

Issue Brief: “Texas vs EPA”

Background:

Disagreement between Texas and the Environmental Protection Agency (EPA) about the federal Clean Air Act (CAA) has grown over the last several years.

EPA Greenhouse Gas Findings and Rules:

In 2007, the US Supreme Court found that greenhouse gases could be regulated under the CAA, then ordered the EPA to examine how greenhouse gases affect climate change, and if so, to regulate them. In Dec. 2009, the EPA issued its “endangerment finding” that current and projected levels of six greenhouse gases threaten the public health and welfare of current and future generations. The EPA also issued a finding that greenhouse gas emissions from motor vehicles “cause or contribute” to pollution that threatens public health and welfare; this finding led to the “tailpipe rule” setting emission standards for cars and light trucks. The tailpipe rule automatically triggered regulation of stationary greenhouse gas emitters starting in Jan. 2011 (the “timing rule”). Under the “tailoring rule,” those regulations were limited to larger stationary sources like certain steel mills and power plants.



State Challenge Rejected / EPA Rule Upheld (so far): Texas and 13 other states sued the EPA (supported by 15 other states) to block the endangerment findings, the tailpipe rule, and the timing and tailoring rules. Texas said EPA’s outsourced consideration process was flawed and that it created bureaucratic licensing and regulatory burdens. In June 2012, the DC Circuit Appeals Court upheld the EPA endangerment findings and tailpipe rule, while determining the states did not have standing to challenge the timing and tailoring rules. Texas and others asked for rehearing en banc, but that was denied in Jan. 2013. Texas and others are expected to seek Supreme Court review.

EPA Cross-State Air Pollution “Transport Rule” (CSAPR):

EPA issued the Transport Rule in Aug. 2011 to replace the invalidated Clean Air Interstate Rule. The Transport Rule “defines emissions reduction responsibilities for 28 upwind States based on those States’ contributions to downwind States’ air quality problems. The Rule limits emissions from upwind States’ coal- and natural gas-fired power plants, among other sources.”

State Challenge Successful / EPA Rule Overturned (so far): Texas, 13 other states, and some generators challenged the EPA’s Transport Rule (supported by others). In Aug. 2012, the DC Circuit Appeals Court vacated the Transport Rule. In Oct. 2012, the EPA asked for rehearing en banc, and petitioners responded in November.

Texas Flexible Permits:

The Texas Commission on Environmental Quality (TCEQ) flexible permit program, initially proposed in 1994, "allows an operator more flexibility in managing their operations by staying under an overall emissions cap" for one or more facilities at one site.

EPA Disapproval / EPA Ruling Overturned: In June 2010, the EPA announced final disapproval of the Texas Flexible Permits Program (for minor "new sources") after determining that it allowed major "new sources" to avoid certain federal clean air requirements. Texas challenged this disapproval, and in Aug. 2012, the Fifth Circuit Appeals Court rejected the EPA's disapproval. The time for the EPA to seek Supreme Court review appears to have passed. In Oct. 2012, the EPA approved TCEQ's revisions to its major new source flexible permit program for existing sources. Meanwhile, as to minor new sources, Texas and the EPA have disagreed on whether EPA should now focus on the 1994-2003 Texas program (Texas) or the 2010 Texas program (EPA).

Conclusion:

The EPA has had an unprecedented level of rulemaking activity in recent years that has affected the Texas energy industry.

Five Questions to Consider:

1. How much will it cost for our energy industry (power, oil, and gas) to comply with these rules?
2. What entities are affected by the timing rule?
3. What is the future in Texas for additional coal plants, and will any existing coal plants be shuttered?
4. What are emission standards for cars and trucks, given the tailpipe rules?
5. As to power plants, what are EPA's and TCEQ's distinctions between new and existing sources, and between minor and major sources?

Resources for Further Reading

- **EPA greenhouse gas findings:** (<http://www.epa.gov/climatechange/endangerment/>)
- **Texas Attorney General news release on its challenge to EPA greenhouse gas findings / rules:** (<https://www.oag.state.tx.us/oagNews/release.php?id=3971>)
- **June 2012 DC Circuit Court opinion on greenhouse gas findings / rules:** ([http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/\\$file/09-1322-1380690.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf))
- **EPA Cross-State Air Pollution Rule (CSAPR) / Transport Rule:** (<http://www.epa.gov/airtransport/>)
- **Aug. 2012 DC Circuit Court opinion on EPA Transport Rule:** ([http://www.cadc.uscourts.gov/internet/opinions.nsf/19346B280C78405C85257A61004DC0E5/\\$file/11-1302-1390314.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/19346B280C78405C85257A61004DC0E5/$file/11-1302-1390314.pdf))
- **Texas flexible permits:** (http://www.tceq.texas.gov/permitting/air/newsourcereview/flexible_permit.html)
- **Aug. 2012 5th Circuit Court opinion on Texas flexible permits program:** (<http://www.ca5.uscourts.gov/opinions/pub/10/10-60614-CV0.wpd.pdf>)

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