



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 15, 2017

Honorable Scott Pruitt, Administrator  
U.S. Environmental Protection Agency  
Office of the Administrator, MC 1101A  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

*via regulations.gov*

Re: Docket ID No. EPA-HQ-OA-2017-0190, Comments from Texas concerning stay of imminent regulatory deadlines for existing regulations currently subject to litigation and abatement of such litigation pending review of each rule.

Dear Administrator Pruitt;

We write in response to the Environmental Protection Agency's (EPA's) request for comment concerning the agency's internal review and evaluation of existing regulations. *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017). We ask that the EPA Regulatory Reform Task Force consider these comments regarding EPA regulations currently subject to judicial review. The goals stated in Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), if achieved, will help return our country to an era of less burdensome federal regulation and greater cooperation between the federal government and states in environmental regulation.

Cooperative Federalism Principles are Embodied in Environmental Law.

Cooperative federalism is an important principle in our country. This is because "the role of the States as laboratories for devising solutions to difficult legal problems" is long recognized. *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). To this point, we recognize that deference to the States "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Therefore, when it comes to relations between the States and the federal government, the Supreme Court has admonished the importance of seeking the appropriate "federal balance." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2659 (2012). The power to spend money, for example, "without concern for the federal balance, has the potential to obliterate

distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.” *NFIB*, 132 S. Ct. at 2659. The same is true when the federal government exercises its regulatory power. For only if the States are able to experiment, so that we may learn lessons from our collective experiences, will the depth and breadth of the potential of our Union be fulfilled.<sup>1</sup>

#### Litigation and Regulation Enforcement Should be Suspended Pending Agency Reconsideration.

Unfortunately, as you are aware, the previous administration was unwilling to engage with most states, and took actions or issued rules ignoring the spirit of cooperative federalism embodied in the Clean Air Act and Clean Water Act. *See* 42 U.S.C. § 7401(a)(3), 33 U.S.C. § 1251(b). As a result, Texas and others, along with industry representatives, were routinely forced to seek judicial review of many of the EPA’s actions. Enclosed at Attachment 2 is a list of pending actions in which Texas is still involved.

The issue statements and briefs filed in the list of pending actions articulate why each of the challenged rules or actions are arbitrary and capricious, not in accordance with the law, are unnecessary or ineffective, impose costs that exceed benefits, and otherwise create serious inconsistency with the initiatives described in Executive Order 13777. Enclosed at Attachments 3A and 3B are the petitions for review and statement of issues filed by Texas in each of the matters.<sup>2</sup> For the reasons discussed in the filings concerning each of the rules listed in Attachment 1, we request that each of those rulemakings be reconsidered and that any imminent regulatory deadlines be suspended pending your Agency’s reconsideration.

Furthermore, although the Department of Justice has sought to abate many matters in litigation while the EPA reevaluates each rule,<sup>3</sup> several matters identified in Attachment 1 are not abated, including the Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016); *Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.), and Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016); *Texas v. EPA*, 17-60088 (5th Cir.); *Texas v. EPA*, 17-1053, consolidated with *Masias (Sierra Club) v. EPA*, 16-1314 (D.C. Cir.).

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<sup>1</sup> This is the subject of a more comprehensive letter Texas and 18 other states previously addressed. Letter from Hon. Ken Paxton to Hon. Scott Pruitt, Mar. 7, 2017, at [https://www.texasattorneygeneral.gov/files/epress/FINAL\\_Signed\\_Letter\\_to\\_EPA.pdf](https://www.texasattorneygeneral.gov/files/epress/FINAL_Signed_Letter_to_EPA.pdf) (also enclosed at Attachment 1).

<sup>2</sup> Because the Court of Appeals for the Fifth Circuit does not mandate the filing of issue statements, those issue statements are not included. Due to the voluminous nature of filed briefs, we refer the agency to the briefs in such cases rather than include them here.

<sup>3</sup> The abatement of litigation is consistent with Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017), and Executive Order 13777.



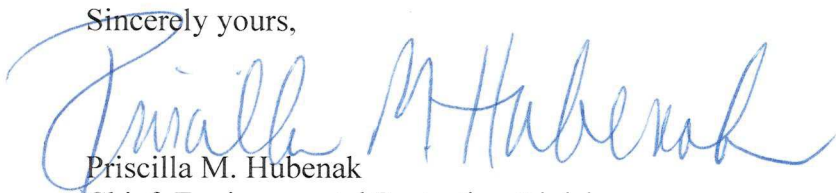
Each of these matters have looming briefing or motion deadlines. Rather than have Texas and other petitioners continue to incur legal expenses and costs to challenge regulations that should be reevaluated, EPA should direct the Department of Justice to abate these matters pending further review of each rule. Any imminent deadlines imposed by those rules should be suspended during agency review.

Abatement of the litigation will allow the EPA time to consider each rule, especially for those rules that form part of a larger, comprehensive framework of unnecessary, overlapping, and duplicative regulation promulgated by the prior administration targeting the same pollutants, goals, and programs of other rulemakings. Particular consideration should be paid to the comprehensive social, economic, and health effects of the entire network of rulemakings and whether rules impose duplicative burdens for negligible net benefits. Abatement will also permit the agency an opportunity to consult with parties in the litigation about revisions to particular rules that might resolve individual grievances.

We appreciate that your agency has many priorities and matters to which to attend and that this request will require substantial deliberation. However, in order to save everyone time and resources, please consider an immediate suspension of any and all active litigation and new regulatory enforcement while the EPA conducts its review and reconsideration of these matters.

We appreciate and thank you for your attention to this matter.

Sincerely yours,



Priscilla M. Hubenak  
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Office of the Attorney General of Texas

Attachments

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