U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Energy and Power– June 6, 2012
"EPA Priorities and Practices"
Testimony of Dr. Bryan W. Shaw, Chairman of the TCEQ

The Texas Commission on Environmental Quality (TCEQ) regularly weighs matters that affect the environment and economy. Our goal is sensible regulation that addresses real environmental risks, while being based on sound science and compliance with state and federal statutes. In every case where Texas disagrees with EPA's action, it is because EPA's actions are not consistent with these principles.

Flexible Permits

Texas' Flexible Permits Program was established in 1994 in an effort to incentivize grandfathered operations to voluntarily enter into the State's air permitting and environmental regulation program. Facilities that were exempted from permitting because of their grandfathered status agreed to submit to state regulation because the program offered them operational flexibility. In exchange for emissions reductions, participants were authorized to allocate emissions on a plant wide basis, rather than by individual emission source. The end result was a program that gave owners and operators greater flexibility and control – but that reduced emissions and complied with all state health standards and all applicable federal Clean Air Act requirements.

At the time that the TCEQ established the Flexible Permits Program, Texas had a large number of "grandfathered" facilities that pre-dated the State's permitting program, which did not begin until 1971. As the EPA acknowledges, neither the EPA nor the TCEQ had statutory authority to impose permitting controls on – or require permits for – these grandfathered facilities.

Because of the Flexible Permits Program – and the enactment of Texas laws that later imposed mandatory permitting requirements – there are no longer any grandfathered facilities in the State of Texas. It is worth noting that some of these facilities are still grandfathered from federal permits.

The TCEQ submitted its Flexible Permits Program rules to the EPA for approval in 1994. Although the TCEQ issued flexible permits without interference from the federal government since the first term of the Clinton Administration, the EPA rejected the rules and disapproved the Texas program on July 15, 2010. This rejection came **fifteen years** after the rules were submitted to EPA as a Texas State Implementation Plan (SIP) revision.

Under the Federal Clean Air Act, the EPA is required to act on Texas' rules within 18 months. Yet the federal government waited more than a decade – three presidential administrations – to take action and ultimately reject the TCEQ's Flexible Permits

Program rules. Despite the fact that more than a dozen years passed since the rules were first submitted, the TCEQ attempted to work with the Bush and Obama administrations and resolve the EPA administrators' objections. On June 16, 2010, the TCEQ proposed draft rules that amended the Flexible Permits Program in an effort to resolve the federal government's concerns. Despite TCEQ's efforts, the EPA summarily disapproved the Texas program just one month after the State's new proposed rules were published.

Even after the TCEQ proposed revisions to the rules to address EPA's concerns, the EPA sent letters to every flexible permit holder requiring submittal of a plan to transition to what EPA refers to as a "SIP-approved" permit.

As of May 2012, the TCEQ has "de-flexed" 65 flexible permits and 36 permit applications are pending in-house. EPA received commitments from the remaining 19 flexible permit holders to de-flex, but application submittals are still pending.

The "de-flex" process has resulted in an incredible waste of time and monetary resources for both permit holders and the TCEQ for no environmental benefit. To date, not one of the "de-flexing" permitting actions has revealed the circumvention and emissions violations that EPA claimed were being hidden by flexible permits. In addition, there have not been any reductions in emission limitations, additional controls required, or additional conditions added to the permits as a result of the process.

The TCEQ, through the State Attorney General's Office, challenged EPA's disapproval in the United States Court of Appeals for the Fifth Circuit. Briefing has been completed and oral argument was held on October 4, 2011. A decision by the court is currently pending.

Permitting of Non-Greenhouse Gas Criteria Pollutants

In the fall of 2011, EPA Region 6 posted a note on their website regarding EPA's and TCEQ's roles in issuing Prevention of Significant Deterioration (PSD) permits for major sources of greenhouse gases (GHGs). The posting stated, "EPA Region 6 is the agency responsible for issuing PSD permits for major sources of GHGs under Federal Implementation Plans (FIPs) in the states of Arkansas and Texas. The States of Texas and Arkansas still retain approval of their plans and PSD programs for pollutants that were subject to regulation before January 2, 2011, i.e., regulated NSR pollutants other than GHGs. In some cases, EPA will be issuing a permit for just GHG emissions while the state's PSD programs will issue a permit for non-GHG emissions. For projects that trigger the need for a PSD permit solely because of GHGs, **EPA will be responsible for permitting the increases on non-GHG pollutants if they are "significant" as defined at 40 CFR 52.21(b)(23)**."

This statement was posted after EPA repeatedly stated they would work with state permitting authorities (even in federal preamble language). EPA held no discussions with the TCEQ about permitting non-GHG pollutants.

Further, in the FIP, EPA only assumed authority for GHG permitting and did not assume authority for permitting of criteria air pollutants.

The TCEQ has clear authority and responsibility to permit increases of non-GHG pollutants through our authorized SIP.

The following is a quote from the September 2010 GHG PSD FIP proposal discussing its intent to limit the FIP: "…our preferred approach – for reasons of consistency – is that EPA will be responsible for acting on permit applications for only the GHG portion of the permit, that the state permitting authorities will be responsible for the non-GHG portion for the permit, and EPA will coordinate with the state permitting authority as needed in order to fully cover any non-GHG emissions [emphasis added] that, for example, are subject to BACT because they exceed the significance levels." (75 Fed Reg 53883, 53890).

EPA Delay in Approving SIP Submittals

The EPA Region 6 has not made final determinations on rules, attainment demonstrations, and other SIP revisions in a timely manner. The federal Clean Air Act requires EPA to take final action within 18 months of a state's SIP revision submittal. Failure to do so subjects EPA to the possibility of a non-discretionary duty lawsuit to take final action.

As of March 2012, all or parts of approximately 75 TCEQ SIP revisions remain pending EPA review. These 75 revisions date back to 1993. Of these 75, approximately 52 were submitted more than 18 months ago. Of these 52, approximately 15 are subject to a settlement of a non-discretionary lawsuit that requires EPA Region 6 to take final action on a staggered schedule ending on December 31, 2013.

The lack of timely action by the EPA regarding new or different requirements creates uncertainty among the regulated community. This is also true for the general public and businesses in regions of the state affected by the SIP revisions that have not received final approval by the EPA. Further, the delay may result in enforcement by EPA against the regulated community for failure to comply with the approved SIP, but where industry is complying with the new TCEQ rules.

The TCEQ may need or be required to engage in rulemaking or SIP revision project on an expedited schedule if the EPA conditionally or fully disapproves a SIP revision. Implementation of SIP-related programs is based on prior SIP submittals and may be disrupted due to EPA taking delayed negative action on the submittals.

EPA Cross-State Air Pollution Rule (CSAPR)

On July 6, 2011, the administrator of the U.S. Environmental Protection Agency (EPA) signed the Cross-State Air Pollution Rule (CSAPR), which FIPs on Texas and 26 other states to address transport requirements under the federal Clean Air Act 110(a)(2)(D)(i) for the 1997 eight-hour ozone NAAQS and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) NAAQS.

The CSAPR was a replacement rule for the federal Clean Air Interstate Rule (CAIR) that was vacated in 2008 by the U. S. Court of Appeals.

The CSAPR requires power plants within the affected states to comply with ozone season nitrogen oxides (NO_X) emission budgets for states included under the rule for the 1997 eight-hour ozone NAAQS and with annual sulfur dioxide (SO_2) and NO_X emission budgets for states included under the rule for the 1997 and 2006 $PM_{2.5}$ NAAQS.

While Texas was only proposed to be included under the CSAPR for the 1997 eight-hour ozone NAAQS with ozone season NO_X emission budget requirements, the EPA finalized the rule with Texas also subject to the particulate matter programs. The EPA assigned Texas annual budgets for NO_X and SO_2 without providing the TCEQ and affected power plants within the state the opportunity to comment on them. The final rule would have required a 47 percent reduction from Texas power plant 2010 SO_2 emissions by 2012.

The federal Clean Air Act does provide that a state cannot allow emissions from sources within their state to contribute significantly to nonattainment or interference with maintenance with a NAAQS in another state. However, the states are supposed to take the primary role in meeting this transport requirement as part of the state implementation plan development process. With the CSAPR, not only did the EPA usurp the state's role in this process, the EPA did not even provide adequate notice or opportunity to the TCEQ in order to comment on the rule.

At proposal the EPA did not find that Texas power plant emissions significantly affected any air quality monitors in other states for $PM_{2.5}$. However, a "significant" Texas linkage for $PM_{2.5}$ to the Granite City, IL monitor (located approximately one half mile from a steel mill) was included at rule finalization. With no indication of any specific significant linkage at proposal, it was not possible for Texas to provide meaningful comment on the technical underpinnings of a linkage to any potential one monitor among dozens of "nonattainment" or "maintenance" receptors for $PM_{2.5}$ covered by the rule.

EPA's own modeling data, which fails to take into account local controls from the steel mill's MOU, shows that the Granite City monitor would be projected to have neither attainment nor maintenance problems for the annual $PM_{2.5}$ standard by 2014 even without the existence of CSAPR controls (i.e. 2014 base case emissions demonstrates attainment).

Despite the EPA's claims that the CSAPR will not impact electric reliability, this rule puts at risk the economic future of power generation; those dependent on affordable electricity in Texas; and places vulnerable citizens at a significant health and safety risk.

The EPA's analysis of electric reliability for the CSAPR was **not** available at proposal and includes **significant errors** regarding generation capacity within ERCOT – the largest grid operator within Texas. The EPA overestimates ERCOT's generation capacity by nearly 20,000 megawatts. The EPA estimates a base generation capacity for ERCOT power plants of around 90,400 MW. This estimate includes 100% of Texas' installed wind generation. ERCOT only plans on 8.7% of installed wind generation due to its unpredictability and unreliability. EPA's estimate of ERCOT's capacity also includes units currently retired and mothballed. More recent

information from the EPA associated with the Mercury Air Toxics Standard (MATS) rule indicates that the EPA is also underestimating future demand while overestimating future capacity.

Litigation regarding the CSAPR is ongoing. The Attorney General for the State of Texas (OAG) filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit on September 20, 2011. And the OAG also filed a motion for stay of the final rule on September 22, 2011. The rule is also being challenged by Texas electric generating utilities, including Luminant and San Miguel, and multiple other parties. Fourteen states, including Texas, filed administrative and legal challenges to the rule. The U.S. Court of Appeals stay put the rule on hold until the courts could make their final decision on the merits of the case. The courts' willingness to put the rule on hold acknowledges two key elements: 1.) That the court agrees the rule would do harm if it were in place, and 2.) That Texas may prevail once all the evidence is considered by the court. Oral arguments were heard on April 13, 2012.

In Situ Uranium Mining – Aquifer Exemptions

EPA Region 6 is reversing over 30 years of precedent by mandating modeling that is not required in EPA or state rules or indicated in EPA guidance on the subject. This new, ad hoc requirement is being applied to the state's Underground Injection Control (UIC) program. As a result, Region 6 has *sua sponte* decided that new aquifer exemptions for two in situ uranium mining projects are incomplete without computer modeling to demonstrate that the aquifer or portion thereof proposed for exemption does not currently serve as a source of drinking water.

EPA's specification that modeling should simulate groundwater conditions throughout all uranium production and groundwater restoration phases of a uranium mining operation ignores the rule criterion's focus on current conditions rather than on future events.

Such modeling is not required in EPA or state rules or indicated in EPA guidance on the subject. In fact, EPA ignores its own guidance. The TCEQ relied upon the EPA memorandum "Guidance for Review and Approval of State Underground Injection Control Programs and Revisions to Approved State Programs, GWDB Guidance #34" in preparing its program revisions to reflect the designation of the aquifer exemptions. Guidance 34 makes no reference of any modeling analysis required to demonstrate that a proposed exempted area does not currently serve as a source of drinking water.

Accordingly, the EPA did not implement any changes to aquifer exemption regulations through a rulemaking process or follow its obligations under the TCEQ-EPA Memorandum of Agreement for proper communication to TCEQ of any proposed or pending modifications to federal statutes, rules, guidelines, policy decisions, etc.

Such modeling has no precedent in any of the over 30 aquifer exemptions approved by EPA for in situ uranium mining in Texas during the 30-year history of the UIC

program in Texas. Furthermore, such modeling is not consistent with applicable case law from *Western Nebraska Resources Council v. United States Environmental Protection Agency*, 943F.2d 867.

In requiring such modeling, EPA Region 6 ignores the applicable UIC program in Texas. Thereby EPA is disregarding the state program's statutes and rules; detailed application technical review by licensed TCEQ staff; opportunity for public participation including public meetings; consideration and response to comment; and opportunity for contested case hearing and judicial review of commission decisions. **For Class III injection wells for uranium mining, the TCEQ's rules are more specific and more protective of groundwater than EPA's regulations.**

TCEQ received a letter from EPA dated May 16, 2012, persisting in their request for computer modeling. The EPA Region 6 did not deny the application, but rather refused to approve it until computer modeling is provided. However, by refusing to grant the aquifer exemption until such a time that all of EPA's "requirements" are satisfied is an effective denial.

In the TCEQ's response dated May 24, 2012, the following points are made:

- As stated in previous communications, EPA regulations, EPA guidance, and EPA precedent **do not require** groundwater modeling to consider a non-substantial UIC program revision to identify an exempted aquifer.
- Although the groundwater outside of the designated exempted aquifer is not relevant to the aquifer exemption criteria, such groundwater is protected by compliance with TCEQ injection well permits, production area authorizations, and enforcement of TCEQ's rules.
- There have been 43 Class III injection well permits issued for uranium mining in Texas. After completion of mining, restoration and reclamation activities, concurrence from the United States Nuclear Regulatory Commission is required to approve the final decommissioning, including groundwater restoration, of an *in situ* uranium mine. **There has not been one instance of documented off-site pollution of a USDW from *in situ* uranium mining activities.**
- EPA has **never** commented to TCEQ that a pending permitting action for an *in situ* uranium mining project would lead to the contamination of a USDW outside of an exempted aquifer. EPA has **never** informed TCEQ that the authorized UIC program is out of compliance with the Safe Drinking Water Act because Class III injection well operators are failing to protect USDWs or groundwater outside of exempted aquifers. And **never** has EPA notified TCEQ that EPA intended to take an enforcement action against a Class III injection well operator for failing to protect USDWs as required by TCEQ permit or rule.

- It appears that EPA may be swayed by the unsubstantiated allegations and fears of uranium mining opponents who have contacted them regarding TCEQ's program revision.
- The TCEQ remains committed to the approved UIC program and believes the permits and authorizations protect USDWs in the area as required in the Safe Drinking Water Act.

Conclusion

We will continue to consider all of our options and remain hopeful that under EPA's new leadership at Region 6, we can reach a satisfactory resolution for everyone involved.

I would also like to draw your attention to the TCEQ's Dr. Michael Honeycutt and Dr. Stephanie Shirley's Clean Air Act cost-benefit analysis study, which provides a detailed look into the critical issues with EPA's methodology. Namely, a methodology that leads to overestimated benefits of the Clean Air Act. This information is particularly disturbing given it is the flawed and inaccurate basis upon which EPA bases many of its policy judgments. Their study is attached, for ease of reference.

I thank you for the opportunity to provide written and oral testimony for this hearing, and remain available for any questions or comments you may have.