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ENVIR. APPEALS BOARD

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June 24, 2010

VIA HAND DELIVERY

Ms. Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: Petition for Review
Flint Hills Resources, LP
Title V Appeal No. _____
Permit No. O1445

Dear Ms. Durr:

Enclosed for filing is one original and five copies of Flint Hills Resources, LP's Petition for Review (and exhibits thereto) in the above-captioned matter. As stated in the enclosed Petition, we respectfully request oral argument and expedited review. Thank you for your attention to this matter.

Sincerely,

David M. Friedland

Enclosures

cc: Flint Hills Resources, LP

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ENVIR. APPEALS BOARD

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Flint Hills Resources, LP Permit No. O1445	)	Title V Appeal No.

PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 71.11(l), Flint Hills Resources, LP ("Flint Hills" or "FHR") petitions the Board to overturn EPA Region VI's May 25, 2010 attempt to assume control over FHR's Title V Permit without following any of the substantive or procedural requirements for doing so.

As described in detail below, this should be a very simple case. In August 2009, FHR requested a minor revision to the existing Title V Permit for its Corpus Christi East Refinery (the "Refinery") from the Texas Commission on Environmental Quality ("TCEQ") to incorporate legally-required special conditions for maintenance, startup, and shutdown ("MSS") activities from a recent preconstruction permit revision. EPA has approved TCEQ's Title V program, and FHR and TCEQ properly followed all procedures required under the EPA-approved Texas Title V rules in requesting this minor revision. EPA Region VI has never disapproved the Texas Title V regulations, the process by which FHR requested this minor revision, or the requested MSS language itself. Nevertheless, on May 25, 2010, EPA Region VI demanded that FHR apply for an entirely new Title V Permit under the federal – not the state – Title V permitting rules (40 C.F.R. Part 71). EPA further demanded that the application must be submitted by September 15, 2010, if the company "wish[es] to continue operations" at the Refinery.

The basis for this demand has nothing to do with the minor permit revision requested by FHR. Instead, as EPA explained, the Agency's concerns were based on longstanding legal and policy disputes with TCEQ over Texas' so-called "Flexible Permitting Program," incorporation by reference of terms into Texas Title V Permits, and other permitting issues – none of which were at issue in FHR's request. When TCEQ did not resolve those issues to EPA's satisfaction within 90 days, EPA instead stepped in to take over the permit, citing its authority to "issue or deny" a Title V Permit under 40 C.F.R. § 70.8(c)(4).

Section 70.8(c)(4) does not give EPA the authority it claims. It gives EPA authority to do only what its plain language says: to issue or deny the requested permit – *i.e.*, the minor revision that FHR requested. It does not give EPA authority to override State regulations that EPA itself has previously approved, nor does it allow EPA to ignore its own procedures for revoking existing, valid permits – and threaten to shut down the Refinery and initiate enforcement if FHR does not immediately comply with its demands. FHR therefore requests that the Board declare EPA's May 25, 2010 final permit decision to be unlawful, and further issue an Order precluding EPA from objecting (or taking any other action based on a purported objection) to FHR's proposed minor permit revision of August 21, 2009.

II. REGULATORY AND PROCEDURAL BACKGROUND

A. Clean Air Act Title V Framework

Title V of the Clean Air Act ("CAA" or the "Act") requires EPA and the states to promulgate and implement operating permit programs for major sources of air pollutants.[1] As with many CAA programs, Title V incorporates traditional concepts of federalism: EPA first establishes minimum criteria for state programs; states then adopt regulations meeting these requirements and submit them to EPA for approval; EPA then reviews and approves those regulations.[2] Where a state does not submit an acceptable Title V permitting program, EPA will instead implement the federal program under 40 C.F.R. Part 71.[3]

Once EPA approves a state's Title V program, the Agency retains some implementation

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[1] The Refinery is a major source for purposes of Title V. CAA § 501(2), 42 U.S.C. § 7661(2); 40 C.F.R. § 71.2.
[2] *See* CAA § 502, 42 U.S.C. § 7661a; 40 C.F.R. Part 70.
[3] *See* 40 C.F.R. § 70.10; 40 C.F.R. Part 71.

authority, but that authority is limited.[4] First, EPA has the right to review and comment on any permit before it is issued; if the state does not adequately respond to the objections EPA raises, EPA may step in and issue or deny the permit.[5] Second, if EPA determines that cause exists to revise or revoke an existing permit, EPA may notify the state and the permittee of its findings under the enumerated grounds for reopening a permit, giving the state 90 days (subject to extension) to propose its own modification or revocation to resolve EPA's objection. If the state does not do so, EPA may revise or revoke the permit after 30 days notice to the permittee and opportunity for the permittee to comment and request a hearing.[6] Finally, if EPA concludes that the state's rules no longer comply with all CAA requirements, or that the state is not adequately implementing the program, it may publish this determination, with supporting reasons, in the Federal Register, and give the state 90 days to respond. If the state then fails to meet EPA's objections, EPA may apply sanctions and begin the process to withdraw approval of the program.[7]

B. Title V Permitting in Texas

The Title V permitting program in Texas followed the path envisioned by the CAA. The state developed a Title V permitting program, based on the model EPA regulations, and EPA granted final full approval to Texas for its Title V program effective November 30, 2001.[8]

Consistent with the federal requirements, the Texas Title V program requires all major

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[4] Of course, both EPA and the State retain full authority to enforce any violations of Title V Permit requirements.
[5] *See* CAA § 505(b)-(c), 42 U.S.C. § 7661d(b)-(c); 40 C.F.R. §§ 70.8(a), (c).
[6] *See* 40 C.F.R. §§ 70.7(f)-(g).
[7] CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3); 40 C.F.R. Part 71.
[8] 66 Fed. Reg. 63,318 (Dec. 6, 2001). EPA subsequently issued a Notice of Deficiency for monitoring requirements, which TCEQ corrected and EPA approved. *See* 67 Fed. Reg. 732 (Jan. 7, 2002); 70 Fed. Reg. 16,134 (Mar. 30, 2005). Those changes are not at issue here.

sources to obtain Title V Permits that contain all "applicable requirements."[9] Title V does not itself establish substantive emission limitations; rather, it "consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, recordkeeping, and reporting of the source's compliance with the Act."[10] Here, the Refinery obtained its initial Title V from TCEQ in 2007.

Because both facility operations and legal requirements change frequently, the Texas Title V program also contains procedures for subsequent revisions to the permit to reflect these changes. Specifically, the regulations allow for three types of revisions, depending on the scope and impact of the change: an administrative permit revision for the most insignificant modifications (*e.g.*, a name change);[11] a minor permit revision, for changes that do not significantly affect critical permit terms;[12] and a significant permit revision, for changes that involve specific types of changes to certain critical permit terms (*e.g.*, a project that triggers major source construction permitting requirements and involves new emissions limits that represent best achievable control technology ("BACT")).[13]

In order to obtain a revision, the source must submit an application.[14] That application must include any information required to determine the applicability of, or to codify, any "applicable requirement."[15] The final revised permit must, in turn, contain all applicable requirements for each emission unit.[16] For minor revisions such as that at issue here, after TCEQ proposes to issue the requested revision, TCEQ must submit the minor permit revision to EPA

[9] 30 Tex. Admin. Code §§ 122.10(2), 122.132(a).
[10] *Ohio Pub. Research Group, Inc. v. Whitman*, 386 F.2d 792, 794 (6th Cir. 2004).
[11] 30 Tex. Admin. Code §§ 122.211-122.213.
[12] 30 Tex. Admin. Code §§ 122.215-122.218.
[13] 30 Tex. Admin. Code §§ 122.219-122.221.
[14] 30 Tex. Admin. Code §§ 122.130-122.132.
[15] 30 Tex. Admin. Code § 122.132(a).
[16] 30 Tex. Admin. Code § 122.142(b).

for review.[17] EPA may object to the issuance of the proposed permit within 45 days if it concludes that the proposal does not, in fact, comply with all applicable requirements or the requirements of the Texas Title V program.[18] In that event, TCEQ is required to revise the permit to address EPA's concerns, and submit the proposed revisions to EPA for further review and approval.[19] The permittee has no regulatory role in the process at this point. If TCEQ does not respond to EPA's objections within 90 days, EPA must then issue or deny the permit itself in accordance with the Part 71 regulations.[20]

C. The Dispute Between Texas and EPA Over Flexible Permitting and Other Permitting Issues

In order to understand EPA's actions in this case, one must understand the substantial policy and legal disputes between Texas and EPA over certain aspects of Texas' air permitting programs. In 1994, Texas adopted a new state permitting program that allowed sources to obtain "flexible" plant-wide emission caps in lieu of certain unit-by-unit emissions limits. 30 Tex. Admin. Code Chapter 116, subchapter G (the "Flexible Permit" program). The state submitted this new program to EPA for approval as part of the State Implementation Plan ("SIP"). EPA took no formal action on Texas' SIP submittal for these regulations for fifteen years. Finally, in the fall of 2009, after an industry lawsuit to compel action, the Agency proposed to disapprove the flex permit rules as a SIP revision.[21]

The Refinery obtained a permit under the Flexible Permit program in 1995 – Flexible Permit No. 6308. Under the existing, EPA-approved Texas Title V regulations, the terms of a

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[17] 30 Tex. Admin. Code §§ 122.217(d), 122.350(b); 40 C.F.R. § 70.7(e)(2).
[18] 30 Tex. Admin. Code § 122.350(c); 40 C.F.R. § 70.8(c).
[19] 30 Tex. Admin. Code § 122.350(d)(3); 40 C.F.R. § 70.8(c).
[20] 30 Tex. Admin. Code § 122.350(e); 40 C.F.R. § 70.8(c)(4); 40 C.F.R. § 71.4(e)(1).
[21] EPA's disapproval appears founded in its concern that the Flexible Permit rules allow sources to circumvent major New Source Review permitting requirements; TCEQ denies that the rules allow any such circumvention.

Flexible Permit are "applicable requirements" under Title V.[22] Accordingly, when FHR applied for its original Title V Permit, it included the terms of its Flexible Permit in its Title V Permit application, and TCEQ included those terms in the draft Title V Permit that was sent to EPA for review. EPA did not object to the proposed permit, and so TCEQ issued that permit, including the Flexible Permit terms, on January 29, 2007 – Federal Operating Permit No. O1445.

Since the Flexible Permit terms were incorporated into the Refinery's Title V Permit, the Refinery has requested, and received, several additional revisions to its Title V Permit. For example, Pollution Control Permit 86054 was issued on October 3, 2008 to authorize the installation of emission control technology and incorporated into the Title V Permit on August 18, 2009; New Source Review ("NSR") Permit 2495, covering boilers at the Refinery, was amended on July 27, 2007 and incorporated into the Title V Permit on February 2, 2008, and amended again on August 15, 2008 and incorporated into the Title V Permit on December 15, 2008.[23] All of these revisions were provided to EPA; in no instance did EPA make the objections it is now raising to incorporation of these permit terms or incorporation of Flexible Permit terms into FHR's Title V Permit.

D. The Minor Permit Revision Currently Under Review

1. April 16, 2009 Revision

On April 16, 2009, FHR applied to TCEQ for a minor revision to its Title V Permit to incorporate 12 proposed changes. *See* Exhibit 1. In general, these revisions were designed to incorporate into the Title V Permit (i) various revisions that had recently been made to the Flexible Permit and (ii) revisions necessary to incorporate new limits resulting from the

[22] 30 Tex. Admin. Code § 122.10(2)(H); *see* 66 Fed. Reg. 63,318 (Dec. 6, 2001).
[23] Prevention of Significant Deterioration ("PSD") Permit TX137M2 and other preconstruction permits were incorporated into the original Title V Permit.

installation of additional "LoTOx" pollution control technology on the fluid catalytic cracking unit. As required by the Title V regulations, TCEQ sent a copy of the proposed permit revision to EPA. EPA did not object, and TCEQ issued the revision on August 18, 2009. *See* Exhibit 2.

2. August 21, 2009 Revision

On July 27, 2009, while the April revision request was pending, TCEQ further amended FHR's Flexible Permit to reflect various changes in the state's MSS rules. The revised Flexible Permit term did not affect the existing site-wide cap in any way, but, for the first time, added a comprehensive cap on emissions from MSS activities, thus increasing the stringency of the permit.[24] The new MSS special conditions also imposed additional monitoring and recordkeeping requirements.

On August 21, 2009, FHR filed a minor permit revision application to incorporate the MSS special conditions into the Title V Permit, as required under Texas Title V regulations.[25] *See* Exhibit 5. Because FHR had not yet received TCEQ's August 18, 2009 revised Title V Permit, FHR's application simply added the MSS special conditions as Item No. 13 to the April 16 list of 12 minor revisions. But, it is clear that the 12 revisions had already been approved with no EPA objection, so that the only remaining issue was Item No. 13 – for the MSS special conditions.

Again as required by the Title V regulations, TCEQ notified EPA of this proposed minor permit revision. On October 13, 2009, TCEQ sent a letter to FHR stating that the Commission had completed the technical review of the minor permit revision application. TCEQ stated,

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[24] *Compare* p. 5 of the "Emissions Sources - Emission Caps and Individual Emissions Limitations" table of the June 15, 2009 version of Flexible Permit 6308 (Exhibit 3) (identifying some emission limits for some sources during planned MSS activities, without a comprehensive cap), *with* p. 1 of the similar table of the July 27, 2009 version of Flexible Permit 6308 (Exhibit 4) (creating a comprehensive cap for various pollutants during planned MSS activities).

[25] 30 Tex. Admin. Code § 122.142(b)(2).

"Based on your submission, we understand that New Source Review (NSR) Permit No. 6308 was amended on July 27, 2009 and that this minor permit revision application was submitted to codify the NSR permit amendment" into the Title V Permit. *See* Exhibit 6. TCEQ further stated that ". . . we understand that processing of this minor permit revision will not result in any changes to your existing FOP [federal operating permit]." *Id.*

On December 4, 2009, EPA objected. Those objections, however, did not address the MSS special conditions (the only remaining term before EPA). Rather, EPA announced four broad objections that were unrelated to the minor permit revision:

- EPA objected to the general concept of incorporation of the Flexible Permit into the existing Title V Permit, based on its disagreement with Texas about the legality of the Flexible Permit program discussed above;
- EPA objected to TCEQ's reliance on incorporation by reference of major NSR permit terms into the existing Title V Permit;
- EPA objected to various unrelated recordkeeping terms of the existing Title V Permit; and
- EPA objected to a special condition of the permit relating to stationary vents with certain flow rates.

See Exhibit 7.[26] FHR did not have an opportunity to respond to EPA's objections. Under both 30 Tex. Admin. Code § 122.231 and 40 C.F.R. §70.7, TCEQ is the only party that can respond to objections EPA raises during its review period.[27]

E. EPA's May 25, 2010 Takeover of FHR's Texas Title V Permit

TCEQ did not respond in any formal way to EPA's objections within 90 days after the objection letter. Accordingly, EPA concluded that it was required to issue or deny the Title V

[26] EPA also included what it characterized as four "Additional Comments" in its objection letter. It is unclear what legal significance these "Additional Comments" have.

[27] EPA has also issued thirty-nine other broad Title V objection letters to Texas facilities, and has taken over the authority to issue two other facilities' Title V Permits. *See infra*, note 36 and accompanying text.

Permit.[28] Because the only term that was properly in front of EPA was the minor revision to the Permit to incorporate the MSS special conditions, EPA could only have acted on that term. But this is not what EPA did. In its final permit decision reflected in its letter of May 25, 2010, EPA first acknowledged that it had only the authority to issue or deny the permit:

> On December 4, 2009, EPA objected to the issuance of the above-referenced Title V Operating Permit. Since the Texas Commission on Environmental Quality (TCEQ) failed to revise and submit a proposed permit in response to the objections raised within 90 days after the date of the objection letter, EPA is required to issue or deny a Title V Operating Permit.

See Exhibit 8 (EPA Letter to Richard Harris). Then, however, EPA went on to take over FHR's Title V Permit process, while at the same time threatening that if FHR did not submit a timely and complete application for an entirely new Part 71 permit from EPA, together with thousands of pages of responses to a detailed set of document and information requests by September 15, the East Refinery *could no longer operate*:

> If you wish to continue operations, you must apply to EPA for your permit by September 15, 2010. Please complete and submit to EPA one original and one copy of the enclosed permit application (Enclosure 1) and the information identified in Enclosures 2, 3, 4 and 5.

Id. at 1. EPA made it crystal clear that their action was a wholesale rejection and takeover of the Texas Title V program for FHR, and that EPA was going to start from scratch to issue a new Title V Permit:

> In addition to the items identified in the application, we are requiring very detailed information to be submitted to EPA as described in Enclosure 2. This information concerns the need for crosswalking all emission points at the stationary source with their applicable requirements (including permits issued under the approved Texas State Implementation Plan (SIP)). The requested information will allow EPA to identify each federally-enforceable and applicable requirement that pertains to each emission point covered by your state-issued flexible permit and any other underlying authorization issued by TCEQ as identified in the New Source Review Authorization References Table.

[28] 30 Tex. Admin. Code § 122.350(e); 40 C.F.R. § 70.8(c)(4).

Id. at 2. One small example of the breadth of this request is Item No. 10 of Enclosure 2. EPA requests that FHR provide "all changes and construction at the Facility since the date that the flexible permit was issued." Changes are not defined, so this request could require a chart listing literally thousands of work orders, maintenance records, and capital requests dating back to 1995.[29]

EPA also threatens both enforcement and denial of the facility's application shield under Title V if the Facility does not strictly comply with both the directive to submit an entirely new Title V application, and respond completely to the information requests:

> If you fail to submit a timely and complete application, you will be considered to be operating without a valid Title V Permit, per 40 C.F.R. § 71.5(b), and you could be subject to enforcement action. In addition, in accordance with 40 C.F.R. § 71.5(a)(2) and 71.7(b), if EPA determines that your permit application does not contain the information requested in this letter and you fail to promptly submit any relevant facts or corrected information by a date specified in the request, your application will be declared incomplete and your permit will not be administratively continued resulting in the loss of your permit application shield. The EPA will not consider the application complete until we are assured that we have all the information needed to prepare a draft permit. Future enforcement actions could include administrative compliance orders, administrative penalty orders, and/or referral to the United States Department of Justice for judicial action with monetary fines.[30]

III. THE ENVIRONMENTAL APPEALS BOARD HAS JURISDICTION OVER THIS DISPUTE, AND THE AUTOMATIC STAY APPLIES

FHR satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 71. The Environmental Appeals Board ("EAB") therefore has jurisdiction over the challenged EPA actions.

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[29] EPA also requests in Item No. 10 the "date each project commenced, the date each project was completed (implemented), a brief description of each project, vendor name, work order number, and the fixed capital cost of each project in nominal dollars." *Id.*

[30] *Id.*

A. Final Permit Decision

The challenged EPA action is, in its entirety, a final permit decision eligible for EAB review under 40 C.F.R. § 71.11(i) and (l). A "final permit decision" includes any "final decision to issue, deny, revise, revoke and reissue, renew, or terminate a permit."[31] Here, EPA has explicitly declared that FHR will be considered to be operating without a Title V Permit, and that EPA will enforce that violation, unless FHR submits an application for a new permit by September 15. But FHR already has an existing, valid Title V Permit that authorizes its continued operation past September 15, without the need to submit any additional information. EPA's May 25 letter effectively revokes FHR's existing permit by fiat. Under the plain language of Section 71.11(i) and (l), FHR therefore is entitled to EAB review of that permit revocation.

EPA's demands have direct, immediate and serious consequences for FHR. Even though FHR currently has a valid Title V Permit issued by TCEQ under Texas' approved Title V program, EPA now denies FHR's right to operate under that permit, upon overt threat of enforcement. If FHR does not prepare and submit to EPA a complete application for an entirely new federal permit and additional information by September 15, FHR may have to shut down its East Refinery facility in order to avoid EPA from ordering it to do so and from seeking to impose potentially substantial civil (and/or criminal) penalties. EPA's demands meet long-standing definitions of finality. *E.g.*, *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) ("[A]n agency action is final if, as the Supreme Court has said, it is 'definitive' and has a 'direct and immediate . . . effect on the day-to-day business' of the party challenging it, *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980), or if, as our court has said, 'it imposes an obligation, denies a right or fixes some legal relationship.'") (internal citations omitted).

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[31] 40 C.F.R. §§ 71.11(i).

B. Standing

FHR is the permittee. Accordingly, it has standing under 40 C.F.R. § 71.11(l)(1) to petition for review of the permit decision. FHR has participated to the full extent possible in the procedures leading up to the challenged permit action. The issues raised in this petition were not required, or possible, to raise during a public comment period. Because the underlying permit revision was a minor permit revision, and because EPA's action demanding that FHR apply for a federal Title V Permit exceeds its authority and occurred outside proper procedures, there was no public comment period. FHR was given no other opportunity to comment on the action. No grounds for review, therefore, have been either waived or previously addressed. FHR also has standing to petition for review of the permit decision due to "new grounds that were not reasonably foreseeable" at the time of any earlier comment period.[32]

C. Automatic Stay

Under 40 C.F.R. § 71.11(i)(2), when review of a final permit decision by the Environmental Appeals Board is requested, the specific terms and conditions that are the subject of the request for review are automatically stayed. Here, because EPA has revoked FHR's entire existing Title V Permit, there is a question about application and scope of the automatic stay. We believe it is applicable, and stays EPA's revocation of the Title V Permit in its entirety, but we request expedited review of this case by EAB because of the September 15 deadline set forth in EPA's May 25, 2010 letter.

[32] 40 C.F.R. § 71.11(l)(1).

IV. STANDARD OF REVIEW

A petition for review may be granted if the permitting authority's decision was based on a clearly erroneous finding of fact or conclusion of law.[33] Here, as explained below, EPA clearly erred in concluding that a minor permit revision could provide the basis for its takeover of the process governing FHR's operations under Title V of the CAA. Moreover, the novel issues challenged in this petition are not "issues that are fundamentally technical in nature," where EPA has "specialized expertise and experience."[34] Rather, the issues presented are legal and policy related. Therefore, EAB owes no deference to Region VI's legal interpretations.

A petition for review may also be granted if the challenged decision was based on "[a]n exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review."[35] In the present dispute with TCEQ, EPA has issued Title V Permit objection letters to forty Texas facilities.[36] It has since issued letters demanding federal permit applications and additional information, similar to the May 25, 2010 demand letter to FHR, to two other facilities: Garland Power & Light's Ray Olinger power plant, and the Chevron Phillips Cedar Bayou petrochemical plant.[37] If left unchecked, EPA may unlawfully demand federal permit applications and additional information from the remaining thirty-seven facilities whose permits or proposed revisions EPA has objected to. Accordingly, the EAB should review EPA's action here in any event because of its critical importance not only to FHR, but also to the Title V program in Texas and to the overall nature of EPA oversight of state Title V permitting programs.

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[33] 40 C.F.R. § 71.11(l)(1)(i).
[34] *In re Peabody Western Coal Co.*, CAA Appeal No. 04-01, 12 E.A.D. 22, 33-34 (Feb. 18, 2005).
[35] 40 C.F.R. § 71.11(l)(1)(ii). Under 40 C.F.R. § 71.11(l)(2), the Board may also decide on its own initiative to review any condition of any permit issued under Part 71.
[36] EPA Region 6, Air Permit - EPA Objection Letters on Title V Federal Operating Permits Proposed by the Texas Commission on Environmental Quality, http://yosemite.epa.gov/r6/Apermit.nsf/AirP (providing links to objection letters).
[37] Both letters are available at http://www.tceq.state.tx.us/permitting/air/announcements/tv_announce_06_18_10.html.

V. ARGUMENT

A. EPA Illegally Revoked the Title V Permit for FHR's Corpus Christi East Refinery

In its May 25 letter, EPA took over from Texas the Title V permitting authority for the Refinery based on TCEQ's failure to reply to EPA's broad-based objections, which were purportedly in response to FHR's application for a minor permit revision. This is unlawful. If EPA wishes either to reopen for cause a validly issued Title V Permit or to disapprove a formerly approved Title V program, the Clean Air Act, EPA and Texas regulations provide mechanisms for doing so, but only if EPA follows its own rules that provide due process protections for sources and state permitting authorities, which EPA did not follow here.

EPA has the authority to reopen a validly issued Title V Permit "for cause" under Texas and EPA Part 70 regulations, but only under certain circumstances.[38] To initiate procedures for reopening a permit, EPA must notify both the permitting authority and permittee, in writing, that cause exists to revise or terminate the permit.[39] Once the permitting authority receives notification, it has 90 days to respond with a proposal to address the Agency's determination, and an additional 90 days to respond if EPA objects to the proposal.[40] If the permitting authority fails to respond to the initial notification or EPA's objection to the permitting authority's proposal within the prescribed time period, EPA may terminate, modify, or revoke and reissue the permit, but only after providing the permittee at least 30 days written notice of its intent to do so and providing the permittee an opportunity to comment and an opportunity for a hearing.[41] In

[38] 30 Tex. Admin. Code § 122.231; 40 C.F.R. § 70.7(f) and (g).
[39] 30 Tex. Admin. Code § 122.231(b); 40 C.F.R. § 70.7(g).
[40] *Id.*
[41] 40 C.F.R. § 70.7(g)(5).

addition, there must be adequate opportunities for the public to participate during the reopening process.[42]

In our case, EPA revoked FHR's validly issued state Title V Permit, but it did not claim to be doing so under 30 Tex. Admin. Code § 122.231 or 40 C.F.R. § 70.7(g). Nor could it have done so under those provisions because it did not comply with the notice and comment provisions discussed above. At no point did EPA provide FHR with an opportunity to comment on the Agency's decision to revoke its validly issued Permit, and at no point did EPA provide opportunities for public participation.

EPA also has the authority to disapprove an approved state Title V program if, and only if, it determines that the "permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter."[43] If EPA makes that determination, it must notify the state, and then the Agency is authorized to sanction the state if the deficiencies in the state program are not corrected within 18 months after the issuance of the notification.[44] Possible sanctions include the loss of federal highway funds and the application of strict emissions offset requirements for new sources in certain areas within the state.[45] If the deficiencies are not corrected within 18 months, EPA itself must "promulgate, administer, and enforce" a federal operating permit program within two years of the notice.[46] EPA obviously did not make any of the required findings regarding the Texas Title V program or follow the procedures set forth in its own rules. Accordingly, its action to take over that program under the guise of a response to a minor permit revision is unlawful.

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[42] 30 Tex. Admin. Code §§ 122.231(f), 122.201(a)(3); 40 C.F.R. § 70.7(h).
[43] *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 330 (2d Cir. 2003) (quoting CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1)).
[44] CAA § 502(i)(1)-(2), 42 U.S.C. § 7661a(i)(1)-(2).
[45] CAA § 179(b)(1)-(2), 42 U.S.C. § 7509(b)(1)-(2).
[46] *Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) (citing CAA § 502(i)(4), 42 U.S.C. § 7661a(i)(4); 40 C.F.R. § 70.10(b)(4)).

B. EPA Could Only Have Objected to FHR's State-Issued Title V Permit Based on the Minor Permit Revision

In its December 4 objection letter, EPA conceded that what was in front of it was FHR's minor permit revision to incorporate the MSS special conditions into the company's existing Title V Permit. ("We [EPA] received the proposed minor revision of the Federal Operating Permit (FOP) for the Flint Hills Resources East Refinery . . . ."). EPA nonetheless went on to formulate several broad-based objections to that permit that had nothing to do with the proposed minor revision. This is unlawful.

EPA has itself acknowledged that only the provisions being revised are open for review in a minor permit revision. In the preamble to the Part 70 rule proposal, EPA stated:

> Before a permit modification can be issued, the proposed changes must be reviewed by the permit authority and submitted to the public and EPA for comment in accordance with the procedures proposed in § 70.8. The EPA stresses that only the subject material associated with, or affected by, the modification need be exposed to review and comment.[47]

As a policy matter, this is the appropriate result because companies need to be able to rely on the finality of terms in their Title V Permits. If EPA could "shoehorn" whole scale revisions to Title V Permit terms in response to minor permit revisions (absent EPA going through the procedures described above), companies would never be able to conduct their business because they could never be certain that longstanding permit terms could not be arbitrarily challenged by EPA. EPA made this precise point in introducing its approach to minor permit revisions to state-issued Title V Permits in the preamble to the Part 70 rule:

> The EPA's final regulations governing permit revisions balance several, sometimes conflicting, goals of the permit program. First, as explained above, the procedures for revising a permit should provide appropriate opportunities for the permitted source, permitting authority, EPA, affected States, and, where appropriate, the public to determine that the permit faithfully applies the Act's

[47] 56 Fed. Reg. 21,712, 21,748 (May 10, 1991).

> requirements. Second, any revision process must be tailored so that the procedural burdens on the permitted facility and permitting authority are reasonable in relation to the significance and complexity of the change being proposed in the permit. Third, the process must provide permittees with a reasonable level of certainty and ability to plan for change at the facility.
>
> . . . EPA has provided the permitting authority, affected States, and EPA an opportunity to review the proposed revision. . . .
>
> [I]t is clear to EPA that industry's primary concern is that quickly changing business conditions require changes in operation on little or no notice. This could not be accommodated by a process of indeterminate length that could delay any decision on even the most routine or noncontroversial changes, despite the permittee's good faith efforts to pursue the revision process. Industry comments do not dispute the fundamental obligation that any permit revision must comply with the applicable requirements, but maintain that the process should not unreasonably delay a decision to allow a facility to comply with the Act under revised permit terms. The minor permit modification procedures are designed to address these concerns within the framework of title V.[48]

Accordingly, EPA may not revoke Flint Hills' Title V Permit and Texas' authority to issue that permit through its response to a minor permit revision under 40 C.F.R. § 70.8(c)(4).

C. If EPA Had Addressed the Minor Permit Revision Incorporating the MSS Special Conditions, It Would Have Approved It

Had EPA properly limited the scope of its review to the requested minor revision incorporating an amendment to the MSS special condition in the Flexible Permit, the Agency should and would have approved the revised permit as fully consistent with EPA policy. EPA has explicitly acknowledged that MSS special conditions from Texas preconstruction permits may be incorporated into Title V Permits as long as they meet reporting and other federal regulatory requirements.[49] Though EPA recently *proposed* to disapprove certain aspects of Texas' MSS provisions relating to use of those provisions as an affirmative defense during

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[48] 57 Fed. Reg. 32,250, 32,280-81 (July 21, 1992).

[49] *See* Letter to Richard Hyde, TCEQ, Director Air Permits Division from Jeff Robinson, EPA, Chief, Air Permits Section (May 21, 2008), p.4.

planned activities, those objections are neither final, nor relevant here.[50] The minor revision to FHR's Title V Permit sought only to incorporate a revision to the Flexible Permit that instituted a new emissions cap for certain pollutants during MSS activities. Thus, FHR's permit revision has nothing to do with the affirmative defense issue, and EPA should have approved the revision request as a matter of course. Its failure to do so, and its affirmative decision to use the proposed revision to revoke FHR's entire permit cannot be justified under EPA's own regulations.

Assuming for the sake of argument both that EPA had properly objected to incorporation of the MSS special condition in the Title V Permit, and that its objection had merit, the only action it could have then taken under 40 C.F.R. § 70.8(c)(4) was to issue or deny the permit. EPA acknowledges as much in its May 25 letter (". . . EPA is required to issue or deny a Title V Operating Permit."). But EPA did not do this. The Agency instead required FHR to submit an entirely new Part 71 Title V Permit application, with the explicit threat that if it did not do so, its existing permit would be invalid. EPA's action is essentially a denial of the MSS minor permit revision.

EPA may respond that it cannot "issue" the Part 71 permit unless it has all of the information requested in its May 25 letter, and that its only option under the regulation is to embark on a process whose ultimate result is to issue its own permit. But again, this argument misses the point. If EPA wants to revisit terms in a validly issued Title V Permit, reflecting its disagreement with Texas, it can do so as long as it complies with the provisions of 40 C.F.R. § 70.7(g), or it can begin the process to withdraw its approval of the Texas Title V program.

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[50] EPA proposes to disapprove the MSS provisions in 30 Tex. Admin. Code § 101.222(h), (i) and (j) because those provisions "provide for an affirmative defense against civil penalties for excess emissions during planned maintenance, startup, or shutdown activities," which, EPA argues, is contrary to Agency policy. 75 Fed. Reg. 26,892, 26,893 (May 13, 2010). This issue is not raised in FHR's minor permit revision.

At least one court has rejected EPA's likely claim to be initiating a process to issue or deny a Title V Permit. In *Sierra Club v. Johnson*, the facility had applied for a Title V operating permit eight years before the Illinois EPA forwarded the proposed permit to EPA. EPA issued an objection following a petition and lawsuit from Sierra Club, and the Illinois EPA did not submit a revised permit within 90 days. Several months after that, Sierra Club sued EPA for its inaction. EPA then set a letter to the facility, informing it that it would be required to submit an application to EPA for a federal Title V Permit. EPA's letter stated that after receiving the application, EPA planned to issue a draft decision on issuance or denial of a Title V Permit. EPA believed that this request was "initiating the process to issue or deny a Title V permit" for the facility, and that this sufficed to meet its requirements to "issue or deny."[51] Although EPA stated that the letter "d[id] not represent final Agency action to issue or deny a permit . . . under Title V," it nevertheless claimed that the letter satisfied EPA's duty under Title V because EPA was "conduct[ing] federal Title V permit proceedings for the facility."[52]

The court disagreed, and denied EPA's motion to dismiss. The court agreed with the Sierra Club that EPA's tactic amounted to a violation of its duty to "issue or deny," and that the court could review EPA's inaction because to "issue or deny" was a mandatory and nondiscretionary duty. It stated:

> It doesn't seem logical that Congress imposed a deadline for citizens to petition the Administrator to object to a permit, for the Administrator to respond to a petition, and for a state to correct the permit after the Administrator's objections, as required by 42 U.S.C. §§ 7661d(b)(2) and (c), but allowed the Administrator to begin again the entire lengthy process if the state misses its deadline. . . . The Administrator claims that § 7661d(b) "directs EPA to conduct a new permit process in accordance with the general requirements of Title V." The

[51] 500 F. Supp. 2d 936, 939 (E.D. Ill. 2007).
[52] *Id.*

> Administrator's interpretation unnecessarily complicates an already complex statute, makes a long process longer, and undermines attaining the goal of cleaner air.[53]

So, in our case, assuming for the sake of argument that EPA had properly objected to the minor permit revision in front of it, EPA's course of action in the May 25, 2010 letter would still be unlawful because it is not the issuance or denial of the permit.

D. EPA's Objections to the Federal Operating Permit are Without Merit

EPA's objections to the minor permit revision are, as set forth above, not appropriate. Even if they were, the Agency's four stated objections are themselves improper because they either misstate the applicable law or application of the law to the facts presented here, or because FHR has never had a chance to address these issues.

1. Objection to the Incorporation of Flexible Permit No. 6308 into the Title V Permit

In its December 4 objection letter, EPA asserted four reasons for its objection to the incorporation of FHR's flexible permit into its Title V Permit: 1) the terms and conditions of flexible permits cannot be determined to be in compliance with SIP requirements; 2) FHR failed to submit the necessary information for EPA to determine if the flexible permit complies with SIP requirements; 3) the Title V Permit lacks an additional condition requiring FHR to prepare and submit to TCEQ a written analysis of any future change/modification to ensure that minor and/or major new source review requirements under the Texas SIP have not been triggered; and 4) the terms and conditions of flexible permits must be identified as State-only terms and conditions.

First, this entire objection is premature. EPA has not formally disapproved Texas' Flexible Permit regulations. Fifteen years after Texas submitted the Flexible Permit regulations

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[53] *Id.* at 940-942.

to EPA for approval, EPA proposed to disapprove the rules as a SIP revision in September, 2009.[54] Despite its insistence that the rules do not violate CAA requirements, Texas recently issued proposed changes to them to meet EPA's objections.[55] EPA has not yet issued a final decision on SIP approval of the rules, so this objection improperly prejudges the outcome of the regulatory process.

Moreover, EPA's first stated reason for objecting to incorporation of Flexible Permit 6308 into the Title V Permit misinterprets the scope of its review of state-issued Title V Permits.[56] Texas's EPA-approved Title V Permit program requires, prior to issuance, that a Title V Permit include all applicable requirements for each emission unit.[57] An "applicable requirement" is defined to include all requirements of 30 Tex. Admin. Code Chapter 116, and any term and condition of any preconstruction permit.[58] Authorized by Chapter 116, Subchapter G, flexible permits are therefore applicable requirements as defined by the regulation, and must be included in a Title V Permit. *And they were in this case.* Indeed, the minor permit revision that FHR submitted was filed in order to roll a revision to its Flexible Permit into the Title V Permit. EPA's attempt to resolve its dispute with TCEQ over the legality of the Flexible Permit regulations through its objection to FHR's individual minor permit revision is inappropriate.

EPA's second stated reason for this objection imposes an extralegal obligation on FHR and impermissibly expands the scope of the Agency's Title V Permit review. EPA may object to

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[54] *See* 74 Fed. Reg. 48,480 (Sep. 23, 2009).
[55] TCEQ Pending Proposal 2010-007-116-PR, Flexible Permitting, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/10007116_pro.pdf.
[56] On June 3, 2010, TCEQ responded to a similar objection in the context of EPA's review of the issuance of the proposed federal operating permit for ExxonMobil Oil Corporation's Colonial Storage Facility. The arguments TCEQ set forth in its response to EPA's specific objection regarding the Texas Flexible Permit program are similar to the arguments made here. *See* Exhibit 9.
[57] 30 Tex. Admin. Code § 122.142(b).
[58] 30 Tex. Admin. Code § 122.10(2)(H).

the issuance of a permit revision under 40 C.F.R. § 70.8(c)(3)(ii) if the *permitting authority* fails to submit any information necessary to review the application. FHR has no authority and is under no obligation to submit information to EPA in this context. FHR also cannot force TCEQ to respond to EPA's objection, so EPA is imposing a new legal duty on FHR without providing a means of accomplishing it.

In addition, when TCEQ first issued FHR's initial Title V Permit, EPA had the opportunity to review that Permit, including the incorporated permits and information that show how the emissions authorized by the flexible permit meet the air permitting requirements of the federally-approved provisions of the Texas SIP. EPA filed no objections. FHR could not have anticipated that its request for a minor revision to its prior-approved Title V Permit would trigger a full scale review of the entire Title V Permit, so it cannot be held accountable for failing to submit information that falls well outside the scope of its initial request.

EPA's third stated argument is unnecessary because existing requirements under FHR's Title V Permit address the Agency's concerns. As described above, FHR's Title V Permit includes all applicable requirements for each emission unit, and applicable requirements include all requirements in 30 Tex. Admin. Code Chapter 116.[59] Divisions 5 and 6 of Subchapter B, Chapter 116 require a source to prepare and submit a written analysis of any future modification to ensure that major NSR requirements under the SIP have not been triggered, and this requirement is in FHR's Title V Permit. Minor NSR applicability requirements are also adequately specified in the permit and in TCEQ rules governing NSR permits. Accordingly, FHR is already subject to the requirements to demonstrate, upon any future change, when minor or major NSR requirements will apply.

[59] 30 Tex. Admin. Code § 122.10(2)(H).

EPA's fourth stated reason for its objection improperly defines flexible permit terms and conditions as "state-only" requirements. The EPA-approved definition of a "state-only requirement" does not include "any requirement required under the Federal Clean Air Act or under any applicable requirement."[60] Because flexible permits are "applicable requirements," as described above, they may not be included as "state-only" requirements.

2. Objection to the Incorporation by Reference of PSD Permits

In its December 4 objection letter, EPA states that it does not object to TCEQ's use of incorporation by reference ("IBR") for emissions limitations from minor NSR permits and Permits by Rule. But, EPA objects to FHR's Title V Permit "because it incorporates by reference the major New Source Review permit PSD-TX-137M2 and fails to include emission limitations and standards as necessary to assure compliance with all applicable requirements." *See* Exhibit 7, Enclosure #2. EPA's IBR objection is irrelevant here because the permit the Agency refers to – PSD-TX-137M2 – is not under review. FHR did not have any opportunity to respond to EPA's general objections to IBR in this permitting action, and as detailed above, EPA cannot raise these objections in response to the minor permit revision for which FHR applied.

3. Objections to the General Recordkeeping Provision and to Special Permit Condition No. 3

FHR was never provided an opportunity to respond to these objections, and if EPA had provided appropriate notice, FHR could have worked with the Agency on these issues. And, again, FHR disputes EPA's authority to object under 40 C.F.R. § 70.8(c)(4) to permit provisions that are not under review in the context of a minor permit revision.

[60] 30 Tex. Admin. Code § 122.10(28)

E. EPA's Approach – Setting Forth Broad Objections Not Raised by the Minor Permit Revision – Raises Serious Due Process Concerns

EPA has made it clear that FHR must submit its new Part 71 permit application and all of the detailed information requested in Enclosures 2-5 by September 15 or risk shutdown and enforcement. The problem is that FHR truly has little control over how EPA and Texas resolve EPA's broad policy concerns with the Texas Flexible Permit program and issues of incorporation by reference in Title V Permits. FHR is caught in the middle between the state and federal regulators. FHR is doing no more than complying with the law – applying for a Title V revision to roll terms from its Flexible Permit revision into a Title V Permit. Accordingly, it cannot be accused of failure to comply with the Clean Air Act.

This is akin to the situation in *United States v. AM General Corp.*[61] In that case, a county health department, pursuant to its authority under a recently approved SIP, issued a permit authorizing an automobile manufacturer to modify its facility to increase emissions of volatile organic compounds, up to the limit permitted by the SIP.[62] Four months after EPA received notice of the issuance of the permit, the Agency sent a notice of violation to AM General and the county health department charging that AM General had been operating its plant in violation of the SIP because the permit failed to require AM General to apply various emission limitation requirements.[63] The court held that because AM General modified its facility in reliance on the state permit and before EPA's determination, the facility could not be subject to an enforcement action.[64] Only after EPA issues a formal finding on the validity of a state-issued permit is a

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[61] 808 F. Supp. 1353 (N.D. Ind. 1992), *aff'd*, 34 F.3d 472 (7th Cir. 1994).
[62] *Id.* at 1359.
[63] *Id.*
[64] *See id.* at 1367.

source proscribed from relying on the state permit provisions.[65]

In our case, FHR has been operating pursuant to a validly issued Title V Permit. TCEQ's authority under the federally-approved Title V program provides the basis for FHR's justifiable reliance that its permit-related activities are shielded from the type of actions EPA is taking here. The revision to incorporate MSS special conditions from the Flexible Permit into the Title V Permit was required by the only applicable rules governing incorporation of such terms: TCEQ regulations.[66]

Moreover, despite its stated objections, EPA has yet to disapprove the Texas Flexible Permit program.[67] Therefore, it was unlawful for the Agency to reject FHR's application for a minor revision because the rejection had no basis in any enforceable regulatory provision.[68] Instead, EPA's action derived from its dislike of the Flexible Permit program, and there is no legal precedent that supports this rationale. To the contrary, courts do not expect sources to comply with regulatory requirements that do not yet exist.[69] Like the situation in *AM General Corp.*, FHR has relied on a valid, state-issued permit, and EPA is now attempting to change the rules under which FHR operates without following the procedures required by its own regulations. Furthermore, FHR cannot be responsible for EPA's failure to formally address its

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[65] *Id.*; *see also Alaska Dept. of Envtl. Conservation v. U.S. Envtl. Prot. Agency*, 540 U.S. 461, 495 (2004) (stating that EPA does not have the authority to look back on a long-past state determination and make a delayed, collateral attack on that decision through an enforcement action).

[66] 30 Tex. Admin. Code § 122.142(b).

[67] EPA has only proposed disapproval of the flexible permit program. 74 Fed. Reg. 48480, 48494 (Sep. 23, 2009).

[68] *See AM General Corp.*, 808 F. Supp. at 1367.

[69] *See id.*; *United States v. Solar Turbines, Inc.*, 732 F. Supp. 535, 539 (M.D. Pa. 1989) (holding that a source cannot be subject to EPA enforcement authority, even for an inadequate, yet validly state-issued permit, based only on EPA's *belief* that the permit was improperly granted).

issues with the Flexible Permit program, which includes multiple informal attempts at resolution by both EPA and TCEQ.[70] FHR is now caught in the middle of the dispute, and EPA has acted impermissibly by attempting to upend an entire permitting scheme by way of its role in a limited review process.

Finally, EPA's actions raise serious due process concerns, in that FHR has not had a formal opportunity to respond to either EPA's broad-based objections to the Title V Permit or to the Agency's attempt to take over the Title V permitting program in its entirety. First, under Texas and federal Title V regulations, when EPA objects to a state Title V Permit during its 45-day review period, the *state* must revise the permit in accordance with EPA's objections.[71] The regulations do not provide the *permittee* with an opportunity to address EPA's objections. That is, of course, another reason why EPA should not be allowed to raise issues for the first time in its objection letter that go beyond the permit revision proposed by the source. Then, if the state does not respond to EPA's objection within 90 days, EPA must issue or deny the permit, again without any chance for the *permittee* to be heard. If EPA's action here is allowed to stand, EPA will have issued unprecedented and broad objections unrelated to the minor permit revision that FHR requested, revoked Texas' authority to issue Title V Permits, and forced FHR to submit an

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[70] As an indication of how long and complicated the history is regarding the Texas SIP in general, TCEQ established a page on its website to chronicle the history of negotiations between itself and EPA, which includes a number of references to the flexible permit program. TCEQ, *Correspondence between EPA and TCEQ regarding Texas Air Permitting Program*, http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_9_5_07.html. TCEQ recently announced proposed changes to its flexible air permit program in an attempt to address the concerns EPA expressed in the proposal issued on September 23, 2009. TCEQ Rule Project No. 2010-007-116-PR (June 16, 2010), *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/10007116_pro.pdf.

[71] 30 Tex. Admin. Code § 122.350(d)(3); 40 C.F.R. § 70.8(c).

entirely new Part 71 Title V application to EPA, *all without any opportunity for FHR to provide any formal input*. EPA's attempt to make an end-run around its own regulations violates FHR's Constitutionally-protected due process rights,[72] and should not be permitted.

VI. CONCLUSION

For the reasons set forth above, FHR requests that the EAB declare that EPA's May 25, 2010 letter revoking FHR's state-issued Title V Permit, and requiring that FHR apply to EPA for a Part 71 Title V Permit (together with the information requests in Enclosures 2-5 of that letter), is unlawful. The Board should further issue an Order precluding EPA from objecting (or taking any other action based on a purported objection) to FHR's proposed minor permit revision of August 21, 2009.

[72] *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that once issued, the very existence of a license – or a permit in our case – may become essential to the holder, and therefore, a license is "not to be taken away without that procedural due process required by the Fourteenth Amendment").

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Date: June 24, 2010

EXHIBITS

1. April 16, 2009 Application for 12 Minor Revisions to the FHR Title V Permit
2. August 18, 2009 Letter from TCEQ to FHR Approving the April 16 Revision Application
3. June 15, 2009 Letter from TCEQ to FHR Amending Flexible Permit 6308
4. July 27, 2009 Letter from TCEQ to FHR Amending Flexible Permit 6308
5. August 21, 2009 Application for a Minor Revision to the FHR Title V Permit to Incorporate MSS Special Conditions
6. October 13, 2009 Letter from TCEQ Notifying FHR of EPA's Review of the Minor Revision to the FHR Title V Permit to Incorporate MSS Special Conditions
7. December 4, 2009 EPA Letter to TCEQ Objecting to the Proposed Minor Revision
8. May 25, 2010 EPA Letter to FHR Taking Over FHR's Title V Permit
9. June 3, 2010 TCEQ Letter to EPA Responding to EPA's Objections to the Proposed Title V Permit for ExxonMobil Oil Corporation's Colonial Storage Facility