TEXAS HOUSE OF REPRESENTATIVES

#42336

Committee on
Environmental Regulation
77th Texas Legislature

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December 18, 2001

The Honorable John Cornyn
Office of the Attorney General
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I.D. # 42336

Dear Attorney General Cornyn:

This letter is to request an Attorney General Opinion concerning interpretation of an uncodified subsection of the Texas Natural Resource Conservation Commission ("TNRCC") Sunset Law, H.B. 2912 at Article 18, Section 18.05(i), more specifically:

> **Whether it is proper or constitutional to construe the language of H.B. 2912, §18.05(i) to refer to notices of violation, enforcement orders, and other compliance history actions that are issued or occur prior to February 1, 2002.**

DISCUSSION

I. Construction Aid: Comparison to Other Provisions in HB 2912

The text of H.B. 2912, Section 18.05(i) reads as follows:

> (i) The changes made by this Act in the definition of compliance history apply to an *action taken* by the Texas Natural Resource Conservation Commission on or after February 1, 2002. An *action taken* by the Texas Natural Resource Conservation Commission before February 1, 2002, is governed by the law in effect on the date the action is taken, and the former law is continued in effect for that purpose. (emphasis added)

Section 18.05 of H.B. 2912 sets out a time table for the TNRCC to implement performance-based regulation as required by Article 4 of the statute. The substantive requirements of the performance-based regulation provisions of the statute requires, among other things, the TNRCC to develop rules for considering a regulated entity's compliance history in agency decision making relating to that entity. *See* H.B. 2912, Article 4.

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The law also requires the TNRCC to develop a uniform standard for evaluating compliance history and specifies minimum components of compliance history, which would include, among other things, enforcement orders, court judgments, consent decrees, criminal convictions, and notices of violation by the TNRCC. *See* H.B. 2912, Section 4.01, amending TEX. WATER CODE by adding § 5.753.

According to H.B. 2912, Section 18.05(a), the TNRCC must establish rules on the components of compliance history by February 1, 2002. Further, Section 18.05(b) requires the TNRCC to establish rules for standards for classification and use of compliance history not later than September 1, 2002. Further, according to Section 18.05(f) and (g):

> (f) The changes made by this Act in the consideration of compliance history in *decisions by* the Texas Natural Resource Conservation Commission relating to the issuance, amendment, modification, or renewal of permits under the following sections apply only to an application for the issuance, amendment, modification, or renewal of a permit submitted to the Texas Natural Resource Conservation Commission on or after September 1, 2002: . . . .
>
> (g) For purposes of consideration of compliance history in *decisions by* the Texas Natural Resource Conservation Commission relating to the issuance, amendment, modification, or renewal of a permit under the sections listed under Subsection (f) of this section, an application submitted before September 1, 2002, is governed by the law as it existed immediately before September 1, 2001, and the former law is continued in effect for that purpose. (emphasis added)

The reference to September 1, 2001, appears to be a mistake, and it is reasonable to interpret that the statute meant to say September 1, 2002, based on a plain reading of its language.

Section 18.05(h) and (j) both similarly specify that consideration of the new compliance history scheme, as enacted by this statute, in decisions by the TNRCC apply effective September 1, 2002, for inspections and flexible permitting (Section 18.05(h)) and to suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the TNRCC (only to such proceedings initiated or such action brought on or after September 1, 2002) (Section 18.05(j)).

It is important to note from the outset that the language of §18.05(i) is significantly different than the language of Subsections (f), (g), (h), and (j). Subsections (f), (g), (h), and (j) relate to changes by the statute in the consideration of compliance history in *decisions* by TNRCC. Under these sections, it is clear that the Agency must utilize the new compliance history consideration scheme in its *decision* making beginning September 1, 2002.

Subsection (i), on the other hand, specifies that the new definition of compliance history applies to *actions* of the TNRCC on or after February 1, 2002. This section does not specify that the TNRCC consider the new compliance history definition[1] in its *decisions*. Had the Legislature wanted the TNRCC to use the new compliance history definition for its *decisions* on or after February 1, 2002, it would have said so, in much the same way it did in Subsections (f), (g), (h), and (j) with respect to changes made by the Act in consideration of compliance history. In each of those subsections, the Legislature clearly articulates when the changes made to consideration of compliance history are to be used in *decisions* by the TNRCC. Subsection (i) does not have similar language, because it is different. It specifies the point in time when TNRCC *actions* (such as issuance of notices of violation, enforcement orders, etc.) are to be categorized according to the new compliance history definition.

This interpretation of the statute is also consistent with the Code Construction Act presumption that a statute is prospective in its operation, unless expressly made retrospective. *See* TEX. GOV. CODE § 311.022. In this case, Subsection (i) is not expressly retroactive; indeed, neither are Subsections (f), (g), (h), and (j). Any interpretation of HB 2912 that would assign new significance to compliance history actions issued prior to the effective date of HB 2912 would be a retroactive construction and, therefore, would be contrary to this clear tenet of statutory construction. The discussion that follows under Section III provides further support that the statute should not operate retroactively, because it impairs substantive rights of regulated entities.

II. Construction Aid: Consideration of Consequences of Contrary Interpretation to Avoid Absurd or Unjust Results

In construing Section 18.05(i), the Code Construction Act mandates that the consequences of a particular interpretation be taken into account. Further evidence that pre-February 2002 compliance actions were not intended to be given new significance by the Legislature under §18.05(i) is the irreconcilable conflict that such an interpretation would create with regard to "no findings" administrative orders issued under TEX. WATER CODE § 7.070. For years, the TNRCC has issued such orders with the following statement: "this order is not intended to become a part of the facility's compliance history." Because there is no basis in HB 2912 for distinguishing such orders from other types of compliance actions (e.g. NOVs), a retroactive interpretation of §18.05(i) would seem to demand that the TNRCC ignore the clauses and violate several hundred negotiated orders.

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[1] Strictly speaking, there is no definition of the term compliance history in the statute. Nevertheless, the statute provides the standard for evaluating compliance history, which includes the minimum components of compliance history. *See* H.B. 2912 § 4.01, amending by adding TEX. WATER CODE § 65.753. Thus, read in this light, Subsection (i) specifies that the new compliance history evaluation standard applies to actions taken by the TNRCC on or after February 1, 2002.

Even if HB 2912 could be read to allow TNRCC to distinguish between "no findings" orders and other compliance actions (e.g. NOVs), that construction would render unjust results for those regulated entities that have received NOVs that were not deemed serious enough by TNRCC to issue an enforcement order. In that situation, by counting such NOVs against one entity while another entity with a more serious NOV that led to an order and would not be burdened with that order on its compliance history would reward those entities with worse compliance histories.

Such an unjust result would be contrary to the presumption in the Code Construction Act that, in enacting a statute, a just and reasonable result is intended. *See* Texas Government Code §311.021(3). Given that part of HB 2912's goal of creating a new compliance history evaluation system is a greater fairness and effectiveness in the evaluation of how well regulated entities comply with environmental laws, the unfairness that would result from considering notices of violation but not certain orders runs contrary to the Code Construction Act's requirement to consider the object sought to be obtained by a statute. *See* Texas Government Code §311.023(1).

III. Construction Aid: Unconstitutional Effect of Contrary Interpretation

Similar to the idea that statutes should be interpreted to avoid absurd or unjust results, the Texas Code Construction Act requires that statutes be interpreted to have a constitutional, rather than an unconstitutional effect. The discussion that follows demonstrates the unconstitutional effect that would result from interpreting Section 18.05(i) of HB 2912 to have a retroactive effect (i.e. to include pre-February 1, 2002, compliance events).

Under a retroactive compliance history evaluation scheme, the TNRCC would establish standards and categorize entities based upon their compliance records. The characterization of an entity in the lowest classification would have specified negative consequences that are not imposed by current compliance history rules. Specifically, under HB 2912, such entities will be subject to unannounced inspections, would be prohibited from obtaining or renewing a flexible permit, and they would be subject to additional oversight and permit review.[2] The existing compliance history rules do not provide for categorization or specific "penalties" for having a poor compliance record.

Article I, Section 16 of the Texas Constitution expressly forbids retroactive legislation. Retroactive legislation is generally understood to mean legislation that affects acts or transactions that occurred before the legislation came into effect. A law is retroactive if it changes the consequences of acts completed before its effective date.[3] Retroactive legislation includes that which authorizes a

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[2] Texas Water Code, §5.753(g) and (h).
[3] Piper v. Perrin, 560 F.Supp. 253, 255 (D.M.H. 1983).

governmental entity to take into consideration conduct that took place prior to the statute's effective date.[4]

The constitutional prohibition against retroactive legislation has been construed to apply only to laws that divest individuals of vested rights acquired under existing laws.[5] The Texas Constitution broadly protects such rights. A right has been defined as "a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law."[6] Texas courts have held that the most important inquiries in determining whether a retroactive statute impairs or destroys vested rights are whether the statutes surprise persons who have long relied on a contrary state of law; whether the retroactive provision gives effect to or defeats the bona fide intentions or reasonable expectations of the affected persons; and whether the public interest is advanced or retarded.[7]

Analysis of the first factor supports a finding that placing any significance on NOVs issued prior to February 1, 2002 would be unconstitutionally retroactive. There is no question that this interpretation would surprise persons who have long relied upon a contrary state of the law. Specifically, regulated entities have long made decisions regarding how to resolve compliance issues based upon existing compliance history rules. For example, in many situations, TNRCC inspectors issue notices of violations that are mistaken or inaccurate, but that are minor and not worth the time or expense in contesting. Nevertheless, under the new compliance history consideration provisions of the Act, such notices of violation could be used against the regulated entity by categorizing it into a compliance history classification to be used in Agency decision making. Had the regulated entity known that such notice of violation was to be used in this manner, it would likely have exercised its right to more formally contest such mistaken or inaccurate allegations.

Attaching any significance to notices of violation issued prior to February 1, 2002, would be unjust when applied to the compliance history evaluation system required by the Sunset Bill. Those who would be affected by such interpretation had no notice of the level of significance that might be attached to previously issued notices of violation. In the Texas Water Rights Commission v. Wright opinion, the court made it clear that the element of surprise was a determinative factor in whether a vested right existed. The court stated that the fact that a statute authorizes the consideration of events that occurred prior to the effective date of the statute does not compel disapproval of the act, provided that the affected parties were given reasonable time to protect their interests. In that case, the court addressed the issue of whether water permits could be canceled for ten years of non-use

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[4] Texas Water Rights Commission v. Wright, 464 S.W.2d 642, 648 (Tex. 1971).

[5] State Board of Registration for Professional Engineers v. Wichita Engineering Co., 504 S.W. 2d 606 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Texas Water Rights Commission v. Wright, 464 S.W.2d 642 (Tex. 1971).

[6] Wright, at 648.

[7] Southwestern Bell Telephone Company v. Public Utility Commission of Texas, 615 S.W.2d 947, 956 (Tex. Civ. App.), writ ref'd n.r.e., per curiam, 622 S.W.2d 82 (Tex. 1981).

by retroactive application of the act. The court concluded that the retroactive statute was not invalid as the water permittees had been afforded reasonable time after the enactment of the statute in which to put their water systems into operation and preserve their rights.

The key factor in Wright appears to be that the parties were afforded an opportunity to comply with the new law to protect their rights and to prevent assessment of penalties against them. The Wright opinion indicates that "the common characteristic in the cases holding a statute invalid is the element of surprise, by which a person has changed his position or omitted to change it in reliance upon the law in force."[8] As noted above, regulated entities made decisions regarding compliance matters based upon the informal and less punitive existing compliance history rules. Accordingly, they did not have the incentive to challenge compliance history actions in the same manner and to the same extent, as they will under the plan that could be adopted by next year.

The second factor used to determine whether a vested right is affected is whether the retroactive provision gives effect to or defeats bona fide intentions or reasonable expectations of affected persons. In fact, the Wright opinion points out that it has been held that this is "the most important single inquiry to be made, from the standpoint of the individual and aside from the public interest."[9] Again, the entities regulated under the current system have been operating under a completely different regulatory scheme, and one that does not impose such structure or the nature or extent of punitive consequences for having notices of violation considered in the evaluation of their compliance histories. In determining how and whether to deal with the Commission regarding past compliance matters, entities simply had no expectation that NOVs would be used against them in the future to potentially deprive them of the ability to receive inspection announcements, obtain approval of a request for a permitting action, or participate in a flexible regulatory program.

The discussion above is also instructive in determining whether the public interest is advanced or retarded by the retroactive application of the law, which is the third factor to be considered in determining if a vested interest exists. Although the public has an interest in the existing compliance history of entities, that interest would not be advanced by the use of previously-issued notices of violation that do not accurately reflect the true performance records of entities regulated by the TNRCC. In fact, consideration of inaccurate notices of violation would likely be counter-productive and work to the detriment of the public's interest, given that it would result in skewed results that unfairly penalize good performers and unfairly benefit poor performers that have received more serious NOVs that led to orders that cannot be considered, as discussed above. Such would be the result because attaching any significance to notices of violation would not facilitate a fair characterization of their history under the new system. Surely, it is in the public's interest to have the TNRCC properly assess and attach appropriate benefits and consequences to the environmental records of regulated entities under the system to be implemented. A contrary result would

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[8] Wright, at 649.
[9] *Id.*

undermine the credibility of the Commission, and could ultimately serve to jeopardize the Commission's ability to achieve its charge to protect human health and the environment.

It has been held that a statute is not made retroactive merely because it draws upon antecedent facts for its operation.[10] However, regarding the prohibition in Article I, Section 16, it has also been held that a law is impermissibly retroactive, and thus, invalid, if it either impairs rights a party possessed when he acted, increased a party's liability for past conduct, or imposes new duties with respect to transactions already completed.[11] Legislation is impermissibly retroactive when it attaches new legal consequences to events completed before its enactment.[12] Clearly, the "new" consequences that would result from consideration of notices of violation would significantly increase the liability imposed upon regulated entities for previously issued notices of violation, rendering such an application of the law unconstitutionally retroactive. Additionally, the unfairness of such increased severity of consequences will be compounded in cases in which existing notices of violation are inaccurate or unmeritorious.

CONCLUSION

Given all of the above, it seems that the proper statutory construction of Section 18.05(i) of HB 2912 is that the TNRCC is only authorized to consider compliance events occurring or issued after February 1, 2002. As noted above, I respectfully request your opinion regarding the proper construction of Section 18.05(i) of HB 2912.

Thank you for your assistance in this matter.

Sincerely,

Warren Chisum

Warren Chisum, Chair
House Committee on Environmental Regulation

cc: TNRCC Commissioners

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[10] General Dynamics Corp. v. Sharp, 919 S.W.2d 861, 866 (Tex.App.--Austin 1996, writ denied).
[11] Berlanga v. Reno, 56 F. Supp.2d 751 (S.D. Tex. 1999).
[12] *Id.*