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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 4, 2010

Attn: Docket ID No. EPA-HQ-OAR-2010-0107
U.S. Environmental Protection Agency
Air and Radiation Docket and Information Center
1301 Constitution Ave., NW
Washington, DC 20460

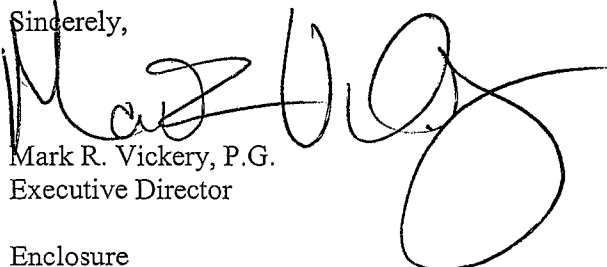
Re: Proposed Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-7; and Proposed Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-8

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to respond to the U.S. Environmental Protection Agency (EPA) announcements of a public comment periods published in the September 2, 2010, edition of the *Federal Register* entitled: "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," and "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan"

Enclosed, please find the TCEQ's detailed comments relating to the EPA actions referenced above. If you have comments or questions concerning the enclosed comments, please contact John M. Minter, Environmental Law Division, Office of Legal Services, (512) 239-0663 or jminter@tceq.state.tx.us.

Sincerely,


Mark R. Vickery, P.G.
Executive Director

Enclosure

**Texas Commission on Environmental Quality Comments on
Actions to Ensure Authority to Issue Permits Under the Prevention of
Significant Deterioration Program to Sources of Greenhouse Gas
Emissions,
Finding of Substantial Inadequacy and SIP Call,
Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-7
Federal Implementation Plan (FIP),
Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-8**

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call and (SIP Call)¹ and Federal Implementation Plan (FIP)².

I. Background

EPA's rule to phase in PSD and Title V permitting of greenhouse gas (GHG) sources at thresholds significantly higher than statutorily allowed will become effective January 2, 2011. The proposed SIP Call identifies thirteen states, including Texas, that EPA represents lack authority to issue PSD permits in conformance with the Tailoring Rule's requirements. EPA proposes to find their respective SIPs "substantially inadequate" under Federal Clean Air Act (FCAA) section 110(k)(5) and calls on those states to submit SIP revisions to correct the inadequacy within 12 months of the rule becoming final. Absent such revisions, EPA will impose a federal implementation plan (FIP) – such as the one proposed in the FIP Rule – and will assume permitting authority for GHGs in those states.

Under the proposed SIP Call, a state may elect a deadline for submitting corrective SIP revisions that is shorter than the full 12 months. The proposal contemplates deadlines as short as three weeks. EPA explains that the purpose of establishing a shorter deadline is to ensure that a FIP is available to prevent a gap in PSD permitting. For example, rather than waiting a full year before EPA undertakes to federalize the

¹ 75 *Fed. Reg.* 53892 (September 2, 2010).

² 75 *Fed. Reg.* 53883 (September 2, 2010).

GHG permitting program, it may do so in a matter of weeks for those states that elect a shorter deadline.

The FIP that EPA proposes will apply federal PSD requirements found in Title 40 Code of Federal Regulations (CFR) § 52.21 to GHG emissions only. States that have a FIP imposed will remain the permitting authority for all other pollutants. EPA invites affected states to accept delegation of authority to implement that FIP, issuing GHG permits under federal law.³

II. General Comments

In EPA's rush to regulate GHG from stationary sources, it is expediting this SIP Call and FIP through at an unprecedented pace; with little time to deliberate the appropriateness or legality of these actions. In little more than one year, EPA has determined that a pollutant that has never been regulated before under the FCAA (or Act) should be done beginning January 2, 2011, without proper guidelines on what controls should apply and how states are to implement this program. EPA acknowledges that subjecting stationary sources of GHG to permit requirements according to the Act's specific thresholds is "absurd" yet EPA is on a course to do just that. TCEQ is concerned that the proposed SIP Call and FIP are merely additional elements of a scheme that short-circuits the statutory process for regulating major stationary sources.

In comments on EPA's Endangerment Finding, the Light-Duty Vehicle Rule, the Johnson Memo Reconsideration and the Tailoring Rule, TCEQ has consistently questioned the legality of EPA's iterative approach to regulating GHGs at major stationary sources. The basic purpose of the PSD program is to safeguard the maintenance of a National Ambient Air Quality Standard (NAAQS or Standard) in areas of the country designated for a NAAQS as attainment or unclassifiable.⁴ EPA to date has not established a Standard for GHG, therefore PSD does not and should not apply. Congressional intent not to cover GHG under the Act is clear. Pursuant to the FCAA

³ 75 *Fed. Reg.* at 53890.

⁴ 42. U.S.C. § 7471, CAA § 161

major source thresholds are set at levels that make permitting such sources for GHG unfeasible.⁵ Buildings with small boilers such as schools, apartment complexes, and office buildings are potentially subject to PSD permitting for GHG under the Act's statutory limits. Furthermore, SIP control strategies and corresponding permitting programs are structured to address pollutants affecting a localized and discrete area. GHG are uniform in concentrations throughout the environment. They do not lend themselves to be controlled through the CAA's SIP statutory and regulatory framework. EPA freely acknowledges that the regulation of GHG is irreconcilable with the FCAA's stationary source thresholds, and it relies on a series of invalid legal theories to support its re-writing of the express language of the statute to raise the GHG thresholds to levels it deems reasonable.⁶

Both the SIP Call and FIP are unlawful because the Tailoring Rule itself is unlawful. The Tailoring Rule is contrary to the express statutory commands of the FCAA and is subject to several challenges, including one by the State of Texas, in the United States Court of Appeals for the District of Columbia Circuit. If that Court stays implementation of the Tailoring Rule, EPA should immediately suspend the actions to which these comments are addressed.

III. Specific Comments

In the SIP Call proposal, EPA has compiled a "Presumptive SIP Call List" – a listing of states with SIPs that do not appear to apply PSD permitting to GHG sources (Table IV-1).⁷ EPA requests information from these states about their authority, or lack

⁵ "Major Emitting Facility" means a stationary source of air pollutants which emit or has the potential to emit 100 tons per year or more of any air pollutant if one of the sources listed in the definition, or any other source with the potential to emit 250 tons per year or more of any air pollutant. 42 U.S.C. § 7479(1), CAA § 169(1).

⁶ EPA's flawed legal position on GHG regulation under the Clean Air Act is explained in detail in Texas's Motion for Stay of the Tailoring Rule. State of Texas' Motion for a Stay of EPA's Greenhouse Gas Tailoring Rule, *State of Texas et.al. v. United States Environmental Protection Agency*, Case No. 10-1222, United States Court of Appeals (D.C. Circuit), consolidated under *Southeastern Legal Foundation, Et. Al. v. United States Environmental Protection Agency*, Case No. 10-1131.

⁷ 75 *Fed. Reg.* at 53899.

thereof, to regulate GHG under their respective PSD programs; about whether and when they will submit SIP revisions; and about the SIP Call deadline each state selects.⁸

In response to EPA's request for information, TCEQ refers EPA to correspondence from the Texas Attorney General to Administrator Jackson dated August 2, 19, and 30, 2010, attached hereto as Exhibits A – C. TCEQ reiterates that EPA's scheme to regulate GHG sources under the PSD program, including its aggressive schedule for doing so as outlined in the proposed SIP Call and FIP, are based on an impermissible interpretation of the FCAA. EPA cannot set different thresholds for GHG sources than those found in the Act, nor can it impose permitting through this program without first setting a NAAQS and determining the attainment status of every portion of the country.⁹

EPA attempts to make a case for a FIP for the presumptive SIP Call List in order to avoid a gap in PSD permitting for GHG sources after January 2, 2011. EPA proposes language that states such as Texas can use to request an earlier deadline for submission of a PSD SIP revision, so that a finding of substantial inadequacy and FIP can be imposed by EPA.¹⁰ This suggestion puts TCEQ on a significantly earlier clock to implement a GHG permitting program that we do not believe is legally allowed under the Act, or face the potential loss of federal grant funds.¹¹ The SIP Call preamble even recognizes that not objecting to any earlier deadline "is contrary to the State's self-interest because an earlier deadline typically increases burdens...".¹²

Even if TCEQ were inclined to accept a premature FIP and request an earlier deadline for revising its SIP, TCEQ is not confident that a FIP will resolve the issue of

⁸ See 75 Fed. Reg. at 53896, 53901.

⁹ In fact, the Center for Biological Diversity and 350.org have already petitioned EPA to complete a NAAQS for GHG. See *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act*. Dec. 2, 2009.

http://www.biologicaldiversity.org/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap12-2-2009.pdf. There has been no response from EPA to date on this petition.

¹⁰ 75 Fed. Reg at 53902

¹¹ See CAA § 179(a) (42 U.S.C. § 7509). "(a) For any implementation plan or plan revision required under this part (or required in response to an finding of substantial inadequacy as described in section 7410(k)(5) of this title, unless such deficiency has been corrected within 18 month, after the finding...one of the sanctions referred to in subsection (b) shall apply,.... In addition to any other sanction applicable as provided under this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7409 of this title."

¹² 75 Fed. Reg. at 53902.

PSD permitting uncertainty. EPA's stated purpose of an early deadline is to impose a FIP as soon as possible to provide certainty to industry that permits for new construction and modifications can be issued under a PSD program.¹³ However, EPA has yet to issue the long-awaited and much-discussed BACT guidance that permitting authorities must follow in order to issue these permits. This is guidance that EPA, in the final Tailoring Rule, assured states was forthcoming, would undergo notice and comment, and would "culminate in training courses for state, local and tribal permitting authorities."¹⁴ Through the Clean Air Act Advisory Committee (CAAAC) process, EPA has solicited input from the many affected stakeholders from the CAAAC Climate Change Workgroup. TCEQ has participated in this workgroup and its development of report to aid EPA's development of BACT guidance from its inception in October 2009. What is clear from this workgroup is that consensus on the definition of BACT and even the scope of BACT review does not exist. While EPA has committed to taking the comments of these stakeholders into consideration in the development of BACT guidance, the final Phase II report has not been deliberated by the CAAAC in order to provide this report to the EPA. It is highly unlikely that EPA will be able to finalize any guidance that takes into account all the diverse concerns raised during the workgroup or during the promised comment period.¹⁵ Assuming the guidance is available by January 2, 2011, the only certainty for state- or EPA-issued permits will be challenges disputing the BACT determination.¹⁶

Any forthcoming guidance will also be of limited usefulness until the control technology is proven: i.e., a source implementing BACT is built. Thus, on January 2 of next year, applicants may know where to submit their applications, but will not know what controls to propose or be subject to. Determining the appropriate "control" of

¹³ 75 *Fed. Reg.* at 53890 and 53901-53902.

¹⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 *Fed. Reg.* 31514, 31589 (June 3, 2010).

¹⁵ See <http://www.epa.gov/air/caaac/index.html>, the next meeting is October 5 and 6, 2010: It is noteworthy to mention that the comment deadline for the SIP Call and FIP is October 4, 2010, thereby precluding permitting authorities to expand on concerns regarding the uncertainty of BACT for PSD GHG as part of these proposed rulemakings.

¹⁶ One of the first proposed power plants to include enforceable GHG limits has already been challenged. See "Planned California Power Plant Would Include GHG Limits", *New York Times*, Feb. 4, 2010; Chabot-Las Positas Community College District Petitions U.S. EPA to Deny Calpine Power Plant Permit to Build Near College Campus, Press Release, April 2, 2010, <http://www.clpccd.org/newsroom/documents/Final-PowerPlantReleaseintheEmailSmallerFileSize.pdf>

carbon dioxide (CO₂) emissions, in particular, is challenging because CO₂ is a product of combustion. Energy efficiency, which has been discussed by the CAAAC workgroup as potential BACT for GHG emissions, measures may reduce the power demand, and thus the CO₂ emissions. However, questions regarding energy efficiency are anticipated concerning how broadly to examine energy efficiency at a plant or even at the demand-side of the source. Outside of eliminating the production of CO₂, there is not a clear control technology that would actually eliminate CO₂. CO₂ sequestration as a control technology option requires its own significant power demand, as much as 20% -30% increase at a coal-fired power plant. If a plant must be over-sized to accommodate this energy demand increase, other pollutants are increased as well. Where geologic sequestration is unavailable for a potential source, BACT options will be limited and even more uncertain particularly given the lack of guidance on this issue.

Industry should be particularly concerned by EPA's lack of resources and experience to issue these permits, which is made apparent by its request for states to take delegation of GHG PSD permitting under any imposed FIP. The result of all of this is that, even under a FIP, it is unlikely any construction of new major GHG sources or major modifications will commence in the foreseeable future.

The proposed SIP Call requests comment on EPA's interpretation of 'reasonable deadline' under FCAA section 110(k)(5).¹⁷ EPA's proposed deadline of 12 months is not reasonable, and does not comport with the Act. Texas's PSD program is a SIP-approved program, and is subject to the requirements in 40 CFR Part 51. These regulations provide that if PSD provisions in a SIP are substantially inadequate, the plan must be revised within three years. More specifically, 40 CFR § 51.166(a) provides: "Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." The Tailoring rule amends section 51.166 and adds a new definition for "subject to regulation" to incorporate higher thresholds for GHGs, therefore section 51.166 applies.

¹⁷ 75 *Fed. Reg.* at 53901.

EPA is improperly using its SIP Call authority in FCAA § 110(k)(5) when it should be following the procedures in 40 CFR § 51.166. EPA cannot reconcile this rule with what it is doing in the SIP Call under the guise of FCAA § 110(k)(5). The Texas SIP is not substantially inadequate to otherwise comply with the Act. EPA has not given ample time to determine inadequacy of the SIP. EPA calling on states to revise their SIPs “by reason of an amendment to this section,” is not a substantial inadequacy. Therefore the federal PSD rules in Part 51 apply, and Texas and other state in Table VI-1 must be given up to 3 years to revise their SIPs.¹⁸

IV. Conclusion

EPA proposes this SIP Call and FIP as the solution to a problem of its own making. As we stated in our comments to the Tailoring Rule, and repeat here, EPA actions magnify the inappropriateness of regulating GHG under the FCAA and are a further attempt to alter the literal application of the Act. The proposals by EPA are an attempt to write policy that should be contemplated by Congress. EPA’s actions exceed its administrative authority to execute the laws that Congress has written. The legally-flawed reliance on section 110(k)(5) as a basis for a SIP Call and lack of regulatory certainty on what constitutes BACT for GHG emissions, as well as the practical effect of no new major construction or modification under state-or EPA-issued GHG permits in the near future, compels TCEQ to urge the Administrator to withdraw these proposals.

¹⁸ See Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}), Final Rule, 73 *Fed. Reg.* 28231, May 16, 2008: EPA specifically said it was following the same process it did in NSR reform, interpreting the Act and its rules to give States 3 years when changes are made to NSR regulations citing to section 51.166; See also 2002 Major NSR reform: actions on State submittals up to 3 years after changes to rules; EPA stated CAA is silent on how much time to give states when revising SIPs for rule changes, not changes in NAAQS. 67 *Fed.Reg.* 80186, December 31, 2002.

ATTACHMENT

A



August 2, 2010

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Dear Administrators Jackson and Armendariz:

In order to deter challenges to your plan for centralized control of industrial development through the issuance of permits for greenhouse gases, you have called upon each state to declare its allegiance to the Environmental Protection Agency's recently enacted greenhouse gas regulations—regulations that are plainly contrary to United States law. 75 Fed. Reg. 31,514, 31,525 & 31,582 (June 3, 2010) (hereinafter, the "Tailoring Rule"). To encourage acquiescence with your unsupported findings you threaten to usurp state enforcement authority and to federalize the permitting program of any state that fails to pledge their fealty to the Environmental Protection Agency (EPA).

On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.

You have declared that EPA's decision to enact automobile tailpipe emission limits for greenhouse gases pursuant to Title II of the federal Clean Air Act renders such gases immediately "subject to regulation" for all purposes under that Act, including the

Title I Prevention of Significant Deterioration (PSD) preconstruction permitting program and the Title V operating permit program. Simultaneously, however, you recognize that permitting greenhouse gases under the Act is “absurd.” In the Tailoring Rule, EPA states: “Here, we have determined, through analysis of burden and emissions data as well as consideration of extensive public comment, that the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 should be considered ‘absurd results.’” 75 Fed. Reg. at 31,517. We agree.

In order to avoid the absurd results of EPA’s own creation, you have developed a “tailoring rule” in which you have substituted your own judgment for Congress’s as to how deep and wide to spread the permitting burden. Notably absent from your rules is any evidence that they would achieve specific results; in fact, you assiduously (and correctly) avoid ascribing what environmental benefit may be achieved by mandating permits to emit a uniformly distributed, trace constituent of clean air, vital to all life, that is emitted by all productive activities on Earth.

Instead of acknowledging that congressionally set emission limits preclude the regulation of greenhouse gases, you instead re-write those statutorily-established limits stating, “For our authority to take this action, we rely in part on the ‘absurd results’ doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs. We also rely on the ‘administrative necessity’ doctrine, which applies because construing the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would render it impossible for permitting authorities to administer the PSD provisions.” 75 Fed. Reg. at 31,541-42.

Because of your view that greenhouse gases become “subject to regulation” on the first day it becomes illegal to manufacture a car not meeting the new tailpipe emission limits for greenhouse gases (on January 2, 2011), you insist that states may not issue permits after that date without considering greenhouse gas emissions. Your view is not enough. Applicable law provides to the contrary.

Texas’ stationary source permitting program encompasses all “federally regulated new source review pollutants,” including, “any pollutant that otherwise is subject to regulation under the [federal Clean Air Act].” 30 TEX. ADMIN. CODE § 116.12(14)(D). The rules of the Texas Commission on Environmental Quality (TCEQ), like the EPA’s rules, do not define the phrase “subject to regulation.” In its Tailoring Rule, however, the EPA promulgated—without notice—a definition of the previously undefined term, “subject to regulation.” This new definition (attached hereto) specifically relates to the regulation of greenhouse gases, spans several *Federal Register* columns, and is over 600 words in length. Specifically, in the EPA’s first phase of greenhouse gas regulation, this new definition raises the PSD permitting threshold for new and modified “major” sources of other pollutants from 100 tons per year to 75,000 tons per year (tpy) of CO₂ equivalent (CO₂e) emissions.

In the Tailoring Rule you have asked TCEQ to report to you by August 2, 2010, whether it would “interpret” the undefined phrase “subject to regulation” in TCEQ Rule 116.12 consistent with the newly promulgated definition in EPA Rule 51.166, in all its specifics and particulars. That is, you have effectively requested that Texas agree to regulate greenhouse gases in the exact manner and method proscribed by the EPA.

In other words, you have asked Texas to agree that when it promulgated its air quality permitting program rules for pollutants “subject to regulation” in 1993, that Texas really meant to define the term “subject to regulation” as set forth in the dozens of paragraphs and subparagraphs of EPA Rule 51.166, first promulgated in 2010.

The State of Texas does not believe that EPA’s “suggested” approach comports with the rule of law. The United States and Texas Constitutions, United States and Texas statutes, and EPA and TCEQ rules all preclude TCEQ from declaring itself ready to require permits for greenhouse gas emissions from stationary sources as you request.

We start with constitutional difficulties. As noted, Texas’ stationary source permitting program encompasses all “federally regulated new source review pollutants,” including “any pollutant that otherwise is subject to regulation under the [federal Clean Air Act].” 30 TEX. ADMIN. CODE § 116.12(14)(D). This delegation of legislative authority to the EPA is limited solely to those pollutants regulated when Texas Rule 116.12 was adopted (1993) and last amended (2006). As the Texas Supreme Court has explained, “The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act.” *Trimmer v. Carlton*, 296 S.W. 1070 (1927). Thus, in order for Texas Rule 116.12 to pass constitutional muster, it must be limited to adopting by reference the definition of “subject to regulation” in existence when Rule 116.12 was last amended in 2006. In other words, Texas Rule 116.12 cannot delegate authority to the EPA to define “subject to regulation” in 2010 to include pollutants that were not “subject to regulation” in 2006.

For example, the Texas Solid Waste Disposal Act defines “hazardous waste” as “solid waste identified or listed as hazardous waste by the administrator of the Environmental Protection Agency under the federal Solid Waste Disposal Act.” When this delegation of legislative authority was challenged, it was upheld by Texas’ highest court, but only because the court found that “the reference to the federal act in section 361.003(15) adopts by reference the act and the regulations promulgated thereunder which were in effect on July 30, 1991, the date section 361.003(15) of the Texas Solid Waste Disposal Act was enacted . . .” *Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.—Austin 1998, pet. ref’d). As the *Elliott* court explained, “We acknowledge that section 361.003(15) may be read to say that the legislature has delegated to the EPA the power to define hazardous waste under the THSC [Texas Health & Safety Code] and that definition may change from time to time at the will of EPA without intervention or guidance from the legislature.” The court noted, however, that “[s]uch a construction would in fact place in doubt the constitutionality of this provision,” and therefore, the

court would “not construe, in this case, the adopting statute as attempting to adopt future laws, rules or regulations of the federal government.” The same analysis applies here: TCEQ Rule 116.12 cannot delegate authority to the EPA to define “subject to regulation” in 2010 to include pollutants that were not “subject to regulation” in 2006.

In addition to constitutional limitations, the TCEQ is also precluded from adopting the EPA’s newly promulgated definition of “subject to regulation” pursuant to the express terms of the Texas Government Code, which requires public notice of agency rulemaking. *See, e.g.*, TEX. GOV’T CODE § 2001.023 (“A state agency shall give at least 30 days’ notice of its intention to adopt a rule before it adopts the rule.”). Likewise, TCEQ rules mandate notice and an opportunity to be heard when substantive rules are enacted. *See, e.g.*, 30 TEX. ADMIN. CODE § 20.3. Like Texas law, federal law also requires notice and hearing before Texas can revise its State Implementation Plan (SIP). *See* Clean Air Act § 110(l); 42 U.S.C. § 7410(l) (“Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing.”). When the TCEQ promulgated Rule 116.12 in 1993, or even when it last amended the rule in 2006, it had no intention of enacting a permitting program for greenhouse gases. Consequently, TCEQ had no reason to (nor did it) give public notice of any such intent. Obviously, Texans concerned with greenhouse gas permitting could not have known to participate and comment on the decision to require permits for pollutants “subject to regulation” in 2006, when the EPA first discovered greenhouse gases were “subject to regulation” in 2010. It should go without saying that the nearly infinite expansion of Texas’ permitting programs to include greenhouse gases with no state-level rulemaking at all would not satisfy Texas or federal law requiring notice and an opportunity to be heard.

Perhaps more fundamentally, however, the EPA itself has not undertaken a proper rulemaking to require all SIPs to include the definition of “subject to regulation” it has just promulgated. This revision to EPA’s Part 51 rules—which lay out the requirements for approvable SIPs—were preceded by no proposal whatsoever. Rather, this new requirement first appeared in the EPA’s final notice announcing the “Tailoring Rule,” and accordingly, has not been properly adopted. *See* Clean Air Act § 307(d)(1)(J); 42 U.S.C. § 7607(d)(1)(J) (requiring formal rulemaking procedures in order to establish any requirement under the PSD program).

And even if EPA provided proper notice and the opportunity to comment, EPA cannot lawfully adopt any rule that directly and immediately changes Texas’ permit program in any respect—much less to expand the reach of the program so far as to be deemed “absurd.” Clean Air Act Section 166(a) sets forth the SIP revision process for “other pollutants” under the PSD program. The only sensible interpretation of the Clean Air Act is one that requires the EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for greenhouse gases before the EPA can require PSD permitting of greenhouse gases. Thereafter, pursuant to the express terms of the Clean Air Act, states are provided with 21 months after EPA undertakes a proper rulemaking to add that new pollutant to their SIP. Clean Air Act § 166(b), 42 U.S.C. § 7476(b) (“Within 21 months after such date of promulgation such plan revision shall be submitted to the

Administrator”). EPA, however, has not developed a NAAQS for greenhouse gases, has not undertaken a rulemaking to promulgate corresponding regulations, and has not allowed any time for a state response.

In addition to circumscribing the statutory 21-month review and implementation process afforded the states, EPA is also circumventing the statutory one-year review and revision process afforded Congress, which specifically states, “Regulations referred to in subsection [166](a) of this section shall become effective one year after the date of promulgation.” The purpose of this one-year delay is to allow Congress the opportunity to review (and approve or revise) new rules for “other pollutants” before states are required to implement them. 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007); *citing* H.R. Conf. 95-564, at 151 (1977), 1977 U.S.C.C.A.N. 1502, 1532. The path proposed by EPA painstakingly avoids such congressional oversight.

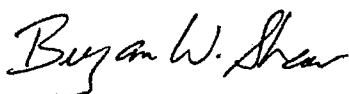
Even under normal SIP revision procedures (those not involving new pollutants), the EPA has failed to provide Texas a reasonable time to submit a plan revision. Clean Air Act Section 110 sets forth EPA’s authority to direct the requirements for approvable SIPs. Section 110(k)(5) allows states up to 18 months after proper adoption of new SIP expectations before requiring their implementation by the states. *See* 42 U.S.C. § 7410(k) (“The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.”).

Instead, EPA has demanded (in the absence of statutory authority) that Texas submit a schedule for the completion of statutory and rule revisions. But notwithstanding the above-referenced statutory requirements regarding SIP revisions, EPA has declared that it will “ensure” all sources of greenhouse gases will be permitted under the final Tailoring Rule on January 2, 2011, by moving “quickly to impose a Federal Implementation Plan (FIP) for PSD through 40 CFR 52.21.” 75 Fed. Reg. at 31,526. The federal Clean Air Act, however, clearly does not authorize such bureaucratic nimbleness. To the contrary, before EPA can implement a FIP, Section 110(c)(1) specifically requires the EPA to first make a finding that a state has failed to make a required submission, such as a revision under Section 110(k)(5), and even then, a FIP is not effective until after the state is afforded additional time to correct the deficiency identified by EPA. EPA has shown no intention of following the Clean Air Act procedures or allowing states a reasonable opportunity to change their rules.

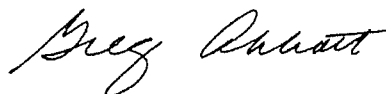
Each of these objections to EPA’s demand for a loyalty oath from the State of Texas would suffice to justify our refusal to make one. Indeed, it is an affront to the congressionally-established judicial review process for EPA to force states to pledge allegiance to its rules (or forfeit their right to permit) on the final day by which states must exercise their statutory right to challenge those same rules. Texas will not facilitate EPA’s apparent attempt to thwart these established procedures and ignore the law. In the event a court concludes EPA’s actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised herein.

We object to adopting the EPA's definition of "subject to regulation" without directly raising any of our substantive objections to each of the four EPA rulemakings that collectively comprise your greenhouse gas control initiative. Those objections will be resolved in litigation now pending in the D.C. Circuit Court of Appeals. Given that you are unable to ascribe the benefits of your greenhouse permitting regime, it is difficult to see why you would refuse to stay the effectiveness of your greenhouse gas rules. We therefore ask you to stay the effectiveness of your rules until our challenge is resolved.

Sincerely,



Bryan W. Shaw, Ph.D.
Chairman
Texas Commission on Environmental Quality



Greg Abbott
Attorney General of Texas

ATTACHMENT

B



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2010

Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Application for a Stay of the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)

Dear Administrator Jackson:

The State of Texas hereby requests that you stay the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule") pending resolution of the State of Texas' petition for review of the Rule, which is currently pending in the United States Court of Appeals for the District of Columbia Circuit. *Perry v. EPA*, No. 10-1222 (D.C. Cir. filed Aug. 2, 2010). Texas' request that EPA stay the Tailoring Rule is independent of any other request that EPA reconsider or stay the Tailoring Rule, and the grounds set forth in this letter are in addition to those set forth in General Abbott and Chairman Shaw's letter to you of August 2, 2010.

Texas has an undisputed right to address air quality management resources issues, including newly-regulated pollutants, on a prospective basis. EPA may not step in unless and until the states have been given full and fair opportunity to do so. In contravention of these fundamental principles, the Tailoring Rule requires that Texas and other states reinterpret or revise their state implementation plans ("SIP") on or before January 2, 2011. If Texas does not do so, EPA has indicated that it will limit its approval of the Texas SIP and impose a federal implementation plan ("FIP"). Texas strongly disputes the legal and policy basis for the Tailoring Rule and EPA's assertion that it may adopt a FIP if Texas fails to revise immediately its SIP. In any event, it would not be possible for Texas to comply with EPA's unlawful and unprecedented deadline.

Texas' and the public's interests would be best served if the D.C. Circuit had the opportunity to review the Tailoring Rule before it went into effect. Texas should not be forced to choose between forfeiting the authority to operate its PSD program and spending significant resources, administrative and otherwise, to meet EPA's unlawful deadline. Moreover, EPA assiduously and correctly avoided ascribing any environmental benefit from the Tailoring Rule, so staying the Tailoring Rule until after Texas has had a full and fair opportunity to litigate its petition for review would likewise not adversely impact public health or welfare.

1. **EPA's Requirement That Texas Reinterpret Or Revise Its SIP By January 2, 2011, Is Impracticable And Unlawful**

The Tailoring Rule revises EPA's Part 51 Regulations, which set forth the requirements for approvable SIPs, despite EPA's failure to propose this change in its Notice of Proposed Rulemaking, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule Proposal"), 74 Fed. Reg. 55,292 (Oct. 27, 2009). In its haste to surreptitiously rewrite the Clean Air Act, EPA violated its own regulations: 40 C.F.R. § 51.166(a)(6) gives states, including Texas, three years to submit revised SIPs following EPA changes to the minimum standards for approvable SIPs:

Amendments. (i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval **no later than three years after such amendment is published** in the *Federal Register*.

* * *

(iii) Any revision to an implementation plan that an amendment to this section required **shall take effect no later than the date of its approval and may operate prospectively**.

EPA even purported to bypass Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5), which unambiguously provides states with a minimum of 18 months to revise their SIPs following SIP call authorized by the Clean Air Act. *See* 75 Fed. Reg. at 31,583.

EPA's regulation allowing states three (3) years to revise their SIPs serves several purposes. First, it helps enforce the states' undisputed right to the first opportunity to address air quality management resources issues, including newly-regulated pollutants under the PSD and Title V programs, on a prospective basis. The Clean Air Act recognizes that "air pollution prevention . . . and air pollution control at its sources is the primary responsibility of States and local governments," not of EPA. Clean Air Act § 101(a)(3), 42 U.S.C. § 7401(a)(3). The Clean Air Act "places primary responsibility on the states for [SIP] revision." *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 781 (3d Cir. 1987). EPA's role is limited. The Agency is not "a roving commission to achieve pure air or any other laudable goal," *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001), and its powers to revise SIPs are limited to those expressly enumerated in Clean Air Act § 110, *see Concerned Citizens of Bridesburg*, 836 F.2d at 797 n.12 Finally, 40 C.F.R. § 51.166(a)(6) reflects EPA's long-standing recognition that SIP revisions take significant resources, and that states (and EPA) have the responsibility to ensure ample opportunity for the public to participate in the SIP revision process.

EPA's threat to impose a FIP on Texas as of January 2, 2011, is similarly unlawful. *See* 75 Fed. Reg. at 31,526 (announcing EPA's intention to "ensure" all sources of greenhouse gases will be permitted under the final Tailoring Rule on January 2, 2011, by moving "quickly to impose a [FIP] for PSD through 40 CFR 52.21"). Clean Air Act § 110(c)(1) specifically requires that EPA first make a finding that a state has failed to make a required submission, such as a SIP revision, and then to allow the state additional time to correct any of EPA's perceived deficiencies. As described above, EPA may not consider a FIP until after the three-year period for SIP revisions described above and then only if Texas defaults in submitting a revision at the end of that three-year period.

Beyond being unlawful, EPA's deadline of January 2, 2011 for states to reinterpret or revise their SIPs is impracticable. As we explained at length in our letter of August 2, 2010, Texas would be unable to reinterpret its SIP to effect the Tailoring Rule. Instead, Texas would need to revise its SIP, a process that it would be difficult, if not impossible, to complete in the approximately five (5) months remaining before EPA's January 2, 2011 deadline.

2. A Stay Is Necessary To Preserve Texas' Ability To Operate Its PSD Program During The Pendency Of The Petition For Review

By imposing the unlawful five-month timetable for Texas to revise its SIP, the Tailoring Rule threatens Texas' ability to maintain its PSD program and issue permits to sources in its state. If EPA follows through on its threat to issue a FIP for Texas on January 2, 2011, Texas will lose its ability to operate its PSD program. EPA's attempt to use this deadline to allow the Agency to promulgate a FIP long before Texas could reasonably be determined to have defaulted on its obligations is contrary to EPA's past practice and state primacy. If EPA were not to implement a FIP on January 2, 2011, the Tailoring Rule would create a cloud on any permits issued by Texas between that time and the time at which EPA chose to act because of EPA's suggestion that any later adoption of the Tailoring Rule through a FIP or SIP revision would apply retroactively. In either case, the Tailoring Rule will adversely affect Texas' ability to manage its air quality resources and to ensure "that economic growth will occur in a manner consistent with the preservation of existing clean air resources." Clean Air Act § 160(3), 42 U.S.C. § 7470(3). Texas is confident that the D.C. Circuit will ultimately vacate the Tailoring Rule, but during the pendency of this suit, the Tailoring Rule's vitiation of Texas' statutory right to operate its permitting program will cause the State irreparable harm.

3. A Stay Will Serve The Public Interest By Allowing Meaningful Judicial Review Of The Tailoring Rule Before It Enters Into Force

Texas has petitioned the D.C. Circuit for review of the Tailoring Rule, as have numerous other petitioners. Texas and the other Petitioners will raise significant challenges to the Tailoring Rule's lawfulness as to the emission rate thresholds it sets for PSD and Title V applicability, EPA's plans to require SIP revisions or reinterpretations by January 2, 2011, and whether the Tailoring Rule is a logical outgrowth of EPA's Notice of Proposed Rulemaking. A stay is particularly apt given EPA's decision to predicate an economy-wide rule on the rarely-

appropriate "absurd results" doctrine, which EPA has invoked because, unlike every other regulated pollutant, EPA has purported to find that regulation of greenhouse gases under the PSD program would produce results plainly inconsistent with congressional intent. See 75 Fed. Reg. at 31,542 (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

While Texas and other States would be harmed if the Tailoring Rule were not stayed, no party would be harmed by staying the Rule. EPA has appropriately not represented that the Tailoring Rule would have any positive effects on public health or welfare. Staying the Tailoring Rule will not harm Texas' sister states. If another state is lawfully able to reinterpret its SIP to conform to the Tailoring Rule's requirements, it can do so without the Tailoring Rule's revisions to the Part 51 Regulations. In the event one of Texas' sister states revises its SIP to incorporate the Tailoring Rule, it can submit the revision for EPA's approval, subject to judicial review in the Court of Appeals where the state is located.

* * *

Texas strongly disputes the legal and policy basis of each of EPA's actions regulating greenhouse gases under the Clean Air Act, including the Tailoring Rule. Texas' objections will be resolved in litigation now pending in the United States Court of Appeals for the District of Columbia Circuit. In order to maintain the status quo regarding the proper allocation of powers between the States and EPA, and in light of EPA's inability to ascribe any public health or welfare benefits to the Tailoring Rule, EPA is obligated to stay the Tailoring Rule until Texas' challenge is resolved. Texas may seek immediate relief from the D.C. Circuit if EPA denies or fails to respond to this request on or before August 24, 2010.

Sincerely,



Jon Niermann
Assistant Attorney General

cc: J. Reed Clay, Jr., Office of the Solicitor General of Texas
David B. Rivkin, Jr., Baker & Hostetler LLP

ATTACHMENT

C



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2010

Hon. Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

*Via Federal Express 0201 7938 6629 6184 and
Facsimile (202) 501-1450*

Re: Application for Stays of EPA's Endangerment Finding, 74 Fed. Reg. 66,496 (December 15, 2009); PSD Interpretive Rule, 75 Fed. Reg. 17,004 (April 2, 2010); and Light-Duty Vehicle Rule, 75 Fed. Reg. 25,324 (May 7, 2010)

Dear Administrator Jackson:

The State of Texas hereby requests that you stay the following three rules pending resolution of the identified petitions for review now before the United States Court of Appeals for the District of Columbia Circuit:

- Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (December 15, 2009) (the "Endangerment Finding"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1041 (D.C. Cir.);
- Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010) (the "PSD Interpretive Rule"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1128 (D.C. Cir.); and
- Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (the "Light-Duty Vehicle Rule"), subject of petition for review in State of Texas, et al. v. Environmental Protection Agency, No. 10-1182 (D.C. Cir.).

Individually and collectively these three rules (the "GHG Rules") suffer serious legal infirmities and are unlikely to withstand judicial review. Texas would suffer significant and irreparable harm if the rules were to take effect before the Court can complete its review. And there is no harm in staying the rules; indeed it would serve public interest.

1. The GHG Rules are legally deficient.

Taken together, the GHG Rules will create the most burdensome regulatory regime in the history of the Clean Air Act ("CAA"), substantially affecting state regulatory agencies as well as

virtually every sector of the nation's economy. Yet the Environmental Protection Agency ("EPA") has imposed its scheme without any of the economic analysis required by statute, without quantifying the harm purportedly avoided by the new rules, and on a schedule so unreasonably short that it deprives Texas of its right under the CAA to take primary responsibility for the prevention and control of air pollution.

EPA would have the GHG Rules operate mechanically, and indeed arbitrarily, to regulate greenhouse gases ("GHGs") at stationary sources—without considering the effects of doing so. For example, EPA's Endangerment Finding is predicated on its unlawful delegation of its statutory responsibilities to a non-governmental, international entity that relied on questionable science to conclude that emissions from mobile sources contribute to GHG pollution endangering public health or welfare. The Endangerment Finding even purports to find that mobile sources "contribute" to pollution by certain GHGs that are not present in mobile source emissions. Moreover, the Endangerment Finding fails to articulate any meaningful criteria to support rational decision-making regarding the selection of regulatory requirements. EPA later relied on its flawed Endangerment Finding to regulate GHGs from mobile sources under its Light-Duty Vehicle Rule.

EPA's Light-Duty Vehicle Rule, which it promulgated jointly with the National Highway Traffic Safety Administration ("NHTSA"), controls GHGs from mobile sources by establishing new corporate average fuel economy ("CAFE") standards. Texas does not challenge NHTSA's CAFE standards, and asks that any stay be limited so as to allow the standards to take effect as scheduled. Nevertheless, EPA's mobile source controls are legally defective in four ways: (1) they are predicated on a deeply flawed Endangerment Finding; (2) they create a single standard for multiple pollutants, including pollutants not found in vehicle emissions; (3) they fail to quantify any health and welfare benefit to the rules; and (4) they fail to consider the costs or benefits caused by the triggering (under EPA's PSD Interpretive Rule) of stationary source regulation. To make matters worse, the Light-Duty Vehicle Rule imposes controls on January 2, 2011. Under EPA's unlawful interpretation of the CAA, this requires automatic and immediate regulation of GHGs at stationary sources—without opportunity for rational decision-making regarding the requirements to be imposed.

EPA's PSD Interpretive Rule violates the CAA and exceeds the EPA's authority because—as EPA itself admits—the Rule leads to an absurd result. Specifically, the Rule interprets the phrase "subject to regulation" found within the definition of the term "regulated NSR pollutant" to require that a pollutant be regulated under the PSD and Title V programs the moment that pollutant becomes subject to control under another provision of the CAA or its implementing regulations. In its preamble to the PSD Interpretive Rule, EPA anticipated that the Light-Duty Vehicle Rule would trigger PSD and Title V for GHGs on January 2, 2011, when GHG "controls" would become required on model year 2012 fleets. Yet EPA would not consider the effects of regulating GHGs at stationary sources either as part of its PSD Interpretive Rule or its Light-Duty Vehicle Rule, or for that matter, the Endangerment Finding.

In addition to deferring its examination of the "significant administrative challenges" posed by the GHG Rules and deferring—apparently indefinitely—any cost/benefit analysis or other review of the economic impacts of regulating GHGs at stationary sources, EPA's PSD Interpretive Rule, together with the Light-Duty Vehicle Rule, creates absurd results under the

CAA. Specifically, under EPA's construction, the rules require automatic regulation of GHGs at the CAA's statutory levels. These levels are so low that EPA has admitted them to be absurd in the context of GHGs. Alternative interpretations of the CAA, which do not entail such absurd results, have to date been ignored by EPA. For example, EPA could interpret the phrase "subject to regulation" to mean subject to regulation at the time of enactment, and thereby avoid regulating GHGs under a scheme that was not intended to regulate GHGs. And Title I of the CAA could be read to require a national ambient air quality standard ("NAAQS") for GHGs before PSD regulation is imposed, but EPA's PSD Interpretive Rule ignores this reasonable approach in favor of creating an admittedly nonsensical regulatory scheme.

Finally, EPA's PSD Interpretive Rule would trigger regulation at stationary sources without allowing the states a reasonable amount of time to revise their state implementation plans ("SIPs") to regulate GHGs. EPA has only recently issued a proposed SIP call and federal implementation plan ("FIP") for GHGs. Once they are final, they would require states to revise their SIPs by January 2, 2011, or face federalization of their permitting programs. This is contrary to the scheme established under the CAA requiring that states be allowed a reasonable time to revise their SIPs before suffering federalization of their air permitting programs. The hair trigger of EPA's PSD Interpretive Rule is one unnecessary cause of this emergency and compels EPA to issue an illegal SIP call and threat of federalization.

EPA purports to cure the incongruous regulatory scheme created by its GHG Rules with its Tailoring Rule, in which it rewrites the plain language of the CAA to change the emission rate applicability thresholds that Congress wrote into the PSD and Title V permitting programs. But EPA cannot create an absurd regulatory program and then capitalize on the unlawfulness of its actions to rewrite the Clean Air Act to accommodate its unlawful regulatory prerogatives. The Tailoring Rule is illegal and will not withstand judicial review; it is no cure at all for the irrational scheme of regulation necessarily imposed by the GHG Rules, which are the subject of this application. Moreover, the Tailoring Rule does not and cannot cure the numerous procedural deficiencies cited above. Even if it had, for example, provided an adequate economic analysis of the effect of regulating GHGs at stationary sources, post hoc rulemaking of this kind cannot cure the substantial procedural defects in the GHG Rules, which themselves provide the foundation for EPA's proposed regulation of GHGs under the PSD and Title V programs.

2. Texas will suffer irreparable harm if the GHG Rules are allowed to take effect pending judicial review.

Allowing the GHG Rules to take effect will upend the partnership between the federal and state governments envisioned in the CAA. Section 101(a)(3) of the CAA expressly provides that states shall have primary responsibility for the prevention and control of air pollution, and section 110, among others, vests this right in the states. Because the GHG Rules go into effect so quickly, EPA has threatened to federalize several of the states' air permitting programs, including Texas', pending appropriate revisions to their SIPs. This scheme denies Texas and similarly affected states their statutory right to determine how they will deploy their resources and craft their own air quality laws to manage newly-regulated pollutants. Likewise, EPA's scheme unnecessarily contravenes Congress's mandate that state and local governments retain primary responsibility for air pollution prevention and control.

Further, EPA's regulatory model harms Texas by requiring it to expend significant resources to hire and train personnel for a vastly expanded air permitting program in early 2011, despite the fact that Texas is facing severe economic pressures and is likewise forced to accommodate other EPA actions, including revised national ambient air quality standards. EPA's unreasonably abbreviated timeline does not allow Texas adequate time to meet EPA's demands. And, to the extent that Texas lack the resources to ramp up its air permitting program on such short notice, it is prevented from providing an essential government service. Without a stay, Texas and similarly affected states will be forced to choose between changing their permitting system or facing the federalization of their permitting program for failure to comply with rules they have challenged as arbitrary and capricious. Notably, these harms imposed on Texas will only be compounded by the cost to unwind GHG permitting when the court rejects EPA's scheme.

In addition, the questionable legal footing of the Tailoring Rule leaves Texas unsure of how to prepare for a situation in which they may experience the full regulatory avalanche triggered by the three GHG Rules. EPA's own estimates of the burdens on state and local authorities caused by the Endangerment Finding, Tailpipe Rule, and PSD Interpretative Rule justify staying these rules until judicial review is complete. EPA clearly recognizes the overwhelming burden that the GHG Rules would create for state and local permitting authorities in the absence of the Tailoring Rule, which Texas separately submits is unlikely to survive judicial review.

Further, the tremendous costs of implementing the required GHG permitting would be borne by Texas for the foreseeable future. Although the fees generated by the Title V sources and PSD programs are required to cover the cost of those respective programs, this does not happen automatically. Significant statutory and regulatory revisions will be required to bring Texas' fee regime into compliance with the requirements of the CAA. The cost of hiring and other implementation costs necessary to address GHG in stationary source permits in the unreasonably short timeline imposed by EPA would necessarily be borne by the State. And Texas will be unable to recoup these expenses.

Finally, the onerous and unnecessary expansion in CAA permitting programs imposed by the GHG Rules will cause Texas to suffer lost business investment. The chilling effect on the Texas economy flows from different factors. First, at present no one knows what best available control technology ("BACT") will apply to sources facing GHG regulation. Businesses will defer or cancel projects to avoid the risk and costs inherent in serving as the guinea pig for state permitting authorities, or EPA under a FIP, as they struggle to determine BACT for the source. At the same time, for those businesses willing to proceed, the lack of capacity to process permit applications will create a backlog of projects sitting in limbo, because state and local authorities will lack the resources to issue PSD and title V permits addressing GHG emissions and, in some cases, the legal authority to do so. Even if EPA implemented a FIP, businesses will face a similar backlog in applications. The chilling effect on investment will be compounded by the uncertain future of rules resting on troubled legal foundations. The CAA preserves state primacy because environmental controls are inextricably tied to fiscal, economic, and resource management issues that are central to its self-governance. This loss of investment and development, coming in the midst of a precarious economic environment and continuing through the course of this litigation, would cause substantial and immediate harm to Texas.

In short, unless the GHG Rules are stayed, EPA's GHG regulatory scheme will deprive Texas of its right to manage its air permitting program; cause expensive and unnecessary hiring, training, and, ultimately, firing of personnel to implement the requirements; and result in the denial of essential state air permitting services and the loss of business investment in Texas. These injuries are significant, immediate, and irreparable.

3. There is no harm in staying EPA's GHG rules, rather it serves the public interest.

In sharp contrast to the significant and irreparable harm that will be caused by the GHG Rules, no harm would be caused by a stay. Nowhere in its GHG rulemaking does EPA quantify or even specifically link the GHG reductions expected from the regulation of GHGs at stationary sources with the public health or welfare benefits of such reductions or ascribe any particular timeline to such GHG reductions, if any. Moreover, NHTSA's revised CAFE standards would remain in effect under the requested stays. Given the relatively short duration of any stay, and lack of environmental benefits ascribed to stationary source regulation, there is simply no harm in staying EPA's GHG rules. To the contrary, stays of the GHG Rules will serve the public interest, by providing greater regulatory certainty, avoiding government waste, and capturing the economic and environmental benefits of keeping industry in the United States.

* * *

In light of EPA's inability to ascribe any public health or welfare benefits to the GHG Rules, the significant and irreparable harm caused by allowing the GHG Rules to take effect during the identified judicial challenges, and the serious legal deficiencies described above in connection with the Endangerment Finding, the Light-Duty Vehicle Rule, and the PSD Interpretive Rule, the State of Texas strongly urges EPA to stay the imposition of each of these rules while the court considers Texas' pending petitions for review.

Sincerely,



J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

JRC/apw

c: File