COPY

200TH DISTRICT COURT

GISELA D. TRIANA
Judge

JAMES T. PARSONS
Staff Attorney
(512) 854-4916

JACOB STOKES
Court Operations Officer
(512) 854-9306

TRAVIS COUNTY COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767

LaDELLE ABILEZ
Official Court Reporter
(512) 854-9325

LYDIA MARTINEZ
Court Clerk
(512) 854-5838

July 9, 2012

Mr. Adam R. Abrams
Texas Environmental Law Center
P.O. Box 24053064
Austin, Texas 78768
Via fax to (512) 687-5342

Ms. Cynthia Woelk
Ms. Nancy Olinger
Assistant Attorneys General
Environmental Protection Division
P.O. Box 12548
Austin, Texas 78711-2548
Via fax to (512) 320-0052

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
Judge, 200th District Court
Travis County, Texas