NO. 03-12-00555-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Appellant,

v.

ANGELA BONSER-LAIN, KARIN ASCOT, as next friend on behalf of TVH and AVH, minor children, BRIGID SHEA, as next friend on behalf of EBU, a minor child,
Appellees.

BRIEF OF APPELLEES ANGELA BONSER-LAIN, et al.

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ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

The Appellant (TCEQ or Commission) argues that the district court did not have jurisdiction to hear the youth Petitioners' claims on the theory that there is no right to judicial review under section 5.351 of the Texas Water Code of an order denying an administrative petition for rulemaking. Brief of TCEQ at 8-15. The TCEQ also argues that the district court's statements that the Texas Public Trust Doctrine extends to greenhouse gases, and that the Federal Clean Air Act does not preempt Texas regulation of greenhouse gases are improper advisory opinions that should be vacated, or extraneous legal conclusions that are not part of the district court's judgment. *Id.* at 17-22.

Appellees now argue that the district court had jurisdiction. Section 5.351 of the Texas Water Code authorizes judicial review of rulings, orders, decisions, or other acts of the commission and thereby waives sovereign immunity. Except for the question of whether the status of other greenhouse gas (GHGs or greenhouse gases) litigation makes it prudent to postpone rulemaking, on which the district court deferred to TCEQ, the issues decided by the district court— the scope of the TCEQ's authority over greenhouse gas regulation under the common law and Texas' constitutional public trust doctrine, and in relation to the federal Clean Air Act—were purely judicial in nature and do not involve any technical expertise.

In the alternative, if this Court finds that Section 5.351 of the Water Code does not authorize judicial review of the denial of the petition for rulemaking, this Court must remand to the district court so Appellees can amend their pleading to seek declaratory judgment under the Uniform Declaratory Judgment Act. In no event should the district court's statements on the Public Trust Doctrine be vacated. They decide a real controversy over whether the TCEQ can regulate greenhouse gases, if and when it becomes prudent to do so. They do not require the TCEQ to adopt any particular rule. They simply clear the way for the TCEQ to commence rulemaking as soon as it becomes prudent to do so.

STATEMENT OF FACTS

Appellees petitioned the TCEQ for rulemaking under the TCEQ's legal authority to control air contaminants to protect against the adverse effects of climate change, including global warming. TEX. HEALTH & SAFETY CODE § 382.0205. AR 1, pg. 27. In addition, Appellees' Petition cited the TCEQ's legal and permanent duty to protect the environment, and specifically the atmosphere, under the common law Public Trust Doctrine. *Id*. at 27-29. The Petition requested the TCEQ adopt by January 1, 2012, a CO_2 reduction plan that would result in peak CO_2 emissions from fossil fuels in Texas in 2012 and beginning in January 2013, reduced fossil fuel CO_2 emission by at least 6% a year. AR 1, pg. 26. The Petition also requested the TCEQ take the following actions: (1) publish annual

progress reports on statewide greenhouse gas emissions, which include an accounting and inventory for each and every source of GHG emissions within the state, verification by an independent third party and are made publicly available on Defendant's website no later than December 31 of each year beginning in 2012; (2) track progress toward meeting the emission reductions, including current and future policies and rules, and report on the progress annually and (3) by December 31, 2011 and annually thereafter, report to the governor and appropriate House and Senate committees the total emissions of GHGs for the preceding year for each major source sector. *Id.* The annual reporting rules must allow development of a comprehensive inventory of GHG emissions for all sectors of the state economy. *Id.* Last, where conflicts between the proposed rule and any other rule in effect exist, the more stringent rule, favoring full disclosure of emissions and protection of the atmosphere, would govern. *Id.*

In harnessing the evidence that our planet is in the midst of a climate crisis, Appellees' Petition provided scientific support for the emission reductions proposed by the rule to redress harms being caused to the atmosphere, Texas' trust resources, and present and future generations of Texans. AR 1, pgs. 3-24.

On June 22, 2011 the TCEQ issued a final decision in Docket No. 2011-0720-RUL denying Appellees' Petition based on the following reasons. AR 4.

- Current "litigation with the U.S. Environmental Protection Agency(EPA) over the issue of regulation of GHG under the Federal Clean Air Act (FCAA);

- Lack of authority under the Texas Clean Air Act (TCAA) "to call in permits or revise permits at amendment or renewal for emissions not currently controlled";

- "[C]ontrol of emissions by one state, or varied control regimes across many states, will not necessarily impact the global distribution of these gases positively or negatively";

- CO2 standard proposed by Appellees was not "developed through the proper mechanism under federal statute";

- "Texas courts have clearly and regularly ruled that where common law duties, such as the public trust doctrine, have been displaced or revised by statutes enacted by legislatures, the statute controls"; and

- "[T]he public trust doctrine in Texas has been limited to waters of the state and does not extend to the regulation of GHGs in the atmosphere."

On July 21, 2011, the Appellees filed suit in Travis County district court under section 5.351 of the Texas Water Code, which affords judicial review of the TCEQ's rulings, orders, decisions, or other acts of the commission. TEX. WATER CODE § 5.351. CR 3-21 at p. 11, ¶ 35 (Plaintiffs' Original Petition). Appellees claimed fair consideration of their petition for rulemaking was spoiled when the TCEQ erred "by limiting the scope of the public trust doctrine," and "by deciding that the public trust doctrine is preempted by section 109 of the FCAA." *Id*. at pp. 11, 13. Appellees requested: the Court should reverse the errors , and remand the case, if appropriate, for further proceedings. *Id.* at p. 13.

The TCEQ filed a plea to the jurisdiction. CR 57-60 (TCEQ's First Plea to the Jurisdiction). The district court denied the plea to the jurisdiction, but affirmed the TCEQ's denial of the petition for rulemaking based on the uncertainty surrounding other cases involving GHG regulation at both the state and federal levels. CR 136-138. In making that determination, the district court addressed the requisite legal questions presented including the scope of the Public Trust Doctrine and the preemption issue.

Since the hearing on the merits in this case, the Circuit Court for the District of Columbia has upheld the federal GHG regulations that the TCEQ cited in rejecting the Appellees' Petition. *See Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 149 (D.C. Cir. 2012). The federal rules do not mandate a fixed reduction in GHGs by a date certain in keeping with the best available science. In addition, at the state level, the TCEQ is fighting dismissal of its appeal of a denial of a plea to jurisdiction in which Public Citizen sought the regulation of CO_2 under the TCAA, but now wishes to dismiss on mootness grounds because the EPA has started issuing GHG permits in Texas. *Tex. Comm'n on Envtl. Quality v. Public Citizen*, No. 03-10-00296-CV (Tex. App.-Austin 2013).

ARGUMENT AND AUTHORITIES

I. Section 5.351 of the Texas Water Code affords the Appellees a right to judicial review of their rejected petitions for rulemaking.

A. Section 5.351 of the Texas Water Code applies.

Appellees sued over the denial of their rulemaking petition under the Texas Water Code, section 5.351. CR 5 (Original Petition). Section 5.351 states: "A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission". On its face, section 5.351 applies and waives the TCEQ's immunity. The TCEQ is wrong that the Texas Administrative Procedure Act ("APA") controls review of a denial of a rulemaking petition because "an agency's enabling legislation determines the proper procedures for obtaining judicial review of an agency decision." *West v. Tex. Comm'n on Envtl. Quality*, 260 S.W.3d 256, 260 (Tex. App. 2008) (quoting *Tex. Natural Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 811 (Tex. 2002)). The APA can provide an independent right to judicial review when the agency's enabling act is silent. *Id.* at 261 (citing *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170 (Tex. 2004)). But it has no relevance when the enabling act—here, the Water Code—grants a right of review. *See id*.

The Texas APA provides for judicial review of contested cases, but the TCEQ denial of a rulemaking petition is not an APA "contested case" decision

because neither a "rule," as defined in the APA, nor an agency's denial of a rulemaking petition is part of the definition of a "contested case." *See* TEX. GOV'T CODE ANN. § 2001.003(1) and (6). "The plain language of the water code, however, does not limit the right to judicial review of Commission decisions only to contested cases." *West*, 260 S.W.3d at 261.

The Texas APA also provides in the Government Code, section 2001.038 for declaratory judgment concerning the validity or applicability of a Texas agency rule. But section 2001.038 does not explicitly address a denial of a petition for rulemaking, and the definition of "rule" includes the amendment or repeal of a rule but is silent on a denial of a rulemaking petition. *See* TEX. GOV'T CODE ANN. § 2001.003(6).

B. Section 5.351 of the Texas Water Code provides a waiver to sovereign immunity.

Section 5.351 provides a waiver to sovereign immunity and case law cited by the TCEQ does not indicate otherwise.

First, the TCEQ cites two cases holding that the Water Code section 5.351 and analogous language in the Health and Safety Code do not waive sovereign immunity from contract claims against state agencies. Brief of TCEQ at 11-13 (citing *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859 (Tex. 2002); *State v. Operating Contractors*, 985 S.W.2d 646, 656 n.14 (Tex. App.- Austin 1999, pet. denied)).

Both cases involved contract claims against the agency; this case does not. Both opinions also recognize that sovereign immunity does not preclude judicial review of regulatory decisions. "The plain text of 5.351 expressly provides only for judicial review of administrative action." *IT-Davy,* 74 S.W. 3d at 859. Section 382.032 of the Texas Health and Safety Code "contemplates rulings of regulatory nature and not contractual matter." *Operating Contractors*, 985 S.W. at 656 n. 14. The pertinent issue before the district court in this matter was judicial review of a regulatory decision, the TCEQ's decision not to exercise its fiduciary duty to regulate and protect trust resources under the Public Trust Doctrine and the Texas Constitution, which TCEQ based in part on its rejection of any such regulatory power or duty over greenhouse gases.

Second, the TCEQ argues that sovereign immunity has not been waived because section 5.351 does not allow for judicial review until administrative remedies have been exhausted. Brief of TCEQ at 12 (citing *Payne v. Tex. Water Quality Bd.*, 483 S.W.2d 63 (Tex. App.-Austin 1972, no writ)). Appellees exhausted their administrative remedies before seeking judicial review in district court when TCEQ denied their petition for rulemaking.

Additionally, the exhaustion doctrine excepts issues judicial in nature that do not require case-specific fact decisions involving agency expertise. *See* Fn 5 in *Tex. Workers' Comp. Comm'n v. E. Side Surgical Ctr.*, 142 S.W.3d 541, 546 (Tex.

App-Austin 2004). It also excepts further action at the agency where such action would have been futile. "Futility is a recognized exception to the exhaustion of administrative remedies requirement." *Ogletree v. Glen Rose Indep. Sch. Dist*., 314 S.W.3d 450, 454 (Tex App-Waco 2010) (citing *Smith v. Blue Cross & Blue Shield United of Wis*., 959 F.2d 655, 659 (7th Cir. 1992); *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007); *Gardner v. School Bd. Caddo Parish*, 958 F.2d 108, 111-12 (5th Cir. 1992)). To come under the futility exception, a claimant must show that it is certain that the claim will be denied on appeal. *Id*. (citing *Smith*, 959 F.2d at 659). Here the Appellees could have petitioned for rulemaking numerous times, citing the TCEQ's public trust obligations, however any subsequent attempt would have been spoiled given the fact the TCEQ unlawfully limited the scope of the Public Trust Doctrine. The issue before the district court was judicial in nature and any further efforts by Appellees before the TCEQ would have been futile: TCEQ refused to undertake any rulemaking on GHGs on the legal grounds that the common law and state constitutional Public Trust Doctrine do not extend to the air and atmosphere. AR 4, AR 6, pg. 6, lns. 226-228.

Finally, the TCEQ leans heavily on a case concerning section 69 (the predecessor to current section 15.001) of the Public Utility Regulatory Act (PURA) and the holding that it did not waive sovereign immunity from a denial of

a petition to amend agency rules. Brief of TCEQ at 13-15 (citing *Sw. Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663 (Tex. App.- Austin 1987, no writ)). Section 69 of PURA is different from section 5.351 of the Water Code, and the TCEQ has misconstrued this Court's holding in this case.

Section 69 provides that: "Any party to a proceeding before the [PUC] is entitled to judicial review." *Sw. Bell Tel. Co.*, 735 S.W.2d at 671. This Court wrote that the "legislature intended PURA section 69 to be coextensive with APTRA section 19 [predecessor to current section 2001.171 of the APA], so the former should be understood as conferring the power of judicial review with respect to final orders of the Commission in contested cases." *Id*. Conversely, as stated above, this Court has acknowledged that section 5.351 does not limit the right to judicial review of Commission decisions only to contested cases. *West*, 260 S.W.3d at 261.

More fundamentally, a petitioner for a rulemaking is not a "party" to a "proceeding." There are constitutional, statutory, and agency rule limits on who is eligible to be a party to an agency contested case proceeding (currently being litigated in the Texas Supreme Court as to the TCEQ). But any "interested person" may petition for adoption of a rule, and any "interested person" may comment on any proposed rule. TEX. GOV'T CODE §§ 2001.021, 2001.029.

Finally, and most importantly, this Court in *Southwestern Bell* relied heavily on the fact that the PUC, although it denied Southwestern Bell's request for a rule amendment to close what Bell contended was a loophole by making it clear that switching systems were included within the PUC's definition of "local exchange services," this Court "invited Bell to have the relevant issues determined in a tariff revision proceeding initiated by Bell." *Sw. Bell Tel. Co.*, 735 S.W.2d at 665-66. "Under the express terms of the Commission's order" denying the rulemaking petition, the Court noted, "it invited Bell to purse an available administrative remedy, a matter over which the Commission has *undoubted* jurisdiction." *Id*. at 671 (emphasis in original).

This Court's *Southwestern Bell* opinion thus is fully consistent with its decision in a leading case that, in general, the choice whether to proceed by rulemaking or by contested case lies in the informed discretion of the agency. *See State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794 (Tex. App.-Austin 1982) (Shannon, J.). In contrast, here, the TCEQ did not invite Appellees to pursue a contested case proceeding or any other form of TCEQ regulation of greenhouse gases. Instead, the TCEQ denied that it has any duty, or power, to regulate greenhouse gases under the Public Trust Doctrine. Indeed, the TCEQ is attempting through litigation to avoid any regulation of GHGs in Texas.

Contrary to the TCEQ's argument, allowing judicial review under section 5.351 of this administrative decision would not "place in disarray the regulatory scheme established by the Legislature." Brief of TCEQ at 14 (quoting *Sw. Bell Tel. Co.*, 735 S.W.2d, at 668). Rather, the judgment below sets out the correct scope of the regulatory scheme established under the common law and the Texas constitutional Public Trust Doctrine, to be implemented under the statutory scheme—including by suitable rulemaking.

The Appellees did not ask the district court to hold a trial in which facts would be weighed, but rather asked for judicial review of the TCEQ's pronounced statement of law that it has no power or duty to act regarding greenhouse gases under the Public Trust Doctrine. After all, the TCEQ never denied that greenhouse gases are air contaminants and pollutants as defined by the Texas Clean Air Act or that the threat of climate change is real, [1] *See* AR 4.

The district court was not precluded by the separation of powers principles from reviewing the TCEQ's statements of law regarding the limits of the Public Trust Doctrine or whether its application is preempted by the FCAA, because those

[1] "'Air contaminant' means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural." TEX. HEALTH & SAFETY CODE § 382.003(2). "'Air pollution' means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property." TEX. HEALTH & SAFETY CODE § 382.003(3).

issues before the district court are judicial in nature. In judicial review of administrative actions, the reviewing court may substitute its own judgment for that of the agency on questions inherently judicial in nature. *A.W. Gregg v. Delhi-Taylor Oil Corp*., 344 S.W.2d 411, 415 (Tex. 1961).

Moreover, "statutes placing ownership and control of natural resources, such as wildlife, in the state are but an expression of both civil and the common law on the subject." *Texas v. Bartee*, 894 S.W.2d 34, 42 (Tex. Crim. App. 1994). The statutory directives provided in the Texas Water Code and the TCAA were promulgated by a legislature that was entrusted with the state's natural resources via Article XVI, Section 59, of the Texas Constitution, which states: "The conservation and development of all the natural resources of this State . . . the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate."

The district court was thus exercising a proper judicial function, involving no second-guessing of agency technical expertise, when it reviewed and held erroneous the TCEQ's holding in denying the rulemaking petition that "the Public Trust Doctrine in Texas has been limited to the waters of the state and does not extend to the regulation of greenhouse gases in the atmosphere." AR 4; AR 6, pg. 6, lns. 226-228.

II. The district court's judgment should not be vacated.

This Court should not vacate the district court's judgment for two reasons. First, even if this Court were to reverse on section 5.351 jurisdiction, it should remand, not render judgment vacating the district court's judgment. Second, the district court's statements have been misconstrued as being "advisory" by the TCEQ when in fact they resolved controversies between the parties by informing the TCEQ and the public of the TCEQ's duties when the pending GHG litigation is finalized.

A. This Court should permit amendment to seek declaratory judgment.

If this Court were to determine that judicial review of the denial of the rulemaking petition was not authorized under Water Code section 5.351, it should remand to allow Appellees to amend to seek declaratory relief under the Uniform Declaratory Judgment Act (UDJA). TEX. CIV. PRAC. & REM. CODE ANN., Chapter 37. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839-40 (Tex. 2007) (determining that a plaintiff who loses a plea to the jurisdiction based on sovereign immunity is entitled to remand for an opportunity to amend, so long as any jurisdictional defects can be cured).

B. The TCEQ misconstrues the language in the district court's judgment regarding preemption under section 109 of the FCAA.

The TCEQ argues that the part of the judgment recognizing that Public Trust Doctrine is not preempted under the FCAA was an advisory opinion. Brief of

TCEQ at 22-25. However, the court addressed a real controversy between Appellees and the TCEQ by rendering the law that already applied to the TCEQ. Importantly, it reaffirmed that the TCEQ can establish more stringent regulations under the FCAA.

The TCEQ assertion in its brief that "[n]either in its written order denying the rulemaking petition, in its briefing to the district court, or anywhere else, has the TCEQ taken the position that it is prohibited from protecting Texas's air quality" is not completely accurate and misconstrues the district court's judgment. Brief of TCEQ at 19. The quote drawn from the district court's judgment was taken out of context by the TCEQ and refers to the TCEQ's ability under the FCAA to do more than what is required under federal law. 42 USC 7417 (d)(7). In other words, if the TCEQ wanted to regulate at a greater level than required by the FCAA, and as petitioned by the Appellees, it would not be prohibited from doing so. The TCEQ's decision rejecting the petition for rulemaking stated:

> "The standard the petitioners propose for CO_2 has not been developed through the mechanism under federal statute, in particular FCAA 109. Texas courts have clearly and regularly ruled that where common law duties, such as the public trust doctrine, have been displaced or revised by statutes enacted by legislatures, the statute controls" AR 4.

However, the federal greenhouse gas rules do not mandate specific reductions of GHGs, but rather subject certain emitters to implement the best available control

technologies. Moreover, none of the cases cited in the TCEQ's recommended ruling to the Commissioners supporting preemption even address preemption of the FCAA.[2]

Nevertheless, the meaning of the preceding quote has no relevance at this juncture since the TCEQ can go above and beyond federal regulations if it chooses. The legislative history of the FCAA "supports the interpretation that Congress, in enacting the various environmental laws, intended to have a federal baseline, which state law must meet but may exceed." *Gutierrez v. Mobil Oil Corp*., 798 F. Supp. 1280, 1284 (W.D. Tex. 1992).

In regards to the issue of whether common law claims are preempted by the FCAA, it is well settled that "persons' claims under state law are not preempted by

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[2] All of the cases cited in TCEQ's Recommended Action (AR ITEM #3, pg 3, ¶ 1, lns 7-12) deal with displacement of common law by state statutes, not preemption by federal legislation. *See Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773, 780 (Tex. App. 1999) (noting displacement of alleged duty of lessee to remove contamination under state common law trespass claim by state water code); *Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 544 (Tex. App. 2001) (holding no breach of duty in lessee/lesssor dispute "because the [state] Legislature has set the standard which governs [state] common law trespass causes of action"); *Ryan v. Travelers, Ins. Co.*, 715 S.W.2d 172, 175 (Tex. App. 1986) ("The Worker's Compensation Act has greatly modified the rights of workers and employers under the English common law, so that the rights and obligations of the parties in a suit brought under this statute are entirely controlled by the statute, except for those matters of form and procedure that are not prescribed."). Even had TCEQ made a displacement argument, it would not apply here because the Public Trust Doctrine cannot be displaced by legislative action. *See In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) ("The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.").

the Clean Air Act." *Id*. at 1282. (citing *Her Majesty the Queen v. Detroit*, 874 F.2d 332, 344 (6th Cir. 1989)). The FCAA preempts state law only to the extent that state law is not as strict as emission limitations established in the FCAA. *Id.* The FCAA's savings clause states: "Nothing in this section shall restrict any right which any person (or class of persons) shall have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e) (2006).

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Cal. Products v. Puretex Lemon Juice, Inc.*, 334 S.W.2d 780, 783 (Tex. 1960). However, the district court's judgment, which quotes *Guitierrez,* in regards to preemption of state common law and federal baselines under the FCAA applies settled law to the dispute between Appellees and Appellants over TCEQ's duty under the Public Trust Doctrine and the TCEQ abilities under the FCAA and, thus, does not constitute an advisory opinion. The law as stated applied to the TCEQ well before the Appellees sought judicial review or even before they petitioned for rulemaking. More importantly, the district court's statement regarding preemption under the FCAA resolved a controversy

between the parties and provided finality on preemption should the Appellees or any other member of the public petition for stronger standards in the future.

C. The district court's statement regarding the scope of the Public Trust Doctrine resolved a controversy and it informs the TCEQ of its duty.

The district court's statements concerning the scope of the Public Trust Doctrine and its acknowledgment that it applies to the air and atmosphere resolved a controversy between the parties and informs the public and the TCEQ of the TCEQ's ongoing duty once rulemaking is appropriate. More importantly, the district court's statement established that the Public Trust Doctrine at the very least protects against agency inaction. The fact that the TCEQ has repeatedly argued that under both the FCAA and TCAA it is not required to regulate emissions of GHGs or CO_2 illustrates the nature of the controversy and effectuated the need for the district court's statement regarding the scope of the Public Trust Doctrine. Currently, the TCEQ refuses to regulate GHGs, but acknowledging that the Public Trust Doctrine applies to the air and atmosphere protects against agency inaction in the event the TCEQ refuses to regulate harmful air contaminants going forward.

The core of the Public Trust Doctrine requires trust management for public benefit rather than private exploit. As stated in *Geer v. Connecticut*: "[T]he power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct

from the people, or for the benefit of private individuals as distinguished from the public good." 161 U.S. 519, 529 (1896). The Public Trust Doctrine applies not just to lands under navigable waters, but to other "property of a special character" as well. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892). This determination is consistent with the ancient underpinnings of the doctrine, as it applies to natural resources that are "common to all mankind." The Texas Supreme Court has acknowledged the state maintains ownership over public resources, such as the submerged lands and waters, as trustee for the public. *See, e.g., Maufrais v. State*, 180 S.W.2d 144 (Tex. 1944). The Public Trust Doctrine has also been incorporated into the Texas Constitution via Article XVI, Section 59, of the Texas Constitution, which states: "The conservation and development of all the natural resources of this State . . . the preservation and conservation of all such natural resources of the State are each and all hereby declared public right and duties; and the Legislature shall pass all such laws as may be appropriate."

In this case, one of the reasons given by the TCEQ for rejecting the Appellees' petition for rulemaking is that federal law concerning GHG regulation is unsettled and Texas is involved in litigation with the EPA. AR 4 ¶ 3, lns. 1-4. The TCEQ's unwillingness to acknowledge that GHGs should be regulated at any level is implicit in the TCEQ's lawsuit against the EPA over the "Endangerment and Cause and Contribute Findings for Greenhouse Gases" (Endangerment

Finding) under section 202(a) of the FCAA. 74 Fed. Reg. 66, 496 (Dec. 15, 2009).[3] The Endangerment Finding was a necessary prerequisite to allow regulation of GHGs by the EPA. Ironically, when the TCEQ rejected Appellees' petition for administrative rulemaking asserting the Public Trust Doctrine was preempted by the FCAA it was simultaneously questioning in federal court the EPA's authority or procedure to regulate greenhouse gases under the FCAA.

Recently in a case before this Court, the TCEQ stated: "Carbon dioxide remains unregulated under the Texas Clean Air Act. Indeed, if EPA's GHG regulatory regime is overturned, either by court order or administrative action, CO_2 will not be regulated at all in Texas."[4] This statement alone justifies the need for the district court's judgment regarding the scope of the Public Trust Doctrine, which was central to Appellees case, and central to TCEQ's denial of Appellees petition for rulemaking. The TCEQ can no more allow GHGs to continue to be emitted unabated resulting in the changing composition of our atmosphere to harm the public, than can its sister agency convey the whole shore of Galveston Island, which is held in trust, to a third party, thus restricting public access. *See City of Galveston v. Mann*, 143 S.W. 2d. 1028, 1034 (Tex. 1940); *State v. Bradford*, 50 S.W. 2d 1065, 1069 (Tex. 1932) (title to submerged land owned by the State may

[3] *See Coal for Responsible Regulation, Inc. v. E.P.A.*, decided last summer affirming the EPA's endangerment finding. 684 F.3d 102 (D.C. Cir. 2012).
[4] *See* pg. 6 of Appellant's Response to Appellee's Motion to Dismiss in *TCEQ v. Public Citizen*, No. 03-10-00296-CV (Tex. App.-Austin 2013).

only be acquired by grant expressly authorized by the legislature). But here, the legislature has indicated that the TCAA is a green light to protect the air and atmosphere for future generations and air quality should be "safe guarded" and air contaminants such as CO_2 should be "abated" and not emitted in a way that restricts the public's access to a healthy and livable planet. . TEX. HEALTH & SAFETY CODE § 382.002(a).

The TCEQ offered no explanation grounded in statute as to why it rejected the Appellees' petition for rulemaking, or why regulating GHGs after the federal litigation is complete would be improper.[5] Instead, the TCEQ offered a laundry list of reasons to support its decision not to regulate. AR 4. While the general proposition is that the judiciary does not have the expertise or authority to substitute policy judgments or the technical decisions of the agency with its own, it certainly has the power to define the scope of an agency's authority and obligations and to determine whether such obligations rest in common law or under the State Constitution. In other words, while discretion should be given to agencies on technical issues, such expertise, which is a benefit to the public, is ultimately rendered meaningless if the agency for whatever reasons refuses to perform its duties and obligations and misinterprets the law.

[5] Appellees addressed why the TCEQ's other reasons for rejecting their Petition ran contrary to statute. CR 111-114 (Reply Brief of Plaintiffs);CR 130-131 (Letter Brief of Plaintiffs).

The TCEQ never argues that the district court's legal interpretation was flawed. Indeed, the district court's statements on the scope of the Public Trust Doctrine under state common law and the Constitution are not being appealed by the TCEQ. The TCEQ has not suffered any harm by the district court's decision because in reviewing the TCEQ's various legal and factual findings, the district court ultimately deferred to the TCEQ's policy determination that pending litigation could affect rulemaking. Thus, the TCEQ was not ordered to do anything.[6]

PRAYER

Appellees respectfully ask this Court to affirm the district court's denial of the TCEQ's plea to jurisdiction and deny the TCEQ's request to have the district court's judgment vacated. In the alternative, if the Court determines the district court did not have jurisdiction, then Appellees respectfully ask that the Court remand so Appellees can amend their pleadings to seek declaratory judgment under the UDJA that the Public Trust Doctrine extends to the air and the

[6] For the sake of argument only and without conceding anything, the Appellees question whether the Court has jurisdiction to hear this appeal. The district court did not order the TCEQ to perform rulemaking and as such the TCEQ has no injury or grievance. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W. 2d 87, 92 (Tex. 1973) (holding that the appealing party may not complain of errors that do not injuriously affect him) (citing *Shell Petro. Corp. v. Grays*, 131 Tex. 515, 114 S.W.2d 869, 870 (Tex. 1938) (dismissing writ of error because "no injury has occurred to the complaining party," and therefore nothing is presented for review "but an academic question of law")). While TCEQ could appeal from the denial of its plea to jurisdiction, it's ancillary arguments challenging the district court's ability to render a judicial decision that defines the legal questions presented is inappropriate here.

atmosphere, and that the Public Trust Doctrine is not preempted under the FCAA nor does Section 109 of the FCAA prevent the TCEQ from promulgating rules more stringent than those imposed under federal law.

The Appellees further pray for all other relief to which it may be entitled.

Dated: April 22, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the contents of this document meet the criteria established by Rule 9.4 of the Texas Rules of Appellate Procedure and that the computer program used to prepare this document reported that there are 5,705 words in the pertinent parts of the document.

//s// Adam R. Abrams
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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing document was served via U.S. Postal Service, facsimile and/or by electronic service on the 22nd day of April 2013, upon the following individuals listed:

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