

INSIGHTS

## Texas Court of Appeals Holds There is No Right Under The Administrative Procedure Act to Seek Judicial Review of a State Agency's Denial of a Petition for Rulemaking

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On July 23, 2014, the Austin Court of Appeals held that Texas trial courts lack subject matter jurisdiction under the Texas Administrative Procedure Act (APA) to review orders by state agencies denying petitions for rulemaking. In *Texas Commission on Environmental Quality v. Bonser-Lain, et al.*, No. 03-12-00555-CV (Tex. App.—Austin Jul. 23, 2014), the Court of Appeals addressed whether the APA waived the Texas Commission on Environmental Quality's (TCEQ) immunity by permitting a district court to consider the appeal of TCEQ's denial of a petition for rulemaking. The Court of Appeals first considered whether TCEQ had standing to appeal, in light of the fact that TCEQ won on the merits at the district court, but its plea to the jurisdiction was denied. After noting concerns that collateral estoppel could preclude relitigation of the jurisdictional issue, the Court of Appeals determined that it had subject matter jurisdiction to consider the appeal. The Court next considered whether the district court had jurisdiction to consider TCEQ's denial of the petition for rulemaking. Noting that the State and its agencies cannot be sued absent an express waiver under principles of sovereign immunity, the Court held that the district court did not have jurisdiction because the Legislature's failure to include such an appeal in the APA, termed "deliberate silence," did not demonstrate its intent to allow judicial review of agency decisions denying petitions for rulemaking.

### **Factual and Procedural Background:**

A group of individuals filed a petition with TCEQ requesting that it adopt rules aimed at limiting greenhouse-gas emissions from fossil fuels in Texas. TCEQ considered the petition at a public meeting but later denied the petition and issued a written order, listing several independent reasons for denying the petition. The group of individuals filed suit against TCEQ, seeking judicial review of the decision based on provisions in the Texas Water Code. In response, TCEQ filed a plea to the jurisdiction arguing that the district court lacked jurisdiction to review TCEQ's decisions because such a review was barred by sovereign immunity and section 5.351 of the Texas Water Code does not provide a waiver of sovereign immunity for suits challenging a denial of a petition for rulemaking. The district court denied TCEQ's plea to the jurisdiction but affirmed its decision based on one of the legal grounds advanced by TCEQ in its administrative order. While the district court upheld TCEQ's decision, it also expressly rejected certain of TCEQ's alternative reasons for denying their petition in its order. TCEQ then filed an appeal raising two issues: (1) that the district court erred in denying its plea to the jurisdiction; and (2)

in the alternative, that the district court's declarations concerning TCEQ's other grounds for denial based on the public trust doctrine and preemption constitute improper advisory opinions and should be vacated by the Court of Appeals.

**Opinion of the Austin Court of Appeals:**

Noting that subject matter jurisdiction is essential to the authority of a court to decide a case, the Court recognized that subject matter jurisdiction was implicated here in two respects: (1) whether the Court had jurisdiction over the appeal, and specifically, whether the TCEQ had standing to bring the appeal since TCEQ prevailed at the district court, and (2) whether sovereign immunity deprived the district court of subject matter jurisdiction over the underlying dispute.

**1. Whether TCEQ Had Standing to Bring the Appeal:**

First, the Court considered whether TCEQ had standing to bring the appeal, since the judgment of the district court had affirmed TCEQ's decision to deny the petition for rulemaking. The Court recognized that Texas courts have long held that a party who obtains a favorable judgment may not appeal the judgment merely to attack findings and conclusions with which it does not agree. However, the Court recognized that, while the judgment of the district court appears favorable to TCEQ, the district court could only have reviewed TCEQ's decision *after* it concluded it had jurisdiction to do so: "In rejecting the Commission's plea to the jurisdiction, the district court necessarily concluded that section 5.351 of the Texas Water Code operated as a waiver of sovereign immunity." See *Tex. Comm'n on Envtl. Quality v. Bonser-Lain, et al.*, No. 03-12-00555-CV, at 6. And under principles of collateral estoppel, the Court noted that TCEQ may be potentially precluded from relitigating this jurisdictional issue in subsequent proceedings. Therefore, the Court determined that TCEQ had sufficiently demonstrated that its interests had been prejudiced or adversely affected by the district court's judgment, and that, consequently, grounds existed for the Court to review the district court's denial of TCEQ's plea to the jurisdiction.

**2. Whether Sovereign Immunity Deprived the District Court of Subject Matter Jurisdiction over the Underlying Dispute:**

The Court next considered whether the district court had jurisdiction to consider TCEQ's denial of the petition for rulemaking. Suits against TCEQ are generally barred by sovereign immunity because the State and its agencies cannot be sued, absent an express waiver by clear and unambiguous language. Sovereign immunity deprives a district court of subject matter jurisdiction. TCEQ argued that neither the APA nor section 5.351 of the Texas Water Code allows for judicial review because the Legislature has not waived immunity. The "pivotal issue" for the Court of Appeals, therefore, was whether the Legislature waived immunity either by statute or legislative resolution.

While the APA provides a right to judicial review of certain agency decisions and provides that, under certain circumstances, a suit for declaratory relief may be brought to determine the validity or applicability of a rule, the APA is silent with respect to whether a person may appeal or challenge an agency's decision to deny a petition for rulemaking. The Legislature must provide a right to judicial review by clear and unambiguous language. The Court noted that while the Legislature has expressly demonstrated its intent to allow judicial review of certain types of agency decisions under the APA, it has not done so with respect to agency decisions on

petitions for rulemaking. Based on this “deliberate silence,” the Court concluded that the APA does not provide a right to judicial review of an agency’s refusal to adopt rules. *See Tex. Comm’n on Env’tl. Quality v. Bonser-Lain, et al.*, No. 03-12-00555-CV, at 9-10. Further, the Court of Appeals concluded that the Texas Water Code does not provide a right to judicial review of a petition for rulemaking, as section 5.351 is limited to the review of “final agency orders” and administrative actions that are regulatory in nature and only upon exhaustion of all administrative remedies. *See id.* at 10-11. Considering the scope of judicial review of section 5.351 of the Texas Water Code in conjunction and harmony with the judicial-review of the provisions of the APA, the Court concluded that neither the APA nor section 5.351 provide a right to judicial review of a petition for rulemaking. Therefore, the Court of Appeals vacated the district court’s judgment and rendered judgment dismissing the cause for want of jurisdiction.

**Important Takeaways:**

The Court of Appeals’ holding is significant because it precludes private parties from asking courts for “second opinions” on state agency denials of requests for rulemaking, thereby avoiding protracted and potentially costly resolution of rulemaking requests. Moreover, the ruling protects the State’s sovereign immunity. It would have been sufficient for the Court to have merely found that the regulations at issue did not contain “clear and unambiguous language” establishing a right of judicial review. But the Court chose to go a step further, specifically noting the Texas Legislature’s “deliberate silence” in the APA with respect to agency decisions on petitions for rulemaking. The Court of Appeals’ decision clearly falls within the line of recent court decisions denying jurisdiction for a suit against an arm of the state, except where the Legislature has expressly provided for such jurisdiction.