TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

TESTIMONY OF CHAIRMAN BRYAN SHAW, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY DELIVERED TO THE UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, SUB-COMMITTEE ON ENERGY AND POWER

April 14, 2016

Chairman Whitfield, Ranking Member Rush, members of the committee:

Good morning, and thank you for the opportunity to visit with you this morning about HR 4775, "The Ozone Standards Implementation Act of 2016" sponsored by Vice-Chair Olson.

My name is Dr. Bryan Shaw, and I am the Chairman of the Texas Commission on Environmental Quality (TCEQ). My agency's mission is to protect Texans' public health and their environment in a way that is consistent with sustainable economic development. In carrying out that mission, we seek to bring together common sense, sound science, and the law to ensure that environmental regulations are safe, fair, and predictable.

The 2015 Standard

I am here today because the Environmental Protection Agency's (EPA) recent action lowering the National Ambient Air Quality Standard for ground level ozone is not consistent with those principles. As you all know, the EPA finalized their proposal to lower the standard from 75 to 70 parts per billion on October 26, 2015. The States' initial designation recommendations are due on October 1, 2016.

The TCEQ detailed our disagreements with the EPA's conclusions in formal comments during the rulemaking process. We even travelled to Washington to meet personally with Administrator McCarthy to make her aware of significant flaws in the studies EPA relied on in promulgating the new standard. The EPA nonetheless lowered the standard, and now my agency is challenging the validity of this standard in court.

While our voluminous comments and legal filings elaborate in great detail on the myriad scientific and legal vulnerabilities with the new standard, I would like to briefly raise a few of the most troubling issues.

First, the EPA claims that the new standard will provide annual health benefits between $2.9 billion and $5.9 billion, with a cost of only $1.4 billion. My agency's

analysis suggests those figures are dramatically incorrect. For example, the EPA only includes industry's costs in their analysis, not the states' or taxpayer's costs. Nor do they look at economic impacts like increased electricity costs.

Another major flaw in the EPA's analysis is their quantification of the benefits that would flow from this new standard. The EPA's own analysis show that lowering the standard even to 65 ppb will not significantly reduce asthma attacks. In addition, approximately two-thirds of the benefits the EPA claims would result from this new standard are not based on ozone reductions at all. In fact, they are based on reductions of an entirely different pollutant that is not the subject of this Rule. Specifically, the EPA reasons that in taking the actions necessitated by this standard, states will also lower levels of fine particulate matter, or $PM_{2.5}$. The flaw in that reasoning is that, at least in Texas' case, levels of $PM_{2.5}$ are already below the standard set by the EPA. Chief Justice Roberts recently questioned this practice when the EPA's Mercury and Air Toxics Standard was reviewed and rejected by the Supreme Court. While the Court ultimately rejected the rule on other grounds, the Chief Justice suggested that EPA's co-benefits analysis might be "an illegitimate way" of muddling the differing regulatory schemes for each pollutant under the Clean Air Act.[1]

HR 4775

HR 4775 is a welcome step in the right direction. It seeks to defer the implementation of the new standard until 2024, and it requires the EPA to spend more time studying and reviewing scientific literature and other factors before implementing new standards.

By suspending the applicability of the new standard, this legislation will allow states to focus their limited resources on fully implementing the 2008 standard, as well as the cascade of other new and expensive regulations coming out of EPA. Especially considering the cost and the negligible health and environmental benefits embodied by the new standard, a delay in implementing this standard is helpful indeed.

More broadly, HR 4775 also seeks to make the NAAQS program, applicable to all six criteria pollutants, more efficient and effective. By lengthening the required review period from five to ten years, it will ensure the EPA does not rush to lower a given standard only to comply with a statutory deadline. Furthermore, it will give states more time to comply with previous standards before getting saddled with more stringent standards and/or facing economic or developmental sanctions for nonattainment.

I also support this legislation's addition of technological feasibility and possible adverse welfare, social, and economic effects to the list of factors the EPA can consider in revising a standard. As the Act is currently written and interpreted by the Supreme Court, the EPA is prohibited from considering whether or not the state of our technological capabilities would even make getting the required reductions possible.

[1] Transcript of Oral Argument at 64. Michigan v. EPA, No. 14-46 U.S. (2015).

Put simply, the EPA could require states to make reductions that are literally impossible to achieve.

The Act's requirement that the EPA ignore technological and economic considerations might have made sense forty years ago when it was initially passed. However, pollution levels have been lowered to such a degree that the law of diminishing returns has made it more and more difficult to continue to reduce pollutant levels at all, much less in a way that is not burdensome economically.

Finally, HR 4775's directive to the EPA to begin timely issuance of implementing regulations and guidance solves a major issue that often confronts states like Texas. Without this protection, the EPA can, and does, require states to develop and propose new standards before the EPA itself has given states specific guidance for the standard's implementation.

There is some language in the bill that I bring to your attention as potentially problematic, and that I discuss in more detail in my written comments to the sub-committee. For example, the term "not later than" in Section 2, subsection(a)(1) would allow states to submit designation recommendations to the EPA before October 2024, which could become a source of confusion due to differing designation, implementation, and attainment dates across the country. At the same time, I am cognizant of the fact that that was not the intent of this legislation, and I look forward to working with the members of the subcommittee to avoid any confusion.

I understand how charged the issue of air quality regulation can be, so I appreciate Vice-Chair Olson's efforts to streamline this process.

Comments on Draft Federal Legislation: H.R. 4775 by Rep. Olson

Section 2, subsection (a)(1), Page 2, lines 1-2:

The language "not later than" would not prevent states submitting designations to EPA earlier than October 26, 2024, which could create confusion and differing designation dates, implementation dates, and attainment dates across the country, since the same language appears in subsection (a)(2). EPA would not be prohibited from (and might be required to) act on earlier submissions. This could result in transport reductions being required from states that have not been designated yet that potentially impact states that chose to submit designations earlier than the specified date. Suggested fix: change the phrase "not later than" to "no earlier than."

Section 2, subsection (b), page 3, line 3:

This section of the draft bill specifies that the 2015 ozone standards shall not apply to the review and disposition of a "preconstruction permit" application if specified criteria are met. "Preconstruction permit" application is defined in section 4 of this bill to mean a permit that is required under part C or part D of title I of the Clean Air Act (i.e., PSD and NNSR permits for major stationary sources). However, EPA interprets FCAA, §110 to also require that preconstruction permits be obtained from minor sources. Because the draft bill does not address applicability for minor sources, the 2015 ozone standard would apply to preconstruction permitting for those sources, while major stationary sources could be exempt. Also, when you read this section together with the definition in section 4, we think that it means that any new or modified source subject to major NSR (PSD or nonattainment) permitting requirements would not be subject to the 2015 standard, including in the case of PSD, a modeling analysis of whether they meet the new standard. This would mean that we would only be looking at the older 75 ppb standard for those sources. We are not sure if this is what was intended by the bill and it would be different from how we have conducted permit reviews during previous standard transitions. It would also mean that we would not be conducting a nonattainment review for any area that might be designated nonattainment under the new standard, nor would we be requiring lower major source thresholds or higher offset ratios for any area that is potentially a higher nonattainment classification under the new standard – we believe that this was the intention of the bill.

Section 2, subsection (b), page 3, line 6:

One of the criteria for determining whether the 2015 ozone standard does not apply to the requirement for a "preconstruction permit" is that the application has been determined to be "complete" on or before the date of promulgation of the final designation. Completeness criteria is not specified by the draft language.

Section 3, subsection (e)(4), page 8, lines 7-15:

As discussed above, "preconstruction permit" application is defined to mean a permit that is required under part C or part D of title I of the Clean Air Act (i.e., PSD and NNSR permits for major stationary sources). However, EPA interprets FCAA, §110 to also require that preconstruction permits be obtained from minor sources. Because the draft bill does not address applicability for minor sources, the 2015 ozone standard

would apply to preconstruction permitting for those sources, while major stationary sources could be exempt.

Section 4, subsection (5), page 11, lines 24-25 and page 12, lines 1-5:

As discussed above, "preconstruction permit" application is defined to mean a permit that is required under part C or part D of title I of the Clean Air Act (i.e., PSD and NNSR permits for major stationary sources). However, EPA interprets FCAA, §110 to also require that preconstruction permits be obtained from minor sources. Because the draft bill does not address applicability for minor sources, the 2015 ozone standard would apply to preconstruction permitting for those sources, while major stationary sources could be exempt.