

Greenhouse Gas Permitting in Texas

TCEQ Rule Project No. 2013-040-116-AI

Greenhouse Gas Permitting in Texas

House Bill (HB) 788, 83rd Legislature, 2013, found that the TCEQ is the preferred permitting authority for emissions of GHGs, and made corresponding changes to the Texas Clean Air Act (Texas Health and Safety Code (THSC), Chapter 382) to provide TCEQ with the express authority to permit GHGs to the extent required under federal law. New THSC §382.05102 requires that TCEQ adopt rules to allow for the authorization of emissions of GHGs, and defines the six compounds or classes of compounds which are considered GHGs. THSC §382.05102 also directs the commission to submit the newly adopted rules to EPA for approval into the Texas state implementation plan (SIP), including procedures for transitioning any PSD GHG applications pending at EPA to the TCEQ. The GHGs permits authorized by this new section are not subject to contested case hearing requirements.

The TCEQ initiated Rule Project No. 2013-040-116-AI to implement HB 788 and incorporate greenhouse gases as a pollutant under the PSD and Title V permitting programs. Rule chapters affected include: 39, 55, 101, 106, 116, and 122.

Proposed rules found at: <http://www.tceq.texas.gov/rules/prop.html>

The comment period for the proposed GHG rules ended December 9, 2013, and all comments submitted are currently under staff evaluation. Based on comments received, staff may make any changes to the proposed rule deemed appropriate. The draft adoption will then be filed with the Chief Clerk for setting on a Commission agenda. It is expected that the Commission will take up the proposed adoption of the rules on **March 26, 2014**.

EPA Greenhouse Gas Permitting requirements:

<http://www.epa.gov/nsr/ghgpermitting.html>

<http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>

<http://yosemite.epa.gov/r6/Apermit.nsf/AirP> [Region 6; Texas]

Important Rule Issues:

- TCEQ's BACT analysis, including the top-down five step analysis, must be available to the public to review and provide comments on
- TCEQ should assess add-on pollution control equipment like IGCC or other carbon capture technologies, fuel switching and process controls
- TCEQ should require an annual inventory of GHG gases by GHG permittees

Informational Tidbits:

Until now, **Texas has refused** to implement greenhouse gas regulations; the only state to do so. Despite clear statutory otherwise [Texas Health & Safety Code Sec. 382.0205], the TCEQ has said it has “neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.”

Given Texas’ refusal, and in order to assure that Texas’ businesses are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects, EPA formally instituted a process whereby facilities in Texas needing GHG permits get them through the EPA, not the TCEQ. Thus, Texas industry is currently subject to a **dual permitting system for GHGs** until the TCEQ implements GHG permitting.

Texas has challenged the EPA through litigation: in the D. C. Circuit Court of Appeals in a suit challenging the GHG regulations in general, and in the 5th U.S. Circuit Court of Appeals in New Orleans in a suit to prevent the EPA from issuing GHG permits in Texas. Despite Texas’s aggressive efforts, 3 times now the **courts have refused to block EPA** from moving forward:

- June 2012: A three-judge panel of the D.C. Court of Appeals said the EPA was “unambiguously correct” in using existing federal law to address global warming, upholding EPA’s finding that greenhouse gases endanger public health, as well as the agency’s “tailpipe” rule for cars and light-duty trucks and “timing” and “tailoring” rules, which deal with when and how greenhouse gas standards apply to stationary sources. In April, 2013, a Texas-led coalition of energy-producing states petitioned the Supreme Court to review the federal appeals court ruling. The Supreme Court has granted review of one narrow question in the case [“whether EPA’s regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases”]. Oral arguments are scheduled for February 24, 2014.
- December 2012: The D.C. Court of Appeals dismissed industry challenges to the proposed greenhouse gas New Source Performance Standards, finding that the “challenged proposed rule is not final agency action subject to judicial review.”
- July 2013: D.C. Court of Appeals upheld the EPA’s rule on how states regulate greenhouse gas emissions; i.e. effectively upholding the Texas FIP.

While the TCEQ is proceeding to implement a Texas GHG permitting program pursuant to HB 788, **Texas continues to challenge** the EPA’s GHG regulations.

EPA will remain the permitting authority for GHG emissions in Texas until rulemaking is completed, the rules adopted by the TCEQ are approved by EPA as part of the Texas State Implementation Plan (SIP), and EPA then withdraws the FIP. TCEQ will be coordinating with EPA regarding the transition period for accepting and processing GHG applications.

Notable Quotes:

The science of global warming is a “*contrived phony mess that is falling apart under its own weight.*” The EPA is a “*rogue agency*” with an “*activist mind-set*” that has “*targeted Texas.*” --- **Governor Rick Perry**

“*The EPA has effectively re-written the Clean Air Act to impose its new standards, imposed severely restrictive timelines on the states to implement its new requirements, and then twisted the act to immediately impose its agenda on Texas.*” The greenhouse gas rules “*will result in no environmental benefits whatsoever while imposing significant costs on industry and American consumers*” --- **TCEQ Chairman Bryan Shaw**

The federal appeals courts have “*failed to rein in the unelected bureaucrats at the (EPA) who are holding our country’s energy independence and fragile economy hostage to a radical environmental agenda.*” --- **Texas Attorney General Greg Abbott**

H.B. No. 788

AN ACT

relating to permitting of greenhouse gas emissions by the Texas Commission on Environmental Quality; limiting the amount of a fee.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that in the interest of the continued vitality and economic prosperity of this state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred permitting authority for emissions of greenhouse gases.

SECTION 2. Subchapter C, Chapter 382, Health and Safety Code, is amended by adding Section 382.05102 to read as follows:

Sec. 382.05102. PERMITTING AUTHORITY OF COMMISSION;

GREENHOUSE GAS EMISSIONS. (a) In this section, "greenhouse gas emissions" means emissions of:

- (1) carbon dioxide;
- (2) methane;
- (3) nitrous oxide;
- (4) hydrofluorocarbons;
- (5) perfluorocarbons; and
- (6) sulfur hexafluoride.

(b) To the extent that greenhouse gas emissions require authorization under federal law, the commission may authorize greenhouse gas emissions in a manner consistent with Section 382.051.

(c) The commission shall:

(1) adopt rules to implement this section, including rules specifying the procedures to transition to review by the commission any applications pending with the United States Environmental Protection Agency for approval under 40 C.F.R.

Section 52.2305; and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

(d) The permit processes authorized by this section are not subject to the requirements relating to a contested case hearing under this chapter, Chapter 5, Water Code, or Subchapters C-G, Chapter 2001, Government Code.

(e) If authorization to emit greenhouse gas emissions is no longer required under federal law, the commission shall:

(1) repeal the rules adopted under Subsection (c); and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

SECTION 3. Section 382.0621, Health and Safety Code, is amended by adding Subsection (f) to read as follows:

(f) The commission may impose fees for emissions of

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greenhouse gas only to the extent the fees are necessary to cover the commission's additional reasonably necessary direct costs of implementing Section 382.05102.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: October 4, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-1342-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 39, Public Notice
Chapter 55, Requests for Reconsideration and Contested Case Hearings;
Public Comment
Chapter 101, General Air Quality Rules
Chapter 106, Permits by Rule
Chapter 116, Control of Air Pollution by Permits for New Construction or
Modification
Chapter 122, Federal Operating Permits Program

House Bill 788 – Greenhouse Gas Permitting
Rule Project No. 2013-040-116-AI

Background and reason(s) for the rulemaking:

In recent years, regulations promulgated by the United States Environmental Protection Agency (EPA) have subjected major sources of greenhouse gases (GHGs) to permitting requirements under the Prevention of Significant Deterioration (PSD) program and the Federal Operating Permits ("Title V") Program. In 2010, EPA imposed a Federal Implementation Plan (FIP) on the state of Texas in order to issue PSD permits to major sources of GHGs. As a result, major sources of GHGs in Texas must currently file an application with EPA to obtain PSD authorization to construct or modify a major source of GHGs. If the source is also major for emissions of non-GHGs, an application must also be filed with TCEQ for a PSD permit authorizing the emissions of non-GHGs. Industry sources have indicated this dual permitting authority has resulted in significant costs and long wait times for issuance of PSD permits for GHGs. In addition, major sources of GHGs must apply for Title V permits; however, current TCEQ rules do not include GHGs as an "air pollutant" under the Title V program.

In order to resolve the issues with PSD GHG permit processing time and Title V applicability, House Bill (HB) 788, 83rd Legislature, 2013, found that the TCEQ is the preferred permitting authority for emissions of GHGs, and made corresponding changes to the Texas Clean Air Act (Texas Health and Safety Code (THSC), Chapter 382) to provide TCEQ with the express authority to permit GHGs to the extent required under federal law. New THSC §382.05102 requires that TCEQ adopt rules to allow for the authorization of emissions of GHGs, and defines the six compounds or classes of compounds which are considered GHGs. THSC §382.05102 also directs the commission to submit the newly

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adopted rules to EPA for approval into the Texas state implementation plan (SIP), including procedures for transitioning any PSD GHG applications pending at EPA to the TCEQ. The GHGs permits authorized by this new section are not subject to contested case hearing requirements.

This rulemaking also addresses a petition from 3M Company filed on April 1, 2013, Docket No. 2013-0700-RUL, requesting that a particular fire protection fluid be provided a reportable quantity (RQ) of 5,000 pounds instead of the default RQ of 100 pounds. The petition was approved at the May 22, 2013, commission agenda.

Scope of the rulemaking:

As HB 788 has broad ramifications, changes are necessary to Chapters 39, 55, 101, 106, 116, and 122 in order to address requirements for permitting, contested case hearings, and public notice associated with the authorization of GHGs. The most significant rule changes are described further.

A.) Summary of what the rulemaking will do:

Chapter 116

- Changes to relevant definitions in §116.12 establish that GHGs are a "federally regulated new source review pollutant," and define how "carbon dioxide equivalent (CO₂e) emissions" are determined.
- New §116.164 establishes the GHGs major source and major modification threshold levels at which a source would require a PSD permit.
- New §116.169 establishes procedures for the transition of GHG PSD permit applications from EPA to TCEQ.
- Changes to §116.610 to establish that a standard permit may be used in conjunction with a PSD GHG permit as long as the non-GHG pollutants meet the conditions of the standard permit.

Chapter 122

- Changes to the §122.10 definition of "air pollutant" and "major source" would make sites with emissions of GHGs exceeding federal threshold levels subject to the requirement to obtain a Title V Federal Operating Permit.
- Changes to §122.122 provide a method for sources to certify enforceable emission limits for GHGs. Since the pollutant GHG is being added to the Title V (and PSD) permitting program, existing sources may have the potential to emit over the major source thresholds, but actual emissions may be below the thresholds. These sources will have 90 days after EPA's final action approving amendments to §122.122 to

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certify emissions of GHGs in order to avoid applicability of Title V permitting. New sources of GHGs would be required to certify emissions no later than the date of operation.

Chapter 106

- Changes to §§106.2 and 106.4 specify that Chapter 106, Permits by Rule, does not authorize or limit emissions of GHGs.
- Changes to §106.4 to establish that a PBR may be used in conjunction with a PSD GHG permit as long as the non-GHG pollutants meet the conditions of the PBR.

Chapter 101

- A definition of "greenhouse gases" has been added under §101.1.
- The §101.1 definition of "reportable quantity" has been amended to specify that there is no RQ for any individual GHG or the aggregate six GHGs except for specific individual air contaminant compounds previously included in the definition of RQ. Emissions of GHGs will not be reported under Subchapter F: Emissions Events and Schedule Maintenance, Startup, and Shutdown Activities.
- Changes to §101.10 to exempt emissions of GHGs from counting towards the emissions inventory (EI) applicability requirement for sources that emit or have the potential to emit 100 tons per year or more of any contaminant, in order to be consistent with the federally tailored thresholds for GHGs; and to exempt GHGs from being required to be reported on EI.
- Changes to §101.27 to exempt the pollutant GHGs from the term "regulated pollutant" to establish that there would be no fees on emissions of GHGs.

Chapter 55

- Changes to §55.201 ensure that applications for a PSD GHG permit are not subject to contested case hearing requirements. A notice and comment hearing process will apply.

Chapter 39

- Changes to §39.411 ensure that the public notice text for PSD GHG permits correctly indicates that a person may request a notice and comment hearing for PSD GHG permits (as opposed to a contested case hearing).
- New §39.412 establishes public notice procedures for certain PSD GHG permit applications previously submitted to EPA.

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B.) Scope required by federal regulations or state statutes:

40 Code of Federal Regulations (CFR) §51.166 and §52.21, are the rules governing the preconstruction authorization PSD (Federal Clean Air Act (FCAA) Title I, Part C) program, applicable to major sources and major modifications of regulated new source review (NSR) pollutants. The federal Tailoring Rule amended §51.166 and §52.21 to establish specific applicability thresholds for emissions of GHGs.

40 CFR Part 70 contains the rules for operating permit programs that are implemented by the states, as required by Title V of the FCAA. State operating permit programs are approved by the EPA. The Tailoring Rule amended Part 70 to require major sources of GHGs (as determined under the tailored thresholds) to obtain, revise, or renew their operating permit to include GHGs-specific applicable requirements.

THSC, §382.051, establishes the permitting authority of the commission. The commission may issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and to operate a federal source. This section also gives the commission authority to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under Chapter 382.

THSC, §382.05102, establishes the commission's authority to adopt rules to issue permits for GHG emissions, to the extent these emissions require authorization under federal law. These permit processes are not subject to contested case hearing under Chapter 382, THSC, Chapter 5, Texas Water Code or Texas Government Code, Chapter 2001. The section also directs the commission to submit the adopted rules to EPA for approval into the Texas SIP, and to develop rules specifying the procedures for transitioning applications pending at EPA to the TCEQ for review and issuance. The section also specifies that the commission will repeal the GHGs permitting rules if emissions of GHGs are no longer required to be authorized under federal law.

C.) Additional staff recommendations that are not required by federal rule or state statute:

- In response to a petition for rulemaking, a proposed change to the §101.1 definition of "reportable quantity" would assign an RQ value of 5,000 pounds to a firefighting compound (C6 Fluoroketone), instead of the default value of 100 pounds.

Statutory authority:

State Authority: THSC Chapter 382 (Texas Clean Air Act), §382.011, General Powers and Duties; THSC, §382.012, State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.05102, Permitting Authority of Commission; Greenhouse Gas Emissions; THSC, §382.054, Federal Operating Permit; THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing; THSC, §382.0518, Preconstruction Permit; THSC, §382.0621 Operating Permit Fee; TWC §5.102, General Powers, and TWC, §5.103 Rules.

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FCAA §110(a)(2)(C); §165(a); §§501 - 505.

Effect on the:

A.) Regulated community:

Approval by EPA of these rules will end the FIP; major sources of GHGs in Texas will submit PSD and Title V applications to TCEQ only. There will be a fiscal impact due to additional collection of PSD permit fees, Title V emissions fees, and the cost for affected sources to prepare emissions inventories.

B.) Public:

Because federal PSD permits issued by EPA under the FIP do not provide an opportunity for a contested case hearing, excluding PSD GHG applications from contested case hearings under state rules would not affect the public in a manner different than under the FIP. The public will have an opportunity to submit comments on the PSD and TV applications that are processed by the commission when the rules are approved and the FIP is lifted.

C.) Agency programs:

TCEQ programs will be affected due to an increased number of PSD and Title V permit applications. The commission will monitor the cost of implementing these rules, and if necessary, may increase air emission fees to fund the additional cost for permitting GHGs.

Stakeholder meetings:

In order to expedite the rulemaking and EPA's approval, no stakeholder meetings are planned. A public hearing will be held, as well as a public comment period of at least 30 days if the commission approves the proposed rule project for publication.

Potential controversial concerns and legislative interest:

HB 788 made the finding that TCEQ is the preferred GHG permitting authority in Texas. The bill passed with two thirds vote in both Houses, taking immediate effect upon the Governor's signature. There is legislative interest that the commission expeditiously adopt rules, so that EPA may approve rules into the SIP and concurrently lift the FIP so that Texas industry may obtain PSD and Title V permits from TCEQ rather than EPA.

Will this rulemaking affect any current policies or require development of new policies? This rulemaking does not specifically affect any current policies, however, because the rules are implementing a new and unique federal permitting scheme, changes to policies may be identified during the implementation phase.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Failure to adopt rules and gain EPA approval will mean the FIP will remain in place and the authority to issue GHG permits will remain with EPA. In addition, HB 788 specifically directs TCEQ to adopt rules, so failure to do so would represent a failure to implement

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legislative directive. There are no alternatives to rulemaking that will satisfy HB 788 and provide the opportunity for EPA's rescission of the FIP.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: October 23, 2013

Anticipated *Texas Register* publication date: November 8, 2013

Anticipated public hearing date: December 5, 2013

Anticipated public comment period: November 8, 2013 - December 9, 2013

Anticipated adoption date: March 26, 2014

Agency contacts:

Tasha Burns, Rule Project Manager, 239-5868, Air Permits Division

John M. Minter, Staff Attorney, 239-0663

Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

House Bill (HB) 788 (83rd Legislature)

cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
Tucker Royall
Office of General Counsel
Tasha Burns
Charlotte Horn

Rule Projects No. 2013-040-116-AI

The Lone Star Chapter of the Sierra Club appreciates the opportunity to offer these brief comments on the rules needed to implement HB 788, which requires TCEQ to take over the greenhouse gas (GHG) permitting process for PSD and Title V permits from EPA. While Sierra Club looks favorably upon the legislative decision to require TCEQ to take over the GHG permitting process, we believe that TCEQ already had the statutory authority to design a GHG permitting program all along and were disappointed that TCEQ itself, and political leaders like Governor Rick Perry and Attorney General Greg Abbot chose to legally challenge the GHG permitting requirements rather than implementing them. We believe significant delay in permitting in Texas, including opportunities for improving these permits, occurred because of the decision by TCEQ to refuse to implement a SIP on GHG permitting with the argument they could not legally implement such a program. Indeed, it was industry, not Sierra Club, who offered the main support behind HB 788 because of their concerns about delays in permitting and construction of major pipelines, refineries and electric plants. In any case, we are glad that TCEQ will now begin the process of taking over the federal program. While there were aspects of HB 788 that we did not support – such as not allowing contested case hearings on GHG proposed PSD permits – we recognize that this is now in Texas statutes, and TCEQ must adopt the rules accordingly.

We do hope however, that in adopting these proposed rules and implementing a GHG permitting program, that TCEQ creates the best process possible to both incorporate Best Available Control Technology for limiting emissions of GHGs and allowing full public input into the decision-making process. We expect TCEQ to assess add-on pollution control equipment like IGCC or other carbon capture technologies, fuel switching and process controls. In “PSD and Title V Permitting Guidance for Greenhouse Gases,” the EPA notes that IGCC “should not be categorically excluded from a BACT analysis for a coal-fired electric generating unit . . . and this technology should not be excluded on redefining the source grounds at Step 1 of a BACT analysis . . . unless the record clearly demonstrates why the permit applicant's basic or fundamental business purpose would be frustrated by application of this process.” The guidance also indicates that carbon capture and sequestration (CCS) as possible BACT, noting that the EPA generally considers CCS to be “available,” but recognizing that it may, depending on the source, be technically infeasible or economically unreasonable. In short, the guidance does not provide assurances that various GHG control measures may be categorically rejected from the BACT analysis process. The TCEQ should not arbitrarily deny certain BACT because of a general belief, the types of available technology must be determined on a case-by-case basis.

We also do want to see “alternative” technologies that reduce GHGs to be considered both by developers and the GHG permitting process. Making sure that there is an understanding that onsite performance and process improvements will be “credited” for any reductions in GHG emissions would be an important part of the permitting process. As an example, some natural gas power plants are looking at both front-end technologies like turbine inlet air chilling, as well as hybrid technologies like solar PV and thermal

technologies as well as energy storage to enhance their power production, and in some cases, replace the need for gas fuel. TCEQ must continually update their analysis to look at such add-ons and new technologies as new permits are considered

Whether as part of this rulemaking or as an informal process, we would suggest that TCEQ annually hold stakeholder meetings to get input on the latest technologies and controls to reduce GHGs.

Specific Comments

Chapter 39 – PSD GHG Public Notice

Sierra Club supports proper notice and public comment for PSD GHG permitting. We are generally supportive of the proposed changes in Chapter 39, including proposed new 39.412 for those applications that were being assessed by EPA but are being moved to TCEQ jurisdiction. That being said, we would suggest some additional language to make the process for 39.412 more accessible to the public and make sure that TCEQ decisions on permits in process are given a reasonable assessment. These extra steps are needed since previous comments on applications at EPA will NOT be considered by TCEQ in their decision-making process. Thus, assuring adequate comment time, and a real assessment of Best Available Control Technology is paramount to making sure the permits are as strong as possible and meet federal guidelines.

Sierra Club acknowledges that there current are no National Ambient Air Quality Standards (NAAQS) for GHGs. At this time, therefore, Sierra Club does not object to TCEQ's decision not to require an air quality analysis for GHG PSD permits where no other pollutant requires such an analysis. However, TCEQ must require a full Best Available Control Technology (BACT) analysis. Clean Air Act § 165(a)(4) requires facilities to install the Best Available Control Technology (BACT), which is defined as "an emissions limitation ... based on the maximum degree of reduction for each pollutant subject to regulation under the Act..." 42 USC 7479(3); 40 CFR 52.21(b)(12). In determining the BACT limit, TCEQ must conduct a BACT analysis using the "top-down" method described in EPA's 1990 Draft New Source Review Manual (NSR Manual). This top-down analysis is a five step process: (1) Identify all Control Technologies; (2) Eliminate Technically Infeasible Technologies; (3) Rank Remaining Control Technologies by Effectiveness; (4) Evaluate Most Effective Controls; and (5) Select BACT. (NSR Manual, B.6) EPA Region 6 currently relies on this top-down five step process for GHG PSD permitting, and we TCEQ must incorporate EPA's five-step process for BACT analysis for PSD and Title V permits related to GHGs.

TCEQ's BACT analysis, including the top-down five step analysis, must be available to the public to review and provide comments on. Sierra Club recommends that the following language be added in 39.412 (3) (C) to make it clear the BACT analysis is included in the documents that can be reviewed by the public prior to issuance of a final permit:

39.412(C) A copy of the executive director's preliminary decision, draft permit, preliminary determination summary, **including a full analysis of Best Available Control Technology**, and air quality analysis..”

Chapter 55

We have no comments at this time. We agree that HB 788 does not allow a contested case hearing on PSD GHG permits. While no contested case hearing is allowed, we hope that TCEQ will take seriously its commitment to assess GHG PSD applications, including the requirement to assess BACT, and take public input seriously.

Chapter 101

While we are in agreement that emissions of carbon dioxide and other GHGs are not subject to fees as part of the required emissions inventory, we fundamentally disagree with the approach that entities not report their annual emissions of GHGs. Instead, TCEQ should take advantage of this permitting process to require an annual inventory of GHG gases by those holding GHG permits. This can be incorporated into the emissions inventory. The fact is that many industries already collect this information – including the electric power industry which annually reports to the EPA – either for regulatory or industry benchmark purposes, and TCEQ and the public would be well served by having access to this information.

Thus, we suggest removal of new (89) (A) (iii) on page 68:

~~(iii) for greenhouse gases, individually or collectively, there is no reportable quantity, except for the specific individual air contaminant compounds listed in this paragraph;~~

Similarly, we would alter proposed changes to 101.10 (a) (3), which states “except of GHGs, individually or collectively, as listed in 101.1 of this chapter.”

Instead, we would suggest that those required to report to EPA under 40 CFR Part 98, be also required to report to the TCEQ emissions inventory. Since these entities already are required to report to EPA, it should be fairly simple to enter the same information.

Thus, we would change (3) to state “except of GHGs, individually or collectively, as listed in 101.1 of this chapter unless the meet the provisions of (6)” and add a (6) to the list of those that must report to state

(6) any source which has the potential to emit more than 25,000 metric tons CO₂e or more per year in combined emissions and is also required to report to the Environmental Protection Agency under 40 C.F.R Part 98 (Greenhouse Gas Emissions Reporting Requirements).

We would then add (6) where appropriate to the remaining text to make it clear that those sources required to report GHG emissions to the federal government should also annually report their GHG emissions to TCEQ on the AEIU.

We would continue to make it clear that the emissions of GHG reported to the AEIU would not be subject to emission fees.

In terms of reportable emissions event, we believe that while most GHGs would not be reportable, we would suggest that methane should be and would make it clear that emissions of methane should be reported.

Chapter 106

We are in agreement with the proposed rules for Chapter 106, and agree that an entity may hold a Permit-by-Rule for a facility for criteria and toxic pollutants, but be required to seek a PSD for GHG emissions. We also agree that an entity that has received its PBR for criteria pollutants can not begin operation until it receives its PSD for GHGs.

Chapter 116

We are unclear why in the definition of carbon dioxide equivalent emissions under (7) (B) the rules state that CO2 emissions from breakdown of organic material prior to July of 2014 will not be included. While we think this provision will have little practical impact since these rules will take time to be incorporated into the SIP and be approved by EPA, we would prefer to take this provision out. Federal guidelines on GHG reporting have changed over the last three years and are likely to change again. Including (B) is not needed Biomass plants or other facilities using organic material should be subject to the same rules and emission thresholds as other industries when it comes to GHG permits. The Sierra Club recommends removing this language.

In addition, we would suggest that language be added to make it clear that TCEQ will do an exhaustive BACT analysis for GHG PSD that is open to alternative methods to meet BACT and that the BACT analysis will be continually updated. We would suggest adding language in 116.111 (I) (ii) under Prevention of Significant Deterioration (PSD) review, such as:

In conducting its PSD review and BACT analysis, the Commission shall consider both add-on control technology to control emissions and on-site operations, including those designed to increase renewable energy and energy efficiency measures on-site that reduce overall emissions of global warming gases. In conducting its permit-by-permit reviews, the Commission shall continually update and review its BACT analysis for particular sources of GHG emissions as new GHG PSD applications are received. The Commission shall consider information provided by stakeholders related to BACT for GHG for different sources.

We are generally supportive of new Sections 116.164 and 116.169 as written, as well as the new rules related to standard permits.

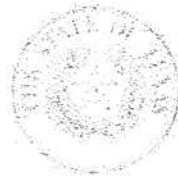
Chapter 122

As stated previously in these comments, we are unclear why in the definition of carbon dioxide equivalent emissions under 122.110 (3) (B) the rules state that CO2 emissions from breakdown of organic material prior to July of 2014 will not be included in the calculation of CO-2 equivalent emissions. While we think this provision will have little practical impact since these rules will take time to be incorporated into the SIP and be approved by EPA, we would prefer to take this provision out. Federal guidelines on GHG reporting have changed over the last three years and are likely to change again. Including (B) is not needed Biomass plants or other facilities using organic material should be subject to the same rules and emission thresholds as other industries when it comes to GHG permits. The Sierra Club recommends removing this language.

We are generally supportive of the other provisions in Chapter 122, including the provision to require those holding a Title V permit because of GHG emissions to submit an abbreviated application to TCEQ within 12 months of approval of the TCEQ GHG permitting program by the EPA.

The Sierra Club appreciates the opportunity to submit these brief comments under Rule Project Number 2013-040-116-AI.

Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 2, 2013

Mr. Sam Coleman
Deputy Regional Administrator
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mr. Coleman,

On October 23, 2013, the Texas Commission on Environmental Quality (TCEQ or commission) approved the publication of proposed new and amended rules to apply its Prevention of Significant Deterioration (PSD) program to greenhouse gas (GHG) emitting sources. This action is the result of passage of House Bill 788 in the 83rd Legislature which added Section 382.05102 to the Texas Health and Safety Code (THSC).¹ To the extent that GHG emissions require authorization under federal law, this new section grants the commission authority to authorize emissions of GHGs in a manner consistent with Section 382.051. In addition, the legislation requires the commission adopt rules to implement Section 382.05102, including procedures to transition applications pending with the Environmental Protection Agency (EPA) to Texas, and to submit the rules for approval into the State Implementation Plan (SIP). If adopted, these rules will be submitted to EPA for approval into the SIP. In addition to the SIP rule revision process, the Federal Implementation Plan (FIP) for PSD GHG permitting must also be rescinded. In order to expedite federal approval and rescission of the FIP, the TCEQ requests that EPA "parallel process" these revisions to the Texas SIP in accordance with 40 Code of Federal Regulations (CFR) Part 51, Appendix V and as contemplated in EPA's May 3, 2011 *Federal Register* notice.²

These actions on the part of the TCEQ reflect the agency's efforts to work with EPA to have the FIP rescinded as that process is outlined in the May 3, 2011 *Federal Register* notice of the final partial SIP disapproval and FIP. In that notice, EPA stated that it will rescind the FIP if: "...(i) Texas submits, and EPA approves, a SIP revision to apply Texas' PSD program to GHG emitting sources, (ii) Texas provides assurances that in the future, it will apply its PSD program to all pollutants newly subject to regulation, including non-NAAQS pollutants, and (iii) Texas provides 'necessary assurances' under CAA section

¹ Act of June 14, 2013, 83rd Leg., R.S., H.B. 788, § 2 (to be codified at Tex. Health & Safety Code § 382.05102).

² Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program, Final Rule, 76 *Fed. Reg.* 25178, (May 3, 2011)

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110(a)(2)(E)(ii) that it will have adequate...authority under State law' to apply its PSD program to such pollutants.

As discussed above, the TCEQ is moving forward expeditiously on rules to apply its PSD permitting program to GHG emitting sources. Regarding the point concerning adequate legal authority, under the Federal Clean Air Act (FCAA) and Texas Clean Air Act (TCAA), the TCEQ is given broad authority over stationary sources of air pollution. The FCAA establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals. Under this partnership, "air pollution prevention ... at its source is the primary responsibility of the states..."⁴ States are to, "after reasonable notice and public hearing" submit plans that include a program to regulate modification and construction of any stationary source within the areas covered by such plan.⁵ Under state law, the TCEQ is provided with similarly broad authority. For instance, the TCAA, codified in Chapter 382 of the Texas Health and Safety Code, was created for the purpose of safeguarding the state's air resources from pollution by controlling or abating air pollution and to do so consistent with the protection of public health, property and general welfare.⁶ In addition, the TCAA provides that "the commission shall... establish the level of quality to be maintained in the state's air, and control the quality of the state's air..."⁷ The commission is further directed to develop a comprehensive air control plan and adopt rules consistent with the policy and purpose of the TCAA.⁸

In order to fulfill the obligation to protect air quality in the state, the TCAA authorizes the commission to issue permits to construct or modify stationary sources.⁹ Before construction is commenced for a new facility or a modification to an existing facility, the commission must issue a permit if the facility will use the best available control technology, or BACT, and there is no indication from the information provided by the permit applicant that emissions will interfere with protection of public health and welfare.¹⁰ Under this permitting authority and the authority to develop rules to carry out its duties under the Act, the commission has adopted specific rules in order to implement the federal PSD permitting program. These EPA-approved rules are found in 30 Texas Administrative Code (TAC) Chapter 116, Subchapter B, New Source Review Permits. Chapter 116 includes requirements for BACT and impacts review among other things, consistent with the federal program rules. Through notice and comment rulemaking, TCEQ incorporated the federal PSD requirements into these rules in order

³ 76 Fed. Reg. at 25,100.

⁴ 42 U.S.C. § 7401(a)(4).

⁵ 42 U.S.C. § 7410(a)(2).

⁶ Tex. Health & Safety Code § 382.002.

⁷ Tex. Health & Safety Code § 382.011.

⁸ Tex. Health & Safety Code § 382.012.

⁹ Tex. Health & Safety Code § 382.051.

¹⁰ Tex. Health & Safety Code § 382.0518.

to gain SIP approval in 1992;¹¹ and conducted numerous rulemakings to amend these rules as federal requirements changed.

As to applying TCEQ's PSD program to all pollutants newly subject to regulation, for many years, TCEQ has used its rulemaking authority under state law and the FCAA Section 110 SIP revision process to include new pollutants or newly promulgated requirements, in its PSD program. Under the TCAA, the commission is required to "adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under [THSC Chapter 382]."¹² The state Administrative Procedure Act contains the general rulemaking authority for state agencies.¹³ This law mandates that agencies adopt rules in a timely manner, requiring withdrawal of a proposed rule six months after publication of proposal if the agency fails to adopt or withdraw the proposed rule.¹⁴ Texas's SIP updating method has been long recognized by EPA in the several revisions it has approved relating to the state's PSD program.¹⁵ As far back as 1986, our predecessor agency, the Texas Air Control Board (TACB), expressed in writing to Region 6 that the agency's intent in incorporating by reference specific federal PSD requirements is not prospective rulemaking. At that time, the TACB Deputy Executive Director stated that any future revisions of state PSD rules to incorporate revisions requested by EPA, would be accomplished after public hearing and opportunity for public comment and participation.¹⁶ For instance, TCEQ submitted a SIP revision on September 29, 1988 to regulate PM₁₀ under PSD, a pollutant newly subject to regulation under the FCAA after EPA established a NAAQS for this pollutant in July 1987.¹⁷ This revision was approved by EPA as part of the 1992 approval of the Texas PSD program. As EPA has amended its permitting rules, TCEQ has acted accordingly to adopt rules in order to maintain its longstanding PSD program approval in the SIP. In a 1991 SIP revision, state rules were amended to reflect new federal NO_x PSD increments that were adopted by EPA in 1988. EPA approved this revision to the Texas SIP in 1994.¹⁸ After EPA promulgated the NSR Reform rules in 2002, TCEQ adopted corresponding rules and submitted them to EPA as a revision to the PSD

¹¹ Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration, Final Rulemaking, 57 *Fed. Reg.* 28093 (June 24, 1992)

¹² Tex. Health & Safety Code § 382.051(d)

¹³ Tex. Gov. Code, Chapter 2001

¹⁴ Tex. Gov. Code § 2001.027

¹⁵ See Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, Interim Final Rule, 75 *Fed. Reg.* 82430, 82439 (December 30, 2010)

¹⁶ Letter from Steve Spaw, Deputy Exec. Director, TACB to William Hathaway, Dir. Air, Pesticides, and Toxics Division, U.S. EPA Region 6 (October 24, 1986)

¹⁷ See EPA's notice of proposed approval of Texas's PSD program, 54 *Fed. Reg.* 52823, December 22, 1989, for a discussion of this process

¹⁸ Approval and Promulgation of State Implementation Plans Texas; Prevention of Significant Deterioration, Nitrogen Dioxide Increments, Direct Final Rule, 59 *Fed. Reg.* 46556 (September 9, 1994)

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program. EPA approved the revision in 2012.¹⁹ More recently, commission rules were amended to incorporate PM_{2.5} implementation requirements after EPA ended the PM₁₀ surrogate policy for demonstrating compliance with the PM_{2.5} NAAQS PSD requirements.²⁰

As contemplated in the FCAA's state-federal partnership concept, a single permitting authority in Texas is preferred by all parties. This concept provides the most certainty and consistency in applying federal and state requirements to the regulated community. As found by the legislature in House Bill 788, Texas desires to continue to be the PSD permitting authority in this state in the future. Toward that end, we commit to EPA that, going forward, we will follow the same SIP amendment process used in the past that has met with EPA approval. We believe this process, which has worked well in the past, ensures the transparency and public scrutiny necessary for effective air quality regulation.

If you have additional questions, please contact me at (512) 239-3914.

Sincerely,



Zak Covar
Executive Director

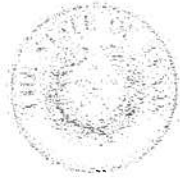
Cc: Adina Wiley, U.S. Environmental Protection Agency, Region VI;
Lynde Schoellkopf, U.S. Environmental Protection Agency, Region VI;
Anne Idsal, Texas Commission on Environmental Quality, General Counsel;
Caroline Sweeney, Texas Commission on Environmental Quality, Deputy, Office
of Legal Services;
Steve Hagle, Texas Commission on Environmental Quality, Deputy, Office of
Air

¹⁹ Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Antibacksliding of Major NSR SIP Requirements for the One-hour Ozone National Ambient Air Quality Standard (NAAQS); Major Nonattainment NSR (NNSR) SIP Requirements for the 1997 Eight-hour Ozone NAAQS; and Major NSR Reform Program, Final Rule, 77 Fed. Reg. 65119 (October 25, 2012)

²⁰ 36 Tex. Reg. 2841, May 6, 2011; "In an effort to ensure the TCEQ meets the regulatory requirements of the FCAA the commission is adopting amendments to Chapter 101 and 30 TAC Chapter 106, Permits by Rule, to add specific definitions related to PM_{2.5} regulation and to address the known requirements for implementation."

Adina Wiley
Lynde Schoellkopf
Anne Idsal
Caroline Sweeney

Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Zak Covac, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 13, 2014

Mr. Sam Coleman
Deputy Regional Administrator
U.S. Environmental Protection Agency Region 6
1445 Ross Avenue
Dallas, Texas 75202

Dear Mr. Coleman:

On December 2, 2013, I wrote notifying you of the proposal and publication of new and amended rules to apply Texas Commission on Environmental Quality's (TCEQ) Prevention of Significant Deterioration (PSD) program to greenhouse gas (GHG) emitting sources in Texas. As part of that letter, I also requested that EPA expedite its review and approval of these rules through parallel processing and fully rescind the Federal Implementation Plan (FIP) that is currently in place regarding GHG PSD permitting authority in this state.

Consistent with a full rescission of the FIP, an integral part of transitioning authority over PSD permitting of GHG sources in Texas is the future administration of those permits that are issued by EPA. Based on previous discussions with your office, it is the TCEQ's understanding and intention that EPA would transfer this authority to our agency upon approval of our rules and rescission of the FIP. EPA has issued several GHG PSD permits in Texas and will likely issue several more before the FIP is lifted; however, our December 2 letter did not expressly address TCEQ's assumption of authority over these permits.

In 1987, TCEQ's predecessor agency, the Texas Air Control Board (TACB), adopted the PSD Supplement. Condition 1 of the PSD Supplement states that TACB will assume responsibility to enforce permits that were issued by EPA prior to TACB receiving authority to implement the PSD program. As an EPA-approved element of the Texas SIP, the PSD Supplement also applies to GHG PSD permits issued by EPA under the FIP.

Therefore, this letter confirms that, as part of and concurrent with EPA's approval of the proposed GHG PSD program rules into the Texas SIP, TCEQ is requesting continued approval to exercise its authority to administer the PSD program with respect to those sources located in Texas that have existing EPA-issued GHG PSD permits. This includes authority for the general administration of these existing permits, authority to process and issue any and all subsequent PSD permit actions relating to such permits

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including modifications, amendments or revisions of any nature and the authority to enforce such permits.

As we move towards our mutual goal of transitioning GHG permitting to Texas, please do not hesitate to contact me at (512) 239-1317.

Sincerely,



Richard A. Hyde, P.E.
Interim Executive Director

cc: Adina Wiley, U.S. Environmental Protection Agency, Region VI
Lynde Schoellkopf, U.S. Environmental Protection Agency, Region VI
Anne Idsal, General Counsel, Texas Commission on Environmental Quality
Caroline Sweeney, Deputy, Office of Legal Services, Texas Commission on
Environmental Quality
Steve Hagle, Deputy, Office of Air, Texas Commission on Environmental Quality