

US EPA ARCHIVE DOCUMENT

From: Erica <henrylaw@io.com>
To: Candace Carraway <carraway.candace@epamail.epa.gov...>
Date: 7/27/99 5:46pm
Subject: letter from Rick Lowerre to Jole Luehrs re: Texas' Title V Program

July 27, 1999

Ms. Jole Luehrs Email - luehrs.jole@epa.gov
Air Permits - T-5 Hard copy with attachments by
EPA, Region VI, 6PD-12 mail
1445 Ross Ave,
Dallas, Texas 75202-2733

Re: TNRCC's Title V Program

Dear Ms. Luehrs:

I am enclosing the documents that I could quickly find related to our discussions on TNRCC's Title V program.

At the outset, please accept my apology if I sounded too harsh on our recent phone call. Given the effort some of us have made to work on a number of EPA authorization decisions, I expected more communications on these matters. As the enclosed correspondence should indicate, my law firm, on behalf of several public interest organizations, has attempted to participate in the EPA's Texas Title V decisions.

In another area involving EPA's review of a Texas program, the Texas UIC program, EPA regional staff (program staff and staff of the regional counsel's office) have made extraordinary efforts to keep EDF, Sierra Club and others advised of major deadlines and opportunities for informal communications. The communications with EPA over the last few years have given me higher expectations regarding EPA's outreach.

As for getting you information on concerns with the Texas Title V program, I will make an effort to encourage others involved in TNRCC decisions to contact your office to explain their position. My concerns continue to be (or have grown to include):

1. Barriers to public access to information arising from
 - a. the problems with the TNRCC's record filing and maintenance systems, and
 - b. TNRCC's refusal to discourage applicants from making false claims of confidentiality in their applications, claims that often include emission data,
 - c. the privilege provisions of the Texas Audit-Privilege law;
2. TNRCC's poor public notice systems: (The time for filing objections with EPA is also triggered by TNRCC's notice.)
 - a. the only notice comes very late in the process - often too late to

allow the public to obtain the draft permit and other documents, hire experts and prepare comments and objections), and

b. no notice on what can be significant modifications to operating permits;

3. TNRCC's failure to mount any effective public outreach program related to Title V. For example, TNRCC has made no efforts to advise the public of opportunities to get on mailing lists and obtain written notices;

4. Texas' additional barriers to effective public participation, including:

a. No real opportunity (rules, guidance or past practices) for obtaining extensions for submission of comments in complex cases,

b. limits in the law on who can request and get a public hearing - only those who qualify under TNRCC's limited interpretation of who is an "affected person;" Section 382.056(b)&(d) & .0561(c),

c. statutory requirements that TNRCC to deny a hearing request if the request is not "reasonable" - a provision that has been interpreted by TNRCC and the Attorney General in a way that greatly limits hearing 382.056 (d) & .0561(c) (there is no guidance on when a request will be unreasonable in the case of a Title V permit - a problem especially given item 6 below),

d. the position of TNRCC and the Texas Attorney General on Texas standing law to appeal a TNRCC Title V decision, in affect, limiting who has standing to such a degree that TNRCC will be able to ignore most comments - the issue EPA raised with the Virginia Title V program,

e. the burden on any appeal due to the lack of any legislative, judicial or regulatory guidance on what process is required for judicial review (a motion for reconsideration as a prerequisite?) and what will be a record for such a review given the unique nature or the Title V process under Texas law,

f. a TNRCC policy that the agency only responds to those comments that are submitted in writing, even if presented orally at the public meeting, and

g. barriers to the use of citizen suit provisions (see item 5 below);

5. Texas barriers to effective enforcement by TNRCC, and to enforcement by EPA, and by local governments and the public through citizen suits as a result of

a. the statutory defenses to enforcement created in Texas law,

b. the limitations on access to information under the Texas Audit-Privilege law,

c. the chilling effects on enforcement resulting from the Texas Takings law,

d. new Texas laws and TNRCC policies for "small businesses,"

e. TNRCC's use of emergency and temporary orders to immunize a violator (i.e. authorize what would otherwise be a violation),

f. TNRCC's use of sweet-heart enforcement deals (as in the Crown Petroleum case) to protect a violator from a citizen suit (i.e. "actions that are not diligent prosecution - where, for example, penalties to recover the economic benefits of non-compliance are not sought),

g. TNRCC's penalty policy that does not provide for recovery of the economic benefits of non-compliance, and

h. Other laws (such as Section 7.071, Texas Water Code,) rules and TNRCC self imposed limitations in inspection and enforcement policies that limit effective penalties for repeat and continuing violations and for "upsets" that are violations;

6. The limitations on assuring meaningful Title V permits

a. given the enormous "allowable emissions limits" in existing Texas permits, limits that do not reflect actual emissions, and

b. given the inclusion of units now governed or to be governed by standard exemptions, standard permits, permits by rule, and other TNRCC exemptions.

It was my understanding in June of 1996, that EPA was going to require TNRCC to present additional information on a number of issues of concern to EPA. I was led to believe (possibly in conversations with Ms. Watson) that there would be a series of letters from EPA to TNRCC during the summer and fall of 1996 explaining further what EPA wanted in the way of documentation from TNRCC on the issues it identified in the Federal Register.

I understand that one letter was sent, a letter on the Texas Audit Privilege law. Since I did not receive copies of other letters, I contacted EPA and was then told that EPA might send only one additional letter that included all other issues of concern. I do not believe that I ever received a copy of such a letter.

In any case, it does appear clear from the Federal Register notice that EPA intended to obtain additional information on the Texas Title V program from TNRCC and evaluate it before the end of the 18 month period for interim approval.

EPA, Region VI and RTP, should have concerns with a number of outstanding issues, given about the significance of the Texas program. If Texas is allowed to complete issuance of all Title VI permits through

its interim authorization, EPA will have greatly limited the opportunities for public participation in this important process.

I understand that Texas has over 3000 Title V permits to handle. It certainly has many of the largest and most complex. The TNRCC program does have major implication, and not just for Texas. Thus, I have provided the example of the types of e-mails that I am receiving from across the country.

Please let me know if you have any questions or want any additional information on these matters.

Sincerely,

Richard Lowerre

XC: Gregg Cooke, Regional Administrator (w/o attachments)
Larry Starfield, Regional Counsel (w/o attachments)