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Geoffrey S. Connor, *General Counsel*

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I.D. # 38837

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

May 14, 1996

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RA-89A

RECEIVED
MAY 21 1996
Opinion Committee

Attention: Jay Aquilar

RE: A Request for an Attorney General's Opinion regarding the constitutionality of suspension of a license prior to hearing

Dear General Morales:

The Texas Natural Resource Conservation Commission ("TNRCC") requests an Attorney General Opinion to fulfill a requirement of the Environmental Protection Agency's ("EPA") Final Rule regarding the Inspection/Maintenance ("I/M") Program Requirements as authorized under the Federal Clean Air Act Amendments ("FCAAA"). The Commission has authorized me to request this opinion (see attached resolution).

The State of Texas is required by the FCAAA to include a vehicle inspection and maintenance program in its State Implementation Plan ("SIP"). The required elements of this program as well as the required SIP submittals are detailed in EPA's Final Rule, 57 Federal Register 52950, published November 5, 1992. As you may know, the previous I/M program submitted by the State of Texas in its SIP was suspended for modification by the 74th Legislature. The Legislature authorized the Governor to issue a new program by executive order. On February 27, 1996, Governor George W. Bush signed Executive Order GWB 96-1 which describes the elements of the Texas Motorist's Choice Program. The new program incorporates the vehicle emissions test into the safety inspection in certain areas of the State. The State of Texas submitted its revised I/M SIP on February 28, 1996.

As part of its revised SIP, the State must meet the requirements of 40 CFR §51.364, (57 Fed. Reg. 52998, Nov. 5, 1992). This section of EPA's Final Rule requires that the State either 1) authorize the immediate temporary suspension of inspector licenses in certain circumstances, or 2) submit an official Attorney General Opinion, supported by case law, explaining that the State has constitutional impediments to such a suspension. A copy of Section 51.364 is included herein for your reference.

The Honorable Dan Morales
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The TNRCC Legal Division has done preliminary research on this issue and believes that case law demonstrates a constitutional impediment to immediate suspension of a license such as the inspector license. According to the case law, the opportunity for hearing is required prior to any suspension or revocation of a license. A memo detailing the research results is attached for your reference.

As previously mentioned, the State of Texas has submitted its SIP revision February 28, 1996. The opinion requested by this letter must be submitted as soon as possible to supplement this SIP revision in order to expedite EPA approval.

Any questions your staff may have may be directed to Ms. Kerri Rowland, Staff Attorney of the Commission's Legal Division, at 239-5693, or Mr. David Duncan, Senior Attorney for Air, Legal Division, at 239-0465. The Commission very much appreciates your courteous attention to this matter.

Very truly yours,



Geoffrey S. Connor
General Counsel

Attachments

cc: (w/o attachments)

Hal Ray, Office of the Attorney General

Jim Phillips, Office of Legal Services, TNRCC

Kevin McCalla, Legal Division, TNRCC

David Duncan, Legal Division, TNRCC

Kerri Rowland, Legal Division, TNRCC

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TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



A RESOLUTION concerning the delegation of certain duties and authority to the General Counsel. Docket No. 96-0406-RES.

WHEREAS, the Texas Natural Resource Conservation Commission ("Commission") is an agency of the State of Texas;

WHEREAS, in accordance with applicable law, the Commission has appointed a General Counsel to serve as the Commission's chief legal officer;

WHEREAS, the Commission's General Counsel is empowered by statute to perform such duties as authorized by law or delegated by the Commission;

WHEREAS, the Commission has determined that it is in the best interests of the Commission to include within the General Counsel's duties the responsibility to manage the Commission's public meetings, including the management of the number and type of matters to be considered at a particular meeting;

WHEREAS, the Commission has determined that it is in the best interests of the Commission to include within the General Counsel's duties the responsibility to advise the Commission on legal matters, including litigation matters, and the duty to take certain actions in legal matters;

WHEREAS, the Commission does not intend by the issuance of this resolution to affect the duties and authority of the Executive Director; and

WHEREAS, the Commission does not intend by the issuance of this resolution to repeal or change the additional duties and authority delegated to the General Counsel by Commission rule;

NOW, THEREFORE, BE IT RESOLVED, that the Texas Natural Resource Conservation Commission delegates to its General Counsel the following:

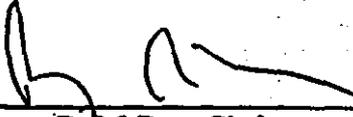
1. Managing the Commission's public meetings, including the number and types of matters to be considered, whether argument or comment will be held and time limits, rescheduling of matters and related deadlines, and referral of matters to the Alternative Dispute Resolution Office when the interested persons agree to referral;

2. Disposition of motions for reconsideration or motions for rehearing, whether by setting such motions for Commission public meetings, or by allowing such motions to expire by operation of law;
3. Representation of the Commission, including discussions with the Office of the Attorney General of the State of Texas or discussions with other state or federal officials;
4. Referral of matters in litigation to the Texas Attorney General or other appropriate officials;
5. Make decisions for the Commission in litigation matters involving Commission permits and orders;
6. Make decisions for the Commission in litigation matters in which the Commission is a named party;
7. Retention of outside counsel to represent the Commission in litigation matters;
8. Make requests to the Texas Attorney General to issue a written opinion on a question concerning the official duties of the Commission;
9. Management of administrative matters in the Office of the Commissioners; and
10. Authority to delegate the duties and authority set forth in this resolution to the attorneys in the Office of the General Counsel.

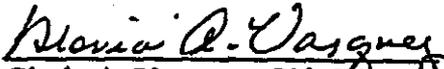
THE COMMISSION FURTHER RESOLVES that the Commission's resolution of May 25, 1995, concerning the delegation of certain duties to the General Counsel (Docket No. 95-0822-EXE), is rescinded and replaced by this resolution.

Issue Date: MAR 25 1996

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION


Barry R. McBee, Chairman

ATTEST:


Gloria A. Vasquez, Chief Clerk

(ii) Site visits at least once per year per number of inspectors using covert vehicles set to fail (this requirement sets a minimum level of activity, not a requirement that each inspector be involved in a covert audit);

(iii) For stations that conduct both testing and repairs, at least one covert vehicle visit per station per year including the purchase of repairs and subsequent retesting if the vehicle is initially failed for tailpipe emissions (this activity may be accomplished in conjunction with paragraph (a)(4)(ii) of this section but must involve each station at least once per year);

(iv) Documentation of the audit, including vehicle condition and preparation, sufficient for building a legal case and establishing a performance record;

(v) Covert vehicles covering the range of vehicle technology groups (e.g., carbureted and fuel-injected vehicles) included in the program, including a full range of introduced malfunctions covering the emission test, the evaporative system tests, and emission control component checks (as applicable);

(vi) Sufficient numbers of covert vehicles and auditors to allow for frequent rotation of both to prevent detection by station personnel; and

(vii) Access to on-line inspection databases by state personnel to permit the creation and maintenance of covert vehicle records.

(b) *Record audits.* Station and inspector records shall be reviewed or screened at least monthly to assess station performance and identify problems that may indicate potential fraud or incompetence. Such review shall include:

(1) Software-based, computerized analysis to identify statistical inconsistencies, unusual patterns, and other discrepancies;

(2) Visits to inspection stations to review records not already covered in the electronic analysis (if any); and

(3) Comprehensive accounting for all official forms that can be used to demonstrate compliance with the program.

(c) *Equipment audits.* During overt-site visits, auditors shall conduct quality control evaluations of the required test equipment, including (where applicable):

(1) A gas audit using gases of known concentrations at least as accurate as those required for regular equipment quality control and comparing these concentrations to actual readings;

(2) A check for tampering, worn instrumentation, blocked filters, and other conditions that would impede accurate sampling;

(3) A check for critical flow in critical flow CVS units;

(4) A check of the Constant Volume Sampler flow calibration;

(5) A check for the optimization of the Flame Ionization Detection fuel-air ratio using methane;

(6) A leak check;

(7) A check to determine that station gas bottles used for calibration purposes are properly labelled and within the relevant tolerances;

(8) Functional dynamometer checks addressing coast-down, roll speed and roll distance, inertia weight selection, and power absorption;

(9) A check of the system's ability to accurately detect background pollutant concentrations;

(10) A check of the pressure monitoring devices used to perform the evaporative canister pressure test; and

(11) A check of the purge flow metering system.

(d) *Auditor training and proficiency.*

(1) Auditors shall be formally trained and knowledgeable in:

(i) The use of analyzers;

(ii) Program rules and regulations;

(iii) The basics of air pollution control;

(iv) Basic principles of motor vehicle engine repair, related to emission performance;

(v) Emission control systems;

(vi) Evidence gathering;

(vii) State administrative procedures laws;

(viii) Quality assurance practices; and

(ix) Covert audit procedures.

(2) Auditors shall themselves be audited at least once annually.

(3) The training and knowledge requirements in paragraph (d)(1) of this section may be waived for temporary auditors engaged solely for the purpose of conducting covert vehicle runs.

(e) *SIP requirements.* The SIP shall include a description of the quality assurance program, and written procedures manuals covering both overt and covert performance audits, record audits, and equipment audits. This requirement does not include materials or discussion of details of enforcement strategies that would ultimately hamper the enforcement process.

§ 51.364 Enforcement against contractors, stations and inspectors.

Enforcement against licensed stations or contractors, and inspectors shall include swift, sure, effective, and consistent penalties for violation of program requirements.

(a) *Imposition of penalties.* A penalty schedule shall be developed that establishes minimum penalties for violations of program rules and procedures.

(1) The schedule shall categorize and list violations and the minimum penalties to be imposed for first, second, and subsequent violations and for multiple violation of different requirements. In the case of contracted systems, the state may use compensation retainage in lieu of penalties.

(2) Substantial penalties or retainage shall be imposed on the first offense for violations that directly affect emission reduction benefits. At a minimum, in test-and-repair programs inspector and station license suspension shall be imposed for at least 6 months whenever a vehicle is intentionally improperly passed for any required portion of the test. In test-only programs, inspectors shall be removed from inspector duty for at least 6 months (or a retainage penalty equivalent to the inspector's salary for that period shall be imposed).

(3) All findings of serious violations of rules or procedural requirements shall result in mandatory fines or retainage. In the case of gross neglect, a first offense shall result in a fine or retainage of no less than \$100 or 5 times the inspection fee, whichever is greater, for the contractor or the licensed station, and the inspector if involved.

(4) Any finding of inspector incompetence shall result in mandatory training before inspection privileges are restored.

(5) License or certificate suspension or revocation shall mean the individual is barred from direct or indirect involvement in any inspection operation during the term of the suspension or revocation.

(b) *Legal authority.* (1) The quality assurance officer shall have the authority to temporarily suspend station and inspector licenses or certificates (after approval of a superior) immediately upon finding a violation or equipment failure that directly affects emission reduction benefits, pending a hearing when requested. In the case of immediate suspension, a hearing shall be held within fourteen calendar days of a written request by the station licensee or the inspector. Failure to hold a hearing within 14 days when requested shall cause the suspension to lapse. In the event that a state's constitution precludes such a temporary license suspension, the enforcement system shall be designed with adequate resources and mechanisms to hold a hearing to suspend or revoke the station or inspector license within three station business days of the finding.

(2) The oversight agency shall have the authority to impose penalties against the licensed station or contractor, as

well as the inspector, even if the licensee or contractor had no direct knowledge of the violation but was found to be careless in oversight of inspectors or has a history of violations. Contractors and licensees shall be held fully responsible for inspector performance in the course of duty.

(c) *Recordkeeping.* The oversight agency shall maintain records of all warnings, civil fines, suspensions, revocations, and violations and shall compile statistics on violations and penalties on an annual basis.

(d) *SIP requirements.* (1) The SIP shall include the penalty schedule and the legal authority for establishing and imposing penalties, civil fines, license suspension, and revocations.

(2) In the case of state constitutional impediments to immediate suspension authority, the state Attorney General shall furnish an official opinion for the SIP explaining the constitutional impediment as well as relevant case law.

(3) The SIP shall describe the administrative and judicial procedures and responsibilities relevant to the enforcement process, including which agencies, courts, and jurisdictions are involved; who will prosecute and adjudicate cases; and other aspects of the enforcement of the program requirements, the resources to be allocated to this function, and the source of those funds. In states without immediate suspension authority, the SIP shall demonstrate that sufficient resources, personnel, and systems are in place to meet the three day case management requirement for violations that directly affect emission reductions.

§ 51.365 Data collection.

Accurate data collection is essential to the management, evaluation, and enforcement of an I/M program. The program shall gather test data on individual vehicles, as well as quality control data on test equipment.

(a) *Test data.* The goal of gathering test data is to unambiguously link specific test results to a specific vehicle, I/M program registrant, test site, and inspector, and to determine whether or not the correct testing parameters were observed for the specific vehicle in question. In turn, these data can be used to distinguish complying and noncomplying vehicles as a result of analyzing the data collected and comparing it to the registration database, to screen inspection stations and inspectors for investigation as to possible irregularities, and to help establish the overall effectiveness of the program. At a minimum, the program

shall collect the following with respect to each test conducted:

- (1) Test record number;
 - (2) Inspection station and inspector numbers;
 - (3) Test system number;
 - (4) Date of the test;
 - (5) Emission test start time and the time final emission scores are determined;
 - (6) Vehicle Identification Number;
 - (7) License plate number;
 - (8) Test certificate number;
 - (9) Gross Vehicle Weight Rating [GVWR];
 - (10) Vehicle model year, make, and type;
 - (11) Number of cylinders or engine displacement;
 - (12) Transmission type;
 - (13) Odometer reading;
 - (14) Category of test performed (i.e., initial test, first retest, or subsequent retest);
 - (15) Fuel type of the vehicle (i.e., gas, diesel, or other fuel);
 - (16) Type of vehicle preconditioning performed (if any);
 - (17) Emission test sequence(s) used;
 - (18) Hydrocarbon emission scores and standards for each applicable test mode;
 - (19) Carbon monoxide emission scores and standards for each applicable test mode;
 - (20) Carbon dioxide emission scores (CO + CO₂) and standards for each applicable test mode;
 - (21) Nitrogen oxides emission scores and standards for each applicable test mode;
 - (22) Results (Pass/Fail/Not Applicable) of the applicable visual inspections for the catalytic converter, air system, gas cap, evaporative system, positive crankcase ventilation (PCV) valve, fuel inlet restrictor, and any other visual inspection for which emission reduction credit is claimed;
 - (23) Results of the evaporative system pressure test expressed as a pass or fail; and
 - (24) Results of the evaporative system purge test expressed as a pass or fail along with the total purge flow in liters achieved during the test.
- (b) *Quality control data.* At a minimum, the program shall gather and report the results of the quality control checks required under § 51.359 of this subpart, identifying each check by station number, system number, date, and start time. The data report shall also contain the concentration values of the calibration gases used to perform the gas characterization portion of the quality control checks.

§ 51.366 Data analysis and reporting.

Data analysis and reporting are required to allow for monitoring and evaluation of the program by program management and EPA, and shall provide information regarding the types of program activities performed and their final outcomes, including summary statistics and effectiveness evaluations of the enforcement mechanism, the quality assurance system, the quality control program, and the testing element. Initial submission of the following annual reports shall commence within 18 months of initial implementation of the program as required by § 51.373 of this subpart. The biennial report shall commence within 30 months of initial implementation of the program as required by § 51.373 of this subpart.

(a) *Test data report.* The program shall submit to EPA by July of each year a report providing basic statistics on the testing program for January through December of the previous year, including:

- (1) The number of vehicles tested by model year and vehicle type;
 - (2) By model year and vehicle type, the number and percentage of vehicles:
 - (i) Failing the emissions test initially;
 - (ii) Failing each emission control component check initially;
 - (iii) Failing the evaporative system functional and integrity checks initially;
 - (iv) Failing the first retest for tailpipe emissions;
 - (v) Passing the first retest for tailpipe emissions;
 - (vi) Initially failed vehicles passing the second or subsequent retest for tailpipe emissions;
 - (vii) Initially failed vehicles passing each emission control component check on the first or subsequent retest by component;
 - (viii) Initially failed vehicles passing the evaporative system functional and integrity checks on the first or subsequent retest by component;
 - (ix) Initially failed vehicles receiving a waiver; and
 - (x) Vehicles with no known final outcome (regardless of reason);
 - (3) The initial test volume by model year and test station;
 - (4) The initial test failure rate by model year and test station; and
 - (5) The average increase or decrease in tailpipe emission levels for HC, CO, and NO_x (if applicable) after repairs by model year and vehicle type for vehicles receiving a mass emissions test.
- (b) *Quality assurance report.* The program shall submit to EPA by July of each year a report providing basic statistics on the quality assurance

Given the general rule enunciated in House of Tobacco, whether due process protection must be afforded upon revocation of a license depends on whether the license is akin to a property right or whether the license is a privilege granted under the State's police power. There is good reason to think that most licenses, including licenses to conduct vehicle emissions tests, are more like property rights than privileges granted under the State's police power. At one time, the Supreme Court of Texas did view a driver's license as a privilege granted under the State's police power, thus making a driver's license subject to suspension absent a prior hearing. Gillaspie v. Dep't of Public Safety, 259 S.W.2d 177, 182 (Tex. 1953). However, a later United States Supreme Court case, Bell v. Burson, held that the temporary suspension of even a driver's license may deprive an individual of something of value and, thus, that due process requires that suspension be preceded by a hearing. Bell v. Burson, 402 U.S. 535, 539-40 (1971). The facts of Bell v. Burson involved a clergyman whose ministry required him to travel by car to three rural Georgia communities. Id. at 537. Suspension of his driver's license would have severely handicapped him in the performance of his ministerial duties. Id. If something as simple as a driver's license is considered akin to a property right, most other kinds of licenses should also be considered akin to property rights.

Furthermore, certain language in the House of Tobacco decision indicates that most licenses should not be considered privileges granted under the State's police power. The example the Court gives of a license granted under the State's police power is a liquor license. House of Tobacco, 394 S.W.2d at 656. The reason the Court considers a liquor license as having been granted under the State's police power is the fact that the Texas Liquor Control Act explicitly states that the requirements of the statute are an exercise of the police power of the State for the protection of the welfare, health, peace, temperance, and safety of the people of the State. Id. When the statute creating a licensing regime makes no such pronouncement of a legislative intent to exercise the police power, it may be reasonable to conclude that the legislature did not intend an exercise of the police power. Thus, most licensing regimes should not be seen as an exercise of the police power.

Apart from the House of Tobacco case, there exists a series of Texas cases holding that a license may not be revoked or suspended without a prior hearing. For example, in Francisco v. Board of Dental Examiners, the court held that a statute authorizing the revocation of a dental license "without ... [a] right of notice and hearing constitutes ... a denial of due process under both [the] federal and state constitutions." Francisco v. Board of Dental Examiners, 149 S.W.2d 619, 623 (Tex. Civ. App.—Austin 1941, writ ref'd). The court reasoned that a license to practice dentistry is a property right, the revocation of which would deprive the licensee of his livelihood. Id. at 622. In any instance in which something of such value is to be taken from an individual, due process requires a prior hearing. Id.

The Supreme Court of Texas later cited the Francisco case approvingly in a case in which the Court established the principle that when a statute does not provide for notice and hearing prior to the revocation of a license, the courts should imply such a requirement on the presumption that the legislature intended a constitutionally valid enactment. Industrial Accident Board v. O'Dowd, 303 S.W.2d 763, 765-66 (Tex. 1957). In this case, the Industrial Accident Board barred two attorneys from practicing before it on the basis of unethical and fraudulent conduct. Id. at 765. The Board did, however, hold a hearing before suspending the attorneys. Id. The attorneys nevertheless challenged the Board's action on the ground that although they had been afforded a hearing, the statute authorizing the Board to bar individuals from practicing before it was unconstitutional because the statute failed to explicitly require a hearing. Id. The Supreme Court, however, upheld the statute contending that when a statute fails to explicitly provide for a hearing, the courts will imply such a

requirement. Id. at 765-66.

A further example of the principle that a license may not be revoked without a prior hearing is found in the case of Denton v. City of Austin, 587 S.W.2d 56 (Tex. Civ. App.—Beaumont 1979, no writ). Upon the suspension of an individual's master electrician's license absent a hearing, the court (citing House of Tobacco, Francisco, and O'Dowd) held that the right to work as a master electrician, once acquired by means of a license, becomes a right protected by the due process clause of the state and federal constitutions. Id. at 58. As in House of Tobacco and Francisco, the court reasoned that a master electrician's license constitutes a valuable commodity, the suspension of which would deprive the licensee of his livelihood. Id. In any instance in which something of such value is to be taken from an individual, due process requires a prior hearing. Id.

Finally, there exist two cases, both dealing with the automatic suspension of Texas driver's licenses after the licensees had been convicted of drunken driving in other states, in which the respective courts held that "[a]s a general rule one cannot be deprived of a license or permit without due process." Texas Dep't of Public Safety v. Hamilton, 304 S.W.2d 719, 721 (Tex. Civ. App.—Eastland 1957), *aff'd per curiam*, 306 S.W.2d 712 (Tex. 1957); Smith v. Speir, 504 S.W.2d 936, 938 (Tex. Civ. App.—Fort Worth 1974, no writ).

The above-cited cases should be controlling in this matter, leading to the conclusion that there exists a constitutional impediment to the temporary suspension of vehicle safety inspection licenses absent a prior hearing.