

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 3, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2011-0720-RUL

Project No.: 2011-020-PET-NR

Who Submitted the Petition:

The Texas Environmental Law Center submitted a Petition for Rulemaking on May 5, 2011, on behalf of Angela Bosner-Lain, Karin Ascot, as next friend on behalf of TVH and AVH minor children, and Brigid Shea, as next friend on behalf of EBU, a minor child (petitioners).

What the Petitioner Requests:

The petitioners request the commission, adopt by January 1, 2012 a greenhouse gas (GHG) reduction plan that when implemented limits carbon dioxide (CO₂) emissions in Texas from fossil fuels that results in a peak in emissions in the state by 2012; and beginning in January 2013, reduces fossil fuel CO₂ emissions by at least 6% a year. The petitioners also request a rule that requires the commission take the following actions consistent with the directive mentioned previously: (1) annual progress reports on statewide GHG emissions published annually on the Texas Commission on Environmental Quality (TCEQ) Web site. The reports must include an accounting and inventory for each and every source of all GHG emissions within the state without exception. The inventory and accounting must be verified by an independent third party. The reports must be made publicly available no later than December 31 of each year beginning in 2012; (2) track progress toward meeting the emission reductions including current and future policies and rules and report on the progress annually; and (3) by December 31, 2011 and annually thereafter report to the governor and appropriate House and Senate committees the total emissions of GHG for the preceding year for each major source sector. The annual reporting rules must allow development of a comprehensive inventory of GHG emissions for all sectors of the state economy. Finally, the petitioners request rule language that states if any rule adopted as a result of this petition conflicts with any other rule in effect, the more stringent rule, favoring full disclosure of emissions and protection of the atmosphere, governs.

Recommended Action and Justification:

The executive director recommends denial of the petition for the following reasons:

Commissioners

Page 2

June 3, 2011

Re: Docket No. 2011-0720-RUL

Texas is currently in litigation with the U.S. Environmental Protection Agency (EPA) over these very issues of regulation of GHG under the Federal Clean Air Act (FCAA). TCEQ has fundamental disagreement with the EPA over how, and if, Congress intended GHG emissions should be regulated under the FCAA. EPA has also issued a Federal Implementation Plan (FIP) to permit major sources of GHG in Texas, and the commission has filed a petition objecting to the FIP. These cases are pending in the United States Court of Appeals for the District of Columbia Circuit. Decisions on any, or all, cases are not expected until 2012. The outcome of these proceedings is very likely to impact any rulemaking TCEQ initiates as a result of granting this petition. The unsettled nature of the federal actions on GHG also raises difficulties with any rule that must be 'consistent with federal law.' (See Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), §382.0205.) Until these issues are resolved, a rulemaking setting GHG emission limits in Texas is imprudent and premature.

THSC, §382.0205 does not require commission action but does predicate any rulemaking on consistency with relevant federal actions. It also does not dictate how the commission should control GHG. While not directly controlling emissions as petitioners suggest, the state of Texas has initiated efforts to diversify our energy portfolio, which has reduced GHG emissions in the state. For example, Texas has the most wind generation in the country and is actively developing solar that diverts a significant amount of the state's power grid from fossil fuels. In 2009, the Legislature enacted THSC, Chapter 382, Subchapter K, (§§382.501 - 382.510) a law directing several state agencies, including TCEQ, to explore locations in state-owned offshore submerged lands for a geologic carbon sequestration facility. The Legislature in the same session directed the commission establish an inventory of voluntary actions taken by businesses and state agencies in Texas since December 2001 to reduce CO2 emissions.

Greenhouse gases, including CO2, are ubiquitous gases that occur relatively uniformly throughout the global atmosphere. As such, control of emissions by one state, or varied control regimes across many states, will not necessarily impact the global distribution of these gases positively or negatively. Therefore, TCEQ cannot meet the directive in THSC, §382.011 to control the state's air quality by acting in isolation to control of GHG emissions in Texas. Petitioners state that the clear goal of the rulemaking is to stop the use of fossil fuels – "a zero CO2 energy system." The merits and implementation of such an energy policy are beyond the authority of the commission to enact.

The basis for the petitioners' request for reductions on CO2 emissions is to achieve a level of 350 part per million (ppm) of CO2 in the atmosphere. National air quality standards are achieved and enforced by the states through implementation plans. The standard the petitioners propose for CO2, as evidenced in Exhibit A of the petition, has not been developed through the proper mechanism under the FCAA, in particular FCAA, section 109. This section provides EPA the authority to establish a National Ambient Air Quality Standard (NAAQS) sufficient to protect public health and welfare.

Re: Docket No. 2011-0720-RUL

The public trust doctrine has never been applied to protection of the atmosphere, in any jurisdiction in the United States. Its primary use has been to protect beaches and navigable waterways for commerce. In addition, extension of this common law doctrine to force reductions in CO₂ emissions in Texas, or any other state, is improper because it is preempted by statute. FCAA, section 109 directs the EPA to adopt standards for air contaminants as necessary to protect human health and welfare, and through the states to adopt and enforce controls to meet those standards. Texas courts have clearly and regularly spoken on this: where common law duties have been displaced or revised by statutes enacted by legislatures, the statute controls. (*Taco Cabana, Inc. v. Exxon Corporation*, 5 S.W.3d 773 (Tex.App. – San Antonio 1999); *Z.A.O. Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531 Tex.App. – El Paso, 2001), *Ryan v. Travelers, Ins. Co.*, 715 S.W.2d 172 (Tex.App. – Houston (1st Dist.) 1986).)

The rule language requested by petitioners suffers from several shortcomings. First, to freeze emissions in 2012 would require TCEQ to call in permits or revise permits at amendment or renewal for emissions not currently controlled. TCEQ does not have this authority under the TCAA. Second, the reduction targets would apply to all sources of fossil fuel CO₂ emissions, including mobile sources. TCEQ is pre-empted by the FCAA to regulate motor vehicles. Third, the accounting and inventory for all GHG emission sources in the state, without exception, is unachievable. TCEQ does not have the capability of acquiring emissions information for every source in the state, in the timeframe required by the rule language. Sources of GHG emissions include countless residential water heaters and motor vehicles. GHG emission data is not available to homeowners or automobile owners and, therefore is not readily accessible by TCEQ.

The inventory requirement of the rule would duplicate federal requirements. In October 2009, EPA promulgated the mandatory reporting of GHG from several large source categories. This is a comprehensive, nationwide data collection effort that applies to direct GHG emitters including utilities and major industrial sectors.

Applicable Law:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule
- 30 TAC §20.15, which provides such procedures specific to the commission
- THSC, §382.011, which provides the commission shall establish the level of quality to be maintained in the state's air and control the quality of the state's air.
- THSC, §382.012, which provides the commission shall prepare and develop a general, comprehensive plan for the proper control of the state's air.
- THSC, §382.014, which provides the commission authority to require a source of air contaminants to submit emissions information to enable development of an inventory of emissions in the state.
- THSC, §382.0205, which provides that consistent with applicable federal law, the commission by rule may control air contaminants as necessary to protect against adverse effects related to climatic changes, including global warming.

Commissioners

Page 4

June 3, 2011

Re: Docket No. 2011-0720-RUL

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Attachment

Petition

cc: Chief Clerk, 2 copies
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