

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 7, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

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

Docket No.: 2013-1342-RUL

Subject: Commission Approval for Rulemaking Adoption
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 GHG PSD 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 GHG PSD 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, and establishes recordkeeping requirements.
- New §116.169 establishes that TCEQ will accept the transition of GHG PSD permit applications from EPA.
- Changes to §116.610 establish that a standard permit may be used in conjunction with a GHG PSD 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 GHGs 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

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will have 12 months after the effective date of either EPA's final action approving amendments to §122.122 or the Federal Operating Permits Program revision, whichever is later, to 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 establish that a permit by rule (PBR) may be used in conjunction with a GHG PSD permit as long as the non-GHG pollutants meet the conditions of the PBR.

Chapter 101

- Changes to §101.1 add the definition of "greenhouse gases."
- Changes to the §101.1 definition of "reportable quantity" 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, Division 1: Emissions Events.
- Changes to §101.10 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 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 GHG PSD 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 GHG PSD permits correctly indicates that a person may request a notice and comment hearing for GHG PSD permits (as opposed to a contested case hearing).

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- New §39.412 establishes public notice procedures for certain GHG PSD permit applications previously submitted to EPA.

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 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 THSC, 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 THSC, Chapter 382; Texas Water Code (TWC), Chapter 5; 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 change to the §101.1 definition of "reportable quantity" assigns 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;

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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.

FCAA, §§110(a)(2)(C), 165(a), and §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 EIs.

B.) Public:

Because federal PSD permits issued by EPA under the FIP do not provide an opportunity for a contested case hearing, excluding GHG PSD 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 Title V 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 were planned. A public hearing was held, as well as a public comment period of 30 days.

Public comment:

The commission received comments from Air Alliance Houston, Association of Electric Companies of Texas Incorporated, State Representative Lon Burnam, C3 Petrochemicals, Calpine Corporation, Environment Texas, Gas Processors Association (GPA), Golden Pass Products LLC, Golden Spread Electric Cooperative, House Bill 788 Working Group (HB788WG), Jackson Walker LLP, Lone Star Chapter of the Sierra Club (Sierra Club), Natgasoline LLC, Occidental Chemical Corporation, OCI Beaumont LLC, Pioneer Natural Resources (Pioneer), Public Citizen, Sustainable Energy and Economic Development Coalition, Texas Chemical Council (TCC), Texas Combined Heat and Power Initiative, Texas Industry Project (TIP), Texas Oil and Gas Association (TXOGA), Texas Pipeline Association (TPA), Texas Solid Waste Association of North America (TxSWANA), Weaver Boos Consultants LLC, Zephyr Environmental Corporation (Zephyr). Eighteen of the commenters supported the rulemaking or portions of the rulemaking, 6 commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

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Significant changes from proposal:

No significant changes were made to Chapters 39, 55, and 101.

Section 106.4(a)(1)(E)(ii) was changed to include the phrase "notwithstanding any provision in any specific permit by rule to the contrary." The addition of the new language ensures that the pollutant GHGs will not be subject to the limit of 25 tons per year for any other air contaminant, if that requirement is specifically listed in an existing PBR. This change was made in response to comments from GPA, TIP, and TPA.

Section 106.4(a)(3) was changed to include the phrase "notwithstanding any provision in any specific permit by rule to the contrary." The addition of the new language ensures that sources that obtain a GHG PSD permit will not be prohibited from claiming PBRs for emissions of non-GHGs, if that prohibition is specifically listed in an existing PBR. This change was made in response to comments from GPA and TPA.

Sections 116.12(7) and 122.10(3) were changed to delete the proposed exclusion for CO2 emissions resulting from biogenic sources in the definition of "carbon dioxide equivalent emissions." The EPA did not propose SIP approval of this exclusion; therefore it would not be in effect for GHG PSD permitting under the Texas SIP. This change was made in response to comments from Sierra Club, TCC, TIP, TXOGA, TxSWANA, and Zephyr.

Section 116.12(15) was changed to include a phrase which ensures the thresholds established in §116.164 are not affected by an EPA-promulgated New Source Performance Standard. EPA established thresholds specifically tailored to emissions of GHGs, and the commission intends to apply those thresholds consistent with federal law. This change was made in response to a comment from TIP.

Section 116.12(19) was changed to include the phrase "or greenhouse gases" in the definition of "major stationary source." The change was necessary because the existing definition applied to a threshold level of contaminants that have a national ambient air quality standard (NAAQS). GHGs do not have a NAAQS, but are included as pollutants which may cause a source to meet the definition of "major stationary source." This change was made in response to comments from Pioneer, TXOGA, and Zephyr.

Section 116.164(a)(4) was changed to clarify applicability. This change was made in response to comment from HB788WG.

Section 116.164(b) was changed to clarify the commission's intent regarding the recordkeeping requirements, and to establish a minimum record retention period. This change was made in response to comments from GPA, Pioneer, TIP, TXOGA, and TPA.

Section 116.160(b) was changed to include the phrase "notwithstanding any provision in any specific permit by rule to the contrary." The addition of the new language ensures that

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sources that obtain a GHG PSD permit will not be prohibited from claiming standard permits for emissions of non-GHGs, if that prohibition is specifically listed in an existing standard permit. This change was made in response to comments from GPA and TPA.

Sections 116.611(c)(3)(A), 122.122(e)(3)(A), and 122.130(b) were changed to provide 12 months for sites to certify emissions of GHGs in order to avoid applicability of the Title V permitting program. The changes were made in order to allow more time for owners or operators to evaluate potential emissions of GHGs, and to be consistent with the deadline to submit a Title V application because of emissions of GHGs. This change was made in response to comments from GPA, Pioneer, TCC, TIP, and TXOGA.

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 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:

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

Anticipated *Texas Register* adoption publication date: April 11, 2014

Anticipated effective date: April 17, 2014

Six-month *Texas Register* filing deadline: May 8, 2014

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Attachments

House Bill (HB) 788 (83rd Legislature)

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