

SUBJECT: Environmental permit a defense to greenhouse gas nuisance lawsuit

COMMITTEE: Environmental Regulation — favorable, without amendment

VOTE: 6 ayes — W. Smith, Aliseda, Chisum, Hancock, Legler, Lyne

3 nays — Farrar, Burnam, Reynolds

SENATE VOTE: On final passage, April 4 — 23-8 (Davis, Ellis, Gallegos, Rodriguez, Van de Putte, Watson, West, Zaffirini)

WITNESSES: No public hearing

BACKGROUND: The U.S. Environmental Protection Agency (EPA) has declared that greenhouse gases are pollutants. At the end of 2010, the EPA issued its plan for establishing greenhouse gas pollution standards under the Clean Air Act. The EPA announced it would propose standards for fossil fuel power plants in July 2011 and for petroleum refineries in December 2011. The EPA plans to issue final standards in May 2012 and November 2012, respectively.

A public nuisance is an unreasonable interference with a right common to the general public, such as a condition dangerous to health. A private nuisance action would arise from a condition, activity, or situation (such as foul odor) that interferes with the use or enjoyment of property. Trespass on the case is a common law action to recover damages that do not immediately result from a wrongful act but are a later consequence. This trespass action was the precursor to various modern-day tort claims, including nuisance.

DIGEST: SB 875 would amend Water Code, ch. 7, to create an affirmative defense to a nuisance or trespass administrative, civil, or criminal action arising from greenhouse gas emissions if the actions that resulted in the alleged nuisance or trespass were authorized by a rule, permit, order, license, certificate, registration, approval, or other form of authorization issued by the Texas Commission on Environmental Quality (TCEQ) or the federal government (collectively referred to hereafter as a “permit”) and:

- the person was in substantial compliance with that permit while the alleged nuisance or trespass was occurring; or
- TCEQ or the federal government exercised enforcement discretion in connection with the actions that resulted in the alleged nuisance or trespass.

This section would not apply to nuisance actions related to a noxious odor.

“Person” would mean an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. The bill would apply only to an administrative enforcement action, civil action, or prosecution that began on or after the effective date.

**SUPPORTERS
SAY:**

SB 875 would protect Texas businesses from greenhouse gas nuisance and trespass lawsuits that stemmed from the EPA’s unilateral and flawed proposed regulation of greenhouse gases. The damages from greenhouse gases, such as health hazards and climate change, are complicated to assess at best. A business should not have to protect itself from charges that it emitted an undefined and speculative harm. The EPA has not yet issued regulations, and any regulations will be subject to intense scrutiny and debate. That is the appropriate legal avenue for determining at what level greenhouse gases are harmful, if harmful at all, not on a case-by-case basis as nuisance lawsuits are filed.

SB 875 would apply only to environmental enforcement actions initiated by state or local governments, because the bill specifically would address only administrative, civil, and criminal actions brought under Water Code, ch. 7. It would not impact the rights of an individual to bring suit because ch. 7 only pertains to the ability of a governmental entity to bring an administrative, civil, or criminal enforcement action. Under ch. 7, an administrative action is brought by TCEQ, a civil action is brought by the Attorney General’s Office or a local government, and a criminal action can only be brought by a county prosecutor. Sec. 7.004 of the Water Code specifically states that nothing in the chapter affects the right of a private corporation or individual to pursue any available common law remedy to abate a condition of pollution or other nuisance.

SB 875 is a direct response to a growing national trend of outlandish lawsuits being filed by government entities against businesses alleged to have caused local abnormal weather activity, including natural disasters. One example of this disturbing trend of trying to impose environmental regulation through nuisance law was the attempt by former Houston mayor Bill White to use a nuisance ordinance to regulate air toxins that already were regulated by the state.

SB 875 is the state's only recourse to protect Texas businesses from the EPA's unilateral decision to regulate greenhouse gases without congressional authorization. A company that operates in substantial compliance with its permits should not have to spend hundreds of thousands of dollars defending itself from speculative greenhouse gas claims, especially when this ultimately would result in the passage of legal expenses onto consumers.

OPPONENTS
SAY:

SB 875 would leave the public without any viable legal avenue to protect itself from the harm caused by greenhouse gases. The bill is an attempt to gut the age-old common law right to protect one's health and welfare through nuisance and trespass lawsuits. Greenhouse gases have been defined by the EPA as harmful pollutants. If individuals, local governments, or other organizations suffer harm from these pollutants, they should be able to sue the entity responsible for damages.

There is disagreement as to whether this bill would prevent individuals from prevailing on greenhouse gas nuisance suits, but blocking the power of government entities to protect themselves through nuisance suits would be just as damaging. Government entities legally represent the interests of their communities and have the resources to pursue legal action to protect those communities. Individuals likely would not have the resources necessary to protect themselves through nuisance suits.

The legal actions of nuisance and criminal trespass are even more important to maintain in the absence of any currently operative state or federal permit requirements specifically limiting the emissions of greenhouse gases. Even when the EPA starts to regulate greenhouse gases, many older power plants and refineries will remain exempt for many years. Yet these are the businesses that emit the greatest level of greenhouse gases likely to cause the most harm.

SB 875 is misleading because it appears to imply that since the government already protects the public through the permitting process, the public does not need the protections of nuisance and trespass actions. In fact, the permits currently required do not address greenhouse gases at all, so the permitting process never considered the level of harm caused by the greenhouse gases. Moreover, to imply protection by requiring that an entity be in “substantial” compliance with a permit unrelated to the regulation of greenhouse gases would be even more misleading. For example, an entity’s substantial compliance with the levels of particulates that its permit allows it to emit does not protect the public from the harms of greenhouse gases.

The bill also would appear to grant immunity from nuisance or trespass suits if TCEQ or the EPA exercised enforcement discretion related to greenhouse gas emissions. This also would imply that the public was already protected, but again, the enforcement discretion could be to take no action. The result would be no regulatory protection and no way to protect the public through a nuisance or trespass action.