

# **TCEQ-EPA LEGAL CHALLENGES**

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**Air & Waste Management Association**

**HOT AIR TOPICS CONFERENCE**

"I go into the office, I sue the federal government and I go home."

Texas Attorney General Greg Abbott - April 27, 2013

Texas has filed suit against or been involved in at least 18 lawsuits against EPA since 2002

- Greenhouse Gas
- Cross State Air Pollution Rule (CSAPR)
- Mercury and Air Toxics Standards (MATS)
- TCEQ's Flexible Permitting Program

February 5, 2014 – Congressional Committee Hearing Charge

- Examining the Science of EPA Overreach: A Case Study in Texas

# Greenhouse Gas (GHG)



# Texas' Legal Challenges Greenhouse Gas (GHG)

*Rick Perry, et al. v. EPA* – petition for review of EPA's FIP Rules in December 2010 and May 2011, filed and consolidated in the U.S. Court of Appeals for the D.C. Circuit

Petition for review of EPA's GHG SIP Call filed in the 5<sup>th</sup> Circuit on December 15, 2010 and in the D.C. Circuit on February 14, 2011

- The 5<sup>th</sup> Circuit case was dismissed
- The D.C. Circuit case was consolidated

Certain Texas GHG challenges were consolidated by the U.S. Supreme Court with 5 other cases in *Utility Air Regulatory Group v. EPA*

- Oral argument is scheduled for February 24, 2014

# Texas' Legal Challenges Greenhouse Gas (GHG)

Texas' challenges in *Utility Air Regulatory Group v. EPA* to GHG permitting authority date back to 2010

- February 16, 2010 – Texas challenge of Endangerment Finding
  - ❑ Denied by the D.C. Circuit
  - ❑ U.S. Supreme Court declined review
- June 1, 2010 - Texas challenge of the Timing Rule
  - ❑ Dismissed by the D.C. Circuit
  - ❑ U.S. Supreme Court granted certiorari
- June 11, 2010 – Texas challenge of the Tailpipe Rule
  - ❑ Denied by the D.C. Circuit
  - ❑ Supreme Court declined review
- August 2, 2010 – Texas challenge the Tailoring Rule
  - ❑ Dismissed by the D.C. Circuit

# Issues Before the U.S. Supreme Court

## Greenhouse Gas

Whether EPA permissibly determined that its regulation of GHGs from new motor vehicles triggered permitting requirements under the FCAA for stationary sources that emit greenhouse gases

Dallas

Morning-News FEB 05 2014

## EPA Shifts Greenhouse Gas Permitting To Texas

Ramit Plushnick-Masti

**HOUSTON (AP)** — The U.S. Environmental Protection Agency gave Texas authority over greenhouse gas permitting on Tuesday, ending a long, often bitter battle between the federal agency and the state.

EPA's administrator in Dallas, Ron Curry, said he signed the paperwork earlier Tuesday delegating authority over the program to the Texas Commission on Environmental Quality. It comes after months of negotiations concerning what the program would look like. There will be a 30-day public comment period on the program's outline.

Noting the EPA and Texas' often contentious relationship and the many unresolved issues between the two, including a backlog of 80 greenhouse gas permits currently in the process of being approved, Curry said "that is big news" when announcing the program had been approved. He spoke at a luncheon sponsored by Air Alliance Houston, an environmental group.

Texas, the leading greenhouse gas producer in the U.S., had been the only

state in 2010 that refused to meet new federal greenhouse gas emission rules, placing some of the nation's largest refineries in operational limbo.

The EPA, in an effort to ensure those facilities could continue to operate, has been directly issuing permits since 2011, assuming a role that has historically belonged to states.

Last year, the Texas Legislature passed a law giving the Texas Commission on Environmental Quality the authority to regulate greenhouse gas emissions. That is when the EPA and the Texas environmental agency began working to develop a program that would meet federal requirements, Curry said.

Initially, Texas had wanted to have a six-month turnaround on all permits, but the EPA refused to put a cap on how long it would take to issue a permit, Curry said. The state also wanted to include a "hearing process" in its program, but the federal agency declined. In addition, Texas had to establish appropriate emission thresholds, he added.

Once those and several other issues were resolved, Curry said he was able to shift authority to Texas, though the EPA "will periodically review this program."

"It's a program that the state will have forever as long as it operates correctly," Curry told The Associated Press.

The Texas Commission on Environmental Quality said in a statement it doesn't agree with the EPA's move to regulate greenhouse gas emissions, but will follow the direction of the Legislature "so that permits can be issued in a timely manner, and to continue the successes of the strong Texas economy."

While most are pleased to see the EPA and Texas begin to resolve issues that have sparked lengthy legal battles, Air Alliance Houston Executive Director Adrian Shelley said he fears the state's primary goal will be to issue permits quickly to "ensure smooth sailing for their industry customers."

"My hope is that EPA will balance TCEQ's goals with environmental protection," Shelley said.

New York

Times FEB 02 2014

## 'A' Pro-Business Stance That's Bad for Business

NEENA SATIJA, Texas Tribune

Businesses in energy-related industries in Texas say they have been unable to take full advantage of the natural gas boom that is roaring across the state because of a delay in the issuing of greenhouse gas permits — an instance in which Texas' antiregulation stance might have actually hurt business.

The Environmental Protection Agency began requiring the permits more than three years ago, but the Texas Commission on Environmental Quality refused to enact the rules, arguing that it was illegal to regulate greenhouse gases. That left the responsibility to the E.P.A., which is only slightly larger than its Texas counterpart and has a small permitting division. As a result, the backlog of applications grew quickly, as did the complaints.

Texas lawmakers directed the state's environmental agency last year to begin following the federal regulations. But it will take months for the agency to implement its own rules to take over the permitting.

The state has long fought the federal government over regulations, especially those from the E.P.A. The chairman of the Texas agency, Bryan Shaw, one of many state officials who question the science of climate change, has repeatedly criticized the E.P.A. for developing rules that could cripple the Texas economy.

But electric power retailers, along with energy transport and chemical companies, have told the Texas Commission on Environmental Quality that the delay has put Texas at a competitive disadvantage against other states that had agreed earlier to issue the permits. Some executives said they have considered building in other states because of the delays.

More than 20 planned industrial facilities in Texas, including chemical plants and power-generating stations, have been waiting more than a year for the E.P.A. to issue the greenhouse gas emissions permits needed to begin construction. The delays have slowed the companies hoping to take advantage of the natural gas boom.

Dow Chemical, for example, has been waiting more than a year for an E.P.A. permit to begin construction on a plant near Freeport that would make ethylene, a petrochemical made from shale that is in high demand. The company had received a \$1 million state grant to help pay for the \$1.7 billion plant, which would employ thousands.

ExxonMobil had to delay construction of an ethylene facility in Baytown that it had hoped to begin building in March 2013. It did not receive E.P.A. approval until November.

"Permit approval times are the leading indicator of how quickly our nation is capturing the benefits of shale energy," Stephen Pryor, the president of ExxonMobil Chemical, said in a speech last year. "Delays could add billions in project costs, restrain job creation and erode America's new competitive advantage."

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# Cross-State Air Pollution Rule (CSAPR)



# Background

## Cross-State Air Pollution Rule (CSAPR)

*EPA v. Homer City Generation L.P.*

Consolidation of matters in the U.S. Court of Appeals for the D.C. Circuit

Based on the "good neighbor" provision of the FCAA, § 110(a)(d)(D) which requires states to reduce emissions that "contribute significantly" to nonattainment in downwind states

# Timeline

## Cross-State Air Pollution Rule (CSAPR)

- September 20, 2011 - Texas files petition for review and request for stay
- December 30, 2011 - stay granted
- August 21, 2012– CSAPR vacated/remanded to EPA
- March 29, 2013 – EPA and environmental groups file petition for certiorari with the U.S. Supreme Court
- December 10, 2013 - arguments heard by the U.S. Supreme Court
- June 2014 - decision expected

# Nature of EPA Action

## Cross-State Air Pollution Rule (CSAPR)

Replaced EPA's 2005 CAIR Rule

CSAPR would require power plants in 28 upwind states in the East, Midwest, and South to reduce nitrogen oxides and sulfur dioxide, in order to help downwind states meet NAAQS for ozone and PM2.5

In a 2-1 decision the D.C. Circuit vacated/remanded CSAPR for two reasons

- the rule may require upwind states to reduce emissions more by more than a "significant contribution" to a downwind state's nonattainment, i.e., more than their "fair share"
- EPA erroneously issued a FIP when it should have allowed states the opportunity to issue SIPs

# Issues

## Cross-State Air Pollution Rule (CSAPR)

Whether states are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution in other states until after EPA has adopted a rule quantifying each state's inter-state pollution obligations

Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind state's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas

Whether the Clean Air Act instead unambiguously requires the EPA to consider only each upwind state's physically proportionate responsibility for each downwind air quality problem

# Mercury Air Toxics Standards (MATS)



# Background of Case

## Mercury Air Toxics Standards (MATS)

MATS litigation has been consolidated in the U.S. Court of Appeals for the D.C. Circuit

- *Utility Air Regulatory Group v. EPA*
- *White Stallion Energy Center LLC, et al v. EPA*

### Timeline

- September 20, 2011 - Texas files petition for review
- December 10, 2013 - arguments heard by the D.C. Circuit

# Nature of EPA Action

## Mercury Air Toxics Standards (MATS)

NESHAPs for HAPs from Coal and Oil-Fired Electric Utility Steam Generating Units

NSPS for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units

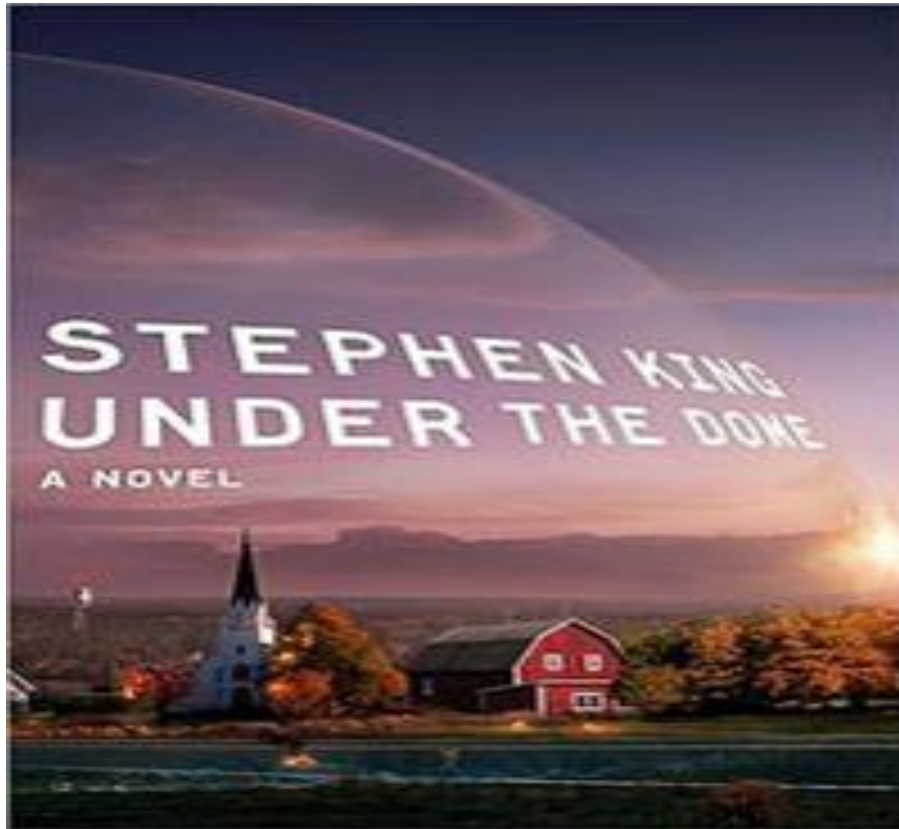


# Issues

## Mercury Air Toxics Standards (MATS)

- The industry groups and states argued that
  - EPA impermissibly promulgated the MATS based on their conclusion in 2000 that mercury from power plants was detrimental to public health without first considering if the regulation was “appropriate and necessary”, which is in violation of § 112(n)(1)(A) of the FCAA
  - EPA failed to conduct an analysis to see if technologies were available to implement MATS and EPA failed to consider costs
  - EPA's 2000 finding only applied to mercury and cannot be extended to toxic metals and acid gases
- The D.C. Circuit Court judges
  - expressed skepticism EPA's approach was impermissible
  - expressed concern about the underlying data upon which EPA relied

# TCEQ Flexible Permit Litigation



# Flex Permits

## *State of Texas, et al v. EPA*

- July 26, 2010 – petition for review in the 5<sup>th</sup> Circuit challenging EPA disapproval of the Flex Permit Program
- August 13, 2012 – petition for review granted, EPA disapproval was vacated, and remanded to EPA
- January 29, 2014 – TCEQ and EPA announce agreement for EPA approval of TCEQ Flex Permit Program, and TCEQ proposed modifications on February 12, 2014
- Of the 120 flex permit holders, most "de-flexed"

## EPA, Texas end fight over air permits

By Matthew Tresaugue

The EPA and Texas on Wednesday said they have reached a deal over state permits for industrial air pollution, ending a four-year fight that to some had become a symbol of regulatory overreach by the federal government.

The agreement comes after the federal agency initially rejected Texas' permitting system, which allows some operating flexibility to oil refiners, chemical makers and others to meet emissions limits.

Despite the EPA's earlier reservations, the Texas Commission on Environmental Quality's permit system appears largely unchanged - leaving environmentalists disappointed.

Ilan Levin, an Austin-based attorney for the Environmental Integrity Project, said the system has the same potential loopholes as before. "The flexible permit program has a long history of abuse, and a lot of the damage is already done," he said.

But Bryan Shaw, the TCEQ's chairman, said the agreement shows that the federal government "now understands why the program is legal and effective."

Under the Clean Air Act, the state has the authority to issue air pollution permits, as long as they meet the EPA's requirements.

The Texas permits in question require owners and operators of large industrial plants to meet an overall emissions cap but allow them to choose how to do so.

The EPA in 2010 concluded that the system was unenforceable and allowed plants to release more air pollutants than similar facilities in other states.

Texas, for example, has allowed some companies to make changes at their plants without requiring use of the lowest-

polluting technology, the agency said. The state's rules said if a company stays below the emissions caps of a flexible permit, they can modify their facilities without additional approvals over the 10-year lifespan of the permit.

Texas and industry groups sued over the EPA's rejection of these rules, arguing that the system cuts bureaucratic red tape and harmful emissions without violating federal law.

In 2012, the New Orleans-based U.S. Court of Appeals for the Fifth Circuit found that the EPA had not justified its decision to reject Texas system. The EPA decided not to appeal the ruling, opting to negotiate a path forward with the state.

### *Overzealous?*

The federal agency and Texas have clashed on several regulatory issues, including limits on carbon dioxide and other heat-trapping gases, as well as air pollution that crosses state lines.

Republican officials saw the fight over permits as another example of an overzealous Obama administration. But the EPA first raised concerns with the Texas system under President George W. Bush.

The TCEQ is scheduled to approve the agreement at its Feb. 12 meeting. The EPA's final approval is expected by the end of the year.

Elena Craft, a Texas-based health scientist for the Environmental Defense Fund, said the EPA should have done more to strengthen the state-issued permits.

"If the permits did not get better or stronger in any way, then EPA wasn't being as forceful as it should," she said.



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