LARRY R. SOWARD

December 21, 2010

The Honorable Glenn Hegar, Jr.
Chairman
Sunset Advisory Commission
P. O. Box 13066
Austin, Texas 78711

Re: Sunset Review of the Texas Commission on Environmental Quality

Dear Chairman Hegar:

Several questions arose during the course of the Sunset Advisory Commission's public hearing on the Texas Commission on Environmental Quality (TCEQ) as to whether the TCEQ has the authority to deny a permit, and whether it has done so in the past. On behalf of the Alliance for a Clean Texas (ACT), and as a former TCEQ Commissioner knowledgeable on this subject, I offer the following comments in supplement to answers given at the public hearing on this issue.

First, current statutory provisions clearly authorize the TCEQ to deny a permit, whether new, amendment or renewal, in most areas of TCEQ's permitting jurisdiction. For wastewater discharge/disposal permits, Texas Water Code, Sec. 26.027 provides: "the commission may refuse to issue a permit when the commission finds that issuance of the permit would violate the provisions of any state or federal law or rule or regulation promulgated thereunder, or when the commission finds that issuance of the permit would interfere with the purpose of this chapter." For injection well permits, Texas Water Code, Sec. 27.051 implicitly authorizes the TCEQ to deny a permit by providing that the commission may grant an application in whole or part and may issue the permit." As for solid waste facility permits, Texas Health & Safety Code, Sec. 361.089 expressly states: "the commission may, for good cause, deny or amend a permit it issues or has authority to issue for reasons pertaining to public health, air or water pollution, or land use, or for having a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."

Yet, despite these clear statutory authorizations, it has been the general practice/policy of the TCEQ not to deny permits, but instead to allow applicants and permittees full opportunity to address and correct any application or permit deficiencies that might otherwise lead to permit denial. Testimony in the hearing from the TCEQ suggested that 14% of all permits processed had been denied by the Commission. However, that testimony was somewhat misleading in that it implied that the Commissioners had denied issuance of that number of permits. In actuality, that number mostly reflects all permit applications returned for deficiencies or withdrawn by the applicant and thus never processed to completion. It has been extremely rare for the Commission to deny a permit once it has been declared administratively and technically complete and either gone through a contested case hearing process or submitted to the Commission for issuance as an unopposed permit.

There is one area, however, where the TCEQ lacks clear statutory authority to deny a permit --- for air permits. For new air permits, Texas Health & Safety Code, Sec. 382.0518 sets out a process whereby the Commission issues a report setting forth any objections it has and gives the permit applicant the opportunity to correct those problems. If the applicant "makes the alterations in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit." Sec. 382.0518(d). Air permit applicants routinely argue that this statutory provision means the TCEQ lacks authority to deny a preconstruction air permit because the statute says that the TCEQ "shall" grant the permit. The TCEQ has generally adopted such an interpretation.

The federal Clean Air Act requires state permitting authorities to retain broad authority, including the authority to deny a preconstruction permit if an applicant fails to satisfy preconstruction permit requirements. Texas has committed, in order to retain authority to implement federal Clean Air Act programs, that the TCEQ has the authority to deny a preconstruction permit. Moreover, under longstanding federal law, a state is never required to issue a preconstruction permit, even if the applicant meets all requirements. A state always retains plenary authority to deny a permit for policy or economic reasons.

For air permit renewals, Section 382.055 of the Health & Safety Code expressly provides that if the applicant meets the TCEQ's requirements in accordance with the renewal schedule, the commission shall renew the permit. TCEQ rule 116.314 requires the ED to renew an air permit if it is determined that the facility meets the requirements of the rules. An air permit renewal cannot be denied unless the TCEQ follows a very exact procedure. Prior to denial, the ED must provide notice to the permit holder with a report which describes the basis for denial. If denial is based on failure to meet the requirements of the renewal rules, the report shall establish a schedule for compliance with the renewal requirements. The report must be forwarded to the permit holder no later than 180 days after the commission receives a completed application. The permit must be renewed if the requirements are met according to the schedule specified in the report. If denial is based on failure to maintain substantial compliance with the Health & Safety Code or the terms of the existing permit, the renewal denial shall be final. After failure to satisfy the commission requirements for corrective action by the deadline specified in the ED's report, the applicant shall show cause in a contested case proceeding why the permit should not expire.

As ACT has recommended in its written comments to the Sunset Advisory Commission, the TCEQ should be clearly authorized to deny an air permit, whether new, amendment or renewal, for good cause, including failure to maintain compliance with the Health & Safety Code or the terms of the existing permit; inability to meet all applicable state and federal air quality standards and regulations; etc.

Thank you for the opportunity to submit these comments for your consideration.

Respectfully submitted,

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