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Re: TCEQ Oil and Gas Permit by Rule and Standard Permit Should Include Well Emissions

Dear Commissioners:

The Texas Commission on Environmental Quality ("TCEQ") is planning to adopt a new permit by rule ("PBR") and standard permit for oil and gas sites on January 26, 2011. The TCEQ executive director has determined that "updated regulatory oversight would be beneficial to ensure protectiveness for air contaminants such as benzene, hydrogen sulfide, and other air contaminants associated with oil and gas production sites." TCEQ Interoffice Memorandum to the Commissioners (Jan. 7, 2011). We are supportive of TCEQ's efforts to secure a more rigorous and comprehensive set of rules to protect public health and the environment from the deleterious air contaminants emitted from oil and gas sites. We appreciate the addition of businesses to the definition of receptors afforded protection in the rule since the last version of the adoption draft.

However, the current adoption proposal still falls short by excluding emissions from oil and natural gas wells. Specifically, the PBR and standard permit fail to include emissions from oil and gas wells in the initial protectiveness review and subsequent authorizations or permits. This omission results in an inaccurate analysis of an oil and gas site's potential to adversely impact human health and the environment. It is also a fundamental failure of the TCEQ's to fulfill its mission to safeguard the state's air quality.

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We noted the omission of well emissions in our initial comments on the proposed rules. Since that time we have been in communication with staff members at TCEQ, as well as individual commissioners. To date, those communications, as well as additional research we have done in response to those communications, have not provided a satisfactory explanation for this significant gap in the rules. This letter provides additional information to supplement our initial comments, based on these additional communications and research which we hope the Commission will consider prior to adopting the final rules. Alternatively, in the event that the Commission decides to adopt the rules in their current form, we are submitting this information to members of the legislature so that they may consider legislation clarifying or providing clear, explicit authority and direction for TCEQ to control air emissions from oil and gas wells.

TCEQ has provided two separate explanations to support its assertion that it does not have jurisdiction to include emissions from oil and gas wells in the oil and gas PBR or standard permit. First, in the proposed PBR rule, TCEQ states that because mines are excluded from the definition of facility in the Texas Clean Air Act ("TCAA"), and because mining is the same thing as drilling, it cannot regulate emissions from drilling activities. Specifically, TCEQ states:

> State law prohibits the consideration of mines and quarries from the definition of facility. The EPA, as well as the commission, consider drilling of petroleum wells to be equivalent to mining, and therefore, those operations are not applicable to permitting. In addition, while THC, 382.003(6) excludes well tests from the definition of facility, the statute continues to narrow this exception in THSC, 382.003(13) and limits the well testing time to 72 hours. Proposed Permits By Rule, Oil and Gas, 35 TexReg 6941 (August 13, 2010).

Second, in response to our comments noting the absence of natural gas wells from the facilities covered by the proposed PBR, TCEQ asserts that it lacks authority to regulate activities associated with drilling or that occur in a well. Specifically, TCEQ explained:

> It is not the commission's intent to have this PBR authorize emissions from any activity excluded under the TCA, specifically mining (referred to here as drilling) and limited duration well tests. The types of activities described by the commenter (completions, re-completions, workovers) all involve actions taken by operators in the well or down hole and are considered part of the drilling process, and therefore beyond the jurisdiction of the permits program. TCEQ, Chapter 106-Permits by Rule, Rule Project No. 2010-018-106-PR, p. 278.

Importantly, neither explanation provides adequate justification for the exclusion of emissions from well activities in the protectiveness review or authorization pursuant to the proposed oil and gas PBR (or standard permit).

A. There is no Support for the Claimed Mining Equals Drilling Equivalency

At the most fundamental level TCEQ has not provided any support for its assertion that it, or the U.S. EPA, consider mining to be equivalent to drilling. A direct, clear statement that the drilling of petroleum wells, or natural gas wells, is equivalent to mining nowhere appears in the Texas statutes or administrative code. Similarly, Texas' statutory framework and text is completely void of any indirect support that could give rise to an interpretation that supports TCEQ's assertion. First, the TX. Nat. Res. Code contains wholly separate chapters and subtitles

dedicated to fluid minerals, on the one hand, and hard-rock and other non-fluid minerals, on the other. Compare Title 2, Chapter 52 ("Oil and Gas") and Title 3 ("Oil and Gas") with Title 2, Ch. 53 ("Minerals") and Title 4 ("Mines and Mining"). In addition, Section 52.012 of the TX. Nat. Res. Code specifically states "[O]il and gas shall only be leased together and shall be leased separately from other minerals."

Second, oil and gas is not included in the definitions of minerals in the TX. Nat. Res. Code. Rather, TX defines "minerals" as "coal, lignite, sulphur, salt and potash", but not oil or natural gas. TX Nat. Res. Code, Section 53.161; See also Nat. Res. Code, Section 132.002 (definition of minerals in the Interstate Mining Compact).

Third, the relevant TX statutes routinely use the term "drilling" to refer to activities involving oil and gas wells and never once use the term "mining." See See TX Nat. Res. Code, § 85.046(6) (physical waste resulting from drilling a well or wells…can constitute waste); § 85.046(9) (escape of gas in excess of the amount necessary in the efficient drilling or operation of the well can constitute waste); § 85.057 (discussing the Railroad Commission's authority to limit the drilling of wells to explore for oil or gas in new areas); § 85.202(1) (discussing that one of the purposes of the Railroad Commission's rules is to prevent waste "of oil and gas in drilling and producing operations.."); § 85.2021 (regarding "drilling permit fee"); § 91.752 (stating that the chapter applies to the "drilling of a new oil or gas well") and references to drilling wells but not to mining wells in Nat. Res. Code, Chapters 86 ("Regulation of Oil and Gas") and 89 ("Abandoned wells"). (emphasis added).

In sum, there is no direct or indirect support in the TX statutes for the proposition that drilling equals mining. Indeed, according to a member of TCEQ staff, the "first time the drilling equals mining equivalency appeared in writing was in the oil and gas PBR proposed rules."

We are not aware of any EPA rule or guidance that refers to the mining of petroleum wells, or that states or implies that mining is equivalent to "drilling" as concerns petroleum or natural gas wells. Nor does any such equivalency appear in the federal Clean Air Act. Indeed, to the contrary EPA routinely uses the term drilling in its oil and gas regulations. See e.g. Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems; Final Rule, 75 Fed. Reg. 74458, 74461, (Nov. 30, 2010) (including well drilling and completion in the onshore production category); 74471 (recognizing that many "well-drilling activities" are conducted by third-party contractors and noting the need for owners and operators subject to the rule to coordinate with "drilling companies"); 74478 (discussing use of screening tool to enter basic activity data such as "drilling activity"); 74488 (referring to "drilled wells"). Notably, at this time EPA does not regulate air emissions from oil and gas wells so there are limited applicable rules where one might expect the agency to refer to the drilling (or mining) of oil and gas wells. However, EPA has indicated that it may issue rules covering well emissions in the near future as part of a revision of certain federal standards.

Even assuming that there is support for the assertion that the drilling of petroleum wells equals mining, TCEQ's explanation for its failure to include wells in the scope of the PBR and standard permit strains logic and reasonableness. First, it does not follow that just because the TCAA exempts mines from the definition of a facility, that all activities associated with mining (as well as any emissions therefrom) are also outside the agency's regulatory authority. To state that the noun, mine, is not a facility is not the same thing as stating that any activity associated with mining, the verb, is also exempt. Had the legislature meant to exempt from TCEQ's jurisdiction

or permitting authority all activities associated with mining surely they would have done so directly.

Indeed, a plain reading of the facility definition in the TX Clean Air Act indicates that the legislature did not intend to exempt all types of wells from TCEQ's permitting authority, but rather only certain wells. Specifically, the legislature carved out test wells lasting less than 72 hours. TX. Health and Safety Code, Section 382.002(6). TCEQ's response to comments acknowledges that test wells lasting more than 72 hours are facilities. TCEQ, Chapter 106-Permits by Rule, Rule Project No. 2010-018-106-PR, p. 277. Had the legislature intended to exclude all types of wells—test wells and others—there would have been no need for the specific exclusion of test wells lasting less than 72 hours. Accordingly, any well other than a test well lasting less than 72 hours are facilities and within the permitting jurisdiction of TCEQ.

Lastly, emissions from re-completions, workovers and well unloading occur during the production, not drilling phase. See, e.g. 75 Fed. Reg. at 74488 (explaining that well workovers means the process(es) of performing one or more of a variety of remedial operations on producing petroleum and natural gas wells to increase production); see also EPA Natural Gas Star PRO Fact Sheet regarding Gas Well Unloading Time Optimization(describing well unloading as occurring in producing wells), http://www.epa.gov/gasstar/documents/unloading_time508.pdf. One can also consider the initial completions as separate from the drilling process as completions occur after a well has been drilled and tested. See 75 Fed. Reg. at 74611 (referring separately to drilling and completion equipment and workover equipment); EPA Office of Compliance Sector Notebook Project, Profile of the Oil and Gas Extraction Industry (Oct. 2000) (discussing drilling activities at pps. 17-26 separately from well completion activities at pps. 26-28 and referring separately to air emissions produced from "drilling operations" and the "well completion process" on p. 38). Thus, even assuming TCEQ has no jurisdiction over emissions from "drilling activities", this jurisdictional prohibition does not support the exclusion of air emissions associated with well re-completions, workovers, or unloading, or arguably completions, depending on how one defines the drilling process since these occur after the well has been drilled and tested.

B. TCEQ Has Jurisdiction Over Emissions of Air Pollutants Emitted From Oil and Gas Wells

As noted above, TCEQ is the primary agency in the state charged with protecting air quality. TX. Water Code, Section 5.102 ("Commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment"); Section 5.120 ("The commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state."). The legislature specifically vested TCEQ with the charge "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants." TX. Health and Safety Code, section 382.002; TX Water Code, Section 5.013(9) (TCEQ has authority over administering the TCAA).

As we previously stated in our comments, oil and gas wells can be significant sources of air contaminants, including benzene, a known carcinogenic and other VOCs that contribute to ozone pollution. TCEQ is violating its mandate to safeguard the state's air quality and provide

for maximum protection of air quality by failing to consider well emissions in the scope of the PBR and standard permits.

We understand that the Railroad Commission has jurisdiction over "oil and gas wells in Texas" and "persons owning or engaged in drilling or operating oil or gas wells in Texas." TX Natural Resources Code, Section 81.051 (4). However, this grant of authority in no way extends to the emissions of air pollutants generated by activities that occur in a well or as part of the drilling process. Control of the air pollution emitted from a well or a drilling activity is distinct, and can be regulated separately from, other activities that occur down-hole and may fall under the jurisdiction of the Railroad Commission. For example, the federal EPA, in conjunction with the states, has authority to prevent and control air pollution. 42 U.S.C. § 7401. This authority extends to oil and gas activities, including wells. However, other activities related to oil and gas drilling, such as leasing and permits, falls within the jurisdiction of the Department of Interior and Agriculture. See, e.g., 30 U.S.C. 181 et seq. (Mineral Leasing Act of 1920, as amended by the Federal Oil and Gas Leasing Reform Act of 1987; 43 C.F.R. pt. 3100 et seq.). No one suggests that the EPA cannot regulate air emissions from drilling activities because the Bureau of Land Management has jurisdiction over drilling permits and stipulations related to drilling such as time and place restrictions. Abatement of air pollution clearly is distinguishable from oversight over the conduct of activites that involve drilling. The same is true in Texas. Accordingly, there is no merit to TCEQ's failure to consider air contaminants emitted from oil and gas wells in the protectiveness review, PBR or standard permit.

C. Conclusion

We respectfully urge the commission to consider this additional information and incorporate emissions from well activities such as completions, re-completions, and workovers into the rule. Alternatively, should TCEQ adopt the PRB and standard permit in their current forms, we would respectfully request that the Commission provide a clear justification, including any concerns over statutory authority. In this event, I hope we can work together with the legislature to clarify that TCEQ's jurisdiction does in fact encompass air emissions from these significant sources of pollution.

Sincerely,

/s/

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