

NO. 03-10-00296-CV

In the Court of Appeals  
for the Third Judicial District  
Austin, Texas

FILED IN  
3rd COURT OF APPEALS  
AUSTIN, TEXAS  
8/2/2013 5:31:47 PM  
JEFFREY D. KYLE  
Clerk

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,  
*Appellant,*

v.

PUBLIC CITIZEN, INC.,  
*Appellee,*

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On appeal from the 250th Judicial District Court  
Travis County, Texas  
Trial Court No. D-1-GN-09-003426

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**APPELLEE'S NOTICE OF FILING NONSUIT IN THE DISTRICT COURT  
OF TRAVIS COUNTY, TEXAS**

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellee Public Citizen, Inc. submits this Notice of Filing Nonsuit in the District Court of Travis County, Texas, pursuant to this Court's Memorandum Opinion dated July 16, 2013. Public Citizen filed a Notice of Nonsuit in the 250<sup>th</sup> Judicial District Court of Travis County, Texas on July 26, 2013, dismissing its claims against the Texas Commission on Environmental Quality (TCEQ). Proof of this filing is attached as Exhibit A. Public Citizen respectfully requests that this appeal be also dismissed, without prejudice.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by /s/ Charles W. Irvine

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*Attorneys for Appellee*

**CERTIFICATE OF SERVICE**

On this 2nd day of August, 2013, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via electronic filing system and/or email and/or U.S. First Class Mail.

/s/ Charles W. Irvine  
Charles W. Irvine

J. Reed Clay, Jr.  
Assistant Solicitor General  
OFFICE OF THE ATTORNEY GENERAL  
Environmental Protection Administrative Law Division  
P.O. Box 12548 (MC059)  
Austin, Texas 78711-2548  
(512) 469-3180 Fax

# **EXHIBIT A**

CAUSE NO. D-1-GN-09-003426

PUBLIC CITIZEN, INC.,	§	IN THE DISTRICT COURT OF
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
THE TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY, <i>et al.</i> ,	§	
	§	
<i>Defendants.</i>	§	250 <sup>th</sup> JUDICIAL DISTRICT

NOTICE OF NONSUIT

COMES NOW Public Citizen, Inc., Plaintiff. This case is currently on interlocutory appeal in the Court of Appeals, Third District, Austin, No. 03-10-00296-CV. Public Citizen, Appellee above, moved to dismiss as moot the case due to recent EPA actions meaning that Carbon dioxide is now regulated as an air pollutant under the federal Clean Air Act. The Court of Appeals issued a Memorandum Opinion (Attachment A) holding that dismissal is available pursuant to Tex. R. Civ. P. 162; See *University of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam) (trial court must dismiss case even when interlocutory appeal is pending). Furthermore, recent Texas legislation—H.B. 788—amends the Texas Clean Air Act, to require the Texas Commission on Environmental Quality (“TCEQ”), to establish a permitting program to regulate greenhouse gas (“GHG”) emissions to the extent that greenhouse gas emissions require authorization under federal law. Tex. Health & Safety Code § 382.05102(b)–(c).

In light of these developments, Public Citizen hereby gives notice to this Court and to all parties in this suit that it is taking a nonsuit, without prejudice, as to all of its claims and causes of actions against the Texas Commission on Environmental Quality and each in his official capacity, Bryan W. Shaw as TCEQ Chairman, H.S. Buddy Garcia as TCEQ Commissioner, Carlos

Rubenstein as TCEQ Commissioner, and Mark R. Vickery as TCEQ Executive Director,  
(collectively “TCEQ”), Defendants, effective immediately on the filing of this notice.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by /s/ Charles W. Irvine

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**CERTIFICATE OF SERVICE**

On this 26<sup>th</sup> day of July, 2013, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via electronic filing service and/or e-mail.

/s/ Charles W. Irvine

Charles W. Irvine

J. REED CLAY, JR.  
Assistant Solicitor General  
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Nancy Elizabeth Olinger, Assistant Attorney General  
Cynthia Woelk, Assistant Attorney General  
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***ATTACHMENT***  
***A***

RECEIVED  
JUL 18 2013

**COURT OF APPEALS  
FOR THE  
THIRD DISTRICT OF TEXAS**  
P.O. BOX 12547, AUSTIN, TEXAS 78711-2547  
(512) 463-1733

Date: July 16, 2013

Case Number: 03-10-00296-CV

Trial Court No.: D-1-GN-09-003426

Style: Texas Commission on Environmental Quality v. Public Citizen, Inc.

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The enclosed opinion was sent this date to the following persons:

The Honorable Gisela D. Triana  
Travis County District Judge  
200th Distict Court  
P. O. Box 1748  
Austin, TX 78767-1748

Mr. J. Reed Clay  
Office of the Attorney General  
Assistant Solicitor General  
P. O. Box 12548 (MC 059)  
Austin, TX 78711-2548

The Honorable Amalia Rodriguez-Mendoza  
Civil District Clerk  
Travis County Courthouse  
P. O. Box 1748  
Austin, TX 78767

Mr. Charles W. Irvine  
Blackburn Carter, P. C.  
4709 Austin Street  
Houston, TX 77004



**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-10-00296-CV**

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**Texas Commission on Environmental Quality, Appellant**

**v.**

**Public Citizen, Inc., Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT  
NO. D-1-GN-09-003426, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

**PER CURIAM**

Appellee Public Citizen, Inc., as part of its motion to dismiss this interlocutory appeal as moot, has asked in the alternative that this Court remand for the limited purpose of allowing Public Citizen to voluntarily dismiss its claims against appellant Texas Commission on Environmental Quality (TCEQ) in the trial court. TCEQ opposes the motion. However, it is not apparent that Public Citizen needs permission from this Court to dismiss its own case. Under the Texas Rules of Civil Procedure, “[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes.” Tex. R. Civ. P. 162. Rule 162 is applicable here because this is an interlocutory appeal from the trial court’s denial of TCEQ’s plea to the jurisdiction. *See University of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per

curiam). Because the trial court generally does not have discretion to refuse to dismiss a suit, Public Citizen has the absolute right to dismiss its claims. See *CTL/Thompson, LLC v. Starwood Homeowner's Ass'n*, 390 S.W.3d 299, 299 (Tex. 2013) (per curiam).<sup>1</sup>

Nevertheless, because Public Citizen has sought permission from this Court to dismiss its suit below, we abate this appeal for thirty days for the sole purpose of allowing Public Citizen to dismiss its claims against TCEQ in the trial court. Public Citizen shall file in this Court proof of its dismissal or nonsuit on or before August 15, 2013. If such proof is not filed in this Court by that date, this appeal will be reinstated. Having decided to abate this appeal, we do not reach Public Citizen's motion to dismiss at this time. Tex. R. Civ. P. 47.1.

Before Justices Rose, Goodwin, and Field

Abated

Filed: July 16, 2013

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<sup>1</sup> Although a nonsuit may not prejudice the rights of an adverse party to be heard on its pending claims, TCEQ's plea to the jurisdiction based on sovereign immunity is not a claim for affirmative relief that survives nonsuit. See *CTL/Thompson, LLC v. Starwood Homeowner's Ass'n*, 390 S.W.3d 299, 300–01 (Tex. 2013) (per curiam); *University of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam).