No. 03-12-00555-CV

COURT OF APPEALS
THIRD DISTRICT OF TEXAS AT AUSTIN

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Appellant,

v.

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

APPELLANT'S BRIEF OF TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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February 19, 2013
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

The Texas Commission on Environmental Quality (TCEQ or Commission) denied Appellees' petition for rulemaking. Appellees filed suit under Texas Water Code section 5.351 seeking reversal of the Commission's decision.

The Commission filed a plea to the jurisdiction. After a hearing on both the plea to the jurisdiction and the merits, Judge Gisela Triana denied the plea to the jurisdiction, upheld the Commission's decision, but also issued declarations the Appellees' sought, including one concerning the scope of the "public trust doctrine" in Texas, applying this common-law doctrine to the atmosphere for the first time.

The Commission appeals from the denial of its plea to the jurisdiction and seeks vacatur of the district court's improper declaratory judgments.[1]

STATEMENT REGARDING ORAL ARGUMENT

The TCEQ requests oral argument to further address the important constitutional and sovereign-immunity issues at stake in this case and to answer any questions the Court may have.

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[1] CR 136-138. References to the Clerk's Record will be by CR followed by page numbers. A copy of the final judgment is in the appendix to this brief at Tab A.

ISSUES PRESENTED

1. Is the Commission's decision not to adopt a particular rule subject to judicial review?

2(a). Did the district court have authority to issue declaratory judgments on issues not essential to resolving the dispute?

2(b). Alternatively, are the district court's extraneous legal conclusions not part of the judgment itself?

TO THE HONORABLE JUSTICES:

SUMMARY OF THE ARGUMENT

In *Southwestern Bell Telephone Co. v. Public Utility Commission*,[2] this Court held that an agency's denial of a petition for rulemaking is not subject to judicial review under the Administrative Procedure Act or the broad judicial review provisions of the Public Utility Regulatory Act. The district court erred in not following this precedent when it found that the Water Code, with a similar judicial review provision, did allow for judicial review.

The Legislature has not provided for judicial review of an agency's decision not to adopt a rule. Although the Water Code's waiver of sovereign immunity is broadly worded, in order to comply with the separation of powers provision it cannot be read to allow judicial control over the agency's rulemaking discretion.

The district court also erred by issuing improper declaratory judgments. The district court's declarations concerning the scope of the "public trust doctrine" and preemption are advisory opinions and should be vacated. In the alternative, the declarations in no way bind the parties.

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[2] 735 S.W.2d 663 (Tex. App.—Austin 1987, no writ).

STATEMENT OF FACTS

Appellees filed a Petition for Rulemaking with the Commission under Texas Government Code section 2001.021 on May 5, 2011.[3] Expressing concerns about climate change, they asked the Commission to adopt a rule by January 1, 2012—less than a year from the date of their petition—that would limit carbon dioxide (CO_2) emissions in Texas from fossil fuels under specifically described guidelines.

The requested rule[4] would have frozen greenhouse gas (GHG) emissions from fossil fuels at 2012 levels, reduced fossil fuel CO_2 emissions by at least six percent a year thereafter beginning in January 2012, required the TCEQ to adopt a GHG reduction plan by January 1, 2012, and mandated annual progress reports on statewide GHG emissions that would:

- include an independently verified accounting and inventory "for each and every source of all [GHG] emissions within the state, without exception";
- be made publicly available no later than December 31 of each year;
- track progress toward meeting emission reductions, including results from current and future policies, and report on the progress annually; and

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[3] AR 1 (Petition for Rulemaking). References to the Administrative Record will be by AR followed by the item number.

[4] *Id*. at p. 26.

- be provided annually to the Governor and appropriate House and Senate committees, with "total emissions of [GHGs] for the preceding year, and totals in each major source sector."

In addition, the rule would have included language making it controlling over any other less stringent rule.[5]

The TCEQ Commissioners considered Appellees' petition at a public meeting on June 22, 2011.[6] Counsel for Appellees, a citizen, and counsel for the Executive Director addressed the Commission. On behalf of the Commission's Executive Director, the Deputy Director of the Office of Legal Services filed a legal memorandum recommending denial of the petition for rulemaking.[7] Counsel for Appellees filed a written argument recommending that the petition be granted.[8] After considering the arguments, the Commission denied the petition in a written order[9] giving the following independent reasons for the denial:

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

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[5] *Id*. at p. 26.

[6] AR 6 (Transcript of TCEQ Commissioners public meeting, June 22, 2011).

[7] AR 3 (Executive Director's legal memorandum).

[8] AR 5 (Appellees' written argument).

[9] AR 4 (Decision of TCEQ Commissioners Denying Petition for Rulemaking). A copy is attached at Tab B.

- 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";

- CO_2 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."

Appellees filed a petition in the district court seeking judicial review of the Commission's decision to deny the petition for rulemaking. Citing Texas Water Code section 5.351 as the jurisdictional basis, Appellees claimed the Commission's decision "was unreasonable, [and] based on an error of law."[10] In particular, they claimed the Commission 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."[11] They sought the following relief: "the Court should reverse errors 1 and 2 above, and remand the case, if appropriate, for further

[10] CR 3-21 at p. 11, ¶ 35 (Plaintiff's Original Petition).

[11] *Id*. at pp. 11, 13.

proceedings pursuant to the Court's authority under the Texas Water Code."[12]

In response, the Commission filed a plea to the jurisdiction.[13] The district court denied the plea to the jurisdiction, but affirmed the Commission's denial of the petition for rulemaking.[14] In making that determination, however, the district court issued declaratory judgments on the scope of the public trust doctrine and the preemption issue.[15]

The Commission appeals the denial of the plea to the jurisdiction and seeks vacatur of district court's declaratory judgments.

STANDARD OF REVIEW

Subject-matter jurisdiction presents a question of law that appellate courts review de novo.[16] Ambiguities about laws waiving sovereign immunity must be resolved in favor of immunity.[17]

The Texas Supreme Court has cautioned courts that are considering the scope of their authority to review agency actions to "carefully restrict their jurisdiction to that clearly granted or necessarily implied from the Constitution and

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[12] *Id*. at p. 13.

[13] CR 57-60 (TCEQ's First Plea to the Jurisdiction).

[14] Tab A (Final Judgment).

[15] *Id*.

[16] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

[17] *Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

specific acts of the legislature."[18]

ARGUMENT AND AUTHORITY

I. There is no right to judicial review of an order denying an administrative petition for rulemaking.

A. The Commission has sovereign immunity.

The Commission is immune from suit absent consent from the Legislature.[19] It is solely the province of the Legislature to waive or abrogate the state's immunity, either by statute or legislative resolution.[20] The Code Construction Act provides that "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."[21] It is the burden of a plaintiff who sues a governmental agency to demonstrate that his claims are within the court's jurisdiction.[22]

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[18] *City of Amarillo v. Hancock*, 239 S.W.2d 788, 791 (Tex. 1951).

[19] *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Review of an agency order is also available when it adversely affects a vested property right or otherwise violates a constitutional right. *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs*., 19 S.W.3d 393, 397 (Tex. 2000).

[20] *Id*.

[21] TEX. GOV'T CODE § 311.034.

[22] *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 446 (Tex. 1993).

The Government Code, in section 2001.021,[23] authorizes rulemaking petitions but does not provide for an appeal from the denial of such a petition. APA section 2001.038, which provides for declaratory judgment suits to challenge "the validity or applicability of a rule" under some circumstances, does not authorize suits to challenge the denial of a petition for rulemaking. No other section of the APA provides a jurisdictional basis for this suit. Thus, while the Legislature created a clear right to judicial review of rules adopted by an agency, it did not create a similar right to challenge the denial of rulemaking petitions.

Based on the lack of such a statutory waiver of sovereign immunity, Professor Ron Beal of Baylor University Law School suggests there can be no appeal from a denial of a petition for rulemaking:

> The APA allows interested parties to request an agency to adopt a rule . . . Upon the proper filing of a petition, the agency has 60 days to either deny the petition in writing or initiate a rule making proceeding. [Citations omitted.] *However, it appears the refusal to adopt a rule by an agency is not reviewable in a court of law.*
> . . .
> APA Section 2001.021 mandates that agencies allow interested persons the opportunity to request the adoption of a rule and the agency must timely respond in writing why it is denying the request. [Citation omitted.] *The APA, however, is silent as to the right of judicial review of that decision and consistent with the long held precedent [citation omitted], legislative silence precludes judicial review of the decision not to make a rule and thereby deprives the*

[23] Chapter 2001 of the Government Code is the Administrative Procedure Act. Hereafter, that Act and sections of it will be referred to as the APA.

district court of subject matter jurisdiction.[24]

Thus, unless the Legislature has authorized judicial review of the denial of a rulemaking petition outside the APA, the district court was without jurisdiction to hear this suit.

B. Water Code section 5.351 does not waive sovereign immunity for this type of suit.

Appellees have identified Water Code section 5.351[25] as the source of the district court's jurisdiction in this case, but they cited no case under that section (or any other) in which a court has reviewed the agency's discretionary decision to deny a rulemaking petition. The preliminary question before the Court, then, is whether that section waives the Commission's immunity and allowed this suit.

But even where the Legislature authorizes judicial review, as in section 5.351, the separation of powers doctrine constrains the Legislature's authority. The Texas Supreme Court has held that "even where judicial review is specifically provided it will be denied if the Legislature requires the court to substitute itself for the administrative body and perform purely administrative acts."[26]

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[24] 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 3.1 at 3-3 and 3-5 (2011) (emphasis added).

[25] Section 5.351(a) says, "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."

[26] *City of Amarillo v. Hancock*, 239 S.W.2d 788, 790 (Tex. 1951).

Thus, the Legislature may not authorize judicial review of agency permitting decisions by trial de novo, because that mode of review would require the court to exercise the inherently administrative function of permitting.[27] And just as courts may not interfere with an agency's "broad discretion" under its rulemaking authority, the Legislature may not authorize that interference through judicial review.

Another well-established principle limits the governmental actions that are subject to judicial review. Statutes waiving sovereign immunity are to be construed narrowly and all doubts about waiver resolved in favor of retaining immunity.[28] The district court misconstrued the statute, reading it broadly rather than narrowly. The district court failed to follow established case law limiting the scope of section 5.351 and similar broadly worded statutes authorizing judicial review.

Section 5.351 is written in broad and general language, yet cases show that there are limits to its applicability.[29] For example, when I-T Davy, a contractor,

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[27] *Gerst v. Nixon*, 411 S.W.2d 350, 353-54 (Tex. 1966).

[28] *Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 696-97 (Tex. 2003) (holding that a statute authorizing suits against a "mental health facility," defined to include the state hospital, did not waive the state hospital's immunity from suit).

[29] Had the TCEQ ignored Appellees' rulemaking petition altogether, Appellees may have been able to file suit under Water Code section 5.352 claiming that the agency had failed to act in a reasonable time to perform a nondiscretionary duty. Here, the TCEQ had a statutory duty to comply with APA section 2001.021's requirement to issue a written decision within 60 days stating its reasons for

sued the TCEQ's predecessor, the Texas Natural Resource Conservation Commission, for claims arising from alleged breach of contract, the Texas Supreme Court held that no court had precisely determined the scope of a reviewing court's jurisdiction under section 5.351 but that the statute does not authorize review of *every* decision of the agency but rather authorizes review of regulatory decisions.[30] Citing an opinion from this Court,[31] the high court ruled that there was no jurisdiction over the contractor's suit alleging breach of contract.

In *Payne v. Texas Water Quality Board*,[32] the Dallas Court of Appeals acknowledged that the same language in a predecessor statute to section 5.351 "is very broad, and if we were to give it a literal interpretation an appeal from anything whatsoever that the Water Quality Board might do or not do would be permitted." But the court held that the language was not intended to be free of limitation and did not give a right to appeal from a preliminary approval of a wastewater-processing plant by a predecessor agency of the Commission. *Payne*

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denying the rulemaking petition. But a suit under section 5.352 is not available where the agency has timely acted, as it did here.

[30] *Tex. Natural Res. Conservation Comm'n v. I-T Davy*, 74 S.W.3d 849, 859 (Tex. 2002).

[31] *State v. Operating Contractors*, 985 S.W.2d 646, 656 n. 14 (Tex. App.—Austin 1999, pet. denied). In *Operating Contractors* this Court construed analogous language in the Health and Safety Code as granting only a limited right to review actions of a regulatory nature, not of a contractual nature.

[32] 483 S.W.2d 63 (Tex. Civ. App.—Dallas 1972, no writ).

shows that the statute does not authorize appeals from every decision made by the agency.

The courts in *I-T Davy* and *Payne* recognized that there are limitations on the availability of review under section 5.351. In *I-T Davy*, review was limited to decisions of a regulatory nature, and in *Payne* to final decisions. Also implicit in section 5.351 and other broadly worded judicial review provisions is the principle that such review is not available to decide issues of public policy that are not susceptible to judicial oversight.

Thus, in *Southwestern Bell Telephone Co. v. Public Utility Commission*,[33] this Court found that a similarly broad waiver in a section of the Public Utility Regulatory Act (PURA) does not waive sovereign immunity to challenge a Public Utility Commission (PUC) denial of a petition to amend agency rules. In that case, Bell had petitioned the PUC to amend one of its rules under section 11 of the Administrative Procedure and Texas Register Act (APTRA), which is the predecessor of APA section 2001.021. After public hearings, the PUC denied the petition for rulemaking, and it explained its rationale. Bell filed suit in district court seeking, *inter alia*, reversal of the order. This Court held there was no jurisdiction to review the PUC's denial of Bell's rulemaking petition under the predecessor to APA section 2001.171 or under the Uniform Declaratory

[33] 735 S.W.2d 663 (Tex. App.—Austin 1987, no writ).

Judgments Act.

Significantly, the Court also found that even the broad language of Public Utility Regulatory Act section 69[34] (the predecessor to current section 15.001) did not allow for judicial review under the circumstances presented, despite being "so broad as to permit, facially at least, the judicial review of almost any order the Commission might enter . . . whether dealing with contested cases, rulemaking, investigations, or enforcement."[35] The Court determined that it was precluded from reviewing the PUC's decision because such review would require a court "to determine all the arguably relevant subsidiary matters that might be involved" and would "place in disarray the regulatory scheme established by the Legislature . . ."[36] Instead, the doctrine of primary jurisdiction required the district court to defer to the PUC on questions that "manifestly and almost uniquely require the exercise of administrative discretion and the special knowledge, experience, and services of the Commission in determining technical and intricate matters of fact."[37]

But even if section 5.351 may be construed more broadly than PURA's judicial review provision, that breadth cannot extend beyond the constitutional

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[34] "Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule."

[35] 735 S.W.2d at 671.

[36] *Id.* at 668.

[37] *Id.*

limits on the judiciary's ability to direct an agency's policy determinations.

C. Separation of powers principles limit courts' ability to review Commission decisions.

Article II, § 1, of the Texas Constitution says,

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The principle summed up in these words contemplates a zone of power for each branch of government that must be kept free of usurpation or undue interference by each other department.[38]

The TCEQ by statute is the agency of this state given primary responsibility for implementing the Texas Clean Air Act (TCAA).[39] "When an administrative

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[38] Among the many cases showing protection of the executive branch from the judicial are *Smith v. Houston Chem. Servs., Inc.*, 872 S.W.2d 252, 258 (Tex. App.—Austin 1994, writ denied) (trial court lacked authority to render judgment denying permit application; grant or denial of an application is an executive function committed exclusively to agency); *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966) (district court lacked power to redetermine agency decision about public need for a new savings and loan association; granting or withholding of a permit in a statutorily regulated commercial endeavor is an administrative function and because of article II, § 1, cannot be delegated to the judicial branch; the court can only review the method the administrative agency employs in arriving at its decision); *Tex. Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, writ denied) (when courts review agency decisions, separation of powers doctrine "insures that discretionary functions delegated to the agencies. . . are not usurped by the judicial branch").

[39] TEX. HEALTH & SAFETY CODE § 382.002.

agency is created to centralize expertise in a certain regulatory area, it is to be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[40] Exercising its policymaking responsibility, it considered and ruled on Appellees' rulemaking petition. Even assuming for the sake of argument that Water Code section 5.351 allows appeals of denials of rulemaking petitions, the separation of powers doctrine necessarily narrows the issues in and the nature of such a suit.

Generally speaking, there is no legal obligation for an administrative agency to adopt any particular rule. Whether to adopt rules and what rules to adopt—a legislative type function[41]—are matters of public policy left to the discretion of the agency. A reviewing court may not substitute its judgment for that of the agency on issues of public policy.[42]

The Legislature was clear in the TCAA that the Commission was merely empowered, but not required, to adopt a rule to control air contaminants related to climate change, saying the agency "by rule *may* control air contaminants as

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[40] *State v. Public Util. Comm'n*, 883 S.W.2d 190, 197 (Tex. 1994); *accord Phillips Petroleum Co. v. Texas Comm'n on Envt'l Quality*, 121 S.W.3d 502 (Tex. App.—Austin 2003, no pet.).

[41] Government function is "legislative," and not "judicial," when "it looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or part of those subject to its power." *City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App.—Austin 1996), *aff'd, as modified*, 7 S.W.3d 109 (Tex. 1999).

[42] 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 3.1.3-.4 (2011).

necessary to protect against adverse effects related to . . . climatic changes, including global warming."[43] Absent an obligation to adopt a rule, the TCEQ was merely exercising its discretion and expertise by denying Appellees' petition for rulemaking. In *Southwestern Bell,* the Court recognized limits on judicial interference with agency discretion in tariff-revision:

> [T]he pertinent issues are intricate and dependent upon a variety of factual circumstances. They necessarily involve the consideration of specialized matters only dimly perceived by a court but well within the specialized knowledge, experience, and understanding of the Commission — a public body that is statutorily charged to determine those matters according to *its* perceptions of the public interest, arrived at under the supervision and policy-making determinations of public officials elected for those very purposes.[44]

Review of the agency's order on the bases asserted by Appellees in this case would allow for an impermissible substitution of judgment by the judiciary of a decision committed to the discretion of an executive branch agency.

II. The district court's declaratory judgments concerning the "public trust doctrine" and preemption should be vacated.

Appellees sought review of the Commission's decision, citing Water Code section 5.351 as the jurisdictional basis for their suit and praying for the court to reverse the decision and remand the matter to the agency for further proceedings.[45]

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[43] TCAA § 382.0205 (emphasis added).

[44] 735 S.W.2d at 671-72 (emphasis in original).

[45] CR 5 and 16 (Plaintiffs' Original Petition).

However, their reply brief[46] made clear that they actually sought a declaratory judgment—and that is the relief they received from the district court.

Section 5.351 authorizes a suit to "review, set aside, modify, or suspend the act of the commission." Nothing in that section authorizes a declaratory judgment on Commission's bases for its decision. While APA section 2001.038 provides for declaratory judgment, it only does so only for challenges to the validity or applicability of an existing rule. Appellees did not plead for a section 2001.038 declaratory judgment**,** nor is such relief available to them since that provision does not authorize declaratory judgments concerning petitions for rulemaking. Yet, in their reply brief, Appellees repeatedly pressed for a declaration of the scope of the public trust doctrine. They said, for example:

> "First, Plaintiffs are . . . asking for judicial review of the Defendant's statements regarding the limits of the Public Trust Doctrine."[47]
>
> "If the Court found that the atmosphere is a shared resource entitled to protection under the Public Trust Doctrine the Defendant would be obligated to fulfill its fiduciary duty, but would still have discretion on how to carry out such duty."[48]
>
> "[T]he nature of this suit rests in the Public Trust Doctrine."[49]

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[46] CR 100-120 (Reply Brief of Plaintiffs).

[47] CR 108 (Reply Brief of Plaintiffs).

[48] CR 108 (Reply Brief of Plaintiffs).

[49] CR 110 (Reply Brief of Plaintiffs).

> "The only issues before the Court are whether the atmosphere is a public trust asset and whether section 109 of the FCAA preempts Plaintiffs' claim."[50]

The district court complied with their request, and issued a declaration "that Defendant's conclusion that the public trust doctrine in Texas is exclusively limited to the conservation of the State's waters and does not extend to the conservation of the air and atmosphere is legally invalid."[51]

The district court's judgment also contained paragraphs opining on the scope of the Texas Clean Air Act and the Federal Clean Air Act. The judgment states that "Defendant's conclusion that it is prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act (FCAA), Section 109 is legally invalid."[52] However, not only is this declaration irrelevant to the disposition of the case, it is also inaccurate. Neither 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.

It is clear that this judgment was intended to be more than an explanation of the district court's reasoning, of the kind commonly found in letter rulings. This is

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[50] CR 114 (Reply Brief of Plaintiffs).

[51] Tab A (Final Judgment).

[52] CR 137 (Final Judgment).

because the district court had already issued a letter ruling[53] explaining the basis for her decision. Instead, the judgment consists of a series of declarations: "The court finds . . . The court further finds . . . The court also finds . . . ."[54] Thus, the district court attempted to impart to its *obiter dicta* the solemnity of a final judgment.

That the district court's statements were intended to be more than mere surplusage is apparent from the way they were treated by Appellees. Though the district court affirmed TCEQ's denial of the petition for rulemaking, Appellees viewed the declaratory judgment on the scope of the public trust doctrine as a victory. Upon learning of the district court's ruling, Appellees' sponsoring organization issued a press release announcing the ruling on the scope of Texas's public trust doctrine.[55] It quotes Brigid Shea, one of the Appellees (as next friend on behalf of her minor son), as touting the district court's "blockbuster" letter ruling, comparing it to the landmark *Brown v. Board of Education* decision of the United States Supreme Court.[56]

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[53] Letter ruling issued July 9, 2013. A copy is attached at Tab C.

[54] CR 136-138 (Final Judgment).

[55] An Oregon-based nonprofit, Our Children's Trust, coordinates and supports lawsuits like this across the country. Its July 10, 2012 press release can be found at http://ourchildrenstrust.org/sites/default/files/Texas%20PR%2007-10-2012%20.pdf.

[56] *Id*. ("This may well be one of those judicial actions like *Brown v. Board of Education* that future generations will look to as a turning point for our planet.") Perhaps because of the press release,

A. The issues that were the subject of the district court's declarations were not essential to resolve the dispute.

If section 5.351 authorized judicial review of the petition for rulemaking denial (which it didn't), the only question before the district court would be whether TCEQ acted within its discretion in denying the rulemaking. In deciding that question, a court is not allowed to substitute its judgment for the Commission's, but rather must uphold the decision if any legal basis supports it. In fact, "[a] reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis for the action taken by the agency."[57] "The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency."[58] Given this deferential standard, there was no need for the district court to wade into the two bases for denial with which Appellees disagreed. Notably, the Commission gave several reasons besides the Appellees' two contested bases for

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articles appeared in major newspapers across the country. *See, e.g.*, http://www.bostonglobe.com/news/nation/2012/07/11/texas-judge-rules-atmosphere-air-public-trust/KidpxrAyYllPPnrijt3OjI/story.html, http://www.huffingtonpost.com/david-morris/texas-judge-rules-the-sky_b_1701492.html http://www.statesman.com/news/news/state-regional-govt-politics/in-suit-minors-challenge-texas-environmental-agenc/nRp9t/

[57] *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984) (quoting *Railroad Comm'n v. City of Austin*, 524 S.W.2d 262, 279 (Tex. 1975)).

[58] *Charter Medical*, 665 S.W.2d at 452.

its decision. It gave six reasons in writing, and it was undisputed that the Appellees did not challenge four of those reasons. As Appellees stated in their reply brief to the district court, "[T]he validity of whether any of these [other four] reasons justified denial of Plaintiffs' Petition are not the issues presented to the Court."[59]

It is fundamental in administrative law that the reviewing court must affirm an agency's decision if it is supported by any valid legal theory.[60] Therefore, the district court was required to uphold the agency order as long as there was one valid ground supporting it.[61]

Ultimately, the district court recognized this principle, affirming the agency order based on one of these unchallenged grounds: the pending litigation between the state and the EPA. Therefore, because the district court, despite its other misgivings, concluded that the TCEQ reasonably exercised its rulemaking discretion based on this rationale, the scope of the public trust doctrine and the preemption issue were not essential to its ruling.

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[59] CR 114 (Reply Brief of Plaintiffs).

[60] *Charter Medical*, 665 S.W.2d at 452-53.

[61] *Bd. of Med. Exam'rs v. Scheffey*, 949 S.W.2d 431, 438 (Tex. App.—Austin 1997, writ denied); *see also Cont'l Imports, Ltd. v. Brunke*, 03-10-00719-CV, 2011 WL 6938489, *5 (Tex. App.—Austin 2011, pet filed) (mem. op.) (*citing Public Util. Comm'n v. Southwestern Bell*, 960 S.W.2d 116, 121 (Tex. App.—Austin 1997, no pet.).

B. The rulings on the public trust doctrine and the preemption issue were improper advisory opinions.

By issuing declaratory judgments on the scope of the public trust doctrine and the preemption issue when they were not essential to the judgment, the district court issued an improper advisory opinion. Courts are prohibited from issuing advisory opinions under the separation of powers article. A declaratory judgment is merely an advisory opinion when it does "not terminate a controversy between parties and would be irrelevant at the time judgment is rendered."[62] Accordingly, "[a] declaratory judgment is appropriate only if a justiciable controversy exists concerning the rights and status of the parties and the controversy will be resolved by the declaration sought."[63] Here, the court's declaration on the scope of the public trust doctrine did not terminate nor resolve any controversy concerning the rights and status of TCEQ and the Appellees, because the scope of the public trust doctrine was only of several independent bases supporting the TCEQ's discretion to deny petitions for rulemaking.[64]

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[62] *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 68 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see also Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).

[63] *Chevron Phillips*, 346 S.W.3d at 68 (citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995)).

[64] Likewise, Appellees' preemption issue concerned just one of the six bases cited by TCEQ in its order.

The rationale for avoiding advisory opinions extends beyond constitutional concerns. Discussing the ripeness doctrine in the context of avoiding advisory opinions, the Texas Supreme Court noted that "[t]he doctrine has a pragmatic, prudential aspect that is directed toward '[conserving] judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes.'"[65] Moreover, "[r]efraining from issuing advisory opinions and waiting for cases' timely factual development is also essential to the proper development of the state's jurisprudence."[66]

In keeping with advisory opinion concerns, appellate courts address only those issues "necessary to final disposition of the appeal."[67] In this way, they avoid issuing advisory opinions on issues that "would not affect the outcome of [the] proceeding."[68] When, as here, district courts review agency decisions, they act in a manner similar to appellate courts, and accordingly should avoid addressing issues that are not necessary to resolving the appeal.[69]

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[65] *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 443 (Tex. 1998).

[66] *Id.*

[67] Tex. R. App. P. Rule 47.1.

[68] *Brown v. Lubbock Cnty. Comm'rs Court*, 185 S.W.3d 499, 505 (Tex. App.—Amarillo 2005, no pet.).

[69] *See Freightliner Corp. v. Motor Vehicle Bd. of the Texas Dep't of Transp.*, 255 S.W.3d 356, 362 (Tex. App.—Austin 2008, pet. denied).

This Court has declined to give advisory guidance when remanding a case to the agency,[70] recognizing that its duty was not "to give legal advice to agencies, but only to decide whether judgments of lower courts must be reversed or modified by virtue of errors of law committed by these courts and strongly preserved and presented on appeal to this court."[71] In reaching its decision, the Court recognized similar concerns to those raised in advisory opinion contexts—that "[t]he judiciary must also seek to insure that its own limited resources are used efficiently," and that it also "must seek to avoid deciding issues gratuitously and off-handedly."[72]

The latter concern—avoiding deciding issues gratuitously and off-handedly—is a major one in this case. The scope of the public trust doctrine is an important issue, not just for Texas, but also nationwide, as demonstrated by the amount of attention the district court's ruling received in the state and national media.[73] As such, any question involving the scope of the public trust doctrine deserves to be fully litigated, with the opportunity for a direct appeal—not decided in a case that turns wholly on an issue of administrative procedure.

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[70] *City of Dallas v. Texas Water Rights Comm'n*, 674 S.W.2d 900 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

[71] *Id*. at 904.

[72] *Id*. at 903.

[73] *See* pp. 20-21 *supra*.

Appellees asked for—and received—declaratory-judgment relief when no statute authorized it. The declaratory judgments, unnecessary to the case's resolution, amounted to an advisory opinion on the scope of the public trust doctrine and the TCEQ's statutory authority. Because these important issues could not and should not have been reached in the case below, the district court's improper declaratory judgments should be vacated.

C. Alternatively, the district court's extraneous legal conclusions are not part of the judgment.

In the event that the Court concludes that the district court's statements construing the public trust doctrine and the scope of the TCEQ's authority under state and federal law are not improper declarations, then it must be that they are not part of the judgment itself. "The factual recitations or reasons preceding the decretal portion of a judgment form no part of the judgment itself."[74] Instead, "[a] judgment is something more than the findings of fact, it is the sentence of law pronounced by the court on the facts found."[75] Here, because the only proper sentence of law pronounced by the district court is the affirmance of the TCEQ's order, the district court's extraneous declarations cannot be considered part of the judgment and thus are in no way binding on the parties.

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[74] *Alcantar v. Okla. Nat'l Bank*, 47 S.W.3d 815, 823 (Tex. App.—Fort Worth 2001, no pet.).

[75] *Ellis v. Mortgage & Trust, Inc.*, 751 S.W.2d 721, 724 (Tex. App.—Fort Worth 1988, no writ).

PRAYER

The TCEQ respectfully asks the Court to reverse the district court's denial of the TCEQ's plea to the jurisdiction, dismiss Appellees' suit for want of jurisdiction, and vacate the district court's judgment. In the alternative, the TCEQ asks the Court to vacate the improper declaratory judgments.

The TCEQ further prays for all other relief to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF COMPLIANCE

I certify that the computer program used to prepare this document reported that there are 5,808 words in the pertinent parts of the document.

//s// Cynthia Woelk
Cynthia Woelk

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing appellant's brief has been served on the persons listed below, by the method indicated, this 19th day of February, 2013:

//s// Cynthia Woelk
Cynthia Woelk

LIST OF PERSONS SERVED

Mr. Adam R. Abrams
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Attorneys for Plaintiffs
By Certified Mail, Return Receipt Requested

Divider Sheet

Proceeding Tab A

CAUSE NO. D-1-GN-11-002194

ANGELA BONSER-LAIN,	§	IN THE DISTRICT COURT OF
KARIN ASCOT, as next friend on behalf	§	
of TVH and AVH, minor children,	§	
BRIGID SHEA, as next friend on behalf	§	
of EAMON BRENNAN UMPHRESS,	§	
a minor child,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Defendant.	§	201st JUDICIAL DISTRICT

FINAL JUDGMENT

On the 14th day of June, 2012, came to be heard Defendant Texas Commission on Environmental Quality's First Plea to the Jurisdiction and the merits of the above-referenced cause. Plaintiffs and Defendant appeared through counsel.

After considering the pleadings, briefs, the administrative record, argument of counsel and the applicable law, the Court finds that Defendant's Plea to the Jurisdiction should be denied.

On the merits of the suit, the Court finds that Defendant's conclusion that the public trust doctrine in Texas is exclusively limited to the conservation of the State's waters and does not extend to the conservation of the air and atmosphere is legally invalid. Rather, the public trust doctrine includes all natural resources of the State including the air and atmosphere. The public trust doctrine is not simply a common law doctrine but was incorporated into the Texas Constitution at Article XVI, Section 59, which states: "The conservation and development of all of the natural resources of this State, ... and 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 thereto."

The Court further finds that the protection of air quality has been mandated by the Texas Legislature in the Texas Clean Air Act, which states, "The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants .... (b) It is intended that this chapter be vigorously enforced and that violations of this chapter ... result in expeditious initiation of enforcement actions as provided by this chapter." *See* Health & Safety Code § 382.002. The Texas Legislature has provided Defendant with statutory authority to protect the air quality by stating: "Consistent with applicable federal law, the commission by rule may control air contaminants as necessary to protect against adverse effects related to: (1) acid deposition; (2) stratospheric changes, including depletion of ozone; and (3) climatic changes, including global warming." *See* § 382.0205.

The Court also finds that Defendant's conclusion that it is prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act (FCAA), Section 109 is legally invalid. Defendant relies upon a preemption argument that the State of Texas may not enact stronger requirements than is mandated by federal law. The Court finds that the FCAA requirement is a floor, not a ceiling, for the protection of air quality, and therefore Defendant's ruling on this point is not supported by law. *See* 42 U.S.C. § 7604(e); *see also*, *Gutierrez v. Mobil Oil Company, et al.*, 798 F. Supp. 1280, 1282-84 (W.D. Tex. 1992) (J. Nowlin) ("[T]he Clean Air Act expressly permits more stringent state regulation. ... In the Clean Water Act and the Clean Air Act, Congress did not intend to preempt state authority. Congress intended to set minimum standards that

states must meet but could exceed. ... states have the right and jurisdiction to regulate activities occurring within the confines of the state.")

However, in light of other state and federal litigation, the Court finds that it is a reasonable exercise of Defendant's rulemaking discretion not to proceed with the requested petition for rulemaking at this time.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant's Plea to the Jurisdiction is DENIED, and that Defendant's June 22, 2011 final decision in Docket No. 2011-0720-RUL denying Plaintiff's petition for rulemaking is AFFIRMED.

It is also **ORDERED** that each party bear its own costs. All relief requested that is not expressly herein granted is DENIED.

This judgment resolves all claims of all parties and is intended to be final and appealable.

SIGNED this 2nd day of August, 2012.

Gisela D. Triana
Judge, 200th District Court
Travis County, Texas

Divider Sheet

Proceeding Tab B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**DECISION OF THE COMMISSION
REGARDING THE PETITION FOR RULEMAKING
FILED BY THE TEXAS ENVIRONMENTAL LAW CENTER
ON BEHALF OF ANGELA BOSNER-LAIN, KARIN ASCOT, AS NEXT FRIEND
ON BEHALF OF TVH AND AVH, MINOR CHILDREN, AND BRIGID SHEA,
AS NEXT FRIEND ON BEHALF OF EBU, A MINOR CHILD**

Docket No. 2011-0720-RUL

On June 22, 2011, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by the Texas Environmental Law Center on behalf of Angela Bosner-Lain, Karin Ascot, as next friend on behalf of TVH and AVH, minor children, and Brigid Shea, as next friend on behalf of EBU, a minor child (Petitioners). The petition, filed on May 5, 2011, requests that the agency initiate rulemaking to adopt by January 1, 2012, a greenhouse gas (GHG) reduction plan that when implemented limits carbon dioxide emissions in Texas from fossil fuels that results in a peak in emissions in the state by 2012; and beginning in January 2013, to reduce fossil fuel carbon dioxide emissions by at least 6% a year.

IT IS THE DECISION OF THE COMMISSION pursuant to Administrative Procedure Act (APA), Texas Government Code, § 2001.021 and Texas Water Code, § 5.102 to deny the petition.

Texas is currently in litigation with the U.S. Environmental Protection Agency (EPA) over the issue of regulation of GHG under the Federal Clean Air Act (FCAA). The commission has a fundamental disagreement with the EPA over how, and if, Congress intended GHG emissions should be regulated under the FCAA. Adoption of a rule to freeze emissions in 2012 would require the Commission to call in permits or revise permits at amendment or renewal for emissions not currently controlled. The Commission does not have this authority under the TCAA. Greenhouse gases, including CO2, are ubiquitous gases that occur relatively uniformly throughout the global atmosphere. As such, control 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. The basis for the petitioners' request for reductions on CO2 emissions is to achieve a level of 350 part per million (ppm) of CO2 in the atmosphere. The standard the petitioners propose for CO2 has not been developed through the proper mechanism under federal statute, in particular

FCAA section 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. In addition, the 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.

This Decision constitutes the decision of the Commission required by the Texas Government Code, § 2001.021(c).

Issued date: JUN 23 2011

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw

Bryan W. Shaw, Ph.D., Chairman

Divider Sheet

Proceeding Tab C

COPY

200TH DISTRICT COURT

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July 9, 2012

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RE: Cause No. D-1-GN-11-002194; In the 201st Judicial District Court of Travis Co., Tx.
Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality

Dear Counsel,

On June 14, 2012, the Court considered and took under advisement Defendant's plea to the jurisdiction and the merits in the above-referenced cause. The Court allowed the parties to submit additional briefing to the Court by June 28, 2012. After considering all briefing, the administrative record, and the applicable law, the Court will find as follows.

Although the Commission argues that the Court must affirm the Commission's action if there exists any valid basis, the Court finds that the agency cannot base such action on grounds that are not legally valid. The Court will examine each of the Commission's grounds to determine if a valid basis does support its decision.

The Court will find that the Commission's conclusion, that the public trust doctrine is exclusively limited to the conservation of water, is legally invalid. The doctrine includes all natural resources of the State. This doctrine is not simply a common law doctrine but was incorporated into the Texas Constitution at Article XVI, Section 59, which states: "The conservation and development of all of the natural resources of this State, ... and 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 thereto." The protection of air quality is mandated by the Texas Legislature in the Texas Clean Air Act (TCAA). *See* Health & Safety Code § 382.001 *et seq.* The Texas Legislature has provided the Commission with the authority to protect against adverse effects including global warming. *See* § 382.0205.

The Court will also find that the Commission's conclusion that it is prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act (FCAA), Section 109 is also legally erroneous. The Commission relies upon a preemption argument that the State of Texas may not enact stronger requirements than is mandated by federal law. The Court will find that the FCAA requirement is a floor, not a ceiling, for the protection of air quality, and therefore the Commission's ruling on this point is not supported by law. *See* 42 U.S.C. § 7604(e).

While the Commission states that it has no authority under the TCAA to regulate greenhouse gases, that issue is involved in separate litigation and is on appeal to the Third Court of Appeals. *See Public Citizen Inc. v. Texas Comm'n on Environmental Quality*; Cause No. D-1-GN-09-003426, in the 250th Judicial District Court of Travis County; Case No. 03-10-00296-CV (submitted on Aug. 3, 2011). Although Plaintiffs note the recent decision of the D.C. Circuit Court which involves the challenge by the State of Texas and other states to the actions of the Environmental Protection Agency, that decision is not final and it will likely be appealed to the U.S. Supreme Court. Because the legal landscape is uncertain, the Court will find, at this time, the Commission's refusal to exercise its authority based on current litigation is a reasonable exercise of its discretion.

Mr. Abrams, please draft an order that reflects the Court's ruling, circulate it to opposing counsel for approval as to form, and submit it to me for my signature. Thank you.

Sincerely,

Gisela D Triana

Gisela D. Triana
Judge, 200th District Court
Travis County, Texas