

Texas Coal Combustion Products Coalition

December 22, 2010

VIA HAND DELIVERY

Sunset Advisory Commission
1501 North Congress Avenue
6th Floor, Robert E. Johnson Building
Austin, Texas 78701

RE: TCEQ Sunset Review

To the Honorable Sunset Advisory Commission:

The Texas Coal Combustion Products Coalition (TCCPC) is writing to enter into the record comments on an issue directly relevant to the Sunset Advisory Commission's review of the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas.

The TCCPC is comprised of entities that own or operate lignite- and coal-fired power plants and surface mines. The TCCPC encourages environmentally protective coal combustion product (CCP) management practices and has been instrumental in developing the expanding market for CCPs in Texas.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact me.

Respectfully,



Michael J. Nasi
Counsel for the Texas Coal Combustion Products Coalition

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COMMENTS OF THE TEXAS COAL COMBUSTION PRODUCTS COALITION

Introduction

The TCCPC is comprised of entities that own or operate coal-fired power plants and surface mines. The TCCPC encourages environmentally protective management of coal combustion residuals (CCRs), the combustion wastes generated by coal-fired power plants. TCCPC has also been instrumental in developing the expanding market for coal combustion products.

As indicated in the Sunset Advisory Commission's *Guide to the Sunset Process* (December 2009), part of the benefit of the Sunset process is "to prevent problems from occurring, instead of reacting to problems." The TCCPC files this comment in order to flag an issue relating to an upcoming federal rulemaking that may require adjustments to TCEQ's statutory authority that might have to be addressed by the 82nd Legislature and should be highlighted as a potentially needed action in the Sunset Advisory Commission's final recommendations.

The TCCPC requests that this comment also be included in the record of the Sunset Advisory Committee's review of the Railroad Commission of Texas as a rebuttal to the Comments submitted by Public Citizen (PC) and Sierra Club, Lone Star Chapter, (SC) dated November 30, 2010. In those comments, PC and SC state that TCEQ, and not the Railroad Commission of Texas, should have the responsibility for regulating and monitoring CCRs regardless of whether they are disposed of in landfills or placed in mines. The TCCPC strongly opposes this position for the reasons set forth below, including the fact that it wholly contradicts the longstanding approach being taken by the federal government.

Discussion

1. Preparing TCEQ to Implement Federal Regulatory Criteria Regarding CCRs

From time to time, federal environmental regulations are imposed or are proposed to be imposed that require amendments of state statutory provisions to ensure that our state agencies have sufficient statutory authority to retain primacy to implement the change or the anticipated change without the need for federal intervention or duplicative regulation. One such anticipated change relates to U.S. Environmental Protection Agency's (EPA's) pending proposal to change the federal government's role in the regulation of CCRs in our country.

CCRs, commonly referred to as coal ash or "Coal Combustion Products (CCPs)", are proposed to be regulated by EPA under a pending rulemaking using a number of alternative options. One proposal would regulate CCRs as "special wastes" under the hazardous waste provisions of Subtitle C of the Resource Conservation and Recovery Act (RCRA); the other would regulate CCRs under the non-hazardous waste provisions of RCRA Subtitle D.

Although it is not yet clear whether EPA will acknowledge the role of states to take the primary role in implementing any new federal criteria, TCEQ should and, hopefully, will be given the ability to maintain their current role as the primary agency in charge of regulating CCR management in Texas. In order to ensure that TCEQ retains that role, key adjustments may be needed in the Texas Solid Waste Disposal Act (Chapter 361, Texas Health & Safety Code) to

give the TCEQ the flexibility to retain primacy in the regulation of CCRs. The changes that may be needed would clarify what options are available to the TCEQ to regulate CCRs in the event of the implementation of the above-referenced federal criteria. Moreover, proactive steps may need to be taken by the 82nd Legislature to avoid unnecessary procedural burdens associated with TCEQ's role under the new system.

This situation is similar to the one faced by the 72nd Texas Legislature twenty years ago when it faced the possibility of a new federal program being implemented in Texas directly by the EPA rather than by a Texas agency. The anticipated program 20 years ago was the Title V air quality permit program under the Federal Clean Air Act. The proactive changes implemented by the 72nd Legislature and further refined in subsequent legislative sessions in order to ensure that TCEQ, not EPA, managed the program in Texas are contained in Sections 382.054 - .0543 and 382.0561 - .0564.

Similar to the steps that were taken to prepare Chapter 382 of the Health & Safety Code for the TCEQ's management of the Title V program, refinements need to be made to Chapter 361 of that Code to maximize TCEQ's chances of retaining a primary role in CCR regulation in Texas.

An additional example is when EPA was in the process of delegating the wastewater permitting program, the National Pollutant Discharge Elimination System (NPDES), to the states. In that instance the Legislature had two provisions in the statute. One portion continued the program as it was currently operating and the other provided the authority to change to the new program when it was officially delegated to the state.

TCEQ's existing CCR regulations are thorough and protective and no environmental damage cases have been documented to prove otherwise. In order to arm the TCEQ with the maximum statutory authority to satisfy EPA's anticipated requirements for state agency involvement, however, Chapter 361 may need to be amended to grant TCEQ the flexibility to satisfy minimum federal requirements for state programs in the event that federal rules are finalized that create an urgency for TCEQ to establish the adequacy of the our state program to retain state primacy. Moreover, like the Title V situation referenced above, a procedural process that meets minimum federal requirements should be expressly contemplated in Chapter 361 for the same reasons Sections 382.-0561 - .0564 were created—to meet federal requirements without unduly burdening the TCEQ or state resources as new and existing facilities come under the new federal criteria.

2. The Railroad Commission Should Retain Oversight of CCR Mine Placement

Turning to the comments submitted by PC and SC regarding which Texas agency should regulated mine placement of CCRs, there is simply no reason to change the regulatory oversight of TCEQ and the Railroad Commission. In arguing that CCR mine placement should be governed by the TCEQ rather than the Railroad Commission, PC and SC fail to recognize or mention that the federal government has set a course for the regulation of CCR placement at mines that contradicts the idea of shifting oversight of mine placement from the Railroad Commission to the TCEQ. Specifically, EPA considered the issue of addressing minefilling in its proposed CCR rules, and concluded that the proposed rules should only address disposal of CCRs in landfills (and surface impoundments) and not the placement of CCRs in mines. EPA

determined that the Department of Interior's Office of Surface Mining (which oversees the coal mine permitting program of the Railroad Commission) should continue to take the lead regarding the regulation of CCR mine placement. EPA specifically stated:

The U.S. Department of Interior (DOI) and EPA will address the management of CCRs in minefills in a separate regulatory action(s), consistent with the approach recommended by the National Academy of Sciences, recognizing the expertise of DOI's Office of Surface Mining Reclamation and Enforcement in this area.¹

...The NRC Committee on Mine Placement of Coal Combustion Wastes also stated that OSM and its SMCRA state partners should take the lead in developing new national standards for CCR use in mines because the framework is in place to deal with mine-related issues. Consistent with the recommendations of the National Academy of Sciences, EPA anticipates that the U.S. Department of Interior (DOI) will take the lead in developing these regulations. EPA will work closely with DOI throughout that process. Therefore, the Agency is not addressing minefilling operations in this proposed rule.²

There are a number of compelling reasons why the RCT, rather than the TCEQ should regulate CCR placement in mines. We will leave that detailed discussion for another day. It should suffice for now to simply restate that there is no legal, technical, or policy reason to change existing practice and run afoul of the approach clearly mapped by the federal government in the above-referenced rulemaking.

Conclusion

The TCCPC appreciates this opportunity to provide a record in the Sunset proceedings to support the appropriate recommendations and, ultimately, any necessary changes to the Texas Solid Waste Disposal Act that may be needed to prevent the federal government from being directly involved in environmental regulatory matters in Texas which are much better handled by the TCEQ. We also appreciate the opportunity to set the record straight in response to comments submitted by PC and SC regarding the appropriate regulatory oversight of CCR mine placement in Texas. We look forward to the opportunity to discuss these issues further with the Commission and staff.

¹ 75 FR 35128,129 (June 21, 2010).

² *Id.* at 35165.