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I. INTRODUCTION

THESE are interesting times in environmental law, both in Texas and nationally. Federal and state laws are undergoing challenge, and the U.S. Supreme Court has been very active in the environmental context. The federal circuit courts and district courts as well as state courts are addressing environmental statutory and common-law issues at a regular clip. During the Survey period, Texas courts have been quite active, and several significant cases have been handed down or at least reflect developing issues that are being addressed in courts across the country.

The United States Supreme Court has actively been involved in determining when a private party may bring cost-recovery actions for voluntarily cleaning up sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] Recently, the Court has decided to hear a closely watched environmental case that may have significant financial implications for both the federal government and private industry. The case, *United States v. Atlantic Research Corp.*,[2] is the second of a duo of cases that consider whether companies can recover costs incurred to cleanup contaminated sites voluntarily under Section 107 of the Act—the general cost-recovery provision.[3] In the first of the two cases, *Cooper Industries, Inc. v. Aviall Services, Inc.*,[4] the Court ruled that parties could not recover such voluntary costs from other liable parties, including the government, under Section 113 of CERCLA—the contribution section of the federal Superfund cleanup statute, which allows one private party to sue another liable party, including governmental bodies.

While voluntary cleanup has been growing, promoted by industry and government alike, the federal government has argued in its briefs to re-

1. 42 U.S.C. §§ 9601-9675 (2007).
2. Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 75 U.S.C.W. 3384 (U.S. Jan. 19, 2007) (No. 07-562).
3. 42 U.S.C. § 9607 (2007).
4. 543 U.S. 157, 160 (2004), *discussing* 42 U.S.C. § 9613 (2004).

strict such volunteers' ability to recover costs from other liable parties, primarily because the government itself is often a liable party.

As this Article was going to press, the Supreme Court recently ruled that private cost-recovery actions are permissible under Section 107 of CERCLA.[5]

Another issue that Texas courts adjudicated is the extent of jurisdiction of the federal Clean Water Act. The United States Supreme Court and the Fifth Circuit Court of Appeals have been active in this area over the last several years. Texas courts have been faced with applying Supreme Court and Fifth Circuit precedent during the Survey Period.

One other matter of particular interest involves the application of as-is provisions in real estate contracts and the extent of the relief that a buyer may receive. The Texas Supreme Court handed down an important decision in an attempt to demarcate the boundaries of the protections that these as-is provisions provide, which real estate and environmental lawyers should spend some time studying.

A variety of other important and interesting issues are addressed in this year's Article. The precedent discussed below may have significant impact on parties facing similar environmental challenges.

II. EFFECT OF "AS-IS" CONTRACTS ON ENVIRONMENTAL LIABILITY FOLLOWING A REAL ESTATE TRANSACTION

Commercial real estate transactions generally occur in the context of a contract with an as-is clause. Such clauses attempt to avoid any seller warranties for defects in the property. Since real estate sales put the buyer at risk of acquiring not only land, but also liability for any contamination or pollution thereon, as-is clauses present questions of environmental liability of both the seller and the buyer and whether the buyer may return to the seller if environmental surprises spring up in the days, months, or even years after the sale. This latent environmental risk often arises as a primary consideration in real estate transactions, and, if not discovered at the time of sale, often results in litigation over the contract's meaning and the extent to which the seller is relieved from environmental liability for the property.

The Texas Supreme Court in prior cases and during the Survey period addressed fraud claims of dissatisfied buyers. Another area of perhaps more importance is statutory environmental liability. An open question not discussed is whether as-is clauses provide sellers any relief from statutory environmental liability.

As-is clauses are usually contained in a longer section of the purchase contract and often also contain so-called "waiver-of-reliance clauses," which are designed to address an element of fraud or misrepresentation,

5. *See* United States v. Atl. Reseach Corp., 126 S. Ct. 2331, 2339 (2007).

namely that the buyer relied on any representation or, in some cases, the failure of the seller to disclose known material information.

Of course, commercial real estate transactions almost always involve at least some investigation of the potential environmental risks associated with the property in the form of Phase I or Phase II Environmental Site Assessments. The typical real estate contract contains a due diligence period during which the potential buyer may investigate the property and may conduct a Phase I assessment. If the environmental consultant who performs the Phase I recommends a Phase II, then he will also conduct intrusive investigation, and may include soil and groundwater testing. The contract often states that the buyer must conduct this investigation and determine whether he wants to proceed with the transaction or not. If he chooses to proceed, then the contract often describes this as evidence that the client is satisfied that there are no defects in the property—environmental or otherwise.

Real estate contracts are often drafted with these types of "boilerplate" provisions. Unfortunately, the standard approach for drafting a particular real estate contract and the environmental assessment that is conducted may not always be in best interest of the buyer. With respect to the contract language, in particular, the buyer may not want to accept that the seller may fail to disclose or misrepresent the property's environmental conditions.

The Texas Supreme Court provided an illustration of this during the Survey period and reviewed Texas case law on applying these provisions. In *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*,[6] the plaintiff-buyer learned the hard way that a standard as-is contract may not provide the kind of protection from fraud that, at least from the buyer's perspective, should be afforded by contract or would otherwise be provided by common law. The case further demonstrates that such contracts arguably attempt to inappropriately afford sellers actual or perceived cover for what may be considered fraudulent behavior. In *Warehouse Associates*, Houston Court of Appeals for the Fourteenth District preserved protections for buyers, but only in limited circumstances.

The case involved a buyer who purchased a property where an asphalt-shingle manufacturing plant had previously operated—where asbestos was used and buried in the ground. The contract provided that the property would be sold on a "where is, as is" basis, "with all faults."[7] It imposed no obligation on the seller to provide documents or records relating to the property's condition but allowed the plaintiff sixty days to inspect the property and terminate the contract for any reason based on its sole discretion within that period. If the buyer proceeded to close, the buyer would accept the property and assume all liability for owning, using, or possessing the property, including any liability imposed by local,

6. 192 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
7. *Id.* at 228.

state, or federal environmental laws or regulations.[8]

The seller produced part of an environmental report to the buyer that discussed asbestos in the buildings but did not discuss asbestos in the soil or its use in the manufacturing process. The part that discussed asbestos use in the manufacturing process was not disclosed to the buyer. Moreover, during the inspection period, a contractor excavating soil on the property discovered what appeared to be raw, friable asbestos buried below the surface. The contractor's employee contacted the director of environmental affairs for the seller and was told to backfill that area and not to perform any other excavation in the area. The buyer's environmental consultant hired to conduct a Phase I Environmental Site Assessment did not ask the director of environmental affairs about asbestos, and no mention of the buried asbestos was made. When asked about the materials used in the manufacturing process, asbestos was not mentioned. The consultant also conducted a Phase II assessment and collected soil samples from the property, but did not perform any asbestos testing.[9]

After the closing, the buyer hired a contractor to remove slabs from the property, and, in doing so, the buried asbestos was discovered. Extensive sampling determined that asbestos contamination was widespread, reaching thirteen feet below the surface. As a result, the buyer filed suit under theories of common-law fraud; negligent misrepresentation; statutory fraud under Section 27.01 of the Texas Business and Commerce Code, seeking rescission of the contract; punitive damages; and attorneys' fees. The seller counterclaimed, and both parties filed motions for summary judgment.

The trial court granted summary judgment against the buyer as to its claims and granted the buyer's summary judgment as to the seller's claims, except for attorneys' fees, for which it awarded two-million dollars for fees and various costs. The buyer appealed the summary judgment and dismissal of its claims.

The court of appeals considered two Texas Supreme Court decisions, *Prudential Insurance Company of America v. Jefferson Associates, Limited*[10] and *Schlumberger Technology Corporation v. Swanson*,[11] in determining how to apply the as-is and waiver-of-reliance language in real estate contracts in order to exclude inducement by fraud and activities of the seller that impaired, obstructed, or interfered with buyer's inspection of the property. The court of appeals concluded that the *Prudential* exception survives the later *Schlumberger* Supreme Court opinion.[12]

The *Prudential* and *Schlumberger* courts raise two competing concerns: on the one hand, the interest in allowing parties to enter into agreements

8. *Id.* at 227-28.
9. *Id.*
10. Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156 (Tex. 1995).
11. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997).
12. *Warehouse Assocs.*, 192 S.W.3d at 230-31.

that finally resolve all issues between them and, on the other hand, preventing fraud to enter into an agreement waiving all claims.

The *Prudential* case set out two exceptions to the as-is and waiver-of-reliance language in contracts. The first is when the seller fraudulently misrepresents or conceals information that induces the seller to enter into the contract.[13] The second exception is when the facts show that the seller impairs, obstructs, or interferes with the buyer's inspection of the property.[14]

A. Inducement by Fraudulent Misrepresentation or Concealment of Information

The defendant in *Warehouse Associates* argued that even if these facts exist, the as-is and waiver-of-reliance language can be enforced.[15] The defendant relied on the Court's decision in *Schlumberger*, where the Texas Supreme Court avoided the commitment-of-fraud view.[16] However, the supreme court concluded that the facts of the particular case warranted not voiding a release of liability.[17] In that case, the issue involved a settlement of the disputed value of an asset or commercial project. Because the waiver of reliance was directed at the dispute over value, the court upheld the waiver as a matter of law and would not permit the seller's claim of fraud.[18]

The court of appeals in *Warehouse Associates* did not agree with the defendant that the *Schlumberger* case held that waiver-of-reliance provisions voided any claim that the seller fraudulently induced a buyer to enter a sales contract. Rather, the court of appeals pointed out that the *Schlumberger* case simply resolved apparent divisions in prior cases and established the rule of law that it would refuse to enforce fraudulently induced "waiver of reliance provisions."[19] This was considered to be consistent with "the great weight of authority, the Restatement of Contracts, and the views of eminent legal scholars."[20]

The court of appeals also noted that *Prudential* recognized other situations in which the as-is or waiver-of-reliance provisions would not apply based on the totality of the circumstances and several factors identified by the Supreme Court.[21] The first was whether the sophistication of the parties was in question or if one or more parties were not represented by counsel.[22] The second was whether the contract arose in an arms-length

13. *Id.* at 230 (citing *Prudential*, 896 S.W.2d at 160-62).
14. *Id.*
15. *Id.* at 231.
16. *Schlumberger*, 959 S.W.2d at 178-79.
17. *Id.*
18. *Id.* at 179-80.
19. *Warehouse Assocs.*, 192 S.W.3d at 231 (citing *Schlumberger*, 959 S.W.2d at 178-79 (discussing Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 234-41 (1957)).
20. *Id.* at 231-32 (citing *Schlumberger*, 959 S.W.2d at 179).
21. *Id.* at 231 n.4 (citing *Prudential*, 896 S.W.2d at 162).
22. *Prudential*, 896 S.W.2d at 162.

transaction.[23] Third, relative bargaining power and whether the contract was freely negotiated were identified as a significant issues.[24] Finally, a factor that was considered, which is of importance to practicing attorneys, is whether the as-is or waiver-of-reliance provision rose to the level of an important feature of the negotiations, or whether it was simply part of the boilerplate in the form real estate contract.[25] This latter issue is important, since most real estate attorneys or their clients maintain forms that are used in most of their transactions. Showing which provisions were actively discussed and which were not may be important in some cases.

In *Warehouse Associates*, the defendant attempted to turn these factors against the plaintiff and argued that, because the buyer was represented by counsel in an arms-length transaction, the waiver-of-reliance provision should be enforced and the fraudulent-inducement exception should not be applied.[26] The court of appeals rejected this position.[27] The court noted that the jury found that the seller had withheld material information and fraudulently induced the buyer to enter the contract. Not surprisingly, the court of appeals would not allow this fraud to go forward.[28] It must be kept in mind that the *Schlumberger* case involved a claim over the asset's value, and this is what the waiver-of-reliance provision was designed to address in terms of a settlement of the buyer's claim. This is different from a real estate transaction because, although the value of the asset, the property, and perhaps building or structures thereon are at issue, the buyer is at a disadvantage by not knowing what the seller may know that is not readily discoverable by observation or environmental assessment. Any claim by the buyer against the seller would arise after the sale.

One issue that arose in *Warehouse Associates* was whether the plaintiff buyer should have known of the buried asbestos. The court of appeals ruled that the defendant seller concealed information and that it was not clear that a buyer should have known asbestos had been used at the former manufacturing plant.[29] The court of appeals also rejected the argument that the plaintiff was charged with *all* information in the public record.[30]

Finally, the court of appeals did not adopt the defendant's argument that the buyer's performance of it's own inspection of the property for environmental conditions negated application of the fraudulent-inducement exception.[31]

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Warehouse Assocs.*, 192 S.W.3d at 234 n.7.
27. *Id.*
28. *Id.* at 233-34.
29. *See id.* at 239.
30. *See id.* at 239 n.9.
31. *Id.* at 244-45.

B. Impairment of Inspection

In *Warehouse Associates*, the court of appeals did not approve the impairment-of-inspection exception to the as-is and waiver-of-reliance provisions.[32] As a first step in applying this exception, the court of appeals stated that it analyzes the "impairment-of-inspection exception separately from the fraudulent-inducement exception."[33] The court of appeals ruled that the property was open for physical inspection and testing. The failure to provide information does not meet the exception, only conduct that impairs, obstructs, or interferes "with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property does."[34]

The court's rationale is important. The opinion supports the ability of sophisticated parties to enter into contracts in which the seller's statements cannot be relied upon so that the exception does not swallow the rule of permitting as-is transactions. In particular, the court of appeals noted that the parties were sophisticated and represented by counsel in "an arm's length commercial transaction in a way that allocated the risk of discovering adverse property conditions entirely to the buyer, and the parties place the burden of inspecting the property for such conditions entirely on the buyer."[35] Thus, the court appeared to leave the issue of concealment of information to the fraudulent-inducement exception.[36]

III. COST-RECOVERY ACTIONS UNDER CERCLA

A. A Plaintiff in a Private CERCLA Cost-Recovery Action under Section 113 May Only Recover Each Defendant's Proportionate Share of Liability

In a case of first impression, the Fifth Circuit in *Elementis Chromium L.P. v. Coastal States Petroleum Co.*[37] held that liability in CERCLA contribution actions is several only, not joint and several.[38] Although the issue of whether or not liability in a CERCLA § 113(f) contribution action is joint and several was one of first impression in the Fifth Circuit noted that the "overwhelming majority of [the] sister Circuits have concluded that liability is merely several under § 113(f)."[39] The Fifth Circuit further reasoned that because "[t]he plain language of § 113(f) directs the courts to 'allocate response costs among liable parties' in an equitable manner," one liable party can recover only the proportionate share from

32. *Id.* at 244.
33. *Id.* at 241.
34. *Id.*
35. *Id.* at 241.
36. *See id.*
37. 450 F.3d 607 (5th Cir. 2006).
38. *Id.* at 613.
39. *Id.* at 612.

each of the other liable parties in a contribution action.[40] Accordingly, the Fifth Circuit held that imposing joint and several liability on the defendants was improper.[41] Because the district court had not provided any division of liability between the defendants, the Fifth Circuit remanded the case to the district court for that determination.[42]

The plaintiff in *Elementis* owned a manufacturing plant in Corpus Christi (the "Elementis Site") that was contaminated with hydrocarbons from operations on an adjacent property owned by El Paso Merchant Energy-Petroleum Co. ("El Paso") and from operations on another adjacent property formerly owned by Amerada Hess Corp. ("Hess") but purchased by Magellan Terminals Holdings L.P. ("Magellan"). Plaintiff sued El Paso for costs that it incurred cleaning up the Elementis Site, and El Paso ultimately settled its case. El Paso then brought a third-party action under CERCLA § 113(f)[43] against Hess and Magellan seeking contribution for response costs at the Elementis site. The district court found that El Paso was 89.95% responsible and that Magellan and Hess were 10.05% responsible. The district court treated Magellan and Hess as a collective entity for allocating responsibility and imposed joint and several liability.[44]

The Fifth Circuit considered El Paso's challenge to the district court's allocation of only 10.05% of future response costs to Hess and Magellan. Because allocation is a question of fact, the Fifth Circuit reviewed the district court's determination for clear error.[45] The Fifth Circuit did not find "evidence sufficient to produce the definite and firm conviction that a mistake has been committed," so it affirmed the district court's allocation of future response.[46]

B. Ability of Private Plaintiffs to Bring Cost-Recovery Actions under Section 107 of CERCLA

Although the availability of cost recovery or contribution was not at issue in *Elementis*, the Fifth Circuit stated that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a) . . . ."[47] The United States District Court for the Southern District of Texas, however, relied on this dicta to make its decision in *Columbus McKinnon Corp. v. Gaffey*.[48] The plaintiffs owned and operated real property allegedly contaminated by former owners and operators of the property. The plaintiffs purchased the property in 1997 but discovered the contamination in 2000. The plaintiffs filed suit in 2006

40. *Id.* at 613.
41. *Id.*
42. *Id.*
43. 42 U.S.C. § 9613(f).
44. *Elementis*, 450 F.3d at 609.
45. *See id.* at 609-10.
46. *Id.* at 613-14.
47. *Id.* at 613.
48. No. H-06-1125, 2006 WL 2382463 (S.D. Tex. Aug. 16, 2006).

against certain of these former owners and operators, asserting claims for response costs under CERCLA § 107 and the Texas Solid Waste Disposal Act. The plaintiffs also asserted fraud and breach of fiduciary duty.[49]

With respect to the CERCLA § 107 claim, the defendants moved to dismiss, claiming that the plaintiffs are "potentially responsible parties" ("PRPs") and PRPs are not entitled to pursue claims under CERCLA § 107.[50] The district court pointed out that, before the 2004 United States Supreme Court decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[51] the law was well established that PRPs do not have a viable claim under CERCLA § 107.[52] The Supreme Court declined to address the issue in *Aviall*, and, since that decision, "the law regarding whether a PRP can maintain a CERCLA § 107(a) claim has become less settled."[53] The district court noted the split among the federal circuit courts and stated that the Fifth Circuit in *Elementis* had "indicated that it would not allow a § 107(a) claim by a PRP."[54] Based on the clear pre-*Aviall* authority, the Supreme Court's refusal in *Aviall* to decide the issue contrary to that authority, and the Fifth Circuit dicta in *Elementis*, the district court in *Columbus* concluded that a PRP does not have a viable claim for cost recovery under CERCLA § 107(a).[55]

As this Article was going to press, the United States Supreme Court ruled that PRP's may bring cost recovery actions under § 107(a).[56] Thus, the holding of the case has been negated.

With respect to the remaining Texas Solid Waste Disposal Act, fraud, and fiduciary claims, the district court analyzed whether the claims were time barred. The district court noted that each of the claims was subject to a four-year statute of limitations.[57] The plaintiffs argued that although they purchased the property in 1997, they did not discover the contamination until 2000, and thus, their claims were not time-barred because of the discovery rule and because plaintiffs did not discover the full extent of the contamination in 2000.[58] The district court pointed out, however, that the discovery rule is not an inquiry into whether the plaintiffs knew the full extent of their damages.[59] The district court reasoned that, if the discovery rule is applicable, it delayed accrual of plaintiffs' state-law claims only until 2000, when the plaintiffs discovered that their property was

49. *Id.* at *1-2.

50. *Id.* at *3.

51. 543 U.S. 157 (2004). For a discussion of the *Aviall* decision and subsequent cases, *see generally* Scott D. Deatherage et al., *Environmental Law*, 59 SMU L. REV. 1279, 1279-83 (2006).

52. *Columbus*, 2006 WL 2382463, at *3.

53. *Id.*

54. *Id.* at *4.

55. *Columbus*, 2006 WL 2382463, at *3-4; Contra Vine Street LLC v. Keeling, 362 F. Supp. 2d 754, 763-64 (E.D. Tex. 2005).

56. United States v. Atl. Research Corp., 126 S. Ct. 2331, 2339 (2007).

57. *Columbus*, 2006 WL 2382463, at *4.

58. *Id.* at *5.

59. *Id.*

contaminated.[60] Accordingly, the four-year statute of limitations had run on the plaintiffs' claims before they brought suit in 2006.[61] Thus, the district court granted the motion to dismiss the state-law claims.[62]

In the remand of the case that upset settled legal precedent on CERCLA contribution, *Aviall Services, Inc. v. Cooper Industries, LLC*,[63] the United States District Court for the Northern District of Texas considered whether PRPs can bring a cost-recovery or contribution action under CERCLA § 107(a) or federal common law.

The district court first considered whether PRPs have an explicit right to cost recovery under CERCLA § 107(a). The district court noted that a party that resolves its CERCLA liability in an approved settlement receives protection from contribution claims under CERCLA § 113(f)(2). The district court reasoned that allowing PRPs to bring a cost-recovery action under CERCLA § 107 would render §113(f)(2) superfluous or, at least, insignificant because non-settling PRPs could file suit against settling parties, and construing a statute to read out a provision violates a cardinal principle of statutory construction.[64] Accordingly, the district court held that PRPs do not have an express right to cost recovery under CERCLA § 107(a).[65]

The district court then considered whether PRPs have an implied right of contribution under CERCLA § 107(a) or federal common law.[66] The district court first noted that dicta from the United States Supreme Court decision in *Aviall* suggested that such an implied right likely does not exist.[67] Further, the Court reasoned that, because Congress expressly provided for contribution via CERCLA § 113, courts should not read additional remedies into CERLCA or imply them under federal common law.[68] Accordingly, no right of contribution was seen to exist under CERCLA § 107(a) or federal common law.[69] As stated above, the United States Supreme Court has rejected this view, and held that a PRP may bring a claim under section 107(a) to recover loss for rendering sites.

C. Pleading Sufficient Facts to Maintain a CERCLA Cost-Recovery Claim

In *General Cable Industries, Inc. v. Zurn Pex, Inc.*,[70] another case in-

60. *Id.*
61. *Id.*
62. *Id.*
63. No. 3:97-CV-1926-D, 2006 WL 2263305 (N.D. Tex. Aug. 8, 2006). For the facts of the *Aviall* case and analysis of the United States Supreme Court decision in *Aviall*, see the Environmental Law Survey article in Volume 59 of the SMU Law Review. Deatherage *supra* note 51, at 1279-83.
64. *Aviall*, 2006 WL 2263305, at *7.
65. *Id.* at *8.
66. *Id.* at *9.
67. *Id.*
68. *Id.*
69. *Id.* at *10.
70. No. 4:05-CV-428, 2006 WL 2827168 (E.D. Tex. Sept. 28, 2006).

volving a CERCLA cost-recovery claim, the issue was whether the plaintiff had adequately pled sufficient facts to support its CERCLA claim. The claimant owned property allegedly contaminated by a release of trichloroethylene ("TCE") from an adjacent property. Before the suit, one of the defendants entered the adjacent site into the Texas Voluntary Cleanup Program and installed ten groundwater monitoring wells and conducted multiple rounds of groundwater sampling. The plaintiff subsequently sought damages from a number of the defendants asserting a variety of claims, including a CERCLA cost-recovery claim. The defendants moved to dismiss the CERCLA claim, arguing that the plaintiff failed to plead facts sufficient to support a cause of action under CERCLA.[71]

The district court ruled that, in order to establish a case of liability in a CERCLA cost-recovery case, a plaintiff must establish, *inter alia*, that a release or threatened release caused the plaintiff to incur response costs.[72] Defendants argued that plaintiff failed to adequately allege that it had incurred response costs.[73] The district court pointed out that the plaintiff alleged that it "incurred costs to investigate and monitor the contamination of its Property," and that it "has expended response costs consistent with the National Contingency Plan . . . including costs to monitor, assess, and evaluate the release or threat of release of hazardous substances into the environment."[74] With only these allegations "[t]he Plaintiff failed to allege what response costs it had incurred in containing the release of TCE."[75] On the other hand, the district court held that the plaintiff pled with specificity the response actions taken by defendants.[76] Because the plaintiff failed to allege a similar factual basis for its alleged response costs, the district court considered plaintiff's allegations to be conclusory.[77] The district court reasoned that, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist."[78] The district court, therefore, held that the plaintiff failed to adequately allege that it incurred response costs consistent with the National Contingency Plan, and, accordingly, the court granted the defendants' motion to dismiss.[79]

D. Successor Liability under CERCLA

The District Court for the Southern District of Texas issued two opinions on CERCLA issues in a single case involving contamination of a

71. *Id.* at *1-4.
72. *Id.* at *4.
73. *Id.*
74. *Id.* at *5.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* (internal quotations omitted).
79. *Id.* *But see* City of Waco v. Schouten, 385 F. Supp. 2d 595, 602-03 (W.D. Tex. 2005).

large tin smelter site; one addressing successor liability,[80] and the other addressing arranger liability and the useful-product defense.[81] In both cases, a number of parties and the United States paid for remediation of the site and some of those parties sought contribution from others, including Oxyde Chemicals, B.V., Oxyde Chemicals, Inc. (together the "Oxyde Defendants"), and Bayer USA, Inc. ("Bayer").[82]

The case involving successor liability arose from a motion for summary judgment by the Oxyde Defendants.[83] The plaintiffs claimed that the Oxyde Defendants were liable as successors in interest to a Netherlands corporation, Oxyde Maatschappij voor Ertsen en Matalen, B.V. ("OMEM"), which delivered contaminated tin residue to the Tex Tin site as part of its metals and ores trading division. In 1985, OMEM sold its chemical division, but not its metals and ores division, to Oxyde Chemicals, B.V.[84]

The plaintiff and the defendants argued different tests for successor liability. The Oxyde defendants proffered the general common-law rule for successor liability that provides that an acquiring corporation is not liable unless one of four exceptions is met: 1) the purchaser assumes liability, 2) the transaction amounts to a consolidation or merger, 3) the transaction is fraudulent or intended to provide an escape from liability, or 4) the purchasing corporation is a mere continuation of the selling company.[85] The plaintiff attempted to apply the "continuity of enterprise" or "substantial continuity" test that is based on a number of factors including retention of the same employees, retention of the same supervisory personnel, retention of the same production facilities in the same physical location, production of the same product, retention of the same name, continuity of assets, continuity of general business operations, and whether the successor holds itself out as the continuation of a previous enterprise.[86]

In considering the two approaches, the district court observed that the continuity of enterprise theory had recently been rejected because it was not part of general federal common law, while the common-law rule was "consistent with the Supreme Court's decision in *Bestfoods*, which applied the general common law to the question of parent/subsidiary liability under CERCLA."[87] Accordingly, the district court believed the common-law approach to be more prudent and consistent with Supreme Court precedent.[88] Nevertheless, because the district court did not find any controlling authority from the United States Supreme Court or the

80. Tex Tin Corp. v. United States, Nos. G-96-247, G-96-272, 2006 WL 1118587, at *1 (S.D. Tex. Apr. 25, 2006).
81. Tex Tin Corp. v. United States, Nos. G-96-247, G-96-272, 2006 WL 2546395, at *2 (S.D. Tex. Aug. 31, 2006).
82. *Id.*
83. *Tex Tin Corp.*, 2006 WL 1118587, at *1.
84. *Id.*
85. *Id.* at *4.
86. *Id.*
87. *Id.* (citing United States v. Bestfoods, 524 U.S. 51, 55, 61-64 (1998)).
88. *Tex. Tin Corp.*, 2006 WL 1118587, at *4.

Fifth Circuit, it analyzed the facts under both tests.[89]

Under the general common-law approach, the district court determined that the Oxyde Defendants were not the successor to OMEM.[90] The Oxyde Defendants did not assume liability, either expressly or indirectly, for the metals and ores trading business of OMEM. Further, the transaction between OMEM and Oxyde Chemicals, B.V. was not a de facto merger or consolidation because OMEM sold the chemicals division to an unrelated entity with different shareholders; OMEM did not dissolve or liquidate after the purchase but continued to operate the metals and ores business; and Oxyde Chemicals, B.V. operated as an independent company after purchasing OMEM's chemicals division. The district court also found that the purchase of the chemicals division was not fraudulent or intended to provide an escape from liability because, at the time of the 1985 purchase, "[t]here was no knowledge of any potential CERCLA liability,"[91] and no evidence had been offered of fraudulent or improper motive. Finally, the district court found that Oxyde Chemicals, B.V. was not a mere continuation of OMEM because after the purchase and sale of the chemicals division, the two corporations continued to exist with different owners, different directors, and different corporate shares.[92] Further, the two corporations engaged in different businesses after the purchase and sale.[93]

Similarly, the district court determined that the Oxyde defendants could not be considered successors under the continuity of enterprise theory.[94] The district court reasoned that "given the clear separation of the chemicals and metals division at OMEM . . . [and] the overwhelming fact that the metals and ores trading division continued as a *separate and independent* entity for 15 years after the sale of the chemicals division," the plaintiffs failed to demonstrate that the Oxyde defendants were successors to the metals and ores division.[95] The Oxyde defendants did not retain any of the metals and ores personnel, obtain assets of the metals and ores division, produce the same product, or hold themselves out as a continuation of the metals and ores business. While the Oxyde defendants did purchase the right to use part of OMEM's name, that alone is insufficient to establish liability.[96] Because the district court found that the Oxyde defendants could not be considered successors to OMEM under the general common-law test or the continuity of enterprise test, the court held the Oxyde defendants were not liable as successors under CERCLA and, accordingly, granted the Oxyde defendants' motion for summary judgment.[97]

89. *Id.*
90. *Id.*
91. *Id.* at *4-5.
92. *Id.* at *5.
93. *Id.*
94. *Id.* at *6.
95. *Id.* (emphasis in original).
96. *Id.*
97. *Id.* at *7.

E. Useful Product Defense to Liability under CERCLA

The second Southern District case involving the tin-smelter site addressed the useful-product defense to arranger liability under CERCLA.[98] The plaintiffs sought contribution from Bayer USA, Inc. ("Bayer"), alleging that Bayer's predecessor arranged for the disposal or treatment of hydrochloric acid and nitric acid at the tin-smelter site. Bayer moved for partial summary judgment arguing, *inter alia*, that the sales of hydrochloric acid and nitric acid to the operators of the tin smelter were sales of a useful product and not arrangement for disposal of a waste. The district court analyzed whether Bayer was an arranger and Bayer's useful-product defense.[99]

Neither CERCLA nor the Fifth Circuit has provided a clear definition or test for arranger liability.[100] The determination is case specific and ultimately turns on "whether a sufficient nexus exists between the responsible party and the disposal of the hazardous substance."[101] Like arranger liability, the useful-product defense has not been precisely articulated by the Fifth Circuit and the availability of the defense is a fact-specific inquiry.[102] When a "product is deemed to be waste and of no further use to the seller and when it can be shown that the seller's motivation was to get rid of the product . . ." the useful-product defense will not be applicable, even if the buyer pays for and uses the product.[103]

Taking the hydrochloric acid first, the district court determined that Bayer was not an arranger under CERCLA.[104] The district court stated that, in the Fifth Circuit, an arranger must have the obligation to exercise control over waste disposal, not simply the ability or opportunity to control disposal. In the present case, no evidence demonstrated that Bayer had the ability or opportunity to control the disposition of the hydrochloric acid at the tin-smelter site, let alone the obligation to do so. Accordingly the Court found that Bayer lacked the required nexus with control over the substance to be liable as an arranger under CERCLA.[105]

The district court also examined two other factors considered by other courts within the Fifth Circuit: 1) ownership of the product and 2) the intent of the parties.[106] Examining ownership, the district court noted that title to the acid passed to the operators of the tin-smelter site well before the acid reached the site.[107] Regarding intent, the district court pointed out that no evidence demonstrated that Bayer had any knowledge of how the hydrochloric acid would be used at the tin-smelter site,

98. Tex Tin Corp. v. United States, Nos. G-96-247, G-96-272, 2006 WL 2546395, at *2 (S.D. Tex. Aug. 31, 2006).
99. *Id.* at *1-2.
100. *Id.* at *4.
101. *Id.*
102. *Id.* at *5.
103. *Id.*
104. *Id.* at *7.
105. *Id.*
106. *Id.*
107. *Id.*

and, thus, no evidence demonstrated that Bayer intended to dispose of the acid as waste.[108] Without any evidence, the district court refused to infer such an intent, and, accordingly, did not find any intent showing Bayer to be an arranger.[109]

Finally, the district court examined whether the hydrochloric acid shipped to the site was a useful product or waste.[110] Bayer produced the hydrochloric acid as part of an integrated chemical plant and used it in other plant processes or sold it to outside customers. Bayer's sales were to a variety of customers and for a range of prices. Further, the operators of the tin-smelter site used the hydrochloric acid that it purchased for ore reduction and ferric chloride production. The district court reasoned that a market existed for the acid and that it was purchased for use in manufacturing processes. Without any evidence showing the acid to be a waste or that Bayer was attempting to dispose of the acid, the district court concluded that the sales of hydrochloric acid were sales of a useful product.[111]

With respect to the nitric acid, because it was a purposefully manufactured product and absent any evidence to the contrary, the district court found the sales of nitric acid to be of a useful product.[112] Because the sales of hydrochloric acid and nitric acid constituted sales of a useful product, and because Bayer did not qualify as an arranger under CERCLA, the district court granted Bayer's motion for partial summary judgment.[113]

IV. CLEAN WATER ACT CASES

A. Clean Water Act Jurisdiction Battles Continue

In *United States v. Chevron Pipe Line Co.*,[114] the United States District Court for the Northern District of Texas attempted to clear up confusion over the extent of the jurisdiction of the Clean Water Act ("CWA"). To understand the case, it is necessary to briefly review the evolution of Supreme Court case law on the issue. In *United States v. Riverside Bayview Homes, Inc.*,[115] the Supreme Court unanimously held that the Army Corps of Engineers (the "Corps") construction of "waters of the United States" to include adjacent "freshwater wetlands" was consistent with its authority under the CWA.[116] In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"),[117] SWANCC challenged a Corps regulation that applied the CWA to any interstate waters

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at *9.
114. 437 F. Supp. 2d 605 (N.D. Tex. 2006).
115. 474 U.S. 121 (1985).
116. *Id.* at 121-40.
117. 531 U.S. 159 (2001).

that "are or would be used as habitat" by migratory birds.[118] The specific issue in *SWANCC* was the court jurisdiction over an abandoned sand and gravel pit that was not adjacent to a traditional navigable water.[119] In a five-to-four decision, the Supreme Court held that "nonnavigable, isolated, intrastate waters" were not included as "waters of the United States" under the CWA.[120]

The Fifth Circuit Court of Appeals in 2003 issued an opinion in *In re Needham*,[121] that discussed *SWANCC* in dicta. The *Needham* court identified the relevance of a waterway being either navigable in fact or adjacent to a navigable body of water.[122] The court went on to state that "in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC 'a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of navigable water.'"[123]

The Supreme Court addressed the scope of "waters of the United States" this year in *Rapanos v. United States*.[124] In *Rapanos*, the government brought a civil enforcement proceeding against a developer who had backfilled, without a permit, three Michigan wetlands lying near ditches that eventually emptied into traditional navigable waters.[125] The district court found federal jurisdiction over the wetlands because they were adjacent to waters of the United States.[126] The Sixth Circuit affirmed, based on the hydrologic connections to the nearby ditches or the more remote navigable waters.[127] The Supreme Court vacated the Sixth Circuit's opinion and remanded the case.[128]

Unfortunately, *Rapanos*, a five-to-four plurality decision, does not provide clear guidance to lower courts or regulated entities as to the scope of the CWA. Justice Scalia, in an opinion joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, wrote that intermittent and ephemeral streams are not covered by the CWA.[129] Thus, the Corps' regulatory definition of "waters of the United States" was not a permissible construction of the statute.[130] Justice Kennedy wrote a concurring opinion that proposed an ambiguous test of whether a "significant nexus" exists as to waters that are, were, or may become navigable.[131] Justice Kennedy, however, provided little guidance as to how the "significant nexus" test should be applied in practice.

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118. *Id.* at 163-64.
119. *Id.* at 162.
120. *Id.* at 167, 170-71.
121. 354 F.3d. 340 (5th Cir. 2003).
122. *Id.* at 345.
123. *Id.* at 345-46 (quoting *SWANCC*, 531 U.S. at 170-71.).
124. 126 S. Ct. 2208 (2006).
125. *Id.* at 2214.
126. *Id.* at 2219.
127. *Id.*
128. *Id.* at 2235.
129. *Id.* at 2220-24.
130. *Id.*
131. *Id.* at 2236-52.

Because of the lack of clarity from the Supreme Court, lower courts have struggled with interpreting the implications of *Rapanos*. In *United States v. Chevron Pipe Line Co.*,[132] the United States District Court for the Northern District of Texas considered whether a discharge of oil into an ephemeral creek was a violation of the CWA and the Oil Pollution Act. The *Chevron Pipe Line* court noted the lack of guidance that *Rapanos* provided and stated, "Without any clear direction on determining a significant nexus [the Kennedy test], this Court will do exactly as Chief Justice Roberts declared—'feel [its] way on a case-by-case basis.'"[133] The district court then indicated that it would apply the prior reasoning that the Fifth Circuit Court of Appeals announced in *Needham* in determining whether there was a "significant nexus" between the ephemeral creek and navigable waters: "[A]s a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow."[134] The court went on to hold, quoting Justice Scalia's opinion in *Rapanos*, that ephemeral channels did not fall within the jurisdiction of the CWA.[135]

B. Calculating Penalties for Violation of Monthly Averages

In *Friends of the Earth, Inc. v. Chevron Chemical Co.*,[136] the United States District Court for the Eastern District of Texas reviewed the penalty calculation under section 309(d) of the CWA. The district court had previously found that Chevron violated the total suspended solids limitations in its NPDES permit sixty-five times.[137] Of the violations, twenty-two involved monthly average TSS violations.[138] The issue before the court was whether the civil penalty for monthly average violations should be counted as a single violation or as a violation occurring each day of the month.[139]

The district court quoted the language of the CWA that provides that a person who violates the statute "shall be subject to a civil penalty not to exceed $25,000 per day for each violation."[140] The district court went on to adopt the position that the Fourth Circuit announced in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*,[141] that the words "per day" and "per violation" strongly suggest that if "a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of

132. 437 F. Supp. 2d 605 (N.D. Tex. 2006).
133. *Id.* at 613.
134. *Id.*
135. *Id.*
136. Nos. 1:94-CV-434, 1:94-CV-580, 2006 WL 887459, at *1 (E.D. Tex. Mar. 29, 2006).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at *1 (quoting 33 U.S.C. § 1319(d) (2007)).
141. 791 F.2d 304 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987).

days in that time period."[142] The district court further noted that this approach was consistent with the Environmental Protection Agency's ("EPA's") penalty policy.[143] Accordingly, the Court held that "the statutory maximum penalty for a monthly average violation should be calculated by multiplying the statutory amount by the total number of days in the month in which the violation occurred."[144]

The district court acknowledged that the daily approach may result in high penalties but indicated that a reviewing court could consider the reasons why a monthly average was violated and reduce the amount of the penalty based on the particular circumstances of the case.[145] Thus, the court has the necessary discretion to assess higher penalties for a polluter engaging in high discharges on a daily basis than a polluter who violates the monthly limitation because of a single discharge.[146]

C. Citizens' Suits

In a case involving the question of standing to bring a citizen's suit under the CWA, the plaintiff in *Downstream Environmental, L.L.C. v. Gulf Coast Waste Disposal Auth.*[147] owned and operated a facility that disposed of grease and grit-trap wastes generated primarily by restaurants. State law requires that such wastes be disposed of at a facility holding an MSW Type V permit issued by the Texas Commission on Environmental Quality ("TCEQ").[148] Downstream alleged that a competitor, U.S. Oil Recovery, L.L.P. ("USOR"), was disposing of grease and grit-trap without the requisite permit. Downstream asserted a number of claims against USOR and the Gulf Coast Waste Disposal Authority, including a claim under the CWA's citizen-suit provision. Downstream's primary contention was that, by avoiding CWA permitting requirements, USOR was able to charge lower prices to its customers, thus harming Downstream.[149]

USOR moved to dismiss Downstream's claims. With respect to the CWA claim, the district court stated that Downstream failed to "allege or identify an aesthetic, recreational, economic, or other legally protected interest in any particular waterway it claimed was affected by USOR's improper discharge and dumping activities."[150] Rather, the district court decreed that Downstream had alleged only economic injury caused by a competitive disadvantage.[151] The district court held that Downstream's alleged injuries were not sufficient to confer standing in a CWA citizen's

142. *Chevron Chem. Co.*, 2006 WL 887459, at *2 (quoting *Chesapeake Bay Foundation*, 791 F.2d at 314).
143. *Id.* at *1.
144. *Id.* at *2.
145. *Id.*
146. *Id.*
147. No. H-05-1865, 2006 WL 1875959 (S.D. Tex. July 5, 2006).
148. *Id.* at *1.
149. *Id.* at *9.
150. *Id.* at *10.
151. *Id.*

suit.[152] Specifically, the district court held that Downstream's allegations were not distinguishable from the generalized grievances of the public and that the claimed injuries were not fairly traceable to the improper discharge by USOR.[153] Consequently, the district court dismissed the CWA claims.[154]

In two other related cases involving a citizen's suit brought under the CWA, the plaintiffs sought declaratory judgment, injunctive relief, and civil penalties against a defendant developer for failing to adequately control stormwater runoff.[155] Specifically, the plaintiffs claimed that the developer's actions resulted in the degradation of water quality and the accumulation of sediment and debris in nearby ponds.

The developer asserted a third-party contribution action against several other parties, including a lawn-care company and two private persons. The developer claimed that inadequate erosion controls by the third-party defendants contributed to the sedimentation of the ponds. The United States District Court for the Northern District of Texas granted the third-party defendants' motion to dismiss, holding that the developer failed to establish that a right of contribution exists for claims asserted under the CWA or federal common law.[156]

The district court did indicate, however, that in determining the amount of civil penalties to be assessed, the CWA permits the consideration of any matter "'as justice may require,' including any facts that may show" that the third-party defendants were responsible for some of the plaintiff's claimed damages.[157] Thus, while the CWA does not allow for a right to contribution, the proportion of damages caused by third parties may be considered in assessing a civil penalty.[158]

In another citizen's suit case, a Texas resident filed a claim under the CWA against the director of the Texas Department of Transportation ("TxDOT") for alleged violations of the Texas Pollutant Discharge Elimination System ("TPDES") program.[159] Specifically, the plaintiff claimed that TxDOT had to implement a compliant stormwater-pollution-prevention plan ("SWP3") for a road-widening project in violation of its TPDES general permit.[160]

On cross-motions for summary judgment, the district court held that the SWP3 complied with the requirements of the General Permit because it discussed temporary erosion, sediment, and pollution-control measures

152. *Id.*
153. *Id.* at *10-11.
154. *Id.* at *12.
155. Envt'l Conservation Org. v. Bagwell, No. 4:03-CV-807-Y, 2005 U.S. Dist. LEXIS 21669, at *3 (N.D. Tex. Sept. 28, 2005); Envt'l Conservation Org. v. Bagwell, No. 4:03-CV-807-Y, 2005 WL 2465003, at *4 (N.D. Tex. Sept. 30, 2005).
156. *Bagwell*, 2005 WL 2465003, at *1.
157. *Id.* at *3-4.
158. *Id.*
159. Hill v. Behrens, No. H-04-CV-3601, 2005 U.S. Dist. LEXIS 29188, at *2-4 (S.D. Tex. Oct. 31, 2005).
160. *Id.* at *5-8.

to be implemented; stabilization of the soil; construction of and maintenance procedures for erosion-control structures; and approval by the project engineer when completed.[161] The district court noted that the SWP3 omitted inspection reports, but it held that this omission was de minimis because there was sufficient evidence of inspections and notification of compliance.[162]

Further, the district court held that the alleged violations were wholly past and could not serve as the basis for a citizen's suit under the CWA.[163] Finally, the district court reasoned that, because the plaintiff was seeking relief for future damages, the suit was not yet ripe for adjudication.[164]

V. CRIMINAL CODE PROVISION AND COMMUNICATIONS WITH FEDERAL AGENCIES

Most people do not pay much attention to the potential impact of a provision of the federal Criminal Code that was created to address false statements in the context of government proceedings. Codified at 18 U.S.C. § 1001, the provision contains the following short language:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States, knowingly and willfully— (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or, imprisoned not more than 5 years, . . . or both.[165]

What relevance does this have for environmental practitioners and their clients? The answer is that government agencies and United States attorneys have been using this provision to prosecute companies or their employees for allegedly making false statements in the context of investigations of potential violations of federal environmental statutes. The government has been taking the position that this provision is very broad and extends not only to actual and direct false statements but also to creating a false impression or failing to fully divulge facts in a discussion, writing, or statement to the investigating official. In our experience, governmental investigators appear very knowledgeable of this provision and use it quite aggressively, accusing parties during the investigation before any decision about prosecution has been made.

While certain federal environmental statutes contained provisions for prosecution for false statements, Section 1001 may be advantageous to

161. *Id.* at *18-19.
162. *Id.* at *19-20.
163. *Id.* at *20-21.
164. *Id.* at *22-23.
165. 18 U.S.C. § 1001(a) (2007).

government officials or attorneys because it is broader than the provisions contained in environmental statutes.

The government's knowledge and use of this provision raises concerns for corporate environmental staff and individual business people. When contacted by government officials or investigators, individuals should take caution in how they respond to these inquiries. The adage that the cover up may be worse than the crime certainly may apply. When a federal environmental investigation begins, training of staff and receiving of advice by attorneys may help avoid potential claims of false statements and prosecution under Section 1001 and similar provisions under federal environmental statutes. Advising employers as to communications with federal agencies—in this case, those with any form of environmental jurisdiction, such as the EPA, the U.S. Fish and Wildlife Agency, the Materials Management Service, or the Coast Guard—appears to be a wise investment of time and training.

A. CASES

1. Section 1001 Case

Several cases in Texas during the Survey period involved criminal prosecution of individuals under this provision.

The first case we reviewed, *United States v. Riecke*,[166] addressed the issue of whether the government could prosecute Riecke under Section 1001 despite the Clean Air Act's similar provision. The defense attorney argued that since the Clean Air Act contained a provision specifically governing false statements, Reicke could not be prosecuted under the general provision.[167]

In considering this challenge, the United States District Court for the Northern District of Texas made two points. First, the district court considered the concept of lenity and the conclusions of other courts in this area.[168] Citing a United States Supreme Court ruling on the issue of lenity,[169] the district court concluded that the rule is designed to guide an interpreting court in resolving ambiguity but cannot serve to create ambiguity.[170] The district court was also guided by a Tenth Circuit Court of Appeals decision in another Clean Air Act case involving alleged false statements.[171] The Tenth Circuit concluded that the provisions in the two statutes did not create any ambiguity, and it permitted prosecution under Section 1001.[172]

166. No. 3:06-CR-109-G, 2006 WL 2381595 (N.D. Tex. Aug. 17, 2006).
167. *Id.*
168. *Id.* at *2.
169. *See* Callanan v. United States, 364 U.S. 587, 596 (1961).
170. *Riecke*, 2006 WL 2381595, at *2.
171. *Id.* at *2 (reviewing United States v. Shaw, 150 F. App'x 863, 864 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 2039 (May 15, 2006)).
172. *Shaw*, 150 F. App'x at 874 n.25.

The second point that the district court made was that the prosecutor may choose under which criminal provision to prosecute a particular defendant if the defendant may have violated more than one statutory provision—absent evidence of Congressional intent to the contrary.[173] The district court again cited the Tenth Circuit decision construing Section 1001 and Section 7413(c)(2)(A) of the Clean Air Act, which ruled that Congress never indicated in any legislative history that the false-statement provision would apply in lieu of any other provision in the United States Code prohibiting false statements to federal officials.[174] Moreover, the district court ruled that the defendant had failed to provide any evidence whatsoever of such intent.[175]

2. *Employees May File Wrongful Discharge Claims Accusing Employers of Attempting to Force Them to Make False Statements*

An issue related to advising employees on communications with federal agencies is the potential for employees to file suit when they contend that the company attempted to coerce them into making false statements or submitting false reports or documents to the federal agency.

The United States District Court for the Eastern District of Texas reviewed a summary-judgment motion by a company that had been sued by a former environmental manager who claimed wrongful termination as a result of his refusal to submit allegedly fraudulent reports to the EPA. In *Graham v. Louisiana Pacific Corp.*,[176] the plaintiff alleged that the company defendant had conspired to conceal violations of the federal Clean Air Act and other environmental laws.

According to the employee's affidavit, the federal government had previously sued the company for violations of the Clean Air Act. The company entered into a consent decree with the government that was entered by the federal district court. The consent decree required that the company perform certain tasks and refrain from engaging in certain activities to ensure that no reprisal or retaliation was carried out against any employee who reports actual or potential violations of law, including environmental law, to any local, state, or federal regulatory authority. While the consent decree was in force, the company was barred from federal contracts.[177]

The employee further alleged that, in an effort to terminate the consent decree early, the company made material false statements to the federal government and to the federal court, many of which involved the plant where the employee had worked as the plant environmental manager.

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173. *Riecke*, 2006 WL 2381595, at *2 (citing United States v. Batchelder, 442 U.S. 114, 123-24 (1979)).

174. *Rieke*, 2006 WL 2381595, at *2 (citing Shaw, 150 F. App'x at 874).

175. *Riecke*, 2006 WL 2381595, at *2.

176. No. 1:04-CV-650, 2006 WL 435711 (E.D. Tex. Feb. 21, 2006).

177. Graham v. La. Pac. Corp., Pl's Resp. to Def's Mot. for Summ. J., No. 1:04-CV-0650, 2006 WL 813714, at *6-7 (E.D. Tex. Feb. 10, 2006).

As a result, the employee claimed, the consent decree was terminated early, and shortly thereafter, the EPA lifted the bar against the company receiving federal government contracts.[178]

The district court reviewed the company's summary-judgment motion. The first issue was whether the former employee has any right to a wrongful-termination claim.[179] In Texas, the law allows employees engaged for an indefinite time period to be terminated without cause.[180] The district court, however, cited the *Sabine Pilot*[181] exception to the termination of at-will employment, which provides that an employee may bring a wrongful-termination action if the sole reason for termination is refusal to perform and illegal act.[182] The employee's resignation letter filed did not waive this cause of action.[183] If an employee can prove that he resigned because he refused to commit an illegal act, he can effectively show constructive discharge.[184] To prove constructive discharge, the employee must demonstrate that his employer has made the employment so intolerable that the employee feels compelled to resign.[185]

The district court denied the employer's motion for summary judgment because the former employee submitted an affidavit in which he alleged he was about to be fired and that he resigned in order to preserve his ability to seek employment elsewhere.[186] The affidavit further alleged the circumstances in which he claimed that he was being asked to participate in a cover up of the facts and violations that would have led to a potential criminal violation of the federal Clean Air Act.

The company alleged that his affidavit contained reasons other than the alleged criminal conduct that caused him to resign and that this was not the sole reason for his resignation. The district court ruled that all of these facts and their inferences were better left to trial and that no summary judgment could be issued.[187]

In considering the potential criminal acts, the district court reviewed Section 7401 and Section 7413(c) of the Clean Air Act, which sets out criminal penalties for violations of the Act.[188] The district court concluded that the pleadings of the plaintiff, if true, would show that he was pressured to abet corporation's criminal activity that could result in his own criminal liability under the Clean Air Act.[189] At least two Texas cases have held that this is sufficient to meet the *Sabine Pilot* exception to the employment-at-will doctrine and the ability to terminate employees

178. *Id.* at *8.
179. *Graham*, 2006 WL 435711, at *2-3.
180. *Id.*
181. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).
182. *Graham*, 2006 WL 435711, at *2-3.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at *3.
187. *Id.* at *4.
188. *Id.*
189. *Id.*

without cause.[190]

VI. CRIMINAL PROSECUTION FOR ENVIRONMENTAL VIOLATIONS

A. Constitutional Challenge of Texas Water Code Provision against "Allowing" Pollution to Occur

Vagueness challenges are not uncommon in challenges to criminal prosecutions under environmental statutes. These statutes are frequently drafted broadly, and the meaning of words or the applications of the prohibitions or requirements may often create an opening for challenging the lack of specificity in the act. During the Survey period, Valero Refining-Texas L.P. ("Valero") challenged a section of the Texas Water Code that prohibited a person from "allowing" a discharge of any waste or pollutant into any water in the state.[191]

The first challenge was to the Water Code provisions because they criminalized an act without identifying to whom the duty applied.[192] The court considered United States Supreme Court precedent as to the vagueness and the issue of awareness of the criminal conduct. The court cited *United States v. Park*[193] in particular and considered that the environmental statutes, like the Texas Water Code, are strict-liability statutes, which do not require that the defendant be aware that his conduct is a criminal act.[194] The court stated that for certain types of actions, the federal and state legislators eliminated the requirement of a culpable mental state.[195] The court concluded that, based on federal and state precedent, for a strict-liability regulatory statute, the mere omission or failure to act is sufficient to convict a responsible corporate agent or the corporation.[196] The court said that the ability to prevent the act was sufficient and the Texas legislature's use of the term "allow" incorporated this "responsible-relationship concept" into the relevant provision of the Texas Water Code.[197]

The court then turned to the meaning of the term "allow." Since that statute did not define it, the court reviewed the plain meaning—"to neg-

190. Morales v. Simuflite Training Int'l, Inc., 132 S.W.3d 603, 608-09 (Tex. App.—Fort Worth 2004, no pet.); Higgenbotham v. Allwaste, Inc., 889 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

191. Valero Ref.-Tex. L.P. v. Texas, 203 S.W.3d 556, 558 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

192. *Id.* at 560-61. Valero relied upon the Court of Criminal Appeals decision in which the court deemed vague a statute that required parties to obtain medical help to people over the age of sixty-five, since the people to whom the provision would apply was not clear, but appeared to apply to everyone. Billingslea v. State, 780 S.W.2d 271, 275-76 (Tex. Crim. App. 1989).

193. 421 U.S. 658, 668 (1975); *see also* Am. Plant Food Corp. v. State, 587 S.W.2d 679, 684-86 (Tex. Crim. App. 1979) (noting the strict-liability of the water-pollution provisions).

194. Valero, 203 S.W.3d at 561.

195. *Id.*

196. *Id.* (citing *Park*, 421 U.S. at 671; U.S. v. Dotterweich, 320 U.S. 277, 280-81 (1943)).

197. *Id.*

lect to restrain or prevent."[198] Relying on Supreme Court precedent in interpreting these types of statutes, these terms were interpreted to require that the person have control over what is being allowed; thus the court construed Section 7.147 of the Texas Water Code to impose a duty on persons who have the ability to control the discharge of pollutants.[199] Moreover, the court ruled that this provision requires responsible persons "to seek out and remedy violations when they occur but also, and primarily, [they have] a duty to implement measures that will insure that violations will not occur."[200] Finally, the court ruled that the defendant could not show that it was outside the group of persons that the statute was designed to reach.[201]

VII. CONCLUSION

We hope the review of the cases in the courts or involving individuals or entities in Texas has demonstrated what was suggested in the Introduction, that the issues are rich and diverse in the Texas environmental-law field. In reviewing these cases, it is important to consider these Constitutional issues these cases raise. As has been the case over the last several decades, many of the most interesting constitutional questions arise—particularly relating to the Commerce Clause—in environmental cases. The extent to which the federal government may regulate wetlands or rivers and streams under the Clean Water Act impacts not only water-pollution prevention and preservation of natural water bodies but also extends to the federal government powers in general.

The debate over the extent of an individual's or entity's private right of action to recover hazardous-waste-clean-up costs raises questions of how courts will interpret other private contribution rights under other statutes. The public-policy issues of whether private parties will be encouraged to take action to address a public concern without first having the government issue an administrative order or commence a lawsuit lie at the heart of the debate of CERCLA cost-recovery actions.

The debate over the ability to release claims and avoid future fraud claims in as-is clauses and the environmental liabilities that go undiscovered by land buyers, addresses public-policy issues in the center of commercial transactions. The concerns of enforcing privately negotiated contracts and the government's and court's responsibility to police and prevent fraud in commercial activities compete; and the degree to which such opposing objectives win out serves as yet another example of when environmental matters or liabilities drive business decisions, valuation of certain assets and companies, and the legal rules that govern commercial behavior and contracts.

198. *Id.* at 562.
199. *Id.*
200. *Id.* (quoting *Park*, 421 U.S. at 672-73).
201. *Id.* at 563.