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Commissioner Ryan Sitton
Railroad Commission of Texas
1701 North Congress Avenue
Austin, Texas 78701

Dear Commissioner Sitton:

We were asked to provide our legal opinion as to whether a constitutional name change of the Railroad Commission has any impact on the U.S. EPA's delegation of the Underground Injection Control (UIC) Program to the Railroad Commission. In other words, whether a name change could provide a basis for EPA to potentially reconsider and/or revise the delegated authority. We do not believe that a name change provides such a basis.

A. Legal setting

The Safe Drinking Water Act ("SDWA"), Part C, establishes the UIC program. 42 U.S.C. § 300h, *et seq*. The SDWA requires states to submit applications to EPA for implementing UIC programs. If approved by EPA, a state can assume primary enforcement responsibility for the UIC program (primacy). If a state's plan is not approved, EPA will implement the program. EPA has delegated UIC authority to both the Railroad Commission and the Texas Commission on Environmental Quality in accordance with these provisions.

With respect to Class II injection wells, which are within the Railroad Commission's jurisdiction, a state has the option of requesting primacy under either Section 1422 or 1425 of the SWDA. The Railroad Commission received primacy from the EPA to administer a state UIC program for Class II wells on May 23, 1982. The program was approved by EPA pursuant to Section 1425 of SWDA. *See* 40 CFR 147.2201. The Railroad Commission also has primacy for Class III brine mining wells, which was approved by EPA pursuant to Section 1422 of SWDA and became effective on March 26, 2004.

B. A name change has no impact on EPA's delegation of UIC authority to a state, under either a Section 1425 approval or the more stringent 1422 approval process

a. Section 1425 approvals

Section 1425 authorizes EPA to approve the portion of a state's UIC program that relates to (1) the underground injection of brine or other fluids which are brought to the surface in connection with oil or gas production; or (2) any underground injection for the secondary or

tertiary recovery of oil or natural gas, if the program meets certain requirements of Section 1421 of SWDA, and is "effective" in preventing endangerment of underground sources of drinking water.[1] As noted, Section 1425 of SWDA provides an alternative means for states to acquire primacy and requires a different legal standard to be met. Whereas primacy pursuant to Section 1422 of SWDA requires states to be as stringent as specific EPA regulations, Section 1425 allows states to generally demonstrate that their existing standards are "effective" in preventing endangerment of underground sources of drinking waters. *See* SDWA Sections 1422(b)(1)(A) and 1425(b). Accordingly, Section 1425 offers states an approval alternative that is not tied to the detailed regulatory requirements for Class II wells found at 40 CFR Parts 124, 144, 145, and 146. Approval under Section 1422, on the other hand, requires that the state UIC program meet the requirements in effect under Section 1421. Those regulations, which are found at 40 CFR 124, 144, 145, and 146, are detailed and specific. *See* 40 CFR 145(b)(1).

As such, a State has more flexibility in developing a section 1425 Class II program than if it were developing the same program for approval under Section 1422. Similarly, EPA has more discretion to approve a Class II program under Section 1425 criteria because that program does not have to be as stringent as the Class II related requirements set out in the regulations. Under Section 1425(c)(2) the state primacy continues until EPA determines, by rule, that the state's demonstration is no longer valid.

This discussion is significant to the instant inquiry insofar as it demonstrates that EPA's ability to reopen earlier approval decisions is much more difficult for Section 1425 approvals than Section 1422 approvals. This is specifically because Section 1425 approvals are more performance based and not tied to specific regulatory criteria, thus hampering EPA's ability to reopen approvals based on changes that do not have an impact on the overall goal of protecting underground sources of drinking water. A name change by a state agency alone does not provide a basis for EPA to reopen a prior approval, as such an action has no impact whatsoever on the Railroad Commission's "effectiveness" demonstration.

Moreover, EPA has not promulgated regulations pursuant to Section 1425, whereas it has done so under Section 1422. As a result, there are no regulations that address the procedures a state that has obtained approval under Section 1425 must follow if there are any changes to its

[1] 42 U.S.C. §300h-4. SDWA Section 1425 was added by the Safe Drinking Water Act Amendments of 1980, P.L. 96-502. The House committee report accompanying the legislation that added Section 1425 noted as follows:

> Most of the 32 states that regulate underground injection related to the recovery or production of oil or natural gas (or both) believe they have programs already in place that meet the minimum requirements of the Act including the prevention of underground injection which endangers drinking water sources. This is especially true of the major producing states where underground injection control programs have been underway for years. It is the Committee's intent that states should be able to continue these programs unencumbered with additional Federal requirements if they demonstrate that they meet the requirements of the Act. (U.S. House of Representatives, Committee on Interstate and Foreign Commerce, *Safe Drinking Water Act Amendments*, H. Rept. 96-1348 to accompany H.R. 8117, 96th Congress, 2d Session, September 19, 1980, p. 5.)

program. Although not applicable to approvals under Section 1425, which constitute the significant majority of wells under the Commission's jurisdiction (Class II wells), we can use the regulations promulgated under Section 1422 as guidance.[2] The discussion below demonstrates that even under the more rigid Section 1422 process, a name change alone would not constitute a program revision. Indeed, arguably even notification to EPA, although advisable, is not required for a simple name change of an administrative agency with an approved UIC program.

b. Section 1422 Approvals

40 CFR 145.32(a) provides that a "program revisions may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented." A simple name change of an administrative agency does not modify the controlling state statutory or regulatory authority over the UIC program. 40 CFR 145.32(b) provides that "substantial" program revisions trigger notice and comment requirements, and require EPA to make a determination as to whether the change satisfies applicable statutory and regulatory requirements. The term "substantial" is not defined in the regulation, but through guidance, EPA has stated that it considers substantial revisions to include:

1. Modifications to the State's basic statutory or regulatory authority which may affect the State's authority or ability to administer the program;
2. A transfer of all or part of any program from the approved State agency to any other State agency;
3. Proposed changes which would make the program less stringent than the Federal requirements under the UIC regulations (or the Safe Drinking Water Act, for Section 1425 programs);....

EPA, Guidance for Review and Approval of State Underground Injection Control (UIC) Programs and Revisions to Approved State Programs, GWPB Guidance #34, at p. 5. Even if a simple name change constituted a "program revision," which it does not, it does not fall within the type of change that EPA considers to be a "significant" program revision. Such a change would therefore be non-substantive and would not provide EPA the authority to re-open and review the underlying delegated UIC program.

In our opinion, a name change alone does not constitute a program revision under a Section 1422 approval. Indeed, arguably, a name change does not even trigger notification to EPA. 40 CFR 145.32 states that a state "shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities." A simple name change does not modify statutory or regulatory authority, procedures, or priorities of the administrative agency. Certain forms will have to be changed if an administrative agency changes its name, but given the context of this section, this requirement addresses modifications more significant than a name change on an agency form.

[2] Note that this discussion is applicable to the Commission's administration of Class III brine mining wells.

C. Recommended modifications to H.J.R. 76 and H.B. 1106

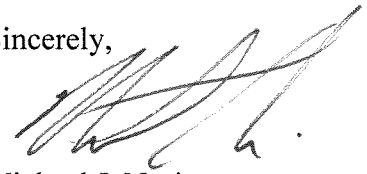
H.J.R. 76 modifies Section 30(b), Article XVI, Texas Constitution, to read as follows: "When a Texas Energy Commission is created by law it shall be composed of three Commissioners,..." This language may be perceived as more than a mere name change of an existing agency. To avoid this perception, we recommend that the language be modified to read as follows: "The Texas Energy Commission shall be composed of three Commissioners,..."

Section 3(c) of H.B. 1106 states that "The Texas Energy Commission is the successor to the Railroad Commission in all respects." This language can similarly be read to mean that the change is something more than a name change of an existing agency. We recommend the deletion of this language altogether to avoid such a reading.

D. Conclusion

Whereas significant structural changes of the Railroad Commission might warrant a different analysis, a simple name change will not create EPA delegation problems. The Commission's Class II UIC program was approved by EPA pursuant to Section 1425 of SWDA. Section 1425 was added as part of the 1980 amendments to the SDWA to offer States an approval alternative that was not necessarily tied to the detailed regulatory requirements for Class II wells found at 40 CFR Parts 124, 144, 145, and 146. As a result of the difference in the legal standards between Section 1422 and 1425 approvals, EPA's ability to reopen earlier approval decisions is much more difficult for Section 1425 approvals than Section 1422 approvals. A name change by a state agency alone does not provide a basis for EPA to reopen a 1425 approval (Class II wells), as such an action has no impact whatsoever on the Railroad Commission's "effectiveness" demonstration. Significantly, even under the more rigid Section 1422 process, a name change alone would not provide EPA with the authority to re-open and review the underlying delegated UIC program and disrupt the state's activities. In our opinion, a bill changing the name of the Railroad Commission alone will not provide the EPA with the authority to disrupt the Commission's administration over either Class II or Class III wells.

Sincerely,



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