

January 2012

Environmental Law

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Recommended Citation

Scott D. Deatherage & James Voelker, *Environmental Law*, 65 SMU L. REV. 447 (2012)
<https://scholar.smu.edu/smulr/vol65/iss2/12>

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ENVIRONMENTAL LAW

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I. INTRODUCTION

IN this Survey period, the most interesting case decided involved standing and the ability of parties to seek evidentiary hearings to challenge environmental permits. A review of procedure, evidence, standard of review, and of how the Texas Commission on Environmental Quality (TCEQ) determines if a party is an “affected person” who thereby has standing presents important issues of environmental, administrative, and constitutional law. Another case addressed the meaning of “public interest” for a Railroad Commission of Texas permit allowing injection of wastewater from hydraulic fracturing of oil and gas wells, and thereby the scope of a challenge to the permit being issued by that agency. The application of the statute of limitations to a party alleging injury from air emission was addressed in a case where the plaintiff claimed in response to an air emissions permit that she was being injured ten years before filing suit. The role of environmental remediation and value of property in eminent domain proceedings and the agreement of a third party to remediate the contamination was presented in another case.

A variety of other cases present challenging issues for companies and the regulated community as well as those challenging the actions or the alleged results of their operations.

II. STANDING TO CHALLENGE ACTIONS THAT MAY AFFECT THE ENVIRONMENT

A. DETERMINATION OF “AFFECTED PERSONS” FOR ASSESSING REQUESTS FOR CONTESTED CASE HEARINGS UNDER THE TEXAS WATER CODE

When a party applies for certain environmental permits, other parties may object to the permit that the TCEQ is prepared to issue. Such objecting parties may request a trial-like hearing to present evidence as to how the permit may not meet the requirements of the applicable statute or the regulations promulgated under the statute. Prior to granting the objecting party a contested case hearing, a threshold determination must be made as to whether the party qualifies as an “affected person” with standing to request such a hearing.¹

The Water Code grants an explicit right to “request that the commission reconsider the Executive Director’s decision or hold a contested case hearing,” but it is equally explicit in its requirement that any such request may only be granted where “the commission determines that the request

1. See TEX. WATER CODE ANN. § 5.556(c) (West 2001) (providing that the TCEQ may only grant a request for a contested hearing if it is “filed by an affected person as defined by Section 5.115.”).

was filed by an affected person as defined by Section 5.115.”² Accordingly, the statute defines “affected person” to mean “a person who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the administrative hearing,” going further to specifically exclude those claiming “[a]n interest common to members of the general public.”³ In rules promulgated pursuant to these statutes, the TCEQ set forth non-exclusive, substantive criteria to guide the determination of who qualifies as an “affected person” under the statute.⁴

The ability of the party to demonstrate that it is an affected person determines whether it may obtain a hearing and effectively protest the permit. Where the TCEQ is prepared to issue a permit, the agency may avoid a hearing and issue a final permit to the applicant. For the applicant, a determination that the opposing party is not an affected party eliminates the need to go through a long trial-like process, which is expensive, delays the permit, and in most cases prolongs the construction of the new or expanded facility. The test for whether a party is an affected person and procedurally how they can attempt to prove they meet the test is thus critical for the contesting party, the party seeking a permit, and the government agency administering the permitting program.

In the prior year’s Survey, the City of Waco (City) was denied affected party status by the Commission, and this decision was upheld by the Austin Court of Appeals.⁵ Specifically, the court noted the evidence offered by the Executive Director of the TCEQ to support the determination that the proposed permit would reduce discharges of pollutants, even with an increase in the number of cattle to be managed at the dairy.⁶ The court also cited evidence offered by the Executive Director related to the distance between the dairy and Lake Waco, and the assertion that the city’s

2. *Id.* § 5.556(a)–(c) (West 2001); see also 30 TEX. ADMIN. CODE § 55.201 (West 2012) (providing that “affected persons” may request a contested case hearing when authorized by law).

3. TEX. WATER CODE ANN. § 5.115(a) (West 2001).

4. 30 TEX. ADMIN. CODE § 55.203(c) (West 2012). The factors include, but are not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Id.

5. *City of Waco v. Tex. Comm’n on Envtl. Quality*, No. 03-09-00005-CV, 2010 Tex. App. LEXIS 7692, at *1 (Tex. App.—Austin Sep. 17, 2010), *withdrawn* *City of Waco v. Tex. Comm’n on Envtl. Quality*, 346 S.W.3d 781 (Tex. App.—Austin 2011, pet. denied).

6. *Id.* at *16.

interests are non-justiciable interests “common to the general public.”⁷

Based upon its review of the evidence before the Commission, the court ultimately found “substantial evidence in the record to support the Commission’s determination that the City is not an ‘affected person’ for purposes of *this* permit application and therefore its decision to deny the City’s hearing request.”⁸

During this year’s Survey period, the Austin Court of Appeals withdrew the prior panel opinion and judgment dated September 17, 2010, and substituted an opinion in which the court ruled that the City was an affected person and thus must be allowed to challenge the permit in a contested-case hearing as an affected person.⁹ Thus, the City was allowed standing in the permit hearing.¹⁰ In another case involving the challenge of a permit under the Water Code for another dairy, private landowners were allowed to pursue a contested-case hearing as affected persons.¹¹

In the second *Waco* case, the court ruled that the determination of whether a party is an affected person is equivalent to the constitutional principal of standing.¹² To demonstrate this status, a party must have “‘real’ . . . controversy,” meaning the plaintiff has “sufficient personal stake in the controversy” to ensure that the court is able to address a real injury of the party seeking standing.¹³

The court determined that the substantial evidence test applied in its first ruling was inappropriate.¹⁴ The application of the substantial evidence review could only be applied when a contested-case or adjudicative hearing was conducted, where evidence was presented by both sides.¹⁵ In addition, the failure to provide such a hearing may deny procedural due process.¹⁶ The court applied an arbitrary or capricious standard and concluded as a matter of law that the TCEQ improperly denied standing to the City.¹⁷ The Commission’s conclusion that the amended permit was more protective and that the City’s interest would thus not be harmed appeared to be a decision on the merits, which the court determined had to be decided at a hearing on the merits, where the party seeking standing could challenge the agency’s evidence and present its own evidence.¹⁸

7. *Id.* at *17–18 (concluding there is “substantial evidence” in the record that “Lake Waco’s water quality is affected generally by discharge from a number of different sources, including the City’s own wastewater treatment plants.”).

8. *Id.* at *18–19 (emphasis added). The dissent argues that given the scope of the majority’s review of the evidence, it has “leaped into the deep waters of the merits of the case which cannot be resolved without a hearing.” *Id.* at *54.

9. *City of Waco v. Tex. Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 787–88 (Tex. App.—Austin 2011, pet. denied).

10. *Id.* at 827.

11. *Bosque River Coal. v. Tex. Comm’n on Env’tl. Quality*, 347 S.W.3d 366, 381 (Tex. App.—Austin 2011, pet. denied).

12. *City of Waco*, 346 S.W.3d at 801–02.

13. *Id.* at 801–02.

14. *Id.* at 818.

15. *See id.* at 818–19.

16. *Id.* at 819.

17. *Id.* at 819–20.

18. *Id.* at 823–24.

The question of the impact the run-off would have on Lake Waco's water quality appeared to be one of the central issues on which the contested-case would be conducted.¹⁹

In this lengthy opinion, the Austin Court of Appeals spent an incredible amount of effort to review prior case law and examine the ability of the TCEQ—and potential agencies with similar procedural programs—to determine a party's standing to contest agency decisions when a contested-case hearing is permitted. The court made an about-face from its first decision in the case, where the agency was allowed to determine whether a party had standing based on its consideration of evidence without an evidentiary hearing on the issue, which may be like a preliminary hearing on jurisdiction or standing in a trial court. The opinion lays out a clearer standard for determining whether an agency has acted properly in making a preliminary decision on standing and what issues are more likely to be left to a hearing on the merits. To what extent the TCEQ or other agencies will adopt a process for preliminary hearings on standing will remain to be seen.

In another case, with an opinion issued a couple of months later by a different panel of judges on the Austin Court of Appeals, the court ruled that a party that owns property downstream from another dairy and confined-animal-feeding lot had standing to contest a permit the TCEQ proposed to issue to the dairy.²⁰ The second panel cited and relied upon the *Waco* decision of the first panel.

Landowners in the watershed of the Bosque River lodged a challenge against the Commission for issuing an amendment to a permit that allowed the dairy to increase its herd size from 700 to 999 and to apply liquid and solid waste to fields.²¹ Confined animal feeding has often resulted in opposition from neighboring landowners who complain of odors and water pollution. The landowners in the Bosque River watershed, where dairies have been locating and growing, asserted challenges to the permit amendment.²² The TCEQ denied the "affected person" status of the contesting parties and issued the permit concluding that the application met the statutory and regulatory requirements.²³ The district court in Austin reviewed and upheld the TCEQ decision.²⁴

The court decided the case along the lines of the *Waco* case. The court ruled that the TCEQ could not generally review the terms of the permit and conclude that, because the agency determined on general and not specific evidence the permit would protect the parties seeking a contested-case hearing, those parties were not harmed and thus had no

19. *See id.* at 824–25.

20. *Bosque River Coal. v. Tex. Comm'n on Env'tl. Quality*, 347 S.W.3d 366, 381 (Tex. App.—Austin 2011, pet. denied).

21. *Id.* at 368–69.

22. *Id.* at 370.

23. *Id.* at 372–73.

24. *Id.* at 372.

standing to present evidence on the merits in a hearing.²⁵ Guided by the *Waco* case, the court held that such conclusory decisions without any form of hearing was improper, and a preliminary hearing was necessary.²⁶ It concluded the TCEQ's decision that the group seeking a contested-case hearing was not an "affected person" was made through improper procedure, was affected by error of law, and was an abuse of discretion.²⁷ The opinion lays out a clearer standard for determining whether an agency has acted properly in making a preliminary decision on standing and what issues are more likely to be left to a hearing on the merits. The extent to which the TCEQ or other agencies will adopt a process for preliminary hearings on standing remains to be seen.

Within this context, it is interesting to compare the approach of the TCEQ with the approach of the EPA in giving notice of a permit and affording an opportunity for public comment. The EPA takes the public comments it receives into account and decides whether to adjust the proposed permit. A contested-case hearing is not conducted, but the commenting parties may file suit in federal court to challenge the issuance of the permit. Thus, the TCEQ arguably provides a great deal more procedural protections under the state approach than the EPA provides under federal statutes. The TCEQ's approach to these cases was perhaps an attempt to move toward an EPA-style process. The difficulty is that the state statute provides an opportunity for an evidentiary hearing at the administrative level rather than the judicial level. To what extent the Texas legislature may at some point allow an EPA-style procedure may depend on how strongly business interests may be able to argue that the current permitting process is too lengthy and costly.

III. ENVIRONMENTAL PERMITTING

A. RAILROAD COMMISSION OF TEXAS LIMITED INTERPRETATION OF PUBLIC INTEREST UPHELD

The meaning of the term "public interest" was the focus of the Supreme Court of Texas in *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water*, which considered the permitting of an injection well for the disposal of wastewater from the hydraulic fracturing of oil and gas wells in the Barnett Shale.²⁸ Whether the term was to be broadly or narrowly construed was largely determined by how the Texas legislature addressed the meaning of "public interest" for injection wells subject to regulation by the TCEQ.²⁹ The legislature added specific language to the statute relevant to TCEQ jurisdiction prior to the court case challenging how the Railroad Commission of Texas (Commission) inter-

25. *Id.* at 378.

26. *Id.*

27. *Id.* at 381.

28. *R.R. Comm'n of Tex. v. Tex. Citizens For a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011).

29. *Id.* at 624.

preted the term.³⁰ The level of deference courts in Texas are to give state agencies when interpreting ambiguous terms was thus a central aspect of the case. The Supreme Court of Texas determined that the Commission's narrow interpretation was entitled to judicial deference.³¹

As background, the case involved a challenge by a group of local citizens who objected to the permitting of a waste injection well.³² The principal objection was that the construction and operation of the well would lead to significant traffic of heavy trucks transporting the waste to the injection well.³³ The local citizens alleged that this heavy truck traffic would be a nuisance and a threat to the safety of local citizens.³⁴ The Commission ruled that the term "public interest" did not include evaluating issues such as the impact of increased truck traffic, but instead was limited to the impact of the well on conservation of the state's oil and natural gas.³⁵ Any consideration of broad public safety issues was, according to the Commission, beyond their jurisdiction.³⁶

While the Austin Court of Appeals determined that public interest should be construed broadly to include issues like the impact of heavy truck traffic, the Supreme Court of Texas disagreed. The supreme court first considered to what extent it should defer to an administrative agency's interpretation of a term in a statute.³⁷ Where the language of a statute is ambiguous, the supreme court cited precedent holding that it should give "serious consideration" to an agency's interpretation of the relevant statutory terms "so long as the construction is reasonable and does not contradict the plain language of the statute."³⁸

The supreme court determined that the term "public interest" was vague or ambiguous, and thereby subject to agency interpretation.³⁹ One of the critical issues that persuaded the supreme court that the Commission's interpretation was reasonable was the Texas legislature's amendment of the definition of "public interest" for purposes of injection wells regulated by the TCEQ.⁴⁰ In 1987, the legislature amended the relevant sections of the Texas Water Code that allows the TCEQ and the Commission to issue permits for injection wells under each agency's jurisdiction.⁴¹ The legislature only amended the relevant sections within the TCEQ's statutory jurisdiction, and specifically required the agency to consider the effects of increased traffic from permitting on local roads and to ensure

30. *Id.* at 626.

31. *Id.* at 632-33.

32. *Id.* at 622.

33. *Id.*

34. *Id.*

35. *See id.* at 630-31.

36. *Id.* at 633.

37. *Id.* at 624.

38. *Id.* at 625 (internal citations and quotations omitted).

39. *Id.* at 628.

40. *See id.* at 626.

41. *Id.*

that this is addressed or mitigated.⁴² Prior to this amendment, the provisions governing industrial and oil and gas waste were the same for both agencies.⁴³

The supreme court concluded that this specific addition to the industrial waste section within the TCEQ's jurisdiction without changes to the oil and gas section under the Commission's jurisdiction demonstrated that the legislature did not intend that the Commission take broad public safety, and specifically truck traffic, into account when issuing oil and gas injection well permits.⁴⁴ Beyond provisions relating to protection of fresh water, the supreme court ruled that the Water Code in the relevant sections only discusses the conservation of oil and gas within Texas.⁴⁵ The supreme court also considered the fact that the Commission's expertise is oil and gas, not traffic safety or impacts of traffic on roads.⁴⁶ Finally, the supreme court recognized the fact that the Commission has construed the meaning of public interest in this way for many years.⁴⁷

The supreme court's decision resulted in upholding a limited and functional definition of "public interest" for the Commission. The long-held interpretation was particularly convincing since the legislature did not change it when amending the section of the Texas Water Code relevant to the jurisdiction of the TCEQ. The legislature's decision to not amend the specific factors the Commission must consider is probably the most important aspect of the case. Where legislatures specifically amend one part of a statute but not another similar provision in that act, courts often conclude the legislature intended through this omission to clarify the meaning of the other unchanged section. To many courts interpreting statutory language, it would then seem to go against the legislature in interpreting the two sections in the same way after the amendment. Courts look to the legislature to provide guidance as to meanings of statutory provisions and specific terms used by the legislature. Where the legislature implicitly chooses to change one section and not another, courts tend to conclude that decision has meaning and is not a mere oversight. With two provisions regulating wastewater disposal wells, and only one amended by the legislature to require consideration of traffic impact, the supreme court's conclusion is unsurprising.

IV. ENVIRONMENTAL ENFORCEMENT ACTIONS

A. CHALLENGE TO TCEQ'S ASSESSMENT OF PENALTIES RELATED TO WASTE MANAGEMENT

In a case involving the failure of property owners to dispose or store waste in compliance with state waste management regulations, owners

42. *Id.*

43. *Id.*

44. *Id.* at 631-32.

45. *Id.* at 627.

46. *Id.* at 630.

47. *Id.* at 632.

fined by the TCEQ for such alleged violations failed to successfully challenge this penalty in court.⁴⁸ The parties argued that the state's environmental civil penalty policy was a rule subject to judicial challenge, that the determination that the materials at the site were wastes was improper, and that the TCEQ modifications to the administrative law judge's findings were arbitrary and capricious.⁴⁹

The parties to the suit owned or operated activities at a property that contained materials the TCEQ concluded were hazardous wastes.⁵⁰ The agency imposed a penalty of \$177,500 on three parties on a joint and several basis.⁵¹ After a contested-case hearing on the enforcement action, the administrative law judge recommended a penalty of only \$1,500.⁵² The parties then filed a challenge to the penalty decision in the district court, which upheld the penalty as being supported by substantial evidence.⁵³ The parties appealed the district court's opinion to the Austin Court of Appeals.

The court of appeals reviewed both the district court's decision and the TCEQ's decision. The first issue was whether the policy the TCEQ staff used to recommend a penalty to the administrative law judge, and on which the administrative law judge and the Commission based their decision, was a "rule."⁵⁴ The plaintiffs asserted that the penalty policy was in effect a "rule" and challenged its legitimacy.⁵⁵ The challenge was based on Section 2001.038 of the Texas Administrative Procedure Act (APA).⁵⁶

For the court to have subject matter jurisdiction under this provision, the penalty policy must be a rule. The APA defines a rule as:

- (A) a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.⁵⁷

The plaintiffs alleged that the penalty policy has a binding effect on private parties and the staff of the TCEQ are bound to follow the policy.⁵⁸ The court of appeals concluded that the trial court was presented evidence that the TCEQ Commissioners were not bound by the policy in

48. *Slay v. Tex. Comm'n on Envtl. Quality*, 351 S.W.3d 532, 534 (Tex. App.—Austin 2011, pet. denied).

49. *See id.* at 543–44.

50. *Id.* at 535–36.

51. *Id.* at 542.

52. *Id.* at 540.

53. *Id.* at 542–43.

54. *Id.* at 543.

55. *Id.*

56. *Id.*

57. TEX. GOV'T CODE ANN. § 2001.003(6) (West 2008).

58. *Slay*, 351 S.W.3d at 546.

determining the final penalty to be imposed on parties under relevant environmental statutes, and that the policy states that it is to be used for the staff to recommend penalties to the Commission.⁵⁹ The appellate court agreed with the district court that the penalty policy did not bind the Commissioners and did not impose specific burdens on private parties.⁶⁰

The plaintiffs also challenged the order assessing civil penalties on three other grounds. The challenges were based on Section 2001.174 of the APA.⁶¹ Under this provision, an agency decision may be reversed or remanded if the governmental action was:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.⁶²

The first challenge under this provision was that the material in question was not a "waste." Observations by a TCEQ staff member and analytical testing indicated the material was a waste and contained chemicals that would cause the material to be regulated.⁶³ The court concluded this was a reasonable basis to support the agency's conclusion that the material was regulated as a waste.⁶⁴

The plaintiffs also argued the application of the penalty policy adopted in 2002 to alleged violations in 1999 was a retroactive application of law.⁶⁵ Because the court concluded that the policy did not have legal effect, no retroactive application of law was deemed possible.⁶⁶

Finally, the plaintiffs argued that the Commissioner's findings and conclusions of law by the administrative law judge were improper.⁶⁷ The TCEQ is allowed to overturn any findings of fact as long as the amendment is "based solely on the record," and is "accompanied by an explanation of the basis of the amendment."⁶⁸ The changes in the number of violations and the counting of violations at individual sites on the property as opposed to a facility-wide approach was not deemed to lack sufficient evidence or to be arbitrary and capricious, but was within the

59. *Id.* at 546–47.

60. *Id.* at 547–48.

61. TEX. GOV'T CODE ANN. § 2001.174 (West 2008).

62. *Id.*

63. *Slay*, 351 S.W.3d at 549–50.

64. *Id.* at 550.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* citing TEX. GOV'T CODE ANN. § 2003.047(m) (West 2008).

statutory discretion of the TCEQ.⁶⁹

The Austin Court of Appeals upheld the use of the penalty policy.⁷⁰ However, to the extent the agency applies the policy as if it is binding, it may appear to be more like a rule than a mere unbinding policy. Agencies will often impose policies on regulated parties inflexibly and in many cases it may be used much like a rule. Thus, the court's decision and analysis may not be comforting to parties who are being regulated or penalized under what the policy states is only guidance. One would hope that when the facts show such a situation, the courts will address these issues under the APA and require the agency not to impose rule-like impacts from policies that do not follow the procedures required under the APA and relevant environmental statutes before adopting rules binding on regulated parties expressly, implicitly, or in practice.

B. JURISDICTION OF TEXAS COURTS TO INTERVENE IN TCEQ ENFORCEMENT ACTIONS UNDER THE TEXAS WATER CODE

The Texas Water Code establishes that the TCEQ is the principal authority in the state on matters relating to the quality of water in the state, and the agency has exclusive jurisdiction to undertake legal proceedings to compel compliance with the code.⁷¹ In *Vickery v. Stanley*, the Tyler Court of Appeals reaffirmed the status of the TCEQ as the primary venue for enforcement actions under the Water Code and clarified the limited scope under which Texas courts may hear challenges to the TCEQ's primacy.⁷² Hearing an interlocutory appeal from the trial court's denial of the plea to jurisdiction entered by the TCEQ Executive Director, the court of appeals reversed the trial court determination that it had jurisdiction over the suit brought by a respondent subject to a TCEQ enforcement action.⁷³

In 2008, approximately thirteen years after the agency initially identified violations relating to an underground storage tank (UST) system located on property owned by C.M. Stanley, Jr. in Gregg County, Texas, the Executive Director recommended that the TCEQ order Stanley to pay an administrative penalty and bring his facility into compliance with the Water Code.⁷⁴ In March 2009, Stanley filed a declaratory judgment action in the Gregg County District Court, and the trial court granted his motion to abate the TCEQ enforcement action while the trial court action was pending.⁷⁵ When the trial court also denied the Executive Director's plea for jurisdiction, the interlocutory appeal to the court of

69. *Id.*

70. *Id.* at 551.

71. See TEX. WATER CODE ANN. § 26.127 (West 2008); see also TEX. WATER CODE ANN. § 7.002 (West Supp. 2010).

72. *Vickery v. Stanley*, No. 12-09-00408-CV, 2010 WL 4638714, at *1 (Tex. App.—Tyler Nov. 17, 2010, no pet.) (mem. op.).

73. *Id.*

74. *Id.*

75. *Id.*

appeals was filed.⁷⁶

The Executive Director first argued that sovereign immunity barred the trial court's jurisdiction over Stanley's suit because Stanley failed to allege any act on the part of the Executive Director that was in fact *ultra vires*, triggering an exception to sovereign immunity protection.⁷⁷ Generally, the Uniform Declaratory Judgment Act (UDJA) is not a blanket waiver of sovereign immunity that can be used as a vehicle to obtain declarations for relief against the state.⁷⁸ Stanley argued, however, that sovereign immunity should not apply because the Executive Director had acted outside of his authority when he "determined" that Stanley was the "owner" of the UST subject to TCEQ enforcement action.⁷⁹ As stated by the court: "A party may employ a declaratory judgment action to intervene in administrative proceedings when an agency is exercising authority beyond its statutorily conferred powers."⁸⁰ This exception only applies, however, if the suit alleges, and ultimately proves, that the officer or agent was not merely exercising her discretion, but rather that she "acted without legal authority or failed to perform a purely ministerial act."⁸¹

The Tyler Court of Appeals assessed the Executive Director's actions within the context of the statutory authority granted under the Water Code.⁸² It noted that the "policy of the state [is] to maintain and protect the quality of groundwater and surface water," and the "TCEQ is the principal authority in [Texas] on matters relating to the quality of water . . . and . . . for setting water quality standards."⁸³ Among the matters within its purview to achieve the stated policy, the TCEQ may develop regulatory programs regarding USTs under the Water Code,⁸⁴ and it "may institute legal proceedings to compel compliance" with the statute.⁸⁵ Under this statutory framework, the court of appeals found that the Executive Director had not determined Stanley was the owner of the UST in naming him as the respondent.⁸⁶ Instead, the Executive Director had merely alleged that Stanley was the owner—an allegation supported by the fact that the USTs were located on Stanley's land and that Stanley has day-to-day control of the UST system.⁸⁷ Because the Executive Director had both the discretion and the legal authority to pursue enforcement proceedings against Stanley, he did not commit an *ultra vires* act

76. *Id.*

77. *Id.* at *2.

78. *Id.* (citing *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 360 (Tex. App.—Austin 2009, pet. denied)).

79. *Id.* at *3.

80. *Id.* at *2 (citing *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 267 (Tex. App.—Austin 2002, no pet.)).

81. *Id.* (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)).

82. *Id.*

83. *Id.* (citing TEX. WATER CODE ANN. §§ 26.341, 26.023, 26.127 (West 2008)).

84. *See* TEX. WATER CODE ANN. § 26.345 (West 2008).

85. *Vickery*, 2010 WL 4638714, at *2 (citing TEX. WATER CODE ANN. § 7.002 (West Supp. 2010)).

86. *Id.* at *3.

87. *Id.* (citing to TEX. WATER CODE ANN. § 26.342(a) (West 2008)).

when he alleged Stanley was the owner, meaning the Executive Director retained his sovereign immunity.⁸⁸

The second argument the Executive Director made against the trial court's exercise of jurisdiction over Stanley's suit was that the TCEQ has exclusive jurisdiction over the regulation of USTs.⁸⁹ Here, the court of appeals again recognized the limited scope of the UDJA, finding that it "cannot be invoked when it would interfere with some other entity's exclusive jurisdiction."⁹⁰ Instead, where "an agency has exclusive jurisdiction to resolve a dispute, a party must first exhaust administrative remedies before a trial court has subject matter jurisdiction."⁹¹

An agency is recognized as having exclusive jurisdiction when a "pervasive regulatory scheme" indicates that the legislature intended for the regulatory process at issue to be the "exclusive means of remedying the problem to which the regulation is addressed."⁹² In this case, the appellate court noted that under the Water Code, the TCEQ has the authority to develop a regulatory program regarding USTs; it may institute legal proceedings to compel compliance with the Water Code, which can include holding hearings in which it receives evidence, makes decisions, and issues orders to enforce the provisions of the Water Code; and it may levy administrative penalties against those violating the Water Code.⁹³ Based upon its assessment of the statutory framework under the Water Code, the court found that this framework represents a "comprehensive scheme intended by the legislature to be the exclusive means of remedying the problem of contamination of ground water by use of USTs."⁹⁴ Accordingly, the TCEQ has exclusive jurisdiction over compliance with the Water Code, meaning Stanley and other respondents must exhaust their administrative remedies through TCEQ enforcement proceedings before a trial court can exercise subject matter jurisdiction over a related matter.⁹⁵

V. ENVIRONMENTAL TORT SUITS

A. ACTIONS AUTHORIZED BY REGULATORY PERMITS ARE NOT SHIELDED FROM SUBSEQUENT CIVIL LIABILITY

A permit holder can typically avoid enforcement actions by operating within the scope of a state-issued permit, yet those same operations may also give rise to civil actions outside of the context of regulatory enforce-

88. *Id.*

89. *Id.* at *4.

90. *Id.* (citing *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009)).

91. *Id.* (citing *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002)).

92. *Id.*

93. *Id.* (citing to TEX. WATER CODE ANN. §§ 7.002, 7.051(a), 26.019–020, 26.345 (West 2008)).

94. *Id.*

95. *Id.*

ment. In *FPL Farming Ltd. v. Environmental Processing Systems*, the Supreme Court of Texas injected itself into the question of whether a state-issued permit offers blanket immunity from civil claims arising from actions that otherwise fall within the scope of permitted activities.⁹⁶ After the Beaumont Court of Appeals disregarded conflicting decisions from each of the Austin and Amarillo Courts of Appeals, the Supreme Court of Texas resolved the emerging appellate court conflict to confirm that a state-issued permit does not immunize the permit holder from civil liability for actions arising out of the use of the permit.⁹⁷

In 1996, Environmental Processing Systems (EPS) obtained a permit from the TCEQ's predecessor to drill and operate a wastewater injection well on land adjoining property owned by FPL Farming (FPL).⁹⁸ Around three years later, EPS successfully amended its permit to increase the allowed injection rate.⁹⁹ In 2006, FPL filed suit against EPS in Liberty County alleging various causes of action, including trespass, negligence, and unjust enrichment.¹⁰⁰ When the trial court denied FPL's motion for a new trial after the jury found for EPS, FPL appealed to the Beaumont Court of Appeals.¹⁰¹ On appeal, the court of appeals rejected the claims forwarded by FPL, deciding as a threshold matter that FPL could not pursue a trespass claim against EPS when the TCEQ had approved a permit allowing the very conduct FPL alleges resulted in harm.¹⁰²

This decision directly conflicted with two prior decisions issued separately by the Austin Court of Appeals and the Amarillo Court of Appeals. In deciding an earlier challenge to the EPS permit from FPL, the Austin Court of Appeals explicitly held that the EPS permit did not impair FPL's rights.¹⁰³ Although it allowed the amended permit, the court concluded that FPL could seek damages from EPS if the waste plume from the permitted well were to migrate into FPL's property and cause harm.¹⁰⁴ Relying in part on the decision in *FPL Farming*, the Amarillo Court of Appeals reached a similar determination in a separate matter, concluding that securing a permit from the Railroad Commission "'does not immunize the recipient from the consequences of its actions if those actions affect the rights of third parties.'"¹⁰⁵

The Supreme Court of Texas sided with the latter decisions, finding that the reasoning of the Beaumont Court of Appeals was "inconsistent

96. *FPL Farming Ltd. v. Env'tl. Processing Sys., L.C.*, 351 S.W.3d 306, 307 (Tex. 2011).

97. *Id.* at 310–11.

98. *Id.* at 307.

99. *Id.* at 308.

100. *Id.* at 309.

101. *Id.*

102. *Id.*

103. *Id.* at 309–10 (citing *FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n*, 03-02-00477-CV, 2003 WL 247183, at *3–4 (Tex. App.—Austin Feb. 6, 2003, pet. denied) (mem. op.)).

104. *Id.* at 310 (citing *FPL Farming*, 2003 WL 247183, at *5).

105. *Id.* (quoting *Berkley v. R.R. Comm'n of Tex.*, 282 S.W.3d 240, 243 (Tex. App.—Amarillo 2009, no pet.)).

with [the supreme court's] general view of the legal effect of an agency's permitting process."¹⁰⁶ It held that because a permit is a "negative pronouncement" offering no affirmative rights to a permittee, a permit granted by an agency "does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit."¹⁰⁷ The negative pronouncement of the permit removes a "government imposed barrier" to the activity requiring the permit, allowing the permittee to proceed under the conditions imposed.¹⁰⁸ In the case of the injection well, the permit allowed EPS to proceed with drilling the well and injecting permitted fluids pursuant to its terms.¹⁰⁹ In issuing the permit, however, the TCEQ was not authorized to determine ownership of the deep subsurface or to determine whether any authorized migration resulting from permitted activities would invade private property rights.¹¹⁰ More significantly, the statute authorizing the TCEQ to issue the permit in question specifically provides that "[t]he fact that a person has a permit issued under this chapter does not relieve him from any civil liability."¹¹¹ In other words, the permit is not a "get out of tort free card."¹¹²

Finally, the Supreme Court of Texas also rejected the Beaumont Court of Appeals' application of two prior supreme court decisions to its consideration of the FPL claim. The court of appeals had applied both *Railroad Commission of Texas v. Manziel* and *Coastal Oil & Gas Corp. v. Garza Energy Trust* to support its conclusions that injections authorized by state-issued permits cannot result in trespass.¹¹³ Both *Manziel* and *Garza* involved the injection of substances pursuant to an agency authorization that had possibly migrated underground across property lines.¹¹⁴ The supreme court drew a clear distinction, however, noting that both *Manziel* and *Garza* dealt with the extraction of minerals and the rule of capture.¹¹⁵ It noted that the injection of substances to recover minerals "serves a different purpose than does injecting wastewater."¹¹⁶ Likewise, while mineral owners can protect their subsurface interests from drainage through pooling or drilling their own wells, the same is not true of land-owners seeking to protect their subsurface from migrating wastewater.¹¹⁷

106. *Id.*

107. *Id.* (citing *Magnolia Petroleum Co. v. R.R. Comm'n*, 170 S.W.2d 189, 191 (Tex. 1943)).

108. *Id.* at 310–11 (citing *Magnolia Petroleum*, 170 S.W.2d at 191, 243).

109. *Id.* at 312.

110. *Id.* (referencing TEX. WATER CODE ANN. § 27.003 (West 2008)).

111. *Id.* (quoting TEX. WATER CODE ANN. § 27.104 (West 2008)). The court also noted that the related regulations explicitly provide that "the issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights." *Id.* (quoting 30 TEX. ADMIN. CODE § 305.122(c) (West 2008)).

112. *Id.* at 311.

113. *Id.* at 313; *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 562 (Tex. 1962); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 4 (Tex. 2008).

114. *FPL Farming*, 351 S.W.3d at 314.

115. *Id.*

116. *Id.*

117. *Id.*

Accordingly, the supreme court confirmed that the rule of capture and related jurisprudence are not applicable to claims brought for damages alleged to have been caused by wastewater injection.¹¹⁸

B. FILING OF AIR EMISSIONS TORT SUIT RULED BEYOND STATUTE OF LIMITATIONS

A number of lawsuits have been lodged over the years alleging that cement kilns in Midlothian, Texas were causing injury to people or property as a result of air emissions from those facilities. The TCEQ and EPA have investigated these allegations. One of these suits was recently heard by the Houston Court of Appeals for the Fourteenth District.¹¹⁹ The case was based on nuisance, trespass, negligence, and gross negligence—typical claims in environmental tort cases. As is also fairly common in these types of cases, the defendant argued the defense of statute of limitations. The court ultimately ruled that the plaintiff had failed to timely file the suit, as she had been told of the potential for the emissions to cause the alleged injury more than two years before suit was filed.

The plaintiff, a landowner named Debra Markwardt, brought suit against Texas Industries (TXI). She alleged that emissions since the mid-1980s had caused her and her dogs health problems, damages to her property, and lost profits in her dog breeding business.¹²⁰ In the trial court, Markwardt attempted to avoid the statute of limitations defense by asserting the discovery rule, a provision under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the continuing tort doctrine, and fraudulent concealment by the defendant.¹²¹ These are typical claims that plaintiffs assert to attempt to avoid a statute of limitations defense in environmental tort cases. The trial court granted summary judgment in favor of TXI, and Markwardt appealed.

On appeal, the Houston Court of Appeals considered the application of limitations for a permanent versus temporary nuisance. The Supreme Court of Texas has addressed how Texas courts should analyze statutes of limitations in tort cases where a nuisance claim and similar claims are asserted.¹²² The analysis begins with the question of the application of the discovery rule to when the plaintiff's cause of action accrues.¹²³ If it is a permanent nuisance, then the claim is barred if the plaintiff did not file suit within two years of when he or she knew of the alleged injury or, exercising reasonable due diligence, should have known of the injury and

118. *See id.*

119. *Markwardt v. Tex. Indus., Inc.*, 325 S.W.3d 876, 880 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

120. *Id.*

121. *Id.*

122. *Id.* at 882.

123. *Id.*

the facts giving rise to the injury.¹²⁴ A temporary nuisance accrues each time an injury occurs, and a party may recover for two years back from the date of filing suit.¹²⁵

In this case, the court ruled that the nuisance was a permanent nuisance because it was constant and continuous and not temporary or intermittent, which can be shown by the plaintiff's injuries or the defendant's operations. The key is whether the events are likely to occur again and whether the future injury can be reasonably determined. Markwardt alleged that TXI had been burning hazardous waste in its cement kiln since 1987 or 1988, and she had protested air emissions permits sought by TXI in 1997 and 1998. Markwardt's alleged health and property injuries were long lasting as well. As a result, the court ruled that the nuisance alleged was properly classified as permanent, and the general discovery rule applied, which the plaintiff had missed by several years.¹²⁶

In addition to asserting the discovery rule and a temporary nuisance to attempt to avoid limitations, plaintiffs in environmental tort suits frequently assert that a CERCLA provision, continuing tort theory, and other defenses apply. The CERCLA provision provides a federal commencement date for claims arising from the release of a hazardous substance, pollutant, or contaminant, such that the running of limitations does not begin until the plaintiff knew or should have known that the injuries alleged were caused or contributed to by the relevant hazardous substance, pollutant, or contaminant.¹²⁷ Markwardt had claimed ten years earlier, in protesting TXI's air permit, that the air emissions were causing her injuries.¹²⁸

The plaintiff made other assertions to avoid the statute of limitations, namely continuing tort and fraudulent concealment. Prior decisions have held that the defense of continuing tort is based on the view that the plaintiff does not know what is causing her illness, whereas Markwardt asserted the air emissions were causing her injury.¹²⁹ Markwardt, in asserting fraudulent concealment, claimed that the TCEQ and EPA concluded there was no harmful effect by the investigations, permitting proceedings, and other statements or actions that the emissions were not harmful, and TXI hid the effects of the emissions.¹³⁰ The plaintiff failed to assert any evidence showing the defendant knew of and had concealed the alleged harm; she also asserted she was being harmed by TXI emissions, so she could not allege reliance on any alleged concealment.¹³¹

124. *Id.* (citing *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270, 274–75 (Tex. 2004); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)).

125. *Id.*

126. *Id.* at 883–86.

127. 42 U.S.C. § 9658(a)(1) (2006).

128. *Markwardt*, 325 S.W.3d at 891–92.

129. *Id.* at 893–94.

130. *Id.* at 895.

131. *Id.* at 895–96.

Thus, the court rejected the fraudulent concealment assertion.¹³²

The plaintiff's attempts to avoid the statute of limitations defense were not likely to succeed given that she had asserted injuries ten years before suit was filed. As this case demonstrates, the Texas law in the area of limitations and the means by which plaintiffs may attempt to avoid limitations is becoming more settled law. The discovery rule and the extent to which the nuisance, injury, or defendant's operations were permanent or temporary will force plaintiffs who have delayed filing for two years from discovering the activities existence to either lose their claims or, in rare cases, to limit them to any injuries occurring within two years of filing suit. *Markwardt* appears to be a clear case of the plaintiff missing her limitations period by waiting too long to file suit.

VI. ENVIRONMENTAL ISSUES, EMINENT DOMAIN, AND TAKINGS

A. ENVIRONMENTAL REMEDIATION AGREEMENT IMPROPERLY EXCLUDED FROM EMINENT DOMAIN PROCEEDING TO DETERMINE VALUE OF LAND

When governmental agencies take property through eminent domain, disputes often arise regarding the value of the property being taken. With contaminated properties, the process of determining value is complicated by the potential liability for remediating the property to governmental standards and, if the contamination has migrated off-site, the cost of remediating that property and the potential for lawsuits asserting property damage and personal injury. The extent to which these concerns are real or the potential actual impact on the value of land are often at issue in negotiations or litigation between the landowner and the governmental entity taking title to the contaminated property.

The problem of valuing contaminated property arose in the case of a landowner whose property had been contaminated by a former tenant engaged in oil and gas drill tool fabrication and repair.¹³³ The current landowner bought the property for \$487,000 in 1995.¹³⁴ In 1996, the prior owner entered into an agreement with the former tenant whereby the tenant would address any environmental remediation required by the relevant governmental agencies based on the tenant's proportional responsibility for the contamination.¹³⁵ Thus, the landowner would not likely incur the costs of environmental remediation.

During the trial, the district court excluded the environmental remediation agreement and testimony about it. The trial court also excluded other testimony regarding the contamination and testimony that the property was worth \$11.5 million without taking contamination into con-

132. *Id.* at 896.

133. See generally *Caffe Ribbs, Inc. v. State*, 328 S.W.3d 919, 921 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

134. *Id.*

135. *Id.* at 921–22.

sideration.¹³⁶ The state presented evidence that the property was worth \$3.3 million in an uncontaminated condition.¹³⁷ Because the state's evidence was that the remediation would take eight years, the property value was discounted to a present value of about \$800,000, and over \$100,000 was subtracted for demolition of buildings.¹³⁸ The final price based on the state's appraiser's testimony was \$681,251—a tremendous difference from the \$11.5 million estimated by the landowner's appraiser.¹³⁹

The jury ultimately returned a verdict that the market value of the property was \$4.5 million.¹⁴⁰ The landowner had been paid \$6,459,500 based on the administrative process regarding value prior to the appeal to the district court.¹⁴¹ The district court ordered the landowner to pay the state \$2,872,000.¹⁴²

On appeal, the appellate court first ruled that exclusion of evidence of the prior tenant's liability for and indemnity agreement to cover the environmental contamination costs was reversible error.¹⁴³ The court specifically held that if a party relies on evidence of environmental contamination in connection with setting the market value of property, then the existence of a third party agreement to remediate the contamination is relevant and admissible in the proceeding to determine the fair market value of the property.¹⁴⁴ The state attempted to argue that its actual argument and evidence was that the delay in construction for many years while the contamination was being remediated resulted in the discounted value.¹⁴⁵ The court rejected this argument as it found no evidence in the case to support the state's claim.¹⁴⁶

The Houston Court of Appeals then rejected the state's argument that any error was harmless because evidence of the value of the property was provided in the case at an uncontaminated value and one piece of evidence that the state presented showed the annual environmental remediation cost was \$0.¹⁴⁷ The court found that the environmental remediation agreement was so important for determining the value of contaminated property that without presenting it and having witnesses and experts testify about the property, however, and its value, the exclusion of the agreement was harmful error.¹⁴⁸ As a result, the court reversed and remanded the case back to the district court.¹⁴⁹

136. *Id.* at 924.

137. *Id.* at 925.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 930–31.

144. *Id.*

145. *Id.* at 930.

146. *Id.*

147. *Id.* at 930–33.

148. *Id.* at 932–33.

149. *Id.* at 933.

Clearly, an agreement by a third party to remediate the property or indemnify the property owner would be critical for determining value of property. Of course the financial ability of the counter party/indemnitor to pay the costs would be critical as well. In this case, it did not appear that the counterparty was in any financial difficulty, and it seemed to be of sufficient size and wherewithal to pay the costs of investigation and remediation.¹⁵⁰ In fact, the former tenant was conducting the remediation, and allegedly the state was obstructing the remediation.¹⁵¹ The argument centering on the delay in ability to contaminate the property was ironic if in fact such obstruction was occurring. In many cases, development may take place even though the property is contaminated and undergoing remediation. For groundwater contamination, this may be especially true depending on the footprint of the new building or other structures and the location of necessary remediation and monitoring wells.

Environmental liabilities are more and more important in eminent domain cases. Contamination can often affect property value. The level of contamination and the degree to which remediation is actually required depends on the actual levels of contaminants in soil and groundwater. The extent actual soil removal or treatment in place is required and whether remediation of groundwater contamination is actually required under applicable regulations are other key considerations. Evidence of these issues proves important in negotiations and proceedings that determine the amount of money a governmental entity must pay a landowner to take their property.

B. TAKINGS VERSUS TRESPASS TO TRY TITLE—THE PROPER
MECHANISM FOR CHALLENGING DETERMINATIONS
REGARDING NAVIGABILITY OF
TEXAS WATERWAYS

The Texas Constitution makes clear that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”¹⁵² In *Texas Parks and Wildlife Department v. Sawyer Trust*, the Supreme Court of Texas addressed the confluence of claims for takings and trespass to try title in the context of determinations by the Texas Parks and Wildlife Department (TPWD) regarding the navigability of Texas waterways.¹⁵³ After both the trial court and the Amarillo Court of Appeals denied the plea to the jurisdiction forwarded by the TPWD, the Supreme Court of Texas reversed, finding the Sawyer Trust could not assert a takings claim given the underlying facts.¹⁵⁴

150. *Id.* at 923–25.

151. *Id.* at 927.

152. TEX. CONST. art. I, § 17.

153. See generally *Texas Parks & Wildlife Dept. v. Sawyer Trust*, 354 S.W.3d 384, 386 (Tex. 2011).

154. *Id.*

The Sawyer Trust owns a parcel of property in Donley County that is traversed by the Salt Fork of the Red River.¹⁵⁵ When the trust had the opportunity to sell sand and gravel from the streambed in question, it sued the TPWD for a declaratory judgment that the waterway was not navigable.¹⁵⁶ The TPWD filed a plea to the jurisdiction, and while the matter was pending, the parties agreed that a surveyor from the General Land Office would survey the waterway to determine if it was navigable.¹⁵⁷ The surveyor concluded that the waterway was navigable, at which point the Sawyer Trust amended its pleadings and added an allegation that the navigability determination constituted a taking of its property under both the U.S. and Texas Constitutions.¹⁵⁸ After the trial court denied TPWD's plea to the jurisdiction, the court of appeals affirmed, finding that because the claim was not an action for the recovery of money from the state or for determination of title, sovereign immunity is not implicated.¹⁵⁹

On appeal to the supreme court, the TPWD argued that Texas law does not provide a general right to sue a state agency for a declaration of rights.¹⁶⁰ The supreme court agreed, reaffirming its position that the Declaratory Judgments Act (DJA) is not a blanket waiver of sovereign immunity that can be used as a vehicle to obtain declarations for relief against the state unless the claim is one for which the Texas legislature has waived sovereign immunity.¹⁶¹

For its part, however, the Sawyer Trust urged that no waiver was necessary because the suit was based on a constitutional taking.¹⁶² The supreme court ultimately resolved this question by contrasting the nature of a takings claim against a claim for trespass to try title.¹⁶³ As a general rule, the sole method for adjudicating disputed claims of title to real property in Texas is a trespass to try title claim under the Property Code.¹⁶⁴ A plaintiff in such a claim sues to recover "immediate possession of land unlawfully withheld," with a remedy of title to, and possession of, the real property at issue.¹⁶⁵ Takings claims, on the other hand, involve claims for compensation stemming from actions by the defendant that resulted in taking, damaging, or destroying property for public use without the owner-plaintiff's consent.¹⁶⁶ Ultimately, where a successful plaintiff in a trespass to try title claim will obtain quiet title and the right

155. *Id.* at 387.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 388 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009); *City of Houston v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007) (per curiam)).

162. *Id.* at 390.

163. *Id.* at 391–93.

164. *Id.* at 396 (citing TEX. PROP. CODE ANN. § 22.001(a) (West 2008)).

165. *Id.* at 391 (quoting *Porretto v. Patterson*, 251 S.W.3d 701, 708 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

166. *Id.*

of possession to the property in question, a successful takings claim entitles the claimant to compensation.¹⁶⁷

In this case, with its determination of navigability, the TPWD identified the waterway in question as belonging to the State of Texas.¹⁶⁸ As the Sawyer Trust itself noted in its pleadings, the state had "wrongfully claimed title" to the streambed.¹⁶⁹ Moreover, the Sawyer Trust did not seek compensation. Instead it only sought declaratory and injunctive relief to determine its ownership of and right to possess the subject waterway.¹⁷⁰ The only question before the court, therefore, was who owns the property, and the only remedy available to the Sawyer Trust was title and possession, meaning the Sawyer Trust did not have a constitutional takings claim for compensation.¹⁷¹ Accordingly, because the Texas legislature has not waived sovereign immunity "by clear and unambiguous language" for trespass to try title claims against the state, the claims by the Sawyer Trust against the TPWD remained subject to the limitations of sovereign immunity.¹⁷²

Nevertheless, the supreme court did not close the door on the Sawyer Trust's claims entirely. In fact, the court confirmed that, on remand, the trust should be afforded the opportunity to amend and cure its pleading to proceed in its suit against the appropriate government officials.¹⁷³ Because the legislature has not waived sovereign immunity for a trespass to try title claim, the Sawyer Trust must demonstrate that the claim was subject to some exception from sovereign immunity, such as a determination that the TPWD acted outside the scope of its authority. By bringing the trespass to try title claim against an individual state official versus the agency, the suit would not be barred by sovereign immunity where the official acted *ultra vires*.¹⁷⁴

Given the circumstances, a successful *ultra vires* claim would rest on demonstrating that the TPWD inappropriately determined the subject waterway is navigable. Under Texas law, the TPWD does have authority to make determinations regarding navigability of streams and to exercise the state's rights over navigable streambeds.¹⁷⁵ Its determination is not conclusive, however, as the supreme court has established that "the question of navigability is, at bottom, a judicial one."¹⁷⁶ Where, upon judicial review, it is determined that a government official acting in his official capacity made an incorrect determination of navigability and possesses the subject property without authority, the possession is not legally that

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 392.

171. *Id.*

172. *Id.* at 393.

173. *Id.* at 394.

174. *Id.* at 393 (citing *State v. Lain*, 349 S.W.2d 579, 581 (Tex. 1961)).

175. *Id.* at 394.

176. *Id.* (citing *State v. Bradford*, 50 S.W.2d 1065, 1070 (Tex. 1932)).

of the sovereign and the defendant official's claim of title will not bar suit.¹⁷⁷

VII. CONCLUSION

Discussions of environmental law in Texas in the coming years are likely to be dominated by the series of high-profile challenges undertaken by the State of Texas against various regulations promulgated by the U.S. Environmental Protection Agency. The impact of these challenges, and any decisions that might result, cannot be denied. As the preceding cases illustrate, however, in the shadow of these challenges, Texas courts continue to hand down decisions that have important impacts on the form of environmental regulation in Texas, and the steps the regulated community must take in its day-to-day operations to comply with those regulations.

177. *Id.* at 393 (citing *Lain*, 349 S.W.2d at 581-83).

