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Texas Regulators Take First Steps to Acquire Greenhouse Gas Permitting Authority

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On October 4th, the Texas Commission on Environmental Quality (TCEQ) released a preliminary draft of a proposal to establish greenhouse gas (GHG) permitting regulations for the state of Texas. This action kicks off what is likely to be a lively discussion between stakeholders and regulators over the design of Texas's GHG permitting program. But it represents a first step toward an important change from the status quo. For almost three years now, Texas companies have been subject to two different permitting authorities for air permits: the U.S. Environmental Protection Agency (EPA) issues GHG permits under a Federal Implementation Plan (FIP), while TCEQ issues permits for all other regulated pollutants. The dual permitting scheme has not been a model of efficiency. In addition to the administrative burden of pursuing two separate permit applications, applicants have experienced substantial project delays and cost increases. Last spring, in an attempt to resolve the situation, the Texas Legislature passed legislation (HB 788) specifically recognizing GHGs as an air pollutant and requiring TCEQ to adopt new regulations for GHGs and incorporate those requirements into its State Implementation Plan (SIP). The draft proposal TCEQ staff released last Friday implements that legislation, revealing some interesting aspects that merit watching as the rulemaking goes forward. TCEQ's task is challenging because it must satisfy both the federal GHG standards as interpreted by EPA and the Texas Legislature's mandates in HB 788. Some of TCEQ's proposed provisions, required by HB 788, will likely be controversial. Specifically, TCEQ states that GHG permit applications will not be subject to contested case hearings (CCH), the traditional vehicle for direct public participation in major air permitting actions in Texas. Instead, stakeholders will be limited to submitting written comments on the GHG aspects of a permit application, and can appeal the TCEQ's issuance of a permit authorizing GHG emissions to state district court. In addition, the proposal specifies that TCEQ will not consider climate change or local air quality impacts from an individual source's GHG emissions. TCEQ's position is that scientific modeling, in its current state, is simply inadequate to set limits for individual source emissions based on an estimated incremental impact on a global problem. With respect to air quality, TCEQ states that GHGs are not a traditional NAAQS pollutant for which specific health impacts have been or can be measured. While those views are not likely to draw significant opposition, as they are consistent with EPA's GHG permitting guidance, TCEQ concludes that "the most practical way to address [these] considerations is to focus on reducing emissions" through "best available control technology" (BACT). To meet BACT, TCEQ suggests that it will likely require fuel

limitations and other process controls, but not "add-on controls." Given EPA's position on the technical feasibility of carbon capture and sequestration (CCS), this could be a source of significant comment from environmental groups and a point of contention between EPA and TCEQ when TCEQ requests EPA's approval of an amended SIP and withdrawal of the FIP. While designed to meet the Legislature's goal of streamlining GHG permitting, these types of provisions may invite stakeholder opposition, and complicate EPA's ability to quickly approve the SIP revisions and rescind the FIP. Environmentalists may argue both to TCEQ and to EPA that add-on controls (*e.g.*, carbon capture technology) *are* available for GHG emissions, contrary to what seems to be TCEQ's position. Stay tuned, as both the TCEQ process and the subsequent EPA process are likely to involve very important discussions about the future of GHG permitting in Texas.