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Texas vs. Environmental Protection Agency:
A Survey of 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.

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 of setting forth air quality standards, while states retain primary authority for implementing 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.

This policy perspective provides a brief overview of the major litigation currently pending between EPA and the state of Texas.

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 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 2009, EPA issued an "Endangerment Finding" regarding greenhouse gases (GHGs), which found that current and projected levels of GHGs threaten the health and human welfare of current and future generations.[2] Multiple private organizations and states, including Texas, have filed petitions for review of this finding, arguing that it had relied on a flawed scientific basis.

STATUS: Oral argument was heard before the D.C. Circuit Court of Appeals on February 28 and 29, 2012.

THE STAKES: EPA's endangerment finding triggers an unprecedented expansion of federal regulatory power. Carbon dioxide emissions are a 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.

Greenhouse Gas Regulation: 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 Ad-

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ministration regulating (GHG) emissions from new mobile sources (i.e. motor vehicles).[3] EPA then issued its Timing Rule, questionably concluding that regulating GHG from mobile sources triggers regulation of stationary sources.[4] 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: Oral argument was heard before the D.C. Circuit Court of Appeals on February 28 and 29, 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.

Greenhouse Gas Regulation: 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 facilities to obtain permits if they emit more than 100-250 tons per year of any "air pollutant." At this level, any restaurant or hotel would likely be required to seek an emissions permit based on the amount of CO_2 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.[5] 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.[6] This is not a matter of agency interpretation, but an explicit re-writing of the plain language in the statute.

STATUS: The Tailoring Rule challenge has now been consolidated with the Timing Rule challenge (see above). Oral argument was heard before the D.C. Circuit Court of Appeals on February 28 and 29, 2012.

> Upholding the Tailoring Rule would legitimize EPA as a legislative body by granting it the authority to rewrite the law passed by Congress.

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 Regulation: SIP Call Rule

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 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 automatically incorporate EPA's new standards for greenhouse gas regulation.[7] The EPA's SIP Call for Texas revoked the state's authority to issue Prevention of Significant Deterioration (PSD) permits for GHG, 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 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. Not surprisingly, 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 Regulation: 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 Interim FIP without undergoing 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.[8]

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 an 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 Final FIP, making revocation of state authority automatically and immediately effective.

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: EPA's Cross-State Air Pollution Rule (CSAPR, pronounced Casper),[9] regulates emissions from one state that drift downwind into other states, imperiling the latters' ability to meet EPA air quality standards. 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, 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.

STATUS: Motion to stay granted on December 30, 2011.

THE STAKES: CSAPR would effectively end the use of lignite coal as a power generation source, 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.[10] Both the Federal Energy Reliability Commission (FERC) and the National Electricity Reliability Council (NERC) have voiced concern that CSAPR, in conjunction with other EPA rules aimed at power plants, could lead to rolling blackouts in many states.[11][12] These concerns have been echoed by the Electric Reliability Council of Texas (ERCOT), which concluded that CSAPR could incur a reduction in generation capacity of up to 3000 MW in the spring, 1400 MW in the summer peak load months, and 5000 MW during fall. ERCOT further concluded that "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."[13]

National Ambient Air-Quality Standards (NAAQS) for SO_2

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 a limit of 75 ppb over the course of an hour.[14] In developing this standard, however, EPA relied on computer modeling rather than actual monitored measurements, and did not subject these models to the ordinary notice and comment procedure required by the Clean Air Act.

STATUS: Oral argument is scheduled for May 3, 2012.

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. Traditionally, EPA has always assessed current ambient levels of a pollutant by means of physical measurements by air quality monitors. In setting the SO_2 NAAQS, EPA for the first time is using models as more legally determinative than monitors.

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 (FPP) 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 permit holders to go beyond established emission caps at one facility "in order not to add additional controls at another facility, provided that the net sum of emissions is at least as stringent."[15] 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, nitrogen 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.[16] Texas submitted the flex-permitting program to EPA for approval in 1994. Despite a statutory requirement that EPA act on such submissions within 18 months, EPA took no action. In September 2009, however, it proposed rejecting the program, and this rejection became final in July 2010.[17]

> 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.

STATUS: Oral argument was heard before the Fifth Circuit Court of Appeals on October 4, 2011.

THE STAKES: Texas' Flexible Permitting Program is an example of how states can serve as the "laboratories of democracy" by developing innovative, effective ways of solving environmental problems. If EPA's actions are upheld, this will hamper the ability of the states to innovate in the future and will check economic growth.

Qualified Facilities Rule

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

BACKGROUND: Adopted in 1995 by the Texas Legislature, 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 Flexible Permitting Program, EPA took no action within the statutorily prescribed one year period. In 2010, however, EPA rejected the Qualified Facilities Rule, leading to the current lawsuit.

STATUS: On March 26, 2012, the Fifth Circuit vacated EPA's disapproval, concluding that EPA had improperly rejected the program based on state law, when it was restricted to considering whether the rule conformed to the Clean Air Act. The Court remanded the case to EPA, with instructions that it approve or disapprove the rule "most expeditiously."[18]

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

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 pollution control project standard permits not limited to any particular pollutant. In 2003, EPA approved Texas' 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.[19] 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 Permits 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: Oral argument was heard before the Fifth Court of Appeals on December 7, 2011.

THE STAKES: 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. In addition, the state of Texas has filed several other challenges to EPA regulations that implicate the New Source Review Reform Rules. *See State of Texas v. Environmental Protection Agency*, No. 10-1415 (D.C. Cir. Filed Dec. 20, 2010) (fine particulate matter); *Luminant Generation Company, et al v. Environmental Protection Agency*, No. 11-60158 (5th Cir. Filed Mar. 17, 2011) (utility deregulation rules). These cases have been stayed pending resolution of the New Source Review case, and a victory in that litigation will likely lead to a successful resolution of those cases as well.

Conclusion

Many of the above challenges will probably not be resolved for several years. And, if recent experience is any indication, it is likely new challenges will soon be added to their ranks. But however long they take, 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. ✯

Endnotes

[1] For an in-depth examination of EPA's recent new and proposed regulations, *see* Kathleen Hartnett White, "EPA's Approaching Regulatory Avalanche."

[2] 74 Fed. Reg. 66496 (15 Dec. 2009).

[3] 75 Fed. Reg. 25,324 (7 May 2010).

[4] 75 Fed. Reg. 17,004, 17,019 (2 Apr. 2010)

[5] 75 Fed. Reg. 31,514, 31,539–40 (3 June 2010).

[6] Ibid.

[7] 75 Fed. Reg. 77,698 (13 Dec. 2010).

[8] 75 Fed. Reg. 82,430, 82,438 (30 Dec. 2010).

[9] 76 Fed. Reg. 48208 (8 Aug. 2011).

[10] Luminant, "Luminant Announces Facility Closures, Job Reductions in Response to EPA Rule," press release (12 Sept. 2011).

[11] Chairman Jon Wellinghoff, Federal Energy Regulatory Commission to the Honorable Lisa Murkowsksi (1 Aug. 2011).

[12] Bernstein Research, "U.S. Utilities: Coal-Fired Generation is Squeezed in the Vice of EPA Regulation; Who Wins and Who Loses?" (Oct. 2010); M.J. Bradley & Associates, "Ensuring a Clean, Modern Electric Generating Fleet while Maintaining Electric System Reliability" (Aug. 2010); NERC "2010 Special Reliability Scenario Assessment."

[13] Electric Reliability Council of Texas, "Impacts of the Cross-State Air Pollution Rule on the ERCOT System" (1 Sept. 2011).

[14] 75 Fed. Reg. 35520 (22 June 2010).

[15] Comments attachment from Texas Commission on Environmental Quality on EPA proposed rulemaking, Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits, 74 Fed. Reg. 48,480 (23 Sept. 2009) Docket ID No. EPA-R06-OAR-2005-TX-0032.

[16] Ibid.

[17] 75 Fed. Reg. 41,312 (15 July 2010).

[18] *Luminant Generation Company, et al. v. Environmental Protection Agency*, ___ F.3d ___ No. 10-60891 (26 Mar. 2012).

[19] 75 Fed. Reg. 56,424 (15 Sept. 2010).

About the Author

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