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Texas vs. EPA Litigation Scorecard

A Survey of Currently Pending Litigation Between the Environmental Protection Agency and the State of Texas

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Key Points

- There are currently more than a dozen lawsuits ongoing between the Texas state government and the EPA.
- These lawsuits raise profound issues about federalism, due process of law, and the democratic accountability of EPA as a government agency.
- The outcome of Texas' four challenges to EPA's attempt to regulate greenhouse gases could determine the future course of the nation's economy.

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Introduction

Environmental regulation of air quality is supposed to be a cooperative enterprise between the federal and state governments. Under the Clean Air Act, the federal government is given the responsibility to set health-based air quality standards, while states retain primary authority to implement those standards.

In recent years, however, EPA has become increasingly aggressive in asserting federal control over state authority to implement environmental regulations, to the point of encroaching on traditional state prerogatives and even in defiance of federal law.[1] EPA also has exceeded its authority under federal law by promulgating many new rules with unachievable dictates. In response, the state of Texas has increasingly had recourse to the courts, challenging EPA's actions on a variety of grounds.While EPA requires states, on pain of sanctions, to achieve the air quality standards it has set forth, it has formally delegated to Texas (through the Texas Commission on Environmental Quality) the authority and obligation to implement major regulatory permit programs. The state is therefore uniquely suited both in terms of expertise and state-interest, to challenge EPA actions it considers unlawful.

In April, the Texas Public Policy Foundation published a policy perspective providing a brief overview of the major litigation pending between EPA and the state of Texas. Since that time, many of these cases have been decided by the courts (including big wins for Texas in the Cross-State Air Pollution Rule and Flex Permitting cases), and new challenges have been filed by the state. This policy perspective thus serves as an update of the state's ongoing litigation efforts.

For ease of reference, the cases have been broken into three categories: 1) challenges to EPA's disapproval of Texas programs, 2) challenges to EPA's proposed national air quality standards, and 3) challenges involving EPA's regulation of greenhouse gases.

Challenges to EPA Disapproval of Texas Programs

Flex Permit Program

State of Texas v. Environmental Protection Agency, No. 10-60614 (5th Cir. Filed July 26, 2010).

Background: The Texas Flexible Permitting Program is an innovative regulatory program that has achieved favorable environmental results faster and at less cost than traditional permitting programs. The distinguishing feature of the Texas FPP is the use of pollutant-specific emission caps in contrast to emission limits for individual pieces of equipment as required in traditional federal permitting The program is "flexible" in that it allows a plant to exceed the cap for a pollutant at one facility so long as it lowers emissions of that pollutant at another facility by a commensurate amount. The majority of large power plants and industrial sources in Texas have operated under Texas Flexible Permits, and Texas' use of the program has coincided with significant reductions in emissions. Coal and petroleum coke-fired power plants with flexible permits have decreased sulfur dioxide (SOx) by 25,803 tons per year, nitrous oxide (NOx) by 10,330 tons per year, and particulate matter by 795 tons per year. For refineries, flexible permits decreased SOx by 3.9, NOx by 15,844, and volatile organic compounds by 920 tons per year respectively.[2] Texas submitted the flex-permitting program to EPA for approval in 1994. Despite a statutory requirement that EPA

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act on such submissions within 18 months, EPA took no action. In September of 2009, however, it proposed rejecting the program, and this rejection became final in July of 2010.[3] EPA's disapproval contained no technical analysis, nor any examples of actual practical problems with the program. Instead, EPA based its decision on strained and hair splitting interpretations of Texas law.

Status: On August 13, 2012, the Fifth Circuit Court of Appeals overturned EPA's disapproval of the Flex Permitting Program, and remanded the case to EPA for further action. According to the court, EPA's objections to the Flex Permitting Program amounted to little more than a "preference for a different drafting style."

The Stakes: Since EPA's disapproval, most of the approximately 140 facilities using flex permits have since begun the process of getting re-permitted under a more inflexible permitting scheme. While many of them may now rethink that choice, EPA's actions have still proven to be a major disruption to a program which had been operating successfully for more than a decade. Nevertheless, the court decision is an important victory for federalism. Texas' Flex-Permit Program is a prime example of how states can serve as the "laboratories of democracy" by developing innovative, effective ways of solving environmental problems.

New Source Review Reform Rules

Luminant Generation Company, et al v. Environmental Protection Agency, No. 10-60891 (5th Cir. Filed Dec. 12, 2010).

Background: In 1993, Texas began its Standard Permits Program, which provides simplified standardized permitting for various pollutants. Texas soon expanded its standard permits for pollution control projects, promulgating a general pollution control project standard permit that was not limited to any particular pollutant. In 2003, EPA approved Texas's Standard Permits Program into the state's SIP, though it took no specific action regarding Texas' specific standard permits. In 2010, however, EPA disapproved of Texas' standard permit for pollution control projects.[4] EPA's disapproval was based not on any inconsistency with federal law, but rather because EPA claimed the standard permits were contrary to Texas' own Standard Permit Program rules. Ironically, the permits at issue in this litigation are for pollution control technologies such as scrubbers, not for the productive operation of a facility.

Status: On March 29, 2012, the Fifth Circuit Court of Appeals overturned EPA's disapproval of Texas' pollution control permits, and remanded the case to EPA with instructions to "expeditiously" grant approval or disapproval and to base its decision solely on federal as opposed to state law.

The Stakes: This case sets an important precedent as to the limits on the deference given to EPA by the federal courts. Typically courts will show deference to EPA's interpretations of federal law. In this case, however, EPA's actions are based on an interpretation of state law (an interpretation that the state of Texas does not share). Texas' challenge maintains that, when the issue is interpretation of state law, it is the state government, not EPA, whose interpretation must be given deference. The decision is also significant in light of the fact that several other Texas challenges involve the same basic issues (see discussion of PM 2.5 challenge and SB 7 challenge below). These challenges have been stayed pending resolution of the New Source Review case, and Texas' victory here will likely lead to a successful resolution of those cases as well.

Qualified Facilities Rule

Texas Oil and Gas Association, et al. v. Environmental Protection Agency, No. 10-60459 (5th Cir. Filed June 11, 2010).

Background: Based on new Texas law, in 1995 by TCEQ adopted the Qualified Facilities Rule allows plants to make physical and operational changes to their sites without having to go through the full re-permitting process unless the changes either increase emissions or result in the release of new contaminants. TCEQ submitted the Qualified Facilities Rule to EPA for approval in 1996. As with the Flex Permits Program, the EPA took no action within the statutorily prescribed one year period. In 2010, however, the EPA rejected the Qualified Facilities Rule, leading to the current lawsuit.

Status: On June 15, 2012, EPA's disapproval was upheld by a panel of the Fifth Circuit Court of Appeals. A petition for rehearing en banc is now pending.

The Stakes: As with the Flexible Permits Program, Texas' Qualified Facilities Rule is an example of how state innovation can improve environmental regulation. A victory for EPA could stifle this progress.

SB 7

Luminant Generation Co., et al. v. Environmental Protection Agency, No. 11-60158 (5th Cir. Filed March 14, 2011).

Background: In 1999, Texas passed SB 7, which created a deregulated electrical market in Texas. Among the many provisions of the bill, SB 7 tightened emissions restrictions on certain "grandfathered" electrical generating facilities, requiring them to comply with the provisions of Texas' Standard Permits Program. In 2009, EPA disapproved of the rules insofar as they relied on the Standard Permits Program, which it also rejected (see above).

Status: The case was stayed pending resolution of the New Source Review challenge, and is now proceeding. As of August of 2012, briefing in progress.

The Stakes: Given Texas' victory in the New Source Review case, it is unlikely that EPA's disapproval will survive review.

Challenges to National Standards

Cross-State Air Pollution Rule (CSAPR)

State of Texas, et al. v. Environmental Protection Agency, No. 11-1302 (D.C. Cir. Filed Sept. 20, 2011)

Background: The Clean Air Act's "good neighbor" provision requires EPA to prevent pollution from upwind states from impeding other states attainment of ambient air quality standards. EPA's Cross-State Air Pollution Rule (CSAPR, pronounced Casper)[5] was the latest attempt by EPA to implement the good neighbor provision. From the beginning, however, CSAPR was beset by numerous procedural and substantive flaws, particularly as it was applied to Texas. At the proposed stage of the rule, EPA did not find that emissions from Texas reached a threshold to trigger impacts on downwind states. At adoption, EPA decided Texas emissions affect just one monitor in Madison County, Illinois. This despite the fact that the monitor in question is in attainment of the relevant federal standard and is projected to continue to meet existing EPA standards in the future. EPA also took the unusual step of imposing its own federal implementation plan (FIP) for the rule, rather than provide states with the opportunity to develop their own state implementation plans (SIPs), as required by the Clean Air Act.

Status: The rule was initially scheduled to go into effect on January 1, 2012. A motion to stay granted on December 30, 2011, and on August 21, 2012 the rule was completely invalidated by the D.C. Circuit Court of Appeals.

The Stakes: The invalidation of CSAPR is significant in two respects. First, CSAPR would have meant the end of lignite coal as a power generation source, killing hundreds of jobs and threatening basic electrical reliability in Texas. In response to the proposed rule, Luminant, the largest generator in Texas, announced it would idle 1200 MW of generating capacity, closing three Texas lignite coal mines, and laying-off 500 employees.[6] And according to an analysis by the Electric Reliability Council of Texas (ERCOT), "had the EPA rules been in effect [during the record hot temperatures in the summer of 2011] Texans would have experienced rolling outages and the risk of massive load curtailment."[7] The ruling is also significant for the effect it may have on Texas' other challenges to EPA rules. For example, the court found that EPA had exceeded its authority by not giving states an adequate opportunity to develop their own SIPs in response to the rule. This is precisely the same situation in Texas' challenge to EPA's Greenhouse Gas FIP (see below). Given the binding nature of this precedent, it is hard to see how EPA can prevail in that case.

Mercury Air Toxics Standard (MATS)

State of Texas, et al. v. Environmental Protection Agency, No. 12-1366 (D.C. Cir. Filed April 13, 2012).

Background: Finalized on December 21, 2011, EPA's Mercury Air Toxics Standard restricts emissions from coal-fired power plants. Despite the name, MATS is not really about mercury. Only 0.004 percent of the claimed benefits from the rule come from mercury reductions. The rest are based on EPA's flawed assessment of the benefits from coincidental reductions in fine particulate matter.[8]

Status: Currently before the D.C. Circuit Court of Appeals.

The Stakes: EPA acknowledges that, at a cost of $11 billion, the rule is the most expensive in agency history. An independent analysis by the National Economic Research Association (NERA) found that the rule could increase average retail electric rates by 12-24 percent and lead to annual job losses of 180,000 between 2013 and 2020. And the National Electricity Reliability Council (NERC) have voiced concern that the rule, in conjunction with other EPA rules aimed at power plants, could lead to rolling black-outs in many states.

National Ambient Air-Quality Standards (NAAQS) for PM 2.5

State of Texas, et al. v. Environmental Protection Agency, No. 10-1415 (D.C. Cir. Filed Dec. 20, 2010).

Background: The Clean Air Act requires EPA to set National Ambient Air-Quality Standards (NAAQS) for six criteria pollutants, including fine particulate matter (PM 2.5). The law requires the NAAQS to be set at a level protective of public health with a margin of safety, based on the best scientific evidence available at the time. Every five years, EPA conducts a review of its NAAQS for each pollutant, and decides whether the existing standard needs to be changed. Texas is challenging the current standards, citing numerous procedural defects in the adoption process.

Status: The case was stayed by the D.C. Circuit Court of Appeals pending resolution of Texas' challenge to the New Source Review case (see above). As of August of 2012, briefing in the case remains incomplete.

Carbon dioxide emissions are an ubiquitous feature of our economy, and indeed of human life itself. Giving EPA authority to regulate greenhouse gases would give it effective control over the details of economic life.

The Stakes: EPA has increasingly relied on claimed health benefits from PM 2.5 as justification for its proposals.

National Ambient Air-Quality Standards (NAAQS) for SO2

National Environmental Development Association's Clean Air Project, et al. v. Environmental Protection Agency, et al., No. 10-1252 (D.C. Cir. Filed Aug. 23, 2010).

Background: The Clean Air Act requires EPA to set National Ambient Air-Quality Standards (NAAQS) for six criteria pollutants, including sulfur dioxide (SO_2). The law requires the NAAQS to be set at a level protective of public health with a margin of safety, based on the best scientific evidence available at the time. Every five years, EPA conducts a review of its NAAQS for each pollutant, and decides whether the existing standard needs to be changed. In 2006, EPA began a process of reviewing its NAAQS for SO_2, ultimately proposing at limit of 75 ppb over the course of an hour.[9] In developing this standard, however, EPA relied on computer modeling rather than actually monitored measurements, and did not subject these models to the ordinary notice and comment procedure required by the Clean Air Act.

Status: On July 20, 2012, EPA's standards were upheld by a panel of the D.C. Circuit Court of Appeals.

The Stakes: While computer models have a place in evaluating environmental regulations, the models have to be subject to the same rigorous scrutiny as other justifications for regulations. Otherwise, reliance on computer models can easily become a means of avoiding accountability.

Challenges to Greenhouse Gas Regulation

Endangerment Finding

Coalition for Responsible Regulation, et al, v. Environmental Protection Agency, No. 09-1322 (D.C. Cir. Filed Feb. 16, 2010).

Background: Several of the suits involve attempts by the EPA to regulate greenhouse gases. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), the United States Supreme Court held that the EPA had statutory authority to regulate greenhouse gases as a pollutant under the Clean Air Act if EPA made a legal finding that greenhouse gases endangered human health. In December of 2009, EPA issued an "Endangerment Finding" regarding greenhouse gases, which found that current and projected levels of GHGs threaten the health and human welfare of current and future generations.[10] Multiple private organizations and states, including Texas, have filed petitions for review of this finding.

Status: The Endangerment Finding was upheld by a panel of the D.C. Circuit Court of Appeals on June 27, 2012. A petition for a *writ of certiorari* to the United States Supreme Court was filed in September of 2012.

The Stakes: EPA's endangerment finding triggers an unprecedented expansion of federal regulatory power. Carbon dioxide emissions are an ubiquitous feature of our economy, and indeed of human life itself. Giving EPA authority to regulate greenhouse gases would give it effective control over the details of economic life.

Tailpipe and Timing Rules

Coalition for Responsible Regulation, et al, v. Environmental Protection Agency, Nos. 10-1073, 10-1092 (D.C. Cir. Filed July 7, 2010).

Background: Subsequent to its endangerment finding, EPA issued joint regulations with the National Highway Traffic Safety Administration regulating greenhouse gas emissions from new mobile sources (i.e. motor vehicles).[11] EPA then issued its Timing Rule, which effectively required it to regulate greenhouse gases from stationary sources as soon as the regulation governing mobile sources went into effect.[12] By structuring its rules in this way, EPA avoided having to consider the cost of the stationary source regulations either when considering whether to adopt the Tailpipe Rule or the Timing Rule. Texas' suit challenges this omission, and also indirectly challenges the basis for the endangerment finding itself.

Status: The Tailpipe and Timing Rules were upheld by a panel of the D.C. Circuit Court of Appeals on June 27, 2012. A petition for a *writ of certiorari* to the United States Supreme Court was filed in September of 2012.

The Stakes: The Tailpipe and Timing Rules represent the first of what would eventually be numerous EPA regulation of American economic life based on the threat of greenhouse gases. EPA's entire greenhouse gas regulatory plan hinges on the tailpipe and timing rule.

Tailoring Rule

Coalition for Responsible Regulation, et al, v. Environmental Protection Agency, No. 10-1073 (D.C. Cir. Filed June 1, 2010).

Background: The statutory text of the Clean Air Act mandates that EPA require stationary sources of air emissions to obtain permits if they emit more than 100-250 tons per year of any "air pollutant." At this level, any restaurant of hotel would likely be required to seek an emissions permit based on the amount of CO2 exhaled by their customers, as well as from ordinary heating and cooling. According to EPA calculations, applying this feature of the law would mean that the number of permits required under the Clean Air Act would increase from 15,000 to more than 6 million. Annual permitting costs would increase from $12 million to $1.5 billion, and the number of man-hours required to administer these programs would increase from 151,000 to 19,700,000.[13] To avoid what it called the "absurd" consequences of following the law, EPA adopted its "Tailoring Rule," wherein it restricted its regulations to large stationary sources like power plants and heavy industry annually emitting more than 100,000 tons of carbon dioxide equivalent.[14] This is not a matter of agency interpretation, but an explicit re-writing of the plain language of the statute.

Status: On June 27, 2012, a panel of the D.C. Circuit Court of Appeals dismissed the challenge to the Tailoring Rule on standing grounds. A petition for a *writ of certiorari* to the United States Supreme Court was filed in September of 2012.

The Stakes: EPA's attempt to avoid the "absurd" consequences of applying the Clean Air Act to greenhouse gases begs the question of why it is regulating greenhouse gases under the Clean Air Act in the first place. EPA's actions are a gross arrogation of legislative powers. By forcing EPA to follow the letter of the law, the true implications regulating CO_2 as a pollutant would become immediately apparent, prompting either an abandonment of the endangerment finding by EPA or a legislative fix from Congress. By contrast, allowing EPA to rewrite the Clean Air Act not only obscures the true import of EPA's regulations, but also gives even more discretion to the agency to selectively apply the law as it sees fit. Upholding the Tailoring Rule would legitimize EPA as a legislative body by granting it the authority to rewrite the law passed by Congress.

Greenhouse Gas SIP Call

Utility Air Regulatory Group, et al, v. Environmental Protection Agency, Nos. 11-1037 & 11-1063 (D.C. Cir. Filed Dec. 15, 2010).

Background: The first four cases described above involved EPA's decision to regulate greenhouse gases as pollutants under the Clean Air Act. The following three deal with EPA's attempts to force this regulation on the states (and specifically on Texas). Under the Clean Air Act, states are required to develop a State Implementation Plan (SIP), which provides control measures technical data, and agreements by the state to meet EPA's air quality standards. If a state's SIP does not meet EPA requirements, the agency can issue a "SIP Call," giving the state a short amount of time to make necessary changes or risk replacement of their SIP with a Federal Implementation Plan (FIP) - a means of direct federal control. The CAA also provides that states are given three years to update their SIPs based on new EPA standards. To avoid this requirement with regard to the Tailoring Rule, on December 13, 2010, EPA simply issued SIP calls for 13 states (including Texas) because they did not incorporate EPA's new standards for greenhouse gas regulation.[15] The EPA's SIP Call for Texas revoked the state's authority to issue Prevention of Significant Deterioration (PSD) permits beginning on January 2, 2011, a mere three weeks later.

Status: Texas' challenge to the SIP Call was originally filed with the Fifth Circuit Court of Appeals, *State of Texas v. Environmental Protection Agency*, No. 10-60961 (5th Cir. Filed Dec. 16, 2010), but was later transferred to the District of Columbia circuit. Briefing in the case is scheduled to be completed in June 2012.

The Stakes: For those not acquainted with typical EPA practice, it can be easy to overlook the breathtaking speed with which EPA has acted in these cases. Between issuing its Endangerment Finding in December 2009 and the SIP Call which scheduled for January 2011, EPA truncated a process that usually would last five or more years and compressed it into the course of a single year. Unsurprisingly, this rush to regulate involved cutting corners in terms of the procedural requirements for EPA rulemaking. The SIP Call suit invokes basic questions of due process and the rule of law. If EPA can ignore clear statutory requirements, then it is effectively a lawless agency.

Greenhouse Gas Interim and Final FIP

State of Texas v. Environmental Protection Agency, No. 10-1425; 11-1128 (D.C. Cir. Filed Dec. 30, 2010)

Background: On December 30, 2010, EPA issued a partial disapproval of Texas' SIP on the grounds that it did not incorporate greenhouse gases. EPA then immediately imposed its own immediately effective Interim FIP without undergo-

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ing the normal notice and comment procedures for EPA rulemaking. In addition, EPA began the rulemaking process for imposing a permanent FIP along the same lines.[16]

Status: Texas filed separate suits challenging both the Interim and Final FIPs. The cases have been consolidated by the D.C. Circuit Court of Appeals and are currently pending.

The Stakes: The Clean Air Act contemplated a division of powers between the state and federal government with respect to environmental protection of air quality. The CAA does grant EPA the ability to impose a federal plan in certain limited circumstances. In practice, however, EPA's ability to impose a FIP has remained largely hypothetical, and at most has served as an incentive for states to meet the requirements of their own plans, rather than as a pretext for a federal takeover. Never in its 40 year history has EPA imposed an Interim FIP, making revocation of state authority automatically and immediately effective.

Conclusion

Texas' battle with EPA overreach is ongoing. While the state has won significant victories, other challenges remain outstanding, and unless EPA changes course, additional litigation may be required. The results of these challenges will have major implications for the relationship between state and federal power, as well as for the course of environmental regulations in Texas and the nation as a whole. It is important that the Attorney General's office be given the necessary support to continue this important fight. While state tax dollars are scarce, the fiscal implications of simply acceding to EPA's dictates would be even more severe. The state should therefore continue to support these legal efforts, and, if necessary, include additional funding to the Attorney General's office to hire outside counsel to defend the state's rights in court. ✯

Endnotes

[1] For an in-depth examination of EPA's recent new and proposed regulations, *see* Kathleen Harnett White, Texas Public Policy Foundation, *EPA's Approaching Regulatory Avalanche* (Feb. 2012).
[2] Ibid.
[3] 75 Fed. Reg. 41312 (15 July 2010).
[4] 75 Fed. Reg. 56424 (15 Sept. 2010).
[5] 76 Fed. Reg. 48208 (8 Aug. 2011).
[6] Luminant, "Luminant Announces Facility Closures, Job Reductions in Response to EPA Rule," press release (12 Sept. 2011).
[7] Electric Reliability Council of Texas, "Impacts of the Cross-State Air Pollution Rule on the ERCOT System" (1 Sept. 2011).
[8] For details, *see* Kathleen Harnett White, Texas Public Policy Foundation, *EPA's Pretense of Science: Regulating Phantom Risks* (May 2012).
[9] 75 Fed. Reg. 35520 (22 June 2010).
[10] 74 Fed. Reg. 66496 (15 Dec. 2009).
[11] 75 Fed. Reg. 25324 (7 May 2010).
[12] 75 Fed. Reg. 17004, 17019 (2 Apr. 2010).
[13] 75 Fed. Reg. 31514, 31539–40. (3 June 2010).
[14] Ibid.
[15] 75 Fed. Reg. 77698 (13 Dec. 2010).
[16] 75 Fed. Reg. 82430, 82438 (30 Dec. 2010).

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