Written Summary

of

Testimony by Barry T. Smitherman

Chairman, Railroad Commission of Texas

before the

Committee on Energy and Commerce, Subcommittee on Energy and Power

United States House of Representatives

Hearing: EPA Enforcement Priorities and Practices

June 6, 2012

Mr. Chairman, and Members of the Committee:

Thank you for the opportunity to provide my perspective on the enforcement priorities and practices of the Environmental Protection Agency ("EPA").

My testimony largely focuses on how EPA's enforcement priorities and practices have affected energy production in the State of Texas. As Chairman of the Railroad Commission of Texas I am responsible for overseeing the nation's leading oil and gas producing state, which produced 413 million barrels of oil and 7.4 trillion cubic feet of natural gas in 2011. Texas has a proven regulatory track record allowing for prolific, yet responsible energy development. It is critical that state regulatory agencies like the Railroad Commission continue to regulate its energy production. Recently, we have seen the many problems that arise when federal agencies like the EPA attempt to usurp regulatory authority from the states.

My testimony focuses on specific problems states have recently encountered with attempted federal regulation by EPA. For instance, EPA has been active in expanding its role regarding hydraulic fracturing. This expansion has led to impractical policies and unsound science. My testimony highlights missteps by EPA in the Range Resources case that took place in Texas, as well as similar troublesome events that occurred in Pavillion, Wyoming and Dimock, Pennsylvania.

My testimony also expresses my concern with EPA's overly broad study of potential impacts of hydraulic fracturing on drinking water.

Furthermore, although the Railroad Commission does not have jurisdiction over air pollution, I discuss grave concerns I have with respect to air pollution regulation by EPA of upstream oil and gas production and downstream power generation.

Sincerely,

Barry T. Smitherman
Chairman
Railroad Commission of Texas

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Mr. Chairman, and Members of the Committee:

Thank you for this opportunity to provide my perspective on the enforcement priorities and practices of the Environmental Protection Agency ("EPA").

As Chairman of the Railroad Commission of Texas (the "Commission"), I am responsible for overseeing the exploration and production of oil, natural gas, and lignite coal in Texas. Texas is the nation's largest producer of oil and natural gas with over 161,000 active oil wells and 102,000 active gas wells, which produced 413 million barrels of oil and 7.4 trillion cubic feet of natural gas in 2011. This energy production supports two million jobs in Texas and a quarter of the State's economy. It is vital to the State's economic well-being that Texas continues to be a leader in energy production.

Effective State Regulation of Oil and Natural Gas Production and Surface Waste Management

The Commission has effectively regulated the energy industry in the State of Texas since 1919. The State has maintained a predictable regulatory environment allowing for prolific, yet responsible energy development. This successful track record is partially due to its scientists, engineers, and policymakers being closest to the variables regulated and most familiar with the elements at play. State regulation of energy resources is critical because it is impossible for blanket federal regulations to account for the unique circumstances of each state. Such blanket regulations often lead to impractical policies based on unsound science. Recently, EPA has begun insinuating itself into areas that have historically been the purview of the states by attempting to unleash a barrage of regulations based on politically-motivated fiction, rather than fact. I am extremely troubled by this trend in EPA's enforcement priorities and practices.

In the past, EPA has often stated that it believes Congress intended for it to regulate under the Safe Drinking Water Act's (SDWA) Underground Injection Control (UIC) Program only those wells whose principle function is the subsurface emplacement of fluids, and not wells whose principle function is the production of oil or natural gas. However, EPA has been actively expanding its role regarding hydraulic fracturing operations, as well as other activities associated with oil and gas production that have historically been under state regulation.

The states have successfully regulated oil and natural gas production and surface waste management activities, including hydraulic fracturing, for decades and have the experience and personnel to effectively regulate such activities. Despite the tremendous oil and gas activity in Texas and a 60-year history of hydraulic fracturing, there is not a single proven case connecting hydraulic fracturing to groundwater pollution. EPA Administrator Lisa Jackson recently confirmed this track record when testifying before the U.S. House Oversight and Government Reform Committee by stating, "I am not aware of any proven case where the fracking process has affected water, although there are investigations ongoing."

A majority of the states also effectively administer UIC Programs under the SDWA. The states maintain their regulations adequately address potential risks to underground sources of drinking water posed by the actual hydraulic fracturing operations. EPA has not indicated how it believes current state regulations fail to protect underground sources of drinking water.

Texas has enforcement primacy for the federal UIC Program. UIC Program duties and funding are split between the Commission and the Texas Commission on Environmental Quality ("TCEQ"). Federal funds allocated to the Commission average approximately $500,000 per year. The Commission has authority over Class II (oil and gas) and Class III (partial-brine mining). The Commission has not yet applied for authority over EPA's recently created Class VI (geologic sequestration of anthropogenic carbon dioxide) UIC Program.

After a 2004 EPA study of hydraulic fracturing of coal bed methane wells indicated some concern with the use of diesel fuel in hydraulic fracturing, Congress amended the SDWA. Section 322 of the Energy Policy Act of 2005 amended the UIC portion of the SDWA (42 USC 300h(d)) to define "underground injection" to exclude "...the underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities" (emphasis added). The language is unclear

and open to interpretation. EPA itself did not clarify what it believed the language to mean until the summer of 2010, when it revised certain wording on its webpage regarding the activity. At that time, EPA undertook no rulemaking in changing its interpretation, nor did it issue any notice of the change to regulators or the regulated community.

In April of 2012, EPA published for comment a draft guidance document for permitting of wells in which diesel fuel is to be used in hydraulic fracturing treatments. EPA has classified wells on which hydraulic fracturing treatments are performed as Class II injection wells, and has recommended all of the requirements for existing Class II wells in addition to numerous other requirements to address what EPA perceives as the additional risks posed by hydraulic fracturing. This will effectively be the first time the federal government has regulated the drilling, completion, and production of oil and natural gas wells on non-federal lands. Because EPA is proposing to define the term "diesel fuel" very broadly, and because EPA failed to include a de minimis threshold for whatever it ultimately defines as "diesel fuel," numerous oil and natural gas wells potentially could be classified as Class II UIC wells requiring a UIC permit.

Although the stated purpose of this guidance document is to assist EPA permit writers in areas and states where EPA is the permitting authority, such guidance can become the standard. The Commission contends that the Class II UIC program requirements, which are designed for long-term continuous injection activities, are not appropriate for hydraulic fracturing.

EPA Attempts to Issue Guidance Documents Rather Than Rulemaking

Furthermore, EPA is proposing these requirements in a guidance document rather than as rules. Recently, several courts have cautioned EPA that it cannot circumvent the rulemaking process and violate the Administrative Procedures Act by issuing guidance in lieu of formal regulations developed through a notice and comment rulemaking process to change environmental rules. Adoption of requirements by guidelines rather than through rulemaking can result in capricious enforcement, particularly because guidelines can be revised at any time.

For example, in *National Mining Association v. Jackson*, the D.C. Circuit Court of Appeals rejected EPA's reliance on guidance documents in lieu of rulemaking.

In July of 2011, in *Natural Resources Defense Council v. EPA*, the D.C. Circuit Court of Appeals held that EPA violated the Clean Air Act's plain language and violated the Administrative Procedure Act by relying on interpretive guidance – rather than a regulation – to allow states to propose alternatives to statutorily required fees for ozone non-attainment areas under the Clean Air Act.

Two Supreme Court decisions, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (2001) and *Rapanos v. United States* (2006), focused on the federal government's jurisdiction over various wetlands. We understand that EPA is continuing to expand its power despite restrictions imposed by the U.S. Supreme Court by moving forward with its controversial "waters of the U.S." guidance under the Clean Water Act, which would significantly expand EPA's regulatory reach. EPA is expected to eliminate the term "navigable" from the definition of "waters of the U.S.," which would expand Clean Water Act jurisdiction to even small depressions and ditches that carry only rainwater. By relying on informal guidance, rather than proper rulemaking procedures, to expand federal jurisdiction over state waters and private property, EPA and the Corps are effectively avoiding legal obligations that would otherwise apply to agency action under the Administrative Procedures Act.

Problematic Practice of EPA Inappropriately Issuing Enforcement Orders

Soon after EPA Region VI Administrator Dr. Al Armendariz spoke of crucifying oil companies like the Romans used to crucify villagers, EPA targeted operators in Texas, Wyoming, and Pennsylvania. EPA deliberately created a public media frenzy in these three cases by asserting that hydraulic fracturing had caused water pollution, only to quietly withdraw or temper those false accusations at a later date once proven wrong.

On December 7, 2010, EPA issued an emergency endangerment order against Range Resources, a Texas natural gas company, for allegedly contaminating a residential water well near Fort Worth, Texas. The order stated that "EPA has determined that appropriate State and local authorities have not taken sufficient action to address the endangerment described herein and do not intend to take such action at this time . . . ." EPA ignored the fact that Commission staff had already advised EPA that the Commission's investigation was ongoing and that no final conclusions had been reached. According to documents released as a result of Range Resources' lawsuit against EPA regarding the emergency endangerment order, we now know that EPA did not

evaluate the geology in the area, did not research to determine possible pathways for migration of methane to groundwater, and was not in agreement with all of its scientists on EPA's conclusions.

EPA acted prematurely. Before EPA issued its order, Commission staff advised EPA that a specific source of contamination was still unknown and that the investigation was ongoing. EPA was also informed that the Commission had secured voluntary cooperation from the operator, including measures to assure safety in the affected household. All parties agreed that natural gas was present in the water wells; however, the Commission advised EPA that evidence indicated the gas was present in area water well aquifer prior to the commencement of Range Resources' activities.

EPA acted without reviewing all available information. We are not convinced that the presence of the gas in the water wells posed an "imminent and substantial danger" to human health. One water well owner had disconnected his water well from the residence and air monitoring of the residence never indicated a threat of explosion. The other water well owner never filed a complaint with the Commission. Reportedly, the well owner was aware of natural gas and was managing it with an open holding tank that vented any gas before the water was used. Moreover, state and local authorities had been actively investigating the matter since August of 2010, had not determined whether there was a connection between Range Resources' activities and the gas in the water wells, and had secured commitments from the company to expand the investigation. The Commission advised EPA of those commitments before EPA issued the emergency order.

EPA relied on faulty science. Based on the evidence presented at a Commission hearing, the Commission Hearing Examiners concluded, and the Commissioners agreed, that gas in the water wells in question was from the Strawn Formation, which is in direct communication with the Cretaceous aquifer in which the water wells are completed. <u>There was no evidence to indicate that the natural gas production wells were the source of the gas in the water wells</u>. The entire investigative and adjudicative process was conducted with administrative efficiency at the Commission in only seven months, compared to the 20 months spent by EPA.

The appropriate geochemical parameters for fingerprinting to distinguish Strawn gas of Pennsylvania age from Barnett Shale gas of Mississipian age, are nitrogen and carbon dioxide, not carbon (as used by EPA). Gas from Pennsylvanian age rock, including Strawn, has higher nitrogen concentration and lower carbon dioxide

concentration than Barnett Shale gas. Gas found in the water wells does not match the nitrogen isotopic fingerprint of Barnett Shale gas. Bradenhead gas samples from both production wells do not match Barnett Shale gas, confirming that gas was not migrating up the wellbores and that the Barnett Shale producing interval in the wells was properly isolated. Three-dimensional seismic data indicated no evidence of faulting in the area of the water wells and microseismic data available for more than 320 fracture stimulations in Parker County indicated a maximum fracture height of approximately 400 feet, meaning that almost one mile of rock exists between the highest fracture and the shallow groundwater aquifer.

Range Resources was forced to spend over four million dollars defending itself against EPA's persecution, not including income lost from halted production. In March 2012, after more than a year in a federal court battle with Range Resources, EPA dropped its emergency endangerment order against the company.

Equally troubling was well owner Steve Lipsky's attempt to extort $6.5 million from Range Resources during this process. On January 27, 2012, District Court Judge Trey Loftin threw out Mr. Lipsky's lawsuit against the company, ruling that Lipsky lacked legal jurisdiction because the Commission had already determined that Range Resources' gas wells were not responsible for contaminating the water well. On February 16, 2012, Judge Loftin subsequently issued another Order against Mr. Lipsky, expressing concern that Lipsky, under the advice or direction of Alisa Rich, an environmental consultant, attached a hose to the water well's gas vent, not to a water line, and then lit the gas from the hose's nozzle. Judge Loftin stated "[the] demonstration was not done for scientific study but to provide local and national news media a deceptive video, calculated to alarm the public into believing the water was burning." Judge Loftin also cited evidence that Ms. Rich had sought to mislead the EPA.

The Range Resources case is not an isolated incident. EPA has acted with similar haste in Pavillion, Wyoming and Dimock, Pennsylvania, where EPA accused oil and gas operators of groundwater contamination from their hydraulic fracturing operations without sufficient evidence to justify those accusations. In both these cases, like with Range Resources, EPA ignored the facts and the science, whipped the public into hysteria, and then quietly backed away from its initial allegations.

EPA's actions relating to emergency orders was brought to the attention of the United States Supreme Court in *Sackett v. EPA*. On March 26, 2012, the Supreme Court in a unanimous decision found in favor of an

Idaho couple, asserting that, when it comes to wetlands, "arbitrary and capricious" EPA compliance orders can indeed be challenged in court without having to wait for EPA to take enforcement action.

I hope that EPA takes heed of past experiences and begins listening to and working with knowledgeable parties at the state level to ensure the use of fact-based, reliable science and avoid further embarrassments. Due to EPA's recent missteps and Dr. Armendariz' overt political activism we must – at minimum – have a full investigation of Dr. Armendariz' actions during his tenure as administrator so that we may determine how often, and to what extent, he crossed the line and harmed our economy and our energy future by pursuing his extreme political agenda instead of science and fact.

EPA's Study on Hydraulic Fracturing

In a Fiscal Year 2010 appropriations bill, Congress urged EPA to "carry out a study of the relationship between hydraulic fracturing and drinking water, using a credible approach that relies on the best available science, as well as independent sources of information." EPA's original scoping document for this study proposed a study of the "Full Life Cycle" of an oil and gas well. In other words, the scope included all areas of oil and natural gas exploration and production activity, such as site selection and development, as well as production, storage, and transportation, which are unrelated to hydraulic fracturing and clearly under the purview of the states. After review, the EPA's Science Advisory Board recommended that EPA direct its initial, short-term research to study sources and pathways of potential impacts of hydraulic fracturing on water resources, especially potential drinking water sources. In spite of the fact that EPA narrowed the scope of the study in its *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources* released on February 7, 2011, it still proposes to include in the study areas beyond the specific practice of hydraulic fracturing, delving into areas beyond the reach of federal law, such as water availability and water withdrawal.

Although the Commission does not have jurisdiction over air pollution, I have been carefully watching and reviewing, in concert with TCEQ, the EPA's recent actions with respect to air pollution regulation of upstream oil and gas production and downstream power generation.

EPA's Expanding Regulation of Air Pollution

<u>New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants</u>

Under the Clean Air Act ("CAA"), EPA is required to review New Source Performance Standards ("NSPS"), National Emissions Standards for Hazardous Air Pollutants ("NESHAP"), and residual risk standards every eight years. The final NSPS and NESHAP regulations for oil and gas, which were signed on April 17, 2012, are the first federal air standards for wells that are hydraulically fractured and for other sources of air pollution in the oil and gas industry not currently regulated at the federal level. These regulations greatly expand EPA's federal authority into oil and gas production activities, which have generally been under state regulation. In addition, EPA appeared reasonable and conciliatory only because it initially proposed unreasonable regulations and then eliminated a few of the most egregious in the final version after discussions with industry.

Cross-State Air Pollution Rule

Last September I testified before the United States House Committee on Science, Space, and Technology regarding the lack of science behind the EPA's controversial Cross-State Air Pollution Rule ("CSAPR"). I testified that CSAPR was an arbitrary, job-killing rule grounded in unreliable and incomplete scientific data. CSAPR would require significant reductions of SO2 and NOx from fossil fuel-fired power plants in 27 states in an effort to regulate emissions from power plants in "upwind" states that allegedly contribute to air quality degradation in "downwind" states. The rules have a disproportionate impact on Texas and an unreasonable timeline for compliance that could result in premature retirement of power plants and could threaten the stability of Texas' power grid.

On July 6, 2011, EPA finalized CSAPR, which requires a significant reduction in SO2 and NOx, both of which are products of the direct process of creating electricity from lignite and natural gas. Despite the fact that Texas' sulfur dioxide emissions make up only 11 percent of those emissions for states covered by the new rule, EPA mandates that 25 percent of the required reductions come from Texas alone. In addition, the final draft is substantially different from the initial draft, leaving no opportunity for public discussion. Moreover, the timeline for compliance is not just unreasonable, but also technically impossible. The rules would require that Texas generating companies comply with this 1,300-page rule by an infeasible date of January 1, 2012. Fortunately, last December, the United States Court of Appeals for the D.C. Circuit issued its ruling to stay CSAPR pending judicial review. The D.C. Circuit was right to stay this highly flawed rule, which is based on inaccurate and incomplete information.

Mercury and Air Toxics Standards for Utilities

On February 16, 2012, EPA finalized the Mercury and Air Toxics Standards for power plant emissions. EPA states that these first national standards will reduce emissions of mercury and toxic air pollution like arsenic, acid gas, nickel, selenium, and cyanide. EPA's own analysis estimates that the rule will cost $10 billion annually – 40 percent more than the total cost of all the Clean Air Act regulations EPA has ever imposed on power plants. Furthermore, the U.S. Chamber of Commerce estimates that 99.99 percent of the benefits EPA derives from the rule actually occur from reductions, not in mercury but particulate matter, a pollutant already extensively regulated by other EPA rules. To make matters worse, the rule already has resulted in the announced shutdown of numerous coal-fired power plants, placing utility grids and jobs at risk.

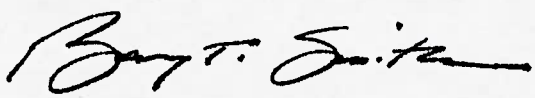
New Source Performance Standards for Greenhouse Gas Emissions from Power Plants

On April 13, 2012, EPA published NSPS for emissions of carbon dioxide for new affected fossil fuel-fired electric utility generating units ("EGUs"). The proposed requirements, which are strictly limited to new sources, would require new fossil fuel-fired EGUs greater than 25 megawatt electric to meet an output-based standard of 1,000 pounds of carbon dioxide per megawatt-hour, based on the performance of widely used natural gas combined cycle ("NGCC") technology.

The proposed NSPS are EPA's first proposed numeric greenhouse gas ("GHG") emission limits for any category of Industrial facility, and will have a significant impact on new power plants. EPA's approach to the final standards is also likely to establish precedents for EPA's regulation of GHG emissions from other types of facilities.

Thank you for the opportunity to testify before the Committee and for your attention to this urgent matter.

Sincerely,



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