

CAUSE NO. _____

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|---------------------------------|---|--------------------------|
| PUBLIC CITIZEN, INC., | § | IN THE DISTRICT COURT OF |
| | § | |
| <i>Plaintiff</i> | § | |
| | § | |
| v. | § | |
| | § | |
| THE TEXAS COMMISSION ON | § | |
| ENVIRONMENTAL QUALITY AND, | § | |
| EACH IN HIS OFFICIAL CAPACITY, | § | TRAVIS COUNTY, TEXAS |
| BRYAN W. SHAW AS TCEQ | § | |
| CHAIRMAN, H. S. BUDDY GARCIA AS | § | |
| TCEQ COMMISSIONER, CARLOS | § | |
| RUBENSTEIN AS TCEQ | § | |
| COMMISSIONER, AND MARK R. | § | |
| VICKERY AS TCEQ EXECUTIVE | § | |
| DIRECTOR, | § | |
| | § | _____ JUDICIAL DISTRICT |
| <i>Defendants</i> | § | |

**PLAINTIFF’S ORIGINAL PETITION
AND REQUEST FOR DISCLOSURE**

COMES NOW, Public Citizen, Inc., filing this Original Petition, and would show the Court as follows:

I. DISCOVERY

1. Pursuant to Rule 190.3 of the Texas Rules of Civil Procedure, this litigation falls within the Level 2 Discovery Control Plan.

II. INTRODUCTION

2. This case challenges rules adopted and applied by the Texas Commission on Environmental Quality (“TCEQ”) in violation of TCEQ’s duty to regulate carbon dioxide (“CO₂”) under the Texas Clean Air Act (the “Act”). Existing rules unlawfully, but effectively, eliminate all opportunity for persons facing significant harm to present the facts of CO₂, global warming, and climate change in permit proceedings for fossil fuel power plants, and even block

the collection of information about CO₂ emissions in Texas – which already are immense, increasing, and dangerous.

3. TCEQ's application of the challenged rules already has harmed members of Public Citizen who have sought to raise issues concerning CO₂ emissions as part of their opposition to permits for power plants fuelled by coal and petroleum coke ("petcoke") in Texas. Seeking to control CO₂ emissions is a key component of Public Citizen's purpose to promote cleaner energy and cleaner air, and so Public Citizen now seeks judicial declarations to stop the unlawful application of TCEQ's invalid rules.

4. Scientists, governments and regulatory agencies in other states, at the federal level, and internationally recognize that CO₂ emissions contribute to global warming, thereby causing significant impacts from climate change. Indeed, for many years, the likelihood of such harms has been ever increasingly documented, to the point that CO₂ now is recognized to be a very harmful air contaminant and pollutant.

5. Under the plain language of the Texas Clean Air Act, CO₂ is both an air contaminant and an air pollutant. The Act requires TCEQ to regulate CO₂, and to allow adversely affected persons to challenge such emissions from proposed power plants.

6. Contrary to the Act, all rules that TCEQ has issued allow unlimited CO₂ emissions, some rules expressly exclude CO₂ from regulation, and TCEQ asserts other rules prevent Public Citizen's members (among others) from even offering testimony and other evidence at hearings and proceedings on power plant licensing. Under this unlawful scheme, TCEQ refuses even to allow consideration of the dangers of global warming and climate change, and continues to issue air permits for coal and petcoke-fuelled power plants in Texas that are the source of enormous quantities of CO₂.

7. TCEQ's actions contribute to making Texas the nation's largest CO₂ emitter, accounting for 677 million tons of this pollution in 2007. Based on current applications for which draft permits have been issued, in the next twelve months TCEQ appears poised to permit at least five new power plants that could increase CO₂ emissions by approximately 37 million tons annually.

8. Public Citizen recognizes that reasonable people can and do differ on what would be proper regulation concerning CO₂, and that the Texas Legislature gave TCEQ responsibilities initially to propose regulations and evaluate comments thereon. However, given the immense evidence of harm caused by CO₂ emissions, and the resulting global warming and climate change, TCEQ's regulatory policy, that "anything goes" for CO₂, cannot be lawful.

III. PARTIES

9. Plaintiff Public Citizen, Inc. ("Public Citizen"), a non-profit organization with members who reside throughout Texas (and elsewhere), seeks to promote clean and sustainable energy, clean air, and alternatives to fossil fuel plants such as those powered by coal and/or petcoke. Public Citizen's goals encompasses opposition to global warming, quite likely the most serious and threatening problem of the 21st Century, as part of its broader mission of promoting environmental protection to secure health, safety, and welfare of its members and others.

10. Defendant, the Texas Commission on Environmental Quality, is a Texas state agency domiciled in and having its principal place of business in Austin, Travis County, Texas. TCEQ is the State agency responsible for implementation and administration of the laws of Texas regarding air quality. Defendant TCEQ may be served by serving Mark R. Vickery, Office of the Executive Director, Building F, TCEQ, 12100 Park 35 Circle, Austin, TX 78753.

11. Defendant, Bryan W. Shaw, sued in his official capacity as TCEQ Chairman, may be served at the Office of the Commissioners, Building E, TCEQ, 12100 Park 35 Circle, Austin, TX 78753.

12. Defendant, H.S. Buddy Garcia, sued in his official capacity as TCEQ Commissioner, may be served at the Office of the Commissioners, Building E, TCEQ, 12100 Park 35 Circle, Austin, TX 78753.

13. Defendant, Carlos Rubenstein sued in his official capacity as TCEQ Commissioner, may be served at the Office of the Commissioners, Building E, TCEQ, 12100 Park 35 Circle, Austin, TX 78753.

14. Defendant, Mark R. Vickery sued in his official capacity as TCEQ Executive Director, may be served at the Office of the Executive Director, Building F, TCEQ, 12100 Park 35 Circle, Austin, TX 78753.

15. The individual defendants, sued in their official capacity, have responsibility to assure that TCEQ acts in accordance with law.

IV. JURISDICTION AND VENUE

16. Plaintiff brings this case under TEX. GOV'T CODE § 2001.038. This action pertains directly to the validity and applicability of TCEQ rules (including interpretive rules) concerning the Texas Clean Air Act, that TCEQ unlawfully adopted and seeks to enforce, and which deny Plaintiff's rights and privileges (including rights and privileges of its members). Jurisdiction and venue for this suit lies in Travis County. TEX. GOV'T CODE § 2001.038(b). A party need not exhaust administrative remedies before requesting a declaratory judgment under TEX. GOV'T CODE § 2001.038.

V. SCIENTIFIC BACKGROUND

17. Texas is the largest generator of greenhouse gases in the United States. If Texas were a nation, it would rank seventh in the world in CO₂ emissions.

18. Worldwide concentrations of CO₂ particularly, and greenhouse gases generally, are at unprecedented levels compared to the recent and distant past. Already, the current atmospheric concentration of CO₂ is higher than at any time in the last 650,000 years. Average global CO₂ concentrations are rising at an average rate of between 1-2 parts per million every year. These high – and rapidly increasing – concentrations are the unambiguous result of human activities and are very likely the cause of the observed increase in average temperatures and other climatic changes. *See generally*, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (April 24, 2009); IPCC Working Group I, Intergovernmental Panel On Climate Change, Climate Change 2007: The Physical Science Basis, Summary For Policymakers (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

19. The effects of global warming and climate change observed and projected to occur include, but are not limited to: significant changes in annual and seasonal temperatures; significant sea level rise; more frequent and intense heat waves, wildfires, hurricanes, typhoons, other storms, and flooding; as well as dangerous degradation of air quality – with additional long term consequences such as saltwater invading fresh water sources, increased drought, and other harm to water resources, as well as harm to agriculture, and harm to wildlife and ecosystems. *Id.*

20. The combustion of fossil fuels, especially coal and petcoke, greatly contributes to such global warming and climate change. In particular, burning such fuels adds large quantities of CO₂ to the atmosphere.

21. Over its lifetime, each coal or petcoke-fuelled power plant built in Texas can contribute several hundreds of millions of tons of CO₂ to the atmosphere, thus significantly contributing to global warming, climate change, and the endangerment of public health and welfare, as well as environmental degradation. The well-documented, immense harms caused by such CO₂ emissions include particular harms to Texans (including Public Citizen members) who reside and/or own property in vulnerable areas such as coastal regions.

VI. LEGAL FRAMEWORK

22. The Texas Clean Air Act requires that TCEQ regulate “air contaminants”, which include CO₂, and which must be considered when evaluating applications to permit coal and petcoke-fuelled power plants. However, Defendants unlawfully yet persistently have ignored the statutory duties, excluded CO₂ from regulation with no explanation, and asserted that the State Office of Administrative Hearings (“SOAH”) cannot even consider these harmful emissions when considering whether and on what terms to license coal and petcoke-fuelled power plants.

TCEQ Must Regulate CO₂ and Must Consider CO₂ in Permitting Coal and Petcoke Plants

23. TCEQ must regulate CO₂ under the Texas Clean Air Act. In that Act, in the Section titled “General Powers and Duties,” the Legislature expressly provided that “[t]he commission shall: (1) administer this chapter; (2) establish the level of quality to be maintained in the state's air; and (3) control the quality of the state's air.” TEX. HEALTH & SAFETY CODE § 382.011(a) (emphasis added). Moreover, “[t]he commission shall seek to accomplish the purposes of this chapter through the control of air contaminants by all practical and economically feasible methods.” *Id.* § 382.011(b) (emphasis added).

24. In the section of the Act titled “Policy and Purpose,” the Legislature clearly set forth the central purpose that TCEQ must “accomplish”: the agency’s mandate is to “safeguard

the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property," TEX. HEALTH & SAFETY CODE § 382.002(a) (emphasis added). The Legislature "intended that this chapter be vigorously enforced" *Id.* § 382.002(b)

25. "Air contaminants" is a defined phrase in the Texas Clean Air Act: "'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." TEX. HEALTH & SAFETY CODE § 382.003(2) (emphasis added).

26. This means that, by plain statutory language, CO₂ is an "air contaminant" when generated by a power plant, because it is a "gas" created by non-natural processes.

27. The Texas Legislature further specifically defined "air pollution" under the Texas Clean Air Act: "'Air pollution' means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property." TEX. HEALTH & SAFETY CODE § 382.003(3).

28. Thus an air contaminant becomes air pollution if its presence and duration, on its own or in combination with other contaminants, "are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property."

29. For many years, well-established scientific evidence has confirmed that CO₂ produced by power plants, alone and in combination with other greenhouse gases, "may" injure and adversely affect human health and welfare, as well as animals, vegetation, and property.

Indeed, it is now abundantly clear that such *CO₂ emissions “are” injurious to people, animals, vegetation, and property.*

30. Thus CO₂ is an air contaminant, and emissions of CO₂ constitute air pollution, which the purpose of the Texas Clean Air Act is to control or abate. TCEQ has the mandate to accomplish this purpose and, while the Act gives some flexibility, TCEQ must evaluate options and adopt an appropriate regulation of CO₂.

31. Moreover, before work begins on “a new facility or a modification of an existing facility that may emit air contaminants,” the Texas Clean Air Act requires TCEQ to find both “(1) the proposed facility ... will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and (2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public’s health and physical property”. TEX. HEALTH & SAFETY CODE § 382.0518(b). Because the terms of the Act provide that CO₂ is an air contaminant, TCEQ’s regulation must enable determination of what is the best available control technology for CO₂, and enable determination of what level of CO₂ emissions would contravene the intent of the Texas Clean Air Act in a TCEQ permit proceeding for facilities that emit CO₂, such as coal and petcoke-fuelled power plants.

TCEQ’s Unlawful Rules Allow Unlimited CO₂ Emissions

32. Over two decades, TCEQ has issued and amended many rules under the Texas Clear Air Act. In diverse contexts, these regulations recognize numerous substances as air contaminants and pollutants, for which TCEQ has established various standards and procedures. None of these rules ever has included a procedure or standard regulating CO₂. TCEQ thus violates Texas law by repeated decisions to issue rules that allow unlimited CO₂ emissions.

33. Moreover, in at least four adopted regulations, TCEQ explicitly recognized that CO₂ is an “air contaminant” under the Texas Clean Air Act, and then purported to exempt CO₂ from regulations that generally applied to other air contaminants.

34. For example, on July 29, 1997, TCEQ adopted amendments to Rule No. 101.1, to provide, in relevant part, as follows:

Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

22 Tex. Reg. 7040, 7055 (eff. 8/5/97) (emphasis added). This provision of Rule 101.1 was subsequently amended to number each definition, such that the definition of unauthorized emissions is now at 30 TEX. ADMIN. CODE § 101.1(107).

35. Three additional TCEQ rules also currently contain the similar language which otherwise applies to “air contaminants” but specifically purports to exclude CO₂ from regulation. 30 TEX. ADMIN. CODE §§ 39.402(a)(2)(B) & (a)(3)(D) (relating to public notice for air quality permit amendments); 106.4(a) (relating to permitting by rule requirements); and 116.610(a)(1) (relating to applicability of standard permits).

36. These four challenged rules exemplify how TCEQ, impermissibly, purports to exempt CO₂ from all requirements of the Texas Clean Air Act, including requirements otherwise applicable to “air contaminants.”

TCEQ’s Unlawful Interpretive Rules Bar Consideration of CO₂ in Air Permit Proceedings

37. TCEQ’s unlawful refusal to regulate includes unlawful interpretive rules purporting to bar consideration of CO₂ impacts when evaluating whether or how to permit fossil fuel power plants.

38. In previous TCEQ air permit contested case hearings, the Executive Director has filed documents with the SOAH Judges arguing that all evidence and testimony relating to CO₂, global warming, and climate change should be barred and stricken completely from the administrative record. For this, TCEQ relies on its unlawful interpretive rules.

39. In each of the following proceedings, affected persons opposing the plant permits argued that Texas law entitled them to offer evidence concerning CO₂, but the SOAH Judge relied on TCEQ's unlawful interpretive rules and precluded testimony and all other evidence concerning CO₂, global warming, and climate change: Application of Oak Grove Management Company, LLC, TCEQ Docket No. 2006-0195-AIR; Application of NRG Texas Power LLC, TCEQ Docket Nos. 2007-1820-AIR AND 2008-1210-AIR; Application of IPA Coletto Creek LLC (TCEQ Docket N0. 2009-0032-AIR).

40. The TCEQ official filings in these air permit proceedings confirm TCEQ's unlawful rules allow CO₂ to be emitted without any limit under Texas law. Interpretive rules, approved by the TCEQ Commissioners and/or by its Executive Director, extend the effect of TCEQ's violations so that neither TCEQ **nor anyone else** may seek limits on power plants due to the impacts of global warming and climate change. Thus Plaintiff and its members are denied rights and privileges to present testimony and other evidence concerning proposed power plants.

VII. HARMS

41. To protect the interests of its members, Public Citizen intends to seek party status in TCEQ administrative proceedings and contested case hearings opposing the issuance of air permits for pending and future coal and/or petcoke-fuelled power plants. In those proceedings and hearings, Public Citizen intends to present testimony and other evidence of the adverse impact on its members and their property, including both harms to members that reflect

conventional air pollution caused by power plants and those additional harms to members caused by global warming and climate change.

42. If Defendants are allowed to continue their unlawful practices, the health, homes and livelihoods of Public Citizen members will be adversely affected because Public Citizen will be denied the opportunity to present evidence regarding air emissions of CO₂ and their impacts. Exclusion of such evidence, which powerfully supports denial or restriction of licenses for fossil fuel plants, harms those Public Citizen members who are exposed to air pollution that – but for the unlawful practices – would not have been permitted, and – because CO₂ contributes to global warming – harms those Public Citizen members who suffer adverse effects from climate change.

43. Members of Public Citizen have participated as interested parties in TCEQ administrative proceedings and contested case hearings to oppose the issuance of air permits for coal and petcoke-fuelled power plants. Public Citizen members have had standing because they suffer personal harms to breathing and other adverse effects of polluted air caused by coal and petcoke-fuelled power plants. In addition, Public Citizen members suffer personal harms caused by climate change, which is accelerated by coal and petcoke-fuelled power plants that emit significant amounts of CO₂. As one of the bases to oppose such air permits, Public Citizen members desire and (as individuals) have attempted to present testimony and other evidence of CO₂ causing climate change in previous contested case hearings, only to have all that evidence stricken because of Defendants' unlawful rules.

44. The following examples show how additional members of Public Citizen will be harmed by future climate change impacts in a way that is different from the public at large.

45. One member of Public Citizen is a coastal landowner near Bay City, Matagorda County. Scientific evidence links increased CO₂ emissions to rising sea level, and that will cause

saltwater to intrude further up the Colorado River, and adversely impact his ability to divert river water to irrigate his pecan crops.

46. One member of Public Citizen is a property owner on Galveston Island whose property flooded during Hurricane Ike. Scientific evidence links increased CO₂ emissions and thus warmer temperatures to more frequent and stronger Gulf hurricanes, so he faces an increased risk of harm in the future.

47. One member of Public Citizen is a rancher who has worked the same land for fifty years. He has observed that spring comes earlier and fall comes later and the ponds which used to freeze no longer do, changes that science links to CO₂ emissions, and which science also links to changes in the dispersion of animals and plants. He personally has observed that several desirable species have disappeared from his ranches.

48. The challenged TCEQ rules also interfere with and/or impair the legal rights and privileges of Public Citizen (including its members) to obtain information about CO₂ emissions because they are not required to be reported and to receive public notice about CO₂ emissions from regulated sources.

VIII. CAUSES OF ACTION

49. This case is ripe for adjudication because the TCEQ has promulgated final rules and applies well-settled agency interpretative rules that deny Plaintiff's rights and privileges. Public Citizen challenges TCEQ rules (including interpretive rules) both as to their validity and as to the applicability, pursuant to TEX. GOV'T CODE § 2001.038.

50. Defendants' rules (including interpretive rules) are invalid because they allow unlimited CO₂ emissions in violation of the Texas Clean Air Act, which requires TCEQ to

control air contaminants and air pollution (including CO₂) by practicable and economically feasible means.

51. Defendants' rules (including interpretive rules) cannot be applied to preclude SOAH Judges from considering testimony and evidence of CO₂ causing global warming and climate change, because the Texas Clean Air Act gives adversely affected parties (including Public Citizen members) the right and privilege to be heard on these facts in opposing power plant applications for permits.

52. Notwithstanding the statutory mandates to regulate air contaminants and pollution including CO₂, and to review air contaminants and pollution during the permitting process, both of which must take into account the dangerous contribution of CO₂ emissions to global warming and climate change, TCEQ entirely fails to provide any reasoned justification for allowing CO₂ emissions without limit, and for excluding consideration of CO₂ in the permitting process,

53. In promulgating rules (including interpretive rules) allowing unlimited CO₂ emissions, and barring consideration of CO₂ emissions, TCEQ failed to comply with the statutory requirements, including requirements for promulgation and/or implementation of rules as established by the Texas Administrative Procedure and Practice Act. TEX. GOV'T CODE § 2001.001 *et seq.*

54. The requested declarations would resolve the existing controversy and protect Plaintiff's rights and privileges. All conditions precedent have been performed or have occurred.

IX. REQUEST FOR DISCLOSURE

55. Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose, within 50 days of the service of this request, the information described in Rule 194.2

X. PRAYER

Plaintiff requests that the Court enter judgment including the following:

- a. Declaring that TCEQ rules, including interpretive rules, are invalid insofar as they purport to allow unlimited emissions of CO₂ by coal and petcoke-fuelled power plants;
- b. Declaring that TCEQ rules, including interpretive rules, cannot be applied to preclude parties from presenting testimony and other evidence on CO₂, global warming, and climate change in contested case hearings before SOAH, and in administrative pleadings before TCEQ;
- c. Declaring that power plants cannot be permitted without making the findings for CO₂ emissions as required by TEX. HEALTH & SAFETY CODE § 382.0518(b); and
- d. Awarding such other and further relief to which Plaintiff shows itself justly entitled.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Defendants be cited and required to answer and appear herein, that a hearing be held and that on final hearing Plaintiff have the judgment of the Court granting the relief requested above.

Respectfully submitted,

BLACKBURN CARTER, P.C.

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