

## Dual Air Permitting Scheme in Texas Lives On, For Now

By: Christopher C. Thiele, John A. Riley and Taylor Holcomb.

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The D.C. Circuit Court of Appeals' ruling on June 26, 2012, upholding the Environmental Protection Agency's (EPA) various rulemakings regulating greenhouse gases is a significant blow to the numerous oil and gas, electric generating, chemical, and refining companies operating in Texas that hoped to see an end to the state's dual permitting scheme, under which EPA Region 6 is the Prevention of Significant Deterioration (PSD) permitting authority for greenhouse gas emissions and the Texas Commission on Environmental Quality issues PSD permits for all other pollutants.

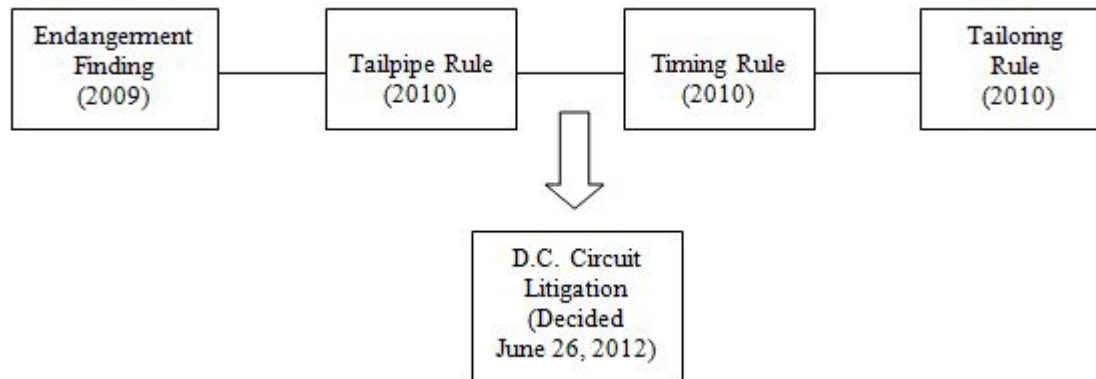
The Court's ruling is not the end of the challenges to EPA's greenhouse gas permitting program, however, as other challenges filed by the State of Texas and industry are still ongoing. Even so, it is possible that the June 26 ruling could initiate calls from industry for the State of Texas to take over greenhouse gas PSD permitting from EPA because of the growing backlog of applications pending at EPA Region 6.

### How Did We Get Here?

After the United States Supreme Court held in 2007 that greenhouse gases are "air pollutants" subject to regulation under the Clean Air Act, EPA very quickly took four steps to begin regulating greenhouse gases under its PSD program.

In 2009, EPA issued the "**Endangerment Finding**," determining that greenhouse gases may "reasonably be anticipated to endanger public health or welfare." It also determined that motor vehicle emissions of greenhouse gases contribute to climate change, and so in 2010 EPA promulgated the "**Tailpipe Rule**," setting emission standards for cars and light trucks. The effects of the Tailpipe Rule extended beyond cars and light trucks, however, because in EPA's view once greenhouse gases were subject to regulation under the Clean Air Act, regulation of stationary sources of greenhouse gas emissions under EPA's PSD and Title V programs was triggered. But, because immediate regulation of "major sources," as traditionally defined, would have resulted in overwhelming burdens on permitting authorities and sources, EPA in 2010 promulgated the "**Timing Rule**." The Timing Rule made clear that major sources of greenhouse gases would be subject to PSD and Title V permitting regulations not immediately, but on January 2, 2011, the date on which the actual control requirements for greenhouse

gases took effect under the Tailpipe Rule. EPA also promulgated the "**Tailoring Rule**" in 2010 to phase in greenhouse gas permitting requirements and to apply them only to the largest stationary sources.



Industry petitioners and fourteen states, including Texas, challenged each of the rulemakings, and all challenges were consolidated into one case before the D.C. Circuit. In the June 26 ruling, the Court found that the Endangerment Finding and the Tailpipe Rule were not arbitrary and capricious, and that industry and state petitioners lacked legal standing to challenge both the Timing and Tailoring Rules.

### What's Next?

Challenges to how EPA attempted to force regulation of greenhouse gases on the State of Texas and then stripped away the state's PSD permitting authority when the state refused to comply, as opposed to challenges to EPA's decision to regulate greenhouse gases, are still ongoing before the D.C. Circuit.

1. In *Utility Air Regulatory Group v. Environmental Protection Agency*, also known as the "SIP Call case," Texas and industry petitioners are challenging EPA's decision to not give states the three years provided by the Clean Air Act to update their state implementation plans (SIP) to account for the regulation of greenhouse gases. Instead of providing the statutory three years, EPA issued SIP calls for 13 states, including Texas, based on EPA's finding that the laws of those states gave the states no authority to issue PSD permits for greenhouse gases and, therefore, were substantially inadequate. *Status*: Briefing in this case wrapped up in early June, and a decision is expected by the end of the year.
2. In *State of Texas v. Environmental Protection Agency*, also known as the "SIP/FIP case," Texas and industry petitioners are challenging EPA's interim, and later, final decisions to partially disapprove of Texas's PSD SIP because it did not appropriately address the applicability of newly-regulated pollutants to the state's PSD program, and to impose a final Federal Implementation Plan (FIP) establishing EPA as the PSD permitting authority for greenhouse gases in Texas. *Status*: A joint brief for the State of Texas and industry petitioners

was filed on June 18, and briefing is scheduled to extend until October, with a final decision expected in the first quarter of next year.

In the meantime, the dual permitting scheme in Texas lives on. Since greenhouse gas PSD permitting took effect on January 2, 2011, and spurred by new shale plays in Texas and low natural gas prices, Texas companies have submitted 30 greenhouse gas permit applications to EPA Region 6 to authorize construction and operation of natural gas processing plants, natural gas-fueled electric generating stations, chemical plant and refinery expansions, and other projects. To date, however, only two greenhouse gas permits have been issued.

As a result of the growing backlog of applications at EPA Region 6, and given the D.C. Circuit's ruling, the State of Texas may need to consider pursuing measures to take over greenhouse gas PSD permitting from EPA. This could be accomplished through a delegation agreement or by revising the Texas PSD SIP, though both options present challenges and could take a significant amount of time—even in the likely event that the state pursues an appeal of the D.C. Circuit's decision to the United States Supreme Court. If the state does not undertake the process to take over greenhouse gas permitting soon, there could be increased pressure from Texas companies for the state to do so, especially if the Region 6 backlog continues to grow and causes Texas's industrial growth to slow.

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