

NEW TEXAS LAWS WILL BOOST THE STATE'S ENERGY INDUSTRY

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This year's Texas Legislative session included significant changes on the environmental and energy front. Here, we focus on three new Texas laws with the potential to have significant beneficial impacts to the state's energy industry.

Texas Reclaims Greenhouse Gas Permitting Authority from EPA (HB 788)

In a reversal of the state's prior refusal to develop a greenhouse gas emissions permitting program, the Texas Commission on Environmental Quality (TCEQ) now has been charged with developing and implementing a permitting program for new or modified industrial GHG sources. Presently, this authority resides with region 6 of the U.S. Environmental Protection Agency.

In 2011, Texas refused to set up a state-level GHG permitting program consistent with the EPA's new source review/prevention of significant deterioration permitting regulations — the only state to do so. The EPA responded by assuming GHG permitting authority for Texas. The result has been a bifurcated and protracted air-permitting process for Texas industry: EPA region 6 processes GHG emissions permits, and the TCEQ handles all other air authorizations.

As a result, a bottleneck has developed at region 6 and several dozen GHG emission-permit applications await action. This has caused complaints that economically important Texas projects are imperiled by the delay or are more likely to be sited in neighboring Louisiana.

The new law promises a more streamlined state process. In particular, unlike the EPA's process, the commission need not analyze permit applications for additional federal consideration — e.g., impacts on endangered species and essential fish habitats. Further, GHG permits will not be subject to contested case hearings that essentially function as agency-level trials.

The commission can begin the rulemaking process immediately, but the program will not go into effect until that process is completed, and the EPA approves the program. Recognizing how critical this is to the continued economic growth of Texas, the commission is promising to expedite its portion of the process and has limited itself to a 180-day period to act on the new rules.

Though the new law reverses the state's refusal to regulate GHGs, Texas continues to challenge the constitutionality of the EPA's GHG rulemakings. In a lawsuit

with 11 other states, Texas has asked the U.S. Supreme Court to review a 2012 ruling by a D.C. Circuit Court upholding the EPA's authority to issue a number of GHG-related rules — i.e., the EPA's "endangerment finding," the "tailpipe rule," the timing rule and the tailoring rule.

Meanwhile, Texas' separate challenge to the EPA's assertion of federal control over GHG permitting in Texas was argued before the D.C. Circuit on May 7, 2013. A decision on whether the U.S. Supreme Court will grant certiorari is not expected until at least October.

New Law Lays Groundwork to Increase Recycling of Drilling and Fracking Wastewater (HB 2767)

Currently, some 80 percent of wastewater from oil and gas drilling and hydraulic fracturing operations in Texas winds up in underground disposal wells. Effective Sept. 1, a new law, HB 2767, lays the foundation to diminish barriers to recycling wastewater for reuse in subsequent operations.

As water resources continue to tighten, especially in west Texas, where petroleum resources are abundant, yet the water needed to recover those resources is scarce, the new law promises something of a reprieve. Drilling companies have indicated willingness to divert their wastewater to recyclers but have generally not done so out of concern that they would retain liability arising from the treatment and reuse of the wastewater after it was no longer in their custody or control.

HB 2767 largely eliminates that risk by making clear that for drilling

wastewater transferred to recyclers for treatment and reuse in drilling activities, the recyclers — not the drilling companies — own the wastewater after the transfer.

In addition, tort liability is eliminated for the subsequent reuse of the treated fluid. However, tort liability remains in place for personal and property injuries caused by exposure to the wastewater or treated fluid.

The law tasks the Texas Railroad Commission with promulgating rules governing the treatment and beneficial reuse of oil and gas wastes.

Clean Air Grant Program is Expanded (SB 1727)

Texas' emissions reduction plan (TERP), which is a vital component in demonstrating Texas' compliance with the Clean Air Act, has been amended to expand opportunities for businesses, individuals and local governments to benefit from financial incentives for emission-reduction projects and efforts.

While the plan has been in a state of constant amendment since its inception, this expansion is especially significant, resulting in approximately 40 percent in additional funding for the program. The TCEQ anticipates bringing on five new staff members to handle the increased administrative demands.

The plan was established by the Texas Legislature in 2001 and codified in Chapter 386 of the Health and Safety Code. Since TERP's enactment, the TCEQ and the Texas Comptroller of Public Accounts have provided grants and other funding for various

diesel emission-reduction incentive programs, motor vehicle purchase or lease programs, air quality research programs, clean bus programs, new technology implementation grants, regional air quality monitoring, special health effects study and specialized air quality planning services.

Over the past 10 years, the TCEQ has issued funding of over \$858 million under the primary TERP emissions reduction grant program — a total of nearly 9,000 projects projected to effect reduction of nearly 165,000 tons of nitrous oxide.

To achieve reductions in ozone precursors and particulate matter, TERP's financial incentives target 42 Texas counties that are designated as "non-attainment" areas for failure to meet federal air quality standards for ozone. Emission reductions generated by the TERP program may be used to demonstrate Texas' conformity with its EPA-required state implementation plan.

The new program makes a number of changes to the existing TERP program. These changes, which will be codified in Chapters 386, 391, 393 and 394 of the Health and Safety Code, include the following:

- New priorities to reduce nitrous oxide and particulate matter at port facilities located in nonattainment areas
- New goals to reduce emissions from drilling equipment and related heavy-duty, nonroad equipment used in oil and gas production fields

- Authorizing the TCEQ to establish and administer certain other emission-reduction program incentives if the commission determines such programs are necessary and effective
- Authorizing new TERP programs affecting “agricultural product transportation” that will result in net reduction in nitrous oxide emissions in nonattainment areas and affected counties
- Creating a new “Drayage Truck Incentive Program” that reduces emissions in and around seaports located in nonattainment areas, principally affecting heavy-duty, short-haul trucks
- Revising the light-duty motor vehicle or lease incentive program to increase the number of vehicles on the road meeting EPA-certified strict emissions standards
- Continuing to encourage the development of a self-sustaining market for natural gas vehicles in Texas

This TERP expansion may enhance Texas’ ability to meet federal Clean Air Act standards. In turn, Texas industries and businesses could gain a generally improved regulatory climate.

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