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## Environmental Law

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# ENVIRONMENTAL LAW

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I. INTRODUCTION

THE environmental issues in this year’s Survey period continued to vary and raised concerns that are becoming of increasing importance in the environmental legal area. One case involved the issue of financial disclosure and accounting for environmental risks, costs, and liabilities. In another case, the effect of international law and agreements on environmental laws in the United States were the basis of the court’s analysis. As events evolve over the next few years in the arena of climate change, environmental financial disclosure and the importance of international treaty negotiations will only become more important in the United States, and even more so in Texas as it is the largest emitter of greenhouse gases in the country.

The remaining cases raised issues relating to environmental cleanup costs, air emissions, wastewater discharges, and the usual panoply of environmental concerns and claims. These cases present legal precedent important to all lawyers in Texas who practice in the continuously evolving area of environmental law.

II. ENVIRONMENTAL DISCLOSURE

The Fifth Circuit Court of Appeals reviewed the issue of whether a corporate officer is guilty of civil securities fraud and insider trading when

environmental reserves were altered in a manner that resulted in a change in the corporate earnings.<sup>1</sup> The U.S. Securities and Exchange Commission (SEC) filed a civil case against Bruce Snyder, the former Vice President and Chief Accounting Officer of Waste Management, Inc. (WMI). The SEC alleged that Snyder signed and filed a misleading 10-Q in 1999. The SEC alleged that the 10-Q was materially false and misleading because it overstated income and included “nonrecurring” adjustments without appropriate disclosure. The SEC also alleged that Snyder engaged in insider trading because he sold 5,500 shares of WMI stock four days after the 10-Q in question was filed.

The acts that the SEC alleged resulted in a materially false and misleading 10-Q were that changes for certain landfill reserves were reduced, which added \$12 million to first quarter earnings; reserves for certain closure and post-closure costs for landfills were reduced, which added \$24 million to first quarter earnings; reserves for a deep well were reduced, which added \$12 million to first quarter earnings; and that international environmental reserves were reduced, which added \$25 million to first quarter earnings. The SEC argued that these events occurred at a time when the management was concerned that the earnings of WMI would not meet expectations for that quarter.<sup>2</sup>

Snyder argued various defenses including that the advice of Arthur Andersen, the accounting firm working for and auditing WMI at the time, and the advice of counsel showed that he did not have the scienter necessary to engage in filing of a false and misleading 10-Q. The jury issued a verdict against him.

At the appellate level, the Fifth Circuit found that the jury instruction relating to the accounting firm’s opinion appeared to shift the burden of proof to the defendant Snyder.<sup>3</sup> Thus, the court reversed and remanded the case to the district court for a new trial.

The case will have to be retried, unless the parties settle the case. What is instructive here is the SEC’s considered analysis of the way in which environmental reserves are changed and the timing of such changes. Care should be taken by corporate officers and other employees as they alter environmental reserves, and as a result, alter the earnings for the year or a quarter. The SEC has shown, in a prior case involving Ashland, Inc., a similar aggressive approach to parties involved in significant reductions in environmental reserves.<sup>4</sup>

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1. U.S. SEC v. Snyder, 292 F. App’x 391, 393 (5th Cir. 2008).

2. *Id.* at 394-99.

3. *Id.* at 407.

4. Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1984, Making Findings and Imposing a Cease-And-Desist Order, Exchange Act Release No. 54830 (Nov. 29, 2006).

## III. INTERNATIONAL LEGAL ISSUES

## A. AFFECT OF INTERNATIONAL LAW ON APPLICATION OF US ENVIRONMENTAL LAWS

In *United States v. Jho*,<sup>5</sup> the Fifth Circuit considered how the interpretation of a federal statute is affected by principles of international law. The Act to Prevent Pollution from Ships (APPS) requires maintenance of an oil record book which includes, *inter alia*, a log of discharges from the ship and disposal of oil-water mixtures. Kun Yun Jho served as the chief engineer on a foreign-flagged ship that transferred bulk petroleum from off-shore oil tankers to ports in the Gulf of Mexico. Coast Guard inspections revealed evidence of tampering with pollution control and monitoring equipment for water discharges from the ship. The government charged Jho with eight criminal counts for knowingly failing to maintain an oil record book, corresponding to eight dates the ship entered a port in the United States. The district court dismissed the complaint, holding that prosecution violated principles of international law, and the government appealed.

The Fifth Circuit reviewed the lower court's interpretation of the criminal statute *de novo*. On appeal, the defendant argued that the requirement to maintain an oil record book only imposed a duty to make entries in the book.<sup>6</sup> The defendants further argued that because the entries were made outside U.S. ports and navigable waters, no violation of APPS occurred.

The Fifth Circuit, however, read the maintenance requirement to include a duty for foreign-flagged ships to keep the oil record book "accurate (or at least not knowingly inaccurate) upon entering" U.S. ports.<sup>7</sup> Under international law, nations have exclusive jurisdiction to enforce laws within their borders unless they consent to surrender their jurisdiction.<sup>8</sup> The APPS showed that the United States decided to exercise its jurisdiction, not waive it.<sup>9</sup> Further, the law of the flag doctrine did not limit the general rule.<sup>10</sup> Under the law of the flag doctrine, a merchant ship is part of the territory of the country whose flag the ship flies, and actions on the ship are subject to the laws of that country.<sup>11</sup> The court noted that the doctrine "does not mandate that *anything* that occurs on the ship *must* be handled by the flag state."<sup>12</sup> Because the court found that the United States had jurisdiction to enforce the APPS on acts committed in U.S. ports, and because Jho failed to maintain the oil record book in a U.S. port, the Fifth Circuit reversed the lower court's dismissal

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5. 534 F.3d 398 (5th Cir. 2008).

6. *Id.* at 403.

7. *Id.*

8. *Id.* at 405.

9. *Id.*

10. *Id.* at 406.

11. *Id.* at 406-07.

12. *Id.* at 406.

of the oil record book charges against Jho.<sup>13</sup>

#### IV. TORT AND CONTRACT CLAIMS

##### A. NUISANCE CLAIMS FOR AESTHETICS

As wind projects continue to be constructed in Texas for their tax incentives and other incentives that encourage the development of renewable energy, some who live by the newly erected wind towers and turbines do not find them attractive. These residents object to the loss of the view that existed prior to the tall white structures springing up in their vicinity. In a case decided during the Survey period, neighboring landowners filed suit against wind farm operators, asserting claims for private and public nuisance and seeking injunctive relief.<sup>14</sup> The district court granted the wind farm operators' motion for partial summary judgment and, following trial, entered a take-nothing judgment against the neighbors and taxed each party with its own costs.<sup>15</sup>

The judge's instructions to the jury on the issue of whether a nuisance existed is of particular interest. The court's instructions stated that:

you may not consider whether the Plaintiffs are offended, disturbed, or annoyed because of the way the wind turbine project has affected their landscape, scenery, or the beauty of the area. Under the laws of the State of Texas, a condition that causes aesthetic changes to the view, scenery, landscape, or beauty of an area is not a nuisance.<sup>16</sup>

In reviewing this jury instruction and the rulings of the lower court, the Eastland Court of Appeals considered the definition of nuisance under Texas law. "Texas law defines 'nuisance' as 'a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.'"<sup>17</sup> The court relied on prior appellate court decisions that concluded the construction of a lumber yard, apartment garage, or cemetery did not constitute a nuisance.<sup>18</sup>

While the plaintiffs conceded that this case law did not permit them to file suit merely because they subjectively did not like the view of the windmills, they argued, among other things, that a reasonable person standard should be applied to combine the light flickering at night from the wind towers, the shadow flicker at dusk and dawn, and the noise.<sup>19</sup> However, the appellate court concluded that "Texas law does not provide a nuisance action for aesthetical impact" and upheld the trial court's

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13. *Id.* at 409-10.

14. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 508 (Tex. App.—Eastland 2008, pet. denied).

15. *Id.*

16. *Id.* at 508 n.3.

17. *Id.* at 509 (citing *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004)).

18. *Id.* at 509-10.

19. *Id.* at 509.

ruling.<sup>20</sup>

## B. STANDING TO BRING PROPERTY DAMAGE CLAIMS UNDER TORT THEORIES

In another nuisance case, the plaintiffs sued alleging the continuous release of chemicals since 1905 from a wood treatment plant owned and operated by the defendants.<sup>21</sup> Plaintiffs filed a class action suit in state court alleging substantively identical facts in June 2005. In October 2006, the state court ruled that the claims must be brought individually. Instead of pursuing individual claims in that suit, the plaintiffs voluntarily dismissed their claims.

The court found the claims to allege a permanent nuisance because plaintiffs alleged regular contamination of their properties from the plant.<sup>22</sup> The court further found that the nuisance began in 1905 when the plant commenced its allegedly contaminating operation.<sup>23</sup> The court noted that the right to bring an action for nuisance-based injury to property belongs to the person who owns the property at the time of injury.<sup>24</sup> The right to pursue the claim does not pass to subsequent property owners unless expressly assigned.<sup>25</sup> The earliest date that any of the plaintiffs was alleged to have an interest in a property near the plant was 1912. The court found that the plaintiffs made only conclusory allegations that they were assigned the rights and failed to provide any documents in support of their contention, despite the fact that the documents would be in their control.<sup>26</sup> Accordingly, the court held, as a matter of law, that the plaintiffs lacked standing to bring the claims.<sup>27</sup>

In another environmental tort suit, plaintiffs alleged nuisance, negligence, gross negligence, and stigma damages based on contamination of groundwater by trichloroethylene (TCE) from defendants' aluminum extrusion facility.<sup>28</sup> Plaintiffs claimed that they offered more than a scintilla of evidence for their nuisance allegation, showing that their properties were contaminated by TCE. Although the affidavit of the plaintiffs' expert included a map allegedly showing a TCE plume and that plaintiffs lived in the footprint of the plume, the court concluded that no evidence was presented showing that any of the plaintiffs had any interests in the properties shown on the map.<sup>29</sup> Accordingly, the court decided that

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20. *Id.* at 513.

21. *Brinston v. Koppers Indus., Inc.*, 538 F. Supp. 2d 969, 972-73 (W.D. Tex. 2008).

22. *Id.* at 978.

23. *Id.*

24. *Id.* at 977 (citing *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 27 (Tex. App.—Tyler 2002, pet. denied)).

25. *Id.* (citing *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.)).

26. *Id.* at 979.

27. *Id.* at 981.

28. *Adamcek v. Reynolds Metals Co.*, No. 13-06-240-CV, 2008 WL 1822772, at \*1 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied).

29. *Id.* at \*3.

plaintiffs had failed to provide any evidence showing an invasion of plaintiffs' interests<sup>30</sup> or raise an issue regarding the element of proximate causation.<sup>31</sup>

Finally, the court considered plaintiffs' contention that the trial court improperly granted defendants' motion for summary judgment on stigma damages. The court found that plaintiffs, despite an additional request for briefing on the issue, failed to provide a clear and concise argument with citation to authorities and the record.<sup>32</sup> The court, therefore, held that plaintiffs waived their argument on this point.<sup>33</sup>

### C. ENVIRONMENTAL CONTRACT CLAIMS IN AN OIL AND GAS TRANSACTION

Environmental remediation issues are generally addressed in contracts to purchase and sell oil and gas wells, leases, and properties. These issues are often addressed through the so-called "environmental defect" process. As these provisions are largely drafted by oil and gas lawyers, they follow "title defect" provisions. In doing so, the provisions do not always address the environmental issues in as sound a manner as they could. Environmental remediation provisions in other purchase and sale agreements, such as asset sales and corporate mergers and acquisitions, might play a role in enhancing these provisions in oil and gas agreements.

In the relevant suit during the Survey period,<sup>34</sup> the purchaser asserted breach of contract claims and sought approximately \$150,000 in damages for an allegedly improperly completed saltwater disposal well installed under a Texas Railroad Commission permit. In response, the seller denied purchaser's claims and filed a counterclaim to recover \$16,710 as reimbursement for amounts spent on pre-closing cleanup work on the property sold.<sup>35</sup> In reviewing the case, the trial court granted summary judgment to the sellers with respect to the injection well but did not state its reasons in the opinion.<sup>36</sup>

The main issue before the court was whether the sellers could obtain a post-closing purchase price adjustment for the expense of environmental remediation work conducted prior to closing. There was an allegation that there had been an oral agreement that the sellers would conduct this remediation at their expense, but the court focused on the contractual language to address the summary judgment before it.

The agreement was structured to allow the purchaser to inspect the oil and gas property or properties prior to closing and to submit a list of

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30. *Id.*

31. *Id.*

32. *Id.* at \*4.

33. *Id.*

34. *Chaparral Tex., L.P. v. W. Dale Morris, Inc.*, No. H-06-2468, 2008 WL 4093704 (S.D. Tex. Aug. 28, 2008).

35. *Id.* at \*1.

36. *Id.*



“Environmental Defects” prior to closing. The agreement defined “Environmental Defect.” The definition is important:

any material environmental defect relating to the Interests in the nature of environmental pollution or contamination, including pollution of the soil, ground water or the air; underground injection activities and waste disposal on site or offsite; failure to comply with applicable land use, surface disturbance, licensing or notification requirements; or violations of environmental or land use rules, regulations, demands or orders of appropriate state or federal regulatory agencies.<sup>37</sup>

The importance of this provision, according to the court, was that it included those claims that did not necessarily constitute a violation of environmental laws, such as pollution or contamination. The court focused, however, on the provision of the agreement that stated that “no Purchase Price adjustments . . . for Environmental Defects” and concluded that this provision barred any claims related to “Environmental Defects,” whether a decline in property value or remediation costs resulted.<sup>38</sup>

This process was developed by oil and gas lawyers who had experience with title issues and “Title Defects,” but perhaps not much experience with environmental laws or environmental remediation issues. This approach functions to press all issues to closing, but it may leave the purchaser with underground contamination issues that may not be tested prior to closing. In fact, in a case that involved post-closing analysis, in which we were engaged, millions of dollars in liabilities were discovered after closing on a large oil and gas transaction. Where significant investigation or Phase II Environmental Assessment Work is not practical or desirable prior to closing, the environmental defect process may not be the best way to address environmental liability issues in oil and gas transactions. In other types of transactions, indemnities are provided by the seller and, at times, amounts, years of duration, and other limitations are placed upon the ability to make claims under these provisions.

Another issue that arises in environmental defect provisions is the issue of what constitutes a defect. Questions arise if contamination is in and of itself a “violation” of environmental laws or if it is something that simply imposes a remedial duty. The timing of the release may affect this analysis, or at least raise issues for arguments by buyers and sellers in disputes. Thus, the definition of “Environmental Defect” may prove very important.

Environmental liabilities can arise from conditions underground, such as soil or groundwater, and not be readily discoverable without drilling, unlike title defects which may be more easily discovered with a review of county deed records and other sources of information. Therefore, the title

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37. *Id.* at \*3.

38. *Id.* at \*7.

defect process may not be the best approach to address environmental liability issues in contracts.

## V. CLEAN WATER ACT

### A. WATER CODE PROVISION APPLIES OVER ADMINISTRATIVE PROCEDURE ACT FOR FILING SUIT CHALLENGING PERMITTING DECISION

Concerns over the issuance of wastewater discharge permits are frequently raised in the application or renewal for a permit. In a case decided during the Survey period, an individual, Walter West, and the Sierra Club filed a challenge to wastewater discharge permit.<sup>39</sup> The trial court and the Austin Court of Appeals both held that the request for judicial review was untimely and that the court was, therefore, without jurisdiction.<sup>40</sup>

The Texas Water Code allows a person to seek judicial review of a Texas Commission on Environmental Quality (TCEQ) decision by filing a petition for judicial review within thirty days after the effective date of the decision.<sup>41</sup> The appellate court noted that “administrative agencies have discretion to set effective dates for their decisions and orders,” and that since “it was not otherwise stated in the permit, the Abitibi permit was effective the day it was signed by the executive director.”<sup>42</sup> The appellants argued that the Administrative Procedure Act (APA) contained an independent right to judicial review. The court interpreted precedent to find that the APA provides an independent right to judicial review only when the agency’s enabling act is silent but the Water Code is not silent.<sup>43</sup> Because the Water Code expressly provided a right to judicial review, the APA provision did not apply.<sup>44</sup>

Appellants further argued that the APA applied because the application was a contested case.<sup>45</sup> The court held that approval of the application was not a final decision in a contested case. Only one hearing request had been granted, and neither West nor the Sierra Club were parties. Additionally, once the hearing request was withdrawn, the application no longer satisfied the APA definition of a contested case. The court rejected the appellants’ argument that once a matter is referred for a hearing it retains the status of a contested case.<sup>46</sup> Since the Water Code, and not the APA applied, failure to challenge the approval within the Water Code’s thirty-day deadline deprived the court of jurisdiction.<sup>47</sup>

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39. *Walter West, P.E. v. Tex. Comm’n on Env’tl. Quality*, 260 S.W.3d 256, 258 (Tex. App.—Austin 2008, pet. denied).

40. *Id.*

41. TEX. WATER CODE ANN. § 5.351 (Vernon 2008).

42. *Walter*, 260 S.W.3d at 260.

43. *Id.* at 261.

44. *Id.* at 260-61.

45. *Id.*

46. *Id.* at 262.

47. *Id.*

## B. EFFECT OF CONSENT DECREE ON ABILITY TO FILE CITIZEN SUIT

The United States Court of Appeals for the Fifth Circuit had the opportunity to review the effect of a consent decree on a prior filed citizen suit in *Environmental Conservation Organization v. City of Dallas*.<sup>48</sup> In December 2003, Environmental Conservation Organization (ECO) filed a citizen suit against the City of Dallas (the City) alleging violations of the Clean Water Act (CWA). Prior to the suit, the United States Environmental Protection Agency (EPA) initiated an investigation and enforcement that ultimately resulted in a consent decree, filed in May 2006, between the City and the EPA.<sup>49</sup> After entry of the consent decree, the City moved for summary judgment in the case with ECO, arguing that resolution of the EPA enforcement action precluded a citizen suit based on the same conduct.<sup>50</sup> The district court dismissed ECO's suit on res judicata grounds and ECO appealed.<sup>51</sup>

As a threshold matter, the Fifth Circuit reviewed *de novo* whether the lower court had jurisdiction at the time it granted the City's summary judgment motion, specifically whether the case was moot.<sup>52</sup> The court noted because mootness is an element of standing, which is constitutionally required to maintain a suit, that a citizen suit may be dismissed as moot even if the mootness arises out of developments after initiation of the suit.<sup>53</sup>

With respect to mootness based on conduct of the defendant, the court distinguished between cases involving voluntary conduct and cases involving compelled conduct.<sup>54</sup> If a defendant voluntarily stops offending behavior, the defendant must show that the behavior could not reasonably be expected to recur for the case to be dismissed as moot.<sup>55</sup> On the other hand, if administrative enforcement has compelled a defendant to cease offending behavior, the case will be moot unless a realistic prospect exists that the violations will continue despite the enforcement.<sup>56</sup> The court reasoned that applying the "voluntary cessation" standard would effectively cede primary CWA enforcement to citizens and would discourage defendants from entering into a consent decree with federal or state agencies because defendants would be exposed to penalties in both enforcement and in the citizen suit.<sup>57</sup> The "realistic prospect" standard, on the other hand, is consistent with statutory preemption of citizen suits by diligent prosecution; if a plaintiff shows "a realistic prospect" that violations will continue notwithstanding enforcement (e.g., a consent decree)

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48. 529 F.3d 519 (5th Cir. 2008).

49. *Id.* at 523.

50. *Id.* at 524.

51. *Id.*

52. *Id.*

53. *Id.* at 526.

54. *Id.* at 527-29.

55. *Id.* at 527.

56. *Id.* at 528.

57. *Id.*

by the government, the plaintiff can likely show “a less-than-diligent prosecution.”<sup>58</sup> Because the consent decree is compulsory on the City of Dallas, the court applied the “realistic prospect” standard.

The Fifth Circuit found that ECO could not show a realistic prospect that the alleged violations “would continue notwithstanding the consent decree,” mooted ECO’s claims for both injunctive relief and civil penalties.<sup>59</sup> The court agreed with the lower court’s determination that the consent decree resolved each allegation in ECO’s citizen suit.<sup>60</sup> The court refused to infer that the City would continue to violate the CWA simply because the City had done so in the past.<sup>61</sup> Underlying the Fifth Circuit’s decision was the recognition that ECO’s interest in the citizen suit was the public’s interest, and that once EPA “secured a consent decree that adequately addressed the same violations alleged” by ECO, the public’s interest had been vindicated.<sup>62</sup>

In the same case, the lower court considered motions from both ECO and the City of Dallas for recovery of attorney’s fees incurred at the trial court level.<sup>63</sup> ECO sought their fees as a prevailing party under the CWA, or alternatively, under a “catalyst theory.” The court held that ECO “was not a prevailing party because ECO did not obtain any actual relief.”<sup>64</sup> The court reasoned that ECO’s suit was dismissed by the court and so ECO was not a party to the litigation resolved by the consent decree and, therefore, did not obtain any enforceable rights under the decree.<sup>65</sup> Turning to the catalyst theory, the court noted that under this theory a plaintiff is considered a prevailing party if the lawsuit brings about a voluntary change in the defendant’s conduct that achieves the desired result.<sup>66</sup> The court pointed out, however, that the United States Supreme Court rejected the theory in a case involving a voluntary change in activity by a defendant, reasoning that the a voluntary action did not have “the necessary judicial imprimatur . . . to establish prevailing party status.”<sup>67</sup> Further, the court reasoned that even if the catalyst theory was available in this case, ECO was not entitled to fees because “no evidence demonstrated” that the ECO citizen suit “had any impact on the ultimate resolution of the EPA litigation.”<sup>68</sup>

Regarding the City’s request for fees under the Clean Water Act, the Court declined to award fees, finding that the case was not “frivolous,

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58. *Id.* at 528-29.

59. *Id.* at 529.

60. *Id.*

61. *Id.*

62. *Id.* at 531.

63. *Env’tl. Conservation Org. v. City of Dallas*, No. 3-03-CV-2951-BD, 2007 WL 4165917, at \*1 (N.D. Tex. Nov. 20, 2007).

64. *Id.* at \*2.

65. *Id.*

66. *Id.*

67. *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 599 (2001)).

68. *Id.*

unreasonable, or without foundation."<sup>69</sup> The court reasoned that the civil penalties and injunctive relief obtained by the EPA against the City of Dallas showed that the ECO suit had considerable merit.<sup>70</sup>

## VI. SOLID WASTE

### A. COST RECOVERY UNDER SECTION 107 OF CERCLA

The federal courts in Texas issued a number of opinions on cost recovery under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>71</sup> and the Texas Solid Waste Disposal Act (TSWDA).<sup>72</sup> Among them is the latest in the series of decisions,<sup>73</sup> *Aviall Services, Inc. v. Cooper Industries, LLC*.<sup>74</sup> The pertinent facts are that Aviall purchased a number of tracts from Cooper, discovered contamination, and voluntarily investigated and remediated the properties under programs administered by the TCEQ. Aviall brought suit against Cooper for costs already incurred and anticipated future costs. In its latest pleading, Aviall's suit rested on, *inter alia*, theories of CERCLA section 107 cost recovery (and alternatively contribution under section 107) and various state law grounds. Both Cooper and Aviall moved for summary judgment.<sup>75</sup>

Cooper asserted that Aviall's section 107 action must be dismissed under section 113(l)<sup>76</sup> because Aviall failed to notify the EPA Administrator and the U.S. Attorney General about the suit until well after it was filed.<sup>77</sup> The court noted, however, that unlike many citizen suit provisions in environmental statutes, section 113(l) does not provide a deadline for providing a copy of the suit or establish any precondition for filing a suit.<sup>78</sup> The court further reasoned that many citizen suits are brought to enforce public regulations typically enforced by the government, while Aviall brought a private action for cost recovery.<sup>79</sup> The court offered many possible rationales for section 113(l)<sup>80</sup> and found that dismissing Aviall's claim would be inconsistent with CERCLA's goal of en-

69. *Id.* at \*3.

70. *Id.*

71. 42 U.S.C. § 9607 (2006); *see, e.g., Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 757 (E.D. Tex. 2006); *AMOCO Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

72. TEX. HEALTH & SAFETY CODE ANN. § 361.001 (Vernon 2001); *see, e.g., Vine St.*, 460 F. Supp. 2d at 754.

73. *See generally*, Scott D. Deatherage et al., *Environmental Law*, 60 SMU L. REV. 987, 996-97 (2007).

74. 572 F. Supp. 2d 676 (N.D. Tex. 2008).

75. *Id.* at 683.

76. "Whenever any action is brought under this chapter . . . the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the [EPA]." 42 U.S.C. § 9613(l) (2006).

77. *Aviall*, 572 F. Supp. 2d at 686.

78. *Id.* at 686-87.

79. *Id.* at 687.

80. *Id.* Among them are that notice of the suit could allow EPA and the Attorney General to monitor and assess the progress of § 107 actions, or would provide EPA with information to provide to Congress about CERCLA's implementation. *Id.*

couraging voluntary cleanups.<sup>81</sup> The court accordingly denied Cooper's motion on this ground.<sup>82</sup>

Cooper also sought summary judgment on the basis that Aviall's response costs were inconsistent with the National Contingency Plan (NCP).<sup>83</sup> Among the requirements of the NCP is "public participation," which the court construed to have two requirements: "(1) there must be sufficient oversight—either by the public or by a government agency charged with protecting the public environmental interest . . . and (2) parties who might foreseeably be affected by the private party's decisions must be given a meaningful opportunity to participate in them."<sup>84</sup> In the present case, because the investigation and cleanup was performed with TCEQ oversight, the court held that Aviall "achieved the oversight interest contemplated by the public participation requirement."<sup>85</sup>

Regarding the opportunity for potentially responsible parties (PRPS) to participate, the court analyzed Aviall's cleanup of each of the various properties separately. With respect to one of the properties, the Forest Park property, Aviall contacted and consulted with owners of two down-gradient properties affected by contamination. Aviall also notified Cooper of their intention to seek cost recovery. The court pointed out, however, that Aviall never contacted or consulted other PRPs, adjoining property owners, or the City of Dallas (which owned property affected by releases at the property).<sup>86</sup> Although not an element of section 107 liability, a plaintiff must show consistency with the NCP to recover costs or damages under this provision.<sup>87</sup> The court held, therefore, that because Aviall failed to allow all parties that might foreseeably be affected to participate in the response at Forest Park, Aviall failed to comply with the NCP and could not recover its costs.<sup>88</sup>

With respect to another property, Love Field, the court found that Aviall produced enough evidence to avoid summary judgment with respect to the public participation requirement of the NCP.<sup>89</sup> After discovering contamination at Love Field, Aviall notified Cooper, notified owners of sixteen down-gradient properties potentially affected, published newspaper notices of its response actions, made its investigatory reports available for public review, distributed local neighborhood newsletters about the response, implemented a community relations plan, and held a public meeting to discuss the proposed remedial plan. With these facts, the court declined to find that Aviall, as a matter of law, failed to afford a meaningful opportunity for comment.<sup>90</sup>

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81. *Id.*

82. *Id.*

83. *Id.* at 689.

84. *Id.* at 693.

85. *Id.* at 694.

86. *Id.* at 696.

87. *Id.* at 700.

88. *Id.* at 697-98.

89. *Id.* at 699.

90. *Id.*

## B. USEFUL PRODUCT EXEMPTION

In *Texas Tin Settling Defendants v. Great Lakes Carbon Corp.*, a number of PRPs formed a group that paid for response and remediation costs and then filed suit seeking cost recovery and contribution from other PRPs, including Bayer USA, Inc.<sup>91</sup> Bayer sold spent nickel catalyst to the owner of the Tex Tin metal smelting facility. Bayer filed a motion for summary judgment, arguing that it was not liable under CERCLA, in part because Bayer sold a useful product and, therefore, is not liable as an arranger.<sup>92</sup>

The plaintiffs alleged that Bayer was liable under CERCLA as an “arranger” for disposal of waste. Bayer argued that it sold a useful product, namely nickel. Although Bayer was paid for the spent nickel catalyst, plaintiffs argued that the transaction was a sham sale.<sup>93</sup> The court pointed out that Bayer used nickel catalyst in manufacturing two other products and did not sell spent nickel catalyst as part of its business.<sup>94</sup> Only 14% of the material provided by Bayer was recovered as nickel. Further, Bayer sold the spent nickel catalyst at 16.8% of the market value of nickel recovered. The court determined that a reasonable fact finder could conclude that although styled as a sale, Bayer arranged for treatment or disposal of a hazardous substance (nickel).<sup>95</sup> Thus the court held that Bayer was not entitled to summary judgment.<sup>96</sup>

## C. OWNER AND OPERATOR LIABILITY

Both state and federal cost recovery claims were considered in *Celanese Corp. v. Coastal Water Authority*.<sup>97</sup> In this case, plaintiff Celanese incurred costs responding to a methanol leak from a pipeline installed in 1971.<sup>98</sup> In the late 1970s, Coastal Water Authority (CWA) contracted with Kellog, Brown, & Root, Inc., (KBR) to design and supervise installation of a water pipeline that ran below and parallel to the Celanese methanol line. Martin K. Eby Construction Company, Inc. (Eby) was the excavation contractor. Celanese alleged that the pipeline was damaged by a backhoe operated by Eby, which led to the methanol leak. Celanese also alleged that CWA, KBR, and Eby knew about the damage but hid it without informing Celanese. Celanese brought a Texas Solid Waste Disposal Act (TSWDA) cost recovery claim against CWA and brought TSWDA and CERCLA cost recovery claims against KBR and Eby.<sup>99</sup>

CWA sought summary judgment claiming it was not a person responsi-

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91. G-96-2047, G-96-0272, 2008 WL 4376363, at \*1 (S.D. Tex. Sept. 22, 2008).

92. *Id.*

93. *Id.* at \*9.

94. *Id.*

95. *Id.*

96. *Id.*

97. No. H-06-2265, 2008 WL 2697321, at \*1 (S.D. Tex. July 2, 2008).

98. *Id.*

99. *Id.*

ble for solid waste under the TSWDA.<sup>100</sup> Celanese argued that CWA qualified as either an operator or arranger. Interpreting Texas law, the Southern District made an *Erie* guess that Texas courts would look to federal CERCLA cases in interpreting “operator,” just as the Texas Supreme Court had done in interpreting “arranger.”<sup>101</sup> The court noted that CWA’s line did not leak and CWA did not have an active role in operating the Celanese methanol pipeline.<sup>102</sup> Celanese argued that CWA was the operator of the project that damaged the methanol line, but the court held that “the operator of a project is not equivalent to the operator of a *facility* for purposes of [T]SWDA liability.”<sup>103</sup> Possible negligence by CWA’s contractors did not transform CWA into an operator.<sup>104</sup>

CWA also argued that it was not an arranger because it did not take any affirmative or intentional action to cause the leak. The court stated that if CWA knew of and concealed damage to the pipeline, then CWA arguably took affirmative and intentional action.<sup>105</sup> The court, however, found that “Celanese [had] no more than a scintilla of evidence that CWA knew of damage to the methanol line and did not inform Celanese.”<sup>106</sup> Accordingly, the court held that CWA was not an arranger.<sup>107</sup>

With respect to Celanese’s claims against KBR and Eby, the court considered a number of summary judgment grounds asserted by KBR and Eby. For example, Eby asserted that Celanese did not have an approved remediation plan and, thus, could not meet the first element of a TSWDA cost recovery claim.<sup>108</sup> At the time the suit was filed and when the court conducted the summary judgment hearing, the TCEQ had not approved Celanese’s Response Action Plan (RAP). Prior to the court’s ruling, however, the TCEQ did approve the RAP and the court concluded that the issue was moot.<sup>109</sup>

KBR and Eby sought summary judgment on the basis that neither qualified as arrangers under CERCLA or the TSWDA.<sup>110</sup> The court noted that the Fifth Circuit requires the term arranger be given liberal interpretation, and analyzed on a case-by-case basis, considering the totality of the circumstances.<sup>111</sup> The court also pointed out that the Fifth Circuit held that summary judgment was inappropriate in a case in which factual disputes existed regarding the actual cause of contamination.<sup>112</sup>

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100. *Id.* at \*2.

101. *Id.*

102. *Id.* at \*3.

103. *Id.*

104. *Id.* at \*4.

105. *Id.* at \*5.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Unfortunately (but understandably since it was not faced with the question), the court did not address whether anything short of RAP approval is sufficient for a TSWDA cost recovery claim.

110. *Id.* at \*7.

111. *Id.*

112. *Id.* at \*7-8.



In the present case, the court concluded that “if the fact-finder accepts Celenese’s version of events, then KBR and Eby may be held liable as arrangers.”<sup>113</sup> The court accordingly denied KBR’s and Eby’s motions for summary judgment.<sup>114</sup>

#### D. ATTORNEY’S FEES UNDER THE TSWDA

Availability of attorney’s fees was the issue in *First Edwards, L.P. v. Union Pacific Railway Co.*<sup>115</sup> First Edwards brought a cost recovery suit under the TSWDA and a declaratory judgment under the Texas Declaratory Judgment Act.<sup>116</sup> First Edwards also sought attorney’s fees pursuant to the Texas Declaratory Judgment Act. Union Pacific removed the case to federal court based on diversity and sought dismissal of the claims for attorney’s fees.<sup>117</sup>

The court noted that “federal courts sitting in diversity apply state substantive law and federal procedural law.”<sup>118</sup> Further, Fifth Circuit precedent supports the position that the Texas Declaratory Judgment Act is not substantive law.<sup>119</sup> A party cannot, therefore, rely on the Texas Declaratory Judgment Act to obtain attorney’s fees in a diversity case.<sup>120</sup> Accordingly, the court granted Union Pacific’s motion to dismiss the claim for attorney’s fees.<sup>121</sup>

#### E. DISPOSAL OF HAZARDOUS WASTE WITHOUT A PERMIT

In one case, the court addressed<sup>122</sup> a straightforward application of the Resource Conservation and Recovery Act’s (RCRA) prohibition on disposal of hazardous waste without a permit.<sup>123</sup> The opinion is an order adopting findings of fact in a criminal action, as a basis for a plea bargain. The defendants were alleged to have disposed of thirty-three compressed gas cylinders filled with high pressure chlorine gas, a characteristic hazardous waste, by digging a hole with a backhoe, tossing the cylinders in from the bed of a truck, and then backfilling the hole. Defendants did not have a RCRA permit for this disposal at their residential and ranching property.

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113. *Id.* at \*8.

114. *Id.*

115. No. H-08-1573, 2008 WL 2674859, at \*1 (S.D. Tex. July 7, 2008).

116. *Id.*

117. *Id.*

118. *Id.* (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)).

119. *Id.*

120. *Id.*

121. *Id.* at \*2.

122. *United States v. Hester*, No. 1:08-CR-67(2), 2008 WL 4146368 (E.D. Tex. Aug. 29, 2008); *see also United States v. Hester*, No. 1:08-CR-67(3), 2008 WL 3914410 (E.D. Tex. Aug. 25, 2008).

123. 42 U.S.C. § 6928(d)(2) (2006).

#### F. VENUE CRITICAL FOR CHALLENGING STATE AGENCY ACTION TO PERFORM REMEDIATION ON PROPERTY

When a state agency seeks access to property to conduct remediation, the question arises of how to challenge access to property necessary to conduct such action. In *Railroad Commission of Texas v. Hale*,<sup>124</sup> the proper jurisdiction for challenging an oil and gas conservation order to enter property to conduct remediation was the critical issue. The Railroad Commission of Texas (Railroad Commission) proposed an environmental remediation project on a ranch neighboring Hale's. The soil removal would require heavy-duty trucks to make over six-hundred trips across a road on Hale's property. The Railroad Commission stated that it was authorized by statute<sup>125</sup> to enter Hale's property for the purpose of conducting the cleanup operation on the neighboring ranch. Hale filed suit seeking a declaratory judgment, temporary restraining order, and injunctive relief contending that the Railroad Commission was improperly applying the statute, or in the alternative, that the statute was unconstitutional because it violated the Due Process Clauses of the Texas and United States Constitutions.<sup>126</sup> The trial court issued a temporary injunction.<sup>127</sup>

The Railroad Commission appealed the denial of their plea to the jurisdiction.<sup>128</sup> The Amarillo Court of Appeals held that a suit to test the validity of an oil and gas conservation law or order must be filed in Travis County.<sup>129</sup> The court concluded that the statute<sup>130</sup> was jurisdictional, and not a venue statute, so, jurisdiction in Travis County was exclusive.<sup>131</sup> Since Hale's action was filed in Roberts County, the court rendered judgment dissolving the temporary injunction and granting the agency's plea to the jurisdiction—effectively ending the landowner's case.<sup>132</sup>

#### G. STANDING TO CHALLENGE LANDFILL PERMITS

The issue of who has standing to challenge a landfill permit modification arose in *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*.<sup>133</sup> Texas Disposal Systems (TDS) operated a landfill near Austin, and it challenged the administrative procedures granting permit modification to a landfill near Weatherford, over 200 miles away. The lower court held that, since the landfills were not competitors, Texas Disposal Systems (TDS) had no standing to challenge the

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124. No. 07-07-0343-CV, 2008 WL 191017, at \*2 (Tex. App.—Amarillo Jan. 23, 2008) (mem. op.), *reh'g overruled by State v. Hale*, Tex. App. LEXIS 1922 (Tex. App.—Amarillo Mar. 11, 2008).

125. TEX. NAT. RES. CODE ANN. § 91.113(c) (Vernon 2001).

126. *Hale*, 2008 WL 191017, at \*1.

127. *Id.*

128. *Id.*

129. *Id.* at \*2.

130. TEX. NAT. RES. CODE ANN. § 85.241 (Vernon 2001).

131. *Hale*, 2008 WL 191017, at \*2.

132. *Id.*

133. 259 S.W.3d 361, 362 (Tex. App.—Amarillo 2008, no pet.).

permit or its issuance.<sup>134</sup> TDS appealed, claiming that it may no longer be able to compete with other landfills if they receive permit modifications via the procedure used by the Weatherford landfill.<sup>135</sup> The appellate court stated that to have standing, “the complainant must show that a concrete, particularized, actual or imminent injury faces him due to the decision; a hypothetical or speculative injury is not enough.”<sup>136</sup> The court held that TDS’s injury was “mere speculation,” falling short of establishing a justiciable interest and standing, and affirmed the trial court’s dismissal.<sup>137</sup>

#### H. REUSE AND RECYCLING AND THE DEFINITION OF SOLID WASTE

The question of when a material that might otherwise be classified as a waste ceases to be a waste because it is going to be recycled is a constant question for environmental lawyers. In a case brought before the Austin Court of Appeals, the Texas Railroad Commission (RRC) argued that the material was still a waste because of how it was stored prior to recycling, while the hauler of the material argued it was not a waste at all, regardless of how it was stored.<sup>138</sup>

The materials in question were drill cuttings and other oil and gas wastes from exploration and production activities. The matter arose when the RRC inspected a facility on a ranch owned by the same party that owned the waste hauling company. The president of the waste hauler first contacted the RRC to ask if the company needed a permit. The RRC staff initially responded that no permit was required, because the facility had been registered with the TCEQ as a waste recycling facility.<sup>139</sup> Subsequently, after further consideration, the RRC staff decided that Rule 8 required the company to obtain a permit to “store and process waste and re-use processed material.”<sup>140</sup> The waste company requested a letter of authority or permit, but it was denied by the RRC. The company appealed the decision to the Travis County District Court.<sup>141</sup> While the suit was pending, an agreement was reached, but the waste hauler failed to meet the agreement; the RRC initiated enforcement proceedings, and the waste hauler filed suit.<sup>142</sup> The court entered an agreed order to allow continued operations if financial security was filed with the RRC, which was filed in the form of a \$500,000 bond to meet financial security requirements under Rule 78.<sup>143</sup> However, the waste hauler failed to reduce its pile of material to 10,000 cubic yards, as

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 364.

138. *Osage Envtl., Inc. v. R.R. Comm’n of Tex.*, No. 03-08-00005-CV, 2008 WL 2852295, at \*6 n.4 (Tex. App.—Austin July 24, 2008, no pet.) (mem. op.).

139. *Id.* at \*1.

140. *Id.* (citing 16 TEX. ADMIN. CODE § 3.8 (2008)).

141. *Id.*

142. *Id.* at \*2.

143. 16 TEX. ADMIN. CODE § 3.78 (2008).

required in the agreed order, and instead allowed it to grow to 62,000 cubic yards.

An enforcement action was then conducted by the RRC, which issued a \$40,000 fine for failure to comply with the permit and RRC rules.<sup>144</sup> Thereafter, the waste hauler initiated a third lawsuit in which the district court affirmed the RRC's order.<sup>145</sup>

On appeal the issue was whether a waste recycler must comply with Rule 8.<sup>146</sup> The waste hauler argued that the material, which was largely drill cuttings, was being recycled by mixing it with caliche, lime, and, at times, other materials to make a road base. He argued that the material was not an "oil and gas waste," but an ingredient for making road base material.

The RRC argued that the material remained a waste until it was recycled into a road base, and before that it was regulated as a waste. The court recognized the cases under federal solid waste laws that have been addressed by federal courts in which materials stored on the ground before recycling were still considered wastes.<sup>147</sup> The court noted that the drill cuttings were first delivered to the ranch and deposited on the ground, where the material could be subject to surface water run-off.

The court concluded that the materials were a waste and were regulated by the enabling statute and the RRC regulations, namely Rule 8.<sup>148</sup> The court found that a permit was required and upheld the RRC's enforcement order against the waste hauler.<sup>149</sup>

#### I. DEFINING THE MEANING OF "THE PUBLIC INTEREST" FOR PERMITTING PROCEDURES

In another case involving the RRC's waste permitting power, a citizens group filed suit against the RRC challenging the issuance of a permit to a party to operate a commercial injection well for the disposal of oil and gas waste.<sup>150</sup> The citizens group challenged the Railroad Commission's granting of the permit on two grounds: first, that allowing the applicant to reschedule the hearing to revise the application so it was administratively complete denied the protesters due process, and, second, that the Railroad Commission read the requirement that the well must be in the public interest too narrowly.

On the first issue, the Austin Court of Appeals concluded that the Railroad Commission had not denied the protesters due process under the

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144. *Osage Envtl.*, 2008 WL 2852295, at \*2.

145. *Id.*

146. *Id.* at \*3.

147. *Id.* at \*6 n.4 (citing *Owen Elec. Steel Co. v. Browner*, 387 F.3d 146, 149-50 (4th Cir. 1994); *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1185-86 (D.C. Cir. 1987)).

148. *Id.* at \*6.

149. *Id.*

150. *Tex. Citizens for a Safe Future and Clean Water v. Tex. R.R. Comm'n*, 254 S.W.3d 492, 494 (Tex. App.—Austin 2008, no pet.).

Texas and U.S. Constitutions.<sup>151</sup> The court concluded that the recess and rescheduling of the hearing did not deny the protesters the right to participate in the administrative process.<sup>152</sup>

The second challenge was the finding of the Railroad Commission that permitting a wastewater well would be “in the public interest.” The Texas Water Code requires that the Railroad Commission find, before issuing a permit, the “use or installation of the injection well is in the public interest.”<sup>153</sup> The Railroad Commission had read this requirement to only require that the well be approved if there is a possibility of increased oil and gas production.<sup>154</sup> The Austin Court of Appeals ruled that this is too narrow a reading of the meaning of “in the public interest.”<sup>155</sup>

One of the issues raised by the citizens group was the flow of truck traffic on roads in the area if the permit was granted. For injection wells reviewed by the TCEQ, the Texas Water Code requires consideration of the impact on public roadways by the agency when reviewing injection well permit applications.<sup>156</sup> While the provision governing the Railroad Commission consideration of injection well permit applications does not require such consideration, the court held that it was within the purview of the agency to consider the effect on public safety.<sup>157</sup> The court remanded the case back to the Railroad Commission to consider public-safety concerns where evidence of such concerns had been presented in the permit proceeding.<sup>158</sup>

## VII. CLEAN AIR ACT

### A. CITIZENS SUIT CHALLENGE OF EPA APPROVAL OF STATE'S IMPLEMENTATION PLAN

The Clean Air Act was a source of litigation during the Survey period. In one case, a citizens group challenged the EPA's final rulemaking action approving the Mid-Course Review State Implementation Plan (MCR SIP) submitted by the State of Texas for the Houston/Galveston/Brazoria Severe Ozone Nonattainment Area (HGB Area).<sup>159</sup> The citizens group known by the acronym GHASP put forth three arguments:

- (1) EPA acted arbitrarily and capriciously in approving the MCR SIP because it [did] not demonstrate attainment of specified emissions reductions;
- (2) EPA acted arbitrarily and capriciously in relying on weight of evidence analysis to excuse modeled nonattainment; and
- (3) . . . EPA violated the non-interference or anti-backsliding provi-

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151. *Id.* at 498.

152. *Id.*

153. TEX. WATER CODE ANN. § 27.051(b)(1) (Vernon 2008).

154. *Tex. Citizens for a Safe Future*, 254 S.W.3d at 499.

155. *Id.* at 502.

156. *Id.* at 500.

157. *Id.* at 501-02.

158. *Id.* at 503.

159. *Galveston-Houston Ass'n for Smog Prevention (GHASP) v. U.S. Env'tl. Prot. Agency*, 289 F. App'x 745, 746 (5th Cir. 2008).

sion of the Clean Air Act.<sup>160</sup>

GHASP's first argument focused on the EPA's action to approve TCEQ's exclusion of three days of exceedances from the nineteen-day sampling period for the photochemical modeling underlying the MCR SIP.<sup>161</sup> The modeling, along with other evidence, predicted that the MCR SIP would allow the HGB Area to meet attainment.<sup>162</sup> GHASP argued that by excluding three days of exceedances from the data set, the modeling was flawed.<sup>163</sup> TCEQ had excluded those three days, along with six other days which were not exceedances, due to "model performance issues."<sup>164</sup> The court noted that the EPA had provided a rational explanation for its determination that the ten remaining sample days provided a sufficient basis for the modeling, and upheld the EPA's action.<sup>165</sup>

GHASP's second argument challenged TCEQ's use of evidence other than modeling to show that the HGB Area would meet attainment. GHASP acknowledged that the Clean Air Act provided that the attainment demonstration could be made through photochemical modeling "or any other analytical method determined . . . to be at least as effective."<sup>166</sup> GHASP argued that the way the EPA applied the weight of evidence analysis was arbitrary and capricious.<sup>167</sup> Specifically, GHASP challenged the EPA's action to allow TCEQ to exclude one day of exceedance because of unusual weather conditions. The EPA had excluded the sampling day because the temperature and wind patterns were unusual. The court concluded that given the explanation and the "substantial deference" given to the agency, the EPA was not unreasonable when it allowed TCEQ to exclude the sampling day.<sup>168</sup>

GHASP's third argument, that the MCR SIP violated non-interference and anti-backsliding provisions of section 110(1) of the Clean Air Act, was based on the fact that the MCR SIP, when compared to the 2001 SIP, relaxed controls on industrial nitrogen oxide (NO<sub>x</sub>) emissions and dropped a requirement for vehicle inspection and maintenance in three counties, restrictions on commercial lawn maintenance operations, speed limit reductions, and restrictions on idling heavy diesel engines.<sup>169</sup> GHASP argued that to comply with section 110(1), EPA had to show that the results under the MCR SIP are better than the 2001 SIP. The court disagreed and held that the EPA may approve a SIP revision "unless the agency finds it will make air quality worse."<sup>170</sup> The court went on to find that, because the EPA considered that the offset of NO<sub>x</sub> controls was

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160. *Id.* at 746-47.

161. *Id.* at 750.

162. *Id.* at 751.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 752 (citing 42 U.S.C. § 7511a(c)(2)(A)).

167. *Id.*

168. *Id.* at 753.

169. *Id.*

170. *Id.* (quoting *Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006)).

offset by the addition of new controls for volatile organic compounds (VOCs), the agency's decision to approve the MCR SIP did not make air quality worse and was not arbitrary and capricious.<sup>171</sup>

#### B. CITIZENS SUIT CHALLENGING A COMPANY'S PERMIT APPLICATION

The citizen suit provision of the Clean Air Act provides a process for a citizen or citizens group to challenge either a private party or an agency's actions.<sup>172</sup> In one case during the Survey period, citizens groups attempted to challenge a company's application for a permit for a coal-fired power plant.<sup>173</sup> The citizens groups filed a lawsuit prior to the permit being issued during the application process. The question in the case was whether the federal Clean Air Act provided jurisdiction for such suits.<sup>174</sup> The federal district court dismissed the suit.<sup>175</sup> The Fifth Circuit reviewed this dismissal on appeal.<sup>176</sup>

Section 7604(a)(1)-(3) of the Clean Air Act provides three situations in which a citizen may file suit.<sup>177</sup> Two of those situations were at issue in the case. The first instance is where a party has violated or is in violation of "an emission standard or limitation" or "an order issued by the [EPA] or a [state agency] with respect to such a standard or limitation."<sup>178</sup> The second instance is where a "person who propose[d] to construct or constructs any new or modified major emitting facility without a permit" or "is alleged . . . to be in violation of any condition" of a permit that has been issued.<sup>179</sup>

The analysis of whether TXU was in violation of an emission standard or limitation centered on the definitions of "emission standard or limitation."<sup>180</sup> The first aspect of the relevant definition is a requirement of condition of a permit.<sup>181</sup> The citizens groups argued that the preconstruction requirements could be deemed to have been violated if the application filed does not meet the Clean Air Act requirements for a permit. The court concluded that until a permit is issued, there is no permit to violate and no standard or limitation to violate.<sup>182</sup>

The second part of the definition of standard or limitation related to the provision that included "any other standard, limitation, or schedule established . . . under any applicable State implementation plan."<sup>183</sup> The citizens groups argued that the state implementation plan contained

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171. *Id.* at 754.

172. *CleanCOALition v. TXU Power*, 536 F.3d 469, 474 (5th Cir. 2008).

173. *Id.* at 470.

174. *Id.* at 473.

175. *Id.* at 471.

176. *Id.* at 473.

177. 42 U.S.C. § 7604(a)(1)-(3) (2006).

178. *Id.*

179. *Id.*

180. *CleanCOALition*, 563 F.3d at 475-76; *see* 42 U.S.C. § 7604(f)(1)-(4).

181. 42 U.S.C. § 7604(f)(3).

182. *CleanCOALition*, 536 F.3d at 475.

183. 42 U.S.C. § 7604(f)(4).

preconstruction requirements and that TXU could be deemed to have violated these by filing a permit application that did not meet the preconstruction requirements.<sup>184</sup> TXU argued that those provisions only involve emission standards and limitations. The court concluded that filing an incomplete application was not relevant since the permit proceeding was ongoing and subject to state review.<sup>185</sup> The preconditions relate to granting a permit, not applying for one.<sup>186</sup>

The court then turned to the issue of whether section 7604(a)(3) allowed a preconstruction citizens suit where a facility had obtained a permit or was in the process of applying for a permit.<sup>187</sup> The court concluded that this provision allowed a suit where the party was operating without a permit. Based on the review of the citizens suits arguments and its rejection of them, the court upheld the district court's dismissal of the citizens suit, partially on the basis that there was no subject matter jurisdiction for the suit.<sup>188</sup>

### C. CITIZEN SUITS AND ATTORNEY'S FEES

Citizen suits are legal actions permitted under environmental statutes whereby citizens may act as private attorney generals and sue parties or agencies for failing to follow a particular statutory provision, regulations promulgated under a particular environmental statute, or environmental permits. In *Blue Skies Alliance v. Texas Commission on Environmental Quality*,<sup>189</sup> the court struggled with the ability of the citizen plaintiffs to recover attorney's fees under the federal Clean Air Act. Environmental organizations brought an action against the EPA for failing to take non-discretionary actions under the Clean Air Act. Several counties and professional organizations intervened, as did the TCEQ.

Negotiations resulted in a consent decree with the EPA and an agreement by TCEQ to undertake several measures. After the court approved the agreements, the environmental organizations filed a motion seeking attorneys' fees from TCEQ under section 304(d) of the Clean Air Act, and the court granted it.<sup>190</sup> TCEQ appealed. The appellate court cited Supreme Court precedent in holding that, even though the Clean Air Act does not explicitly limit attorney's fees to successful parties, "a clear showing from Congress is required to conclude that it intended to depart from 'intuitive notions of fairness.'"<sup>191</sup> The court stated that "some degree of success on the merits" by the claimant was necessary to justify an award.<sup>192</sup> The court held that since the groups had sued to compel the

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184. *CleanCOALition*, 536 F.3d. at 476.

185. *Id.* at 478.

186. *Id.* at 477-78.

187. *Id.* at 478-79.

188. *Id.* at 478.

189. 265 F. App'x 203 (5th Cir. 2008) (not designated for publication).

190. *Id.* at 206.

191. *Id.* (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)).

192. *Id.* (quoting *Ruckelshaus*, 463 U.S. at 694).



EPA administrator to perform his duties and had “articulated no cause of action against the TCEQ, they could not achieve any success on the merits . . . to justify an award of attorneys’ fees” from TCEQ.<sup>193</sup> The court reversed the award of attorneys’ fees.<sup>194</sup>

The case of *United States v. Alcoa, Inc.*<sup>195</sup> involved two suits, one a citizen suit brought by the Neighbors for Neighbors, Inc., Environmental Defense, and Public Citizen, Inc., and one brought by the United States against Alcoa, Inc. The district court decision was reviewed in last year’s Environmental Survey. During this Survey period, the Fifth Circuit reviewed and upheld the lower court’s ruling. The case consisted originally of claims that Alcoa failed to obtain appropriate permits for alleged modifications made to three lignite-fired boilers that provided electricity to an Alcoa aluminum plant in Rockdale, Texas. In addition, the plaintiffs alleged that Alcoa exceeded its permit limits for NOx, sulfur dioxide (SO<sub>2</sub>), and particulate matter (PM). The parties entered into a settlement and the district court entered a consent decree on July 28, 2003 (the consent decree).<sup>196</sup> The consent decree allowed Alcoa three options to continue to supply electricity to its aluminum plant. Alcoa chose to replace the existing lignite-powered units and to construct new ones that apply the pollution controls consistent with new permitting requirements.<sup>197</sup> The provision required that construction of new units begin within nineteen months of receiving a TCEQ permit amendment and within twenty three months that construction of all new units begin. The old units were shut down as the new units became operational, the first of which was to begin operation by April 25, 2007. Alcoa petitioned the district court to modify or continue the deadline, but they were denied.<sup>198</sup>

The United States and Alcoa, with its new partner, a TXU subsidiary, negotiated a stipulated order to address the violations of the deadlines in the consent decree. As is required, the settlement was published in the federal register and public comment was received. In response to that public comment, an amended stipulated order was submitted to the district court. The order provided for approximately \$1.8 million in penalties, extended the date for commencing the operation of the new plant by two and one-half years, required the old plant to shut down sooner, and set stricter standards for the new plant.<sup>199</sup> The district court also held Alcoa in contempt and changed attorneys’ fees and other sanctions.<sup>200</sup>

The citizens groups objected to the stipulated order. The main reason for the objection was that the consent decree did not require Alcoa to seek a new permit that would require tougher restrictions on the emis-

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193. *Id.* at 207.

194. *Id.*

195. 533 F.3d 278, 281 (5th Cir. 2008).

196. *Id.*

197. *Id.* at 281-82.

198. *Id.* at 282.

199. *Id.* at 282-83.

200. *Id.*

sions of the new power plants, which they contended was an appropriate sanction for failing to timely initiate construction.<sup>201</sup>

One of the objections was that the court was modifying the consent decree when, by its terms, it required agreement of all parties. The Fifth Circuit ruled that the district court acted within its power to provide a remedy for the violation of the consent decree rather than modifying it.<sup>202</sup>

## VIII. NATIONAL ENVIRONMENTAL POLICY ACT

Texas courts addressed several National Environmental Policy Act (NEPA) cases. The overriding themes of all of the NEPA decisions were that NEPA only guarantees a process and not a result, and that courts are extremely deferential to government agencies.

### A. CONSTRUCTION OF A PROJECT MAKES NEPA CHALLENGE MOOT

In the first case, homeowners who were dissatisfied with the noise generated by a proposed new highway ramp brought actions against the federal government under the Fifth Amendment and the Administrative Procedure Act for violations of NEPA and the Federal Aid Highways Act (FAHA).<sup>203</sup> The trial court dismissed the homeowners' claims, and they appealed. By the time of the appeal, the highway ramp had been completed, so the appellate court addressed the issue of mootness.<sup>204</sup> The Fifth Circuit cited precedent holding that completion of construction moots a NEPA action.<sup>205</sup> "These cases recognize that 'the basic thrust of NEPA is to provide assistance for evaluating proposals or prospective federal action in light of their future effect upon environment factors, not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of construction.'"<sup>206</sup> The court stated that "NEPA guarantees a process, not a particular result," and that "NEPA's pre-construction process offers little to a plaintiff after completion of construction."<sup>207</sup> The court stated that although the NEPA claim was moot, the FAHA claim was not because FAHA can require more than just process.<sup>208</sup> The court ultimately held that, while the FAHA claim was not moot, the appealing homeowners had not presented meritorious grounds for appeal, and it affirmed the trial court's judgment.<sup>209</sup>

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201. *Id.* at 283, 285.

202. *Id.* at 286.

203. *Ware v. U.S. Fed. Highway Admin.*, 255 F. App'x 838, 838-39 (5th Cir. 2008) (not designated for publication) (per curiam).

204. *Id.* at 839.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 840.

B. ADEQUACY OF ENVIRONMENTAL ASSESSMENT AND DECISION NOT TO PROPOSE AN ENVIRONMENTAL IMPACT STATEMENT

In the second NEPA case, *City of Dallas, Texas v. Hall*, the City of Dallas and the Texas Water Development Board challenged the U.S. Fish and Wildlife Service's (FWS) decision to establish the Neches River National Wildlife Refuge under NEPA by claiming that an adequate Environmental Impact Statement (EIS) or Environmental Assessment (EA) was not prepared.<sup>210</sup> The FWS established an acquisition boundary for the refuge after performing an EA and issuing a Finding of No Significant Impact (FONSI). The plaintiff city and state agency had planned to potentially build a reservoir on the site to meet Dallas's future water needs in 2060. In the first set of issues, the City claimed that the FWS was wrong in failing to prepare an EIS.<sup>211</sup>

The court analyzed the factually-similar *Sabine River Authority v. U.S. Department of Interior*<sup>212</sup> case and concluded that NEPA does not require a federal agency to prepare an EIS to maintain the status quo.<sup>213</sup> As for the indirect effects on Dallas, the court held that any impacts on the City's future water supply would not be proximately caused by the FWS and that the impacts would be too remote and speculative to determine.<sup>214</sup> The City argued that agency guidelines required the preparation of an EIS, but the court found that the federal action here did not affect the human environment and that the agencies acted within their discretion.<sup>215</sup>

In the second set of issues, the plaintiffs argued that the EA was inadequately prepared.<sup>216</sup> The court held that, as to all of the City's complaints, the highly deferential standard of review led to a determination that the FWS had not acted arbitrarily or capriciously.<sup>217</sup> For example, even though the FWS had used a twenty-year-old analysis of the habitat, the City had not sufficiently shown that a more current study would have revealed the existence of a significant impact or a different set of alternatives.<sup>218</sup> Lastly, the plaintiffs alleged that FWS acted arbitrarily and capriciously by not appropriately consulting with state and local agencies.<sup>219</sup> The court cited the fact that the plaintiffs waited until the end of the EA process to ask for more time to conduct their own research.<sup>220</sup> The court held that "NEPA does not require an agency to delay . . . indefinitely" while agencies or other outside parties spend an unreasonable amount of

210. Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2008 WL 2622809, at \*1 (N. D. Tex. June 30, 2008) (mem.).

211. *Id.* at \*4.

212. 951 F.2d 669, 671 (5th Cir. 1992).

213. *Hall*, 2008 WL 2622809, at \*5.

214. *Id.* at \*7.

215. *Id.* at \*8.

216. *Id.* at \*9.

217. *Id.* at \*9-13.

218. *Id.* at \*12.

219. *Id.* at \*13.

220. *Id.* at \*14.

time developing alternatives.<sup>221</sup> The court held that although the regulations do not address the timing of inter-agency consultation in the preparation of an EA, the process should parallel the EIS regulations.<sup>222</sup> Finally, the court found that the record showed that the FWS had considered and responded to the plaintiffs' concerns before preparing the EA.<sup>223</sup> Based on this analysis, the court denied the plaintiffs' summary judgment motions.<sup>224</sup>

### C. STATUTE OF LIMITATIONS FOR NEPA SUIT

The third case involved a nonprofit organization that brought a suit under NEPA, complaining about the approval process for a highway.<sup>225</sup> The defendants claimed that the suit was filed after the statute of limitations had expired. The two issues in this case were: (1) which statute of limitations applied, and (2) whether a later reevaluation of a project can revive the statute of limitations on an earlier finding of no significant impact (FONSI) decision.<sup>226</sup>

The limitations period that applied when the FONSI was issued was six years. Shortly thereafter, and two years before the suit was filed, the limitations period was changed to 180 days. The court held that the period of limitations in place at the time the plaintiff *filed* his complaint governed.<sup>227</sup> The court held that the change was not genuinely retroactive because it governed the secondary conduct of filing suit rather than the primary conduct of the defendants and that it did not alter either party's liability or impose new duties.<sup>228</sup> Since the plaintiff had constructive notice of the statute and a reasonable time to pursue his claim in court, there was no inequity in applying the shorter limitations period.<sup>229</sup>

The plaintiffs then argued that the agencies' second look at the environmental concerns re-opened those issues to litigation, while the defendants argued that the reevaluation was more similar to an internal memorandum. Here, the reevaluation tailored the project to include several new rights of way and drainage and trail easements that required the use of an additional 5.7 acres. The court considered whether this was a fundamental change, which would constitute a final agency action, or a minor alteration.<sup>230</sup> The court found that the reevaluation made minor changes to design elements already contained in the FONSI, so reliance on it as the basis for filing suit was inappropriate.<sup>231</sup> The court found that

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221. *Id.*

222. *Id.*

223. *Id.* at \*15.

224. *Id.*

225. Highland Vill. Parents Group v. U.S. Fed. Highway Admin., 562 F. Supp. 2d 857, 860 (E.D. Tex. 2008) (mem.).

226. *Id.* at 862.

227. *Id.* at 863.

228. *Id.*

229. *Id.*

230. *Id.* at 865.

231. *Id.*

the plaintiffs' claims were barred by the statute of limitations and dismissed the suit.<sup>232</sup>

## IX. ENDANGERED SPECIES

### A. THE ENDANGERED SPECIES ACT AND POTENTIAL UNDISCOVERED CRITICAL HABITAT

In a case involving the role of the federal Endangered Species Act in decisions of the Texas Public Utilities Commission (PUC), a group of landowners appealed a PUC order allowing the construction of a power transmission line across their property.<sup>233</sup> They contended that the PUC's findings regarding endangered species habitat were not supported by substantial evidence. The Austin Court of Appeals stated the standard of review for agency findings: the court presumes that the order is supported by substantial evidence and the challengers have the burden to demonstrate otherwise.<sup>234</sup>

"Substantial evidence requires 'only more than a mere scintilla,' and the evidence on the record may preponderate against the decision of the agency and nonetheless amount to substantial evidence."<sup>235</sup> Experts on both sides acknowledged that a previously unknown, occupied habitat might exist along the route. However, the court held that since there was no evidence of occupied habitat, the PUC's finding of fact was supported by the record.<sup>236</sup> Furthermore, the court held that "environmental integrity [was] only one factor that the PUC may consider."<sup>237</sup> The court refused to substitute its judgment for how the PUC weighed the several statutory factors, stating that none were intended to be absolute.<sup>238</sup>

### B. COMPLETION OF PROJECT MAKES CHALLENGE MOOT

In another case involving the Endangered Species Act, *Aquifer Guardians in Urban Areas v. United States Fish and Wildlife Service*, environmental organizations brought suits against the U.S. Fish and Wildlife Service and the Army Corps of Engineers (the Corps) under the Endangered Species Act alleging that an approved power transmission line would jeopardize the habitat of an endangered bird.<sup>239</sup> By the time the case reached trial, the power transmission line at issue had already been built. The trial court found that the organizations' claims were moot.<sup>240</sup> The court held that since the project was complete, the Corps no longer

232. *Id.* at 866.

233. *Dunn v. Pub. Util. Comm'n of Tex.*, 246 S.W.3d 788, 789-91 (Tex. App.—Austin 2008, no pet.).

234. *Id.* at 791.

235. *Id.* (quoting *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995)).

236. *Id.* at 793.

237. *Id.* at 794.

238. *Id.*

239. 555 F. Supp. 2d 740, 741 (W.D. Tex. 2008).

240. *Id.* at 745.

had jurisdiction over the private company's activities, and no federal action remained for the FWS to review.<sup>241</sup>

Although the plaintiffs argued that "the Corps always has general jurisdiction over the waters . . . of the United States," the court held "that the Corps [did] not have jurisdiction over private parties whose permitted projects have been completed."<sup>242</sup> The plaintiffs contended that the case should not be held moot, because, under the capable-of-repetition doctrine, future scenarios could similarly avoid review. The court held that "although there may be a limited span of time between issuance of the permit and completion of the construction, there are methods available to halt the construction and receive full review."<sup>243</sup>

Here, although the plaintiffs filed suit before the line was complete, they did not move for a restraining order or an injunction. The court acknowledged that what the plaintiffs really wanted was a change in policy, so that future considerations would not suffer from the same defects.<sup>244</sup> However, the court stated that "speculative future actions" are not final agency actions, so the court does not have jurisdiction to grant such relief.<sup>245</sup>

## X. CRIMINAL PROCEEDINGS

### A. NONDELEGATION DOCTRINE

The challenge of agency action at times goes beyond whether an agency is properly acting under the statute passed by the legislative branch and extends to whether the legislature had the power to delegate certain powers to that agency in the first instance. This concept is known as the nondelegation doctrine—that is, what limits apply to a legislature's ability to delegate certain powers to an administrative agency. In one case during the Survey period, a Texas appellate court analyzed the nondelegation doctrine with respect to the TCEQ's authority to determine which materials may be placed on an outdoor burn ban list.<sup>246</sup> The party that challenged the TCEQ's power had started a fire that consumed crosssties, fiberglass, tires, and PVC pipe.<sup>247</sup> He was criminally prosecuted under section 7.177(a)(5) of the Texas Water Code for violating the TCEQ regulations concerning outdoor burning.<sup>248</sup> The TCEQ's outdoor burning rules were promulgated under the authority of Texas Health & Safety Code section 382.018(a), and prohibit the burning of "[e]lectrical insulation, treated lumber, plastics, non-wood construction/demolition

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241. *Id.* at 744.

242. *Id.* at 743-44.

243. *Id.* at 745 (quoting *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000)).

244. *Id.* at 744.

245. *Id.*

246. *State v. Rhine*, 255 S.W.3d 745, 748 (Tex. App.—Fort Worth 2008, pet. granted) (mem. op.).

247. *Id.* at 747.

248. *Id.*

materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber.”<sup>249</sup>

The defendant filed a motion to quash the charging information, arguing that “the legislature had unconstitutionally delegated authority” to the TCEQ to determine precisely which materials should be placed on the burn ban list.<sup>250</sup> The trial court granted the defendant’s motion, concluding that the “nondelegation doctrine” of article II, section 1 of the Texas constitution prohibited the legislature from delegating such authority to the TCEQ.<sup>251</sup>

The nondelegation doctrine provides that the legislature cannot delegate to some other commission or tribunal the power to pass laws.<sup>252</sup> The Fort Worth Court of Appeals, citing extensively to *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*,<sup>253</sup> noted that the nondelegation doctrine has been applied sparingly, and that “in our complex society, it is not possible for the Legislature to shoulder the burden of drafting the infinite minutiae required to implement every single law necessary to adequately govern the State of Texas.”<sup>254</sup> The court went on to find that the provisions of the Health and Safety Code delegating power to TCEQ contained “definite guidelines” and included “sufficient standards” to guide the discretion conferred.<sup>255</sup> The court of appeals reversed the trial court and held that the legislature’s delegation of authority to TCEQ to promulgate a burn ban list was constitutional.<sup>256</sup>

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249. *Id.* (quoting 30 TEX. ADMIN. CODE § 111.219(7) (2007)).

250. *Id.* at 747-48.

251. *Id.*

252. *Id.* at 748.

253. 952 S.W.2d 454 (Tex. 1997).

254. *Rhine*, 255 S.W.3d at 748-49 (citing *Lewellen*, 952 S.W.2d at 454).

255. *Id.* at 751-53.

256. *Id.* at 753.