

April 6, 2010

TCEQ Proposes Restrictions on Standard Permits and Permits By Rule

On April 14, 2010, the Texas Commission on Environmental Quality ("TCEQ") Commissioners are scheduled to consider proposing new rules that would significantly restrict the ability of companies who rely upon Standard Permits and Permits by Rule ("PBR") for air quality authorizations to install new facilities or expand or modify existing facilities.

The draft proposal would preclude persons who build a facility under a Standard Permit or a PBR from applying for a full construction permit for authorization of a facility at the same site for a period of one year. The draft also would preclude persons who apply for a full construction permit from withdrawing that application after it becomes administratively complete and then qualifying for a standard permit or a PBR authorizing that facility at that site, also for a period of one year. Finally, the draft would preclude persons from using PBRs at a site if total emissions from facilities at that site exceeded certain levels unless at least one facility at that site had been subject to the public notification requirements applicable to new or renewed permits.

The proposals reflect agency concerns that persons seeking authorizations sometimes use Standard Permits or PBRs to "circumvent" a contested case hearing or to get a "head start" on the construction of a facility prior receiving a full construction permit. The TCEQ already has a rule designed to prevent persons from artificially limiting the scope of a project to enable it to qualify for a PBR prior to seeking a full construction permit, but apparently wants to establish more objective standards. Although an objective standard may be easier to implement, it is likely to have both expected and unexpected consequences that would prevent construction of viable projects that do not represent an attempt to evade the basic purposes of the public comment and hearing process.

The draft proposal package can be found at: <http://www.tceq.state.tx.us/rules/pendprop.html#09016>

As noted, the Commissioners are scheduled to consider the matter on April 14, 2010. If they approve, the proposed rules would be published in the Texas Register and a public comment period would ensue prior to a decision on whether to adopt the new rules. Because the proposal could significantly restrict the ability of companies to install new facilities or expand or modify existing facilities, persons who utilize the permitting system will want to follow its development.

Please feel free to contact us if you have any questions regarding this matter.

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