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ENVIRONMENTAL LAW

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I. INTRODUCTION

DURING the Survey period, a rich variety of environmental issues and claims were adjudicated by state and federal courts. Texas courts addressed questions of how parties may seek to address environmental risks and liabilities in litigation arising from real-estate transactions; how citizen groups may seek to redress injury resulting from statutory violations by power plants; and how parties may recover clean-up costs under Texas and Federal clean-up statutes.

Several criminal cases were also decided during the Survey period. The most important of which derives from a provision added to the criminal code by the passage of the Sarbanes-Oxley Act. This provision imposes criminal liability on persons who "alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any documents with the intent to impede, obstruct, or influence the investigation or administration of any matter within the jurisdiction of any federal agency."[1] The case involved the alleged tampering with records the Coast Guard inspects as part of its statutory duties. Regulated persons should take notice of the risk of criminal liability, as advised in last year's Environmental Law Survey article, when tampering with or falsifying any documents being managed under federal environmental statutes.[2]

These cases bring to the courts the never-ending fascinating issues, controversies, and needs of development and natural resource use and the protection of air, water, land, flora and fauna, and their habitat.

II. ENVIRONMENTAL DISPUTES IN REAL ESTATE TRANSACTIONS

Environmental lawsuits arising from real estate transactions have been a frequent issue in previous Environmental Law Survey articles. This Survey period is no exception. For instance, in *In re Kimberly-Clark Corp.*, the Dallas Court of Appeals addressed issues involving a buyer's ability to conduct an inspection of property for the purpose of assessing potential environmental contamination following the breakdown of the underlying real-estate transaction.[3] In this case, a real estate company apparently failed to conduct an environmental assessment prior to the expiration of its due diligence period and then sought to conduct such assessment in an extended closing period.[4] When the seller refused to permit the buyer's environmental consultant to enter the property to conduct testing, the buyer filed suit to gain such inspection and then sought access for testing as part of discovery. For several reasons discussed be-

1. 18 U.S.C. § 1519 (Supp. 2005).
2. Scott D. Detherage, Brendan Lowrey, and Chris Smith, *Environmental Law*, 60 SMU L. REV. 987, 1008 (2007).
3. *In re* Kimberly-Clark Corp., 228 S.W.3d 480, 483 (Tex. App.—Dallas 2007, orig. proceeding).
4. *Id.*

low, the Dallas Court of Appeals ruled against the potential buyer.[5]

Cases involving real estate transactions and environmental issues often provide lessons for those who are involved in these transactions. Here, it is clear the court was not as sympathetic to the buyer, but rather considered the overriding issue in the balance of equities in the discovery dispute to be the potential for the seller to discover environmental conditions requiring government reporting and to potentially incur costs to conduct further investigation and remediation.

This case involved the sale of the historic Texaco building in Houston. Kimberly-Clark owned the building, and in August 2006, Ashkenazy & Agus ("Agus") entered into a contract to purchase the property for $18.8 million.[6] The contract contained fairly standard provisions: an "as-is" provision, detailed disclaimers, waivers, and releases relating to environmental conditions, a review period permitting environmental assessment and testing (although the seller's consent was required to conduct any invasive testing), and a requirement that the seller provide buyer copies of all environmental records, reports, and testing in the seller's possession.[7] The contract provided that the seller had "no actual knowledge of the presence or existence of any hazardous substances" on the property. This type of provision is often a matter of negotiation. Sellers typically seek to avoid representations on environmental matters in an attempt to support the as-is nature of the sale. Buyers seek to obtain representation and warranty provisions to ensure that no known conditions are hidden by the seller and that a fraud claim may be maintained if a condition is not disclosed.

The real heart of this case appears to be the failure of the buyer to conduct testing within the due diligence period. It is not clear from the decision why the buyer did not conduct a Phase II Environmental Site Assessment ("ESA") and thereby test the soil and groundwater at the property. Prior environmental testing was conducted; in August 2006, Kimberly-Clark sent Agus a Phase II ESA Report dated January 1999, and a subsequent Phase I ESA Report dated April 12, 2001, which disclosed the existence of two sets of underground storage tanks.[8]

The buyer then entered into an agreement with the seller to extend the contract in October of 2006, but the extension stated that the due diligence period had expired.[9] It is not clear why the buyer did not attempt to extend the due diligence period as part of the contract extension. It may be that certain escrow money had been paid and, based on the terms of the agreement, it would not be refunded. This may have motivated the buyer to enter into an extension even without any additional time to conduct an environmental investigation.

5. *Id.* at 493.
6. *Id.* at 483.
7. *Id.*
8. *Id.*
9. *Id.*

However, in February 2007, the buyer claimed its lender required a Phase II ESA and would not proceed with financing without an investigation of the underground tanks that were located on the property. The buyer sent an environmental consulting firm to the property to conduct an investigation of the tanks.[10] Kimberly-Clark would not permit access to the site to conduct testing, and turned away the environmental consultant. Agus contended that the parties then entered into an agreement to extend the closing beyond the original closing set for February 28, 2007, to allow the buyer time to work through the environmental concerns of its lender. However, the seller argued that because no additional escrow money had been deposited, the extension had no effect and as a result the closing date was unchanged.[11]

On February 27, 2007, the day before that closing date, litigation ensued. Agus sued Kimberly-Clark and the title company for common law fraud, statutory fraud in a real-estate transaction, and negligent misrepresentation. Agus also sued Kimberly-Clark alone for breach of contract and deceptive trade practices; and the title company alone for negligence and breach of fiduciary duty.[12] The claims were subsequently amended, but the main issue on appeal was Agus's claim for a declaratory judgment allowing them to test the soil and groundwater in the area adjacent to the underground storage tanks, or in the alternative, a ruling that their elected termination of the agreement within fifteen days of receiving the soil tests would be for good cause.[13] The buyer also sought a temporary restraining order to prohibit the release of the escrow money and sale of the property to a third party. The trial court granted the temporary restraining order.[14]

The crux of the reported case, however, dealt with the discovery request to obtain access to the property to conduct the soil testing sought in the declaratory judgment. The trial court granted this request, and the seller sought a writ of mandamus from the court of appeals to reverse the discovery order.[15] The justification for the study was that the buyer needed the data to show that the seller fraudulently induced the buyer to enter into the contract by not disclosing the environmental conditions of the property. The court of appeals found that the buyer could not obtain through discovery what it was seeking in its declaratory judgment action.[16] The court concluded that the testing alone would not prove fraud, and the risk to the seller was that it would be burdened with reporting to the state any contamination found and have to remediate the property, and, thus, ordered the buyer to engage in traditional discovery to prove

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 483-84.
14. *Id.*
15. *Id.* at 484.
16. *Id.* at 491.

any fraud claim.[17]

III. CLEAN AIR ACT CASES

A. Citizens Suit Against Coal-Fired Power Plants

In *Public Citizen v. American Electric Power Co.*,[18] the plaintiffs filed suit under the citizen suit provisions of the federal Clean Air Act ("CAA")[19] against a utility that operates a coal-fired power plant. The dispute before the U.S. District Court for the Eastern District of Texas in Texarkana involved various alleged violations, including claims that the owner and operator of the plant violated the "prevention of significant deterioration" ("PSD") permit and the "State Implementation Plan" for excessive carbon monoxide and sulfur emissions, as well as state permits and regulations.[20] The defendants, American Electric Power and its subsidiary that owned the refinery, Southwestern Electric Power (collectively, "AEP"), filed a motion to dismiss for failure to state a claim.

AEP challenged the notice letters sent by Public Citizen and the Sierra Club because they failed to provide any description of the alleged violations and when they occurred.[21] The second letter merely stated that the carbon monoxide violations occurred "on numerous occasions." AEP claimed that the first letter was even less detailed than the second. The citizen groups responded that the letter need not identify every detail, but only provide sufficient information so that the recipient of the notice letter may identify those details, and that a range of times in which the alleged violations occurred is sufficient.[22] According to the citizen groups, data or dates are not required in the notice letter.

The federal district court reviewed the law and prior precedent and ruled that an allegation of particular activities and a range of years is sufficient to state in a pre-suit notice under a federal environmental statute.[23] The court found that the statements in the notice letter that carbon monoxide violations occurred at all three units at the power plant since at least 2000 were sufficient to meet the statutory notice requirements prior to filing suit.[24]

AEP also challenged the standing of the plaintiffs to file suit under the CAA.[25] The basis for this allegation was that the plaintiffs asserted purely past violations, not ongoing violations. AEP also argued that the allegations were for prior permits, and that the permits no longer had any effect. The citizen groups argued that the past violations allow a citizen

17. *Id.* at 489-90.
18. No. 5:05-CV-39-DF, 2006 WL 3813766, at *1 (E.D. Tex. Dec. 27, 2006) [hereinafter *AEP I*].
19. *See* 42 U.S.C. § 7604 (2000).
20. *AEPI*, 2006 WL 3813766, at *1.
21. *Id.* at *3.
22. *Id.*
23. *Id.* at *4.
24. *Id.*
25. *Id.* at *5.

suit if there is evidence that the violations have been repeated.[26] The plaintiffs further argued that the permit rule on which the defendants relied was a state rule, and does not provide a defense under federal law. Citing the United States Supreme Court decision in *Friends of the Earth v. Laidlaw*,[27] the plaintiffs argued alternatively that the imposition of penalties payable to the U.S. Treasury provides a sufficient remedy for their grievance.[28] The defendants argued that *Laidlaw* actually supports dismissal because award of civil penalties do not provide redress because the citizen groups have not demonstrated that they "face[ ] the threat of future injury due to illegal conduct ongoing at the time of suit."[29]

The federal district court in applying *Laidlaw* recognized that citizen suit plaintiffs cannot bring other claims for violations that have abated at the time of suit, but that they have the ability to bring claims under certain circumstances.[30] The court focused on whether the plaintiffs alleged sufficient facts to show ongoing or potential future violations of the federal PSD permit, which depends on whether the carbon monoxide emissions limitation was a federal or a state-only requirement. If the carbon monoxide limit is required by federal law, "the requirement could not have been changed by the standard pollution control permit without federal approval."[31]

The citizen groups argued that carbon monoxide ("CO") is a "criteria pollutant" under the CAA and, as such, is subject to PSD permitting. The citizen group claimed that since AEP "represented certain CO emission levels in PSD permit application materials in 1978, and that [their] 1998 permit set out CO emission limits for Welsh Plant Unit 2," those limits became part of the federal PSD permit.[32] The court, however, did not rule on whether the CO limits constituted a PSD requirement. Rather, the court noted that it was *possible* that the CO limits were incorporated into the PSD requirements. Therefore, because all doubts must be resolved in favor of the plaintiff at the stage of a motion to dismiss, the court found that the citizen groups "alleged sufficient facts to show . . . CAA violations, and the claim should not be dismissed."[33]

AEP also challenged the sufficiency of the citizen group plaintiffs' notice letters regarding their claim of excessive sulfur dioxide limits. The court concluded that it need not determine whether the citizen groups satisfied the notice requirement in its letters "if the fuel sulfur limit may be a PSD requirement."[34]

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26. *Id.*
27. Friends of the Earth v. Laidlaw, 528 U.S. 167, 187 (2000).
28. *AEP 1*, 2006 WL 3813766 at *5.
29. *Id.*; *see also Laidlaw*, 528 U.S. at 185; Sierra Club v. Browner, 130 F. Supp. 2d 78, 83 (D.D.C. 2001).
30. *AEP 1*, 2006 WL 3813766 at *5.
31. *Id.* at *6 (citing 42 U.S.C. § 7416 (2000)).
32. *Id.*
33. *Id.*
34. *Id.* at *7.

The citizen group argued that the fuel sulfur limit was a part of the PSD permit. Because AEP had a consolidated permit that did not distinguish any of its terms as PSD or non-PSD the citizen group argued that first, "the original state permits did not contain a fuel sulfur limit;" second, AEP's "representations in its 1976 PSD permit application that it would use low-sulfur coal in its units is federally enforceable pursuant to 40 [C.F.R.] § 52.21(r)(1);" third, "regulators may add terms to PSD permits after such permits are issued."[35]

AEP argued that the consolidated permit's label "merely shows that at least one of the permits consolidated into the one permit was a PSD permit;" that it did not make all aspects of the consolidated permit a PSD permit or any particular part of the permit; and that the PSD permit does not incorporate representations made in the PSD permit application.[36] The citizen groups provided a document issued by the Texas Commission on Environmental Quality "indicating that representations about fuel sulfur content were made in 'permit renewal applications and follow up requests for information' relating to the consolidated permit."[37]

The court reviewed these arguments and again noted that the areas of doubt should be construed in favor of the plaintiff in deciding a motion to dismiss. The court concluded that a state may add limitations upon renewal of a PSD permit and that a fuel sulfur limit may be a PSD limit.[38] Further, the court concluded that a PSD limit violation need not be specifically noticed to bring a citizen suit.[39]

In a second decision issued by the court, the plaintiff citizen groups filed a motion for summary judgment.[40] The motion for summary judgment sought four rulings:

> (1) heat input limits in the . . . [AEP] permit are "standards or limitations" within the meaning of the Clean Air Act; (2) the particulate matter limit in the . . . [AEP] permit is a limit on the sum of filterable and condensable particles; (3) there is no exemption for one opacity exceedance per hour; and (4) . . . [AEP is] liable and subject to injunctive relief and penalties for opacity exceedances that result from maintenance activities.[41]

The defendants responded by challenging the plaintiffs' ability to seek declaratory relief because they had not filed for relief under the federal Declaratory Judgment Act. The parties also disputed whether a summary judgment can address partial claims and narrow issues before the court.

One of the issues was whether an exemption from the PSD requirements applied for an opacity emission that exceeded the relevant stan-

35. *Id.*
36. *Id.*
37. *Id.* at *8.
38. *Id.*
39. *Id.*; *see also* 42 U.S.C. § 7604(a)(3) (2000).
40. Pub. Citizen v. Am. Elec. Power Co., No. 5:05-CV-39-DF, 2006 WL 3813762, at *1 (E.D. Tex. Dec. 27, 2006) [hereinafter *AEP 2*].
41. *Id.*

dard for one six-minute period for every hour. Opacity is a measure of soot or particulates emitted from an emissions stack. The "New Source Performance Standard" ("NSPS") permits an exception for such limited temporal events,[42] but the plaintiffs argued that the AEP permit limits did not.[43]

AEP argued that the data relied upon by the citizen groups was derived from data gathered from electronic emissions monitoring, and an NSPS violation can only be based on the Environmental Protection Agency's ("EPA") visual test method. On the other hand, the plaintiffs argued that the "credible evidence rule" applied, "which provides that citizens bringing private suits may use any credible evidence to establish a violation."[44] Additionally, the plaintiffs' assert that the EPA has rejected the AEP's claim "that test methods that increase [the] stringency [applied to capacity limits] are not allowed."[45]

The court concluded that the interpretation and application of Texas regulations and federal regulations were factual questions and denied the plaintiffs' motion for summary judgment on these issues.[46]

The next issue related to whether an exemption for maintenance exceedances applied. Plaintiffs argued that there was no exemption, and defendants asserted that the exceedances were "exempt as 'startup,' 'shutdown,' or other exempt activities."[47] AEP relied upon an exemption "during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard,"[48] and a Texas interpretation of this provision.[49] For purposes of the summary judgment motion, again the court deferred to the non-movant's factual arguments, ruling that summary judgment would be denied as a result of a factual question.[50]

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42. *Id.* at *3 (citing 40 C.F.R. § 60.42(a)(2) (2007) ("[N]o owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases that . . . [e]xhibit greater than 20 percent opacity except for one six-minute period per hour of not more than 27 percent opacity.")).

43. *Id.* at *3-4.

44. *Id.* at *4 (citing 62 Fed. Reg. 8314, 8317 (Feb. 24, 1997), and 40 C.F.R. § 60.11(g)).

45. *Id.* at *4 (citing Sierra Club. v. Tenn. Valley Auth., 430 F.3d 1337, 1348 (11th Cir. 2005), and 62 Fed. Reg. 8314, 8326 (Feb. 24, 1997)).

46. *Id.* at *4. Texas rules provide that opacity "must not exceed 20 percent averaged over a six-minute period," except for certain periods; described as follows:

> Visible emissions during the cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, and rapping of precipitators may exceed the limits set forth in this section for a period aggregating not more than six minutes in any [sixty] consecutive minutes, nor more than six hours in any [ten]-day period.

30 TEX. ADMIN. CODE § 111.111(a)(1)(B), (E) (2008).

47. *AEP 2*, 2006 WL 3813762 at *5.

48. *Id.* (quoting 40 C.F.R. § 60.11(c)).

49. *Id.* (citing 30 TEX. ADMIN. CODE § 111.111).

50. *Id.*

B. Citizens Group Fails its Challenge of Federal Settlement of Violations of Consent Decree

The case of the *United States v. Alcoa, Inc.*[51] 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. ("Alcoa") claiming 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 their permit limits for nitrogen oxides ("NO_x"), sulfur dioxide ("SO_2"), and particulate matter ("PM"). The parties entered into a settlement and the court entered a consent decree on July 28, 2003 ("the consent decree"). The consent decree allowed Alcoa three options to continue to supply electricity to its aluminum plant, and Alcoa chose to replace the existing lignite-powered units and construct new ones to apply the pollution controls consistent with new permit limits.[52] The settlement required Alcoa to begin construction on the first new units within nineteen months of receiving a Texas Commission on Environmental Quality ("TCEQ") permit amendment, and that Alcoa must have commenced construction on all of the new units within twenty-three months of receiving the TCEQ permit amendment.[53] The old units would be retired as the new units became operational, the first of which would begin operation by April 25, 2007.

Alcoa decided to seek out a partner in the electricity utility business and enter a joint venture to construct and operate the new power plant, which would not only sell power to Alcoa, but to other parties as well.[54] Alcoa's goal was to obtain reduced rates for electricity. Such negotiations were unsuccessful, and Alcoa was facing a construction start date of April 25, 2004. Alcoa informed the plaintiffs that it had initiated construction by this date, but little work occurred thereafter. In September or October of 2005, Alcoa began discussions with TXU Corporation ("TXU") about a partnership concerning the new power plant.[55] An agreement was reached by which a TXU subsidiary would own and operate the new plant and be bound by the consent decree.

The original TCEQ permit expired on March 25, 2005, but Alcoa obtained an extension allowing construction to commence to September 25, 2006. The agreement with TXU allowed construction of the new plant and shut down the existing plants, but not within the time frames provided in the consent decree. The consent decree provided for payment of stipulated penalties for failure to comply with its terms.[56]

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51. No. A-03-CA-222-SS, 2007 WL 628710 (W.D. Tex. Feb. 27, 2007).
52. *Id.* at *1.
53. *Id.*
54. *Id.* at *2.
55. *Id.*
56. *Id.*

The plaintiffs asserted that Alcoa failed to meet the consent decree's deadline to construct the power plant "because the construction undertaken in 2005 was minimal, was followed by a long period of inactivity, and was not utilized by the construction begun in 2006" on the replacement power plant.[57] While Alcoa contested these assertions, it agreed that the replacement power plant would not be completed within the timeline of the consent decree.

The United States, Alcoa, and the TXU subsidiary negotiated a stipulated order to address the violations of the deadlines in the consent decree.[58] As is required, the settlement was published in the federal register for public comment.[59] In response to public comments, an amended stipulated order was submitted to the court. The order contained the following major points:

(1) release of all claims arising from the construction delay;

(2) payment of $859,000 in stipulated penalties;

(3) shutdown three of the older power plants three months earlier than the consent decree required;

(4) commence operation of the single replacement power plant by August 2009—the first plant was required under the consent decree to come on line by April 2007;

(5) achieve twenty percent lower NO_x emissions than required by the consent decree, and to further reduce NO_x emissions if determined to be feasible;

(6) achieve twenty-five percent lower SO_2 emissions than required by the consent decree, and to further reduce SO_2 emissions if determined to be feasible;

(7) install a selective catalytic reduction system to eliminate most of the NO_x emissions from the one older power plant that will remain in operation, not addressed by the consent decree; and

(8) addition of the TXU subsidiary as a party to the consent decree to be jointly and severally liable with Alcoa to meet its obligations.[60]

The citizen groups objected to the stipulated order primarily because the consent decree did not require Alcoa to seek a new permit requiring tougher restrictions on the new power plants' emissions. The citizen groups contended that the imposition of more stringent requirements was an appropriate sanction for failure to timely initiate construction.[61] Another objection was that the court was modifying the consent decree, when by its terms it required agreement of all parties. The court, however, concluded that this was within its power.[62]

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57. *Id.* at *2.

58. *Id.* at *3.

59. *See* Notice of Filing of Proposed Stipulation to Resolve Certain Alleged Violations of a Clean Air Act Consent Decree With Alcoa, Inc., 71 Fed. Reg. 7,640-01 (Nov. 22, 2006).

60. *Id.*

61. *Id.* at *4.

62. *Id.* (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 373 n.2 (1992)).

The court also held that the reductions in air emissions would be greater than the original consent decree.[63] But the court noted that reductions would be required in the modification of a power plant that would not have been addressed under the consent decree. Moreover, the TCEQ granted an extension or modification to the construction permit, with which the court was not willing to interfere.[64] Ultimately, the court held Alcoa in contempt of court, and ordered it to pay $50,000 to the government, $80,000 to the citizens groups for attorneys fees, and $100,000 into an environmental mitigation fund.[65]

C. Neighbor's Challenge of TCEQ Issuance of a Standard Permit for a Concrete Batch Plant

Concrete and asphalt batch plants are frequently the source of complaints and permit challenges by neighboring landowners. These parties generally are concerned about the dust, emissions, and truck traffic caused by these plants. In *Rawls v. Texas Committee on Environmental Quality*,[66] a neighbor filed suit challenging the TCEQ's grant of a standard permit application for a concrete batch plant. The crux of the problem with the suit was the failure of the neighbor to follow the procedures set out in the regulations thereby exhausting his administrative remedies.

The main procedural issue was the neighbor's failure to request a contested case hearing.[67] All persons living within 440 yards of the proposed plant may request a contested case hearing.[68] The notice further states that if a contested case hearing is not requested within fifteen days, the TCEQ can approve the application and no further opportunity for hearing will be provided.[69]

The neighbor conceded that he had not requested a contested case hearing within fifteen days after the notice was published in the local newspapers. However, the neighbor appealed the trial court's dismissal, for lack of jurisdiction, of the lawsuit challenging the TCEQ's grant of the standard permit. The neighbor "contend[ed] that the trial court had jurisdiction because he exhausted his administrative remedies before filing suit, that it was unnecessary to do so because his suit presented a question of pure law, and that [the] plant was ineligible for a standard permit."[70]

The court ruled that the exclusive jurisdiction belonged to the TCEQ and the neighbor could challenge the TCEQ's issuance of a standard permit only through the contested case hearing process.[71] Only after the

63. *Id.*
64. *Id.* at *5.
65. *Id.* at *9.
66. No. 11-05-00368CV, 2007 WL 1849096 (Tex. App.—Eastland June 28, 2007, no pet.) (mem. op.).
67. *Id.* at *3.
68. Tex. Health & Safety Code Ann. § 382.05195, .05198-.05199 (Vernon supp. 2006).
69. *Rawls*, 2007 WL 1849096, at *1.
70. *Id.*
71. *Id.* at *2.

contested cases hearing process had been exhausted could the neighbor seek judicial relief because, without doing so, the administrative remedies had not been exhausted and no court appeal was available.[72] The public notice and comment process does not open the door to such a judicial challenge, as it was designed to allow the general public to participate in the informal process for administrative decision making.[73]

The neighbor then challenged the need to meet the exhaustion of administrative remedies requirement by arguing the issue he raised was purely an issue of law and no fact issues were at stake. But a court does not allow on to escape the requirement of exhausting administrative remedies merely because the question is purely legal. Otherwise, this would allow a mere collateral attack of a governmental agency's decision.[74] Regardless, the court ruled that factual issues had not been resolved, so no exception to the requirement would apply.[75] The court therefore dismissed the neighbor's appeal.

IV. CLEAN WATER ACT CASES

The United States District Court for the Northern District of Texas considered the preclusive effect of a consent decree in *Environmental Conservation Organization v. City of Dallas*.[76] In this case, an environmental citizens group known as the Environmental Conservation Organization ("ECO") brought suit in December of 2003, against the City of Dallas ("City") for violations of the federal Clean Water Act ("CWA"), alleging that the City failed to comply with the City's storm water discharge permit, issued by the EPA, and the City's storm water plan prepared under the permit.

In February of 2004, the EPA issued a compliance order citing the City with violations of the City's storm water plan, including many of the violations alleged by ECO in its suit. Over the following two years, the City and the EPA negotiated and entered into a consent decree to resolve "the violations alleged in the [c]ompliance [o]rder through the date of lodging."[77] In May of 2006, the United States and the State of Texas sought judicial approval and entry of the consent decree, and the court entered the consent decree as its final judgment in August of 2006.

As a result of the prior case, the City moved for summary judgment against ECO on the basis that the entry of the consent decree was *res*

72. *Id.* at *2-3 (citing TEX. HEALTH & SAFETY CODE ANN. § 382.05199(f) (Vernon Supp. 2006); TEX. GOV'T CODE ANN. §§ 2001.051, .081, .087, .091 (Vernon 2000)).

73. *Id.*

74. *Id.* at *4 (citing Grounds v. Tolar Indep. Sch. Dist., 707 S.W.2d 889, 892 (Tex. 1986), *abrogated in part on other grounds by* Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000); MAG-T, L.P. v. Travis Cent. Appraisal Dist., 161 S.W.3d 617, 635 (Tex. App.—Austin 2005, pet. denied); Benavides Indep. Sch. Dist. v. Guerra, 681 S.W.2d 246, 248-49 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)).

75. *Id.* at *5.

76. 516 F. Supp. 2d 653 (N.D. Tex. 2007).

77. *Id.* at 656.

judicata as to all claims asserted by ECO.[78] The court noted that "the Fifth Circuit has never considered whether *res judicata* applies to a citizen enforcement action under the CWA," but pointed out that the federal courts that have considered the issue have concluded that *res judicata* applies to a citizen suit even when the suit was filed before the government filed suit and obtained a judgment based on the same violations alleged in the citizen suit.[79]

ECO argued that *res judicata* was not applicable to a citizen suit if the government failed to initiate an enforcement proceeding within sixty days of receiving notice of the alleged CWA violations.[80] Under the CWA, a citizen suit may not be filed prior to sixty days after notice of the alleged violation has been provided to the EPA, the state in which the alleged violation occurred, and the alleged violator.[81] The court reasoned that this notice requirement was a jurisdictional prerequisite, but that it did not address the preclusive effect of a consent decree.[82]

ECO also argued that the City failed to establish the *res judicata* defense on two bases.[83] First, ECO was not a party to the consent decree or litigation by which the consent decree was approved and entered, and ECO argued it was not in privity with EPA and Texas because the government did not diligently pursue the case.[84] Making the assumption that diligent prosecution is required, the court concluded that a government prosecution and consent decree should be sufficient to demonstrate diligent prosecution.[85] Accordingly, the court held, "as a matter of law, that the EPA and the State of Texas diligently prosecuted their enforcement action against the City as evidenced by the comprehensive relief obtained in the Consent Decree."[86]

Second, ECO argued that the City failed to establish the *res judicata* defense by claiming that the consent decree did not resolve all of the claims raised in ECO's citizens suit.[87] To evaluate this claim, the court used the "transactional test" and evaluated whether the citizen suit and the EPA enforcement order, suit, and consent decree were "based on the 'same nucleus of operative facts.'"[88] The court noted that the consent decree expressly resolved the issues alleged in the compliance order, and

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78. *Id.* at 656-57.
79. *Id.* at 657.
80. *Id.*
81. *Id.* at 658 (citing 33 U.S.C. § 1365(b)(1)(A) (2000)).
82. *Id.*
83. The court stated the four elements of the test for *res judicata*:
> (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action; (2) the judgment in the prior case was rendered by a court of competent jurisdiction; (3) there has been a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits.

Id. at 657.
84. *Id.* at 658.
85. *Id.*
86. *Id.* at 659.
87. *Id.* at 658.
88. *Id.* at 659.

that the compliance order specifically addressed various violations of the City's storm water plan, including those alleged by ECO. Accordingly, the court held that ECO was precluded from litigating the same claims in a citizen suit and granted the City's motion for summary judgment.[89]

Because the EPA continues to use consent decrees as an enforcement tool and increases its efforts to use consent decrees on an industry wide basis,[90] cases such as this one are important to the regulated community and highlight some issues to keep in mind while negotiating a consent decree. For example, although the EPA has resisted including specific language in consent decrees regarding diligent prosecution, those negotiating consent decrees should seek language or an indication that the consent decree is comprehensive. Additionally, although it may not be absolutely necessary, both the EPA and the regulated community should want consent decrees to be clear about the scope of alleged violations and issues resolved in a consent decree so that res judicata will be applicable to those alleged violations and issues. If entering a consent decree will not provide final resolution of those violations and issues, the EPA will have difficulty finding parties willing to enter into a consent decree, since the regulated community will avoid the possibility of entering a consent decree and later litigating the same issues.

V. REMEDIATION COST RECOVERY ACTIONS

A. Cost Recovery Action Under CERCLA

In June of 2007, the United States Supreme Court issued its decision in *United States v. Atlantic Research Corp.*,[91] significantly altering the cost recovery and contribution scheme under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Prior to that decision, however, the United States District Court for the Southern District of Texas considered a number of cases involving CERCLA cost recovery issues. Although portions of the Southern District cases were effectively overruled by the *Atlantic Research* decision, the Southern District cases did reach conclusions on a number of issues not affected by the *Atlantic Research* decision. One of these cases, *Differential Development-1994, Ltd. v. Harkrider Distributing Co.*,[92] involved perchloroethylene (perc) releases from a dry cleaner.

In *Differential Development*, the plaintiffs were, first, the owners of a shopping center and, second, the operators of a dry cleaning business at the shopping center. The plaintiffs alleged that they began an investigation and cleanup of the perc in soil and groundwater at the shopping center.[93] The plaintiffs also entered into a Voluntary Cleanup Program

89. *Id.* at 659-60.

90. Examples of industries in which EPA has entered into a number of similar consent decrees include the petroleum refining industry and the construction industry.

91. 127 S. Ct. 2331 (2007).

92. 470 F. Supp. 2d 727 (S.D. Tex. 2007).

93. *Id.* at 730.

("VCP") agreement with the TCEQ. The VCP agreement did not contain any admission of liability.[94] The plaintiffs sued the City of Houston, Harkrider Distributing Co., and Safety-Kleen Systems, Inc., asserting CERCLA cost recovery and contribution claims.

The plaintiffs alleged that the City of Houston caused or contributed to the dry-cleaning solvent contamination because wastewater containing perc was discharged to the City's sewer system, which leaked from cracks and gaps in the sewer lines near the shopping center.[95] The plaintiffs alleged that Harkrider and Safety-Kleen caused, or contributed to, the contamination at the shopping center due to spills from service or delivery trucks and product or water containers. Harkrider and Safety Kleen moved to dismiss the CERCLA claims.

One of the issues considered by the court was whether the VCP agreement was sufficient to establish a contribution claim under section 113(f)(3)(B) of CERCLA.[96] To claim contribution, the party seeking contribution must have entered into "an administrative or judicially approved settlement . . . ."[97] The court noted that the VCP agreement did not state that it resolved any CERCLA liability, did not mention CERCLA, was expressly not an admission of liability, and clearly stated that it did not resolve any claim against the participating parties.[98] Further, the Certificate of Completion issued at the completion of a successful cleanup under the VCP did not contain any statement releasing VCP participants from state or federal CERCLA claims. The agreement required to trigger section 113(f)(3)(B) of CERCLA is a final settlement resolving CERCLA liability to the United States or a state. Because the VCP agreement did not resolve any claims, the court concluded it was not sufficient to trigger a right to contribution.[99]

The plaintiffs also claimed that they were not potentially responsible parties ("PRPs") under CERCLA even though they owned and operated the dry-cleaning facility, because the dry-cleaning facility did not release dry-cleaning solvent into the environment. Rather, the plaintiffs argued that the dry-cleaning facility released solvent into other facilities, namely the City of Houston sewer system or the trucks and containers of Harkrider and Safety-Kleen, which in turn discharged solvents into the environment.[100]

The court, however, found that neither CERCLA nor case law supported the plaintiffs' argument regarding "facility-to-facility" transfers.[101] The court noted that the term "release" under CERCLA is defined broadly and that disposal is one of the acts that qualifies as a release

94. *Id.* at 730-31.
95. *Id.* at 731.
96. *Id.* at 738.
97. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (2000).
98. *Differential Dev.*, 470 F. Supp. 2d at 740.
99. *Id.* at 743.
100. *Id.* at 747.
101. *Id.*

under CERCLA.[102] Release to a sewer or other container that subsequently leaks is considered a release to the environment.[103] PRPs include those who owned or operated a facility at the time the complaint was filed, regardless of when the disposal occurred and regardless of causation.[104] Here, the plaintiffs owned and operated the dry-cleaning facility at the time the complaint was filed. Further, the plaintiffs owned and operated the dry-cleaning facility at the time when perc was disposed of.[105] The court accordingly held that the plaintiffs qualified as PRPs under CERCLA.[106]

The United States District Court for the Southern District of Texas considered a number of other cost recovery issues under federal and state law in *Celanese Corp. v. Coastal Water Authority*.[107] In *Celanese*, the plaintiff Celanese sought recovery of costs incurred in addressing a methanol release from a damaged pipeline. Celanese discovered the leak in 2002, but alleged the damage was caused in 1978 during excavation for and installation of a water pipeline below the methanol pipeline.[108] Celanese sued the Coastal Water Authority ("Authority") and Kellogg, Brown & Root, Inc. ("KBR") alleging various actions, including cost recovery under section 107 of CERCLA and under section 361.344 of the Texas Solid Waste Disposal Act ("TSWDA"). The Authority and KBR moved to dismiss all of Celanese's claims.

The Authority sought dismissal of the TSWDA and CERCLA claims based on sovereign immunity. Celanese argued that the state had waived sovereign immunity. With respect to the TSWDA, the court pointed out that "person" is defined in the TSWDA to include a "government or governmental subdivision or agency."[109] Further, in defining the scope of persons responsible for a release, the TSWDA includes an exception for a port authority or navigation district in certain instances.[110] Because the TSWDA itself included the "government-inclusive definition of 'person,'" and because the port authority/navigation district exception would be rendered meaningless absent a waiver of immunity, the court found that "[t]he TSWDA clearly and unambiguously expresses the Legislature's intent to waive sovereign immunity."[111]

With respect to Celanese's CERCLA claims, the court analyzed whether the Authority was an arm of the state entitled to protection from suit under the Eleventh Amendment. The court, relying upon the Fifth

102. *Id.* at 748.
103. *Id.*
104. *Id.* at 749.
105. *Id.* at 730.
106. *Id.* at 749.
107. 475 F. Supp. 2d 623 (S.D. Tex. 2007).
108. *Id.* at 628.
109. *Id.* at 630 (quoting TEX. HEALTH & SAFETY CODE ANN. § 361.003(23) (Vernon 2001)).
110. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 361.271(g) (Vernon Supp. 2007)).
111. *Id.* at 631.

Circuit's six-factor test for Eleventh Amendment immunity,[112] concluded that the Authority was an arm of the state protected by the Eleventh Amendment, and accordingly granted the Authority's motion to dismiss Celanese's CERCLA claims.[113]

KBR, on the other hand, contended that it was not an arranger subject to liability under section 107 of CERCLA or the TSWDA.[114] The court stated that "[t]he Fifth Circuit has rejected a bright line test for determining arranger status," instead ruling that determination of arranger status is a case-by-case analysis of a number of non-dispositive factors, including:

> [w]hether the alleged arranger had some actual involvement in the decision to dispose of the waste, or had an obligation to dispose of the waste, engaged in a transaction for the purpose of waste disposal, owned or possessed the waste, or controlled the disposal of waste regardless of whether it owned or possessed it.[115]

"Celanese allege[d] that KBR knew about the damage to the methanol pipeline, and intentionally covered it up by backfilling soil over the damaged pipeline."[116] Celanese argued that hiding the damaged pipe was equivalent to a decision to dispose of the methanol.[117] At least at the preliminary stage of a motion to dismiss, the court found that Celanese had pleaded sufficient facts for a claim under federal notice pleading standards.[118] Thus, the court denied KBR's motion to dismiss Celanese's CERCLA claim.[119]

With respect to the TSWDA claim against KBR, the court stated that "[a]rranger liability under the TSWDA is analyzed according to the same principles as under CERCLA."[120] Thus, the court adopted its analysis of CERCLA arranger liability for the TSWDA and denied KBR's motion to dismiss Celanese's TSWDA claim.[121]

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112. The five factors used by the court were:

> (1) whether the states statutes and case law view the agency as an arm of the state; (2) the source of the entity's funding; (3) the degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; and (5) whether the entity has the right to hold and use property.

Id. at 632 (citing United States *ex rel.* Barron v. Deloitte & Touche, LLP, 381 F. 3d 438, 440 (5th Cir. 2004)).

113. *Id.* at 634.

114. *Id.* at 635.

115. *Id.* (citing Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 929 (5th Cir. 2000)).

116. *Id.* at 635-36.

117. *Id.*

118. *Id.* at 636.

119. *Id.*

120. *Id.* (citing R.R. St. & Co. v. Pilgrim Enters., Inc., 166 S.W.3d 232 (Tex. 2005)).

121. *Id.*

B. TSWDA Cost Recovery—Domestic Waste Exclusion and TCEQ Approval of Response Action

In *Vine Street, LLC v. Keeling ex rel. Estate of Keeling*,[122] the United States District Court for the Eastern District of Texas considered a case addressing a variety of cost recovery issues, both under CERCLA and the TSWDA. Two of the court's holdings will be reviewed here, one on the domestic sewage exclusion from the TSWDA definition of solid waste and the other on what is an approved response action for TSWDA cost recovery purposes. *Vine Street* involved perc contamination at a former dry cleaner site.[123] The plaintiffs alleged that the separators installed at the cleaner released perc laden water to sewage drains, and the perc escaped the sewer pipes and contaminated the site. The plaintiff sought cost recovery from a number of defendants under both the CERLCA and the TSWDA.

One of the elements of cost recovery liability is that the defendant be a person responsible for solid waste. Defendants argued that the perc in this case was not a solid waste under the TSWDA because it fell within the domestic sewage exclusion.[124] Defendants argued that the exclusion applied as soon as the perc entered a sewer system that connected with a "publicly owned treatment works" ("POTW") and would eventually mix the perc with domestic sewage, regardless of whether the perc actually ever mixed with domestic sewage.[125] The court noted that the Texas Supreme Court rejected a similar argument and held that because the perc leaked into the ground prior to mixing with domestic sewage and prior to reaching a POTW, the domestic sewage exclusion was inapplicable and the perc was a solid waste under the TSWDA.[126]

Another element of a cost recovery claim is that a plaintiff must show its costs were incurred for a removal or remedial action approved by the TCEQ.[127] The court noted that the Houston Court of Appeals for the First District found that a VCP agreement with the TCEQ and TCEQ's approval of a closure plan was sufficient to show response or remedial action approval for TSWDA cost recovery purposes.[128] In the present case, the plaintiff had entered into a VCP agreement with the TCEQ, but did not have an approved closure plan. The court pointed out that the plaintiff, the plaintiff's environmental consultant, and the TCEQ engaged in numerous correspondences discussing "the contamination, its monitoring and evaluation, and the work plan for eventual cleanup."[129] The

122. 460 F. Supp. 2d 728 (E.D. Tex. 2006).
123. *Id.* at 734.
124. *Id.* at 753-54.
125. *Id.* at 754.
126. *Id.* (citing R.R. St. & Co. v. Pilgrim Enters., Inc., 166 S.W.3d 232, 249-50 (Tex. 2005)).
127. Tex. Health & Safety Code Ann. § 361.344 (Vernon 2008).
128. *Vine St.*, 460 F. Supp. 2d at 754-55 (citing R.R. St. & Co. v. Pilgrim Enters., Inc., 81 S.W.3d 276, 299 (Tex. App.—Houston [1st Dist.] 2001), *rev'd*, 106 S.W.3d 232 (Tex. 2005)).
129. *Id.* at 755.

court stated that "[t]he removal action has been an evolving process characterized by several stages of work, plan submissions and proposals, TCEQ comments thereon, and revisions in accordance with those comments."[130] The court concluded that TCEQ had approved the steps the plaintiff had taken to address the contamination.[131]

Under *Vine Street*, a potential TSWDA cost recovery plaintiff does not have to wait until the TCEQ approves a final closure plan under the VCP and can recover costs incurred before final approval. In most cases (including *Vine Street*), significant work will be performed and significant cost incurred before that point. Especially in cases in which the person conducting the response action should bear only a minority portion of the cost, forcing the person to pay all the bill until late in the game is not equitable. The unknown question after *Vine Street* is the required amount of interaction with the TCEQ. *Vine Street* involved significant interaction. Under the rationale of *Vine Street*, however, even initial TCEQ review and discussion of investigation and steps to evaluate the contamination should suffice to trigger the right to bring a cost recovery action.

VI. ENVIRONMENTAL CRIMINAL PROCEEDINGS

A. Obstruction of Justice

The decision in *United States v. Kun Yun Jho*[132] is a good example of the wide reach of Sarbanes-Oxley legislation and application in environmental cases. The defendant Kun Yun Jho, as the chief engineer of an oil tanker, had overall responsibility for engine room operation, including the pollution control equipment. Specifically, Jho oversaw operation of the oil water separator which treated oily bilge water prior to discharge. Jho maintained oil record books tracking operation of the separator and the oil content of discharge from the tanker.[133] The Coast Guard inspected these oil record books. The United States alleged, *inter alia*, that Jho falsified entries in the oil record book and charged him with conspiracy to violate 18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation, or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined . . . [or] imprisoned . . . .[134]

Jho moved to dismiss the charges, arguing that an investigation had to be underway and that he must know of the investigation and then alter or destroy documents with intent to impede the investigation in order to

130. *Id.*
131. *Id.*
132. 465 F. Supp. 2d 618 (E.D. Tex. 2006).
133. *Id.* at 626.
134. *Id.* at 635 (quoting 18 U.S.C. § 1519 (Supp. IV 2004)).

violate § 1519.[135] Jho also argued that § 1519 is unconstitutional because it does not have a *mens rea* requirement.[136]

The court held that the drafters of Sarbanes-Oxley intended the statute "to apply broadly and be bound only by an 'intent' element and a 'jurisdictional' element."[137] The intent element does not require intent to obstruct a specific investigation, but rather "intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of" a government agency.[138] Thus, no pending or imminent investigation or proceeding or knowledge thereof is required.[139] The court further concluded that a defendant must "act *knowingly* with the *intent* to obstruct justice."[140] As to the jurisdictional element, the court ruled that the creation or destruction of evidence must affect an investigation or matter within the jurisdiction of any federal agency.[141] Accordingly, the court held that Jho could be found guilty if a jury concluded, and the facts established beyond a reasonable doubt, that Jho conspired to knowingly falsify entries in the oil record book with the intent to obstruct a matter within the jurisdiction of the Coast Guard.[142]

Environmental practitioners should take serious note of the obstruction provisions and its increased application to environmental cases. Many (if not a majority of) environmental records might be considered to be created and maintained pursuant to a federal regulatory program or to a federal program delegated to a state, and all those records fall within the jurisdiction of a federal agency. As a result, environmental record-keeping should be performed scrupulously because, in addition to exposure to potential civil penalties, federal criminal obstruction charges may be filed for suspected misstatements in environmental records or filings. Further, any knowing tampering or falsification may be considered to have been performed with the intent to obstruct. Since no knowledge of a pending investigation or proceeding is necessary, presumably any falsification, even if years before a federal agency reviews documents or information, might lead to criminal prosecution.

B. Illegal Dumping

In *Gandy v. State*,[143] appellant Gandy owned and operated an alleged recycling operation. In March of 2004, in response to an odor complaint, an investigator from Harris County Pollution Control inspected Gandy's operation and observed 3,000 cubic yards of trash and garbage. The in-

135. *Id.*
136. *Id.*
137. *Id.* at 636 (quoting Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519, 1559 (2004)).
138. *Id.*
139. *Id.*
140. *Id.* at 637 n.9 (original emphasis).
141. *Id.* at 636.
142. *Id.* at 636-37.
143. 222 S.W.3d 525 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

vestigator later explained to Gandy that "[b]ecause the trash had not been separated into specific components i.e., glass, plastic, metal, paper, etc., but was commingled with putrescible garbage," Gandy was in fact operating a solid waste facility without a permit in violation of the TSWDA.[144] The investigator visited Gandy's operation again in April and three times in May of 2004, and again observed commingled solid waste. In June of 2004, the investigator "observed approximately 4,500 cubic yards of garbage."[145] Eventually, Gandy accumulated approximately 7,000 cubic yards of waste. In June of 2004, a grand jury indicted Gandy for illegal dumping, and a jury later convicted Gandy.[146]

Gandy appealed his conviction on a number of grounds. Most relevant to environmental practitioners, Gandy claimed the trial court erred because it permitted the possibility of a non-unanimous verdict when the trial court asked the jury for a general verdict even though the allegedly violated statutes contained separate offenses.[147] The court agreed that the illegal dumping statute provides for three separate offenses even though contained in a single statute.[148] In contrast to statutes that provide for alternate means and manners of committing a single offense, the illegal dumping statute contains three provisions that begin "[a] person commits an offense if . . . ," evidencing an intention to define three separate violations.[149] Thus, the court held that disposal of litter or solid waste at a non-permitted facility; receipt of litter or solid waste for disposal at a non-permitted facility; and transportation of litter or solid waste to a non-permitted facility are all separate violations.[150] Although the court found error, the court reasoned that the jurors could not have found Gandy guilty of one of the offenses without also finding him guilty of the other offenses alleged, and held that Gandy was not harmed by the error.[151]

VII. TORT CLAIMS

A. Claim for Injury to Land Requires Ownership Interest

In 2007, the Beaumont Court of Appeals held that in order to have standing to assert a cause of action for nuisance, a plaintiff must have an interest in land. *In re Premcor Refining Group, Inc.*[152] involved two defendant energy companies' petition for writ of mandamus to compel the trial court to dismiss nuisance claims alleged in an underlying mass toxic tort case. Most of the plaintiffs in the underlying suit were minors claiming that they were damaged by emissions from a refinery in Port Arthur,

144. *Id.* at 527.
145. *Id.*
146. *Id.* at 528.
147. *Id.*
148. *Id.* at 530.
149. *Id.* (quoting Tex. Health & Safety Code Ann. § 365.012 (Vernon 2001)).
150. *Id.* (citing Tex. Health & Safety Code Ann. § 365.012).
151. *Id.* at 531.
152. 233 S.W.3d 904 (Tex. App.—Beaumont 2007, orig. proceeding).

Texas.[153] One of the causes of action asserted was nuisance.[154] None of the plaintiffs owned any real property allegedly affected by the defendants' emissions. The defendants argued that without an interest in land, the plaintiffs lacked standing to bring a nuisance claim.[155]

The court noted that, by definition, a claim for nuisance involves an invasion of another's interest in land, and under Texas law a cause of action for injury to land belongs only to the person who owns the land.[156] On that basis the court of appeals held that the trial court abused its discretion in not dismissing the nuisance claims asserted against the defendants.[157]

B. Oil Company Loses Argument that the Texas Railroad Commission Had Primary Jurisdiction over Damages to Land from Salt Water Disposal Wells

The Eastland Court of Appeals issued an opinion concerning whether a plaintiff, alleging damages caused by the misuse of salt water injection wells, could bring suit in district court without first having the matter referred to the Texas Railroad Commission ("TRC").[158] The plaintiff, Discovery Operating, Inc. ("Discovery"), owned an oil and gas lease and sued defendant American Production Co. ("BP") for damages allegedly caused by BP's misuse of two saltwater injection wells.[159] Discovery asserted claims for negligence, negligence per se, and common law and statutory waste, and alleged that BP had violated its injection well permits and TRC regulations. The trial court abated the proceedings pending a hearing by the TRC on the alleged regulatory violations.

The plaintiff filed a petition for writ of mandamus in order to vacate the trial court's order of abatement, arguing that the TRC lacked exclusive jurisdiction over the case. The court determined that because section 85.321 of the Natural Resource Code and section 7.004 of the Water Code expressly provide the right to a private cause of action for damages to land, the TRC did not have exclusive or primary jurisdiction.[160] Consequently, the court of appeals held that the trial court abused its discretion in ordering the case abated.[161]

VIII. NEPA / CONSERVATION EASEMENT

In 2007, the City of Dallas ("City") and the Texas Water Development Board ("TWDB") challenged the United States Fish and Wildlife Ser-

153. *Id.* at 905.
154. *Id.* at 906.
155. *Id.*
156. *Id.* at 907, 908.
157. *Id.* at 910.
158. *See In re* Discovery Operating, Inc., 216 S.W.3d 898 (Tex. App.—Eastland 2007, orig. proceeding).
159. *Id.* at 901.
160. *Id.* at 902-05.
161. *Id.* at 905.

vice's ("FWS") decision to establish the Neches River National Wildlife Refuge ("Refuge") on a site identified as a future reservoir.[162] In 2003, FWS began the process of creating the Refuge by conducting an Environmental Assessment ("EA") pursuant to the National Environmental Policy Act ("NEPA"). FWS concluded that the Refuge would have no significant impact on the human environment within the meaning of NEPA, and that therefore an Environmental Impact Statement was not necessary. FWS concluded that the reservoir project was speculative in the short term and far beyond the planning horizon of the Refuge proposal. Consequently, FWS determined that it could not evaluate the impacts of a future reservoir in the EA.[163]

The City, TWDB, and FWS negotiated in 2005 and 2006 to try to develop a compromise plan to allow both the Refuge and the planned reservoir.[164] In June 2006, the FWS Director approved the EA, and FWS obtained a one-acre conservation easement from James and Annie Yount on the Refuge site.[165] In November 2006, TWDB incorporated the proposed reservoir in its fifty-year state water plan.[166]

The City and TWDB filed suit in United States District Court for the Northern District of Texas, alleging that FWS failed to comply with the Administrative Procedure Act ("APA"), NEPA, and two executive orders. The City also sued James and Annie Yount, landowners who conveyed a conservation easement to the FWS for establishment of the Refuge.[167]

The first issue the court addressed was whether FWS violated executive order 13,132, which "addresses how federal agencies shall maintain the basic precepts of federalism when they formulate and implement federal policy," and Executive Order 13,352, which directs agencies "to promote cooperative 'conservation' . . . among federal, state, and local officials."[168] The court held that there was no private right of action under either Executive Order because (1) the orders expressly prohibit such an action and (2) the orders were not part of the FWS's NEPA analysis.[169]

The court next addressed whether the donated one-acre easement was void ab initio as contrary to the explicit purposes of the National Wildlife Refuge System Administration Act ("NWRSAA") and the APA. The court noted that, "[i]n addition to satisfying the Article III requirements for standing, a plaintiff challenging an administrative agency's decision must also show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated

162. City of Dallas v. Hall, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2007 WL 3125311, at *1 (N.D. Tex. Oct. 24, 2007) (mem. op.).
163. *Id.* at *4.
164. *Id.* at *5.
165. *Id.*
166. *Id.*
167. *Id.* at *1, *5.
168. *Id.* at *3 (citing Exec. Order No. 13,132, 64 Fed. Reg. 4,325 (Aug. 4, 1999); Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004)).
169. *Id.* at *6.

by the statute or constitutional guarantee in question.'"[170] The court held that the City's interest at stake, the opportunity to construct a reservoir, did not fall within the zone of interests protected by the NWRSAA which include ensuring a national network of lands and waters for conservation and recreational use.[171]

The City attacked the conservation easement by arguing that FWS obtained the easement from the Younts in bad faith, and thereby violated the APA.[172] Noting that there is no right to seek judicial review under the APA in the absence of the violation of an underlying statute, the court rejected this argument because the City did not identify any underlying statute that formed the basis for its APA complaint.[173]

The TWDB argued that the conservation easement was invalid under the Texas Conservation Easement Act, chapter 183 of the Texas Natural Resources Code.[174] That act provides that "an action affecting a conservation easement may be brought by: (1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person authorized by other law."[175] TWDB asserted that it was "a person authorized by other law" and that the "other law" was the APA. The court rejected this argument, noting that nothing in the APA gives the TWDB standing to enforce the terms of the easement or the statute.[176]

IX. ENDANGERED SPECIES ACT

The Save Our Springs Alliance ("SOS") sued the Secretary of the Interior and the FWS and its Director (collectively "FWS"), seeking declaratory and injunctive relieve for violations of the APA, the Endangered Species Act ("ESA"), and the NEPA.[177] The subject of the suit was a letter from the FWS to the TCEQ regarding optional measures for water quality to avoid the 'take' of endangered species, specifically the Barton Springs salamander."[178]

The Barton Springs salamander was listed as endangered in 1997. The salamander is threatened by habitat destruction resulting "from the degradation of the quality and quantity of the water in the Edwards Aquifer, which feeds Barton Springs in Austin, Texas."[179] TCEQ developed a document entitled "Optional Enhanced Measures for the Protection of

170. *Id.* at *8 (quoting Nat'l Athletic Trainers Ass'n, Inc. v. U.S. Dep't of Health and Human Servs., 455 F.3d 500, 503 (5th Cir. 2006)).
171. *Id.* at *9.
172. *Id.* at *10.
173. *Id.*
174. *Id.* at *13-14.
175. *Id.* at *13 (quoting TEX. NAT. RES. CODE ANN. § 183.003(3) (Vernon 2001)).
176. *Id.* at *14.
177. Save Our Springs Alliance v. Norton, No. A-05-CA-683-SS, 2007 WL 958173, at *1 (W.D. Tex. Feb. 20, 2007).
178. *Id.*
179. *Id.*

Water Quality in the Edwards Aquifer" ("the Optional Measures").[180] This document describes the best management practices that developers may use to comply with TCEQ's Edwards Aquifer rules. In 2005, the Regional Director of FWS issued a letter to TCEQ "articulat[ing] the FWS's belief that a project planner or landowner's voluntary compliance with the Optional Measures would result in 'no take' of covered species."[181]

SOS argued that the (1) FWS letter was a final agency action reviewable under the APA; (2) the letter was a rulemaking subject to notice and comment under the ESA and APA; (3) the issuance of the letter was arbitrary and capricious; and (4) FWS failed to conduct a NEPA analysis before issuing the letter.[182] In response, FWS argued that the letter was not subject to the procedural requirements of the APA, ESA, and NEPA because it was not a final agency action.

The court first noted that under *Bennett v. Spear*,[183] an agency action is final if (1) the action "mark[s] the 'consummation' of the agency's decision-making process," and (2) the action is "one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'"[184] When an agency action is "'final only in the sense that the agency currently has no plans to revise it," it is not a final agency action unless it also "establishes new rights or duties or fixes a legal relationship."[185]

After reviewing the FWS letter, the court concluded that it was not a final agency action.[186] The court focused on the fact that the letter did not alter the legal requirements for complying with the ESA:

> The ESA and its implementing regulations remain the only sources of federal obligations concerning the Barton Springs salamander. The letter in no way alters the reach of the ESA's "take" prohibition, nor does it change the evidentiary burdens for establishing an unlawful take. The letter does not change the fact that no person may "take" a single Barton Springs salamander without prior authorization under the ESA.[187]

The court also noted that FWS could not grant immunity from liability to developers who simply follow the Optional Measures. Thus, the letter regarding the Optional Measures did not establish legal rights. Despite finding that the FWS letter was not a final action, the court stated that if FWS were to issue an incidental take permit based upon an actor's compliance with the Optional Measures, that decision would be a fully re-

180. *Id.*
181. *Id.*
182. *Id.*
183. 520 U.S. 156 (1997).
184. *Save our Springs*, 2007 WL 958173, at *2 (quoting Bennett v. Spear, 520 U.S. 156, 177-78 (1997)).
185. *Id.* at *3 (citing Dow Chem. v. U.S. Envtl. Prot. Agency, 832 F.2d 319, 323-24 (5th Cir. 1987)).
186. *Id.*
187. *Id.* (internal citations omitted).

viewable agency action.[188]

X. CONCLUSION

The liability risks for individuals and entities engaging in activities that harm or pollute the natural environment have not abated. The cases in this Survey period, particularly the one involving the criminal provision of the Sarbanes-Oxley Act, raise serious concerns for those companies and their employees managing documents and information required of the rather massive environmental regulatory system in this country. Care must be taken by those who manage the numerous testing requirements, data gathering, records, and reports required under environmental regulations. Hopefully, care will also be taken by government enforcement personnel and prosecuting attorneys in the manner in which these laws governing documents and reports are enforced. Otherwise, innocent parties may be the subject of prosecution where no intent to deceive was present.

As you can see, the cases present interesting issues for lawyers and the layperson alike to consider, and the courts to attempt to balance and resolve. Environmental litigation and the key guides it provides to the practitioners who advise clients on the law governing the environment and land development, oil and gas, and the commercial transactions continue to evolve; new issues and new law or the development of existing law continue to change how practitioners handle environmental law in their daily practice.

188. *Id.* at *4.