

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

ANGELA BONSER-LAIN,	§	IN THE DISTRICT COURT OF
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	§	TRAVIS COUNTY, TEXAS
	§	
	§	
VS.	§	
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
	§	
DEFENDANT	§	<u>201st</u> JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

COME NOW 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") and file this Original Petition, seeking judicial review of a final decision entered by the Texas Commission on Environmental Quality ("TCEQ" or "Defendant") denying Plaintiffs' Petition requesting promulgation of a comprehensive rule to reduce carbon dioxide (CO₂) emissions in this state and that would mandate the tracking of such reductions.

I. DISCOVERY

1. This case is an appeal of an administrative agency's action. If discovery becomes necessary, it should be controlled by Level 2. TEX. R. CIV. PROC. § 190.3.



II. CASE OVERVIEW

2. Plaintiffs seek review of Defendant's June 22, 2011 final decision in Docket No. 2011-0720-RUL. (*See Exhibit "A": Defendant's Decision*). The final decision denied Plaintiffs' petition for rulemaking (Petition) which requested the Defendant adopt by January 1, 2012 a CO₂ reduction plan that would result in peak CO₂ emissions from fossil fuels in Texas in 2012 and beginning in January 2013, reduce fossil fuel CO₂ emission by at least 6% a year. The petition also requested the Defendant take the following actions: (1) publish annual progress reports on statewide greenhouse gas (GHG) emissions, which include an accounting and inventory for each and every source of GHG emissions within the state, verification by an independent third party to be made publicly available on Defendant's website no later than December 31 of each year beginning in 2012; (2) track progress toward meeting the emission reductions, including current and future policies and rules, and report on the progress annually and (3) by December 31, 2011 and annually thereafter, report to the governor and appropriate House and Senate committees the total emissions of GHG for the preceding year for each major source sector. The annual reporting rules must allow development of a comprehensive inventory of GHG emissions for all sectors of the state economy. Last, where conflicts between the proposed rule and any other rule in effect exist, the more stringent rule, favoring full disclosure of emissions and protection of the atmosphere, would govern.

3. Plaintiffs' Petition cited Defendant's legal authority to control air contaminants to protect against the adverse effects of climate changes, including global warming. TEX. HEALTH & SAFETY CODE § 382.0205. In addition, Plaintiffs' Petition also cited



Defendant's legal and permanent duty to protect the environment, *and specifically the atmosphere*, under the common law Public Trust Doctrine.

4. Plaintiffs' Petition provided scientific evidence in support of the emission reductions proposed by the rule to redress harm being caused to the atmosphere, earth's trust resources and present and future generations of Texans.

III. JURISDICTION AND VENUE

5. Jurisdiction of this action lies in this Court pursuant to TEX. WATER CODE § 5.351 allowing for judicial review of Defendant's rulings, orders, decisions or other acts. Venue is proper in this Court pursuant to TEX. WATER CODE § 5.354.

IV. PARTIES

6. Angela Bosner-Lain is 25-years old and is a resident of Williamson County, Texas. Angela is concerned about the severe droughts that southern states, such as Texas, are experiencing. She enjoys swimming, hiking and is interested in becoming a professional outdoor photographer. However, with the severe droughts taking place, much of what she loves and what she would use to build her photography career are quickly disappearing due to the effects of the severe drought patterns--lack of regional water and sweeping wildfires. She also believes future generations should have the opportunity to experience Texas and the rest of the southern region without the damage to the natural environment that is currently taking place.

7. Karin Ascot brings this action as next friend on behalf of her minor children TVH and AVH (*TVH and AVH's full names are withheld for privacy*). TVH and AVH



are 3.5 years and 11 months of age respectively, and are residents of Travis County, Texas. TVH and AVH were both baptized in Barton Springs. TVH has already spent many hours hiking in the Barton Creek greenbelt. He loves to walk in the flowing water as he watches the birds, dragonflies, fish, and other living things. Global climate change threatens to dry up most of these waters, turning them from gorgeous, life-giving springs into dangerous flash-flooding drainages when the rare, heavy rains do come. The summers will become increasingly unbearably hot and dry. The outdoors will be inhospitable and the children will have fewer places to recreate in nature as the climate changes. They will be living in a world of drought, water shortages and restrictions, and desertification.

8. Brigid Shea brings this action, as next friend on behalf of her minor child Eamon Brennan Umphress. Eamon is 15 years old and is a resident of Travis County, Texas. Eamon is very concerned that the impacts of climate change will dramatically harm his future. He enjoys swimming at Barton Springs and in the area lakes and creeks. The increasing effects of drought and high temperatures due to climate change are threatening these water resources, and his use of them. He worries that the springs and the creeks may dry up. In addition to the loss of something he loves to do, he fears that the species that live in Barton Springs would be harmed and the region might suffer from a loss of drinking water.

9. In sum, the Plaintiffs are youth and young adults, who represent a living generation of public trust beneficiaries who have a profound interest in ensuring that the climate remains stable enough to ensure their rights to a livable future. A livable future includes the opportunity to drink clean water and abate thirst, to grow food that will abate



hunger, to be free from imminent property damage caused by extreme weather events, and to enjoy the abundant resources and rich biodiversity of Texas.

10. Defendant TCEQ is the state administrative agency charged with the responsibility for protecting the state's environment and air quality under the Texas Water Code, the Texas Clean Air Act and Texas' Public Trust Doctrine. Defendant may be served service of process on its Executive Director, Mr. Mark Vickery, at 12100 Park 35 Circle, MC-109, Austin, Texas 78753.

V. FACTUAL AND LEGAL BACKGROUND

A) Overview of Evidence and Facts Supporting Plaintiffs' Proposed Rule As Submitted in Administrative Proceeding Below

11. Plaintiffs' Petition was supported by comprehensive and credible authority explaining the causes of global climate change, which confirm the worldwide consensus that global warming is a result of human activity, specifically the unabated burning of fossil fuels. These cited works included reports and studies from both international and federal agencies, as well as peer-reviewed papers from leading experts in their fields.

12. In addition, the Petition highlighted adverse affects that are likely to occur in Texas if CO₂ emissions are not reduced significantly. For example, a sea level rise of 1.5 meters could displace approximately 100,000 households and create more than \$12 billion in infrastructure losses in and around the Galveston area alone. The Petition also cited studies and quoted experts indicating that climate change will reduce Texas' water supply, result in conditions ripe for the proliferation of wildfires, and harm the states' agricultural industry.



13. Finally, Plaintiffs submitted a paper by Dr. James Hansen, one of the world's top climate change scientists. This paper discusses the harms of climate change, the primary and secondary effects of global warming, impacts to both the natural environment and human populations and cites to human activity as the cause of the imbalance of CO₂ in the atmosphere. Dr. Hansen and fellow prominent climate experts find that 350 parts per million (ppm) (from 390 ppm currently) is the target level of atmospheric CO₂ we need to achieve by the end of the century in order to begin to stabilize the atmosphere and slow the effects of climate change. The Petition's requested relief is consistent with best available science.

B) Legal Authority Supporting Plaintiffs' Proposed Rule

14. Defendant TCEQ has both the authority and duty to protect against climate change under the Public Trust Doctrine. The public trust duty resides in all three branches of government.

15. The Texas Water Code declares that "[TCEQ] is the agency of the state given primary responsibility for implementing the constitution and the laws of this state relating to the conservation of natural resources and the protection of the environment." TEX. WATER CODE § 5.012. The Public Trust Doctrine is one such law that the TCEQ is responsible for implementing.

16. The Texas Clean Air Act (TCAA) also confers on Defendant TCEQ the authority to regulate CO₂. In the TCAA Section titled "General Powers and Duties," the Legislature expressly provided that "[t]he commission shall: (1) administer this chapter; (2) establish the level of quality to be maintained in the state's air; and (3) control the quality of the state's air." TEX. HEALTH & SAFETY CODE § 382.011(a).



17. “Air contaminants” is a defined phrase in the TCAA: “‘Air contaminant’ means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.” TEX. HEALTH & SAFETY CODE § 382.003(2) (emphasis added). This means that, by plain statutory language, CO₂ is an “air contaminant” when generated by non-natural processes.

18. The Texas Legislature further specifically defined “air pollution” under the TCAA: “‘Air pollution’ means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property.” TEX. HEALTH & SAFETY CODE § 382.003(3).

19. Defendant by rule may control air contaminants as necessary to protect against adverse effects related to “climatic changes, including global warming.” TEX. HEALTH & SAFETY CODE § 382.0205(3).

20. The atmosphere, essential to human existence, is an asset that belongs to all people. The Public Trust Doctrine requires that the Defendant hold vital natural resources in trust, for both present and future generations of Texas citizens. Such resources are so vital to the well being of all people, including the citizens of Texas, that they must be protected by this distinctive, long-standing judicial principle. The atmosphere, including the air, is one of the most crucial assets of our public trust and each sovereign government shares a co-tenant trustee duty to protect it.



21. The Public Trust Doctrine holds government responsible, as perpetual trustee, for the protection and preservation of the atmosphere for the benefit of both present and future generations.

22. Today the citizens of Texas are confronted with an atmospheric emergency. The Defendant must regulate and account for CO₂ through its fiduciary duties under the Public Trust Doctrine. The Defendant is responsible for preserving and protecting the atmosphere, as a public resource for future generations.

23. The Public Trust Doctrine is an ancient legal mandate originating in Roman law that establishes a sovereign obligation in states to hold vital natural resources in trust for the benefit of their citizens: “The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.” Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). Likewise, under English common law, “There are some few things which . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . .” *Geer v. State of Connecticut*, 161 U.S. 519, 668 (1896) (citing William Blackstone, 2 BL Comm).

24. The Public Trust Doctrine was incorporated into the colonial charters when the American colonies were first established. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). Following the American Revolution, the doctrine was likewise adopted into the American common law as a flexible mechanism to protect integral public interests.

25. The Texas Supreme Court acknowledged the state maintains ownership over public resources, such as the submerged lands and waters, as trustee for the public. *See, e.g. Maufrais v. State*, 142 Tex. 559 (Tex. 1944). Texas courts have also recognized that the



State can take action to prevent pollution of trust resources. *Cummins v. Travis County Water Control and Improvement Dist*, 175 S.W. 3d 34, 49 (Tex. App. 2005). *Cummins*, discussed the rights of landowners against the rights of the public where trust resources are concerned. The opinion acknowledged Texas courts have weighed in favor of regulating resources for the public benefit “especially when the regulation affecting the owners’ property is essential or material for the prosperity of the community, and is one in which all of the landowners have to a certain extent a common interest” *Id.* (citing *Parker v. El Paso Water Improvement Dist. No. 1*, 297 S.W.737, 740-42 (1927) (internal citations omitted)). Texas courts have also discussed the Public Trust Doctrine as a law that does not remain static or fixed. *See Severance v. Patterson*, 54 Tex Sup. Ct. J. 172 (2010) (boundary-line demarcations of wet and dry sand when it comes to determining what is part of the public trust and what is private property is an ever-changing determination).

26. The importance of Defendant’s fiduciary duty to protect its natural resources, including the atmosphere, is evident in the Texas Constitution, which states, in pertinent part, that “[t]he preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.” Tex. Const. art. XVI §59. The public, including present and future generations, have a right in the preservation and conservation of their natural resources, including the atmosphere.

27. Because the atmosphere is necessary for humanity’s very survival, it logically follows that the Public Trust Doctrine extends to the atmosphere, and Defendant, as trustee of the atmosphere for the people of Texas, holds this resource in trust for present and future generations of Texans.



28. Just as in traditional trusts, the Public Trust Doctrine imposes a duty on the Defendant to affirmatively preserve and protect the public's trust assets from damage or loss, and to avoid using the asset in a manner that causes injury to the trust beneficiaries, present and future. The trustee has an affirmative fiduciary duty to prevent waste, to use reasonable skill and care to preserve the trust property and to maintain trust assets. The duty to protect the trust asset means that the sovereign ensures the continued availability and existence of healthy trust resources for present and future generations. The duty mandates the development and utilization of the trust resource in a manner consistent with its conservation and in furtherance of the self-sufficiency of Texas.

29. The fiduciary's duty in this instance is defined by scientists' concrete prescriptions for carbon reductions. As indicated in the Petition, Scientists have clearly opined as to the minimum CO₂ reductions needed to restore the Earth's equilibrium, and the requisite timelines for implementation of those reductions. Defendant may not disclaim this fiduciary duty and is subject to an ongoing mandatory duty to preserve these resources.

C) Summary of Defendant's Decision

30. In rejecting the Petition, the Defendant cited that it does not have control over air permits necessary to meet the Petition's requested emission reductions. Citing the Defendant refusal to regulate GHGs, the Environmental Protection Agency (EPA), pursuant to its federal Clean Air Act (FCAA) authority, issued a Federal Implementation Plan (FIP) to authorize the EPA to issue permits in Texas to GHG sources until Texas' required State Implementation Plan (SIP) revision for GHG permitting is submitted and approved by the EPA.



31. Additionally, the Defendant cited a fundamental disagreement with the EPA over how and whether Congress intended GHG emissions should be regulated. This fundamental disagreement has resulted in Texas suing EPA regarding the legality of the Federal GHG rules.

32. Defendant's decision failed to address, or deny, whether CO₂ is an air contaminant as defined by TEX. HEALTH & SAFETY CODE § 382.002(2), and as alleged in the Petition. Nor did Defendant refute the scientific basis underlying the proposed rule.

33. Next, Defendant's decision attempts to limit and put parameters on the common law Public Trust Doctrine, without any basis in law. Defendant's decision unequivocally states "*...the public trust doctrine does not extend to the regulation of GHG's in the atmosphere.*"

34. Finally, Defendant's decision suggests that the Public Trust Doctrine is preempted by Section 109 of the FCAA, which illustrates its fundamental misunderstanding of its duties under the Public Trust Doctrine.

VI. CAUSES OF ACTION:

REQUEST FOR RELIEF PURSUANT TO THE TEXAS WATER CODE

35. Defendant's decision as described above was unreasonable, based on an error of law, and deserves review under the Texas Water Code for the following reasons:

Error No. 1: The Defendant Committed an Error of Law by Limiting the Scope of the Public Trust Doctrine.



36. Plaintiffs incorporate by reference herein paragraphs 20-29 and 33.

37. The Public Trust Doctrine includes the atmosphere as a public trust resource. As discussed above, the Public Trust Doctrine protects certain resources as assets of the trust. These resources, such as water, submerged lands and air all share certain properties: they are valued resources of the natural environment, vital to both the continued use and enjoyment of the natural environment and vital to the health of the human population. These resources are common to all people and as public property, the state, as trustee, has the duty of protecting and managing these resources for the benefit of the people of the state and for future generations of Texans.

38. In the alternative, the atmosphere must also be protected under the Public Trust Doctrine because of its impact on other well-recognized trust assets such as waterways and coastlands. As discussed above and in greater detail in the Petition, climate change is already impacting water supplies in navigable waterways as well as for drinking water in many parts of the country, including Texas. It will cause drought, which will create secondary impacts including but not limited to wildfires. Additionally, sea level rise as a result of climate change could potentially result in human, ecological and financial devastation for Texas' coastal communities.

39. Defendant committed an error of law by limiting the scope of the Public Trust Doctrine, asserting that it did not extend to the protection of the atmosphere. While no court has expressly stated that the public trust protects atmospheric resources, it is implicit in the purpose of the Doctrine. Also, no court has expressly stated that the Public Trust Doctrine does not protect atmospheric resources. It is, therefore, a legal issue that



this Court may review, and it was an error of law for the Defendant to attempt to limit the common law Public Trust Doctrine, which is outside its authority.

Error No. 2: The Defendant Committed an Error of Law by Deciding that the Public Trust Doctrine Is Preempted by Section 109 of the FCAA.

40. Plaintiffs incorporate by reference herein paragraphs 20-29 and 34.

41. The Public Trust Doctrine is an independent authority that operates concurrently with the State's other responsibilities and duties delineated by statute. The mere existence of another statute regulating the same resource does not extinguish the State's other duties in regards to that resource. If that were true, other resources such as navigable waters in Texas would not be protected under the Public Trust Doctrine because of the existence of the Clean Water Act and other water protection laws.

42. Plaintiffs contend that Section 109 does not and cannot preempt the Public Trust Doctrine. In addition, to the extent the Defendant believes that the Public Trust Doctrine is preempted by Section 109, then its decision is internally inconsistent. Defendant can only assert that the Public Trust Doctrine is preempted by a federal Clean Air Act provision for National Ambient Air Quality Standards if they also believe that the Public Trust Doctrine extends to the protection of the atmosphere. Defendant's two statements are inconsistent and express a clear error of law.

VII. CONCLUSION AND PRAYER FOR RELIEF

For all reason set forth above, Defendant's decision is unreasonable, exceeds Defendant's authority, and is affected by other errors of law. Accordingly, the Court should reverse errors 1 and 2 above, and remand the case, if appropriate, for further proceedings pursuant to the Court's authority under the Texas Water Code.



WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court 1) reverse TCEQ's decision, 2) remand this case to TCEQ for further proceedings consistent with the Court's opinion, if appropriate, 3) assess all costs of these proceedings to Defendant, and 4) grant all other relief in law or equity to which Plaintiffs may be entitled.

Respectfully Submitted,

TEXAS ENVIRONMENTAL LAW
CENTER

By: \s\ Adam R. Abrams
Adam R. Abrams
TBN: 24053064
P.O. Box 685244
Austin, Texas 78768
Phone: (713) 444-2252
aabrams@texaselc.org

ATTORNEY FOR PLAINTIFFS

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk,
Travis County, Texas, do hereby certify that this
is a true and correct copy as same appears of
record in my office. Witness my hand and seal
of office on 07-21-11

AMALIA RODRIGUEZ-MENDOZA



DISTRICT CLERK

By Deputy: *Lydia Amador*