

**TEXAS FLEXIBLE PERMITS: DO THEY ALLOW
TEXAS REFINERIES AN UNFAIR ADVANTAGE OR
AN ECONOMICAL WAY TO MEET EMISSION
REQUIREMENTS?**

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I. INTRODUCTION

Due to incompatibilities between the Federal Clean Air Act (CAA) and the Texas Flexible Permits, the Environmental Protection Agency (EPA) has recently rejected the Texas Commission on Environmental Quality (TCEQ) issued Texas Flexible Permits.¹ The rejection has caused many Texas refineries to operate under permits that violate federal law.² Also, the EPA’s decision has sparked controversy over federal and states’ rights; whether the federal environmental agency, the EPA, or the Texas state environmental agency, the TCEQ, has the power to regulate the Texas refineries’ permits.³ The EPA’s disapproval of the Texas Flexible Permits has also raised debate over which system most effectively improves the environment without substantial effect on the economy.⁴ The implications of the EPA’s decision and the federal court’s response to the EPA’s decision will affect the many Texas refineries who are holders of flexible permits and the economy of Texas, and will determine the scope of the TCEQ’s authority.⁵ On a broader scale, the federal court’s ruling on the EPA’s decision will affect state agency power in general.⁶

Part II will begin with a discussion of the CAA and the Texas Flexible Permitting System.⁷ Part IV and V will address the EPA’s formal disapproval of the Texas Flexible Permitting System in light of both the EPA’s position and the state’s position.⁸ Part VI will discuss the EPA’s voluntary audit program for businesses currently holding a Texas Flexible Permit.⁹ Part VI will also examine the audit process in action as the state’s first flexible permit holder must agree to transform its permit to be in compliance with the federal

1. See 40 C.F.R. § 52.02 (2011) (outlining the EPA parameters for disapproving state plans).
 2. See discussion *infra* Part IV.
 3. See discussion *infra* Part V.
 4. See discussion *infra* Part VII.
 5. See discussion *infra* Part VII.
 6. See discussion *infra* Part VII.
 7. See discussion *infra* Part II.
 8. See discussion *infra* Parts IV, V.
 9. See discussion *infra* Part VI.

standards, and additionally, a permit holder's alternative option of directly negotiating with the EPA.¹⁰ Additionally, Part VI will examine the TCEQ's role in the new permitting system.¹¹ This comment will analyze the uncertain effects of the EPA's decision from predictions of those in favor of the EPA and those in favor of the Texas Flexible Permits.¹² Also, This comment includes a discussion of the current and presently evolving battle between the EPA and the TCEQ.¹³ The final section will discuss recommendations for how to handle the uncertainty created by the opposing views of Texas and the EPA.¹⁴

II. THE CLEAN AIR ACT

A. *The History of the Clean Air Act*

Due to increasing environmental and human health concerns, the United States established the Air Pollution Control Act in 1955, which eventually led to the Clean Air Act of 1963 and the Air Quality Control Act of 1967.¹⁵ The main goals of the CAA are to regulate emissions in the United States and to improve the overall air quality.¹⁶ Moreover, the CAA defines the "EPA's responsibilities for protecting and improving the nation's air quality and the stratospheric ozone layer."¹⁷ The CAA amendments in 1970 gave the act more substance and grit and simultaneously created the EPA to execute the many requirements under the CAA.¹⁸ The 1970 amendments to the act and the establishment of the EPA increased the federal government's environmental enforcement authority.¹⁹ The 1970 amendments to the act also established the four major components of the CAA, which are (1) to "put into place National Ambient Air Quality Standards" (NAAQS) developed by the EPA; (2) to create for the EPA "New Source Performance Standards to determine how much pollution should be allowed by different industries in different regions"; (3) to specify standards for auto emissions; and (4) to promote states to establish plans to satisfy the federal standards through state implementation plans.²⁰

10. See discussion *infra* Parts VI.A–B.

11. See discussion *infra* Part VI.D.

12. See discussion *infra* Part VII.

13. See discussion *infra* Part VIII.

14. See discussion *infra* Part IX.

15. See *History of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/caa/caa_history.html#caa70 (last updated Feb. 17, 2012).

16. See *id.*

17. *Clean Air Act*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/air/caa/> (last updated Feb. 17, 2012).

18. *Clean Air Act*, ORACLE THINKQUEST EDUC. FOUND., http://library.thinkquest.org/26026/Politics/clean_air_act.html (last visited June 20, 2012) [hereinafter *Act*].

19. *History of the Clean Air Act*, *supra* note 15.

20. *Act*, *supra* note 18.

In 1977, amendments increased the permit review requirements for polluters to “ensure attainment and maintenance of the NAAQS.”²¹ In 1990, amendments to the CAA further expanded the EPA’s enforcement authority and established the current permit program requirements.²²

B. The Clean Air Act as It Relates to the Texas Flexible Permits

Pursuant to the CAA, every facility in the nation must comply with the NAAQS.²³ To ensure that facilities stay within these national emission requirements, the EPA established the New Source Review (NSR) program, which requires facilities to obtain an emissions permit.²⁴

The Air Enforcement Division (AED, Office of Regulatory Enforcement), is responsible for implementing the U.S. EPA's judicial and administrative enforcement activities under the NSR program. The U.S. EPA has broad authority under the Clean Air Act to pursue alleged violators of the NSR permitting requirements. The Act grants EPA expansive and sweeping authority to: request information from individuals and companies, inspect facilities, conduct investigations, and pursue judicial and administrative enforcement actions for injunctive relief and civil penalties.²⁵

Section 7401 of the CAA states that it “is the primary responsibility of States and local governments” to prevent air pollution.²⁶ In 1990, the CAA amendments required states “to establish programs to issue, review and renew permits to operate for their most important or ‘major’ sources of air pollution” and to ensure that the facilities stayed within the NAAQS.²⁷ Pursuant to this provision, the TCEQ was required to “develop a state implementation plan to meet federal requirements” on emissions and to ultimately reduce pollution and protect public health.²⁸ Permits issued separately by the states must include all CAA requirements, but do not impose any new requirements.²⁹ While states have flexibility in carrying out the act’s requirements, states still must adhere to the federal standards. The EPA has the authority to oversee state and local permit programs “to ensure national consistency and adherence

21. *History of the Clean Air Act*, *supra* note 15.

22. *Id.*

23. *CAA National Enforcement Programs*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/civil/caa/caaenfprog.html> - Title V (last updated Nov. 8, 2011).

24. *Id.*

25. *Id.*

26. 42 U.S.C. § 7401(a)(3) (1997).

27. *CAA National Enforcement Programs*, *supra* note 23.

28. Naureen S. Malik, *EPA Rejects Texas Industrial Air-Quality Permits*, AUTOMATED TRADER (June 30, 2010, 10:54 PM), <http://www.automatedtrader.net/real-time-dow-jones/2665/update-epa-rejects-texas-industrial-air-quality-permits>.

29. *CAA National Enforcement Programs*, *supra* note 23.

to Clean Air Act legal principles.”³⁰ The “national consistency between states” called for by the legislature is necessary to “ensur[e] a level playing field among industry.”³¹

III. SOURCES OF EMISSION CONCERNS

A. Emission Intensive Industries and the Inevitable Pollutants That Result

Oil refineries, power plants, and manufacturing plants all emit pollution into the air during the various processes of converting a product into its intended form. These various refineries and plants are one of the main sources of air pollution in the United States and are, therefore, the target of the EPA’s efforts to improve air quality.³² While pollutants are mainly an unavoidable result of producing these important commodities, there are many negative implications of extensive emissions, specifically related to human health.³³ Air pollutants can be especially dangerous to children, the elderly, and those suffering from heart and respiratory illnesses.³⁴ In addition to respiratory problems, pollutants deplete the ozone layer, which can result in skin cancer and eye problems.³⁵ Air pollutants are also harmful to the environment and, subsequently, the economy due to acid rain destroying crops, fisheries, and other industries.³⁶ Obviously, controlling pollution is necessary to protect the public’s health and well-being—the placement and extent of this control, however, is unclear.

B. The Economic Importance of Refineries and Plants in Texas

The Texas economy has strong ties to energy development and manufacturing, both of which are emission intensive industries.³⁷ Texas is the “largest producer of oil and gas and refining operations” in the United States, “accounting for more than one-fourth of [the nation’s] refining capacity.”³⁸ In Texas, there are approximately “130 power plants, refineries and other

30. *Id.*

31. *Texas Air Permitting Program*, U.S. EPA (September 23, 2009), <http://www.epa.gov/region6/6xa/sippressrelease.html>.

32. *See Taking Toxics Out of the Air*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/air/toxicair/takingtoxics/p1.html> (last updated Aug. 19, 2011).

33. *See Why Should You Be Concerned About Air Pollution? U.S. ENVTL. PROT. AGENCY*, <http://www.epa.gov/air/peg/concern.html> (last updated Mar. 6, 2012).

34. *See id.*

35. *See id.*

36. *See id.*

37. *Malik*, *supra* note 28.

38. Kay Bailey Hutchison, *EPA Regulations on Refineries Will Kill Jobs in Texas*, CHRON.COM (Jan. 8, 2011, 6:30 AM) <http://www.chron.com/disp/story.mpl/editorial/outlook/7371466.html>.

facilities”]; mostly located along the east coast.³⁹ Additionally, “[t]he energy sector of Texas employs nearly 400,000 people in high-paying jobs.”⁴⁰ Some of the nation’s largest oil refineries are holders of Texas Flexible Permits, including Exxon Mobile Corporation, British Petroleum, and Valero Energy Corporation.⁴¹

IV. TEXAS FLEXIBLE PERMIT SYSTEM

A. The Texas Commission on Environmental Quality Developed the Flexible Permit System to Control Air Pollution and to Entice Unregulated Facilities

The TCEQ established the Texas Flexible Permit System as an incentive for “grandfathered” facilities to enter into the Texas environmental regulation program.⁴² Grandfathered facilities are those facilities established before any permitting system existed and are, therefore, exempt from federal and state permitting requirements.⁴³ In return for the facilities entering into the Texas permit system, the facilities received a permit that allowed emission flexibility.⁴⁴ Instead of specific emission limits on each type of pollutant and each portion of a refinery, the flexible permits “set an overall cap and let companies decide how to get there.”⁴⁵ A company with a flexible permit may structure the flexible permit to best suit the needs of the company.⁴⁶

Some basic rules of flexible permits are: [f]acilities are limited to one flexible permit per plant site or account; however, the applicant can choose which facilities to include. The applicant can choose to establish caps or individual emission limitations for certain pollutants with not all pollutants emitted from the source(s) included in the flexible permit. The final permit may contain an overall emission cap for all sources per pollutant, combination of multiple emission caps that cover groups of facilities, and/or individual emission limitations for individual facilities. The flexible permit is not restricted to

39. Gabriel Nelson, *AIR POLLUTION: EPA Issues Final Plan for Auditing Rejected Texas Permits*, E&E PUBL’G (Sep. 21, 2010) <http://www.eenews.net/public/Greenwire/print/2010/09/21/1>; Asher Price, *Texas Attorney General Sues EPA to Overturn Air Permit Program Disapproval*, STATESMAN.COM (July 26, 2010, 9:26 PM) <http://www.statesman.com/news/texas-politics/texas-attorney-general-sues-epa-to-overturn-air-824773.html> (last updated July 29, 2010, 11:35 AM).

40. *Hutchison*, *supra* note 38.

41. *Malik*, *supra* note 28.

42. *State of Texas Challenges EPA’s Flex Permit Ruling*, ATT’Y GEN. OF TEX. (July 26, 2010), <https://www.oag.state.tx.us/oagNews/release.php?id=3423>.

43. *Id.*

44. *Id.*

45. *Nelson*, *supra* note 39; see 30 TEX. ADMIN. CODE § 116.716 (2011) (Tex. Comm’n on Env’tl. Quality, Emission Caps and Individual Emission Limitations).

46. *Flexible Permits*, TEX. COMM’N ON ENVTL. QUALITY, http://www.tceq.state.tx.us/permitting/air/newsourcereview/flexible_permit.html (last modified Nov. 30, 2009).

grandfathered sources. The applicant may choose to combine grandfathered, existing permitted, and newer facilities to maximize flexibility at the site.⁴⁷

Thus, one portion of a facility could pollute more than another portion of that facility as long as the overall emissions from the facility do not violate federal clean air standards.

B. The Immediate Results of the Texas Flexible Permits

The TCEQ presented the Texas Flexible Permit Program to the EPA in 1994, and Texas, through the TCEQ, has since issued the flexible permits to Texas companies.⁴⁸ When TCEQ established the Flexible Permit System, a large number of grandfathered facilities existed in Texas.⁴⁹ Due to the flexible permits, no grandfathered facilities exist in Texas any longer.⁵⁰ In contrast, many other states still contain many grandfathered facilities—facilities that are not subject to federal or state emission requirements.⁵¹ Ninety-three percent of the refineries in Texas operate under a Texas Flexible Permit.⁵²

V. THE EPA FORMALLY DISAPPROVED OF THE TEXAS FLEXIBLE PERMITS

A. The Environmental Protection Agency Determined That the Texas Flexible Permits Did Not Comply With the Clean Air Act

The federal CAA required the EPA to make a decision regarding the Texas Flexible Permit System within one year of its establishment.⁵³ However, the EPA waited until July 2010 to formally disapprove the flexible permits—sixteen years after the Texas program began.⁵⁴ In 2009, the EPA sent out notices to Texas Flexible Permit holders to inform the companies currently not in compliance with federal standards that they must comply with the federal standards in addition to the standards required by the Texas Flexible Permits.⁵⁵ The EPA stated that it wanted to enable the states to handle their own permitting systems under the Clean Air Act, but that Texas “skipped too many mandates of the federal law to remain in force.”⁵⁶ However, the EPA assured

47. *Id.*

48. Brief for Petitioner at 1–2, *Texas v. Entvl. Prot. Agency* (No. 10-60961), 2011 WL 710598.

49. *State of Texas Challenges EPA’s Flex Permit Ruling*, *supra* note 42.

50. *Id.*

51. *Id.*

52. Rosebud Manning, *Texas Challenges EPA Ruling*, *TEX. J. OF OIL, GAS, AND ENERGY L.* (Oct. 24, 2010), <http://tjogel.org/blog/?p=47=more47>.

53. 42 U.S.C. § 7401(b) (1997).

54. 40 C.F.R. § 52.2273 (2011).

55. *Id.* § 52.02.

56. Randy Lee Loftis, *EPA Offers Texas Firms an Out from Permit Fight*, *THE DALL. MORNING NEWS* (Sept. 20, 2010, 1:39 PM) <http://energyandenvironmentblog.dallasnews.com/archives/2010/09/epa-offers-texas-firms-an-out.html>.

that the “TCEQ will remain the point agency handling the new permits under the federal Clean Air Act.”⁵⁷

Specifically, the EPA determined that Texas Flexible Permits do not meet the NSR requirements.⁵⁸ The EPA’s concern is that the flexible permits allow facilities to emit more harmful pollution than would be allowed under federal law.⁵⁹ Additionally, the EPA argues that the flexible permits “stifle public comment [and] make it hard for EPA officials to verify emissions reductions”⁶⁰ According to the EPA, the state’s “program provided inadequate opportunities for the public to review permit decisions in Texas, as compared with public participation opportunities provided by other states.”⁶¹

The air quality director of the Sierra Club’s Texas chapter “described the flexible permits as a ‘sweetheart deal for industry’ because they allowed companies to operate older equipment that was highly polluting without upgrading to cleaner technology.”⁶² Proponents for stricter permit requirements justify their position based on the reasoning that, because refinery sites can cover hundreds of acres, stricter monitoring requirements allow for the EPA to more easily determine if residents living next to these refineries face exposure to high concentrations of toxins.⁶³

B. Texas Defends the Flexible Permits, Claiming They Improve the Air Quality and Benefit the Economy

In light of the EPA’s decision, what seemed to be an environmental issue quickly progressed into a heated battle over states’ rights and has put many Texas industries in the middle of political crossfire.⁶⁴ The TCEQ, the Texas Attorney General, and Texas Governor Rick Perry formally opposed the EPA’s disapproval of the Texas Flexible Permits, asserting that the EPA’s challenge to the Texas Flexible Permits is “an effort to assert federal control and push the state aside.”⁶⁵ United States Senator John Cornyn said that the EPA’s rejection of the Texas Flexible Permits

57. R.G. Ratcliffe, *EPA Air Permit Rejections Put Jobs at Risk, Perry Says*, CHRON.COM (June 30, 2010, 5:30AM), <http://www.chron.com/default/article/EPA-air-permit-rejections-put-jobs-at-risk-Perry-1611168.php>.

58. *Texas v. Entvl. Prot. Agency*, No. 10-60961, 2011 WL 71598 at *2 (5th Cir. Feb. 24, 2011).

59. *Nelson*, *supra* note 39.

60. *Id.*

61. *Texas Air Permitting Program*, *supra* note 31.

62. *Ratcliffe*, *supra* note 57.

63. *Malik*, *supra* note 28.

64. Ramit Plushnick-Masti, *EPA: Texas Refinery to Get Permits Amid State Flap*, THE BOS. GLOBE (Oct. 22, 2010), http://www.boston.com/business/articles/2010/10/22/apnewsbreak_epa_grants_permits_for_texas_refinery.

65. *Nelson*, *supra* note 39.

... “shows reckless disregard for Texas’ strong record of reduced emissions and improved air quality, while creating economic uncertainty for Texas industries and the workers they employ.”

“The Obama administration keeps digging themselves into a deeper hole when it comes to this economic recession. Instead of working with Texas to improve an existing successful program, they are burying the Texas economy with this EPA overreach. . . .”⁶⁶

Texas has challenged the EPA’s rejection of the program in federal court, claiming that the program yields the same emissions reductions and helps regulators and businesses meet NAAQS at a lower cost.⁶⁷

In a letter to President Obama, Governor Perry defended the flexible permits arguing that the Texas requirements are more effective than federal requirements and pointed out that as national “emissions fell by approximately 27 percent between 2000 and 2008, Texas . . . emissions plummeted 46 percent.”⁶⁸ Governor Perry argued that by disapproving of the Texas Flexible Permits, the “EPA took unprecedented steps to quash Texas’ federally delegated, successful Title V permitting program and replace[d] it with a less effective Washington-based, bureaucratic-led, command and control mandate.”⁶⁹ In a statement Governor Perry stated “[t]he EPA’s irresponsible and heavy-handed action not only undermines Texas’ successful clean air programs, but threatens thousands of Texas jobs, families, businesses and communities throughout our state . . . [and it] will also likely curtail energy supplies and increase gasoline prices nationwide.”⁷⁰

Attorney General Greg Abbott recently filed suit in a federal court in Washington D.C. against the EPA on behalf of the TCEQ over concern that the EPA, by disapproving of the Texas Flexible Permits, negatively affected the fragile economy because fear of “new and pending regulations have kept businesses sitting on their cash instead of investing in new jobs and equipment.”⁷¹ Additionally, the strain of the new requirements the EPA will impose on Texas enforcement agencies, Texas employers, and Texas workers will affect the economy.⁷² The Attorney General also filed a petition for review of the EPA’s formal disapproval in the Federal Fifth Circuit Court of Appeals in New Orleans in an “effort to defend the State’s legal rights and challenge improper overreach by the federal government,” based on TCEQ’s

66. Dave Montgomery, *EPA Rejects Texas’ Flexible Permit System*, ISURF GEORGETOWN (June 30, 2010), <http://isurfgeorgetown.com/news/texas/5006-epa-rejects-texas-flexible-permit-system.html>.

67. *Texas v. Entvl. Prot. Agency*, No. 10-60961, 2011 WL 710598 at *3 (5th Cir. Feb. 24, 2011).

68. Letter from Rick Perry, Governor of Texas, to Barack Obama, President of the United States (May 28, 2010), available at <http://governor.state.tx.us/files/press-office/O-ObamaBarack201005280133.pdf>.

69. *Id.*

70. *Ratcliffe*, *supra* note 57.

71. Chuck Lindell, *Texas Attorney General Greg Abbott Opposes Federal Government on Many Fronts*, STATESMAN.COM (Aug. 7, 2010, 10:26 PM), <http://www.statesman.com/news/texas-politics/texas-attorney-general-greg-abbott-opposes-federal-government-847623.html>.

72. *State of Texas Challenges EPA’s Flex Permit Ruling*, *supra* note 42.

determination that the Texas Flexible Permits, as established in 1994, are in compliance with federal requirements.⁷³

Commentators point out that the Texas Flexible Permit holders are stuck in the political crossfire between republicans and democrats.⁷⁴ Many democrats claim that the Bush administration allowed Texas to skate by and avoid federal emission compliance.⁷⁵ As soon as the Obama Administration took over the White House the EPA decided to crack down on the Texas permitting system.⁷⁶ In addition to disapproving of the Texas Flexible Permits, Texas also lost a \$2.6 billion contract with the federal government for producing army trucks and the Houston based space center lost a \$108 billion contract with the federal government.⁷⁷ In addition to Texas losing major contracts, the federal government also recently imposed fines on Texas for missing food stamps benefits deadlines and thousands of teachers were “deemed noncompliant with the No Child Left Behind law.”⁷⁸

Governor Perry claims that Washington punished Texas for having “dodged the worst of the recession and for taunting Washington’s ear-marking ways” and that instead of punishing Texas, Texas should be an example of a system that both improves air quality and does not stifle the economy.⁷⁹ Many Texans are of the opinion that Obama gives too much power to federal agencies in an effort to strangle the states with regulations.⁸⁰ A former US representative even went as far as to say that “[i]t is part of a Washington culture that ‘looks down their noses’ at self-sufficient states like Texas, [and that t]his resentment probably transcends all government agencies, and they just can’t stand that we’re a successful red state.”⁸¹

While federal agencies might have a pure heart, the unequivocal result is that Texas is losing thousands of jobs during the worst recession in decades.⁸² Neutral parties attribute the recent federal crackdown on Texas a result of the tension between the state’s business friendly, laissez-faire approach versus the Obama administration’s public health and tough enforcement approach.⁸³ In 2008, at the same time the Obama Administration took control of the White House, the Democratic Party won the majority in Congress.⁸⁴ At this time, the

73. *Id.*; Brief for Petitioner, *supra* note 48.

74. Christy Hoppe, *Regulators Get Tough as Texas’ Clout Wanes in Washington*, THE DALLAS MORNING NEWS (May 3, 2010, 7:01 AM), <http://www.dallasnews.com/news/politics/state-politics/20100502-Regulators-get-tough-as-Texas-3959.ece>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

Texas delegation was “heavy with GOP members and had few seasoned Democrats in line to claim powerful chairmanships.”⁸⁵

In response to the allegation that the Obama Administration treated Texas unfairly, many democrats are of the view that the Obama Administration is not punishing Texas but simply holding the state accountable to the same standards imposed on every other state.⁸⁶ ““You don’t have disproportionate enforcement in Texas. You have disproportionate noncompliance in Texas,”” said a democratic lobbyist.⁸⁷

The EPA’s disapproval of the Texas Flexible Permits occurred during the Texas governorship race—the front-runners being the current governor, republican Rick Perry, and democrat Bill White.⁸⁸ During the campaign White accused Perry of failing to make the TCEQ accountable, while Perry suggested that White ““encouraged the EPA to attack Texas policies despite [Texas] becoming a global energy leader while effectively cleaning [its] air.””⁸⁹

VI. THE ENVIRONMENTAL PROTECTION AGENCY’S PROPOSED SOLUTION

A. *A Voluntary Audit Program for Texas Flexible Permit Holders*

In addition to the EPA’s disapproval of the Texas Flexible Permits, the EPA has created a voluntary audit program that would allow flexible permit holders the option of participating in an audit program in return for the EPA not pursuing civil penalties against the facility for non-compliance of the CAA requirements.⁹⁰ This process would not remove the TCEQ from the permit system, but would require participants to obtain a federally approved permit from the TCEQ.⁹¹ According to the EPA, “[t]he purpose of the [audit] Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental law.”⁹²

“The program is available for 90 days after publication in the Federal Register, which occurred in the Sept. 28, 2010, issue.”⁹³ “Companies signing

85. *Id.*

86. *Id.*

87. *Id.*

88. Nolan Hicks, *EPA Takes Control of Permit-issuing for Texas Plants*, UWIRE (July 1, 2010), <http://uwire.com/2010/07/01/epa-takes-control-of-permit-issuing-for-texas-plants/>.

89. *Id.*

90. Notice, 75 FR 59711 (Sept. 28, 2010).

91. *Lofis*, *supra* note 56.

92. *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice*, 65 Fed. Reg. 19618 (Apr. 11, 2010) available at <http://epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf> [hereinafter *Incentives for Self-Policing*].

93. *EPA Starts Voluntary Program for Texas Flexible Permit Holders*, OIL & GAS J. (Sept. 30, 2010), <http://www.oj.com/articles/2010/09/epa-starts-voluntary.html> [hereinafter *EPA Starts Voluntary Program*].

up in the first 45 days can take advantage of a reduced penalty incentive for potential violations.”⁹⁴

Under the proposed audit program, a facility would voluntarily agree to participate in an audit in which a third party would identify each emission unit regulated under the flexible permit program and all “current federally—applicable CAA requirements, including: (1) [e]mission limitations/standards; (2) operational limitations/special conditions; (3) monitoring, recordkeeping, and reporting (MRR) requirements; and (4) specific references for all federal requirements identified.”⁹⁵ The auditor would then provide a detailed audit report that identifies the ways in which the facility is not in compliance with federal standards and recommendations on how the facility can improve its emission controls to comply with federal law.⁹⁶ “These independent findings will be ‘directly transmitted’ to the company and EPA and used to ‘establish new limits in state-issued permits.’”⁹⁷ Following the auditor’s report, the “company would enter into a consent agreement and final agreement order (CAFO) with [the] EPA ‘based on the [auditor’s] findings.’”⁹⁸

The company must then make the necessary changes to comply with the CAA in order to avoid the EPA filing a civil suit.⁹⁹ The audit program combined with the “CAFO would resolve any . . . ‘noncompliance issues’ that occurred while operating with the flexible permit. . . .”¹⁰⁰ So, while the program is voluntary, once a company decides to participate, it is unilaterally agreeing to make any improvements necessary to comply with federal law.¹⁰¹ If a facility participates in the audit but does not follow the auditor’s recommendations, the facility is basically asking the EPA for a lawsuit.¹⁰² The EPA issued the following statement regarding the effectiveness of the audit program:

Overall, the Audit Policy evaluation revealed very positive results. The Policy has encouraged voluntary self-policing while preserving fair and effective enforcement. Thus, the revisions issued today do not signal any intention to shift course regarding the Agency’s position on self-policing and voluntary disclosures but instead represent an attempt to fine-tune a Policy that is already working well. . . .

94. *Id.*

95. *Audit Program for Texas Flexible Permit Holders*, FED. REG. (Sept. 28, 2010), <https://www.federalregister.gov/articles/2010/09/28/2010-24289/audit-program-for-texas-flexible-permit-holders>.

96. *Id.*

97. *EPA Starts Voluntary Program*, *supra* note 93.

98. *Id.*

99. *Audit Program for Texas Flexible Permit Holders*, *supra* note 95.

100. *EPA Starts Voluntary Program*, *supra* note 93.

101. *See Audit Program for Texas Flexible Permit Holders*, *supra* note 95.

102. *See id.*

... As of October 1, 1999, approximately 670 organizations had disclosed actual or potential violations at more than 2700 facilities.¹⁰³

The EPA expects the audit process to take about a year.¹⁰⁴

1. Audit Implications for Facilities That Are Not Found to be in Compliance with Federal Standards

Many Texas businesses fear that when they volunteer for the audit program, and therefore, publically admit that they do not comply with federal environmental emission standards, the EPA may shield them from suit, but they will open themselves up to lawsuits by the various public environmental protection organizations.¹⁰⁵ The EPA counters this by arguing that it would not be a smart move for organizations to file suit against a business that volunteered for the audit because that would discourage other businesses from participating in a process that will allow them to comply with the federal standards—the precise goal of these public environmental protection organizations.¹⁰⁶

B. Flint Hills Resources LP—The First to Embark on the Environmental Protection Agency’s Suggested Path to Federal Compliance

The guinea pig for the EPA audit program is a privately held refinery, Flint Hills Resources LP, located in Corpus Christi, Texas.¹⁰⁷ The EPA is requiring Flint Hills to apply for an EPA permit because their current flexible permit violates the CAA.¹⁰⁸ “Flint Hills’ president and chief executive officer said[] the company is taking a ‘proactive and constructive approach to resolve the issue.’”¹⁰⁹ The process that will transition Flint Hills’ permit from a flexible permit to a federally compliant permit includes four main stages:

1. STEP ONE: Minor Permit Revision of the Title V operating permit to commit to restructuring a 30 TAC Chapter 116, Subchapter G permit to 30 TAC Chapter 116, Subchapter B permit (“Transition Process”).
....
2. STEP TWO: Determining federally-applicable requirements[.]
....

103. *Incentives for Self-Policing*, *supra* note 92, at 19619.

104. *EPA Starts Voluntary Program*, *supra* note 93.

105. *Nelson*, *supra* note 39.

106. *Id.*

107. *Malik*, *supra* note 28.

108. *Id.*

109. *Plushnick-Masti*, *supra* note 64.

3. STEP THREE: Application and Issuance of the NSR SIP-Approved Permit[.]
-
4. STEP FOUR: Revision of the CAA Title V Permit[.]¹¹⁰

C. Alternative Way That Companies Can Become Federally Compliant and Avoid an Audit

Companies that want to take a proactive approach but do not want to undergo a third party audit also have the option of negotiating directly with the EPA.¹¹¹ The EPA, as opposed to a third party audit would, determine if the facility is federally compliant and if the facility is not, the EPA and the company will then agree on a plan to remedy the facility.¹¹²

VII. THE EFFECT OF THE ENVIRONMENTAL PROTECTION AGENCY'S DECISION

A. The Economic Effects

1. The Effect on the Facilities Themselves (Including the Employees)

The EPA will not require facilities to shut down while obtaining a new permit. While “some permits [may] be upgraded administratively,” other facilities will have to undergo a review process that may result in having to install more modern clean air technology.¹¹³ However, the installation of the new technology could cost millions of dollars for each company.¹¹⁴ The Texas Oil and Gas Association expressed concern that some of these new technologies do not exist yet, which would give some facilities the option of either operating out of compliance or shutting down, putting many Texans out of a job and thus, negatively affecting the Texas economy due to the loss in production.¹¹⁵ Companies holding flexible permits “are caught in the middle, creating significant uncertainty at a time when our economy can least afford it.”¹¹⁶ According to a study by the Texas Public Policy Foundation, the

110. Letter from Jim Mahoney, Flint Hills Resources, to Dr. Alfredo Armendariz, EPA Region 6, *Agreed Process for Transitioning Flint Hills Resources, LP's Texas Air Permits with Subchapter G Flexible Permits to State Implementation Plan (SIP)—Approved Permits* (Oct. 20, 2010), http://www.epa.gov/region6/6xa/pdf/10-20-10_entire_document_final-flr_to_epa.pdf.

111. *EPA Starts Voluntary Program*, *supra* note 93.

112. *Id.*

113. *Ratcliffe*, *supra* note 57.

114. *Id.*

115. *Id.*

116. T.J. Aulds, *EPA Pulls Permits for Two Texas City Refineries*, THE DAILY NEWS (July 1, 2010), <http://galvestondailynews.com/story/160182>.

EPA's decision could result in a loss of 200,000 Texas jobs by the year 2030.¹¹⁷

2. *The Effect on the Texas Economy as a Whole*

The Public Policy Foundation released additional findings which determined that by the year 2030, "Texas would lose: . . . \$29.9 billion to \$40.8 billion in gross state product; 4.6 percent to 5.4 percent of its total manufacturing output; and \$2.1 billion to \$2.87 billion in state tax revenues."¹¹⁸ Kathleen Hartnett White of the Texas Public Policy Foundation stated

"[t]he sectors that would absorb the most damage from a cap of carbon emissions are among the most productive and central to Texas' economic success during the last decade. . ."

"These are the type of good-paying jobs we need to bring to Texas, rather than lose those jobs to foreign countries that don't handicap their industries with costly and ineffective carbon mandates."¹¹⁹

3. *The Effect on the National Economy*

In the aftermath of the EPA's disapproval of the Texas Flexible Permits, that the national economy will likely suffer a blow similar to that of Texas.¹²⁰ The EPA's decision will inevitably cause increased energy prices all across the country due to the fact that Texas is the largest producer of energy in the United States.¹²¹ The increased prices will directly and indirectly affect consumers, as well as other companies, will have to make up for increased energy prices by increasing the cost of their products or by laying off employees.¹²²

VIII. THE EFFECTS ON STATE AGENCY POWER

One of the basic principles of the United States Constitution is to allow states to deal with issues in their own unique ways. States generally have a better grasp on the local problems and solutions, as opposed to the federal

117. See Margo Thorning & Pinar Cebi Wilbur, *The Texas Economy: How Would Climate Change Legislation Impact Economic Growth and Jobs?*, TEX. PUB. POLICY FOUND. 15–19 (Feb. 2010), <http://www.texaspolicy.com/pdf/2010-02-RR02-WaxmanMarkey-mthorning.pdf>.

118. Margo Thorning, *The Texas Economy: How Would Climate Change Legislation Impact Economic Growth and Jobs?* AM. COUNCIL FOR CAPITAL FORMATION (Feb. 18, 2010), <http://www.accf.org/publications/131/the-texas-economy-how-would-climate-change-legislation-impact-economic-growth-and-jobs>.

119. *Id.*

120. *Hutchison*, *supra* note 38.

121. *Id.*

122. *Id.*

legislators who make broad laws to encompass the nations issues as a whole.¹²³ “States must be free to experiment with new ideas and new approaches that can lead to breakthroughs and an increased competitive edge.”¹²⁴ This not only allows states to deal with problems in a way that is best for their specific state, but also results in each state solving a similar problems in slightly different ways, some better than others.¹²⁵ States can then look to other states and see if their approach can be improved.¹²⁶ The agency power of states is how this problem solving approach is broken down to an even more specific level.¹²⁷ The EPA is in charge of solving the broad problem of air pollution in the United States.¹²⁸ The TCEQ is responsible for solving the problem of air pollution in Texas.¹²⁹

The EPA has determined that even though the TCEQ has created a system to improve air quality in a way that is best for Texas, the TCEQ has not done so in a way that is federally compatible with the CAA and has taken the TCEQ’s permitting authority into its hands.¹³⁰

A. Where Does This Leave the Texas Commission on Environmental Quality?

Currently, the flexible permits issued by the TCEQ are in violation of federal law.¹³¹ Accordingly, if the federal court holds that the EPA’s authority is constitutional, the TCEQ must either change its permitting system or lose the authority to issue permits completely.¹³²

123. Gov. Rick Perry, *Texas Air Program Should be Copied Not Obstructed*, CALLER.COM (June 4, 2010, 3:02 AM), <http://www.caller.com/news/2010/jun/04/texas-air-program-should-be-copied-not-obstructed/>.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See discussion supra* Part V.

132. *See discussion supra* Part V.B.

IX. SOLUTION: SHOULD THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY PURSUE THE FIGHT AGAINST THE ENVIRONMENTAL PROTECTION AGENCY IN COURT OR ENCOURAGE FACILITIES TO PARTICIPATE IN THE VOLUNTARY AUDIT PROGRAM?

A. *Getting Rid of the Texas Flexible Permits Would be Harmful to the Texas Economy and Would Not Benefit the Environment*

The TCEQ has committed to the flexible permits, stating that the “EPA’s demands may cause companies to alter their expansion plans, hurting Texas jobs; [the demands] will cost companies more money, which will be passed onto consumers in the form of increase[d] prices; and above it all, will not result in cleaner air.”¹³³ Texas Flexible Permits have proven to be successful in reducing emissions.¹³⁴ “If not for the state permitting program that [the] EPA now opposes, grandfathered coal-burning power plants would still be allowed to emit pollution without any controls, and [the] EPA would have absolutely no recourse.”¹³⁵ Concrete evidence shows that the Texas Flexible Permits are effective in reducing emissions—the exact goal of the EPA and the CAA.¹³⁶ “Emissions data cited by the Governor’s Office indicates that [since 2000] the Texas clean air program achieved a 22 percent reduction in ozone and a 46 percent reduction in NO_x, which outpaces the eight percent and 27 percent reductions that were recorded nationally.”¹³⁷ The TCEQ Chairman Bryan W. Shaw released a statement on behalf of the TCEQ, stating that if the EPA gets its way and Texas flexible permits are no longer allowed, “air quality could actually suffer.”¹³⁸

In Texas, not only have emissions reduced more rapidly than the national average in the years since the establishment of the Texas Flexible Permits, but the Texas economy has remained superior to the economies of most other states.¹³⁹ “From 2000 [to] 2009, Texas’ annual refinery operable crude oil distillation capacity increased by 11.9%”, the same period in which Texas reduced emissions.¹⁴⁰ If the EPA is successful, the increased regulations

133. [Plushnick-Masti](#), *supra* note 64.

134. See [Perry](#), *supra* note 68, at 1.

135. *Id.* at 2.

136. See *id.* at 1.

137. [State of Texas Challenges EPA’s Flex Permit Ruling](#), *supra* note 42.

138. [Malik](#), *supra* note 28.

139. According to Portfolio.com and bizjournal—both associates of the San Antonio Press—the Texas economy is ranked number three among all fifty states due to the state’s employment growth rate of 5.9 % between 2005 and 2010. See G. Scott Thomas, *Texas’ Economy Rocks Compared with Rest of Nation*, SAN ANTONIO BUS. J., (Aug. 1, 2010, 11:00 PM), <http://www.bizjournals.com/sanantonio/stories/2010/08/02/story10.html?page=all>; see also *Comptroller’s Economic Outlook*, TEX. AHEAD, <http://www.texasahead.org/economy/outlook.php> (last updated June 15, 2012) (stating in 2011, the GDP of Texas increased by 2.4%, while the nation’s GDP grew by 1.6%).

140. Mark Tapscott, *EPA Rejects Texas Program That Reduced Emission, Increased Productivity*, WASH. EXAM’R (July 1, 2010, 3:00 AM) <http://washingtonexaminer.com/article/1894>.

imposed on Texas facilities would not only cause many companies to spend millions in new technology, but the Texas economy will also likely suffer because of increased prices of production, thereby putting more strain on the employers' budgets, which would likely lead to employers cutting jobs to meet the new financial burden.¹⁴¹ Representative Pete Olson predicted that “[t]he inflexibility of EPA’s regulatory mandate will cost Texas thousands of jobs.”¹⁴²

While the EPA claims that the reasoning behind requiring stricter permits is to allow it to better monitor emissions in the best interest of public health by rejecting the flexible permits, it is doing exactly the opposite of its stated purpose.¹⁴³ The EPA’s decision will not only result in more pollution—endangering public health—but will also harm the Texas economy, adversely affecting the public it claims to protect.¹⁴⁴

X. THE CURRENT/PENDING SITUATION

A. *For now, Texas Prevails Over the Environmental Protection Agency in Federal Court*

On March 26, 2012, the Fifth Circuit issued its opinion in *Luminant Generation Company, L.L.C. v. EPA*.¹⁴⁵ The court found that the EPA acted “arbitrarily and capriciously” in its review of Texas regulations, its insistence on a “similar-source” requirement, and its lack of replicability in the decisions.¹⁴⁶ The court ordered the EPA decisions vacated and remanded to the agency, with instructions to either “approve or disapprove [the Texas regulations] most expeditiously.”¹⁴⁷ While the opinion presented a scathing disapproval of the EPA’s actions, the Texas regulations at issue are still subject to EPA approval in the near future.

141. See [Perry](#), *supra* note 68, at 2.

142. [Tapscott](#), *supra* note 140.

143. *Id.*

144. *Id.*

145. *Luminant Generation Co., L.L.C. v. United States Env'tl. Prot. Agency*, 675 F.3d 917 (5th Cir. 2012).

146. *Id.* at 925–26.

147. *Id.* at 933.

XI. CONCLUSION

As discussed in this comment, there are many uncertainties in the wake of the EPA's decision to disapprove of the Texas Flexible Permit System.¹⁴⁸ The uncertainty encompasses the future of the Texas economy, the national economy, and the role of agencies in general.¹⁴⁹ The EPA's disapproval of the Texas Flexible Permit System has also raised debate over which system most effectively improves the environment while in turn maintaining and improving the economy.¹⁵⁰ The implications of the EPA's decision and the federal court's response to the EPA's decision will affect the many Texas Refineries, who are holders of flexible permits, and the economy of Texas, and will determine the scope of the TCEQ's authority.¹⁵¹ On a broader scale, the federal court's ruling on the EPA's decision will affect state agency power in general.¹⁵²

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148. See discussion *supra* Part VII.

149. See discussion *supra* Part VII.

150. See discussion *supra* Part VII.

151. See discussion *supra* Part VII.

152. See discussion *supra* Part VII.