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ENVIRONMENTAL LAW

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I. INTRODUCTION

DURING the Survey period, Texas appellate courts issued opinions in several environmental cases. At least two of these cases set forth important standards for parties attempting to obtain, or

for persons who would like to prevent a party from obtaining, a permit to build or modify an industrial plant or a hazardous waste facility. In the other case discussed in this Article, a rather broad reading of the meaning of "water in the state" may expose many unsuspecting parties to potential criminal liability for violations of the Texas Water Code.¹ Finally, one other case decided by the Texas Supreme Court addressed the ability of an insured to recover under certain insurance policies for environmental liabilities and upheld certain "absolute pollution exclusions."² This case was discussed in last year's Survey in the insurance section.³

II. A PARTY CANNOT APPEAL A FAVORABLE ADMINISTRATIVE DECISION BASED ON THE FINDINGS OR CONCLUSIONS SUPPORTING THE DECISION

The Austin Court of Appeals ruled in *C.O.N.T.R.O.L. v. Sentry Environmental*,⁴ that a party may not appeal a favorable decision of the Texas Natural Resource Conservation Commission (TNRCC, the Agency, or the Commission) because the Agency did not grant that decision based on all grounds urged by that party.⁵ The controversy arose over the attempt by Sentry Environmental (Sentry) to obtain a permit for a landfill. Several individuals, citizen groups, cities, and other parties challenged the permit. Following denial of the permit application by the TNRCC, these parties appealed the decision because the TNRCC rejected several grounds for denial that the challenging parties had raised. The district court in Austin ruled that it did not have jurisdiction to review the decision because the appellants were not aggrieved parties who had any right to an appeal of the administrative decision.⁶ On appeal of the district court ruling to the Austin Court of Appeals, the appellate court held that a party may file an appeal as to the result of a favorable administrative decision, *but not* the findings or conclusions supporting that result.⁷ In essence, a party cannot "look a gift horse in the mouth."

While the appellants were undoubtedly pleased that the TNRCC had denied the permit application, they were unhappy with the Agency for not ruling in their favor on all grounds that they had raised. The TNRCC's stated basis for denying Sentry's permit application was that Sentry had not adequately characterized deep groundwater at the site and had not established that the operation of the landfill would not con-

1. TEX. WATER CODE ANN. § 26.211 (Vernon Supp. 1995).

2. *National Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995).

3. H. Michelle Caldwell, *Insurance Law, Annual Survey of Texas Law*, 49 SMU L. REV. 1127, 1144-46 (1996).

4. 916 S.W.2d 677 (Tex. App.—Austin 1996, writ denied).

5. *Id.* at 678-80.

6. *Id.* at 678.

7. *Id.* at 679.

taminate the groundwater located beyond the boundaries of the site.⁸ The appellants had challenged the permit application on several other grounds, including that the presence of the landfill would reduce nearby property values and increase risk to air traffic.⁹

In evaluating the appeal of the TNRCC decision, the Austin Court of Appeals applied section 2001.171 of the Texas Administrative Procedure Act (APA).¹⁰ This section provides that a person who has participated in an administrative hearing and "who is aggrieved by a final decision" may seek judicial review of that decision.¹¹ The key question, according to the Austin Court of Appeals opinion, was whether or not the appellants were "aggrieved by a final decision" in the sense required by the APA.¹²

The appellants claimed that they were aggrieved by the decision because they did not receive all of the relief they sought. Citing prior decisions it had issued, the court determined that a party must appeal from a judgment rather than the findings or conclusions supporting that judgment.¹³ In what the court construed as similar or analogous cases, it had determined that a party that was either successful in obtaining the relief it sought or that was able to later challenge an issue reserved by the administrative agency, could not, rather than seeking reversal of the decision, seek modification of the basis for the decision.¹⁴

The court then turned to section 2001.174 of the APA upon which appellants relied for jurisdiction of their appeal. Section 2001.174 of the APA¹⁵ provides that a court may reverse or remand a decision of an agency "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are improper.¹⁶ The APA lists six grounds for which a party may appeal.¹⁷ Before reviewing these grounds, the court regarded as a fundamental issue whether the party's "substantial rights . . . have been prejudiced."¹⁸ The court regarded as even more important the threshold question of whether the party's claimed rights were in fact "substantial rights."¹⁹

The court concluded that a person's substantial rights do not include the right to modify an agency decision denying an applicant's permit so that the party can have better ammunition to attack any subsequent per-

8. *Id.* at 678.

9. *Id.*

10. TEX. GOV'T CODE ANN. § 2001.171 (Vernon 1996).

11. *Id.* § 2001.171.

12. *C.O.N.T.R.O.L.*, 916 S.W.2d at 678, 679.

13. *Id.* at 679.

14. *Id.* The court relied upon *Champlin Exploration Inc. v. Railroad Comm'n*, 627 S.W.2d 250, 251 (Tex. App.—Austin 1982, writ ref'd n.r.e.) and *Gulf States Utils. v. Coalition of Cities*, 883 S.W.2d 739, 746-47 (Tex. App.—Austin 1984, no writ).

15. TEX. GOV'T CODE ANN. § 2001.174 (Vernon 1996).

16. *Id.* § 2001.174(2).

17. *Id.*

18. *C.O.N.T.R.O.L.*, 916 S.W.2d at 679.

19. *Id.*

mit application.²⁰ Absent a substantial right, no jurisdiction existed for the party's appeal.²¹

This opinion raises important questions about what, if any, preclusive effect, such as *res judicata* or collateral estoppel, would apply to the appellants if Sentry attempted and perhaps succeeded in meeting the TNRCC's requirements with respect to groundwater protection in a subsequent permit application proceeding. If the appellants were precluded from rearguing other objections to the permit application in the second proceeding, then the appellants would appear to be aggrieved by the prior decision. It would appear that logic and fairness would require that the appellants have a right to appeal the agency's findings and conclusions in either the first proceeding or a later proceeding. Depending on the result, a party might argue that it is denied its due process rights under the United States and Texas constitutions. In essence, if a party could not challenge the basis for a favorable decision in the first permitting proceeding and could not attack a second permit application on these same grounds, the agency's basis for its first decision would be precluded from judicial review.

III. THE AUSTIN COURT OF APPEALS ELUCIDATED THE TNRCC'S ABILITY TO REVERSE A HEARING EXAMINER'S DECISION UNDER THE TEXAS SOLID WASTE DISPOSAL ACT

A. BACKGROUND

In *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission*,²² the Austin Court of Appeals faced a case of first impression. In its opinion, the court elucidated the TNRCC's ability to reverse a decision by a hearing examiner in a proceeding under the Texas Solid Waste Disposal Act (TSWDA). Section 361.0832 of the TSWDA restricts the ability of the Commission to overrule the decision of a hearing examiner.²³ The court considered three types of decisions for which the TSWDA sets out the Commissioners' power to overturn a hearing examiner's findings and conclusions.²⁴ It then turned to the substantive issues and applied the applicable standards.²⁵ In doing so, the court set out new law on the TNRCC's review authority over the decisions of hearing examiners.

B. POLICY ISSUES UNDERLYING THE COURT'S DECISION

The first step the court took was to consider the policy considerations underlying the Commission's role in reviewing hearing examiners' deci-

20. *Id.* at 679-80.

21. *Id.* at 680.

22. 910 S.W.2d 96 (Tex. App.—Austin 1995, writ denied).

23. TEX HEALTH & SAFETY CODE ANN. § 361.0832 (Vernon 1992 & Supp. 1997).

24. *Hunter Indus. Facilities*, 910 S.W.2d at 102.

25. *Id.* at 105.

sions. The court focused on the Commissioners' duty "to prevent damage to public health and the environment" and their duty to scrutinize "every aspect of any facility that seeks a permit" for disposal of hazardous wastes under the TSWDA.²⁶ Specifically in Hunter Industrial Facilities' (HIFI) case, the court pointed out the "significant health and environmental risks potentially posed by HIFI's proposed experimental waste facility."²⁷ The court believed these risks significantly influenced the decision ultimately reached by the agency.²⁸

C. THE SOLID WASTE DISPOSAL ACT STANDARDS FOR TNRCC'S REVIEW OF A HEARING EXAMINER'S DECISION

Having considered the policy considerations relating to HIFI's hazardous waste permit applications, the court then turned to the procedural issues. The court considered the ability of the Commission to overturn three types of findings or conclusions of the hearings examiner: (1) underlying findings of fact; (2) conclusions of law; and (3) ultimate findings based on policy considerations.²⁹

1. Findings of Fact

The first issue related to the standard of review for findings of fact. The Act provides that such a finding may be overturned "only if the commission finds that the finding was not supported by the great weight of the evidence."³⁰ HIFI argued that this was equivalent to the "against the great weight of evidence standard."³¹ The court rejected this interpretation based upon statutory construction in case law that required the court to accept the specific language set out in the legislation.³² The court did agree that the Texas Legislature's intent when it enacted this standard was to "significantly restrict" the Commission's discretion to overturn a hearing examiner's factual finding.³³ The court concluded that the intent was to restrict review beyond the substantial evidence standard.³⁴ Thus, the Commission cannot overturn a factual finding on the ground that "it would have reached a contrary decision."³⁵ Rather, the Commission may only overturn factual findings "that do not find support in the 'great weight' of the evidence in the record."³⁶

26. *Id.* at 102.

27. *Id.*

28. *Id.*

29. *Id.*; see TEX. HEALTH & SAFETY CODE ANN. § 361.0832(c)-(e).

30. TEX. HEALTH & SAFETY CODE ANN. § 361.0832(c).

31. *Hunter Indus. Facilities*, 910 S.W.2d at 102.

32. *Id.* at 103.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

2. *Conclusions of Law*

The second standard of review involved legal determinations.³⁷ The standard set out in the statute is that the Commission may reverse a decision if it determines the legal conclusion is “clearly erroneous.”³⁸ The court again rejected HIFI’s interpretation that the hearing examiner’s conclusion need only be “reasonable.”³⁹ Instead the court ruled that the Commission must be allowed to apply the rules that it adopted and may reject a legal conclusion regardless of its “theoretical reasonableness.”⁴⁰ The court adopted the U.S. Supreme Court’s evaluation of the meaning of “clearly erroneous”—where the “reviewing body ‘is left with the definite and firm conviction that a mistake has been committed.’”⁴¹

3. *Ultimate Findings Based on Policy Considerations*

The third standard interpreted by the court involved ultimate findings based upon policy considerations “if [they] involve compliance with or satisfaction of a statutory standard the determination of which is committed to the Commission’s discretion.”⁴² HIFI argued that this standard only applies where policy considerations form the basis of the finding and not where factual findings also underlie the decision.⁴³ The Austin Court of Appeals determined that an ultimate finding “usually involves a conclusion of law or at least a mixed question of law and fact.”⁴⁴ Thus, the court concluded that the policy decision involving compliance with a statutory standard the determination of which is committed to the discretion of the Agency is equivalent in the legal sense to a conclusion of law or a mixed question of law or fact.⁴⁵ Because of the frequent mixed nature of ultimate findings, the court concluded that relying on facts in addition to policy considerations is sufficient if it involves compliance with a statutory standard.⁴⁶

D. THE AUSTIN COURT OF APPEAL’S STANDARD OF REVIEW OF THE TNRCC’S DECISION

In reviewing the Commission’s decision, the court ruled that it must determine whether the Agency committed any legal error in overturning the hearing examiner’s decision under section 2001.174(2)(A)-(B) of the APA.⁴⁷ It thus charged itself with reviewing the findings and conclusions

37. *Id.*

38. TEX. HEALTH & SAFETY CODE ANN. § 361.0832(d).

39. *Hunter Indus. Facilities*, 910 S.W.2d at 104.

40. *Id.*

41. *Id.* (citing *U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

42. *Id.*; see TEX. HEALTH & SAFETY CODE ANN. § 361.0832(d).

43. *Hunter Indus. Facilities*, 910 S.W.2d at 104.

44. *Id.* (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)).

45. *Id.*

46. *Id.*

47. *Id.* at 105.

of the Commission to determine the consistency with the standards set out in section 361.0832 of the TSWDA.

E. APPLICATION OF THESE STANDARDS TO THE TNRCC'S DECISION

Having interpreted the meaning of the standards governing the Commission's review of a hearing examiner's decision and the court's own ability to review the Commission's decision, the court evaluated the specific basis for the TNRCC's denial of HIFI's permit applications.⁴⁸ The applications for permits were denied for the following reasons: (1) the salt dome was not adequately characterized; (2) adequate financing to construct the facility was not adequately demonstrated; (3) an urgent public necessity for the hazardous waste injection was not adequately demonstrated; and (4) the underground injection wells were not demonstrated to be in the public interest.⁴⁹ The Commission had determined that these were the ultimate statutory or regulatory findings necessary to obtain a permit, and thus a negative finding by the Commission on any one of them was sufficient to support denial of a permit.⁵⁰

1. *Geologic Characterization*

The hearing examiner had examined the evidence presented regarding the characterization of the geology of the salt domes where the hazardous waste was to be injected and the earth surrounding the salt domes.⁵¹ While the hearing examiner concluded that the characterization was imprecise, he nonetheless read two regulatory requirements together to allow a margin of error calculation of 500 feet between the injection area and the edge of the salt dome.⁵² The examiner, more surprisingly, decided that the characterization required to obtain the permit could be completed *after* the permit was issued.⁵³ Not surprisingly, the Commission rejected this decision.⁵⁴ The Commission would not allow estimates to substitute for facts required to obtain a permit nor allow the evidence required for approval to be submitted after the permit was issued.⁵⁵ The Austin Court of Appeals upheld the Commission's decision. The court concluded that the Commission had the discretion to overturn a hearing examiner's decision that was not consistent with statutory or regulatory requirements.⁵⁶ The court cited precedent in which the court had reversed the granting of a permit by the Texas Department of Health. In that case, the department averaged two expert opinions about the depth

48. *Id.*

49. *Id.* at 105-06.

50. *Id.* at 106 (citing *Gerst v. Goldsbury*, 434 S.W.2d 665, 667 (Tex. 1968) ("order of disapproval is correct if substantial evidence supports any of agency's negative findings")).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 107.

of groundwater to support issuing a permit.⁵⁷ The court emphasized that the Commission had to be allowed to interpret its own rules.⁵⁸ The court noted that this was particularly true when the examiner blended two requirements to avoid imposing expensive tests on the applicant required to prove an evidentiary point.⁵⁹

2. *Financial Assurance*

The second issue appealed by HIFI was the Commission's reversal of the examiner's determination that the applicant had demonstrated adequate financial assurance to complete construction of the facility.⁶⁰ Two witnesses had been offered by HIFI during the hearing. One witness testified that to complete construction HIFI could use both equity and long-term debt financing, while the other testified that the institutional debt market would probably not be used.⁶¹ Both testified, however, that adequate financing was available.⁶² The court overturned the Commission's reversal of the examiner's finding that adequate financing was shown.⁶³ It held that the Commission had overstepped its bounds under the standard set out in section 361.0832(c) for factual determinations.⁶⁴ No conflict existed between the testimony. One expert only stated that he did not anticipate the use of one type of financing.⁶⁵ The court did not believe that any evidence supported the finding that the applicant failed to show adequate financing was available.⁶⁶

3. *Public Necessity and Public Interest*

Finally, the TNRCC denied permits for the proposed hazardous waste facility on the grounds that the hearing examiner erred in concluding that there existed an urgent public necessity for the facility and that construction and operation of the facility would be in the public interest.⁶⁷ An urgent public necessity must be found before the TNRCC may issue such permits.⁶⁸ Five criteria for evaluating a purported "urgent public necessity" are set forth in the TSWDA and the Water Code.⁶⁹ Under the Water Code, the Commission must also conclude that the injection well would further the public interest.⁷⁰ In addressing these broad questions,

57. *Id.* (citing *Flores v. Texas Dep't of Health*, 835 S.W.2d 807 (Tex. App.—Austin 1992, writ denied)).

58. *Id.*

59. *Id.*

60. *Id.* at 108.

61. *Id.* at 108-09.

62. *Id.* at 109.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; see TEX. HEALTH & SAFETY CODE ANN. § 361.114(6).

69. TEX. HEALTH & SAFETY CODE ANN. § 361.114(b); TEX. WATER CODE ANN. § 27.051(g)(2) (Vernon 1995).

70. TEX. WATER CODE ANN. § 27.051(a)(1) (Vernon 1995).

the Commission focused upon need and safety as the critical questions in making the determination of public necessity.⁷¹

a. Need

The TNRCC focused on the question of the capacity needed to manage hazardous waste generated in the state⁷² and whether practical, economic, and feasible alternatives to an injection well are reasonably available.⁷³ The Agency also had to consider the need for different types of technologies for hazardous waste disposal.⁷⁴ To satisfy these standards, HIFI presented an expert witness who testified that a 1992 Texas capacity survey, known as a Needs Assessment, had grossly underestimated the amount of hazardous waste that would need to be managed in Texas by 780 percent.⁷⁵

The Commission rejected HIFI's expert testimony and determined that there was not a need for the facility.⁷⁶ The Austin Court of Appeals upheld this decision. While HIFI's expert was the only expert that testified at the hearing before the hearing examiner, a TNRCC employee commented on the need question at the hearing before the Commissioners themselves.⁷⁷ As the primary fact finding agency, the court allowed the Commission to reject the testimony.⁷⁸ It allowed the Commission to discount expert testimony if it does not believe it to be credible and to resolve factual ambiguities.⁷⁹ HIFI argued that the state's own 1992 study showed a need existed.⁸⁰ The court ruled that the TNRCC could deny a permit if a need for the *specific* facility does not exist.⁸¹ In applying the "great weight of the evidence" standard to the factual determination of need, the court deferred to the specialized expertise of the agency and left the question to its discretion.⁸² Part of the court's decision depended upon the "untested and experimental method of irretrievable waste injection into salt domes."⁸³

HIFI alternatively argued that if the standard did not allow the permitting of its facility, the requirements were too vague and ambiguous and it was not told prior to the evidentiary hearing that it had failed to meet that evidentiary standard. Thus, it argued the decision did not comport with constitutional due process requirements.⁸⁴ The court again rejected

71. *Hunter Indus. Facilities*, 910 S.W. 2d at 109, 112.

72. See TEX. HEALTH & SAFETY CODE ANN. § 361.114(b)(2); TEX. WATER CODE ANN. § 27.051(g)(2)(B).

73. See TEX. WATER CODE ANN. §§ 27.051(d)(2), 27.051(g)(2)(B).

74. See TEX. HEALTH & SAFETY CODE ANN. § 361.0232(a).

75. *Hunter Indus. Facilities*, 910 S.W.2d at 109-10.

76. *Id.* at 110.

77. *Id.*

78. *Id.*

79. *Id.* at 111.

80. *Id.*

81. *Id.* (citing for support TEX. HEALTH & SAFETY CODE ANN. § 361.114(b)(2)).

82. *Id.*

83. *Id.*

84. *Id.*

HIFI's arguments.⁸⁵ In considering this dialogue, the court first concluded that "substantial or obvious need" is a definite enough standard.⁸⁶ Second, the court ruled that a series of factors, including the experimental nature of the facility, estimates of the capacity shortfall, the desire to develop innovative technologies, and protection of the water supply, could be considered in determining need.⁸⁷ In a footnote the court determined that need was not an ultimate finding of necessity, but a factual finding underlying the statutory determination.⁸⁸ Thus, it was governed by the "great weight of the evidence" test for factual determinations and not the standard for ultimate statutory findings.⁸⁹

b. Safety

The Commission concluded that HIFI had failed to meet its burden in meeting safety requirements.⁹⁰ The court agreed on most grounds but differed on one issue: the safety standards identified by the court are found in the TSWDA, the Texas Water Code, and in TNRCC regulations in the Texas Administrative Code⁹¹—including a 15,000 year no-escape requirement.⁹² The disposal process is of interest at this point. HIFI's process would have involved the solidification of hazardous wastes followed by the injection of the solidified material down the wells into the salt domes.⁹³ The Commission determined that there needed to be evidence showing that the process would work over time. The court concluded this was critical because the material could not be retrieved from the salt domes if the process failed.⁹⁴

The Commission's decision that HIFI failed to show the safety of the proposed facility was based on six grounds: the Commission determined that HIFI had not presented adequate evidence to show that (1) the waste will not migrate over the 15,000 year period, (2) solidification will work on all wastes and will remain solidified, (3) gas and pressure will not build in the salt domes, (4) the injection area would be a safe distance from the edge of the salt dome, (5) the waste analysis and classification plan was adequate, and (6) adequate chain-of-custody plans would be in place for waste samples being analyzed.⁹⁵ The court upheld all but the Commission's reversal of the hearing examiner's findings on waste classification as not being supported by the great weight of evidence.⁹⁶ The

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 112 n.17.

89. *Id.*

90. *Id.*

91. *Id.* at 112; see TEX. HEALTH & SAFETY CODE ANN. § 361.114(b)(1), (3), (4); TEX. WATER CODE ANN. § 27.051(g)(2)(A), (C), (D); 30 TEX. ADMIN. CODE § 331.162.

92. 30 TEX. ADMIN. CODE § 331.162.

93. *Hunter Indus. Facilities*, 910 S.W.2d at 112.

94. *Id.*

95. *Id.*

96. *Id.*

court focused primarily on the 15,000 year no-escape requirement.⁹⁷ The court believed this to be an incredible burden to meet. Coupling this incredible burden with the "high stakes" of hazardous waste facilities for health and the environment, the court concluded that the Commission had "no margin for error."⁹⁸

F. ANALYSIS OF COURT'S DECISION

On this last basis no one should be surprised that the company failed to obtain the requisite permits to construct and operate its proposed salt dome facility for disposal of hazardous waste. The court seemed to focus on what it perceived as the particularly risky nature of the use of an underground salt dome as a hazardous waste disposal facility.⁹⁹ The court may not have been so lenient in its review of the basis for the Commission's permitting decision had that not been the case. With the advent of the land disposal restrictions enacted by Congress in 1984 and developed by the U.S. Environmental Protection Agency in subsequent rulemaking, the 15,000 year no-migration requirement will be very difficult to meet. If a "no margin for error" rule truly applies, then one may almost rule out facilities that bury or inject hazardous wastes into the ground. The question may be whether or not a "no margin for error" rule was intended either by legislative or regulatory bodies. Even with scientific and engineering models, measurements, and estimates, it may be very difficult to meet this strict test.

IV. A CONVICTION WAS UPHELD FOR DISCHARGING INDUSTRIAL WASTE INTO A SANITARY SEWER WITHOUT A PERMIT

In a rather broad interpretation of the meaning of "water in the state" under the Texas Water Code,¹⁰⁰ the First District Court of Appeals of Houston upheld a criminal conviction of a person who discharged industrial waste into the Houston sanitary sewer without a permit.¹⁰¹ The defendant, Gary Lynn McGee, appealed the case. He relied in his appeal largely on the argument that the statutory meaning of "water in the state" does not include a sanitary sewer. The appellate court rejected this point of error and concluded that the specific criminal definition applied.¹⁰² In interpreting this definition, the court concluded that a discharge to any "water in the state" within the state's jurisdiction includes a discharge into a sanitary sewer.¹⁰³

In this case, the defendant worked for a company that cleans grease

97. *Id.* at 113.

98. *Id.*

99. *Id.*

100. TEX. WATER CODE ANN. § 26.2121 (Vernon Supp. 1995).

101. McGee v. State, 923 S.W.2d 627 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

102. *Id.* at 631.

103. *Id.*

traps and septic tanks with a vacuum truck.¹⁰⁴ Before cleaning the grease trap of a grocery store, the defendant discharged the wastewater from the vacuum truck into the City of Houston sewer collection system. The system leads to the City of Houston publicly owned wastewater treatment works. No authorization to discharge the wastewater into the sewer had been provided to the defendant from the City of Houston, the State of Texas, or the U.S. Environmental Protection Agency. The material discharged consisted of 94 percent water and 6 percent oil and grease.

As stated above, McGee contended in his appeal, that he did not discharge wastes to "water in the state."¹⁰⁵ On this basis, he claimed he did not violate the relevant statutory provisions.¹⁰⁶ The provisions under which he was charged are sections 26.2121(a) and 26.2121(d) of the Texas Water Code.¹⁰⁷ Both of these sections require the discharge "into or adjacent to any water in the state."¹⁰⁸ McGee argued that a sanitary sewer was not "water in the state." McGee's first point is that in the general definitions "water in the state" does not include a sanitary sewer. Furthermore, he argued that "sewer system" is separately defined to include such things as pipelines, force mains, and other things for transporting waste.

The State on the other hand contended that these definitions are irrelevant because they do not apply to criminal cases, but only civil proceedings.¹⁰⁹ Another definition of "water" is found in the criminal section.¹¹⁰ It provides that "water" would "include both surface and sub-surface water," and "water in the state" means "any water within the jurisdiction of the state."¹¹¹ The court applied the Texas Code Construction Act to conclude that the more specific provision controls over a more general provision.¹¹² The Texas Court of Criminal Appeals had previously reached a similar conclusion in holding that a drainage ditch fell within the broad definitions.¹¹³ The court concluded that a jury instruction tracking only the definition in section 26.211(1) was sufficient.¹¹⁴

McGee argued that it makes no sense to construe as a discharge to a water in the state a discharge to a piping system, that leads to a treatment plant for treatment *before* being discharged to a water body.¹¹⁵ The material is treated and the discharge from the treatment plant is regulated by state and federal authorities. The court rejected this position. It de-

104. See *id.* at 628-29 for a general summary of the facts stipulated by the defendant and the prosecution.

105. *Id.* at 629.

106. *Id.*

107. TEX. WATER CODE ANN. § 26.2121 (a), (d).

108. *Id.*

109. *McGee*, 923 S.W.2d at 630.

110. TEX. WATER CODE ANN. § 26.211(1).

111. *Id.*

112. *McGee*, 923 S.W.2d at 630.

113. *American Plant Food Corp. v. State*, 587 S.W.2d 679, 682-83 (Tex. Crim. App. 1979).

114. *Id.* at 683.

115. *McGee*, 923 S.W.2d at 630.

terminated that the fact that state and federal authorities regulate the discharge does not mean that the state is without authority to regulate "pollution of waters entering" the treatment plant.¹¹⁶ The court cited similar conclusions of courts in other states interpreting similar statutes.¹¹⁷

McGee's next challenge to his conviction rested on constitutional grounds. His argument in essence was that the criminal provision as applied to discharges to sewer systems was too vague and he could not have known that his discharge would rise to the level of a criminal act. His argument consisted of three parts: (1) that section 26.003 makes it a state policy to discharge into waste collection systems and that is what McGee did; (2) the TNRCC has never required discharge permits for discharges into municipal sewer systems; and (3) to make such discharges a crime would result in the impracticable requirement that industries discharging to sewer systems obtain TNRCC permits to avoid criminal prosecution.¹¹⁸ However, the court did not find this convincing. It found that no evidence had been presented that he was in any way confused about the provisions or unable to comply with them.¹¹⁹ He also pleaded no contest to the charges and thereby admitted the allegations in the information which established (1) that a permit from some authority was required, (2) that he failed to obtain any such permit, and (3) that he knew this and still discharged without such a permit.¹²⁰ Because of these admissions by virtue of the plea, the court concluded that the statute was not unconstitutionally vague as applied to him.¹²¹

Finally, he challenged the conviction under a "double jeopardy" theory. McGee argued that he was being criminally prosecuted for the same act under two statutory provisions.¹²² In analyzing this provision the court turned to a United States Supreme Court decision holding that if one provision requires an additional fact than another then the person is being tried for more than one offense.¹²³ In applying this rule of law, the Houston Court of Appeals determined that prosecution under section 26.2121(a) requires a discharge "(1) into or adjacent to water in the state, (2) that causes or threatens to cause water pollution, (3) unless there is compliance with a permit, rule or order."¹²⁴ By comparison, section 26.2121(d) requires "(1) a discharge from a point source, (2) in violation of chapter 26, a rule, permit, or order."¹²⁵ The need to prove different

116. *Id.* at 630.

117. *A.E. Staley Mfg. Co. v. EPA*, 290 N.E.2d 892, 894-95 (Ill. App. Ct. 1972); *Armstrong Chemcon, Inc. v. The Pollution Control Bd.*, 310 N.E.2d 648, 651 (Ill. App. Ct. 1974).

118. *McGee*, 923 S.W.2d at 631.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Blockburger v. United States*, 284 U.S. 299 (1932).

124. *McGee*, 923 S.W.2d at 631.

125. *Id.*

facts for each charge made them different offenses. Thus, the court determined the conviction under either or both provisions to be appropriate.¹²⁶

The interpretation of the definition of "water in the state" to include sewers seems rather circular. The definition the court applied was "any water within the jurisdiction of the state." To then say that any "water in the state" falls within the jurisdiction of the state does not answer the question. The question was *what* water is within the state's jurisdiction. The court did not provide much of an analysis of that question. To answer that question it may well have been appropriate to look to other sections of the statute. The civil sections indicate that a "sewer system" is a separate concept from "water in the state," the sewer system being more of a conveyance to a water in the state. Under this interpretation, the conviction would have been overturned.

Another defensive argument with respect to the charge under section 26.2121(a) would have been that no water pollution occurred and none was threatened. If the material was easily treated by the treatment plant, then this would have been a potentially successful defense. While this defense would not apply to the second charge under section 26.2121(d), the defendant could have argued that it did not cause the discharge of a material from a *point source* that violates any permit, rule, or order. Again, if the discharge to the sewer was properly treated and did not discharge to a water body, then there would have been no discharge from a point source. In other words, it seems fully supportable to construe a discharge to a sewer as not violating these criminal provisions.

If the Houston Court of Appeal's interpretation of the definition of "water in the state" under these criminal provisions of the Texas Water Code is widely held, it could create a wide net which would ensnare individuals and corporations who discharge into municipal sewer systems. The question arises not only for those who may not have any discharge authority from the municipality or local government operating the public owned treatment works and associated collection system, but perhaps for those which discharge materials in excess of the parameters allowed in their authorization or which discharge materials not included within that authority. Closer scrutiny of its discharge authority and the levels and types of materials being discharged by any industrial or commercial entity would be advised. Such actions would potentially reduce the possibility of criminal prosecution.

V. CONCLUSION

The decisions during the Survey period interpreting environmental laws may have significant implications. The close scrutiny applied by the Austin Court of Appeals could make it difficult to obtain a hazardous waste facility permit. The interpretation of the criminal provisions of the

126. *Id.* at 631-32.

Texas Water Code could expose any party who discharges into any sewer without any government authorization or in excess of that authorization. Thus, the environmental cases reviewed for this Survey period create potential problems for persons regulated under environmental laws in Texas.

