

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

ANGELA BONSER-LAIN,
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.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Defendant.

§ IN THE DISTRICT COURT OF
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§ TRAVIS COUNTY, TEXAS
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§
§ 201st JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

AUG 12 2012 BP

At _____
Amalia Rodriguez-Mendoza, Clerk

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.”)

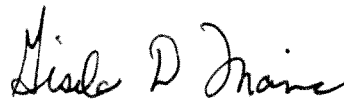
However, in light of other state and federal litigation, the Court finds that it is a reasonable exercise of Defendant’s rulemaking discretion not to proceed with the requested petition for rulemaking at this time.

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.

A handwritten signature in black ink, appearing to read "Gisela D. Triana", is written over a horizontal line.

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