



33rd Annual Texas Environmental Superconference: Air Quality Panel

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Although we never really left...



TCEQ* Perspective

- Pending Litigation: Issues to Watch
- Evolving Perspective on Interstate Transport
- Current TCEQ Issues of Interest

Pending Litigation: Issues to Watch



Pending Litigation: Issues to Watch

Affordable Clean Energy Rule/Clean Power Plan Repeal Decision and Further Appeal

Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021)

Vacatur and remand of the ACE emission guideline and the CPP Repeal and vacatur of part of the new implementation regulations (40 CFR Part 60, Subpart Ba). Court granted partial stay of the mandate relating to the vacatur of the CPP Repeal, so states are not obligated to comply with the CPP. Vacatur of the ACE emission guideline effective, so states are not required to provide an ACE state plan.

Numerous petitions for certiorari filed - Texas participating with multistate group led by West Virginia.

Will the Supreme Court grant cert to determine the bounds of EPA's authority under FCAA, §111(d)?

Pending Litigation: Issues to Watch

Dallas-Fort Worth (DFW) & Houston-Galveston-Brazoria (HGB) Areas: Revoked Ozone NAAQS Antibacksliding Cases

Downwinders at Risk v. EPA, No. 18-60290 (5th Circuit)

Appeal of the redesignation substitute approval for the DFW and HGB (1-hour and 1997 8-hour ozone) areas based on after-arising grounds (*SCAQMD v. EPA*, 882 F.3d 1138 (D.C. Circuit), which vacated the redesignation substitute mechanism). Abated pending resolution of challenge to the 2020 replacement actions (cases below).

Sierra Club v. EPA, Case No. 20-1121 (D.C. Circuit); and No. 20-60303 (5th Circuit)

Appeal of the redesignation substitute replacement actions removing the antibacksliding requirements for the DFW and HGB (1-hour and 1997 8-hour ozone) areas, as well as EPA's approval of the HGB Section 185 fee program approval. 5th Circuit case stayed while D.C. Circuit determines venue. Abated while EPA reviews challenged final actions pursuant to Executive Order 13,990.

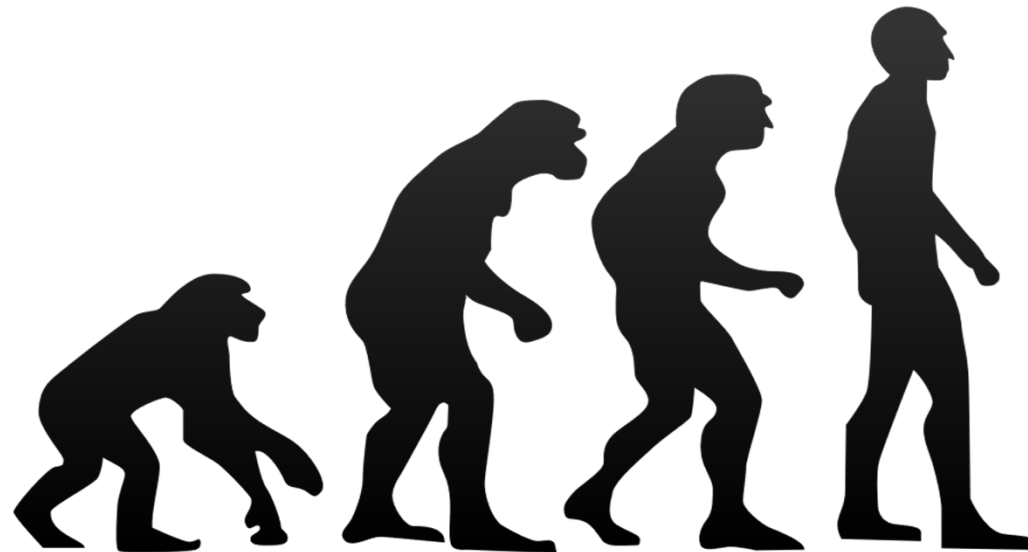
Stay tuned for decision that will impact states' obligations for revoked NAAQS.

Pending Litigation: Issues to Watch

Regional Haze

- *Texas v. EPA*, No. 16-60118, 5th Circuit
 - Challenge to EPA's partial disapproval of the Texas reasonable progress SIP and promulgation of an EGU SO₂ FIP (January 5, 2016). Court denied transfer to the D.C. Circuit; granted partial remand to EPA for reconsideration; abated.
- *Nat'l Parks Conservation Ass'n v. EPA*, No. 17-60828 and No. 20-60929, 5th Circuit
 - Challenge to EPA alternative trading program SO₂ BART FIP, approval of the use of CSAPR for the 2008 ozone NAAQS to satisfy NO_x BART and approval of Texas' determination that EGUs are not subject to PM BART (October 17, 2017). EPA issued a supplemental proposal and ultimately finalized a new SO₂ BART FIP (August 12, 2020). Both cases consolidated and transferred to the D.C. Circuit to determine venue and consolidated as noted below.
- *Nat'l Parks Conservation Ass'n v. EPA*, No. 20-1408, D.C. Circuit
 - Consolidated challenges transferred from the 5th Circuit re: SO₂ BART FIP and Texas' Withdrawal from CSAPR and Updated CSAPR Better than BART determination; abated.
- *Texas v. EPA*, No. 17-1021, D.C. Circuit
 - Challenge to the federal rule amendments (January 10, 2017); abated.

Evolving Perspective on International Transport



Evolving Perspective on International Transport

Federal Clean Air Act,
§179B

Provides relief from specific
statutory obligations if the
State can demonstrate to
EPA's satisfaction that an
area would attain/maintain
the NAAQS but for
international emissions.



Energy needs in foreign countries like China and India continue to drive expansion in electric plants. This photo by Unknown Author is licensed under CC BY-ND.

Evolving Perspective on International Transport

FCAA, §179B(a): Prospective (not-NAAQS specific)

Implementation Plans/Revisions **shall be approved** if:

- The plan/revision meets all requirements other than demonstrating attainment by the attainment date; and
- EPA agrees the plan would be adequate to attain and maintain the NAAQS by the attainment date but for international emissions.

FCAA, §179B(b): Retrospective (ozone specific)

States **shall not** be subject to reclassifications for failure to attain or FCAA, §185 penalty fees if:

- EPA agrees that the State would have attained the NAAQS by its attainment date, but for international emissions.

Evolving Perspective on International Transport

EPA Approval Actions

- El Paso, Texas (CO, PM₁₀, & Ozone)
- Imperial Valley, California (PM₁₀)
– vacated by the 9th Circuit
- Nogales, Arizona (PM₁₀)

Recent EPA Guidance

- Issued in December 2020 (Trump Administration) after opportunity for public review and comment.
- Requires complex analysis that does not easily fit within existing statutory timeline / framework.
- <https://www.epa.gov/ground-level-ozone-pollution/international-transport-air-pollution>

Evolving Perspective on International Transport

- The statute reflects Congress' agreement that states should not be penalized for air quality issues caused by international emissions.
- Progress in the understanding of international emission inventories, meteorology, ozone chemistry, and more advanced photochemical modeling techniques have advanced our technical understanding of the potential impact of international emissions on an area's ability to attain or maintain the NAAQS.
- The policy/regulatory framework has not evolved, resulting in a requirement for more complex demonstrations in an unworkable statutory timeframe.

Current TCEQ Issues of Interest



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Air Quality Planning

SO₂ SIPs

- Freestone-Anderson & Titus Resignation & Maintenance SIPs
- Rusk-Panola Attainment Demonstration SIP
- Howard, Hutchinson & Navarro Counties Attainment Demonstration SIPs

2008 Ozone SIPs

- DFW/HGB Area Bump-Up SIPs (Severe)

2015 Ozone SIPs

- DFW/HGB/San Antonio Area Bump-Up SIPs (Moderate)
- El Paso redesignation to nonattainment (Marginal)

Current TCEQ Issues of Interest

Air Permitting: New Source Review

- Inter-pollutant trading vacated by *Sierra Club v. EPA*, 985 F.3d 1055 (D.C. Cir. 2021)
- Project Emissions Accounting – adopted by the Commission June 9, 2021
- Continued updating of various electronic workbooks for permit applications
- Standard Permits (New & Updated)

Current TCEQ Issues of Interest

Air Permitting: Title V

Recent Petition Orders:

- June 30, 2021: Sandy Creek Energy Station Petition Order
- July 20, 2021: BP Amoco Chemical – Texas City

July 19, 2021: Notice of Proposed Consent Decree with Schedule for pending petitions for Texas sources, requiring EPA action by:

- August 31, 2021 – 3 of 8 petitions;
- September 30, 2021 – 1 more;
- October 31, 2021 - 1 more;
- November 30, 2021 – 1 more;
- December 31, 2021 – 1 more; and
- January 31, 2022 – the last one.

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