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Activists Urge Texas Court to Force State Air Agency to Regulate Global Warming Emissions

AUSTIN – Saying that climate change must be considered when new coal plants and other facilities are approved, Public Citizen today sued the Texas Commission on Environmental Quality (TCEQ) in the Travis County District Court to require the commission to regulate global warming gases. This case seeks to extend to Texas law the precedent set by the U.S. Supreme Court in *Massachusetts v. EPA*, which held that carbon dioxide is a pollutant under the federal Clean Air Act and that the U.S. Environmental Protection Agency (EPA) must regulate it.

“Texas leads the nation in the emissions of global warming gases. If we were a nation, we would rank seventh in emissions among the countries on earth,” said Tom “Smitty” Smith, director of Public Citizen’s Texas office. “The time has come for the TCEQ to take its head out of the sand and begin the process to regulate CO₂ emissions from Texas sources. Because the agency will not do so on its own, we are seeking to have a Texas court order it to do so.”

In the past four years, 11 coal plants have applied for permits under the EPA’s New Source Review program, which requires companies to install modern pollution controls when building new plants or expanding existing facilities. If they were all to be built, they would add 77 million tons of CO₂ to Texas’ already overheated air. Six permits already have been granted for plants that will produce CO₂ emissions of 42 million tons per year. Another five are in the permitting stages, and they would add 35 million tons of CO₂ per year.

The issue of global warming has been raised by opponents in permit hearings in all but one of the six power plant cases, but the TCEQ has said it would not consider global warming emissions in the permitting process. Beginning this month, hearings will begin on permits for the remaining five plants.

Texas law gave the TCEQ the authority to regulate climate change emissions in 1991. In May 2009, the Texas Legislature passed a series of laws that would give incentives for new power plants that capture carbon dioxide, allow the TCEQ to regulate the disposal of CO₂ emissions, set up a voluntary emissions reduction registry and develop a “no-regrets” strategy for emissions reductions to recommend policies that will reduce global warming gases at no cost to the state and its industries.

Smith noted that the TCEQ is undermining even the inadequate mitigation strategies that several coal plant builders are proposing. The NU Coastal plant promised to offset 100 percent of its CO₂ emissions, but the TCEQ refused to make that promise part of the permit. Tenaska is promising to

separate 85 percent of the carbon it emits, but it is not in the draft permit from the TCEQ. The Hunton coal gasification plant will separate 90 percent of its CO₂, but the TCEQ classified it as an “experimental technology” so it wouldn’t set a precedent for other coal plant applications. NRG is promising to offset 50 percent of its emissions.

“Without the TCEQ putting these limits in the permits, there will be no guarantee that the power plant builders will keep their promises,” Smith said.

“The TCEQ steadfastly refuses to allow any discussion or consideration of CO₂ or climate change issues during permit proceedings,” said attorney Charles Irvine of Blackburn & Carter, who is representing Public Citizen in the case. “The State Office of Administrative Hearings administrative law judges have deferred to TCEQ’s position that CO₂ is not a regulated pollutant and therefore not relevant during contested case hearings. As a result, all evidence and testimony submitted on these issues has been repeatedly stricken in multiple coal plant cases. We now ask the court for a declaratory judgment to force the agency to follow the broad mandates of the Texas Clean Air Act and recent Supreme Court decisions.”

In 2007, the U.S. Supreme Court in *Massachusetts v. EPA* recognized that CO₂ is an air pollutant within the definition in the federal Clean Air Act. Public Citizen contends that the Texas Clean Air Act’s definition of “air contaminant” similarly must include CO₂. Specifically, the state law says that:

“ ‘Air contaminant’ means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.” [Texas Health and Safety Code § 382.003(2)]

“So any gas created by non-natural processes – including CO₂ generated by a power plant – under the plain language of the definition is an air contaminant,” Irvine said.

The lawsuit is available at <http://www.citizen.org/texas/>.

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Public Citizen is a national, nonprofit consumer advocacy organization based in Washington, D.C., with an office in Austin, Texas. For more information, please visit www.citizen.org.