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WAYNE CHRISTIAN, *COMMISSIONER*
JIM WRIGHT, *COMMISSIONER*



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GENERAL LAW SECTION

RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

MEMORANDUM


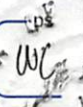

TO: Chairman Christi Craddick
Commissioner Wayne Christian
Commissioner Jim Wright

FROM: Betsy Peticolas, Attorney ^{DS}_{bp}

THROUGH: Alexander C. Schoch, General Counsel ^{DS}_{AS}

DATE: February 28, 2023

SUBJECT: Office of General Counsel's Recommendation to Refer the Environmental Protection Agency's Disapproval of Texas's Interstate Transport State Implementation Plan for the 2015 8-Hour Ozone National Ambient Air Quality Standard and Proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard

February 28, 2023		
Approved	Denied	Abstain
^{DS} 	^{DS} 	^{DS} 

The Office of General Counsel recommends the Commission approve the referral of the two above-referenced rules to the Office of the Attorney General to challenge their validity.

On October 1, 2015, the Environmental Protection Agency ("EPA") revised the National Ambient Air Quality Standards ("NAAQS") for ground-level ozone.¹ After EPA adopts or revises a NAAQS, the Federal Clean Air Act ("CAA") establishes statutory timeframes for states to adopt a State Implementation Plan ("SIP").² One of the applicable requirements for SIPs is known as the "good neighbor" or "interstate transport" provision, which generally prohibits emission sources within a state from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in downwind states.³

On February 13, 2023, EPA published final disapproval of the 2015 8-hour ozone NAAQS Transport SIPs for 19 states, including Texas, published at 88 Fed. Reg. 9,336 (Feb. 13, 2023). On the same day, a Petition for Review was filed in the United States Court of Appeals for the Fifth Circuit to challenge this action. The Petition for Review and accompanying federal register publication are attached to this memorandum as Attachment A.

Disapproving a SIP submission establishes a 2-year deadline for the EPA to promulgate a Federal Implementation Plan ("FIP"), which is an air quality plan developed by EPA that federalizes air regulation in areas where it takes effect. On April 6, 2022, well before finalizing disapproval of Texas's Interstate Transport SIP, EPA proposed a Federal Implementation Plan ("FIP") Addressing Ozone Transport for the 2015 Ozone NAAQS (the "Transport FIP"), attached hereto as Attachment B and published at 87 Fed. Reg. 20036 (April 6, 2022). The Transport FIP proposes to establish nitrogen oxides (NO_x) emissions budgets for fossil fuel-fired electric generating units ("EGUs") in 25 states, including Texas, to participate in an

¹ See [80 Fed. Reg. 65292](#) (October 26, 2015) (National Ambient Air Quality Standards for Ozone).

² 42 U.S.C. § 7410(a)(1); CAA § 110(a)(1) (requiring states to adopt and submit a SIP within 3 years after the promulgation of a NAAQS).

³ CAA § 110(a)(2)(D)(i)(I).

allowance-based ozone season trading program beginning in 2023. In addition, the proposed FIP establishes NO_x emissions limitations for several other industrial stationary sources. Of particular interest to the Railroad Commission, EPA is proposing to establish emissions limits and other additional regulatory requirements that would apply to stationary engines used in the Pipeline Transportation of Natural Gas industry.

The Texas Commission on Environmental Quality (TCEQ) submitted comments on both the proposed disapproval of the Transport SIP and the proposed Transport FIP. TCEQ's comments cited numerous technical and legal errors. In addition, comments on the proposed FIP stated that EPA's proposed action is arbitrary and capricious, inconsistent with statutory authority, and will have negative impacts on the electric grid and the economy. The comments stated that EPA's analysis of Natural Gas Pipeline Transmission sources used surrogate data which underestimated the impact of the proposed FIP and the number of sources that would be affected. TCEQ's comments on the proposed disapproval and proposed FIP are attached to this memorandum as Attachments C and D, respectively.

Considering these rules' impact on the pipeline transportation of natural gas, the Office of General Counsel recommends referring this matter to the Office of the Attorney General to join the challenge to the rules' validity.

cc: Wei Wang, Executive Director
Danny Sorrells, Deputy Executive Director