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I. INTRODUCTION

DURING the Survey period, numerous cases were decided by Texas courts applying state and federal environmental laws. The disputes varied from Clean Air Act cases, to continuing litigation in the *Aviall*[1] series of decisions, to other statutory claims, as well as contract and tort suits. Finally a decision, in a dispute between a permitted facility and neighboring landowners, who entered into a settlement agreement regarding a contested permit, provides interesting insights into how one should draft such settlement agreements. Further, Texas courts continued to hear a variety of important statutory, contract and tort cases in

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1. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 1, 57 (2004).

environmental law from which practioners can draw guidance when counseling clients, drafting agreements, and representing parties in litigation.

II. CLEAN AIR ACT

In *Blue Skies Alliance v. Texas Commission on Environmental Quality*,[2] the Amarillo Court of Appeals considered challenges from two environmental groups to a flexible air permit for an 800-megawatt pulverized coal power plant in McLennan County. One group, Texans Protecting Our Water, Environment and Natural Resources (TPOWER), claimed that the Texas Commission on Environmental Quality (TCEQ) erred in issuing the permit, alleging that no contribution to ozone in nonattainment areas is allowed and that the plant would increase ozone in the Dallas/Fort Worth (DFW) nonattainment area. Ozone is not a direct emission but is formed by the reaction of a number of precursors, such as volatile organic chemicals (VOCs) and nitrogen oxides (NO_x), under certain circumstances.[3] The court of appeals noted that under rules issued by the U.S. Environmental Protection Agency (EPA), no single source of VOCs is presumed to "cause or contribute to ozone exceedences."[4] Further, the TCEQ modeling guidelines provide that "[i]f a source is NO_x-dominated, then local ozone impacts will be insignificant."[5] The court of appeals reasoned that both the EPA and the TCEQ reasonably allow "extremely low levels of ozone precursors to flow into an ozone nonattainment area" without violating air quality rules.[6]

TPOWER also claimed that the plant's contribution of ozone to the DFW area, less than 0.03 parts per billion (ppb), was not insignificant. TPOWER alleged that DFW officials and businesses would be saddled with the cost of offsetting the plant's emissions, but the court of appeals noted that TPOWER did not provide "any evidence of the cost of procuring a less than 0.03 ppb ozone reduction."[7] Similarly, TPOWER alleged that health in the DFW area would be negatively affected, but it failed to introduce evidence of the effect of an increase in ozone of less than 0.03 ppb. The TCEQ, however, found that the "incremental effect on DFW ozone levels would be approximately 0.04 percent of the 8-hour ozone" standard, far less than the one-percent level defined as insignificant for other criteria pollutants.[8] Thus the court of appeals declined to second-guess the TCEQ's determination without evidence from TPOWER of the impact of the potential increase in ozone.[9]

Environmental Defense, Inc. (EDI) brought the second challenge, alleging that the best available control technology (BACT) analysis for the

2. 283 S.W.3d 525 (Tex. App.—Amarillo 2009, no pet.).
3. *Id.* at 530.
4. *Id.*
5. *Id.* at 530-31.
6. *Id.* at 531.
7. *Id.* at 533.
8. *Id.* at 532.
9. *Id.*

plant should have included an evaluation of the integrated gasification/combined cycle (IGCC) process.[10] In the IGCC process, electricity is generated by burning gases extracted from coal as opposed to burning the coal. The court of appeals reviewed the definition of BACT and concluded that the analysis required consideration of the "control technologies that can be applied to the proposed major source"[11] and that BACT analysis did not require consideration of control technologies that would require a redesign of the facility.[12] Further, in response to a certified question from administrative law judges over the contested case hearing for this permit, the TCEQ executive director explained that "IGCC would require a redesign of the proposed facility and thus, would be outside the scope of a BACT analysis."[13]

EDI argued that IGCC must be considered under the BACT analysis as a clean-fuel technology, but EDI did not argue that IGCC would not require a redesign of the plant. The court of appeals reasoned, however, that the clean-fuels provision had to be limited to clean-fuel technologies capable of application to the proposed facility, because otherwise, IGCC would have to be considered for every type of energy-producing facility, whether a coal plant, wind plant, or nuclear plant.[14] Because the BACT analysis applies only to technologies capable of application to the proposed source, and because EDI did not offer evidence that IGCC could be applied to the proposed plant, the court of appeals found that the IGCC evidence from EDI was irrelevant.[15]

III. SOLID WASTE AND HAZARDOUS SUBSTANCES

The latest decision in the *Aviall Services, Inc. v. Cooper Industries, LLC* saga makes it clear that a party seeking cost recovery under section 107 of CERCLA[16] cannot cure a failure to allow public participation during a remedial investigation with a later opportunity to provide comments or with a TCEQ Innocent Owner Certificate (IOC).[17] Aviall sought to recover costs under section 107 from Cooper for investigation and remediation of a number of properties, including one at Love Field in Dallas. To recover under section 107, a party must comply with the National Contingency Plan (NCP), including the public participation requirement that foreseeably affected parties be allowed a meaningful opportunity to participate in the remedial investigation.[18] By February 1997, Aviall's investigation had uncovered contamination at the Love

10. *Id.* at 533.
11. *Id.* at 535.
12. *Id.*
13. *Id.* at 536.
14. *Id.*
15. *Id.* at 536-37.
16. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (codified at 42 U.S.C. §§ 9601-75 (2006)).
17. No. 3:97-CV-1926-D, 2009 WL 498133, at *5 (N.D. Tex. Feb. 27, 2009).
18. *Id.* at *1, *4.

Field property and at the adjacent Bachman Lake Park. Aviall had also demonstrated that the groundwater flow was toward twelve adjacent properties. Because of the properties' proximity to known contamination, and the direction of groundwater flow, the Northern District of Texas found that the twelve landowners were foreseeably affected parties even without detected contamination on the twelve properties.[19] In June 2007, Aviall completed its remedial investigation; however, the twelve downgradient landowners were not notified until November 2007. Because Aviall completed the remedial investigation before it provided notice to the twelve landowners, the court found that Aviall had not complied with the NCP.[20]

Aviall contended, however, that it provided an opportunity for meaningful participation, despite the tardy notification. First, Aviall stated that it offered to obtain an IOC at its cost for each of the twelve downgradient owners. The court, however, found that an IOC was not equivalent to the opportunity to comment on, and possibly influence, a remedial investigation.[21] Additionally, Aviall stated that even though the remedial investigation was complete at the time the landowners were notified, it still would have considered any landowner's request for additional investigation. Aviall, however, did not offer any evidence that the landowners knew of the opportunity. The court further found that the notice letters actually gave the impression that the remedial investigation was closed and not subject to further input.[22] The court also generally rejected the idea that public participation is not required at the remedial investigation stage if a later opportunity for participation is provided.[23] The *Aviall* decision demonstrates the importance for parties conducting cleanups to take a broad view of the scope of foreseeably affected parties and provide an opportunity to participate as early as possible if the parties seek cost recovery.

Another case concerned the issue of the knowledge of a release and how it affects liability under CERCLA of a party that arranges for the disposal of a hazardous substance.[24] The U.S. Supreme Court recently held that mere knowledge that a process may result in a release is not sufficient on its own to establish CERCLA arranger liability.[25] In *Celanese Corp. v. Coastal Water Authority*, the Southern District of Texas considered the converse, i.e., whether a lack of knowledge of a release precludes a finding of arranger liability under CERCLA and the Texas Solid Waste Disposal Act (TSWDA).[26] *Celanese* involved a release of methanol from a pipeline that ruptured during construction of a under-

19. *Id.* at *4.
20. *Id.* at *5.
21. *Id.*
22. *Id.*
23. *Id.* at *4.
24. *See generally* Celanese Corp. v. Coastal Water Auth., No. H-06-2265, 2009 WL 981717 (S.D. Tex. Apr. 13, 2009).
25. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1873 (2009).
26. 2009 WL 981717, at *1.

ground water pipeline. Celanese sought cost recovery under CERCLA and the TSWDA from both Eby, the construction contractor for the water pipeline, and Brown & Root, the engineer that oversaw the design and construction of the pipeline project. At trial, a jury found that an unknown Eby employee, operating a backhoe, damaged the methanol pipeline. The jury also found that the Eby employee did not know what he had hit, and that neither Eby, nor Brown & Root, nor their employees knew of the damage to the methanol pipeline.

The court noted that arranger liability under both CERCLA and the TSWDA required proof of a "nexus between the defendant's conduct and the disposal of the hazardous substance" after consideration of the totality of the circumstances in each case.[27] The court concluded that a lack of knowledge can defeat a claim of arranger liability in a given case.[28] In the present case, the court concluded that neither Eby nor Brown & Root qualified as arrangers based on the lack of any knowledge of either the release or the conditions causing the release.[29]

In another case, the appellee, Kelsoe, submitted an application to the TCEQ for the issuance of a solid-waste landfill permit,[30] which the TCEQ executive director determined was administratively incomplete on December 9, 2005.[31] "Kelsoe filed a motion to overturn that decision on January 3, 2006, and that motion was overruled by operation of law on January 23, 2006."[32] Kelsoe filed suit in Travis County district court on March 2, 2006, challenging the TCEQ's determination that the application was incomplete. The agency then filed a plea to the jurisdiction, arguing that Kelsoe's petition was filed too late to invoke the court's jurisdiction.[33]

The trial court determined that Kelsoe was entitled to an additional notice of deficiency and reversed the TCEQ's determination that the application was incomplete.[34] The TCEQ appealed to the Austin Court of Appeals,[35] and the court of appeals reversed the trial court and dismissed Kelsoe's suit as untimely filed.[36]

The court of appeals first noted that under section 361.321(a) of the Texas Health and Safety Code and section 5.351 of the Texas Water Code, a person affected by a decision of the TCEQ may appeal to the district court no "later than the 30th day after the date of the ruling, order, decision, or other act."[37] Kelsoe argued that the thirty-day deadline did not

27. *Id.* at *4-5.
28. *Id.* at *5.
29. *Id.*
30. Tex. Comm'n on Envtl. Quality v. Kelsoe, 286 S.W.3d 91, 93 (Tex. App.—Austin 2009, pet. denied).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 94.

apply, because TCEQ's decision to return his application as incomplete was not a final and appealable agency action, and because the thirty-day deadline applies only to actions of the TCEQ, not those of the executive director of the TCEQ. The court of appeals rejected both of these arguments and held that a person seeking judicial review of the executive director's decision to return an application as administratively incomplete must file an appeal within thirty days as required under section 361.321 of the Texas Health and Safety Code and section 5.351 of the Texas Water Code.[38]

Kelsoe also argued that his motion to overturn the decision extended the thirty-day deadline. In support, Kelsoe cited to TCEQ rules regarding motions to overturn.[39] The court of appeals noted that the agency's rules on motions to overturn apply only to applications declared to be administratively complete. The court of appeals concluded that the TCEQ's rule, regarding the executive director's determination of whether an application is administratively complete do not allow for a motion to overturn.[40] Thus, the deadline for filing his appeal was January 9, 2006, thirty days after the executive director returned Kelsoe's application as incomplete.[41] *Kelsoe* establishes that a party seeking to review the executive director's determination that a permit application is administratively incomplete must file an appeal in court within thirty days of the decision and cannot rely on a motion to overturn to extend the deadline.

IV. CLEAN WATER ACT

A challenge to a permit issued by the U.S. Army Corps of Engineers (the Corps) under section 404 of the Clean Water Act arose as a result of wetlands filling.[42] The permit would have authorized the dredge and fill of approximately four acres of wetlands on the west end of Galveston Island in connection with the construction of a housing development. The permit, however, was challenged by a number of environmental groups, primarily on the basis that the Corps failed to "properly analyze cumulative impacts of the proposed . . . development and other past, present, and reasonably foreseeable future actions."[43]

Under the National Environmental Policy Act (NEPA) regulations, federal agencies are required to consider cumulative impacts.[44] The Fifth Circuit requires that a cumulative impacts study must identify:

> (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions that . . . have had or are expected to have impacts in

38. *Id.* at 95-96.
39. *Id.* at 96.
40. *Id.*
41. *Id.*
42. Galveston Beach to Bay Pres. v. U.S. Army Corps of Eng'rs, No. G-07-0549, 2009 WL 689884, at *1-2 (S.D. Tex. Mar. 11, 2009).
43. *Id.* at *3.
44. *Id.* at *6 (quoting 40 C.F.R. § 1508.27(b)(7)).

> the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.[45]

The environmental groups argued that the Corps failed to consider the cumulative environmental impacts of another development planned to be constructed adjacent to the permitted development, the safety impacts of additional boat traffic resulting from the permitted development, the "overall impact . . . if the individual impacts are allowed to accumulate," and the cumulative effects of the planned development and the existing developments on the west end of Galveston Island.[46]

The Southern District of Texas rejected the environmental groups' challenges under their first three theories, noting that the administrative record showed that the Corps had considered the effects of planned developments and that the Corps was entitled to significant deference regarding its conclusions.[47] But the court remanded the case on the final issue, ruling that the Corps's significance analysis did not sufficiently support a conclusion that the cumulative impacts were not significant, which left open the question of whether a comprehensive regional assessment was necessary.[48]

The court focused on the Corps's statements in its Environmental Assessment (EA) that the west end of Galveston Island had suffered a "dramatic loss of wetlands and aquatic habitat" and that "the cumulative impacts to both freshwater and saltwater wetlands and tidal flats have been substantial."[49] The Corps also stated that Galveston Island's remaining upland prairie habitat "may experience an adverse cumulative impact."[50] The court could not reconcile these statements with the Corps's conclusion that the cumulative impacts were not significant.[51] The court noted that under NEPA, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[52] The court went on to describe the Corps's analysis of cumulative impacts to be "too brief and too conclusory for the court to understand" in light of its statements in the EA.[53] The court remanded the case and directed the Corps to correct the deficiencies in its significance analysis.[54]

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45. *Id.* (citing Fritiofson v. Alexander, 772 F.2d 1225, 1245 (5th Cir. 1985), *overruled on other grounds*, Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 678 n.1 (5th Cir. 1992)).

46. *Id.* at *8-10.

47. *Id.* at *8-10, *12.

48. *Id.* at *12.

49. *Id.* at *11.

50. *Id.*

51. *Id.* at *12.

52. *Id.* (citing Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

53. *Id.*

54. *Id.*

This case reinforces the principle that courts will generally give federal agencies a high degree of deference to determine whether any particular environmental impact rises to the level of significance. But even under such deference, agencies still must provide a rationale and explanation for their conclusions, and failure to do so leaves the door open for a procedural challenge to the contemplated federal action.

V. OIL POLLUTION ACT

In *United States v. Viking Resources, Inc.*[55] the Southern District of Texas considered a number of issues, including the corporate veil piercing analysis in a federal Oil Pollution Act (OPA)[56] case, and the adequacy of affidavit testimony to support a summary judgment motion on removal costs and natural resources damages. Two of the most important issues decided in the case, however, are the scope of "facility" under the OPA and the right to have a jury determine removal costs and natural resource damages under the OPA.

In *Viking Resources*, the Coast Guard, the National Oceanic and Atmospheric Administration (NOAA), EPA, Texas Railroad Commission (RCC), and Texas General Land Office sought cost recovery and natural resource damages under the OPA for a 2004 oil spill in Galveston County. The oil spill originated from a tank battery and flowed into a wetland adjacent to a bayou. Viking Resources, Inc. (Viking) was the "last known lessee and operator of a subdivided portion of the . . . [l]ease underlying the land where the old tank battery was located."[57]

The OPA imposes strict liability for removal costs and damages on the responsible party for a facility from which oil is discharged into or upon navigable waters or adjoining shorelines.[58] All parties agreed that the tank battery qualified as a facility but disagreed over whether Viking owned the tank battery. As an alternative to proving that Viking owned the tank battery, the government asserted that the applicable facility in this case extended to all oil-related equipment and structures within the boundaries of Viking's lease. The court, however, found that OPA's definition of "responsible party" did not allow such a broad interpretation.[59]

The court pointed out that the definition of responsible party distinguished between onshore and offshore facilities.[60] "For onshore facilities 'any person *owning* or *operating* the facility' is a responsible party."[61] "[F]or offshore facilities . . . 'the lessee . . . permittee . . . or the holder of a right of use and easement . . . for the *area* in which the facility is located is

55. 607 F. Supp. 2d 808 (S.D. Tex. 2009).
56. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 33 U.S.C.).
57. *Viking Res.*, 607 F. Supp. 2d at 814.
58. *Id.* at 815.
59. *Id.* at 818.
60. *Id.* at 817.
61. *Id.*

the responsible party."[62] The court reasoned that because Congress chose not to use area as a criterion for defining the responsible party for an onshore facility, the Government could not expand the scope of facility in this case beyond the tank battery.[63] The court therefore held that the Government had to prove that Viking owned the tank battery itself.[64]

The interpretation of a narrow scope of onshore facility in OPA cases is significant. Under this decision, a current oil and gas lessee should not be liable under the OPA for a previously abandoned onshore facility merely by virtue of the lease. Presumably this would apply not only to tank batteries, but also to wells, pits, and other areas from which a release might occur. Further, for a party acquiring a lease, it may be prudent to clearly identify in a lease what structures and improvements are included with the lease or to specifically exclude certain structures or improvements from the lease.

The second issue of particular interest in *Viking Resources* was an issue of first impression: whether a defendant has a right to have a jury determine removal costs and natural resource damages under the OPA. Because the OPA does not provide a right to trial by jury, the court examined application of the Seventh Amendment to the U.S. Constitution.[65] The application turns on whether the issue in a claim is more legal or more equitable in nature, since the Seventh Amendment preserves the right to a jury trial on legal issues but not for equitable claims.[66]

Although the issue had not been analyzed under the OPA, the court analogized it to existing CERCLA case law.[67] The court pointed out that courts have consistently found that response costs under CERCLA are essentially restitution, which is an equitable remedy.[68] Further, a suit for removal costs under the OPA had been held to be an equitable action, although not in the context of determining the right to a jury trial.[69] Based on these cases, the court held that recovery of removal costs under the OPA is an equitable remedy, and thus, Viking was not entitled to a jury trial on this issue.[70]

On the other hand, the court found that at least one aspect of natural resource damages under the OPA is legal in nature.[71] Calculation of natural resource damages under the OPA includes addition of "(1) 'the cost of restoring, rehabilitating, . . . or acquiring the equivalent of, the damaged natural resources,' (2) 'the diminution in value of those natural resources pending restoration,' and (3) 'the reasonable cost of assessing

62. *Id.*
63. *Id.* at 817-18.
64. *Id.* at 818.
65. *Id.* at 828.
66. *Id.*
67. *Id.* at 829, 831.
68. *Id.* at 829.
69. *Id.* at 830.
70. *Id.*
71. *Id.* at 832.

those damages.'"[72] The court reasoned that compensation for the diminution in value of natural resources is similar to compensating a plaintiff for injury to property based on nuisance or trespass, both classic legal causes of action.[73] Although other components of a natural resource damage may be equitable, the right to a jury trial is triggered by a single legal component.[74] In the present case, the judge decided to have the entire case tried by a jury, whose verdict would be binding on all legal issues and advisory on the remaining equitable issues.[75]

VI. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) became the focus of a lawsuit over a planned reservoir in East Texas in *City of Dallas v. Hall*.[76] In 1961, the State of Texas identified a site on the Upper Neches River in East Texas as a "potential reservoir to serve the growing Dallas/Ft. Worth Metroplex."[77] In 1985, the U.S. Fish & Wildlife Service (FWS) identified the same site as a possible wildlife refuge. In 2004, the FWS prepared an Environmental Assessment (EA) for the proposed wildlife refuge. The result of the EA was a Finding of No Significant Impact (FONSI), eliminating the need for the FWS to prepare an Environmental Impact Statement (EIS).[78] The alternatives identified in the EA, other than the no-action alternative, would prohibit the construction of a reservoir on the site.

In 2006, the FWS designated the boundaries of the wildlife refuge and accepted the first conservation easement within the refuge.[79] In early 2007, the City of Dallas (the City) and the Texas Water Development Board (TWDB) filed suit in federal district court, arguing that "the EA was flawed, that the FWS should have prepared an EIS, and that the [creation of the wildlife] refuge violated the Tenth Amendment."[80] At the time of the suit, neither the City nor the TWDB had taken any action to create the reservoir or begun initial feasibility and environmental studies of the site.[81]

The Northern District Court of Texas dismissed the City's and the TWDB's constitutional claims and granted a motion for partial summary judgment in favor of the FWS.[82] The court held that an EIS was not needed, because "the establishment of the acquisition boundary did not cause any change in the physical environment."[83] The court further held

72. *Id.* at 830-31 (quoting 33 U.S.C. § 2702(b)(2)(A)).
73. *Id.* at 832.
74. *Id.*
75. *Id.*
76. 562 F.3d 712 (5th Cir. 2009).
77. *Id.* at 715.
78. *Id.* at 716.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

that "the refuge's effect on the City's water supply was speculative and not within the scope of NEPA."[84]

The case was appealed to the U.S. Court of Appeals for the Fifth Circuit. The court held that the EA prepared by the FWS complied with NEPA.[85] The court rejected the City's and TWDB's argument that the FWS improperly declined to consider impacts of the refuge on the possible future construction of the reservoir.[86] The court noted that "[t]he City and TWDB never committed to constructing the reservoir and may have never done so," and "never [took] any concrete steps toward constructing the reservoir, such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project."[87] Because of the high level of "uncertainty over whether the reservoir [would have been] constructed and its impact on water supplies, . . . the effects of establishing the [wildlife] refuge on water supplies [was] not concrete enough . . . to regulate that they be included in the EA."[88] The court also rejected the City's and the TWDB's argument that the FWS's decision-making process was a sham.[89] The court noted that that "FWS engaged in an extensive process of public education and public comment."[90] The court further stated that NEPA did not "require an agency to insinuate itself into state planning processes."[91] Thus, the court concluded that the EA was adequate.[92]

The Fifth Circuit also rejected the City's and the TWDB's argument that an EIS was necessary.[93] Citing *Sabine River Authority v. U.S. Department of Interior*, the court held that the acceptance of an "easement which prohibits development does not result in the requisite 'change' to the physical environment" to require an EIS.[94] The court further rejected the City's and the TWDB's constitutional challenge because those issues were not properly raised on appeal.[95]

Hall establishes that speculative future development need not be considered by federal agencies in the NEPA process. Thus, entities proposing future development should take concrete steps toward such development to ensure that the effects of a proposed federal action on the development are considered. This is particularly important in connection with large public works projects with long-term horizons, such as reservoirs and transportation infrastructure projects.

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84. *Id.* at 719-20.
85. *Id.* at 722.
86. *Id.* at 718-19.
87. *Id.* at 719.
88. *Id.* at 719-20.
89. *Id.* at 720-21.
90. *Id.* at 720.
91. *Id.* at 721.
92. *Id.* at 722.
93. *Id.* at 723.
94. *Id.* at 721 (citing 951 F.2d 669 (5th Cir. 1992)).
95. *Id.* at 723.

VII. SAFE DRINKING WATER ACT

In a uranium mining case under the Safe Drinking Water Act (SDWA), Goliad County (the County) alleged that the Uranium Energy Corporation (UEC) failed to properly plug and seal numerous exploratory boreholes and allowed storm water to enter the boreholes, resulting in contamination of an aquifer.[96] The County argued that UEC thereby "converted" the exploratory boreholes into injection wells without obtaining the required permits.[97] The County brought a citizen suit under the SDWA, and it also sought relief under the federal Declaratory Judgment Act and under state common-law theories of nuisance and nuisance per se.[98]

The process of "[u]ranium mining involves the injection of oxygen and bicarbonate into ore zones through injection wells to solubalize uranium, which is then pumped to the surface through production wells."[99] Under SDWA regulations, "uranium injection wells are classified as Class III wells, which are wells designed for the injection of materials for the extraction of . . . minerals."[100] Uranium mining is regulated by the TCEQ under a grant of jurisdiction by the EPA, pursuant to the Underground Injection Control (UIC) program of the SDWA.[101] In contrast to mining, uranium exploration is regulated by the Railroad Commission of Texas (RRC) and is not subject to the SDWA.[102]

UEC obtained a permit from the RRC for the exploratory boreholes it drilled in the county.[103] The RRC issued UEC a notice of violation for failure to properly plug the boreholes.[104] A number of residents of the county thereafter complained that the water from their wells was polluted. UEC then filed a permit application with the TCEQ to allow UEC to conduct *in situ* uranium mining. The County alleged that after the UEC had contaminated the aquifer, it collected baseline water samples that were included in its TCEQ application. In the suit, the County sought to prohibit UEC from seeking a UIC permit from the TCEQ. At the time the suit was filed, the TCEQ was in the midst of processing UEC's permit application.[105]

UEC moved for dismissal, which the Southern District of Texas granted, holding that the case was not ripe for adjudication and that the County had failed to state a claim under the SDWA.[106] First, the court noted that in determining ripeness, it must consider "(1) whether delayed

96. Goliad County v. Uranium Energy Corp., No. V-08-18, 2009 WL 1586688, at *1 (S.D. Tex. June 5, 2009).
97. *Id.*
98. *Id.* at *4.
99. *Id.* at *1.
100. *Id.* (citing 40 C.F.R. § 146.5(c)(2)).
101. *Id.* at *2 (citing TEX. WATER CODE ANN. §§ 27.001 *et seq.*).
102. *Id.* (citing TEX. NAT. RES. CODE ANN. §§ 131.001 *et seq.*).
103. *Id.* at *3.
104. *Id.*
105. *Id.* at *3.
106. *Id.* at *6.

review would cause hardship to the plaintiff; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the court would benefit from further factual development of the issues presented."[107] Under these criteria, the court concluded that because UEC's permit application was still pending before the TCEQ, and the agency had not decided whether to grant or deny the application, the County's claims were not ripe for review.[108]

Second, the court held that even if the case were ripe, the County failed to properly allege a violation of the SDWA because UEC's alleged "conversion" of an exploratory well to an injection well was not subject to regulation under the statute.[109] The court concluded that the definition of "injection" and "injection activity" under SDWA regulations and case law "requires, at a minimum, some action that either knowingly would result in—or is designed to allow for—the funneling of fluid into a well, and at a maximum, a calculated use of force designed to propel such fluid into a well."[110] "A purely unknowing and passive allowance, would not . . . be sufficient to cause the 'injection' of some substance into the ground or otherwise constitute an 'injection activity.'"[111] Because the County did not allege that UEC knowingly allowed storm water to enter the boreholes, the court concluded that the County had failed to properly allege facts sufficient to make the boreholes' injection wells subject to the SDWA.[112]

The outcome of *Goliad County* is important for two reasons. First, it confirms that courts are generally reluctant to decide cases when there is an ongoing administrative process. Until that process is complete, the uncertainty surrounding the agency's final action may render any judicial suit unripe. Second, *Goliad County* suggests that in order to be subject to the injection well provisions of the SDWA, an entity must have knowledge that its actions will result in underground injection. The mere potential for future contamination of an aquifer through a borehole or well is not sufficient to establish the applicability of the SDWA.

VIII. CONTRACT CLAIMS

A somewhat complicated case involving contract claims raises interesting questions as to what a permit applicant should ask for in a settlement with a party disputing its permit application.[113] The complaining parties were two brothers, J.E. and N.K. Hicks, who owned land adjacent to an egg facility, operated by Pilgrim, which housed a million chickens. The Hickses challenged Pilgrim's attempts to permit waste management prac-

107. *Id.* at *5 (citing Monk v. Huston, 340 F.3d 279, 282 (5th Cir. 2003)).
108. *Id.* at *6.
109. *Id.* at *8.
110. *Id.* at *9.
111. *Id.*
112. *Id.*
113. Hicks v. Pilgrim Poultry, G.P., 299 S.W.3d 249, 252 (Tex. App.—Texarkana 2009, no pet.).

tices with the TCEQ.[114]

An original settlement with the brothers allowed a specific approach to managing the waste or wastewater, but the management method was not cost-effective, so a second approach was proposed, and an amendment to the first settlement was agreed upon by the parties (the Second Agreement). The Second Agreement included a payment to the Hickses of $750,000, $50,000 in attorney's fees, and the creation of a $1 million escrow account to pay for corrective actions for odor problems. It also required the implementation of measures for odor control and compliance with the conditions of the first agreement incorporated into the Second Agreement.[115]

The Hickses agreed to release all claims related to the permit applications and the first agreement, contingent upon operation of the new facility to address the wastewater management, and completing certain other actions. In addition, the Hickses agreed to file a written request to withdraw any hearing request or objection to the relevant permit application, and they agreed not to oppose the inclusion of the new method of managing the wastewater from the Pilgrim facility.[116]

The action of Pilgrim after the settlement raised concerns by the Hickses; however, they withdrew their objection to the permit, and the TCEQ issued it. Subsequent to that action, "Pilgrim filed a request with the TCEQ to amend the permit to change it to . . . a registration in lieu of a permit, to increase the number of birds at the facility by 138,715, to add 484 acres of on-site land application of waste or wastewater, and 1,023 acres of off-site land application, to make the use of treated wastewater optional rather than mandatory, and to employ" the method previously agreed by the parties.[117]

Thereafter, the Hickses filed a letter with the TCEQ reciting the prior agreements with Pilgrim and objecting to several of the changes requested by Pilgrim, as well as requesting a contested case hearing on Pilgrim's request to the TCEQ. Pilgrim filed a declaratory judgment action against the Hickses, asserting breach of the Second Agreement, to which the Hickses counterclaimed for declaratory judgment that Pilgrim had breached the Second Agreement.[118]

The trial court submitted the question of the breach of contract to the jury, which determined that the Hickses breached the Second Agreement and owed Pilgrim $750,000.[119] The trial court's judgment included $174,000 in pre-judgment interest, $148,000 in attorney's fees, and court costs against the Hickses.

On appeal, the Texarkana Court of Appeals overturned the trial court's

114. *Id.*
115. *Id.*
116. *Id.* at 253.
117. *Id.*
118. *Id.* at 254.
119. *Id.*

judgment.[120] The first issue, whether the contract was ambiguous, was for the court to decide.[121] Pilgrim argued that the release was ambiguous and that, although it was not specifically stated in the settlement, it prohibited the Hickses from complaining about events that occurred on the facility prior to the signing of the Second Amendment. The court of appeals rejected this argument and determined that the release was not ambiguous and that it did not contain the prohibition argued by Pilgrim.[122] The court of appeals also ruled that where a contract is not ambiguous and the facts are not disputed, it is error for the trial court to submit the interpretation of the contract to the jury.[123] The language of the Second Agreement specifically stated that it did not preclude filing complaints to actions under the permit, filing complaints to actions in violation of the permit, or filing hearing requests, objections, or complaints related to future applications for renewal, amendments, or other revisions.[124] Thus, the court of appeals ruled that the Hickses did not breach the Second Agreement in contesting the revision of the permit and Pilgrim's related requests to the TCEQ, or in sending letters to other neighboring landowners about Pilgrim's activities.[125]

Hicks illustrates how settlement agreements in lawsuits and permit appeals must be carefully drafted to consider future issues and actions by complaining parties. Additionally, the case demonstrates how actions following such an agreement should be carefully considered by both settling parties with respect to a potential breach of the settlement agreement. Specifically, the abilities of the permitted facility to change its activities and the ability of the neighboring landowner to raise complaints about those activities have to be carefully negotiated and drafted.

IX. TORT CLAIMS

In *DBMS Investments, L.P. v. ExxonMobil Corp.*, the Corpus Christi Court of Appeals considered whether the plaintiffs exercised the appropriate level of diligence to trigger application of the discovery rule and thus toll the limitations period applicable to injury to soil and groundwater based on contamination.[126] Having filed the lawsuit sixteen years after the alleged injury to the land occurred, the plaintiffs argued that they "did not discover, and in the exercise of reasonable diligence could not have discovered, the condition of the property, the wrongful acts of Defendant, and the resultant injury until less than two years prior to the filing of [the] lawsuit."[127] Complicating the issue was the fact that one of

120. *Id.* at 261.
121. *Id.* at 255.
122. *Id.* at 258.
123. *Id.*
124. *Id.* at 260.
125. *Id.*
126. No. 13-08-00449-CV, 2009 WL 1974646, *1 (Tex. App.—Corpus Christi June 11, 2009, pet. denied).
127. *Id.* at *2.

the plaintiffs, DBMS, did not own the property at the time the alleged injury occurred.

In its analysis, the court of appeals first addressed the circumstances under which a subsequent property owner, here DBMS, can recover for injury to property that occurred prior to the subsequent property owner's ownership.[128] The court of appeals recognized that under Texas law: (1) the rights of action for damages resulting from injury to land accrue to the owner at the time the cause of the injury begins to affect the land, (2) the right to sue for injury is a personal right that belongs to the person who owns the property at the time of the injury, and (3) a subsequent purchaser can recover for that injury if an express provision in the deed, or an assignment, grants the subsequent property owner that authority.[129]

Next, the court of appeals addressed whether the discovery rule tolled the applicable limitations period. Under the discovery rule, the accrual of limitations may be tolled where "the nature of the injury is inherently undiscoverable and evidence of the injury is objectively verifiable."[130] Further, to determine whether an injury is inherently undiscoverable, courts look to whether the type of injury—rather than the particular injury—was discoverable.[131] If the discovery rule does apply, "a cause of action accrues when the plaintiff knows, or through the exercise of reasonable care and diligence should have discovered, the nature of his injury and the likelihood that it was caused by the wrongful acts of another."[132]

To prove that the contamination was inherently undiscoverable, plaintiffs presented an environmental consultant's affidavit, liability assessment report, remedial action plan, and remediation cost estimate. The consultant's affidavit stated that, based on his investigation, the contamination on the property, in all likelihood, emanated from the adjoining property, formerly owned and operated by ExxonMobil, and was caused by ExxonMobil sometime between 1985 and October 1990. Further, the environmental consultant concluded that the contamination was inherently undiscoverable, because it could not be observed by visual inspection of the surface of the property, no public records would have put the property owners on notice that the property was contaminated, and the contamination was not discoverable through the exercise of reasonable diligence. Included in the liability assessment report were aerial photographs of the property dating from 1979 through 2000 that showed waste disposal pits/surface impoundment and petroleum storage tanks on the adjacent property. The environmental consultant stated in the report that, based on the direction of groundwater flow, the storage tanks appeared to be upgradient from a contaminated area of the property. A

128. *Id.* at *3-4.
129. *Id.*
130. *Id.* at *6.
131. *Id.*
132. *Id.* at *6.

site location map included in the report also showed that a number of oil wells surrounded the property.[133]

ExxonMobil's evidence showing why the discovery rule should not apply—that is, because the contamination was not in fact "inherently undiscoverable"—included: (1) the plaintiffs' answers to ExxonMobil's interrogatories, admitting that the plaintiffs knew the property was adjacent to a gas plant and that gas pipelines ran underneath the property, (2) a real estate appraisal report prepared before DBMS acquired the property, observing that the property is located in an area of long-term, concentrated industrial use with accompanying environmental hazards, and that such activities had a direct detrimental influence on the neighborhood, (3) statements in the real estate appraisal report recommending a Phase I Environmental Site Assessment to evaluate obvious environmental impacts, (4) several letters and reports from the RRC documenting remediation efforts on land surrounding the property, (5) documentation of spills that had occurred in and around the property, and (6) an affidavit from the custodian of records of the Texas General Land Office (GLO), stating that the spill reports were business records of the GLO.[134]

With all the information, the court of appeals determined that ExxonMobil's evidence largely undermined the conclusions of the plaintiffs' environmental consultant that the contamination was inherently undiscoverable.[135] The court of appeals highlighted the fact that though the environmental consultant's conclusions claimed a lack of publicly available information about the contamination, the RRC, the TCEQ, and the GLO all had records evidencing that oil and gas spills had occurred on land adjacent to the property.[136] Further, the aerial photographs showed that the property was near a gas plant, waste pits, and storage tanks. The court of appeals concluded that this information demonstrated that the plaintiffs should have inquired about the gas plant operations next door.[137]

The court of appeals, in part, relied on the reasoning in *HECI Exploration Co. v. Neel*,[138] which considered the level of diligence mineral interest owners should employ while protecting their interests against neighboring operators. In *Neel*, the Texas Supreme Court found that mineral interest owners should exercise "reasonable diligence in determining whether adjoining operators have inflicted damage."[139] The supreme court further determined that "royalty owners cannot be oblivious to the existence of other operators in the area of the existence of a common reservoir."[140] The court of appeals came to a similar conclusion in

133. *Id.* at *7.
134. *Id.* at *8-9.
135. *Id.* at *9.
136. *Id.* at *9-10.
137. *Id.* at *10.
138. 982 S.W.2d 881 (Tex. 1998).
139. *Id.* at 186.
140. *Id.*

DBMS Investments, finding that—like the Neels—DBMS "could not ignore the surrounding operations nor the possibility that the operations would cause contamination to the land."[141] The court of appeals held that a reasonably diligent landowner would have inquired about the operations on the adjacent property, and would have investigated the records available at the GLO, TCEQ, and RRC before acquiring the property.[142] Thus, the contamination was not inherently undiscoverable, and the discovery rule could not be used to toll the limitations period applicable to the claims of contamination.[143]

This decision puts prospective property owners on notice that, before acquiring a property, they should employ reasonable diligence. This may include record searches at relevant agencies if the prospective purchasers have knowledge of surrounding conditions that could adversely affect the property.

In another case, the question of subsurface trespass raised issues regarding the ability to sue a party whose underground injection migrates under another person's property without that person's permission or a lease allowing use of the pore spaces under the property.[144] The facts involved a nonhazardous wastewater injection well operated by Environmental Processing Systems (EPS) and the intersection of common-law claims with administrative permitting. EPS held a permit issued by the former Texas Natural Resource Conservation Commission (TNRCC) to inject nonhazardous wastewater into the Frio saltwater formation. At issue was whether injected and migrating wastewater could be considered a subsurface trespass when the injecting entity has a permit for such activity. FPL Farming claimed that it owned the portion of the Frio saltwater formation and the groundwater within the formation underneath its property, and thus, any migration of EPS-injected wastewater into the subsurface of FPL Farming's property constituted a trespass. FPL Farming raised objections to EPS's injection well at two contested case hearings. One objection was resolved through settlement with EPS, while the other was overruled when the TNRCC granted EPS's application to amend its permits. This, however, was later affirmed by both the Travis County district court and the Austin Court of Appeals.[145]

The TCEQ (then the TNRCC) authorizes wastewater injection wells "for the benefit of the state and the preservation of its natural resources."[146] The Beaumont Court of Appeals compared the TCEQ's authorization at issue in this case to the RRC's authorization at issue in *Railroad Commission of Texas v. Manziel*, where the Texas Supreme Court considered a claim for trespass in light of the RRC's issuance of

141. 2009 WL 1974646, at *10 n.11.
142. *Id.*
143. *Id.*
144. FPL Farming Ltd. v. Envtl. Processing Sys., 305 S.W.3d 739, 739-42 (Tex. App.—Beaumont 2009, pet. filed).
145. *Id.* at 741-42.
146. *Id.* at 744 (quoting TEX. WATER CODE ANN. §§ 27.011-.012).

authorization for a secondary recovery operation that utilized saltwater injection.[147] Relying on the reasoning put forth by the supreme court in *Manziel*, the Beaumont Court of Appeals concluded that no trespass occurs under common law when the TCEQ has authorized deep subsurface injections and the injected fluids later migrate into the deep subsurface of nearby property.[148] To support this conclusion, the court of appeals emphasized the agency's requisite consideration of multiple interests, one of which may be the doctrine of common-law trespass.[149]

The holding in *FPL Farming* reveals the challenges a landowner confronts in proving common law claims, such as trespass or nuisance, where a regulatory agency has authority to authorize the activity that is allegedly causing the injury. Under recent case law, the landowner faces a challenge in establishing actionable common law claims if a permit has been issued authorizing the activity. However, the case also highlights potential points of attack in such cases. For example, where an agency is not required to take into account private interests, such as injuries to private property or other established common-law doctrines, a landowner may be able to argue that authorization of the activity does not authorize the particular injury. Where the public interest is also harmed by the particular instance of the agency's exercise of authority, even where a regulatory agency is required to consider the public interest as part of its authorization, the landowner could attack the administrative decision by arguing that the authorization violated the agency's duty to protect the public interest.

X. CONCLUSION

The summaries of these cases provide helpful precedents for future counsel and can serve as "helpful guidance" for contract drafting. The precedents further elucidate federal and state statute, and provide guidelines for future application to and counsel of regulated parties as they attempt to comply with, and take action under, environmental statutes.

147. 361 S.W.2d 560 (Tex. 1962).
148. *Id.*
149. *FPL Farming*, 305 S.W.3d at 744.