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## Texas Proposes New GHG Emissions Rules

By Anthony Cavender and Amanda Halter

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*In response to the standoff between the U.S. Environmental Protection Agency (EPA) and the State of Texas over EPA's promulgation of new rules regulating stationary-source greenhouse gas (GHG) emissions, the Texas Legislature enacted House Bill 788 to provide the Texas Commission on Environmental Quality (TCEQ) with GHG permitting authority. On October 23, 2013, the TCEQ proposed rules to implement HB 788. The new rules, once promulgated, will for the first time empower the TCEQ to issue permits and other forms of authorization for GHG emissions in Texas. The TCEQ has estimated that there may be as many as 1,800 existing sites at which emissions could trigger GHG review in the future.*

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While the State of Texas continues to challenge EPA's GHG rules in court—so far unsuccessfully, although the U.S. Supreme Court has accepted certiorari on one challenge—the stage is now being set for Texas to issue GHG permits. If the Supreme Court affirms EPA's authority to regulate GHG emissions through the Clean Air Act (CAA)'s programs for the permitting of new and modified stationary sources, then TCEQ's GHG permitting rules will govern future GHG air permitting in Texas. On the other hand, if the Supreme Court ultimately rules against EPA and finds that the Agency lacks authority to use the CAA's permit programs to regulate stationary sources of GHGs, Section 2 of HB 788 also allows the TCEQ to repeal these rules. A Supreme Court ruling is expected before the end of the Court's current term in June 2014.

### **The Proposed Rules**

On October 23, 2013, the TCEQ voted to approve the publication of the proposed GHG rules and to invite public comment. Not only will these new rules establish a new TCEQ GHG permitting program, they will eventually end the existing bifurcated air permitting process in which Texas air permit applicants must seek separate approvals from both TCEQ and EPA when their facilities emit not only conventional air pollutants in sufficient amount, but also GHGs. TCEQ's lack of authority over GHG emissions left the EPA as the only permitting authority in Texas that could issue the necessary preconstruction permits to major sources of GHG, a situation that was itself the source of many complaints from the regulated community. To redress this situation, the Texas Legislature enacted HB 788.

HB 788, which became effective June 14, 2013, enables TCEQ to assume the GHG permitting responsibilities that EPA has exercised since 2011. TCEQ's new authority is now codified in the Texas Health and Safety Code at Section 382.5102, and the Agency has wasted no time in drafting comprehensive rules to implement its new authority. A few weeks ago, the TCEQ made available a complete draft of these proposed GHG rules before they were formally approved by the Commission on October 23, 2013. Publication of these proposals in the Texas Register is slated for November 8, 2013; a public hearing is scheduled for December 5, 2013; and the public comment period will run until December 9, 2013. The TCEQ aims to promulgate these rules by March 26, 2014, but the process does not end there.

TCEQ must then submit the newly promulgated rules to EPA for approval as part of the Texas' State Implementation Plan (SIP), specifically those portions of the SIP which govern "Prevention of Significant Deterioration" (PSD) permitting. The TCEQ in effect will be conceding, unless the Supreme Court decides otherwise, that PSD applications in Texas must address not only the conventional air pollutants that have always been covered by the PSD program, such as NO<sub>x</sub>, VOC and SO<sub>2</sub>, but GHGs as well. One of the most significant implications of the new rules is that the TCEQ, not EPA, will be making key PSD decisions regarding the level of control that PSD applicants must exercise in order to satisfy the Best Available Control Technology (BACT) element of PSD review. To date, nationwide, BACT for GHGs is usually based on the maximum degree of energy efficiency that a source or modification can achieve. Increasingly, GHG reviews are also focused on reducing releases of methane from oil and gas facilities. For the foreseeable future, it is only in the case of new or modified coal-fired power plants that EPA might insist upon the installation of GHG emissions capture systems to satisfy the BACT requirement, and then only once EPA has set a final New Source Performance Standard (NSPS) under CAA section 111(b) to that effect.

The CAA's SIP approval process can be time-consuming, especially in Texas, where the State and EPA have been battling each other for several years. The process has been an iterative, complicated and sometimes even contentious. Indeed, some months ago, the TCEQ estimated that the process to propose, promulgate and obtain the EPA's approval of the new GHG rules could take as long as three years to complete. In some cases, EPA has shelved TCEQ SIP submissions for over a decade or more. Moreover, the currently effective Federal Implementation Plan or FIP, which was put in place to ensure there was some GHG permitting authority in Texas in the absence of any state permitting authority, must be rescinded before the revised Texas SIP can take effect. Finally, both agencies are likely to consume time in developing transition plans when it is appropriate to do so.

### Legal Background

The path to TCEQ's newfound GHG permitting authority has been tumultuous, arising from an ongoing dispute about whether EPA has the expansive GHG permitting authority it has claimed. In 2007, the U.S. Supreme Court held in *Massachusetts v. EPA* that greenhouse gases can be regulated as an "air pollutant" under the Clean Air Act. This ruling initially empowered EPA to regulate GHG from motor vehicles if the agency made the requisite "Endangerment Contribution Findings", which it did on December 15, 2009. EPA then issued the "Tailpipe Rule" to regulate GHGs from motor vehicles. Pursuant to the Agency's long-standing interpretation of the CAA, this automatically triggered permitting requirements for new and modified stationary sources of GHG under both the PSD (Part C) Preconstruction Permit Program and the Title V Operating Permit Program. However, acknowledging the considerable administrative burdens that would be placed on industry and state permitting officials, EPA issued a "Tailoring Rule" in June 2010 to phase in the new permitting requirements, which established revised applicability thresholds that raised the threshold from around 100/250 tons per year of GHG emissions to around 100,000 tons per year for new sources and 75,000 tons per year for modifications. All of these rules were challenged in court, and they were sustained by the U.S. Court of Appeals for the DC Circuit in *Coalition for Responsible Regulation v. EPA*, but the U.S. Supreme Court will now review only the chain of logic that led EPA to bring GHGs into the PSD and Title permitting programs, and not the validity of the Endangerment Contribution Findings, nor the Tailpipe Rule.

The Texas SIP was first approved by EPA in 1972. In 1983, Texas was delegated the authority to implement the CAA's PSD program, and EPA approved the Texas PSD SIP in 1992. However, EPA retroactively disapproved the 1992 Texas SIP in May 2011 with respect to GHG emissions, which resulted in an awkward division of major source air quality preconstruction reviews: EPA claimed the authority to regulate new and modified sources of GHG emissions under the PSD and Title V programs, while the State of Texas asserted the authority to regulate air pollutants other than GHGs. As noted above, this division of authority has often compelled major source air permit applicants to obtain two different permits for the same project, a burdensome, costly, and inefficient process that inspired the enactment of HB 788. The TCEQ's proposed new rules are intended to correct these problems.

### Scope of the Proposed Rules

The TCEQ is proposing revisions to its rules codified at Chapter 39 (Public Notice), Chapter 55 (Contested Case Hearings), Chapter 101 (the General Air Quality Rules), Chapter 106 (Permits by Rule), Chapter 116 (New Construction Permits), and Chapter 122 (the Federal Operating Permit Program known as the Title V Program). Interested parties should carefully evaluate TCEQ's proposed changes and consider filing written comments on some or all of these proposals. A brief synopsis of some of these proposals follows, which is based on the pre-publication draft.

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#### Chapter 39 -

##### 30 TAC Chapter 39

Existing rule 30 TAC Section 39.411 would be amended and replace former subsection (e)(15). The new rule will require that any mailed notice of a GHG permit application must include a statement that any person is entitled to request a public hearing or a notice and comment hearing from the TCEQ.

A new 30 TAC Section 39.412 is proposed, which will authorize the TCEQ to issue two separate public notices regarding GHG permit applications that were initially filed with EPA in accordance with the Texas FIP and are transferred to the TCEQ, or were initially filed with the TCEQ to authorize only GHG emissions. TCEQ states that this rule will comply with the relevant federal notice requirements.

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#### Chapter 55 -

##### Contested Case Hearings

HB 788 provides that the Texas GHG permitting process is not subject to the contested case hearing provisions of the Texas Water Code or the Government Code. 30 TAC Section 55.201(i)(31)(c) would make this change; as amended, the review of PSD GHG permit applications will not be covered by the contested case hearing requirements.

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#### Chapter 101 -

##### General Air Quality Rules

30 TAC Section 101.1 (Definitions) would be amended to define "Greenhouse Gases" at subsection (42), and thereby establish the authority of the TCEQ to regulate and permit major sources of GHG emissions in Texas, consistent with federal law. The "Reportable Quantity" definition at subsection (89) would be amended to establish a new Reportable Quantity of 5,000 pounds for fire protection fluids, and a provision is proposed that will provide that there is NO Reportable Quantity for GHG emissions under these rules, except for individual air contaminant compounds. The definition of "Unauthorized Emissions" would be revised to remove CO<sub>2</sub> and methane from this definition.

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30 TAC Section 101.10, the Emissions Inventory Requirements, would be amended to exclude GHG. The TCEQ explains that while an annual air emissions inventory must be filed by major sources, GHG emissions of 100 tons per year would be considered negligible because of the physical qualities of GHG, and the Agency could not process the number of filings that would be otherwise generated. However, if a PSD permit for GHG emissions is required, an inventory must be filed in that instance.

30 TAC Section 101.27, Emissions Fees, would be amended to exempt GHG emissions, standing alone, as emissions not subject to these fees.

30 TAC Section 101.201 describes reportable emissions events. The rules would be amended to exclude emissions of GHG from these reporting requirements, except for otherwise listed individual air constituent compounds listed in the definition of Reportable Quantity.

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**Chapter 106 –  
Permits by Rule**

Emissions of GHG will not be subject to the Permit by Rule program, and the applicable rule, 30 TAC Section 106.2, would be amended. 30 TAC Section 106.4 is clarified to specify that the Permit by Rule program can still be used to authorize emissions of non-GHG, unless a major source requires a PSD permit.

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**Chapter 116 –  
Permits for New  
Construction or  
Modification**

The TCEQ has proposed several changes to these rules. 30 TAC Section 116.12, the Non-Attainment and PSD Review definitions rule, would be amended to define “carbon dioxide equivalent (CO<sub>2</sub>e) emissions,” and will include EPA’s deferral from regulation those CO<sub>2</sub>e emissions generated by the combustion or decomposition of non-fossilized or biodegradable organic material. The proposed re-definition of “Major stationary source” references the regulatory GHG thresholds set forth at proposed 30 TAC Section 116.164.

The permit application rules of 30 TAC Section 116.111 would be amended to provide that the PSD review requirements will apply to any facility or modification whose GHG emissions exceed the regulatory thresholds of Section 116.164.

The PSD review rule at 30 TAC Section 116.160(a) would be amended to require major sources of GHG to comply with the PSD rules regardless of their location, because no NAAQS has been established for GHG in view of the extreme difficulty in determining a safe concentration of GHG. Such emissions are typically non-toxic, inactive, and nonflammable.

30 TAC Section 116.164, the PSD Applicability Rule, would be amended to establish the regulatory thresholds for new sources emitting only GHG (100 or 250 tons per year on a mass basis, and 100,000 tons per year or more of CO<sub>2</sub>e). New 30 TAC Section 116.164(b) would provide that GHG emissions below the regulatory thresholds are not subject to PSD preconstruction review.

New 30 TAC Section 116.169 would provide that the TCEQ will accept the transfer of and review PSD GHG applications previously filed with EPA. This rule will be effective when the currently effective FIP is rescinded.

30 TAC Section 116.610, the Standard Permits rule, would be amended to clarify that a source of GHG may qualify for a standard permit to authorize only the emissions of non-GHG from the facility. As stated throughout, GHG emissions in Texas will only be authorized through the PSD permitting program.

30 TAC Section 116.611, which provides that the Standard Permit process can be implemented through a registration procedure, would be amended to provide that sources subject to PSD review solely because of GHG emissions and using a Standard Permit for non-GHG emissions may not begin construction until the source has acquired a PSD permit.

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#### Chapter 122 –

#### The TCEQ's Federal Operating Permit Rules

The definitions set forth at 30 TAC Section 122.10 would be amended to define "Greenhouse Gases," "Applicable Requirement," "Carbon Dioxide Equivalent Emissions," and "Major Source." The "potential to emit" rules at 30 TAC Section 122.122(e) would be amended to clarify that existing sites may certify by registration that their GHG emissions are below the major source thresholds to avoid Title V permitting requirements. The Title V permit application rules at 30 TAC Section 122.130 would be amended to establish a deadline to submit an application for sources now subject to Title V permitting.

#### Conclusion

The TCEQ has worked carefully and methodically to splice the necessary GHG permitting requirements into its existing air permit programs in order to ensure that the resulting system is as workable as the overarching complex mix of the CAA, EPA regulations, federal court decisions, and state law allow. Interested parties should take advantage of the opportunities afforded by the Agency's public hearing and public comment processes to assist TCEQ in developing a fully workable approach to regulating new and modified stationary sources of GHG emissions in Texas, which will affect hundreds of businesses across the state and over time.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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