

**COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
REGARDING PROPOSED BEST AVAILABLE RETROFIT TECHNOLOGY AND
INTERSTATE VISIBILITY TRANSPORT PROVISIONS, REGIONAL HAZE AND
INTERSTATE VISIBILITY TRANSPORT FEDERAL IMPLEMENTATION PLAN FOR THE
STATE OF TEXAS; EPA DOCKET ID NO. EPA-R06-OAR-2016-0611**

I. Summary of Notice

On August 27, 2018, the United States Environmental Protection Agency (EPA) issued a proposed action in the *Federal Register* requesting additional comment on the final federal implementation plan (FIP) published by the EPA on October 17, 2017 to address certain Federal Clean Air Act (FCAA) regional haze requirements for Texas, including best available retrofit technology (BART). The final FIP includes a BART alternative establishing an intrastate sulfur dioxide (SO₂) trading program for certain electric generating units (EGU) in Texas based on the allocations under the Cross-State Air Pollution Rule (CSAPR). On December 15, 2017, the EPA received a petition for reconsideration on the final FIP. To provide for additional public input, the EPA is requesting comment on the SO₂ trading program as a BART alternative and other aspects of the EPA's October 17, 2017 final action.

II. Comments

1. The Texas Commission on Environmental Quality (TCEQ) supports the EPA's affirmation that the October 2017 Regional Haze FIP satisfies Texas' obligations for BART as well as interstate visibility transport for certain National Ambient Air Quality Standards (NAAQS).

In response to the December 15, 2017 petition for reconsideration, the EPA is requesting comment on the intrastate SO₂ trading program adopted as a BART alternative and other aspects of the EPA's October 2017 final action to provide for additional public input. The EPA has proposed to affirm certain determinations made in the final FIP and is requesting comment on those determinations. The TCEQ supports the EPA's affirmations regarding the October 2017 FIP. Specifically, the TCEQ supports the following EPA determinations.

- The intrastate SO₂ trading program for certain EGUs in Texas is an appropriate BART alternative and satisfies all SO₂ BART requirements.
- No sources in Texas are subject to BART for particulate matter (PM).
- Texas' participation in the CSAPR Ozone Season Nitrogen Oxides (NO_x) Program satisfies NO_x BART requirements and, with the SO₂ intrastate trading program, fully addresses Texas' interstate visibility transport obligations, and ensures emissions from Texas do not interfere with visibility in nearby states, for the following six NAAQS per FCAA, Section 110(a)(2)(D)(i)(II): 1997 Eight-hour Ozone; 1997 Fine Particulate Matter (PM_{2.5}) (annual and 24-hour); 2006 PM_{2.5} (24-hour); 2008 Eight-hour Ozone; 2010 One-hour Nitrogen Dioxide (NO₂) and 2010 One-hour SO₂.

2. The TCEQ may replace the SO₂ trading program FIP with a state-run trading program in the upcoming regional haze state implementation plan (SIP) revision for the second planning period. However, any commitments made in the 2017 Memorandum of Agreement (MOA) between the TCEQ and the EPA are no longer applicable.

The EPA noted in the proposed action published on August 27, 2018 that Texas and the EPA entered into an agreement via an MOA that the TCEQ would replace the FIP with a SIP-based trading program. However, the EPA stated that TCEQ has not met its commitment to provide a SIP and that the EPA had little choice but to continue the FIP (83 FR 43587). While the TCEQ agrees that the EPA must continue the FIP until such time as a SIP is approved to replace the FIP, the TCEQ does not agree that the MOA remains a binding commitment on the TCEQ. The TCEQ may choose to replace the FIP with a state-run trading program as an alternative to source-specific BART for EGUs but is under no legal obligation to do so.

The MOA was submitted to the United States District Court for the District of Columbia as part of a request by the EPA for more time to finalize an action on BART in Texas. The MOA established a schedule for the TCEQ to adopt and submit a BART SIP to EPA for approval rather than the EPA finalizing a FIP. The court did not grant the extension and the EPA promulgated the trading program BART alternative FIP in September 2017. As such, any commitment made by the TCEQ in the MOA is no longer applicable. Additionally, petitions for review were filed two months after promulgation of the FIP. This created uncertainty regarding whether the EPA would revisit the final FIP in response to these petitions – as this proposal confirms.

Given the unknown future of the FIP trading program, it became apparent to the TCEQ that moving forward with a SIP revision based on the FIP would be premature. The TCEQ anticipates that review of a possible state trading program alternative to replace the FIP would be appropriate during development of the second planning period regional haze SIP revision that is due to the EPA in July 2021.

3. The EPA should eliminate the additional flexibility afforded to Coletto Creek's owner in the Supplemental Allowance Pool of the SO₂ trading program FIP because Coletto Creek is no longer an isolated unit in the program.

As part of the BART FIP SO₂ requirements for Texas EGUs that the EPA finalized on October 17, 2017 (82 FR 48324), the EPA incorporated into the final rule at 40 Code of Federal Regulations (CFR) §97.912(a)(3)(i) compliance flexibility specific to Coletto Creek and the Supplemental Allowance Pool. As the EPA discusses in the preamble to the October 2017 final rule and in the preamble of this proposed rule to address BART and interstate transport provisions, the EPA decided to provide additional flexibility to Coletto Creek by allowing it to draw its maximum supplemental allocation from the Supplemental Allowance Pool before any other eligible source could draw allowances from the Supplemental Allowance Pool for the same control period. The reason provided by the EPA was that Coletto Creek consisted of a single coal-fired unit and this coal-fired unit was the only unit in Texas owned and operated by Dynegy, thereby surmising that insufficient incentives may exist to compel Dynegy's competitors to make their additional allowances available for purchase by Dynegy.

Given the recent merger between Dynegy and Vistra Energy, which owns or operates several other Texas EGUs that are subject to the Texas intrastate trading program for SO₂, Coletto Creek will now be part of a larger set of participating units under the same owner/operator. Because Coletto Creek is no longer at a disadvantage as it was before, the flexibility afforded to Coletto Creek under the Supplemental Allowance Pool is no longer necessary. Vistra Energy will be able to transfer allowances among the multiple participating units should any one source require additional allowances during any control period greater than its allocation, including Coletto Creek. Eliminating the flexibility directly afforded to Coletto Creek under 40 CFR §97.912(a)(3) as a result of the merger will provide an equal opportunity among the participating sources for access to the Supplemental Allowance Pool. The TCEQ acknowledges this change to the Supplemental Allowance Pool would require rulemaking. As discussed in TCEQ Comment 5, the timing of rulemaking to implement changes to the program is a potential concern given the imminent start of the program. However, in this case, the TCEQ encourages the EPA to discuss with program stakeholders appropriate timing for making a change to the Supplemental Allowance Pool.

4. The total number of allowances that can be allocated in a control period from the Supplemental Allowance Pool should remain the same as the EPA finalized in the October 2017 FIP.

After the EPA finalized the BART FIP in October 2017 (82 FR 48324), the EPA became aware of some participating units that shut down in late 2017 and early 2018 as well as two additional, proposed participating unit shutdowns. In the August 2018 notice on the October 2017 FIP (83 FR 43586), the EPA proposed an alternate calculation to determine the total number of allowances that could be allocated in a control period from the Supplemental Allowance Pool. This proposed alternative downwardly adjusts the total number of allowances that can be allocated, from 54,711 to 41,335 tons. Considering the EPA's solicitation of comment of how shutdowns should impact allocations of retired units for a period of five years and solicitation of comment of this impact on the alternate proposal, the EPA has not provided any explanation as to why the maximum amount of allowances allocated from the Supplemental Allowance Pool should be adjusted downward, other than to state that the final number of 41,335 tons is appropriate based on the omission of the annual allocations for the participating units projected to be permanently retired as of January 1, 2019. The EPA should retain the maximum distribution of 54,711 tons from the pool reflecting the reality that electric energy consumption in the state will not decrease merely because some program's participating units have ceased operation by the start of the program compliance date. Retaining the maximum distribution of 54,711 tons will offer existing, operating participating units, both coal- and gas-fired, compliance flexibility should they realize an increase in annual emissions resulting from increased generation output. The purpose of the Supplemental Allowance Pool is to support those units that, regardless of the reason, exceed their general allocations.

5. The TCEQ suggests retaining current program elements finalized in the October 2017 FIP, considering the imminent start of the program on January 1, 2019. Significant program changes may mean the EPA must propose another rule, potentially causing significant interruption in the planning operations of participating sources.

The EPA noted in the preamble discussion of this proposed rule that should the EPA act pursuant to any comments submitted on the policy questions posed by the EPA, the EPA may initiate a new proposed rule (83 FR 43587). The EPA finalized in its October 2017 FIP (82 FR 48324) for certain Texas EGUs that not only did the SO₂ intrastate trading program satisfy as a BART alternative, but that it also satisfied the requirements for BART alternatives of the Regional Haze Rule. Participating sources have made planning efforts to comply by January 1, 2019 based on the amount of their respective allocations in addition to the maximum distribution of allowances from the Supplemental Allowance Pool originally based on all participating units of the program. Even if the EPA were to implement changes through a separate rulemaking, making changes in the early stages of the program creates uncertainty and may result in disruption of operations among the participants. Additionally, it would be inappropriate for the EPA to commit to any changes from the October 2017 final rule, especially given the EPA's willingness to propose to affirm what it previously finalized. Finally, should the EPA decide to make changes then such changes should have a delayed effectiveness to avoid creating confusion with compliance during a control period. The TCEQ suggests that the effectiveness of any significant changes to the program (e.g., changes to allocations) be delayed until at least one full control period after the EPA adopts the changes to the regulation, i.e., if changes are finalized in 2019 then the changes would not take effect until the 2021 control period. Depending on the extent of the changes, more time may be necessary.