BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR ADMINISTRATIVE ACTION

Environmental Defense Fund ("EDF") and Caddo Lake Institute ("CLI") (collectively, the "Petitioners") respectfully petition the U.S. Environmental Protection Agency ("EPA") to review and withdraw its delegation of permitting authority to the Texas Commission on Environmental Quality ("TCEQ") under the Clean Water Act ("CWA"). This includes delegations for National Pollution Discharge Elimination System ("NPDES") permitting, pretreatment permitting for publicly owned treatment works, and sludge management permitting. The Petitioners also respectfully petition EPA to: find that Texas's new source review permitting program under the Clean Air Act ("CAA") is substantially inadequate to comply with the CAA; promptly notify Texas of such inadequacies; and, require Texas to correct such inadequacies in its state implementation plan within a reasonable time period. We also hereby request that EPA promptly put in place a federal plan correcting deficiencies should Texas fail to act. *See, e.g.*, 42 U.S.C. § 7410(c)(1); 40 C.F.R. § 52.21; 40 C.F.R. Part 124. EDF and CLI request that EPA: formally respond to this petition in writing, as required by 40 C.F.R. § 123.64(b)(1); notify the State of Texas that it is not administering its approved and delegated programs under the CAA and CWA in accordance with federal law as required by 42 U.S.C. § 7410(k)(5) and 33 U.S.C. § 1342(c)(3); and schedule a public hearing regarding these violations, *id.*; 40 C.F.R. § 123.64(b)(1).

EDF and CLI petition EPA to withdraw Texas's delegated CWA authority and to require revisions to Texas's CAA new source review program in light of ongoing noncompliance with federal standards and recent amendments to Section 2003 of the Texas Government Code and Sections 5 and 7 of the Texas Water Code. These amendments prevent TCEQ from adequately implementing delegated and approved programs under the CWA and CAA. The amendments would: (1) restrict and limit the public's ability to obtain judicial review of TCEQ's permitting decisions; (2) reduce opportunities for public participation by increasing the burden on permit opponents in a contested case hearing; and (3) provide inadequate resources for implementation and enforcement of the CAA and CWA. These amendments violate the requirements for delegated authority under the CWA and for an adequate new source review[1] permitting program under the CAA.

This petition is made pursuant to Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), as well as the CAA and CWA. *See* 42 U.S.C. § 7410(k)(5); 33 U.S.C. § 1342(c)(3). The Administrator may initiate CWA withdrawal proceedings on her own initiative

[1] Petitioners use the terms "new source review" and "NSR" in this Petition to indicate both the prevention of significant deterioration ("PSD") program under CAA Title I, Part C, 42 U.S.C. §§ 7470–7492, and the nonattainment new source review program under Title I, Part D, 42 U.S.C. §§ 7501–7515.

or "in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part." 40 CFR § 123.64(b)(1).

I. Federal Requirements

State programs for implementing and enforcing the CAA and CWA must meet the requirements of federal law, including requirements for judicial review, public participation, and adequate resources for enforcement activities. The CWA requires EPA to withdraw delegated authority should state programs fail to meet these requirements. The CWA requires that "[a]ny State [NPDES] permit program . . . shall at all times be in accordance with this section and [EPA] guidelines." 33 U.S.C. § 1342(c)(2). Pursuant to Texas's delegated authority under the CWA, EPA must "review, on an annual basis, the legal authority upon which the [TCEQ's] TPDES program is based, including State statutes and regulations . . . [and] the [TCEQ's] public participation policies, practices, and procedures." EPA-TNRCC Memorandum of Agreement Concerning the National Pollutant Discharge Elimination System, 68 (May 5, 1998). If the Administrator determines that "a State is not administering a program approved under this section in accordance with the requirements of this section . . . the Administrator shall withdraw approval of such program" after notifying the State of such a determination. 33 U.S.C. § 1342(c)(3). Further, the Administrator may withdraw a delegated program if the "State's legal authority no longer meets the requirements of this part" due to, *inter alia*, "[a]ction by a State legislature." 40 C.F.R. § 123.63(a).

The CAA requires each state to adopt and submit to EPA a state implementation plan ("SIP") that includes a permit program to address emissions from new or modified sources of air pollution. 42 U.S.C. § 7410(a)(2)(C). EPA has codified minimum requirements for these state permitting programs, including public participation and notification requirements. *See* 40 C.F.R. §§ 51.160–51.164 & 51.166. If, after approving a SIP, EPA later finds that it has become "substantially inadequate" to comply with the CAA, then EPA "shall require the State to revise the plan as necessary to correct such inadequacies." *Id.* § 7410(k)(5). EPA, in turn, has a duty to put in place a federal plan when a state fails to make a required submission—in this case taking timely corrective action. 42 U.S.C. § 7410(c).

A. Judicial Review Requirements

State programs must provide opportunities for judicial review of state permitting decisions that are consistent with federal law. Under the CWA, "[a]ll states that administer . . . a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State." 40 C.F.R. § 123.30; *see also* 33 U.S.C. § 1369(b)(1). EPA regulations specify that a state program will meet this standard if "State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." 40 C.F.R. § 123.30. And "[a] State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." *Id.* Examples of overly-narrow restrictions that would not meet federal standards include "if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review." *Id.* EPA has recognized that "if

State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose." 61 Fed. Reg. 20,772, 20,775 (May 8, 1996).

Similarly, EPA has interpreted the CAA to require an opportunity for state judicial review of new source review permits. *See, e.g.*, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (proposing to disapprove of Virginia's PSD SIP due to state law standing requirements limiting judicial review); 72 Fed. Reg. 72,617, 72,619 (Dec. 21, 2007) (approving South Dakota's PSD program); 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012) (approving a portion of California's PSD program).

EPA has interpreted these requirements to mean that a state must provide for access to judicial review of permitting decisions that is at least as broad as federal court standing requirements under Article III of the United States Constitution. *See, e.g.*, *Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon*, 63 Fed. Reg. 65,783, 65,783 (Nov. 30, 1998); *see also Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) (upholding EPA disapproval of a state permit program where the state's standards for challenging a permit were more stringent than Article III requirements). Article III requires a potential litigant to show: "(1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury; and (3) likelihood that the injury would be redressed by a favorable judicial action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992). The injury alleged may "reflect aesthetic, conservational, and recreational as well as economic values." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

B. Public Participation Requirements

State programs must also provide opportunities for public participation in permit decision-making and failing to do is sufficient for EPA to withdraw delegated CWA authority or to disapprove of a State's new source review SIP. Under the CWA, State programs must "provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30. EPA may withdraw delegated authority if the State's program "fail[s] to comply with the public participation requirements of this part" including requirements for public hearings. 40 C.F.R. § 123.63(a)(2)(iii). Under the CAA, there are public participation requirements for state NSR permitting programs. *See* 42 U.S.C. § 7470(5); *id*. § 7475(a)(2); 40 C.F.R. §§ 51.160–51.164; *id*. § 51.166(q). If EPA finds that a state permitting program does not meet the CAA's public participation requirements, then EPA "shall require the State to revise the plan as necessary to correct such inadequacies." *Id*. § 7410(k)(5).

C. Enforcement and Resource Requirements

State agencies who have delegated authority must have adequate resources to enforce federal law. Under the CWA, in order for program approval, states must provide adequate funding. 40 C.F.R. § 123.22(b). In addition, one basis for withdrawing a state's CWA program is when the enforcement program fails "to seek adequate enforcement penalties." 40 C.F.R. §

123.63(a)(3)(ii). Similarly, the CAA requires that state NSR permitting programs and regulations are sufficient to assure the achievement of the health-based national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7410(a)(2)(C). Thus, the CAA recognizes that NSR permitting programs are a critical component to achieving the NAAQS. If a state dedicates inadequate resources to its NSR permitting programs, then it increases the risk that its air quality will violate the CAA's bedrock health protections. Further, the state must have adequate personnel, funding and authority under State and local law, without prohibition, to carry out the NSR permitting programs. 42 U.S.C. § 7410(a)(2)(E). This is a central requirement.

II. Texas's CWA and CAA Programs No Longer Meet Federal Requirements

EPA delegated authority to the State of Texas to implement CWA permitting programs, and recently approved the Texas SIP establishing public participation requirements for CAA new source review permits. *See* 63 Fed. Reg. 51,164 (Sept. 24, 1998) (NPDES program delegation); 79 Fed. Reg. 551 (Jan. 6, 2014) (SIP approval).

As described above, State program approval is contingent upon meeting federal requirements. Recent amendments to the Texas Code violate the federal requirements for judicial review, public participation, and resource adequacy for enforcement under the CWA and CAA. As demonstrated below, the amendments make Texas's programs deficient under the CWA and CAA, and EPA has the authority and obligation to revoke delegated CWA authority from Texas and require revisions to the Texas CAA SIP to address these deficiencies.

A. The New Requirements for "Affected Person" Status Restrict Access to Judicial Review of Permitting Decisions

Texas's recently-passed Senate Bill ("SB") 709 narrowed the universe of people who qualify as "affected persons" who may participate in contested case challenges to permit applications. TCEQ's position has historically been that one who fails to participate in the contested case hearing process at the agency, if that process is available in a particular situation, has failed to exhaust his or her administrative remedies. Exhaustion of administrative remedies is a prerequisite to judicial review in Texas state court. So, TCEQ's narrowing of the range of persons who may qualify as "affected persons" deprives some persons of judicial review rights guaranteed to them by federal law. For example, SB 709 added to Texas Water Code § 5.115—the state "affected person" statute—a new subsection a-1 that specifies the variables the TCEQ may consider when making "affected person" determinations, and that section does not include a person's recreational, aesthetic or environmental interests. The section also imports the "harm" showing a person must make to prevail on the merits to the showing a person must make to secure standing to litigate in the first instance. In its September 18, 2015 comments on TCEQ's proposed rules implementing SB 709, EPA identified many of these same concerns with the role of contested case hearings in TCEQ's public participation process.

In order to contest a TCEQ permitting decision under the CWA or the CAA's new source review program, a party may request a "contested case hearing" before the Texas State Office of Administrative Hearings. TEX. WATER CODE ANN. § 5.556; TEX. HEALTH AND SAFETY CODE ANN. § 382.056(n) (applying Water Code § 5.556 procedures to public hearing requests on CAA new source review permits). TCEQ may only grant such a request if the Commission determines

that the person requesting a contested case hearing is an "affected person." In addition, the Texas Administrative Procedure Act requires that a party exhaust all available administrative remedies before the party can seek judicial review of an agency's final decision. TEX. ADMIN. PROCEDURE ACT § 2001.171. In litigation before the Court of Appeals for the 3rd District of Texas, TCEQ has taken the position that "a person must exhaust the contested case hearing procedure before seeking judicial review of the merits of a permit" because a "court may not consider a party's challenge to the merits of a permit if those issues had not been tried first in a contested case hearing." Appellee TCEQ's Brief at 7-8, *Sierra Club v. TCEQ*, No. 03-14-00130-CV (Tex. App. 2015). SB 709 significantly narrows the criteria that TCEQ "may consider" in making "affected person" determinations and these new criteria are more restrictive than federal Article III standing requirements. *See* SB 709, *amendments to* TEX. WATER CODE ANN. § 5.115(a-1). As a result, some interested persons or associations that would be entitled to judicial review in federal court of a federally-issued air or water permit, will be foreclosed from obtaining judicial review in Texas state court if the exact same air or water permit were issued by TCEQ.

The Fourth Circuit has found that EPA's disapproval of a state permit program under the CAA was permissible where the state's standards for who could challenge a permit were more stringent than the Article III requirements for standing. *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996). In that case, Virginia law required a permit opponent to show a "pecuniary and substantial interest" in order to have standing to challenge the permit. *Id.* at 879. The Court held that Virginia's standing requirements were more restrictive than federal Article III standing requirements, which allow challenges based upon, *inter alia*, aesthetic, recreational, or environmental interests. *Id.* EPA disapproved Virginia's permit program because it limited access to judicial review of agency decisions in a manner inconsistent with federal requirements.

Similarly, the overly-restrictive requirements under SB 709 render TCEQ's permitting programs under the nation's environmental laws inadequate: they are stricter than the requirements for Article III standing and limit the public's ability to seek judicial review of permits. Specifically, SB 709 does not include recreational, aesthetic, and environmental interests amongst the criteria that TCEQ may consider in making an affected person determination. EPA has recognized that "if State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose." 61 Fed. Reg. 20,772, 20,775 (May 8, 1996). In accordance with this requirement, the Texas Administrative Code provides that TCEQ "shall" consider the "likely impact of the regulated activity on the use of the impacted natural resource by the person" who is seeking affected person status. 30 TAC §§ 55.203(5), § 55.256. However, SB 709 excludes this as a consideration when TCEQ makes an "affected person" determination, thus narrowing, beyond federal requirements, the types of injuries on which an affected person determination may be based. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("[T]he interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values.").

This narrower definition of affected person under SB 709, in turn, restricts the public's ability to obtain judicial review of a permitting decision in state court. If TCEQ denies a permit

opponent's request for a contested case hearing, then the opponent will be unable to exhaust its available administrative remedies before the administrative agency, which is a prerequisite for judicial review under Texas law. *See Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 527 (Tex. App. 2002) ("[A] trial court is generally without jurisdiction if the plaintiff fails to exhaust his administrative remedies."). Administrative exhaustion is jurisdictional and courts are "obliged" to determine whether parties have exhausted all remedies before the agency. *Entergy Corp. v. Jenkins*, No. 01-12-00470-CV, 2014 WL 5780638, at *2 (Tex. App. Nov. 6, 2014). Furthermore, courts review TCEQ's decisions to deny a hearing request under an abuse of discretion standard. *Sierra Club v. TCEQ*, 455 S.W.3d 214, 222-23 (Tex. App. 2014). Therefore, when a party who has been denied affected person status challenges that threshold determination in state court, the court will review TCEQ's determination under state law, including SB 709, for an abuse of discretion. Applying such a deferential standard of review to TCEQ's application of SB 709's narrow affected person criteria will likely require state courts to affirm any contested case denial based upon a permit opponent's aesthetic, recreational, or environmental interests because those interests are not amongst those that TCEQ "may consider" pursuant to SB 709.

Furthermore, SB 709 requires that the party seeking affected person status demonstrate that TCEQ's decision "likely impact[s]" their interests; this imposes a higher burden on a permit opponent to demonstrate causation at the standing stage than is required under federal law. Federal standing law requires only that the claimed injury be "fairly traceable" to the regulated activity for a party to have standing. Although a permit opponent must "establish causation if they are to prevail on the merits, they need not do so to establish standing." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 793 (5th Cir. 2000). In requiring the impact on the protestant's health, safety, or use of property to be "likely" rather than simply "fairly traceable," SB 709 creates a higher bar to participate in a contested case hearing than required under federal law.

Moreover, SB 709 also permits TCEQ to consider the "merits of the underlying application" in making an affected person determination. While Texas courts may "consider relevant evidence submitted by the parties when necessary to resolve jurisdiction issues," *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004), full consideration of the merits in determining affected person status is inappropriate under federal law. *See Merrimon v. Unum Life Ins. Co.*, 758 F.3d 46 (1st Cir. 2014) (for standing, "a plaintiff does not need to show that her rights have actually been abridged: such a requirement would conflate the issue of standing with the merits of the suit. Instead a plaintiff need only show that she has a colorable claim to such right." (citations omitted)); *Arreola v. Godinez*, 546 F.3d 788, 794–95 (7th Cir. 2008). SB 709's authorization for TCEQ to consider the merits of the application in making an affected person determination, rather than just the evidence relevant to the determination, is inconsistent with federal law.

In summary, SB 709 places impermissible limits on opportunities for judicial review of TCEQ permitting decisions. As a result, Texas's programs for implementing and enforcing the CAA and CWA violate federal requirements. Therefore, EPA should review and withdraw delegated CWA authority from Texas, and find that Texas' CAA new source review SIP is substantially inadequate and warrants prompt corrective action.

As further evidence that the Texas Legislature has disregarded the limits of EPA's delegation of CWA permitting authority, the Texas House passed House Bill ("HB") 912 in 2015, which would have eliminated local governments' opportunity to challenge or seek judicial review of a permit application. HB 912 was left pending in a Senate committee when the State Constitutional time limit on the legislative sessions expired. HB 912 would require TCEQ to dismiss a downstream local government's protest of a TPDES permit application when the protestant is subject to less stringent requirements than the requirements established by the permit. In directly instructing TCEQ to dismiss these protests, this bill would eliminate the ability of local governments to challenge wastewater discharge permits in order to protect the human health and environment of their communities. This is inconsistent with federal requirements for opportunities for judicial review of permitting decisions. *See, e.g.*, 33 U.S.C. § 1342(b)(2) (state programs must "provide an opportunity for public hearing before ruling on each such [permit] application.") The TCEQ raised no objection about HB 912 as being contrary to requirements for Federal delegation under the CWA, or any other objection. Thus, the practice in Texas is that standing, not only for downstream governments, but for all prospective parties, is subject to serious curtailment.

B. The Increased Burden on Permit Opponents in Contested Case Hearings Impedes Effective Public Participation in Permitting Decisions

For those permit opponents who are able to meet the restrictive "affected person" requirements and are granted a contested case hearing, SB 709 now requires that they bear the burden of proving that the permit violates state or federal requirements. Under SB 709, the act of filing a permit and the TCEQ Executive Director's preparation of a draft permit creates the presumption that the permit meets all state and federal requirements and is adequate to protect human health and the environment. *See* SB 709, *amendments to* TEX. GOV'T. CODE § 2003.047(i-1). Rather than the responsibility for demonstrating the permit is adequate falling on the permit proponent in a contested case hearing, the opponent must now present evidence that the draft permit violates a "specifically applicable state or federal requirement." *See id.* § 2003.047(i-2)(2).

By shifting the burden of proof and requiring opponents to put forth evidence demonstrating that the permit violates state or federal requirements, SB 709 limits effective public participation. While federal law does not require an opportunity for a contested case hearing, once the procedure is in place, it must comport with fundamental principles of the adversarial process and must not hinder the public's ability to participate. *See, e.g.*, 42 U.S.C. § 7470(5) (PSD permit decisions must be "made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process"); *id*. § 7475(a) (prohibiting construction unless owner/operator demonstrates requirements are met); 40 C.F.R. § 123.30. Permit opponents, who have far less access to information regarding the permit and its health and environmental impacts, will have to provide experts and acquire sufficient information—much of which is in the possession and control of the permit applicant—to demonstrate that the permit should not be issued. *See, e.g., id.* § 7475(a)(2) (public hearing on PSD permit must afford opportunity for interested persons "to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, [and] control technology requirements.") The public is one

critical source of scrutiny in evaluating permit applications, and shifting the burden of proof to opponents will inhibit the public's ability to effectively and rigorously participate in permitting decisions. This could result in weaker levels of protection in the permit, possibly below federal requirements, and less rigorous assessment by TCEQ, as aided by the public, before it makes its final permitting decisions.

The shift in burden of proof under SB 709 impermissibly hinders opponents' ability to participate in contested case hearings in violation of federal public participation requirements.

C. TCEQ and Local Government Agencies Have Insufficient Resources to Adequately Implement and Enforce Federal Programs

The amendments and recent budget cuts impair state and local agencies' ability to implement and enforce federal programs due to inadequate funding and resources. In delegating authority to Texas under the CWA, EPA relied on Texas's representations that it had sufficient resources to appropriately administer the programs. For example, as part of its delegation determination, EPA "reviewed the resources [TCEQ] will devote to the TPDES program . . . and determined that [TCEQ] has the capacity to administer the program upon assumption." 63 Fed. Reg. 51,164, 51,176 (Sept. 24, 1998). Further, EPA concluded that "the State will need to provide adequate resources for [the period more than two years after delegation] in a timely manner, and the State . . . expressed the intention to do so. " *Id.* at 51,177. Finally, EPA warned that "[i]f a state were to fail to ensure adequate resources to administer an authorized program, there could be potential grounds for program withdrawal under 40 CFR 123.62." *Id.* It is clear that EPA's delegation to Texas was dependent on sufficient funding and resources dedicated to implementing and enforcing federal programs, which is no longer the case.

Over the past ten years, Texas's spending on environmental protection has significantly decreased while new energy development in Texas has significantly increased. In the 2007 fiscal year, the Texas Commission on Environmental Quality (TCEQ) spent $596 million. By 2014, this dropped to $374 million;[2] adjusted for inflation, this is a 45% decrease in total agency expenditures.[3] This has been accompanied by an even sharper 51% decrease in general revenue legislative appropriations to TCEQ, from $494 million in 2008 to $305 million in 2015.[4] Texas is out-of-step nationally. In 2012, Texas spent $39.65 per capita on natural resources—this is the fifth-lowest of all the states and only 57% of the national average.[5]

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[2] Texas Transparency, Spending by Agency, http://www.texastransparency.org/State_Finance/Spending/Spending_by_Agency.php.

[3] Calculated using the U.S. Bureau of Labor Statistics' Consumer Price Index Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl.

[4] Conference Committee Report, Texas General Appropriations Act, 2008 and 2009 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2008-09.pdf); 2010 and 2011 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2010-11.pdf); 2012 and 2013 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2012-13.pdf); and, 2014 and 2015 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2014-15.pdf).

[5] U.S. Census 2012 Annual Survey of State Government Finances, https://www.census.gov/govs/state/historical_data_2012.html.

These budget cuts have had a tremendous impact on Texas's clean air program expenditures, which makes up the majority of total TCEQ spending. In 2005, Texas spent $342 million on air quality assessment and planning; in 2013, these expenditures were only $171 million, and TCEQ projects to only spend $119 million in 2017.[6] Spending and staffing for Texas's air permitting programs has remained steady as the number of air permits processed has briskly increased. In 2005, Texas spent $11.4 million dollars on air permitting and reviewed 5,741 permit applications.[7] In 2013, Texas spent $14.3 million dollars and reviewed 9,482 permit applications.[8] Adjusted for inflation, this marks a 42% decrease in expenditures per permit application.[9] At the same time, staffing levels have not increased, so the number of permits that must be reviewed per each air permitting staff member has doubled: from twenty-seven in 2006 to fifty-four in 2014.[10]

Furthermore, another bill the Texas Legislature passed this session, House Bill 1794 ("HB 1794"), would also limit the resources available to implement and enforce the delegated federal programs. HB 1794 caps the penalties that a local government may collect in an environmental enforcement action at $2,150,000 and limits the time period in which local governments may bring such an action. This will decrease the resources available to local agencies that have received CAA and CWA enforcement authority from TCEQ. TCEQ relies upon these local agencies to help broaden and deepen CAA and CWA enforcement capacity within Texas.

If TCEQ and local agencies do not have sufficient funding to implement and enforce the CAA and CWA, Texas would no longer be in compliance with federal law, which provides a basis for EPA to withdraw its CWA delegation and require revisions to Texas's NSR SIP.

III. Relief Requested

EDF and CLI request the following specific relief from EPA:

1. Issue a formal finding of Texas's program deficiencies under the Clean Water Act and Clean Air Act, as discussed above;

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[6] TCEQ Legislative Appropriations Request by Fiscal Year: 2008 and 2009 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_07/037_07.pdf); 2010 and 2011 (http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/037_10/037_10.pdf); 2012 and 2013 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_12.pdf); 2014 and 2015 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_14.pdf); and, 2016 and 2017 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037-16.pdf).

[7] *Id*.

[8] *Id*.

[9] *See supra* n. 2.

[10] *See supra* n. 5.

2. Find that Texas's CAA new source review SIP is substantially inadequate, promptly notify Texas of such inadequacies, and require Texas to correct such inadequacies in its state implementation plan within a reasonable time period pursuant to 42 U.S.C. § 7410(k)(5);

3. Promptly put in place a federal implementation plan for Texas's NSR permitting program if the state does not correct the inadequacies in its SIP (*see, e.g.*, 42 U.S.C. § 7410(c)(1) & 40 C.F.R. § 52.21);

4. Conduct a public hearing and issue a notice of CWA deficiency to Texas pursuant to 33 U.S.C. § 1342(c)(3); and,

5. Assume administration of Texas's water permitting programs under the CWA if Texas does not take prompt corrective action as required by that statute.

IV. Conclusion

For the foregoing reasons, EDF and CLI respectfully request that EPA grant our Petition for Administrative Action. Thank you for your time and consideration of this urgent matter.

Dated: January 11, 2016.

Respectfully submitted,

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