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MEMORANDUM

TO: Chairman Darby and Members of House Energy Resources Committee

FROM: John R. Hays, Jr. and Alicia R. Ringuet

RE: H.J.R. 76, H.B. 1106, and EPA delegation authority

DATE: April 17, 2015

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The pending H.J.R. 76 and H.B. 1106 would provide for placing on the ballot a constitutional amendment to change the name of the Railroad Commission to the "Texas Energy Commission." Through this letter, we provide an opinion regarding the impact, if any, that a mere name change would have on the federal Environmental Protection Agency's ("EPA") delegation to the Commission of the underground injection control ("UIC") program authority. We believe that merely changing the agency's name would not affect the delegation of UIC authority to the Commission. This is because, with regard to the vast majority of wells within the Commission's jurisdiction, the EPA cannot rescind UIC authority absent a determination that the Commission's program is ineffective at protecting groundwater. Other wells under the Commission's authority – namely, brine mining wells – are subject to more onerous requirements, but even this authority is not in jeopardy for two basic reasons. First, the name change would not be a "program revision" under the applicable regulations – nothing about the actual program would change. Second, even if a mere name change were considered a "program revision," it would be at most a "non-substantial" program revision.

A. Background and Introduction

From time to time it has been suggested that the name of the Railroad Commission be changed to reflect the agency's current jurisdiction and responsibility, including the fact that it no longer regulates railroads. In this context, some have raised the question as to whether a name change might affect the EPA's delegation of UIC authority to the Commission. It is our opinion that merely changing the name of the Commission would not jeopardize the Commission's delegated authority to administer the UIC program.

B. Merely changing the Commission's name would not authorize EPA to disrupt the State's energy development and production or the Commission's activities.

Subchapter C of the Safe Drinking Water Act ("SDWA") establishes the federal UIC program, which focuses on protecting groundwater. 42 U.S.C. § 300h, *et seq*. The SDWA allows states to submit plans to the EPA for implementing UIC programs and, if approved by EPA, to assume primary UIC responsibility. If a state's plan is not approved, the EPA will implement the program. The EPA has approved state plans and delegated UIC authority to both the Railroad Commission and the Texas Commission on Environmental Quality in accordance with these provisions.

UIC authority was initially delegated to the Railroad Commission on April 23, 1982, under two separate sections of the SWDA – Sections 1422 and 1425. 47 FR 17488-01. Section 1425 covers the "Class II" injection wells that are traditionally directly associated with oil and gas activity, including injection wells that dispose of oil and gas waste, injection wells used for enhanced recovery of oil and gas, and underground hydrocarbon storage wells. The EPA delegated UIC authority over brine mining injection wells, which are "Class III" injection wells, to the Railroad Commission under Section 1422.[1]

Thus, authority over the vast majority of the injection wells under the Commission's jurisdiction was delegated under Section 1425 rather than 1422. This is important, because the statutory requirements relating to a state's obtaining UIC authority are far less onerous under Section 1425, and also because the EPA's ability to rescind delegated authority is much more limited under Section 1425. Section 1425 provides that the EPA may delegate UIC authority if a state can establish, among other requirements, that it has an "effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." 42 U.S.C.A. § 300h-4. Once the EPA delegates authority under Section 1425, the state retains primary UIC responsibility "until such time as the Administrator determines, by rule, that such demonstration [that the state has an effective program] is no longer valid." 42 U.S.C.A. § 300h-4(c)(2). This is a difficult standard to satisfy, and simply changing the

[1] This is because, under the SDWA, Section 1425 may be applied to delegate authority over "Class II" oil and gas wells only.

name of the agency in charge of the UIC program clearly has no impact on the EPA's determination regarding the effectiveness of the Commission's UIC program.

A name change could not, therefore, affect the Commission's UIC program authority over most wells that fall within the Commission's UIC program.

a. The proposed name change should not be considered a "program revision" under Section 1422 of the SDWA.

Authority over brine mining wells was delegated by the EPA to the Railroad Commission under Section 1422. Under this section, states are required to "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities." 40 C.F.R. § 145.32. When a state makes such a "program revision," the EPA must approve the revision to the state's UIC program. *Id.*

It is not the case that any change to a state agency is a "program revision" requiring EPA approval in accordance with Section 145.32. The EPA has provided that:

> Revisions to State UIC programs require EPA approval or disapproval actions *only if they are within the scope of the Federal UIC program.* Aspects of the program which are beyond the scope of the Federal UIC regulations are *not considered program revisions under §145.32.*

EPA, *Guidance for Review and Approval of State Underground Injection Control (UIC) Programs and Revisions to Approved State Programs*, GWPB Guidance #34, at p. 4 (hereinafter, "EPA Guidance #34") (emphasis added). A revision to an agency's name alone is clearly not within the scope of the federal UIC program. We believe that the name change would not in fact be a "program revision" under the regulations and should not require EPA approval or even notification under the UIC program.

b. Even if the proposed name change were considered to be a "program revision," it would be a "non-substantial" revision that would not affect the Commission's delegated UIC authority.

Changing the Commission's name should not be considered a "program revision" under Section 1422 of the SDWA. Even if it were, though, merely changing the

Commission's name would be a "non-substantial" revision and therefore would not provide the EPA with the authority to review the underlying delegated UIC program and thereby potentially disrupt the State's energy activities.

The procedural requirements relating to program revisions under Section 1422 depend on whether the revision is "substantial" or "non-substantial." When the EPA determines that a revision is substantial, it will issue notice, provide the opportunity for hearing, and determine whether the proposed revision satisfies its applicable rules and the SDWA. 40 C.F.R. § 145.32(b)(2)-(3). Once the Administrator approves the program revision, notice is published in the Federal Register. In contrast, non-substantial program revisions need not go through this formal rulemaking process and can be approved by letter to the governor.

EPA's rules do not define "substantial" or "non-substantial" UIC program revisions, but the EPA has provided guidance on this issue and considers substantial revisions to include the following:

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); and

4. Proposed exemptions of an aquifer containing water of less than 3,000 mg/l TDS which is: (a) related to any Class I well; or (b) not related to action on a permit, except in the case of enhanced recovery operations authorized by rule.

EPA Guidance #34, at p. 5. Any program revision that is not considered "substantial" is a "non-substantial" revision. *Id.*

Even if a name change were somehow considered to be a "program revision" under Section 1422 of the SDWA, it would be a "non-substantial" revision.[2] While Texas and the EPA have conflicted in the past, we do not believe the EPA would use the proposed name change to attempt to disrupt the Commission's delegated authority or the State's energy activities, as the name change clearly appears to be, at most, a non-substantial revision (if it were even properly considered to be a "program revision"). Of note, it is our understanding that both the EPA Region 6 office in Dallas, and the Texas Attorney General's office view it this way, namely that a mere name change would at most be a non-substantial revision under the applicable regulations.

C. Note on certain language in H.J.R. 76 and H.B. 1106

a. H.J.R. 76

H.J.R. 76 provides the text of the proposed constitutional amendment to change the name of the Railroad Commission to the Texas Energy Commission. The proposed language in Section 30(b), Article XVI, Texas Constitution, would retain the existing introductory phrase, changing the reference to the Energy Commission, to read "When a Texas Energy Commission is created by law, it shall be composed. . ."

We would recommend that this be simplified as was done with certain other language in this section 1999 amendment. The simplification would be to delete the introductory phrase "When a Texas Energy Commission is created by law" so that it would read "The Texas Energy Commission shall be composed. . ." This would also lessen the chance that someone might argue that the Texas Energy Commission was a new agency rather than just a renamed Railroad Commission.

b. H.B. 1106

Section 3(c) of H.B. 1106 states in the first sentence that "The Texas Energy Commission is the successor to the Railroad Commission in all respects." We recommend that this sentence be deleted because it is not necessary and could be read to

[2] If a bill does not merely seek to change the Commission's name, but instead to abolish the Railroad Commission, to create a new agency, and to transfer the Railroad Commission's responsibilities to the new agency, that might be considered a "substantial" revision, as it would involve the "transfer of all or part of any program from the approved State agency" to a different agency.

establish the Texas Energy Commission as a new (successor) agency rather than simply a name change as stated in Section 3(a)(1). While this should not be a problem, the recommended change could help reduce potential confusion.

D. Conclusion

A bill or Constitutional amendment that does not affect any substantive change to the Commission, its structure, its powers, or its duties and will in no way affect its authority or ability to administer the UIC program should not be considered a "program revision," as defined in the EPA's policy statement. Even if it were considered to be a "program revision" as the term is used in Section 145.32 of the Code of Federal Regulations, such a name change certainly would not be a "substantial" change under the SDWA or EPA's rules or policies. Moreover, most of the wells within the Commission's jurisdiction are not even subject to this analysis. Authority over these wells is unaffected unless the EPA determines that the Commission's UIC program is ineffective at protecting groundwater. A mere name change would not change the effectiveness of the existing program.

It is our opinion, therefore, that a bill changing the name of the Commission alone will not provide the EPA with the authority to disrupt the Commission's UIC authority or oil, gas, and energy activities in the State.

cc: Railroad Commission Chairman Christi Craddick
Railroad Commissioner David Porter
Railroad Commissioner Ryan Sitton

Representative Larry Phillips