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# ENVIRONMENTAL LAW

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## I. INTRODUCTION

A significant number of state and federal court cases were adjudicated involving environmental legal issues during the Survey period. These cases provide insights to those who litigate environmental claims, perform due diligence in business transactions, advise clients in regulatory and permitting actions, and otherwise counsel clients in environmental matters. The cases include significant rulings on the ability to recover environmental remediation expenses, the application of administrative and constitutional issues in the context of environmental law, criminal environmental prosecution, claims for property damages and personal injury, and endangered species issues. In the Texas

Legislature, significant legislation was enacted, including a new Municipal Settings Designation program allowing parties to avoid cleaning up groundwater to drinking water standards when no one will drink the relevant groundwater and a program designed to create a fund to pay for remediation of releases of solvents from dry cleaning operations. In sum, significant new environmental laws were enacted in Texas, and important court decisions were issued during the Survey period.

## II. ADMINISTRATIVE LAW AND CONSTITUTIONAL ISSUES

### A. Challenges of Agency Rule-Making

#### *1. Standing to Seek Review of Agency Rules*

Some of the more important decisions during the Survey period arose from challenges of the United States Environmental Protection Agency (EPA) and the Texas Commission on Environmental Quality (TCEQ) rules and decisions regarding plans to address the failure of certain metropolitan areas in Texas to meet the National Ambient Air Quality Standards (NAAQS). In one of the most significant cases, *BCCA Appeal Group v. United States Environmental Protection Agency*,[1] EPA challenged the standing of the BCCA Group and of Brazoria County to seek review of EPA's approval of a state implementation plan (SIP)[2] that the State of Texas submitted to reduce ozone levels in the Houston-Galveston non-attainment area under the Clean Air Act.[3]

To establish standing, the petitioner must demonstrate "(1) it has suffered an 'injury in fact' that is (2) fairly traceable to the defendant's conduct and not 'some third party not before the court,' and (3) it is 'likely . . . that the injury will be redressed by a favorable decision.'"[4] EPA claimed that BCCA's injury did not meet the second or third elements above in that the TCEQ had adopted the control measures in question, not EPA, and, therefore, the control measures are not fairly traceable to EPA, and the injury would not be redressed by a favorable decision. The court reasoned that, although EPA's role in approving the SIP is limited in that it must approve any plan that meets the minimum statutory requirements, BCCA had standing to challenge EPA's decision regarding the SIP's compliance with the minimum requirements of the Clean Air Act, because its injury would be redressable by a favorable court decision.[5]

In this case, EPA also asserted that BCCA had waived its arguments by failing to raise or properly present them during the comment period.[6]

1. BCCA Appeal Group v. United States Envtl. Prot. Agency, 355 F.3d 817 (5th Cir. 2004).
2. 66 Fed. Reg. 57,160 (Nov. 14, 2001).
3. 42 U.S.C. §§ 7401-7671 (2000).
4. *BCCA Appeal Group*, 355 F.3d at 825 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).
5. *Id.* at 826.
6. *Id.* at 827.

EPA contended that BCCA failed to alert EPA to the relevant portions of the deposition transcripts, hearing transcripts, and exhibits related to a state court action that BCCA submitted as comments and that BCCA failed to explain how those voluminous materials related to BCCA's specific objections in its comments.[7] The court disagreed, finding that BCCA was a meaningful participant in the rulemaking proceeding in that it sufficiently clarified its position for EPA and identified the issues to which the material was relevant.[8] In contrast, the court found that Brazoria County had failed to raise its arguments during the rulemaking process that certain provisions of the SIP violated state law. The court cited the general rule that a court will not rule on questions of law that were not presented to the agency during the notice and comment period and held that Brazoria County waived its argument.[9]

### 2. *Challenges to Implementation of the Federal Clean Air Act by the State of Texas*

At least three significant challenges to Texas's implementation of the federal Clean Air Act were decided during the review period. These cases were decided by the United States Fifth Circuit Court of Appeals. In all but one respect, the Fifth Circuit upheld EPA's actions, leaving Texas's programs intact and showing a considerable amount of deference to EPA's decision making and decision making process.[10]

#### a. Petitions to Review the Houston SIP

The *BCCA Appeal Group*[11] case was a consolidation of petitions for direct review of EPA's decision approving the Texas SIP developed to attain the NAAQS for ozone in the Houston-Galveston ozone nonattainment area ("Houston SIP"). BCCA and Brazoria County opposed the Houston SIP on the grounds that certain measures were too stringent and in any event would fail to attain the NAAQS. BCCA also challenged EPA's approval of the state's computer modeling and use of other analytical measures to demonstrate attainment. Brazoria County maintained that components of the control strategy violated state law and that EPA's approval of the measures was arbitrary and capricious.[12] Other petitioners claimed the Houston SIP did not go far enough in adopting measures to achieve attainment by 2007. The court denied all of the petitions for review.[13]

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7. *Id.*
8. *Id.* at 828.
9. *Id.* at 829-30.
10. The one exception is that the court reversed the portion of EPA's final action approving the one-hour ozone SIP for the Beaumont/Port Arthur area (66 Federal Register 26,914) that granted the area an extension of its attainment date from 1996 to 2007. Sierra Club v. United States Envtl. Prot. Agency, 314 F.3d 735, 745 (5th Cir. 2002).
11. *BCCA Appeal Group*, 355 F.3d at 817.
12. As noted previously, the court ruled Brazoria County waived these arguments by failing to present them to EPA during the notice and comment period. *Id.* at 823-24.
13. *Id.* at 821.

The court noted that, under the Administrative Procedure Act, it must uphold EPA's findings, conclusions, and ultimate action unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[14] The court instructed that this standard of review is narrow and that a rule is arbitrary and capricious "only where the agency has considered impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise."[15] Furthermore, "[a] reviewing court must be most deferential to the agency where, as here, its decision is based upon its evaluation of complex scientific data within its technical expertise."[16] The Fifth Circuit also applied the two-step *Chevron* analysis to EPA's interpretation, and the court granted deference to EPA's agreement here to the extent they involved the reasonable resolution of ambiguities in the Clean Air Act.

The court found that EPA's decisions were not arbitrary, capricious, or contrary to law.[17] With respect to inaccuracies in the photochemical grid models used for the attainment demonstration raised by BCCA, the court was satisfied that EPA had considered BCCA's arguments during the administrative process, that EPA was aware of the difficulties posed by the model, and that EPA had provided a rational explanation for its reliance on its model despite its imperfections.[18]

With respect to the petitioners' challenge that computer modeling failed to demonstrate future attainment, the court found the statute was ambiguous as to how such modeling may be used.[19] Applying the *Chevron* standard for judicial review of agency evaluation of statutory requirements, the court found the EPA's approach "reasonable" because the statute granted EPA broad authority to approve equally effective alternatives to the photochemical grid modeling, and EPA guidance expressly authorizes the approach Texas uses.[20] Likewise, the court rejected various other legal and scientific challenges to the EPA's actions on the Houston SIP.

b. Petition to Review EPA's Approval of the Beaumont/Port Arthur SIP

Another significant case under the Clean Air Act involved a regional plan to clean up polluted air, *Sierra Club v. United States Environmental*

14. *Id.* at 824 (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000)).

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

16. *Id.* (citing Baltimore Gas & Elec. Co. v. NROC, 462 U.S. 87, 103 (1983)).

17. *Id.* at 821.

18. *Id.* at 833-34.

19. The statute requires that an attainment demonstration be "based on photochemical grid modeling," not that such model be the sole or direct basis of the attainment demonstration. *Id.* at 835.

20. *Id.* at 834 (citing 42 U.S.C. § 7511a(c)(2)(A)).

*Protection Agency*.[21] In this case, the petitioners challenged EPA's final action approving the State of Texas's SIP for the Beaumont/Port Arthur area (Beaumont SIP).[22] The Beaumont/Port Arthur area is a moderate nonattainment area with respect to the one-hour ozone NAAQS. Petitioners specifically challenged EPA's extension of the attainment deadline for the Beaumont area and its approval of the SIP without requiring additional reasonably available control measures (RACM).

EPA had approved extending the attainment date for Beaumont from November 16, 1996 (the statutory attainment date for moderate nonattainment areas) to November 15, 2007 (the statutory attainment date for the Houston/Galveston nonattainment area), which was consistent with its 1999 policy allowing such extensions under certain conditions for moderate or serious nonattainment areas downwind of areas that transport ozone and interfere with the downwind area's ability to attain the NAAQS.[23] EPA reasoned that such downwind areas should not be penalized by being forced to adopt additional costly and onerous measures to compensate for pollution transported from upwind areas when such measures will become superfluous once the upwind area reduces its contribution to the downwind area's pollution. EPA applied its extension policy based on the state's modeling, which demonstrated that requiring additional emission reductions in the Beaumont area would not accelerate attainment of the one-hour ozone NAAQS because of the pollution contribution from the Houston area.

The court analyzed the Clean Air Act provisions that specify when EPA may extend attainment deadlines to account for upwind emissions that jeopardize another area's attainment. The court found that application of EPA's extension policy was contrary to congressional intent for an area such as Beaumont, which has implemented a SIP and has failed to meet its attainment deadline.[24] Accordingly, the court reversed EPA's extension of the attainment deadline for the area.

The court affirmed the portion of the Beaumont SIP that includes as potential RACM only those measures that would advance the attainment date. Finding the Clean Air Act provisions ambiguous and EPA's construction of the statute reasonable, the court deferred to EPA's conclusion that potential measures requiring intensive and costly implementation are not RACM because they cannot be readily implemented.[25]

### 3. *Petition to Review EPA's Approval of Texas's Title V Operating Permit Program*

In *Public Citizen, Inc. v. United States Environmental Protection*

21. Sierra Club v. United States Envtl. Prot. Agency, 314 F.3d 735 (5th Cir. 2002).
22. 66 Fed. Reg. 26,914 (May 15, 2001).
23. *Sierra Club*, 314 F.3d at 739.
24. *Id.* at 742-43.
25. *Id.* at 745.

*Agency*,[26] the Fifth Circuit considered challenges to EPA's order[27] granting full approval to operating a permit program promulgated pursuant to Title V of the Clean Air Act and to EPA's February 21, 2002 decision[28] not to issue notices of deficiencies related to four aspects of the Texas Title V program.

a. Considerable Deference Afforded EPA's Review of the State's Title V Program

In reviewing EPA's actions under the Administrative Procedure Act and the U.S. Supreme Court's *Chevron* standards, the Fifth Circuit concluded that the Clean Air Act was ambiguous with respect to whether Section 502(g) of the Act requires that EPA grant full approval to any program that corrects interim deficiencies, or whether Section 502(d) prevents EPA from granting full approval until a state has corrected *all* deficiencies in the program, no matter how insignificant the deficiency is thought to be or when EPA identifies the deficiency.[29] Thus, EPA's interpretation was entitled to the deferential standards set forth in *Chevron*.

The Fifth Circuit held that EPA's interpretation was not "plainly erroneous," that it was entitled to "controlling weight," and that it was neither arbitrary nor capricious.[30] The court concluded that the language in Section 502(g) suggests that the interim approval notice must identify all of the changes required for full approval and that making such changes triggers full approval. The court further concluded that this approach comports with the statutory approval timetables and that the Clean Air Act provides a mechanism for correcting deficiencies in fully-approved programs. The last conclusion indicates that the court believed that all deficiencies need not be corrected prior to full approval.

The court also rejected the petitioners' challenge that EPA acted arbitrarily and capriciously in granting full program approval when Texas had not fully corrected three of the deficiencies identified at interim approval.[31] The court was satisfied that EPA had conducted a detailed, technical evaluation of the revisions to the Texas program and concluded that the program satisfactorily addressed EPA's concerns.[32] Thus, EPA's interpretation of the Clean Air Act was given substantial deference.[33]

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26. Pub. Citizen, Inc. v. United States Envtl. Prot. Agency, 343 F.3d 449 (5th Cir. 2003).

27. 66 Fed. Reg. 63,318 (Dec. 6, 2001).

28. 67 Fed. Reg. 16,374 (Apr. 5, 2002).

29. *Pub. Citizen, Inc.*, 343 F.3d at 456-57.

30. *Id.* at 457.

31. *Id.* at 459-62.

32. *Id.*

33. The court also rejected the petitioners' alternative argument that the EPA was required but failed to issue a notice of deficiency for Texas's failure to satisfy regulatory requirements; the court found that Congress left the decision of whether and when to issue a notice of deficiency and thus engage the formal enforcement mechanism to the administrator's discretion. *Id.* at 462-65.

b. The Texas Audit Privilege Act Permitted Sufficient State Enforcement Authority

One of the petitioners' claims in challenging the approval by EPA of the Texas Clean Air Act's implementation of the federal Title V permit program was directed at the alleged deficiencies created by the Texas Environmental, Health, and Safety Audit Privilege Act.[34] In its interim approval notice, EPA identified the Audit Privilege Act as potentially preventing Texas from having adequate enforcement authority to implement the Title V operating permit program. Texas then amended the Audit Privilege Act to eliminate immunity and privilege for criminal actions and for violations that result in a serious threat to health or the environment. The amendments also eliminated immunity and privilege where the violator obtained a substantial economic advantage. These amendments were meant to clarify that the law would not sanction individuals who report violations to government agencies, and that the privilege does not impair access to information required by federal or state law to be made available to government agencies.

Petitioners claimed that the amended Audit Privilege Act still prevents adequate enforcement and appropriate penalties and improperly gives audit reports privileged status. The court found the Act neither limited declaratory or injunctive relief for violations disclosed by an audit, nor provided immunity for criminal sanctions or serious violations.[35] The court also concluded that EPA reasonably determined that Texas's Audit Privilege Act allows the State to consider appropriate factors in imposing penalties.[36] With respect to access to documents, the court determined that the EPA was reasonably satisfied that the Audit Privilege Act allows state employees to review information required to be made available under state or federal law, including specifically any documents required to be collected, maintained, or reported under the Texas Title V operating permit program.[37]

## B. Challenges of Environmental Permitting Decisions

### *1. Constitutional and Evidentiary Challenges*

In addition to challenges of agency rulemaking, in several cases during the Survey period petitioners contested agency decisions with respect to permits issued under Texas environmental statutes. In *Collins v. Texas*

34. *See id.* at 461-62.

35. *Id.* at 462.

36. *Id.* Although the EPA interprets the Clean Air Act and the EPA's Part 70 regulations to require state law to allow for consideration of the penalty factors in Section 113(e) of the Clean Air Act, 42 U.S.C. § 7413(e) (compliance history, economic benefit, and the seriousness of the violation), the court found that the EPA reasonably determined that the Audit Privilege Act allowed Texas to consider the appropriate factors in assessing penalties. *Id.*

37. *Pub. Citizen, Inc.*, 343 F.3d at 462.

*Natural Resource Conservation Commission*,[38] a poultry company applied to the TCEQ for a permit to change from a dry waste management system to a wet waste management system, that involved lagoons as part of an expansion of the poultry operation. An organic farmer, Collins, whose farm was located near the poultry farm, requested a contested case hearing to oppose the application. After considering Collins's submissions and providing Collins with two opportunities to speak at public meetings, the TCEQ denied the hearing request. Collins sought judicial review of the decision in district court, which affirmed the TCEQ's decision and held that Collins's due process rights had not been violated. Collins appealed the district court's decision and claimed that the commissioners of the TCEQ erred in not providing findings of fact and conclusions of law as part of their written decision.

The Austin Court of Appeals examined whether there was substantial evidence to support the commission's determination and concluded that there was substantial evidence to support the finding that Collins was not an affected person. In reviewing the factual evidence, the court observed that Collins's home was not close enough to the lagoons to be affected.[39] Moreover, based on the affidavits of two engineers, the court concluded that the environment around the poultry farm would in fact be positively impacted by the change to a wet waste management system.[40]

The court also found that Collins's due process rights had not been violated. Although Collins predicted that the lagoons would constitute a nuisance that would deprive him of property rights, the court pointed out that such a nuisance would violate the terms of the proposed permit and that "[m]ere speculation . . . in the face of conflicting evidence about the improved operation of the site under the permit does not deprive Collins of protected liberty or property rights."[41] Thus, the court held that the process afforded to Collins was sufficient.[42]

Finally, the court found no error in the commission's failure to make findings of fact and conclusions of law because, (1) Collins's failure to complain in his motion for rehearing to the commission did not preserve the issue, and (2) findings and conclusions were not required since the determination of a hearing request was not a contested case hearing subject to the Texas Administrative Procedure Act.[43]

38. Collins v. Tex. Natural Res. Conservation Comm'n, 94 S.W.3d 876 (Tex. App.—Austin 2002, no pet.).

39. The court pointed out that Collins's property was not adjacent to the poultry company's property, and that although Collins's property is 590 feet from the poultry company's property at its closest point, Collins's home was approximately 1.3 miles from the lagoons. *Id.* at 883.

40. *Id.* at 884-85.

41. *Id.* at 884.

42. *Id.*

43. *Id.*

### 2. *Landfill Permit Upheld*

In another case involving a judicial challenge of a TCEQ permitting decision, *Coalition for Long Point Preservation v. Texas Commission on Environmental Quality*,[44] the court considered the TCEQ's grant of a permit to build and operate a municipal landfill. In this case, a number of parties sought and received a contested case hearing regarding the permit application. The administrative law judge assigned to the case issued a proposed decision in favor of granting the permit, which the commissioners of the TECQ adopted in pertinent part. The Coalition filed suit to challenge the TECQ's order in state district court and then appealed the district court's decision to uphold that order.

The Coalition alleged that six regulatory permit requirements had not been met.[45] Since the court was reviewing an administrative order following a contested case proceeding, the court examined each issue to determine whether there was substantial evidence for the TECQ's decision.[46] With respect to requirements concerning groundwater monitoring, proximity to a Holocene fault, subsidence measurements, and floodplain analysis, the court found that, despite some conflicting evidence, there was substantial evidence to support the TECQ's decision.[47] With respect to an analysis of the effect of excavation outside the landfill footprint, the court found that such an analysis was not required, since the TECQ assumed that the only excavation would be from within the footprint of the landfill itself.[48] With respect to drainage calculations, the court found that the Coalition had not preserved the issue because, in its motion for rehearing, the Coalition did not allege that the testimony concerning drainage was erroneously admitted.[49] Furthermore, the court concluded that the testimony was reliable because there were other studies and testimony that indicated that the method for calculation was reliable.[50] Thus, the court upheld the trial court's decision to affirm the TECQ's order.[51]

### 3. *EPA Issuance of Stormwater Permits to Two Cities Upheld*

In a case involving a dispute over EPA permitting decisions, *City of Abilene v. United States Environmental Protection Agency*,[52] two cities challenged municipal stormwater permits EPA issued under the Clean Water Act (CWA). The permits required the cities to implement programs to limit the introduction of pollutants into storm sewers that even-

44. Coalition for Long Point Pres. v. Tex. Comm'n on Envtl. Quality, 106 S.W.3d 363 (Tex. App.—Austin 2003, pet. denied).
45. *Id.* at 367.
46. *Id.* at 366.
47. *Id.* at 367-72.
48. *Id.* at 372.
49. *Id.* at 373.
50. *Id.* at 374-75.
51. *Id.* at 375.
52. City of Abilene v. United States Envtl. Prot. Agency, 325 F.3d 657 (5th Cir. 2003).

tually drain into waters of the United States. After the cities were denied relief by EPA's Environmental Appeals Board, the cities sought review by the Fifth Circuit. The cities claimed that EPA did not have the authority to require a state or local government to regulate its residents in order to receive a permit, that the permits required the cities to regulate third parties within their boundaries according to federal standards in violation of the Tenth Amendment, that certain educational provision in the permits violated the First Amendment, and that the permits were arbitrary and capricious.

The court dismissed each of the cities' arguments in turn. The court examined the language of the CWA and concluded that the plain language of the applicable section conferred broad authority to EPA, and that the permit conditions were within EPA's discretion.[53] With respect to the Tenth Amendment argument, the court reasoned that although the federal government may not compel state and local governments to implement federal regulatory programs, the federal government may "persuade" state and local governments by offering them the choice between complying with the federal scheme and not complying. "[I]f the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive, or otherwise unappealing is insufficient to establish a Tenth Amendment violation."[54] In this case, the court reasoned that the cities had a choice between the municipal permits and more stringent industrial permits.[55] Since the industrial permits did not exceed EPA's authority, the choice EPA presented to the cities did not violate the Tenth Amendment.[56] Similarly, the cities' First Amendment argument failed because the cities were not compelled to implement the educational provision of the permits.[57]

The cities argued that EPA's decision was arbitrary and capricious because the cities would be responsible for discharges from third parties, and the permit provisions required the cities to have the legal authority to implement the plans. The court pointed out that EPA's Environmental Appeals Board expressly provided that the cities would not be liable for third-party discharges and that the cities enjoyed a considerable degree of self-governance. The court also pointed out that the cities were not claiming that they did not have the authority to implement the permit.[58] Thus, the court concluded that the permit requirements were not arbitrary and capricious.[59] Since the court rejected all of the cities' arguments, it denied their petition for review.[60]

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53. *Id.* at 660-61.
54. *Id.* at 662 (citing Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 766 (1982)).
55. *Id.* at 652.
56. *Id.* at 662-63.
57. *Id.* at 663-64.
58. *Id.* at 664.
59. *Id.* at 664-65.
60. *Id.* at 665.

*4. Courts Rejected Takings Claims Against the TCEQ for Permitting Decisions*

In three cases, the TCEQ permitting activities or actions were challenged on the basis that property rights were being taken without just compensation. In one case, *Monk v. Huston*,[61] the Fifth Circuit Court of Appeals reviewed a challenge of nearby landowners to a landfill permit application submitted to the TCEQ. At the time of the appeal, the TCEQ had not yet processed the application. While the challenge was largely a procedural attack, the Fifth Circuit ruled that the challenge was not ripe. The Fifth Circuit had addressed similar claims in a prior case.[62] The guiding principles in both cases on ripeness was whether the issues were fit for judicial review and what hardship the appealing party would suffer if the court withheld its review.[63] The court further evaluated the question under the following standard: "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[64] The court concluded that no deprivation of a property interest had yet occurred. Since the permit application review procedure was still underway, the agency could deny the permit, thereby mooting the challenge.[65]

Another constitutional challenge to the TCEQ permitting action was made in *FPL Farming, Ltd. v. Texas Commission on Environmental Quality*. In *FPL*, landowners argued that the agency's action constituted a taking without just compensation in violation of the federal and state constitutions. In this case, a landowner challenged the granting of a deep injection well permit.[66] The landowner claimed a property interest deep into the subsurface. The Austin Court of Appeals considered the question of whether the TCEQ's actions in granting the deep well injection permit "impaired" those interests, assuming the landowner held such interests, as the relevant section of the Texas Water Code provides.[67] The court deferred to and considered reasonable the agency's expertise in concluding that the migration of injected material would not interfere with the intended uses of the subsurface more than a mile below ground. The landowner had failed to produce any evidence that the landowner could not inject into the same formation after the injection by the permit holder. This also proved to be decisive with respect to the landowner's constitutional takings argument. The court concluded that despite the granting of the permit, should the migration of chemicals in fact cause

61. Monk v. Huston, 340 F.3d 279 (5th Cir. 2003).

62. *Id.* at 282 (citing Smith v. City of Brenham, 865 F.2d 662 (5th Cir. 1989)). In the cited case, a party brought a due process challenge to landfill permitting procedures before the permitting process was complete. *Id.*

63. *Id.*

64. *Id.* (citing New Orleans Pub. Serv., Inc. v. Council of New Orleans, 833 F.3d 583, 586 (5th Cir. 1987)).

65. *Id.* at 283.

66. FPL Farming, Ltd. v. Tex. Comm'n on Envtl. Quality, No. 03-02-00477-CV, 2003 Tex. App. LEXIS 1074, at *1 (Tex. App.—Austin Feb. 6, 2003, pet. denied).

67. TEX. WATER CODE ANN. § 27.051 (Vernon 2003).

property damage, the landowner could sue the permittee.[68] Thus, an adequate remedy at law existed.

In the last case, Base Truck Lines, Inc. v. Texas Commission on Environmental Quality, a landowner challenged an agency order requiring the paving of portions of the landowner's trucking facility.[69] The landowners challenged the TCEQ order as being so vague and ambiguous as to deny due process of law. The court concluded the issue had not been raised in the prior administrative or judicial process and dismissed the suit. The second due process challenge of the penalty assessed against the landowner revolved around a letter from a legislator encouraging the TCEQ to issue significant penalties. The court ruled that there was no evidence of undue influence in the decision to assess a $2,500 penalty. The court also upheld the evidence that the facility was causing a dust problem in the area.

Finally, the court denied the takings claim. The court applied a rule of constitutional law that the regulation must be "tantamount to a physical taking."[70] The court's threshold question was whether all economically viable use of the property was denied.[71] The court ruled this was not the case where the government orders property to be paved; this was a remedial action, leaving value to the property.

## III. TEXAS SOLID WASTE DISPOSAL ACT

### A. Government Injunction Shuts Down Sham Recycling Facility

So-called recycling facilities have been the locus of much environmental contamination and environmental risk where the activities involve mostly illegal disposal activities or "sham recycling." In the case of *AAA Natural Recycling*, Harris County and the State of Texas obtained injunctive relief to stop the delivery or disposal of wood wastes on two tracts of land. The court concluded that the operation was nothing more than a "sham recycling" operation that in essence served as a dump for wood waste, despite the fact that the owner claimed it would be turned into compost.[72]

The owner of the facilities appealed the trial court's granting of an injunction prohibiting receipt of any additional waste at the two facilities. The owner's first argument was that the recycling business was governed by Chapter 332 of the Texas Administrative Code, not by the solid waste regulations in Chapter 330. The owner's second argument was that even

68. *FPL Farming Ltd.*, 2003 Tex. App. LEXIS 5941, at *16. The court cited Section 27.104 of the Texas Water Code in reaching this conclusion.

69. Base Truck Line, Inc. v. Tex. Comm'n on Envtl. Quality, No. 03-02-00272-CV, 2003 Tex. App. LEXIS 5941, *1 (Tex. App.—Austin July 11, 2003, pet. dism'd).

70. *Id.* at *22.

71. *Id.* at *23 (stating the test as "whether any value remains in the property after the governmental action").

72. Thumann v. Harris County, No. 14-02-00307-CV, 2002 Tex. App. LEXIS 8792 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet.).

if the solid waste regulations apply, the composting exceptions relieve the owner from those regulations. However, the court upheld the trial court's finding that the facilities were not in fact recycling or composting the wood materials. As much as 300,000 cubic yards of wood waste had been placed at one of the facilities and Harris county officials testified that no more than one to two percent of the material brought to the sites had ever been ground into mulch.[73]

The temporary injunction was upheld based on the evidence presented to prove the risk of harm arising from the large piles of wood waste being accumulated at the facility. In addition, the appellate court reviewed the lower court's findings that the operator did not have sufficient fire suppression capability to quell a fire if it were to start. The court concluded that Harris County had presented sufficient evidence to show the owner or operator had violated Section 330 of the Texas Administrative Code and that the continuing violations and the risk of allowing ongoing receipt of wood waste was sufficient to allow the court to temporarily enjoin the further delivery of wood waste to the site. The risk of fire was significant, and the lack of adequate fire suppression capability made the site a significant concern to both the district and appellate courts.[74]

### B. Ban on Injunction of Hazardous Waste Into Salt Domes Upheld

*Secured Environmental Management, Inc. v. Texas Natural Resource Conservation Commission*[75] presents the question of whether the Federal Resource Conservation and Recovery Act (RCRA) preempts Section 361.114 of the Texas Solid Waste Disposal Act (TSWDA), which bans disposal of hazardous waste, solid or liquid, in solution-mined salt domes or sulphur mines.[76] Section 361.114 of the TSWDA was passed after Secured Environmental Management, Inc. (SEM) applied for a permit to dispose of hazardous waste in a solution-mined salt dome. In response to this statutory prohibition, the Texas Natural Resource Conservation Commission (TNRCC) notified SEM that the TNRCC would not consider SEM's permit application with respect to disposal of hazardous waste in a solution-mined salt dome and requested that SEM revise its permit application accordingly. SEM challenged the TNRCC's position by seeking a declaratory judgment that Section 361.114 was preempted by RCRA and an injunction preventing the statute's implementation. The trial court held that RCRA did not preempt Section 361.114.[77] SEM appealed the decision.

Federal "preemption can be demonstrated explicitly or implicitly."[78]

73. *Id.* at *8-9.
74. *Id.* at *13.
75. Secured Envtl. Mgmt., Inc. v. Tex. Natural Res. Conservation Comm'n, 97 S.W.3d 246 (Tex. App.—Austin 2002, pet. denied).
76. *Id.* at 248.
77. *Id.*
78. *Id.* at 252.

Because RCRA does not explicitly preempt state regulation of hazardous waste disposal in solution-mined salt domes, the Austin Court of Appeals analyzed whether RCRA impliedly preempted the state statute.[79] When assessing the implied preemptive effect of a federal statute over a state statute, the court must determine "whether the statute is consistent both with the federal statute's structure and purpose, taken as a whole, and its objectives and policies."[80] In this case, the court considered "whether 'the practical impact' of Section 361.114 interferes with the goals and methods of the RCRA."[81]

RCRA provides that land disposal of hazardous waste, such as in solution-mined salt domes, poses substantial risk to human health and the environment, and, therefore, should be the least favored method for managing hazardous waste. Storage of fossil fuels in solution-mined salt domes has shown that the formations are not stable. When the salt moves, the walls crack, allowing whatever is contained inside to leach out into the surrounding area. This danger is the reason that both the federal and state governments have developed statutes that carefully limit this type of hazardous waste management.[82] The RCRA creates an outright ban on disposal of liquid hazardous waste in a set of geologic formations including salt domes and a corresponding disapproval of solid waste disposal in the same formations. The court agreed with SEM that RCRA's different treatment of disposal of liquid and solid hazardous waste in underground salt formations suggests the possibility that at some point some hazardous waste may be safely disposed in some of the underground geologic formations.[83] SEM, however, interpreted such recognition as the creation of a requirement that land disposal be a permissible alternative in the waste disposal program under the authority of EPA or the authorized states.

The court concluded that a statutory ban is within the scope of RCRA's savings clause in Section 6926, which provides that states and local governments "may not impose any requirements less stringent" than those specifically set forth in RCRA, while explicitly authorizing state governments to create regulations "more stringent" than those specifically set forth in RCRA.[84] The court opined that "[i]f Congress has the ability to regulate waste disposal by creating an outright ban on liquid hazardous waste disposal in certain geologic formations, then Texas's power to enact more stringent regulations, pursuant to the savings clause, must include the ability to extend that ban in order to meet the same underlying policy concerns."[85] Thus, the court of appeals affirmed the

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 249-50.
83. *Id.* at 254.
84. *Id.*
85. *Id.* at 256.

summary judgment for the TNRCC in SEM's declaratory judgment action.

## IV. ENDANGERED SPECIES ACT

Since its enactment, the Endangered Species Act (ESA) has been the basis of much litigation. Landowners have attacked the statute, believing that their constitutional rights were denied in government attempts to control the use of their land or that the statute exceeded congressional authority granted under the Constitution. In *GDF Realty Investments, Ltd. v. Norton*,[86] the Fifth Circuit was presented with a Commerce Clause challenge to the take provision of the ESA. In the case, a number of landowners had applied for an incidental take permit that would allow them to develop their property for a number of uses. The United States Fish and Wildlife Service (FWS) denied the permit and the property owners filed suit against the FWS, claiming that the ESA take provision as applied to the Cave species was unconstitutional. The district court granted summary judgment for the FWS, holding that the take provision was constitutional in this situation. The property owners appealed, claiming that the taking of the Cave species had no relationship, let alone a substantial one, to interstate commerce and that aggregation in this case was improper because the taking of the Cave species was not economic or an essential part of a regulatory scheme.

The Fifth Circuit chronicled the recent Supreme Court cases addressing the scope of the Commerce Clause, paying close attention to the difficulty associated with the aggregation principle, including what activity may be aggregated in a Commerce Clause analysis. The court stated that the district court had erred in finding a direct link to interstate commerce based primarily on the property owners' commercial motivation, as "Congress, through the ESA, is not directly regulating commercial development."[87] The Fifth Circuit then concluded that, considered alone, the taking of the Cave species did not have a substantial effect on interstate commerce.[88]

Next, the court considered whether the taking of the Cave species could be aggregated with the taking of all endangered species. Earlier, the court had noted that "[o]ne way in which the regulated activity might be economic is when . . . the intrastate activity is part of an economic regulatory scheme which could be undercut but for the particular intrastate regulation."[89] Relying on the legislative history of the ESA, the court concluded that the ESA's protection of all endangered species was economic in nature.[90] Additionally, the court reasoned that the taking of any individual species was an essential element of the entire federal scheme of species protection, in part because of the interdependence of

86. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).
87. *Id.* at 634.
88. *Id.* at 637-38.
89. *Id.* at 630 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).
90. *Id.* at 639.

all species.[91] Thus, the court held that a taking of the Cave species could be aggregated with all ESA takings in a Commerce Clause analysis and that the ESA's taking provision as it related to the Cave species did not exceed the scope of the Commerce Clause.[92]

In another ESA case in Texas, *Sierra Club v. Veneman*,[93] the Fifth Circuit considered whether the Texas Red-Cockaded Woodpecker (RCW) plan satisfied the requirements of the ESA. The plaintiffs alleged that the RCW plan was arbitrary and capricious because it allowed clear-cutting or even-aged management methods for timber production in National Forests in Texas. The court pointed out that "[o]nly challenges to final, specific agency action, such as a specific timber sale, are permissible."[94] Additionally, the RCW plan required a site-specific evaluation before clear-cutting would be allowed. Despite the fact that there may be disagreement over the best method for accomplishing an objective in the RCW plan, that "does not mean that the Forest Service acts arbitrarily when it must choose among competing alternatives."[95] Thus, the court held that the RCW plan was not arbitrary and capricious, and that it met the requirements of the ESA.[96]

## V. ENVIRONMENTAL TORTS AND COST RECOVERY CLAIMS

### A. Cost Recovery and Contribution Claims Under Environmental Statutes

#### *1. Right of Cost Recovery Under CERCLA Without First Being Sued*

In a very significant Fifth Circuit Court of Appeals case discussed in last year's Survey, the ability of private parties to conduct investigation and remediation of their property and then to recover the costs of those actions from other liable private parties was upheld in an en banc decision reversing the earlier panel decision. Such "cost recovery claims," as they have been called, have frequently been brought under Section 113 of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[97] The Fifth Circuit panel issued an opinion that concluded the statutory language of CERCLA requires that plaintiff may only file a cost recovery claim during or following the prosecution of a CERCLA action against that plaintiff.[98] The full en banc panel reversed this holding, and held that the plaintiff need not be a current or former defendant in a CERCLA action to file a suit against other responsible parties to recover the costs it has expended to remediate a contami-

91. *Id.* at 640.
92. *Id.* at 640-41.
93. Sierra Club v. Veneman, 273 F. Supp. 2d 764 (E.D. Tex. 2003).
94. *Id.* at 768 (citing Sierra Club v. Peterson, 204 F.3d 580 (5th Cir. 2000)).
95. *Id.* at 768-69.
96. *Id.* at 769.
97. 42 U.S.C. § 9613 (2003).
98. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 138 (5th Cir. 2001).

nated site.[99]

The Fifth Circuit cited a list of opinions decided after the 1986 enactment of Section 113 that it believed supported the conclusion that a plaintiff may file cost recovery claims under CERCLA without first being sued or having a judgment rendered against the plaintiff. An earlier United States Supreme Court decision considered the ability to bring a cause of action under Section 113 and concluded that it was specifically allowed.[100] Other Fifth Circuit opinions and other circuit courts of appeal had similarly ruled that a contribution claim was allowed by parties without first being a defendant in a CERCLA proceeding. The court in this case concluded that the statutory language and legislative history supported the ability of private parties to bring suit without prior judicial action against that party.[101]

Finally, the court reviewed the policy implications of the panel's ruling. The court believed the panel's ruling would have impeded the successful implementation of CERCLA by not allowing responsible parties to move forward voluntarily with remediation without first being sued such parties could then file suit after completing mediation to allocate the costs incurred among other responsible parties.

### B. Tort Claims for Environmental Contamination and Personal Injury

Over the years, property damage claims and personal injury claims that arise from alleged releases of contaminants or pollutants to the air, water, or soil have grown in number. Several interesting cases during the Survey period were handed down by state and federal courts.

#### *1. Property Damage Claims*

In *Mieth v. Ranchquest, Inc.*,[102] the plaintiffs, owners of the surface of a large tract of grazing land, sued oil and gas well operators for contamination of their land. The trial court concluded that the injury to the land was permanent and that the correct measure of damages was the diminution in value to the land. Because the jury found no diminution in value, the trial court rendered judgment for the defendants. The court of appeals reversed the decision in part and remanded the cause for further proceedings.

At trial, evidence was presented that the defendants violated Railroad Commission regulations enacted to prevent the pollution of surface and subsurface water, and the jury awarded $200,000 as reasonable costs to

99. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th. Cir. 2002), *cert. granted*, 124 S. Ct. 981 (2004). This case has been appealed to the U.S. Supreme Court and accepted for hearing.

100. Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

101. *Aviall Serv., Inc.*, 312 F.3d at 682.

102. Mieth v. Ranchquest, Inc., No. 01-02-00461-CV, 2003 Tex. App. LEXIS 6550, at *1 (Tex. App.—Houston [1st Dist.] July 31, 2003, no pet.).

repair plaintiffs' property. The appellate court held that because the uncontested evidence established that the damage to plaintiffs' land could be remediated, the damage to the property was temporary. The "[p]roper measure of damages for temporary injury to land is the cost of restoration to its condition immediately preceding the injury."[103] "However, the diminution in fair market value is the measure to be applied when the cost of restoration exceeds the diminution in fair market value."[104]

The defendants argued that their unsolicited and unaccepted offer to buy the property for its fair market value was proof that there was no diminution in value of the land. The court found this argument to be contrary to settled case law. The court found that Texas courts have long held that unaccepted offers to purchase property are not evidence of the fair market value of property. The court stated that such evidence is uncertain and speculative and does not establish the good faith of the person making the offer. The court held that there was no evidence to support the jury's finding of no diminution in property value.[105]

### 2. *Sufficiency of Evidence—Validity of Claims for Airborne Particulates Under Texas Law*

In *Stevenson v. E.I. DuPont De Nemours and Co.*,[106] a rather unique argument was made by the defendant, E. I. DuPont De Nemours and Company (DuPont). A central part of the defense was that dispersion of airborne particulates onto another person's property cannot serve as the basis for a tort claim by the owner of that property. The plaintiffs in the case brought suit and alleged that the defendant's plant emitted heavy metal particulates that contaminated their properties and affected their health and their animals' health. The plaintiffs sought recovery under theories of negligence, nuisance, and trespass. The jury found for the plaintiffs only on the trespass theory and awarded damages for the diminished value of the property. The Fifth Circuit affirmed the trial court's denial of DuPont's motion for judgment as a matter of law, but reversed the jury's award for damages and remanded the case for a new trial on damages.[107]

On appeal, DuPont argued that, as a matter of law, the plaintiffs could not recover for trespass based on contamination by airborne particulates. DuPont argued that trespass requires a showing of direct and physical invasion by tangible matter onto another's property and that intrusion of airborne particles was not a sufficient intrusion. DuPont further argued that even if airborne particles were a sufficient intrusion, the plaintiffs would still have to prove substantial damages to their properties. The

103. *Id.* at *12.
104. *Id.*
105. *See id.* at *12-20.
106. Stevenson v. E.I. DuPont De Nemours & Co., 327 F.3d 400 (5th Cir. 2003).
107. *Id.* at 410.

court found that DuPont's arguments failed for two reasons. First, because there was no assertion in the case that Texas law had set the required levels of contamination necessary for recovery, the plaintiffs were not required to show substantial damage to their property. The court did cite two cases where the state had set the minimum levels of damage necessary to maintain a trespass cause of action, but distinguished these cases from the case at hand. Second, the court concluded DuPont's arguments failed under the current application of Texas law on trespass. The court held that "[t]o constitute trespass there must be some physical entry upon the land by some 'thing.' . . . Because the only showing necessary is entry over land by some 'thing,' Texas law would permit recovery for airborne particulates."[108]

The second challenge concerned the sufficiency of the plaintiffs' evidence. The court held the plaintiffs were not required to rule out all other potential causes of their damages, but were required only to show that the defendant's emissions more probably than not landed on the plaintiffs' properties. Testimony presented at trial showed that the emissions from DuPont's factory were most heavily concentrated over the plaintiffs' property and that their property showed evidence of heavy metal contamination that was most likely airborne in nature.[109] With regard to damages, the court held that the plaintiffs did not have the burden of establishing that the trespass was temporary or permanent. In absence of proof that repair is actually or economically feasible, the injury may be deemed permanent. Because DuPont did not present any evidence to support a temporary trespass or request a jury charge on the issue, it was not error for the jury to consider only damages for permanent trespass. However, the court vacated the damage award and remanded the case for a new trial on damages because the jury had been presented with testimony only about the value for the property after damages; no evidence on the value of the land before the trespass was presented.[110]

### C. FRAUD

In *Nelson v. Najm*,[111] the plaintiff sued Philip and Carrie Nelson based on Philip Nelson's alleged failure to disclose material information to Najm prior to Najm's purchase of Nelson's gas station. In a bench trial, the trial court awarded $100,000 plus pre-judgment interest and attorney's fees to Najm. At the time of the purchase there were four underground gasoline storage tanks and one underground waste oil storage tank. The four gasoline tanks were registered with the TNRCC, now the TCEQ, but the waste oil tank was not. Nelson disclosed the existence of the gasoline storage tanks, but he did not disclose the existence of the

108. *Id.* at 406.
109. *Id.* at 408.
110. *Id.* at 409.
111. Nelson v. Najm, 127 S.W.3d 170 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.).

waste oil tank and told Najm that there was no need for testing. After closing, Najm discovered soil contamination at the station.

With regard to Najm's claim for recovery based on common-law fraud, the appellate court concluded that Nelson's failure to disclose the existence of the underground waste oil tank was a material omission. Nelson did not verbally inform Najm about the tank nor did he disclose it on the commercial property form. The court found that Nelson made an affirmative misrepresentation when he told Najm that a property inspection was not necessary.[112] The court further found that Nelson had a statutory duty to disclose not only the existence of every tank on the property, but also the regulations governing the tanks.[113] The "as-is" provision included in the earnest money contract was deemed not to be valid because Nelson concealed a known fact.[114] The appellate court upheld the trial court's granting of contract rescission, finding that a general prayer for relief will support any relief raised by the evidence that is consistent with the allegations and causes of action in the petition and was within the discretion of the trial court.[115]

### D. Statute of Limitations

In *Baylor Health Care System v. Maxtech Holdings, Inc.*,[116] Baylor Health Care System (Baylor) sued Maxim Holdings, Inc. alleging that Maxim negligently performed an environmental site assessment before Baylor purchased the properties in 1991. The trial court granted summary judgment on the basis of the statute of limitations. Baylor contended the trial court erred in granting the motion, in holding that the discovery rule did not apply, and in concluding that Baylor discovered, or should have discovered, its injury more than two years prior to filing suit.

The parties disputed whether the discovery rule applied and, if applied, when Baylor knew or should have known that its property was contaminated as a result of past dry cleaning operations. Baylor contended it discovered the contamination when it discovered a contaminated sump many years after it purchased the properties. Maxim contended that the date of discovery was, at the latest, 1996 when it delivered a second environmental site assessment report on an adjacent property to Baylor. The second report expressed concern about contamination and the need for additional investigation.

The court held that "assuming the discovery rule applied, the 1996 report raised concerns over the environmental impact of the former dry cleaning services."[117] Although the report did not identify perchlorotheylene as a solvent used in dry cleaning operations, Maxim rec-

112. *Id.* at 174-75.
113. *Id.* at 175.
114. *Id.* at 176.
115. *Id.* at 177.
116. Baylor Health Care Sys. v. Maxtech Holdings, Inc., 111 S.W.3d 654 (Tex. App.—Dallas 2003, pet. denied).
117. *Id.* at 658.

ommended additional testing and expressly stated that dry cleaning solvents may have posed an environmental concern to the site. The court found "that this alone should have put Baylor on notice that dangerous contaminants could exist and would need to be cleaned up."[118]

## E. Personal Injury Claims

### 1. *Exemplary Damages*

Personal injury claims are also common in environmental tort suits. During the Survey period, several interesting opinions were issued by appellate courts hearing Texas cases. In *Brown & Root, Inc. v. Moore*,[119] the estate of a steel mill employee brought a personal injury suit against a corporation for exposure to asbestos. The employee worked at the steel mill from 1977 to 1985. He worked around the furnaces while the corporation's employees removed insulation. The employee developed and died from mesothelioma. The jury found that the corporation was partially responsible and that the corporation acted with malice. Thus, the estate was awarded exemplary damages. The corporation appealed, claiming that there was no evidence supporting the malice determination and that the exemplary damages were improper.

The court pointed out that malice has an objective prong and a subjective prong.[120] In examining whether the objective prong of malice had been satisfied, the court pointed to trial evidence indicating that by the 1970s the risks of asbestos were well known.[121] The court found the evidence to be legally sufficient to conclude that the insulation removal, viewed objectively from the corporation's perspective, involved an extreme degree of risk.[122] Regarding the corporation's subjective awareness of the risk, the court pointed to a number of facts indicating that the corporation was aware of the risk and had taken steps in other situations to limit exposure to asbestos.[123] The court also cited the testimony of corporation employees concerning the corporation's knowledge.[124] The

118. *Id.*

119. Brown & Root, Inc. v. Moore, 92 S.W.3d 848, 850 (Tex. App.—Texarkana 2002, pet. denied).

120. "Objectively, the defendant's conduct must involve an extreme risk of harm. Subjectively, the defendant must have actual awareness of not just a risk, but of an extreme risk created by the conduct." *Id.* at 851 (citing Celanese Ltd. v. Chem. Waste Mgmt., Inc., 75 S.W.3d 593, 599 (Tex. App.—Texarkana 2002, pet. denied)).

121. The court cited trial testimony indicating that it was common knowledge as far back as 1930 that asbestos products were a serious health risk, that it was accepted by 1949 that asbestos could cause lung cancer, that asbestos was linked to mesothelioma in approximately 1960, and that there were Texas and OSHA regulations issued in 1958 and 1972 respectively. *Id.* at 852.

122. *Id.*

123. For example, the corporation issued a memorandum regarding OSHA asbestos regulations, the corporation performed asbestos monitoring at a number of sites other than Lone Star Steel, and the corporation followed stringent asbestos safety rules when working for another client. *Id.* at 853.

124. Testimony from the corporation's health, safety, and environmental manager and from one of the corporation's industrial hygiene technicians indicated that the corporation was aware that furnace thermal insulation often contained asbestos, that there were regula-

court held that there was sufficient evidence to find that the corporation had subjective knowledge of the risks of exposure to asbestos.[125] Additionally, the court pointed to testimony of the highest ranking supervisor at the steel mill site who indicated that he was aware that asbestos could cause health problems and that the corporation had not taken any steps to determine if asbestos was present or to prevent the steel mill employees from exposure to asbestos.[126] The court found that the actions of the supervisor alone were sufficient evidence for the jury to find malice on the part of the corporation.[127] Thus, the court upheld the jury's finding of malice and the exemplary damages award.

### 2. *Review of Expert Testimony Causation Evidence*

In another personal injury case, *Daniels v. Lyondell-Citgo Refining Co.*,[128] the family of a refinery worker, Daniels, filed a wrongful death action against the refinery. The family claimed that the refinery improperly and negligently released a known carcinogen, benzene, into Daniel's work environment, causing Daniels to develop bronchial alveolar cancer. The refinery owners filed a no-evidence motion for summary judgment on the grounds that the plaintiffs had not provided any evidence that benzene causes bronchial alveolar cancer in humans. The trial court granted the refinery owners' motion, and the plaintiffs appealed.

The court pointed out that unless the plaintiffs could produce more than a scintilla of evidence raising a genuine issue of material fact on the issues of general and specific causation, the trial court's ruling would stand.[129] To support their contention that occupational exposure to benzene causes lung cancer, the plaintiffs presented testimony from two experts and relied on three epidemiological studies.[130] Following the Texas Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[131] the court examined the underlying data to evaluate whether the evidence was reliable. For the epidemiological studies, the court utilized the standard enunciated in *Havner* that "doubling of the risk" would satisfy the no-evidence standard of review and the "more likely than not" burden of proof.[132] The court noted that none of the studies proffered by the plaintiffs demonstrated that the risk of lung cancer doubled based on occupational exposure to benzene.[133] Thus, the court concluded that the

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tions concerning exposure to asbestos, and that there were risks associated with exposure to asbestos. *Id.* at 853-54.

125. *Id.* at 855-56.

126. *Id.* at 854-55.

127. *Id.* at 855-56.

128. Daniels v. Lyondell-Citgo Ref. Co., 99 S.W.3d 722 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

129. *Id.* at 725.

130. *Id.* at 726, 730.

131. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

132. *Daniels*, 99 S.W.3d at 727 (citing *Havner*, 953 S.W.2d at 717-18).

133. *Id.* at 728-29.

plaintiffs had not presented any evidence of general causation.[134] Since the court found no evidence of general causation, the court declined to address the issue of specific causation and affirmed the trial court's summary judgment.[135]

In a second personal injury case reviewing causation evidence, the court in *Exxon Corp. v. Makofski*[136] also relied on the *Havner* decision. In *Makofski*, several hundred people sued alleging that they suffered various health ailments resulting from exposure to benzene via a contaminated water supply. The water supply had been contaminated by a leak from an oil and gas well. Four adults and two children were selected for the bellwether trial. The jury found Exxon negligent and grossly negligent and awarded approximately $7 million in actual and punitive damages. However, the trial court rendered take nothing judgments for the four adults and reduced the judgments for the two children. Both sides appealed.

Exxon challenged the opinions of the plaintiffs' experts, claiming that they did not establish a basis for finding that the exposure caused the plaintiffs' ailments. The appellate court examined the trial record, additional materials, and studies provided at the court's request. The court first examined the evidence related to acute lymphocytic leukemia (ALL). With respect to two studies, the court found that the risk of developing ALL due to exposure to benzene was not statistically significant under the *Havner* standard, i.e., the risk was not doubled.[137] With respect to another study that barely demonstrated risk doubling, the court pointed out that the authors of the study concluded that the results were spurious because of the historical difficulty in distinguishing ALL from other leukemias.[138] The court found that other evidence did not establish a link between benzene and ALL.[139] The court declined to consider other studies mentioned in expert testimony at the trial level because the court did not have the studies available to it.[140] The court also discounted an Agency for Toxic Substances and Disease Registry (ATSDR)[141] study on the subdivision in which the plaintiffs lived in large part because the study did not contain or claim to contain any findings regarding ALL and benzene.[142] With respect to the experts proffered by the plaintiffs, the court discounted their testimony because it was not based on any pub-

134. *Id.* at 730.
135. *Id.*
136. Exxon Corp. v. Makofski, 116 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).
137. *Id.* at 183-84.
138. *Id.* at 184.
139. The court found that two studies did not provide any statistical information concerning ALL, in one case because the "study found a significant association between ALL and other lymphatic leukemias with exposure to benzene and other solvents." *Id.* at 184-85.
140. *Id.* at 185.
141. "The ATSDR is a division of the federal Department of Health and Human Services that gathers health information on persons exposed to hazardous substances." *Id.*
142. *Id.* at 185-87.

lished, peer-reviewed studies and was inconsistent with the many published, peer-reviewed epidemiological studies.[143]

With respect to the other diseases complained of, the court did not find any reliable scientific evidence to connect benzene to the diseases.[144] Additionally, the jury had made awards for future pain, impairment, and medical care, but awarded nothing for past damages.[145] The court reasoned that the jury had not based their awards on diseases exhibited to date.[146] Since Texas law prohibits recovery for future diseases without a reasonable medical probability that the disease will occur,[147] and since the court did not find any legally sufficient evidence to tie benzene to a future disease, the court reversed the jury's award.[148]

The jury had also awarded damages for mental anguish to some plaintiffs, although they had awarded nothing for the other claims.[149] The court pointed out that Texas law does not allow recovery of "mental anguish damages for fears related to developing a disease that has not occurred and has not been shown to be likely. . . ."[150] Thus, the court upheld the trial court's order setting aside the mental anguish awards. In sum, the court declined to "rush to impose liability when scientifically reliable evidence is unavailable,"[151] and decided that the plaintiffs would receive no damages.[152]

The dissent in this case asserted that the trial court's decision should be upheld. The dissent argued that the trial judge had determined the reliability of the scientific evidence in a pre-trial hearing.[153] Additionally, since there was not a record of the pre-trial hearing, the dissent argued that no error had been presented for the court to consider.[154] The majority responded that the dissent had confused the legal sufficiency challenge with an admissibility challenge;[155] the majority determined that *Havner* requires that both the admissibility and the legal sufficiency of expert testimony be determined by the same guidelines of relevance and reliability, although the standards of review are different.

143. *Id.* at 187-88.
144. *Id.* at 189.
145. *Id.* at 188.
146. *Id.* at 189.
147. *Id.* at 190.
148. *Id.*
149. *Id.*
150. *Id.* at 191.
151. *Id.*
152. *Id.*
153. *Id.* at 192-94 (Seymour, J., dissenting).
154. *Id.* at 197-98 (Seymour, J., dissenting).
155. *Id.* at 181-82.

## VI. CRIMINAL PROSECUTION

### A. CRIMINAL PROSECUTION FOR "PASSIVE MIGRATION" OF CONTAMINANTS IN GROUNDWATER IS NOT PERMISSIBLE

In *L.B. Foster Co. v. State*, a company, L.B. Foster, challenged its convictions for knowingly disposing of a hazardous waste and knowingly disposing of used oil on its land.[156] One of the major issues in the case was the question of whether a criminal violation continued as long as contaminants released from a prior action on a particular date or dates migrated through the soil. This theory has been raised in a variety of federal environmental statutory claims for cost recovery by governmental entities and private parties. Although this theory has been rejected in the criminal context, the remaining question is whether the theory will ultimately be rejected by Texas courts in the context of governmental claims or private party attempts to recover expenses incurred in investigating and remediating contaminated properties.

On its site, L.B. Foster cuts and threads pipe and cuts rails for railroad companies. From December 30, 1997 to February 18, 1998, Houston police officers and environmental investigators made a number of visits to the site and observed various conditions, including: oil on the ground under hydraulic roller machines, leaking hydraulic hoses on various machines, blackened and/or stained soil, tipped over buckets of black sludge, open buckets of hydrocarbon fluids, and oil in the sewer. On July 24, 2000, the State indicted L.B. Foster for knowingly disposing of a hazardous waste and knowingly disposing of used oil on its land, both in violation of the Texas Water Code. The jury found L.B. Foster guilty on both counts, and the trial court denied L.B. Foster's motion for a new trial. L.B. Foster appealed, challenging the legal sufficiency of the evidence of the hazardous waste conviction and challenging the used oil conviction on a number of grounds.

In examining the legal sufficiency of the evidence of hazardous waste conviction, the court first noted that while there was adequate circumstantial evidence to indicate that there had been disposal of hazardous waste, the evidence did not indicate that disposal had taken place within the three year statute of limitations.[157] As an alternate theory, the State argued that L.B. Foster continued to passively (i.e., without human contact) dispose of the hazardous waste as long as the contamination migrated through the soil—a theory referred to as "passive migration."[158] Thus, the court examined whether the term "disposal" since in the statute included passive migration. The court reasoned that since the term "disposal" is not defined in the Water Code, it would look to a technical meaning in the context of other environmental statutes. The parties

156. L.B. Foster Co. v. State, 106 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).
157. *Id.* at 201-02.
158. *Id.*

adopted "polarized positions" on issue of the scope of the term so the court looked to other statutes for guidance.[159] Specifically, the court examined two statutes with similar definitions of disposal—the Texas Solid Waste Disposal Act (TSWDA) and CERCLA. The court noted that the TSWDA defined disposal in terms of active verbs that require affirmative human conduct.[160] Unfortunately, the court was unable to find any judicial guidance in Texas on passive migration in this context.[161] On the other hand, the court pointed out that a number of CERCLA cost recovery and enforcement actions considered passive migration.[162] However, the court discounted the applicability of these cases because all were civil cases based on a strict liability statute, while the case at hand was a criminal case based on a statute with an intentional or knowing mental state requirement.[163] Furthermore, unlike the present case, none of the CERCLA cases involved passive migration in the context of a statute of limitations.[164]

In fact, the court found only one case in any jurisdiction involving a criminal conviction based on passive migration under a similar statute. In that case, a Colorado appellate court reasoned that construction of the term "disposal" to include passive migration is inconsistent with the existence of a statute of limitations because there would be no method to accurately determine when the limitations period started.[165] The court agreed with the reasoning of the Colorado court and held that, in criminal cases, the term "disposal" under Water Code subsection 7.162(a)(2) did not include passive migration.[166] "As a corollary to the passive migration theory, the State asserted that L.B. Foster committed a continuing offense."[167] However, the court noted that the legislature had foreclosed that possibility by providing that each day of illegal disposal constituted a separate offense, not a continuing offense.[168] Thus, the court held that the evidence presented was not legally sufficient to sustain the hazardous waste conviction.[169]

With respect to L.B. Foster's challenge to the used oil conviction, the court held that there was legislative intent to include corporations within the definition of person for purposes of prosecuting Water Code violations,[170] that the term "directly" in the statute distinguished between mixing of used oil with solid waste before disposal and disposal of used oil by

159. *Id.* at 202-03.
160. *Id.* at 204.
161. *Id.* at 202.
162. *Id.* at 205-06.
163. *Id.* at 206.
164. *Id.*
165. *Id.* at 206-07.
166. *Id.* at 207.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 208.

itself (i.e., directly),[171] and that there was no error in the jury charge.[172] Thus, the court upheld the used oil conviction.[173]

## VII. LEGISLATIVE DEVELOPMENTS

After reauthorization of the TCEQ during the last legislative session, the 78th Legislative Session was relatively quiet with regard to new environmental statutes. Nevertheless, there were a couple of new environmental programs enacted during the session.

### A. MUNICIPAL SETTING DESIGNATIONS

One of the most significant environmental developments was the passage of House Bill 3152, authorizing the TCEQ and local governments to create municipal setting designations (MSDs). The bill offers developers, lenders, real-estate professionals, and property owners new opportunities to return environmentally impacted properties to productive use in a shorter time frame and at lower cost. The legislation authorizes the creation of MSDs for properties within the corporate limits or extraterritorial jurisdiction of municipalities that have a population of at least 20,000 and that have public drinking water supplies.[174] The MSD application process allows an individual, company, or a local governmental entity to apply to the TCEQ for an MSD. Before an MSD can be certified, the municipality containing the proposed MSD must restrict the potable use of groundwater in the proposed MSD area by ordinance.[175] Individuals are authorized to restrict potable use of groundwater on individual properties by deed restrictions enforceable by the municipality containing the property, provided that the municipality passes a resolution supporting the designation.[176]

Once an MSD is established, parties responsible for contaminated properties within the MSD will no longer have to consider the risks associated with human consumption of the contaminated groundwater in developing a response action to address the contamination.[177] Consequently, groundwater remediation costs, which are most often driven by the requirement to achieve drinking water quality, should be greatly reduced or eliminated. The creation of MSDs should also expedite the issuance of VCP certificates of completion for MSD properties.

### B. DRY CLEANER FUND

The dry cleaner legislation creates a fund to remediate dry cleaner facilities that use dry cleaning solvents, including perchloroethylene and/or

171. *Id.* at 209-10.
172. *Id.* at 210-13.
173. *Id.* at 213.
174. TEX. HEALTH & SAFETY CODE ANN. § 361.803 (Vernon 2003).
175. *Id.* § 361.8065.
176. *Id.*
177. *Id.* § 361.808.

non-aqueous solutions. The new law requires the TCEQ to promulgate rules requiring certain performance standards for new dry cleaning operations, and for older facilities to retrofit those performance standards. Smaller operations with annual gross receipts of $200,000 or less may be exempt.[178]

The primary thrust of the legislation is the dry cleaner fund for completing corrective action at contaminated dry cleaning facilities. To provide monies for the fund, dry cleaning facilities must pay an annual registration fee depending on the type of cleaning method and annual gross receipts.[179] In addition, fees are imposed on the purchase of dry cleaning solvents. The fee does not apply to an owner who has never used or allowed the use of perchloroethylene at a facility in Texas or to the purchase of carbon dioxide solvents.[180]

Dry cleaning facilities had the opportunity to opt-out of the fund program, including the fees, by January 1, 2004. To opt-out, the facility owner must have demonstrated that it never used or allowed the use of perchloroethylene at any dry cleaning facility in Texas and the owner must have agreed that perchloroethylene will not be used at the facility. Owners of nonparticipating facilities are not eligible for any expenditures of money from the fund or other benefits, and the facility is prohibited from later becoming a participating facility.[181] Nonparticipating facilities may be subject to a bonding requirement.[182]

The TCEQ is required to prioritize contaminated dry cleaning sites by ranking facilities that do not require emergency action.[183] The statute also authorizes the TCEQ to hold an owner responsible for all of the costs of corrective action for several reasons, including when an owner has caused a release by using substandard operating practices.[184] The owner of a facility, or the applicant for ranking, must pay as a deductible the first $5,000 of corrective action costs, and the TCEQ is prohibited from using fund money for costs in excess of $5 million for corrective action at a single contaminated dry cleaning site.[185] Under the new law, the TCEQ may evaluate several factors in determining whether corrective action at a dry cleaning site is complete, including the benefits of additional corrective action, degree of harm to humans, and costs.[186]

Other than property damage included in a corrective action plan approved by the TCEQ, fund money may not be used to compensate third parties for bodily injury or property damage caused by a release.[187] If an owner or other person is eligible to have corrective action costs paid by

178. *Id.* § 374.053.
179. *Id.* § 374.102.
180. *Id.* § 374.103.
181. *Id.* § 374.104.
182. *Id.* § 374.105.
183. *Id.* § 374.154.
184. *Id.* § 374.202.
185. *Id.* § 374.203.
186. *Id.* § 374.054.
187. *Id.* § 374.205.

the fund, then an administrative or judicial claim cannot be made under state law against the owner or other person, by the state, or by any other person (except a political subdivision) to compel corrective action or seek recovery of the costs of corrective action that result from the release.[188] The statute authorizes the fund through September 1, 2021,[189] but disbursements from the fund for corrective action are not authorized until January 1, 2005.

### C. Other Legislation

In addition to the MSD and Dry Cleaner Fund programs, the legislature passed the following environmental bills during the 78th Legislative Session:

- House Bill 2546 modifies the state's sludge program by modifying the requirements and increasing restrictions for companies that land apply Class B sludge, including a more comprehensive tracking system and additional notice and permit application requirements.[190]
- House Bill 44 expands the scope of the advisory panel for the Small Business Stationary Source Assistance Program to allow the panel to advise the TCEQ storm water programs that affect small businesses. The program is now known as the Small Business Compliance Assistance Program.[191]
- Senate Bill 1272 exempts from the contested case hearing process certain concrete batch plants constructed to satisfy more stringent environmental standards contained in a the TCEQ general permit. If the standard permit applies, only a public meeting would be required as part of the permitting process.[192]
- House Bill 555 clarifies that a portable facility relocated to a location that contained a portable facility permitted by the TCEQ within the previous two years is exempt from the notice and contested case hearing requirements of the Texas Clean Air Act. House Bill 555 also prohibits the TCEQ from issuing permits, permit amendments, or other authorization for certain portable facilities and rock-crushing facilities.[193]
- House Bill 1287 modifies the law to prohibit, under certain circumstances, the operation of a concrete crushing facility within 440 yards of a building used as a single or multifamily residence, school, or place of worship.[194]

188. *Id.* § 374.207.
189. *Id.* § 374.253.
190. *Id.* § 361.121.
191. Tex. Water Code Ann. § 5.135 (Vernon 2003).
192. Tex. Health & Safety Code Ann. §§ 382.05198, 382.05199 (Vernon 2003).
193. *Id.* § 382.056.
194. *Id.* § 382.065.

- The Texas Emissions Reduction Plan (TERP), established in 2001, created incentive programs to assist in reaching attainment by 2007. House Bill 1365 generally modifies the TERP program to allow for a more efficient program.[195]
- Senate Bill 934 provides some circumstances under which the TCEQ will accept a company's inhouse or on-site laboratory services.[196]
- House Bill 567 enacts a number of changes to the statute regulating low-level radioactive waste, including provisions that restrict the sites suitable for the disposal of low-level radioactive waste and requirements for the application process of disposing radioactive waste.[197]
- House Bill 3030 requires the TCEQ to notify by mail owners of private drinking water wells that may be contaminated within thirty days of knowing about contamination that may impact their wells.[198]

## VIII. CONCLUSION

This survey of Texas environmental cases includes some significant legal holdings of which environmental practioners should be aware. The continuing variety and number of environmental cases being heard each year by state and federal courts indicates that the importance of environmental laws and issues has not waned in an era not thought by some as a time of significant governmental enforcement of environmental laws. Private party disputes over property contamination and personal injury claims appear to continue apace. In addition, the Texas legislature adopted significant new environmental legislation, including legislation creating the municipal settings Designation Program and the Dry Cleaner Remediation Fund.

195. *See id.* at Chapter 386.
196. TEX. WATER CODE ANN. § 5.127 (Vernon 2003).
197. TEX. HEALTH & SAFETY CODE ANN. § 401.201 (Vernon 2003).
198. TEX. WATER CODE ANN. § 26.408 (Vernon 2003).