C and D of the Act.³⁸ Each Title V permit must comply with all requirements, including preconstruction permits under Title I.³⁹ The EPA argues Title V permits may not supersede SIP-approved permits, but must record those SIP requirements

32. Letter from David Neleigh, Chief, Air Permits Section, EPA, to Steve Hagle, Special Assistant, Air Permits Division, TCEQ (April 11, 2006) (on file with EPA).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Letter from David Neleigh, *supra* note 32. The EPA's initial problems with the TCEQ program are as follows: BACT/LAER is not enforceable for new or modified sources; NSR, PSD, minor NSR, and permit representations under SIP are all void; and permits are void without public participation. *Id.*

38. *Id.*

39. *Id.*

under Title I of the CAA.⁴⁰ Furthermore, the EPA finds the term “modification” within TCEQ flexible permits to be too vague, resulting in exemptions from major NSR.⁴¹

In reply, the TCEQ denies its flexible permit program has any impact on federal regulation.⁴² The TCEQ states flexible permits are an alternative to traditional minor NSR, authorized by § 116.710(a).⁴³ The TCEQ does not recognize the flexible permits’ role in determining federal NSR applicability for PSD or NSR.⁴⁴ The TCEQ warns not to confuse flexible permits with the Plantwide Applicability Limit program simply because both programs use caps.⁴⁵ In TCEQ flexible permits, an initial emission cap is used based on controls at the time of permit issuance.⁴⁶ A final emission cap is applied “after all control upgrades have been put into place, and is based on the application of BACT to all facilities contributing to an emission cap.”⁴⁷ Interim caps may be used when facilities upgrade prior to the implementation of final caps.⁴⁸

The TCEQ asserts federal requirements still apply to new or amended flexible permits.⁴⁹ Flexible permits have monitoring, recordkeeping, and reporting requirements under § 116.715.⁵⁰ Existing unincorporated facilities are authorized under separate tracking numbers.⁵¹ The TCEQ insists exemptions related to the definition of a “modification of an existing facility” apply only to minor NSR criteria.⁵² Addressing the EPA’s concern over netting requirements, the TCEQ clarified that any increase over the permit cap because of netting triggers federal PSD or NSR.⁵³ The TCEQ also implemented an anti-backsliding provision in §

40. *Id.*

41. Letter from David Neleigh, *supra* note 32.

42. Letter from Richard A. Hyde, P.E., Director, Air Permits Division, Office of Permitting, Remediation, and Registration, TCEQ, to Jeff Robinson, Chief, Air Permits Section, EPA, Region 6 (Aug. 30, 2007) (on file with EPA).

43. *Id.*

44. *Id.* Federal applicability uses baseline emissions, project emissions increase, and the net emissions increase; flexible permits use BACT to establish caps, including NAAQS analysis if PSD review is triggered or LAER control technology with offsets if NSR is triggered. *Id.*

45. *Id.* at 2.

46. Letter from Richard A. Hyde, *supra* note 42.

47. *Id.*

48. *Id.*

49. *Id.* at 3.

50. *Id.* at 4.

51. Letter from Richard A. Hyde, *supra* note 42.

52. *Id.* at 6.

53. *Id.* at 7.

116.711(3).⁵⁴ Flexible permits differ from Plantwide Applicability Limits, so TCEQ does not agree that they need to be consistent.⁵⁵ Therefore, the TCEQ allows modifications to an existing facility through alterations to a flexible permit instead of a minor source permit amendment.⁵⁶ Public participation requirements still apply to new construction and major modifications under flexible permits.⁵⁷

The most recent letter from the EPA, dated March 2008, detailed the requirements necessary for the EPA to approve the TCEQ flexible permit program.⁵⁸ The EPA asked the TCEQ to show how the flexible permit program is like the federal Plantwide Applicability Limit program.⁵⁹ From the EPA's perspective, the application of TCEQ flexible permits to major sources would lead to enforceability concerns.⁶⁰ The EPA believes the Texas flexible permit program is not limited to minor sources.⁶¹ For the EPA to approve the TCEQ flexible permits, the EPA would require the following changes from the TCEQ: a deletion of § 116.716(d), which may trigger NAAQS or major NSR; an indication that *current* BACT technology is required in § 116.711(3); a specification that a federal definition of BACT applies under § 116.716; a requirement of a twelve-month rolling average for each pollutant regulated under the Flexible Permit; and a clarification that § 116.711 does not cover major stationary sources or major modifications unless through a major NSR process.⁶² Other requirements include a thirty-day public notice and comment period if emissions limitations are increased and mandatory netting to avoid major NSR or to meet NAAQS and other monitoring requirements.⁶³ The EPA also requires the permit holders to 1) retain records for five years, 2) accept violations when flexible permit caps are exceeded, and 3) re-issue

54. *Id.* at 8.

55. *Id.*

56. Letter from Richard A. Hyde, *supra* note 42, at 9.

57. *Id.* at 11. When PAL is chosen in addition to a TCEQ flexible permit, the TCEQ believes the PAL will help facilities avoid NSR, PSD, and netting requirements in the event modifications or permit amendments are sought by a facility. Interoffice Memorandum from Victoria Hsu, P.E., Div. Dir., NSR Permits to New Source Review (NSR) Permit Engineers (Dec. 31, 1998), *available at* <http://www.tceq.state.tx.us/assets/public/permitting/air/Guidance/Historical/palmemo.txt>.

58. Letter from Carl E. Edlund, P.E., Dir., Multimedia Planning and Permitting Div., EPA Region 6, to Dan Eden, Deputy Dir., Office of Permitting, Remediation, and Registration, TCEQ (Mar. 12, 2008) (on file with EPA).

59. *Id.*

60. *Id.* at 3.

61. *Id.*

62. *Id.* at 4-6.

63. Letter from Carl E. Edlund, *supra* note 58, at 8.

flexible permits under a SIP-approved rule.⁶⁴ The EPA requires “practical enforceability” before approval of the TCEQ flexible permits.⁶⁵

While the conflict continues between federal and state regulation, Texas permit holders are the ones who will be injured by the SIP gap. For some permit holders, the cost to revert from the flexible program to the pre-existing SIP program may be prohibitive. For industry created after the TCEQ flexible permit program, there may not be an older, EPA-approved permit to use as a reference point. Faced with financial and administrative difficulties, some permit holders are voicing their own positions.

IV. INDUSTRY RESPONSE

The EPA issued a notification letter to holders of TCEQ flexible permits in September 2007, warning them to comply with federal requirements.⁶⁶ Matthew Kuryla of the Texas Industry Project responded by saying TCEQ flexible permits—as integrated into Title V permits—are federally enforceable.⁶⁷ Kuryla also argued many of the flexible permits were approved through Texas’ NSR or PSD rules and so are federally enforceable.⁶⁸ Lastly, Kuryla argued a superseded TCEQ permit cannot be a part of the Texas SIP or preclude current permits.⁶⁹

The EPA’s position is the TCEQ flexible permits only become requirements under Title V after passing EPA approval as a revision to the Texas SIP.⁷⁰ Until approved, the EPA considers the program to be a state-only requirement.⁷¹ The EPA interprets CAA § 502 to mean that, while Title V permits are federally enforceable, Title V holders must still comply with other requirements not included in the Title V permits.⁷² For flexible permit holders, there are no findings by the permitting authority of non-applicability or an allowable permit shield.⁷³

64. *Id.* at 11.

65. *Id.* at 14-15.

66. Letter from John Blevins, *supra* note 12.

67. Letter from Matthew L. Kuryla, Tex. Indus. Project, Baker Botts, to John Blevins, Dir., Compliance Assurance and Enforcement Div., EPA Region 6 (Oct. 16, 2007) (on file with EPA).

68. *Id.* at 3.

69. *Id.* at 3-4.

70. Letter from John Blevins, Dir., Compliance Assurance and Enforcement Div., EPA Region 6, to Matthew L. Kuryla, Tex. Indus. Project, Baker Botts (Nov. 20, 2007) (on file with EPA).

71. *Id.*

72. *Id.* at 2.

73. *Id.*

Deviations and compliance certifications should continue to be reported for existing Title V permits.⁷⁴

Industry representatives raise a valid point when they note flexible permits are already integrated into Title V permits and approved by Texas' NSR and PSD rules. The EPA, however, does not appear to be convinced. During this debate over enforcement authority, permit holders will need to consider their options.

V. ADVICE TO INDUSTRY

While the EPA and the TCEQ discuss methods to resolve the SIP gap, flexible permit holders are left in limbo. New facility operators are unsure if they can pursue a flexible permit as part of Title V. For facility operators seeking to avoid litigation, it is important to remember the EPA can seek enforcement through CAA § 113. Risk-adverse facilities should choose to follow the Texas SIP until EPA approves its revision.

Facilities that currently hold flexible permits, or those willing to take a risk, might file a citizen suit under CWA § 304 to compel the EPA to act on the proposed SIP revision. If the EPA vetoes the proposed SIP revision, a source may still have a remedy for noncompliance; the penalties are lowered for sources that can prove an agency unreasonably delayed taking action.

Regardless of whether the EPA or the TCEQ's position is ultimately accepted, federal requirements must be met. Both the EPA and the TCEQ recognize the need for PSD or NSR permits, BACT, and individual emissions limitations. Since the main debate centers on form over substance, facilities would be safe to comply with both the EPA-approved Texas SIP and the TCEQ flexible permit programs. When the EPA does take action, facilities may stop following the monitoring and reporting requirements of the defunct permit. Industry can avoid SIP gaps in the future by working with the TCEQ to address the EPA's comments during the rulemaking process. An early discussion may prevent an unreasonable delay when the EPA rules on SIP revisions. Prompt decisions will lead to clearer permitting procedures for facility operators and fewer enforcement actions. Whether the EPA will bring enforcement actions in this current situation is still unknown.

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74. *Id.*