TEXAS PUBLIC POLICY FOUNDATION
Testimony

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*Center for Natural Resources*

# Invited Testimony to the Senate Natural Resources Hearing, Panel on Conflicting Federal and State Positions

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Thank you for the opportunity to testify on the current federal—state relationship legally controlling air quality issues in Texas. My comments will separately address ozone issues and potential carbon dioxide issues. For Texas, perhaps more than any other state, maintenance of the current process driven by EPA authority and state responsibility is an intolerably inefficient, unnecessarily costly, counterproductive path to improving air quality. EPA headquarters, many states, environmental advocates, local governments and the private sector increasingly question the current State Implementation Plan process through which states are compelled to attain Federal Ambient Air Quality Standards (NAAQS). In short, EPA has all authority; the state has all the responsibility but not requisite legal authority to fulfill its responsibility. The clearest example: 80 percent of key ozone producing emissions in the DFW region are now from mobile sources. Control of mobile source emissions is a pre-empted federal authority.

## Ozone: Too much Federal Authority and Too Little Federal Responsibility

**Continually changing ozone standards, protracted litigation, and court-dictated unrealistic deadlines confound the state's efforts on air quality.**

In good faith, Texas has spent vast sums of money, conducted nationally acclaimed air quality research, and imposed among the nation's most extensive and stringent controls on ozone precursors. Ozone levels in DFW and HGB are steadily improving at a more rapid pace than in other states. At the same time the Texas population and economy also is growing faster than in other states. Ever stricter ozone standards, however, continually extend the goal line.

During the last five years, EPA has imposed three different ozone standards: a One-hour, an 85 ppb Eight-hour and a recently lowered 75ppb Eight-hour. Within months after meeting the One-hour standard in DFW, EPA switched to the first 85 ppb Eight-hour standard. The same month TCEQ submitted the Eight-hour SIPs, EPA formally proposed and now has adopted, but not yet implemented, a much stricter 75 ppb standard. Once again, litigation will likely delay implementation.

EPA is now poised to approve the DFW SIP submitted by TCEQ last May 2007. The attainment date is less than two years away. All the elaborate modeling for the DFW and HGB Eight-hour SIPs demonstrates the dominance of now mobile—and not industrial point source—emissions. In the DFW area, mobile accounts for 80 percent. And even with the nation's massive industrial complex in the HGB region, mobile sources now produce 62 percent of NOx.

Although EPA mandates that the state attains the federal standard and supposedly allows the state to choose the control measures to achieve requisite emission reductions, states lack the legal authority to regulate mobile sources. Regulation of engines and fuels is the pre-empted authority of the federal government. A wise pre-emption, in my opinion, to facilitate interstate commerce through nationally fungible engines and fuels. Because key federal standards have effective dates too far in the future to help with federally imposed ozone attainment dates, Texas developed creative, although expensive, ways to get mobile source reductions. As of April 2008, TCEQ has issued Texas Emission Reduction Program (TERP) grants of more than $545 million for the replacement or retrofit of cleaner burning engines, vehicles and equipment. Between the New Technology Research and Development (NTRD) Fund and direct appropriations, the

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state has spent $30 million in air quality research since 2004.

TERP grants were to incentivize early purchase of cleaner engines not federally required for several years. As time goes on, the effective dates for these federal engine standards are arriving. The purchase of these cleaner engines is, or soon will be, not early but federally required. The cleaner engines will be the only ones available to purchase as the tiered federal standards now begin to take effect.

Texas had to receive an exemption from the federal government to mandate Texas Low-Emission Diesel (TXLED) in counties east of I-35. Federal Low Sulfur Diesel, now in effect, provides almost the same reductions of NOx as TXLED. Boutique fuels, like TXLED, in various states contribute to increased fuel prices and inadequate refining capacity.

TCEQ modeling showed that as a result natural fleet turnover and federal engine standards, DFW would attain the 85 ppb Eight-hour standard by 2012 without any additional controls. If EPA had, indeed, exercised its responsibility to regulate mobile sources in conjunction with its authority to mandate ozone attainment, Texas air quality would be better and hundreds of millions of Texans' TERP moneys would be saved.

EPA's recent adoption of a far stricter National Ambient Air Quality Standard (NAAQ) for ozone of 75 ppb intensifies these tensions between federal authority and state responsibility. Under a 75-ppb ozone NAAQ, five more urban areas in Texas would be non-attainment. TCEQ would be developing seven ozone SIPS. Calling the prodigious, scientifically high-powered effort and more than a thousand page SIP document a 'plan,' is highly misleading. Ozone SIP development takes years, hundreds of technical staff, the combined efforts of thousands at the state and local level and the expenditures of millions if not now billions of dollars.

Ozone is not the only pollutant for which TCEQ must develop individual SIPs. At the moment, TCEQ must develop some 35 SIPs for different areas in the state, different pollutants as well as regional haze, interstate transport, and natural occurrences. The administrative burden is staggering. The paper SIP world is an extremely inefficient method for improving air quality.

**The legal SIP process should be fundamentally restructured. Clean Air Performance Agreements between states and EPA, respecting state authority, offer a far more efficient process for effective improvement of air quality.**

Senior officials at EPA headquarters have begun to question the environmental efficiency and administrative viability of the current SIP process. These problems in the 'paper SIP world' were sharply underlined in a National Academy of Science report of several years ago. Experts in Texas have created a SIP Reform Group including environmental organizations and industry. Some advocate a single multi-pollutant SIP to coordinate in one super plan emission controls across the board. Some advocate eliminating the "model heavy" paper attainment demonstration SIP and substituting a far more state-driven Clean Air Performance Agreement between a state and EPA.

Texas should be the natural leader in such efforts to improve the federal-state process for assuring healthy air quality. As the second largest state, an economy the size of Canada's, home to the nation's petrochemical complex providing fuels and chemicals for the entire country, the most technically high-powered state environmental agency, exemplary programs and regulatory controls already in place, continual air quality improvement and comparatively superior financial resources: Texas has the track record to lead the way.

## Potential Regulation of Carbon Dioxide

**State-only regulatory programs would be counter-productive and have no temperature saving effect. Regulatory mandates to reduce CO2 are now premature. Cost-efficient energy efficiency programs and research and development of carbon capture technologies are the best path forward. Texas should lead the nation in realistic energy policy and creative environmental programs.**

The possibility of federal legislation and/or EPA decision to mandate reduction of anthropogenic CO2 raises unprecedented stakes in the federal-state air quality relationship. I do not believe ambitious federal CO2 regulation is as inevitably around the corner as commonly claimed. As the plans for regulating CO2 become more legally tangible, many federal policy makers begin to realize how exorbitantly costly and practicably impossible the project would be in the absence of commercially available control technology.

**Given the pending federal decisions, it would be counter-productive for the state to consider regulatory climate change legislation. Cap and trade schemes would not work in individual state programs. Carbon trading limited to a**

**single state would be too limited to support a well-functioning market.**

Carbon dioxide is now so popularly characterized as a pollutant it is critical to reconsider the extent to which CO2 is wholly unlike conventional pollutants regulated under the CAA by NAAQ setting, permitting and the SIP process. The CAA addresses chemical compounds like SOx and NOx emitted into the ambient air (lower atmosphere) known to adversely affect human health in certain concentrations and exposures. As predicted by the reigning climate change science of the Intergovernmental Panel on Climate Change of the United Nations (IPCC), anthropogenic CO2 from global sources as accumulated in the upper atmosphere may increase global mean temperatures over decades. Thus, the location of source of CO2 is irrelevant and there is no direct ambient exposure which harms health.

The IPCC contends that reductions on the magnitude of 60-85 percent less than global levels in 2000 are necessary "to avoid dangerous interference with the global climate." Yet, unlike SOx and NOx, control technologies capable of this level of reduction do not yet exist on a commercially available scale. By the year 2020, the IPCC also predicts that developed countries like the U.S. and Europe will emit only 25 percent of global CO2. The developing countries like China and India will emit 75 percent of the global volume. State reductions … even state elimination of all human-induced CO2 —would have absolutely no temperature saving effect. Using the metrics and model of the IPCC, a study conducted by Science and Public Policy Institute concluded that total elimination of all anthropogenic CO2 in Texas would reduce predicted global temperature by 0.012 percent in 2050.

## EPA Decision

Without the passage of any legislation, EPA could impose CO2 regulation under existing federal law. EPA's pending decision on whether CO2 is a CAA regulated pollutant flows from a recent U.S. Supreme Court. Contrary to prevalent claims, the Court did not rule that CO2 is a pollutant that EPA must regulate. The Court concluded that EPA must make a more justified finding one way or the other: whether CO2 is or is not a pollutant endangering human health. If EPA did declare CO2 is a pollutant under the CAA, every state in the country would be non-attainment for the indefinite future.

How could EPA set a National Ambient Standard for CO2 as it impacts global accumulation in the upper atmosphere? How could states develop CO2 attainment demonstration SIPs like those for ozone? Yet, federal enforceability and sanctions legally would still apply. If EPA declared that CO2 was a pollutant but chose not to set a NAAQ and require SIPs, under existing law a court likely could force EPA to take this path. To utilize the SIP process for regulating addressing CO2 would leave, as with ozone, all the responsibility on the states.

## Federal Legislation: Lieberman-Warner Cap and Trade Legislation

In early June, the U.S. Senate considered for final passage the *America's Climate Security Act* or the Lieberman-Warner bill (L-W). A cloture vote on the 450 page bill with its 250 page last minute amendment failed. After the vote, 10 Democrats issued a letter stating they could not vote in support of the bill. Bill supporters vow the bill will return after the November elections. Many eyes have been opened. **This cap and trade bill to mandate massive reduction of GHG, especially CO2, is the most ambitious, enforceable, exorbitantly costly climate change scheme in the world to date—far stricter, complex, and mandatory than the Kyoto Protocol or the Emission Trading System (ETS) of the European Union.**

*The Wall Street Journal* called L-W "the most extensive government re-organization of the economy since the 1930s." George Will called the bill "an unprecedentedly radical government grab for control of the American economy." Of course, estimates of predicted costs and job loss vary but all are staggering. Texas would be disproportionately impacted because Texas produces so much of the fuel, power and raw materials used by the entire country. EPA, never known to inflate economic impacts of regulation, predicts a reduction of GDP of almost 4 percent by 2030 and 7 percent by 2050. That amounts to $1-3 trillion loss in productivity.

The ramifications on federal and state relations from legislation like L-W are so multiple and complex, they are well beyond the scope of this testimony and hearing. However much I champion our state authority and can testify to the superior effectiveness of state-driven programs, a GHG reduction scheme as ambitious and enforceable as L-W is unquestionably a national effort. The growth in the federal estate created by this bill is massive and unwarranted. I refer to a chart made to depict the number of new federal regulations and procedures flowing from this bill. Given that 75 percent of CO2 emissions will soon derive from developing countries and not the U.S., I suggest there is a much better way to responsibly address the uncertain risk of harmful

global warming than fine-tuning the unprecedented federal juggernaut that is the Lieberman-Warner bill.

**Without commercially available carbon capture and storage (CCS) technology, large, near-term reductions of CO2 are impossible without energy rationing. Although renewable sources provide great hope for the future, displacement of the U.S. energy supply now based 85 percent on carbon rich fossil fuels would take decades.** In energy and climate change policies, Texas should be a national leader in the accelerated development of truly cost-efficient, market driven alternatives including CCS, clean coal technologies, safe nuclear generation and storage of nuclear waste. Texas programs on energy efficiency are an effective way of reducing CO2 and other emissions. The U.S., without CO2 regulatory programs, indeed has slightly reduced CO2 while the European Union with such regulatory programs has measurably increased CO2. Market driven efficiency works better than mandates. ★

## About the Author

**Kathleen Hartnett White** joined the Texas Public Policy Foundation as Director of the Center for Natural Resources in January 2008.

Prior to joining the Foundation, White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ). With regulatory jurisdiction over air quality, water quality, water rights & utilities, storage and disposal of waste, TCEQ's staff of 3000, annual budget of over $600 million and 16 regional offices make it the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.

Prior to Governor Rick Perry's appointment of White to the TCEQ in 2001, she served as then Governor George Bush appointee to the Texas Water Development Board where she sat until appointed to TCEQ. She also served on the Texas Economic Development Commission and the Environmental Flows Study Commission.

White is also co-owner of White Herefords and a partner with her husband in a 125 year-old ranching operation in Jeff Davis and Presidio counties. She also is Vice-Chairman of the Texas Water Foundation and sits on the board of the Texas Natural Resource Foundation. She recently received the 2007 Texas Water Conservation Association's President's award, the Colorado River Foundation's Friend of the River Award and the Texas Chemical Council's Leadership Award.

## About the Texas Public Policy Foundation

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