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EPA Proposes Disapproval of Certain Texas Air Quality Permitting Programs

In a widely publicized announcement, EPA is proposing to formally disapprove certain aspects of the air quality permitting of the Texas Commission on Environmental Quality ("TCEQ"). If adopted, the EPA proposal could have significant ramifications for companies that have relied upon those aspects of the Texas program that provide flexibility for making changes at existing plants without the need for amending existing permits.

Under the federal Clean Air Act, states are required to develop and submit to EPA for approval a State Implementation Plan ("SIP") that includes the requirements the states believe necessary to meet national ambient air quality standards. EPA is required to evaluate the state programs to determine whether they meet the minimum federal requirements for approval. Changes to the state programs also are submitted and must be approved or disapproved by EPA. The actual process for EPA evaluation of state programs can become lengthy if EPA has concerns. While EPA review is pending, a "SIP Gap" can occur, which results in differing state and federal requirements for the same program. Two examples involve flexible permits and qualified facilities.

The flexible permit and the qualified facilities programs allow companies in Texas to make a number of different changes at a facility without having to amend existing permits. Although these programs have been in existence for over ten years, EPA has yet to approve either, creating SIP Gaps.

There has been increasing pressure on EPA from environmental groups to disapprove portions of the Texas program and from the regulated community to act on the Texas submittals, to provide certainty and eliminate the SIP Gaps. Recently, a group of companies in the regulated community filed suit against EPA and negotiated a consent decree placing deadlines on EPA to take action on some thirty TCEQ submissions for SIP revisions, including the permitting programs identified in the EPA announcement.

EPA's concerns with the flexible permit and qualified facilities programs relate to whether changes made to plants under these programs meet the minimum federal standards for use of best available control technology, public participation, evaluation of emission impacts, and review to ensure that the changes do not trigger the federal permitting requirements applicable to major emitting sources. Additionally, EPA is proposing to disapprove revisions to the Texas permitting program that address the permitting of major sources and the use of standard permits. Other aspects of the TCEQ permitting system may be addressed in future EPA notices, including, for example, the use of permits by rule at major sources.

The ultimate resolution of this issue will await further negotiations between TCEQ and EPA. TCEQ has offered to make certain changes to its programs while maintaining that many of EPA's objections are not supported by the facts. The ultimate impact on those sources relying upon the programs in question remains uncertain until the issues are finally resolved. There is a potential that sources may have to revisit changes made under the TCEQ program and be subjected to a new round of permitting. EPA or citizens may claim that these sources do not have valid permits under federal law. So, in addition to having to adjust to how the permitting issues are resolved, some companies face the possibility of enforcement action by either EPA or citizen groups, which may have broader legal implications.

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