



May 13, 2011

The Honorable Wayne Smith
Texas House of Representatives
Chairman, House Environmental Regulation Committee

Dear Chairman Smith,

I write in the hope that you and your fellow House members will uphold HB 2694, as amended by the Environmental Regulation Committee and passed by the House, notwithstanding the April 29, 2011 letter to Chairman Glenn Hegar of the Sunset Advisory Commission from Lawrence Starfield, Deputy Regional Administrator of the U.S. Environmental Protection Agency for Region 6.

The concerns expressed by Mr. Starfield are of a piece with the EPA's increasing and unwarranted interference with the state's administrative and permitting functions under the Clean Air Act. As stated in this letter, EPA's threats of disapproval of state permitting programs and "direct federal intervention in specific [state] permitting actions" are without support in federal law and are, as unsolicited, an inappropriate interference in the legislative deliberations of the state of Texas.

Mr. Starfield's first objection concerns §5.316 of HB 2694, which provides that in a contested case hearing before the State Office of Administrative Hearings regarding a permit application, "the rules, guidance, and policies in effect at the time the technical review portion of the application process closes are the applicable rules, guidance, and policies for the contested case hearing." Mr. Starfield's objection is based on the assumption that the referenced clause could operate to exempt federal requirements or corresponding effective dates. Notably absent from his letter is any reference to applicable and federal law governing permit program approval that would support his objection.

As you are aware, federal law requires "only" a legislative-type hearing, and notice and comment process prior to state agency issuance of air permits subject to federal programs. As Mr. Starfield rightly acknowledges, Texas law goes well beyond that to allow the opportunity for a contested case adjudication by the State Office of Administrative Hearings in addition to the notice and comment process. Given that TCEQ could issue permits based on the rules in place at the conclusion of the notice and comment process (also the end of the "technical review") without a subsequent adjudicatory hearing, it should go without saying that fixing the applicable requirements to those in place at the end of technical review (the intent of proposed §5.316) more than satisfies applicable federal law.

The intention, or at least the outcome, of Mr. Starfield's objection is to create a process in which the law that governs a contested permit case is not fixed when it starts and, in principle, is never fixed. Such a procedure conflicts with basic tenets of the rule of law. Given that the contested hearing process for an air permit often lasts more than a year after completion of the technical review, a change in "rules, guidance and policies" during the proceedings is almost guaranteed. In order to comply with procedural requirements, the permit process, arguably, would have to start over. The laudable intention of §5.316 is to end these arguments over tail-chasing exercises, in which it becomes impossible to clearly identify and satisfy the applicable legal requirements for permit issuance.

EPA itself is struggling with a similar issue in the relatively few permit programs for which EPA is the ultimate decision maker. The EPA Administrator has adopted rules to create an Environmental Appeal Board to review the permitting decisions of the EPA regions, a process analogous to the contested case that follows technical review of a permit by the TCEQ Executive Director. This EAB has issued decisions remanding permits back to the EPA

regions, with instructions to apply rules created or amended after the regional decision on the permit. Then rules or guidance may change again after review on remand, yielding further remands, *ad infinitum*.

As a result of these do-loops, a federal court in the District of Columbia now considers a ruling that the EAB is unlawful because it precludes compliance with the federal Clean Air Act requirement that air permits be issued within a year of application. The experience of the Desert Rock project in New Mexico or the Avenal project in California reinforces the need for provisions in Texas law to establish an appropriate fixed point at which the rules of decision governing an air permit are fixed: Texas law, like the federal Act, requires timely action on air permits. How to accomplish this is precisely the sort of administrative prerogative that is left to a sovereign state permitting program.

Mr. Starfield also objects to HB 2694 because of its proposed new Section 382.056(n) of the Health and Safety Code, which would clarify that in a proceeding related to a contested permit, “the burden of proof is on the affected party to show that the permit should not be issued or renewed or that the a related permit condition should be imposed, modified, or omitted.” Mr. Starfield states that these provisions “should be reviewed by EPA to ensure that it does not interfere with federal requirements.” We encourage Mr. Starfield to undertake that review, whereupon he will learn that no federal law precludes such placement of burden. Indeed, the EAB process applicable—at least for now—to appeals of EPA regional office decisions on permits place the burden squarely on the appellant (opponent) to show error in the Region’s response to a previously raised objection.

The current TCEQ permit process can require up to a year of technical review by the State government experts charged to review permit applications, only to have the results of their work mean effectively nothing if the permit decision is referred for a contested case after technical review. At that point, the applicant is charged with proving up to the satisfaction of the State Office of Hearing Examiners, and ultimately the Commission, that it meets all requirements for permit issuance. Section 382.056(n) simply creates the presumption that the Executive Director’s decisions were correct. This is a needed improvement to a State program that runs afoul of no federal requirement, and is in fact perfectly consistent with the federal analogue.

EPA long had a cooperative relationship with Texas agencies and with the Texas Legislature. That relationship, however, no longer functions. EPA has assumed an adversarial, disrespectful, and intrusive posture towards Texas, arbitrarily cancelling highly successful State permitting programs that it had long approved and issuing an automatically effective Federal Implementation Plan, an action never before taken in the 40-year history of the Clean Air Act. These and many other actions have led our governor and multiple state agencies to challenge EPA’s actions as violations of the U.S. Constitution and federal law.

While this litigation is working its way through the federal courts, and while members of Congress from both parties move to protect the States from increasingly heavy-handed actions of federal agencies, I urge you and your fellow members of the conference committee to include amendments to HB 2694 passed by the House in order to protect the State’s authority in fundamental administrative procedures for permitting and contested case hearings.

The challenged provisions of HB 2694 are eminently a matter for Texans, in their Legislature assembled, to decide.

Thank you for your consideration of this issue.

Sincerely,



Kathleen Hartnett White
Distinguished Senior Fellow and Director of the
Armstrong Center for Energy and Environment
Texas Public Policy Foundation

cc: The Honorable Jessica Farrar, Vice Chair
Texas House

The Honorable Jose Aliseda
Texas House

The Honorable Lon Burnam
Texas House

The Honorable Warren Chisum
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The Honorable Kelly Hancock
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The Honorable Ken Legler
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The Honorable Lanham Lyne
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The Honorable Ron Reynolds
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The Honorable Glenn Hegar
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The Honorable Joan Huffman
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