

Testimony of Jim Marston

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In 1867, Mark Twain wrote, “The most outrageous lies that can be invented will find believers, if a man only tells them with all his might.” Sadly, that is what is going on here. The members of this committee have been fed some Texas-sized whoppers by certain Texas officials.

This Committee has passed legislation that would strip EPA of its authority to regulate greenhouse gases. Unfortunately, this legislation provides no alternatives for reducing harmful climate-disrupting pollution and is based entirely on misconceptions about EPA’s role in regulating these deleterious pollutants. When it comes to the flexible permitting system and the regulation of greenhouse gases the problem isn’t EPA – it’s Texas.

The legal background:

EPA has a non-discretionary legal responsibility to supervise all Clean Air Act permits in all the States, including Texas, to ensure compliance with the Federal Act.

EPA is not some interloper, butting into the business of the Texas. Like many other federal environmental statutes, the Clean Air Act is founded on cooperative federalism. Congress “offer[ed] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.” *New York v. United States*, 505 U.S. 144, 167 (1992). For example, under the Act states have the opportunity to implement the pre-construction review permit program required through federally-approved state programs. See *Alaska Dept. of Env’tl. Cons. v. EPA*, 540 U.S. 461, 472-74 (2004). But the Act provides EPA with “encompassing supervisory responsibility” over preconstruction permitting, *id.* at 484 (citing 42 U.S.C. §§ 7413(a)(5), 7477). “In notably capacious terms, Congress armed EPA with authority to issue orders stopping construction when ‘a State is not acting in compliance with any [Clean Air Act] requirement or prohibition ... relating to the construction of new sources or the modification of existing sources,’ § 7413(a)(5), *ADEC*, 540 U.S. at 484.

As early as 1989, Texas specifically promised to follow EPA guidelines on air permits. Now Texas has reneged on that promise. The air quality review permit program under the nation’s Clean Air Act ensures large pollution sources deploy cost-effective, made in America solutions to reduce the harmful airborne contaminants that will be discharged over the life of the facility, with many major facilities operating for half a century or longer.

On September 5, 1989, in obtaining the delegation of the federal PSD permitting program, the predecessor agency to TCEQ told EPA, and the public, that Texas is committed to the implementation of EPA decisions regarding PSD program requirements [Appendix 1]. In the proposed rule recommending that Texas receive delegation published in the Federal Register on

December 22, 1989, EPA stated, "[A]ction by the EPA to approve this PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations." [Appendix 2- 54 Fed. Reg. 245, 52823 (Dec. 22, 1989)]. The final rule reiterated that obligation of Texas and the on-going supervisory role of EPA. [Appendix 3 - Texas 57 Fed. Register No. 122 28093 (June 24, 1992)].

Not only has Texas made promises that EPA is legally required to monitor and enforce, but the TCEQ gets about \$43 million dollars a year from the federal government for which EPA has a fiduciary duty to the taxpayer to assure this money is not squandered or misappropriated for purposes other than its intended legal use.

Myths about Flexible Permits in Texas

Myth No. 1:

The only reason why EPA has objected to the Texas "flexible permits" is because President Obama is "punitive" against "big, red" Texas.

The Facts:

EPA has raised concerns about the illegality of the Texas flexible permitting programs since 1994. The Bush Administration in 2006 and 2008 wrote letters saying that the Texas program did not meet the legal standard of the Clean Air Act. This is not a new complaint by EPA and it is not political. The only people playing politics are Texas officials who are misrepresenting the facts.

EPA has raised concerns about the illegality of the Texas flexible air permits since **1994**. I will discuss the illegal nature of the paper later in this testimony. The Environmental Protection Agency raised concerns about the program when it was first proposed [Appendix 4 -Oct 3 hearing letter from EPA]. The TCEQ never seriously addressed the legal concerns of EPA. The legal problems with flexible permits have spanned the terms of three Texas Governors and three U.S. Presidents respectively. And contrary to testimony that you'll hear today, EPA has not been silent on the issue – rather Texas has been deaf.

Following years of patience with TCEQ's repeated attempts to develop a legal permitting program, and many further attempts to work with Texas, the Bush EPA wrote formal letters to Texas laying out the legal problems with their flexible permits [Appendices 5 and 6 – letters from April 11, 2006 and March 12, 2008]. EPA under President George W. Bush issued a letter to flexible permit holders in 2007 [Appendix 7 – letter to industry from EPA], notifying the TCEQ that their permits issued under the flexible permit program did not comply with the Clean Air Act. While intelligent companies made the decision to transition out of their flexible permits upon receipt of their letter, others (often egged on by counsel who had wrongly advised them that the flexible permits were legal) decided to sue EPA to force a decision on the issue of flexible permits and other portions of the Texas permitting program.

As a result of the industry lawsuit, EPA settled with the industry plaintiffs and agreed to a deadline of June 30, 2010 to make a formal ruling on the Texas flexible permitting program. On

June 30, 2010, EPA gave industry the clarity and certainty they asked for. EPA formally announced to Texas the same thing that they'd been saying to Texas for over 15 years, the same position as the Bush EPA – that the flexible permitting program did not comply with the long-standing protections under the Clean Air Act.

It is more than a myth; it is a serious misrepresentation to claim that EPA's concern about the illegality of the Texas program began with the Obama administration or that EPA's action is a result of the way Texas voted in recent elections.

Myth No. 2:

The Texas flexible permit program has resulted in large emission reductions.

The Facts:

The improvement in air quality is due to factors other than the flex permitting program, mainly national clean air protections and EPA enforcement actions.

Air Quality has improved in Texas, but the improvement is in spite of, not because of the flexible permitting program. The vast majority of the documented reductions of emissions in Texas are from the following five actions:

1. Consent decree settlements between **U.S. EPA** and several Texas facilities. These agreements alone have accounted for 21,967 tons per year of NOx reductions and 54,280 tons per year of SO2 reductions found in Appendix 8;
2. Emissions controls in many parts of the state adopted as part of the **federally required State Implementation Plan (SIP)**. In the Houston area, for example, point source NOx emissions have been cut by approximately 80% and stringent limits placed on highly reactive VOCs. A more complete list of control measures can be found in Chapter 4 of the Adopted HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard.
3. **National emission standards for vehicles and engines** that have been adopted by the EPA. A few of the most recent standards adopted can be found in Appendix 9.
4. **Citizen suits under the Federal Clean Air Act** against industry have resulted in large emission reductions. For example, a recent settlement between Sierra Club and Shell refinery requires that Shell reduce its emissions from upset emission events by nearly three-quarter of a million pounds per year.
5. Emission reductions from use of infrared technologies such as the infrared camera have caught permit violations and required reductions that are estimated to be 7,000 tons of volatile organic compounds per year.
6. Emission reductions from SB 7 in 1999 that statutorily required "grandfathered" plans to reduce their emissions by 50%.

Even with these reductions, however, Texas air quality is nothing to brag about [Appendix 10]. Over 66% of Texans breathe air that is considered unhealthy. And the TCEQ themselves has identified 13 areas around the state where Texas citizens are at increased risk for health effects from air toxics [Appendix 11]. Many of these areas have shown no improvement over the years.

Myth No. 3:

Flexible Permits are legal and just as good at protecting the public as the permits in other states.

The Facts:

The flexible permits are unenforceable, don't protect public health, and have far higher emission rates of pollution than at facilities in other states with enforceable, transparent, legally compliant permits limiting air pollution discharges.

- 1. The flexible permit pollution trading system is unenforceable and fails to protect public health.** Flexible permits allow sources to lump hundreds of pieces of polluting equipment under a single pollution limit. Because most of the equipment is not monitored, it is almost impossible to determine whether or not companies are complying with their pollution caps.
- 2. Flexible permits eliminate individual unit-specific pollution limits designed to protect public health.** Flexible permits eliminate Clean Air Act, unit-specific, pollution limits that are intended to assure that public health is protected from industrial air pollution. This means that facilities could alter the location of their emissions, including increasing emissions at the fence line, concentrating exposures to neighbors, without having to address any of the impacts that might affect air quality or the surrounding community.
- 3. Flexible permit emission caps violate the principle of Best Available Control Technology (BACT).** Industry made a covenant with the public at the time of the enactment of the Clean Air Act in 1970. In return for not having to have existing plants meet new air standards, industry agreed that every time they made a major investment in the project, they would simultaneously up-grade their pollution controls to meet a standard called Best Available Control Technology. Flexible permits because there is an overall cap rather than an individual source limit, allow companies to avoid having to meet BACT, as long as they do not exceed the overall cap. Texans are not getting the continuous improvement that other states get because of the Texas flexible permit.

Myth No. 4:

The disapproval of Texas's unique "flexible" permitting program is costing jobs.

The Facts:

This is now much ado about nothing, because almost all of the companies with flex permits have come forward with proposals that will result in them having legal and better permits within the year.

You may have heard claims by some that EPA's disapproval of the flexible permit program has resulted in some unnamed, mysterious company from coming to Texas. First, states across the nation – other than Texas – comply with the Clean Air Act by ensuring the largest polluters put in place cost-effective, Made-in-America solutions to reduce their harmful air pollution.

Industrial facilities operate just fine in those states. Texas company executives are not dumber or less resourceful than their counter-parts and can likewise make money while following the Clean Air Act permit protections employed in other states.

In Texas, now that they have a clear ruling, Texas companies are coming in left and right to get deflexed permits. Of the 74 companies with legally flawed Texas flex permits, 71 have informed the EPA that will revise their permits or “deflex” their permits in order bring their permits in compliance with the Clean Air Act with the next year.

As is often the case with environmental policy these days, industry is ahead of many of the politicians.

The Big Lies about EPA Greenhouse Gas permitting actions in Texas

Lie No. 1:

EPA is picking on poor little ol’ Texas.

The Truth:

Texas is an outlier among all the states. Texas alone decided not to modify its permitting program to comply with the law.

On, December 1, 2010, EPA released the State Implementation Plan (SIP) Call Rule for greenhouse gas emissions that flowed from the Supreme Court decision in Massachusetts v. EPA. In the SIP call, EPA found that Prevention of Significant Deterioration (PSD) permitting regulations in 13 states did not meet CAA requirements because their programs did not cover GHG emissions. EPA asked those states to change their laws and submit those changes as a part of a revised SIP for review and approval, giving them one year to change their laws. Twelve states cooperated, Texas alone refused to cooperate with EPA’s efforts to apply GHG requirements in the PSD program.

In order to allow industry in Texas to be able to obtain legal permits, the EPA was forced to issue a Federal Implementation Plan (FIP) and to handle the responsibility of issuing the PSD permits for stationary power plants, large factories and other industrial facilities.

EPA had no other choice – Texas refused to take the responsibility of granting permits.

Lie No. 2:

EPA is acting unilaterally and without Congressional authorization.

The Truth:

EPA is enforcing the Clean Air Act as written, and as interpreted by the Supreme Court. It is not that EPA is engaging in its own discretionary program -- it has acted pursuant to mandatory CAA requirements that EPA regulate where, as here, a pollutant endangers the public.

What the Upton bill will do is slash away at longstanding provisions in the Act itself. The bill would be unprecedented in the extent to which it repeals basic Clean Air Act protections.

Furthermore, if it were true that EPA had gone beyond the bounds of the Clean Air Act, there would be a ready remedy without gutting the Act itself: Every key step EPA has taken concerning regulation of GHGs under the Clean Air Act is subject to judicial review. Parties, including Texas and sources located in Texas, have a full opportunity to place before the court arguments that EPA acted inconsistent with the law; invaded states' constitutional authority; acted arbitrarily; made decisions not warranted by the record, or failed to allow for full and fair participation in its decision-making process. Numerous parties, including states, trade associations, public policy groups, and companies, have challenged virtually all aspects of EPA's decisions in court. The courts, and not politicians and industry lobbyists, are a much better judge of whether EPA acted outside the bounds of the law -- and Congress should let the judicial review process play out.

Lie No. 3:

Texas has a legitimate lawsuit concerning the endangerment finding that is aimed at protecting Texans.

The Truth:

The Texas lawsuit was filed at the behest of industry lawyers, the state is represented by a Yankee lawyer whose firm represents Exxon among other polluters, and the claims are based on faulty legal and factual basis.

The lawsuit filed by the Texas Attorney General challenging the finding of endangerment will largely turn on the issue of climate science. An email exchange obtained under a Texas Open Records Act request shows an attorney at Vinson & Elkins, who represents many of the nation's biggest polluters, urged Texas to challenge these EPA clean air protections. [Appendices 12 & 13 - emails December 30, 2010]. The Attorney General is represented in this lawsuit by a New York law firm who represents many big polluters including Exxon [Appendix 14].

Attorney General Abbott asked Congress to pass legislation gutting EPA's authority to regulate many pollutants, including CO₂. The basis for Abbott's litigation is that the science that is basis of the EPA greenhouse gas finding of endangerment was laced with "cover-ups, and the suppression, and destruction of scientific evidence" [Appendix 15]. Why is Abbott seeking recourse to Congress, which would unravel bedrock Clean Air Act protections, if he believes he has sound legal claims?

Attorney General Abbott admits not consulting with the State Climatologist or any of the atmospheric scientists at Texas A & M, Texas Tech, Rice, or the University of Texas. If he had, they would have told him that and that their own work and that the National Research Council and the U.S. Global Climate Research Program, along with the IPCC show that the EPA's finding is based on good science [Appendices 16, 17, & 18].

Lie No. 4:

Texas industries just can't comply with the greenhouse gas regulations.

The Truth:

Many Texas industries are going beyond the minimum requirements of EPA's rules. Officials are selling Texas' businesses short.

Texas state officials have claimed that it will be impossible or too burdensome for Texas firms to comply with the greenhouse gas regulations that like industries have to comply with in other states and thus, these regulations will hurt jobs.

But the PSD permitting guidance that EPA issued in November 2010 makes clear that new facilities should be able to meet permit requirements solely through the use of energy efficiency, efficiencies that saves the companies and their customer's money.

In fact, the largest electric utilities in Texas are saying that they can make more emission reductions than required by the EPA rule. The largest investor-owned electric company in the State, Energy Future Holdings has made a commitment to reduce its greenhouse gas emissions back to 1990 levels by 2020, a more rigorous requirement than EPA's PSD permitting rule for new plants. The company reported earlier this year to its Sustainable Energy Advisory Board that the company is on schedule to meet that target and does not anticipate that meeting their greenhouse gas commitment will exacerbate the admittedly difficult financial situation.

The second largest investor-owned electric company, NRG, has made large investments in the last two years in solar, wind, off-shore wind, nuclear, smart grid, and electric vehicles. In February, NRG President David Crane laid out a vision for his company that includes a clean generation share of more than 50% of the electricity they will produce by 2050.

The two largest municipal utilities have adopted clean energy plans that surpass the requirements of the EPA regulations.

This is what Texas innovation looks like.

Lie No. 5:

The EPA GHG regulations put Texas at a terrible competitive disadvantage.

The Truth:

Texas has natural resources that mean it can be a big winner with greenhouse gas regulations, IF we have forward thinking leaders.

Yes, as always when things change in economies, there will be winners and losers. There is near unanimous opinion that the States that will win under greenhouse gas regulations have:

- Large amounts of producible natural gas;

- Strong winds;
- Abundant, bright sunshine;
- Geologic formations that can sequester carbon dioxide from power plants and refineries for decades near old oil fields that can come to life again with enhance recovery techniques using that same CO2;
- A strong clean tech industry; and
- Made relatively few energy efficiency investments to-date so that there is a lot of low-hanging fruit (money saving efficiency opportunities) available.

Welcome to Texas. Perhaps there is no state that fits the profile of a winner under greenhouse gas regulation better than Texas. The issue is whether Texas tries to protect old polluting industries as some officials are doing or whether the State uses its natural resource and other advantages to embrace the economy of the future.

Chevron Oil Company has a new TV ad that declares that “oil companies should put their profits to good use.” We agree. And there is no better use of oil company profits than to provide large health benefits to Texans, which these regulations will bring. It would be a shame if this Congress guts clean air protections based on myths and lies coming out of Texas.