

# TEXAS ONE MAJOR STEP CLOSER TO EFFICIENT GHG PERMITTING

This article was originally published in *Law360* on November 13, 2013.

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On Nov. 8, 2013, the Texas Commission on Environmental Quality's proposed new greenhouse gas permitting rules were published in the Texas Register (see 38 Tex. Reg. 7845-7925). Now that these comprehensive new stationary-source greenhouse gas (GHG) emissions permitting rules have been formally proposed by the agency, the current bifurcated air permitting regime — in which major stationary sources apply to the U.S. Environmental Protection Agency Region 6 for their GHG permits and to TCEQ for non-GHG permits — is a major step closer to ending.

If TCEQ receives permitting authority for GHG emissions from EPA Region 6 as planned, affected Texas businesses will likely spend less time and money securing their GHG permits, and the ancillary issues that must be reviewed as part of the federal permitting process, (i.e., the Endangered Species Act, the National Historic Preservation Act, environmental justice, and even climate change issues) will not loom as large at the state level.

The path to TCEQ's newfound GHG permitting authority has been tumultuous, arising from an ongoing dispute about whether the 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 the EPA to regulate GHG from motor vehicles if the agency made the requisite "Endangerment Finding", which it did on Dec. 15, 2009.

In May 2010, the 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 Prevention of Significant Deterioration (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, the EPA issued a "Tailoring Rule" in June 2010 to phase in the new permitting requirements, which established revised applicability thresholds that raised the regulatory 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 D.C. Circuit in *Coalition for Responsible*

Regulation v. EPA. However, the U.S. Supreme Court has granted certiorari on one of the many challenges to these rules; the court will review the chain of logic that led the EPA to bring GHGs into the PSD and Title V permitting programs. The other findings and conclusions were not disturbed.

As a result of these developments and an ongoing dispute between Texas and the EPA, the EPA retroactively disapproved Texas's State Implementation Plan in May 2011 with respect to GHG emissions, creating the awkward division of major source air quality preconstruction reviewing authority between the EPA and TCEQ that exists today: The 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 retains the authority to regulate air pollutants other than GHGs.

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 Legislature to enact HB 788, which finally gives TCEQ authority to promulgate new GHG permitting rules.

Responding to the concerns of the regulated community, TCEQ is acting quickly. A public hearing is scheduled for Dec. 5, 2013, and the public comment period will end Dec. 9, 2013. The TCEQ aims to promulgate these rules by March 26, 2014, but the process does not end there.

TCEQ must submit the newly promulgated rules to the EPA for

approval as part of the Texas State Implementation Plan, specifically those portions of the SIP governing 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 nitrogen oxide (NOx), volatile organic compounds (VOCs) and sulfur dioxide (SO<sub>2</sub>), but GHGs as well.

While both the EPA and the TCEQ have pledged to process these SIP revisions as expeditiously as possible, the SIP approval process can be time-consuming, especially in Texas, where the state and the EPA have been battling each other for several years. The process has been iterative, complicated and contentious.

Indeed, some months ago, the TCEQ estimated that the process to propose, promulgate and obtain the EPA approval of its new GHG rules could take as long as three years. With respect to some past SIP revisions, the EPA failed to act on them for over a decade.

Moreover, before the revised Texas SIP can take effect, the EPA will have to rescind the Federal Implementation Plan, or FIP, which was put in place to ensure that there was some GHG permitting authority in Texas in the absence of state permitting authority. All in all, the regulated community can expect to wait a fair bit longer for relief.

Still, vesting GHG permitting authority at the state level in Texas will undoubtedly streamline the process for applicants, and it may even diminish the importance of the

often-complicating effects of other federal issues beyond GHG.

For example, while Region 6 examines GHG permit applications for potential impacts to species protected under the Endangered Species Act and cultural artifacts protected by the National Historic Preservation Act, TCEQ would have greater discretion to determine the scope of review applicable to these issues and may be inclined to emphasize them less.

Similarly, while EPA Region 6 has a robust Environmental Justice Program that is gradually being integrated into the permitting process, TCEQ's environmental equity program instead serves largely as a public reference resource. Also, at the federal level, climate change issues continue to be very prominent, as indicated by the president's new executive order directing federal agencies to develop plans to address climate preparedness and resilience. TCEQ does not have such a mandate.

Another significant implication of the new rules is that the TCEQ, not the EPA, would make key PSD decisions regarding the level of control that PSD applicants must exercise in order to satisfy the Best Available Control Technology 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, federal 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 the EPA might insist upon the installation of GHG emissions capture systems to satisfy

the BACT requirement, and then only after the EPA has set a final New Source Performance Standard under CAA Section 111(b) to that effect.

### **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.

With the potential benefits of focusing GHG permitting authority at the state level, 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.

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