



August 2, 2010

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Dear Administrators Jackson and Armendariz:

In order to deter challenges to your plan for centralized control of industrial development through the issuance of permits for greenhouse gases, you have called upon each state to declare its allegiance to the Environmental Protection Agency's recently enacted greenhouse gas regulations—regulations that are plainly contrary to United States law. 75 Fed. Reg. 31,514, 31,525 & 31,582 (June 3, 2010) (hereinafter, the "Tailoring Rule"). To encourage acquiescence with your unsupported findings you threaten to usurp state enforcement authority and to federalize the permitting program of any state that fails to pledge their fealty to the Environmental Protection Agency (EPA).

On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.

You have declared that EPA's decision to enact automobile tailpipe emission limits for greenhouse gases pursuant to Title II of the federal Clean Air Act renders such gases immediately "subject to regulation" for all purposes under that Act, including the

Title I Prevention of Significant Deterioration (PSD) preconstruction permitting program and the Title V operating permit program. Simultaneously, however, you recognize that permitting greenhouse gases under the Act is “absurd.” In the Tailoring Rule, EPA states: “Here, we have determined, through analysis of burden and emissions data as well as consideration of extensive public comment, that the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 should be considered ‘absurd results.’” 75 Fed. Reg. at 31,517. We agree.

In order to avoid the absurd results of EPA’s own creation, you have developed a “tailoring rule” in which you have substituted your own judgment for Congress’s as to how deep and wide to spread the permitting burden. Notably absent from your rules is any evidence that they would achieve specific results; in fact, you assiduously (and correctly) avoid ascribing what environmental benefit may be achieved by mandating permits to emit a uniformly distributed, trace constituent of clean air, vital to all life, that is emitted by all productive activities on Earth.

Instead of acknowledging that congressionally set emission limits preclude the regulation of greenhouse gases, you instead re-write those statutorily-established limits stating, “For our authority to take this action, we rely in part on the ‘absurd results’ doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs. We also rely on the ‘administrative necessity’ doctrine, which applies because construing the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would render it impossible for permitting authorities to administer the PSD provisions.” 75 Fed. Reg. at 31,541-42.

Because of your view that greenhouse gases become “subject to regulation” on the first day it becomes illegal to manufacture a car not meeting the new tailpipe emission limits for greenhouse gases (on January 2, 2011), you insist that states may not issue permits after that date without considering greenhouse gas emissions. Your view is not enough. Applicable law provides to the contrary.

Texas’ stationary source permitting program encompasses all “federally regulated new source review pollutants,” including, “any pollutant that otherwise is subject to regulation under the [federal Clean Air Act].” 30 TEX. ADMIN. CODE § 116.12(14)(D). The rules of the Texas Commission on Environmental Quality (TCEQ), like the EPA’s rules, do not define the phrase “subject to regulation.” In its Tailoring Rule, however, the EPA promulgated—without notice—a definition of the previously undefined term, “subject to regulation.” This new definition (attached hereto) specifically relates to the regulation of greenhouse gases, spans several *Federal Register* columns, and is over 600 words in length. Specifically, in the EPA’s first phase of greenhouse gas regulation, this new definition raises the PSD permitting threshold for new and modified “major” sources of other pollutants from 100 tons per year to 75,000 tons per year (tpy) of CO<sub>2</sub> equivalent (CO<sub>2</sub>e) emissions.

In the Tailoring Rule you have asked TCEQ to report to you by August 2, 2010, whether it would “interpret” the undefined phrase “subject to regulation” in TCEQ Rule 116.12 consistent with the newly promulgated definition in EPA Rule 51.166, in all its specifics and particulars. That is, you have effectively requested that Texas agree to regulate greenhouse gases in the exact manner and method proscribed by the EPA.

In other words, you have asked Texas to agree that when it promulgated its air quality permitting program rules for pollutants “subject to regulation” in 1993, that Texas really meant to define the term “subject to regulation” as set forth in the dozens of paragraphs and subparagraphs of EPA Rule 51.166, first promulgated in 2010.

The State of Texas does not believe that EPA’s “suggested” approach comports with the rule of law. The United States and Texas Constitutions, United States and Texas statutes, and EPA and TCEQ rules all preclude TCEQ from declaring itself ready to require permits for greenhouse gas emissions from stationary sources as you request.

We start with constitutional difficulties. As noted, Texas’ stationary source permitting program encompasses all “federally regulated new source review pollutants,” including “any pollutant that otherwise is subject to regulation under the [federal Clean Air Act].” 30 TEX. ADMIN. CODE § 116.12(14)(D). This delegation of legislative authority to the EPA is limited solely to those pollutants regulated when Texas Rule 116.12 was adopted (1993) and last amended (2006). As the Texas Supreme Court has explained, “The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act.” *Trimmer v. Carlton*, 296 S.W. 1070 (1927). Thus, in order for Texas Rule 116.12 to pass constitutional muster, it must be limited to adopting by reference the definition of “subject to regulation” in existence when Rule 116.12 was last amended in 2006. In other words, Texas Rule 116.12 cannot delegate authority to the EPA to define “subject to regulation” in 2010 to include pollutants that were not “subject to regulation” in 2006.

For example, the Texas Solid Waste Disposal Act defines “hazardous waste” as “solid waste identified or listed as hazardous waste by the administrator of the Environmental Protection Agency under the federal Solid Waste Disposal Act.” When this delegation of legislative authority was challenged, it was upheld by Texas’ highest court, but only because the court found that “the reference to the federal act in section 361.003(15) adopts by reference the act and the regulations promulgated thereunder which were in effect on July 30, 1991, the date section 361.003(15) of the Texas Solid Waste Disposal Act was enacted . . .” *Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.—Austin 1998, pet. ref’d). As the *Elliott* court explained, “We acknowledge that section 361.003(15) may be read to say that the legislature has delegated to the EPA the power to define hazardous waste under the THSC [Texas Health & Safety Code] and that definition may change from time to time at the will of EPA without intervention or guidance from the legislature.” The court noted, however, that “[s]uch a construction would in fact place in doubt the constitutionality of this provision,” and therefore, the

court would “not construe, in this case, the adopting statute as attempting to adopt future laws, rules or regulations of the federal government.” The same analysis applies here: TCEQ Rule 116.12 cannot delegate authority to the EPA to define “subject to regulation” in 2010 to include pollutants that were not “subject to regulation” in 2006.

In addition to constitutional limitations, the TCEQ is also precluded from adopting the EPA’s newly promulgated definition of “subject to regulation” pursuant to the express terms of the Texas Government Code, which requires public notice of agency rulemaking. *See, e.g.*, TEX. GOV’T CODE § 2001.023 (“A state agency shall give at least 30 days’ notice of its intention to adopt a rule before it adopts the rule.”). Likewise, TCEQ rules mandate notice and an opportunity to be heard when substantive rules are enacted. *See, e.g.*, 30 TEX. ADMIN. CODE § 20.3. Like Texas law, federal law also requires notice and hearing before Texas can revise its State Implementation Plan (SIP). *See* Clean Air Act § 110(l); 42 U.S.C. § 7410(l) (“Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing.”). When the TCEQ promulgated Rule 116.12 in 1993, or even when it last amended the rule in 2006, it had no intention of enacting a permitting program for greenhouse gases. Consequently, TCEQ had no reason to (nor did it) give public notice of any such intent. Obviously, Texans concerned with greenhouse gas permitting could not have known to participate and comment on the decision to require permits for pollutants “subject to regulation” in 2006, when the EPA first discovered greenhouse gases were “subject to regulation” in 2010. It should go without saying that the nearly infinite expansion of Texas’ permitting programs to include greenhouse gases with no state-level rulemaking at all would not satisfy Texas or federal law requiring notice and an opportunity to be heard.

Perhaps more fundamentally, however, the EPA itself has not undertaken a proper rulemaking to require all SIPs to include the definition of “subject to regulation” it has just promulgated. This revision to EPA’s Part 51 rules—which lay out the requirements for approvable SIPs—were preceded by no proposal whatsoever. Rather, this new requirement first appeared in the EPA’s final notice announcing the “Tailoring Rule,” and accordingly, has not been properly adopted. *See* Clean Air Act § 307(d)(1)(J); 42 U.S.C. § 7607(d)(1)(J) (requiring formal rulemaking procedures in order to establish any requirement under the PSD program).

And even if EPA provided proper notice and the opportunity to comment, EPA cannot lawfully adopt any rule that directly and immediately changes Texas’ permit program in any respect—much less to expand the reach of the program so far as to be deemed “absurd.” Clean Air Act Section 166(a) sets forth the SIP revision process for “other pollutants” under the PSD program. The only sensible interpretation of the Clean Air Act is one that requires the EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for greenhouse gases before the EPA can require PSD permitting of greenhouse gases. Thereafter, pursuant to the express terms of the Clean Air Act, states are provided with 21 months after EPA undertakes a proper rulemaking to add that new pollutant to their SIP. Clean Air Act § 166(b), 42 U.S.C. § 7476(b) (“Within 21 months after such date of promulgation such plan revision shall be submitted to the

Administrator”). EPA, however, has not developed a NAAQS for greenhouse gases, has not undertaken a rulemaking to promulgate corresponding regulations, and has not allowed any time for a state response.

In addition to circumscribing the statutory 21-month review and implementation process afforded the states, EPA is also circumventing the statutory one-year review and revision process afforded Congress, which specifically states, “Regulations referred to in subsection [166](a) of this section shall become effective one year after the date of promulgation.” The purpose of this one-year delay is to allow Congress the opportunity to review (and approve or revise) new rules for “other pollutants” before states are required to implement them. 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007); *citing* H.R. Conf. 95-564, at 151 (1977), 1977 U.S.C.C.A.N. 1502, 1532. The path proposed by EPA painstakingly avoids such congressional oversight.

Even under normal SIP revision procedures (those not involving new pollutants), the EPA has failed to provide Texas a reasonable time to submit a plan revision. Clean Air Act Section 110 sets forth EPA’s authority to direct the requirements for approvable SIPs. Section 110(k)(5) allows states up to 18 months after proper adoption of new SIP expectations before requiring their implementation by the states. *See* 42 U.S.C. § 7410(k) (“The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.”).

Instead, EPA has demanded (in the absence of statutory authority) that Texas submit a schedule for the completion of statutory and rule revisions. But notwithstanding the above-referenced statutory requirements regarding SIP revisions, EPA has declared that it will “ensure” all sources of greenhouse gases will be permitted under the final Tailoring Rule on January 2, 2011, by moving “quickly to impose a Federal Implementation Plan (FIP) for PSD through 40 CFR 52.21.” 75 Fed. Reg. at 31,526. The federal Clean Air Act, however, clearly does not authorize such bureaucratic nimbleness. To the contrary, before EPA can implement a FIP, Section 110(c)(1) specifically requires the EPA to first make a finding that a state has failed to make a required submission, such as a revision under Section 110(k)(5), and even then, a FIP is not effective until after the state is afforded additional time to correct the deficiency identified by EPA. EPA has shown no intention of following the Clean Air Act procedures or allowing states a reasonable opportunity to change their rules.

Each of these objections to EPA’s demand for a loyalty oath from the State of Texas would suffice to justify our refusal to make one. Indeed, it is an affront to the congressionally-established judicial review process for EPA to force states to pledge allegiance to its rules (or forfeit their right to permit) on the final day by which states must exercise their statutory right to challenge those same rules. Texas will not facilitate EPA’s apparent attempt to thwart these established procedures and ignore the law. In the event a court concludes EPA’s actions comport with the law, Texas specifically reserves and does not waive any rights under the federal Clean Air Act or other law with respect to the issues raised herein.

We object to adopting the EPA's definition of "subject to regulation" without directly raising any of our substantive objections to each of the four EPA rulemakings that collectively comprise your greenhouse gas control initiative. Those objections will be resolved in litigation now pending in the D.C. Circuit Court of Appeals. Given that you are unable to ascribe the benefits of your greenhouse permitting regime, it is difficult to see why you would refuse to stay the effectiveness of your greenhouse gas rules. We therefore ask you to stay the effectiveness of your rules until our challenge is resolved.

Sincerely,



Bryan W. Shaw, Ph.D.  
Chairman  
Texas Commission on Environmental Quality



Greg Abbott  
Attorney General of Texas