SMU | Dedman School of Law

SMU Law Review

Volume 58
Issue 3 *Annual Survey of Texas Law*

Article 16

January 2005

Environmental Law

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ENVIRONMENTAL LAW

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I. INTRODUCTION

DURING the Survey period, a significant number of environmental cases were decided by courts in Texas,[1] including a seminal case in the context of nuisance law, one of the first cases in which a court ruled on the application of the privilege under the Texas Environ-

1. The federal and state cases are too numerous to discuss in the survey article. We have tried to discuss the decisions of the Texas state courts primarily, and those that we felt were more significant or more interesting.

mental, Health, and Safety Audit Privilege Act,[2] and a case in which certain landowners attempted to use the citizens suit provision of the federal Pipeline Safety Act[3] to address alleged significant risks from a pipeline by asking a court in essence to take over operation of the pipeline. As in past years, the cases provide interesting facts and important legal arguments.

II. ENVIRONMENTAL TORTS AND COST RECOVERY CLAIMS

The Texas Supreme Court handed down a landmark opinion in the area of environmental torts. The *Schneider* decision set a new standard for distinguishing a temporary and permanent nuisance, which determines the measure of damages and often whether a case is barred by the statute of limitations.[4] The supreme court also addressed a number of other issues encountered in environmental tort and cost recovery cases that could provide seminal statements for future development in environmental suits.[5]

A. Statutes of Limitations

1. *Texas Supreme Court Establishes a New Standard for Determining Whether a Claim Is for a Temporary or Permanent Nuisance.*

One of the most important cases decided during the Survey period is *Schneider National Carriers, Inc v. Bates*.[6] This case will likely be considered a landmark case for environmental torts, because it sets a new standard to address one of the critical issues in environmental contamination cases: whether injury to property is permanent or temporary. Prior Texas case law, developed over more than a century, left much room for interpretation and application of the rule and standards, resulting in decisions applying the same law under similar facts with different results. Conflicting applications of the law made the job of attorneys for plaintiffs and defendants much more confusing and the proper analysis by courts much more challenging.

The ultimate holding of the Texas Supreme Court in the *Schneider* case was that the plaintiffs' claims were barred by the applicable statute of limitations.[7] The application of the statute of limitations is generally one of the most important results of the determination of whether a nuisance or other environmental tort claim for damage to property involves a permanent or temporary injury to land. Several other cases addressed the statute of limitations during the Survey period, but this case should be

2. Tex. Rev. Civ. Stats. Ann. art. 4447cc, §§ 1-13 (Vernon Supp. 2004-2005).
3. 49 U.S.C. §§ 60101-60133 (2000).
4. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004).
5. *See id.*
6. *Id.*
7. *Id.* at 268.

considered most carefully by practitioners.[8]

The *Schneider* case, like many other environmental tort cases, hinged initially on the question of whether the plaintiffs' claims were barred by the statute of limitations. The plaintiffs claimed that various defendants were causing a nuisance with respect to the plaintiffs' homes or property through their industrial operations along the Houston ship channel. The plaintiffs also asserted claims of trespass, negligence, negligence per se, negligent endangerment, and gross negligence—all of which were subject to the two-year statute of limitations.[9] The critical issue in these cases often is when a cause of action accrues. In Texas, the cause of action for a permanent injury to property accrues and the statute of limitations begins to run when the injury occurs, or if the discovery rule applies, when the plaintiff knew or should have known through reasonable inquiry that the injury existed.[10] For temporary damages, a cause of action can be brought for injury or damages occurring two years prior to filing suit.[11] As a result of this rule, it is clear why a plaintiff who has been injured or discovered his injury more than two years before suit was filed would argue that the damages or injury are temporary—to avoid his claims being barred by the statute of limitations.

The plaintiffs' claims in the *Schneider* case were similar to those in many air emissions tort cases. The plaintiffs alleged that they could not go outside, had to keep their doors and windows shut because of foul odors, and that airborne material was deposited on their homes, yards, cars, and other property.[12] The plaintiffs filed affidavits with the trial court as part of the requirements of a "Lone Pine Order," which requires plaintiffs in such cases to provide basic facts regarding their claims. In these affidavits, the plaintiffs admitted that conditions had been going on for a long time, definitely more than two years.[13] An interesting aspect of these cases is that because the wind changes direction, the plaintiffs often agree or assert that the smell or deposition of material is not constant every day, but changes as the direction and speed of the wind changes. The question of whether this sort of injury is permanent or temporary is thus one that has challenged the courts.

As a result of the difficulty of applying the Texas rule in these and other difficult factual scenarios, the Texas Supreme Court believed that the Texas rule had not been clear enough to allow courts to reach consistent opinions.[14] The majority decided to develop a new standard for de-

8. *See* K-7 Enters., L.P. v. Jeswood Oil Co., No. 2-03-312-CV, 2004 WL 1219062 (Tex. App.—Fort Worth June 3, 2004) (opinion withdrawn and superseded on rehearing by 2005 WL 182947 (Jan 27, 2005)); Potter v. Kaufman & Broad Home Sys. of Tex., Inc., 137 S.W.3d 701 (Tex. App.—San Antonio 2004, no pet. h.); Walton v. Mobil Oil Corp., No. 08-02-00485-CV, 2004 WL 440874 (Tex. App.—El Paso Mar. 11, 2004, no pet. h.).

9. *Schneider*, 147 S.W.3d at 268, 270.

10. *Id.* at 279.

11. *Id.* at 280.

12. *Id.* at 268-69.

13. *Id.*

14. *Id.* at 274.

termining when an injury is permanent or temporary.[15]

Under the Texas rule, a nuisance was permanent if it was "'an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely.' Thus, a nuisance is permanent if it is 'constant and continuous,' and if 'injury constantly and regularly recurs.'"[16] On the other hand, a temporary nuisance was one that was "of limited duration . . . uncertain if any future injury will occur, or if future injury 'is liable to occur only at long intervals'. . . 'occasional, intermittent or recurrent,' or 'sporadic and contingent upon some irregular force such as rain.'"[17]

The court decided to adhere to the American rule on the distinction between temporary and permanent nuisances and the Texas rule on how to make the distinction.[18] However, as a result of the difficulty in applying the Texas rule, the court decided to develop a new standard for determining the "boundary lines" in the continuum between a temporary and a permanent nuisance.[19] The problem in drawing the distinction along this continuum is demonstrated by two cases that were decided by the Texas Supreme Court at different times involving flooding. In one case, the court decided flooding created a temporary nuisance and, in another case, a permanent nuisance.[20] Similarly, in two other cases involving dust, smoke and cinders, the court reached opposite results, in one case ruling that dust, smoke and cinders from a power plant caused a temporary nuisance but in another case ruling that when dust, smoke, and cinder arose from a locomotive, a permanent nuisance resulted.[21]

In order to attempt to clarify the standards that should be applied in determining whether a nuisance is temporary or permanent, the court focused first and foremost on the legal consequences that flow from which

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15. *Id.* at 276.

16. *Id.* at 272 (internal citations omitted); *see also* Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978); Columbian Carbon Co. v. Tholen, 199 S.W.2d 825, 826 (Tex. Civ. App.—Galveston 1947, writ ref'd) (affirming jury's finding of permanent nuisance based on instruction, "[b]y the term 'permanent' as used in the foregoing charge is meant a condition of such a character and which exists under such circumstances that it will be presumed to continue indefinitely.").

17. *Schneider*, 147 S.W.3d at 272 (internal citations omitted).

18. *Id.* at 273.

19. *Id.*; *see also* Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 569, 571 (Tex. App.—Texarkana 2000, pet. denied) (holding chicken hatchery waste dumped on neighboring hillside was temporary as defendants "did not build a facility"); Lamb v. Kinslow, 256 S.W.2d 903, 904-06 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.) (holding nuisance involving annual burning of cotton burns near plaintiff's home was permanent, as "he is deprived of the enjoyment of his home for several months of the year").

20. *Schneider*, 147 S.W.3d at 273-74 (citing Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978) (holding to be a temporary nuisance); City of Amarillo v. Ware, 40 S.W.2d 57, 61-62 (Tex. 1931) (flooking to be a permanent nuisance)); *see also* Durden v. City of Grand Prairie, 626 S.W.2d 345, 348 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (saying flooding caused by a storm sewer in north Texas was permanent as a matter of law).

21. *Schneider*, 147 S.W.3d at 274 (citing Parsons v. Uvalde Elec. Light Co., 163 S.W. 1, 1-2 (Tex. 1914); Rosenthal v. Taylor, B. & H. Ry. Co., 79 Tex. 325, 15 S.W. 268, 269 (Tex. 1891)); *see also* Angelina Hardwood Lumber Co. v. Irwin, 276 S.W.2d 407, 410 (Tex. Civ. App.—Galveston 1955) (holding sawdust and soot from sawmill was permanent nuisance).

distinction is made: "1) whether damages are available for future or only past injuries; (2) whether one or a series of suits is required; and (3) whether claims accrue (and thus limitations begins) with the first or each subsequent injury [expected in the future]."[22]

a. Damages for Future or Only Past Injuries

The first consequence of the distinction is what damages may be recovered: for temporary nuisance, recovery is for lost use and enjoyment measured by the lost-rental value, and for permanent nuisance, recovery is for lost-market value, which includes lost-rental value.[23] The crux of the Texas Supreme Court's consideration of these issues in determining the proper classification for a nuisance is whether the impact of the nuisance is likely to be one that has caused a temporary loss but not a permanent reduction in market value.[24] In particular, the court discussed an injury that occurs infrequently, but over a period of years, occurs often enough to cause a loss in the market value of the property.[25] According to the court, a nuisance need not continue daily; it could occur annually and still result in a reduction in the market value of the property.[26] In applying this concept, the court would require that the lower courts consider whether the "injury occurs often enough before trial that jurors can make a reasonable estimate of the long-term impact of the nuisance on the market value of a property"; if so, the court concluded that the lower courts should allow the jury to make that determination.[27]

b. Claims Splitting

The second legal consequence the court considered was the splitting of claims for purposes of bringing sequential lawsuits for temporary injuries.[28] If the rule is that suit may be brought for injuries occurring two years before filing suit, then multiple suits would follow, absent an injunction to force the defendant or defendants to cease their activities causing the injury.[29] In Texas, claim splitting into multiple lawsuits is generally prohibited.[30] Under the standard developed by the court in this case, where a temporary injury exists, claim splitting is perceived as a necessary evil because future damages cannot be accurately calculated.[31] The court, however, viewed multiple lawsuits filed once a decade to be acceptable, but not several times a year, the goal being to limit the number of

22. *Schneider*, 147 S.W.3d at 275 n.49.
23. *Id.* at 276.
24. *Id.*
25. *Id.* at 276-77.
26. *Id.* However, the court did point out that a decrease or increase in market value alone does not determine whether a nuisance exists, as other factors affect market value over time. *Id.* at 277.
27. *Id.*
28. *Id.* at 278.
29. *Id.*
30. *Id.*
31. *Id.*

lawsuits through the determination of whether an injury is permanent or temporary.[32] Again, the court's stated goal was to allow the jury to determine the future damages if it can do so in one lawsuit as opposed to several.[33]

c. Accrual of Cause of Action for Limitations Purposes

The third concept that the court applied to the distinction between temporary and permanent nuisances focuses on when a cause of action accrues for purposes of the application of the statute of limitations and thus when a party's cause of action is barred.[34] The first issue discussed was the typical accrual date, when an injury first occurs.[35] The discovery rule offers an exception whereby the accrual date is "when an injury is both inherently undiscoverable and objectively verifiable."[36] With a nuisance claim, the court observed that, since the nature of the cause of action is the loss of enjoyment, "plaintiffs will usually know of unreasonable discomfort or annoyance promptly. . . . [Thus,] application of the discovery rule in nuisance cases is rare."[37]

In explaining the application of the accrual issue for nuisance cases, the court pointed out that a claim accrues upon the claimant's notice of injury, even if the claimant does not yet know the full extent of damages or the chances of avoiding them.[38] Thus, if a party is aware a portion of its property is harmed, then he may have to investigate the remainder of his property to determine the full extent of the injury or risk losing his claims for undiscovered damage.[39]

The court distinguished the case in which additional harm is done to property by reviewing the example of the *Atlas Chemical* case.[40] In that case, pollutants of various kinds had been discharged into a creek upstream of the plaintiff's land for more than forty years. A subsequent discharge, however, of new pollutants affected sixty acres owned by the plaintiff that had not been previously polluted—the new pollution occurring as a result of extraordinary floods.[41] In that case, the court decided that a new and distinct injury occurred and that the new injury would not be barred but would be subject to a new running of limitations.[42] "An old nuisance does not excuse a new and different one."[43]

The court appeared to be interested in establishing a new rule or stan-

32. *Id.* at 278-79.
33. *Id.*
34. *Id.* at 279.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* (discussing Atlas Chem. Indus. v. Anderson, 524 S.W.2d 681 (Tex. 1975)).
41. *Atlas Chem.*, 527 S.W.2d at 685-87.
42. *Id.*
43. *Schneider*, 147 S.W.3d at 280.

dard that would make most cases a permanent nuisance.[44] The court stated that "once the conditions begin to recur more often, the nuisance should normally be treated as permanent because it is injury to the property in general that has occurred, not separate injuries that ought to be considered separately."[45]

The standard of distinguishing permanent from temporary nuisances elucidated by the court is generally based on the jury's ability to determine damages. If the event leading to the injury happens with such frequency that the jury would likely have sufficient evidence to determine the impact on the value of the plaintiff's property value, then the nuisance would be permanent. If the impact on the property would be speculative, then the nuisance would be deemed temporary.[46]

d. Consideration of the Permanence of the Source of the Nuisance or the Injury Caused by the Nuisance

The court next turned to the question whether the source of the nuisance or the injury itself should be considered in determining the permanence of the nuisance.[47] The court noted that Texas courts had considered both.[48] The court's conclusion on this issue would appear to allow a temporary nuisance in only rare circumstances: "The presumption of a connection between the two can be rebutted by evidence that a defendant's noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again."[49] Thus, an operation that emits air pollutants would not be considered temporary just because the wind changes direction from day to day.

e. Ability to Abate the Nuisance

The ability to abate a nuisance has been a central focus in some states, but not in Texas.[50] While recognized as a relevant issue in some cases, precisely how the ability to enjoin the nuisance would affect the categorization of the nuisance was not clear.[51] The court decided that the ability to abate the nuisance should not be considered in distinguishing the type of nuisance.[52]

The court viewed the issuance of an injunction as an end to a permanent injury and ruled that a permanent nuisance and permanent injunc-

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 282.
48. *Id.* (citing Baugh v. Tex. & N.O. Ry. Co., 15 S.W. 587, 588 (Tex. 1891)); *see also* Meat Producers, Inc. v. McFarland, 476 S.W.2d 406, 410 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).
49. *Schneider*, 147 S.W.3d at 283.
50. *Id.*
51. *Id.* at 283-84.
52. *Id.*

tion are "mutually exclusive."[53] The court identified the problem of double recovery if damages and an injunction are both issued.[54] The court ruled that if an injunction is issued, the nuisance is no longer permanent, but if an injunction is not issued, it may still be permanent or temporary.[55] In an apparent contrary conclusion, the court ruled that abatement of the source would not eliminate the injury, so the nuisance would still be considered permanent.[56] The court was concerned that the plaintiff would still suffer lost market value of his property even with the abatement of the source.[57] An example might be a pollution source that was abated, but the plaintiff's property remains polluted.

The court then turned to the issue whether certain activities or operations should be abated.[58] Because judges, acting as courts of equity, determine whether an injunction should be granted, the Texas Supreme Court stated that the equities may require that public works remain operational, or even private plants may be allowed to emit noxious odors, based on factors such as location and how "badly they are needed."[59] The broader economic and environmental impact would be considered in determining whether to shut down a plant.[60] Environmental regulation was seen as a better means to decide how a plant's operations should be altered.[61]

The court was clear that an injunction or the effect of an injunction does not revive claims for a permanent nuisance that were not filed before the running of the statute of limitations.[62] The court did not address the issue whether an injunction may be sought where the claim for damages would be barred but noted several cases in which an injunction action was allowed beyond the limitations period for seeking damages.[63]

The court considered the question of issuing an injunction to fall on the balancing of the equities, particularly where private parties were concerned.[64] While noting that governments have the right of eminent domain to take private property, the court stated that, because private parties do not have this right, allowing the nuisance to continue if the operator of the source will pay damages to those suffering the uninvited

53. *Id.* at 284.
54. *Id.*
55. *Id.* at 285.
56. *Id.* at 286.
57. *Id.* at 285-86.
58. *Id.* at 286.
59. *Id.* at 287.
60. *Id.*
61. *Id.*
62. *Id.* at 288-89.
63. *See id.* (citing Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 575 (Tex. App.—Texarkana 2000, pet. denied) (holding equitable relief not barred by limitations); Abbott v. City of Princeton, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (same); Stein v. Highland Park Indep. Sch. Dist., 540 S.W.2d 551, 554 (Tex. Civ. App.—Texarkana 1976, writ refused n.r.e.) (same)).
64. *Schneider*, 147 S.W.3d at 289.

nuisance is often not an equitable result.[65]

f. Application of the Legal Analysis to the Case

In reviewing the particular case before it, the court ruled that the air emissions and noise issues suffered by the plaintiffs were permanent nuisances.[66] The affidavits of the plaintiffs stated that the nuisances had continued for many years and, based upon those affidavits, would continue in the years to come several times each week or month.[67] The court noted that a sudden industrial accident or other irregular occurrence could create a nuisance that is properly deemed temporary, despite the long- term regular operations of the neighboring plants.[68] No allegations of such events were made.[69]

g. Ability to Bring a Trespass Suit for Light, Noise, and Air Pollution

The court raised some doubt as to whether a trespass claim, as opposed to a nuisance claim, may be brought for light, noise, and air pollution that affects neighboring properties.[70] The court indicated that it doubts such claims may be made and cited two decisions in this regard.[71] The issue is whether some thing must physically invade the property of another in order to result in a trespass.[72] This case, thus, raises a legal question as to the ability to bring trespass cases in nuisance cases involving light, noise, and even deposition of particles.

h. Impact of *Schneider*

The impact of the Schneider case may be more certainty for litigants and lower courts in determining what is a temporary or permanent nuisance and when an injury is permanent or temporary for purposes of trespass or negligence claims.[73] It is likely that more cases will be deemed permanent and fewer temporary. As a result, more cases may be barred by the statute of limitations because many plaintiffs do not attempt to engage counsel and file suit until many years after a purported nuisance or trespass occurs.

The potential for seeking an injunction when the ability to seek damages is barred by limitations is another significant issue raised, though not decided by the court.[74] This would, in essence, have the effect of resusci-

65. *Id.* at 289-90.
66. *Id.* at 290.
67. *Id.*
68. *Id.* at 292.
69. *Id.*
70. *Id.*
71. *Id.* (citing R.R. Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 567 (Tex. 1962) ("To constitute trespass there must be some physical entry upon the land by some 'thing.'"); Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 416 (Tex. 1961)).
72. *Id.*
73. *See generally Schneider*, 147 S.W.3d at 264.
74. *Id.* at 288-89.

tating a claim as a defendant may settle with a plaintiff by payment of money if the defendant's operations are faced with potential shutdown. The court did indicate a balancing of economic, environmental and other public issues in determining whether such a shutdown would be possible.[75] It also indicated that the regulation of air emissions and related issues may be best left to regulatory agencies.[76]

2. *CERCLA Provision on Statutes of Limitations Accrual Date for Personal Injury and Property Damages Claims Arising from Hazardous Substances, Pollutants, or Contaminants*

After reviewing the Texas Supreme Court's treatise on accrual dates for property-damage claims, it is interesting to consider a federal statutory provision on state-law accrual dates for claims involving hazardous substances, pollutants, and contaminants. The issue arose in a case filed in federal court over the accrual date for a Texas statute of repose arising from a claim related to a release of chemicals from a tank.[77] One of the defendants sued the installer of the tank. The defendant asserted that Section 16.012 of the Comprehensive Environmental Response Compensation and Liability Act,[78] required that the cause of action had not accrued until he was aware of the claim and aware that it was caused by a hazardous substance, pollutant, or contaminant.[79] The federal district court faced with this issue ruled that such a federal-discovery rule does not apply unless a CERCLA cause of action was also asserted by the plaintiff, in this case a third-party plaintiff.[80] The Fourth Circuit and two district courts have similarly held.[81] On the other hand, the Ninth Circuit has ruled that no CERCLA claim must be filed and that all state personal injury and property damages claims were nevertheless subject to the federal discovery rule with respect to state statutes of limitations.[82]

The district court adopted the Fourth Circuit's holding and ruled that the defendant's claim was barred by the statute of repose.[83] The district court also held that the discovery rule applied to the commencement of the cause of action but not to the length of the limitations period; accordingly, it would not have allowed any additional time to file the claim.[84] Finally, the court, in rejecting an intermediate California court's holding, ruled that CERCLA would not apply because the third-party defendant

75. *Id.* at 286-87.

76. *See id.* at 287.

77. Burlington N. & Santa Fe Ry. Co. v. Poole Chem Co., Inc., No. 5-04-CV-047-C, 2004 U.S. Dist. LEXIS 17215, at *4, *11, *34-35 (N. D. Tex. Aug. 27, 2004).

78. 42 U.S.C. § 9658(a) (2000).

79. *Burlington N.*, 2004 U.S. Dist. LEXIS 17215, at *4, *34-37 (citing Freir v. Westinghouse Elec. Corp., 303 F.3d 176, 196 (2d Cir. 2002)).

80. *Id.* at *34-35.

81. *Id.* at *35 n.8 (citations omitted).

82. *Id.* (citations omitted).

83. *Id.* at *38.

84. *Id.*

was not a "responsible person" under CERCLA.[85]

B. Standing in Suits for Past Injury to Property

In *Denman v. CEC Pipeline Co.*,[86] the court considered whether subsequent purchasers have standing to bring suit for injuries to property that occurred before their purchase of the property. In this case, the landowners, the Denmans, filed suit against several defendants, including CEC, for alleged contamination and injuries to their land caused by the presence of oil and gas equipment. The trial court granted summary judgment to the defendants on the ground that the Denmans, as subsequent purchasers of the property, lacked standing to sue for injuries that occurred before their purchase of the property.[87]

The appellate court affirmed the trial court's grant of summary judgment.[88] The appellate court held that the right to sue for the injury to land is a personal right belonging to the person owning the property at the time of the injury.[89] The court held that the Denmans did not have standing to bring suit against the oil company because any injury to their property occurred before they purchased it, and their deed contained no assignment of any cause of action.[90] Whether the injuries are characterized as permanent or temporary is not important to the inquiry on standing.[91]

C. "As Is" Provision as a Defense to Tort or Cost Recovery Claims

Environmental and other attorneys routinely draft real estate purchase and sale agreements and other contracts with "as is" or "where is, as is" provisions. Two cases during the Survey period raise questions at to the effectiveness of these provisions to prevent future environmental and health claims.

1. "As Is" Provision Does Not Bar Claims under the Texas Solid Waste Disposal Act

The question of the effect of "as is" provisions in real estate purchase and sale agreements on environmental statutory claims is one that has raised numerous views among practitioners. In *Bonnie Blue, Inc. v. Reichenstein*, the Dallas Court of Appeals ruled that, even though the seller and buyer of real estate had agreed in their contract of sale that the property was being sold "as is," the buyer could bring a later claim under the Texas Solid Waste Disposal Act ("SWDA") for costs of remediating

85. *Id.* at *39-40.
86. 123 S.W.3d 728 (Tex. App.—Texarkana 2003, no pet. h.).
87. *Id.* at 730.
88. *Id.*
89. *Id.* at 732.
90. *Id.* at 734.
91. *Id.* at 732, 734-35.

the property for contamination existing at the time of the sale.[92]

The court reviewed the holdings in what has been considered the leading case on the effect of "as is" provisions.[93] In *Prudential Insurance Co. v. Jefferson Associates, Ltd.*, the Texas Supreme Court ruled that the plaintiff could not recover for asbestos present in the building sold by the defendant as a result of an alleged misrepresentation of the condition of the building because the "as is" provision in the *Prudential* case prevented the buyer from proving that the seller caused the buyer harm.[94] The Dallas Court of Appeals ruled that a cause of action under SWDA is different in that the claim is not a damages claim based on misrepresentation or failure to disclose but a statutory claim for cleanup costs, in which the causation issues in *Prudential* are not present.[95] The court concluded that a "responsible party" under the statute will be held liable "without the need to establish causation."[96] While this may be true to establish liability, causation may be an element of apportionment of liability.[97]

2. *"As Is" Provisions and Leases*

Caldwell v. Curioni [98] involved claims by lessees of residential property for injuries caused by mold. The Caldwells brought suit against lessor Curioni for damages for personal injuries and property damage allegedly caused by mold in the house they rented from Curioni. The Dallas Court of Appeals did not allow the lessor to rely upon the "as is" provision in the lease and reversed the summary judgment finding in his favor.[99]

The court did not allow the "as is" clause in the lease to bar the Caldwells' causes of action against Curioni.[100] The court found that the Caldwells took the property "as is," except for conditions materially affecting the safety or health of ordinary persons.[101] In reversing the grant of Curioni's "no evidence" summary-judgment motion, the court found that the Caldwells offered more than a scintilla of evidence that Curioni breached a duty to them and thereby caused their damages.[102] The Caldwells

> offered evidence: (1) that Curioni had reason to know . . . that there was an infestation of mold in the house, (2) that there were potentially harmful effects of mold, (3) that he should have cured the mold problem before renting the house to the Caldwells, and (4) that his failure to eliminate the mold before the Caldwells occupied the

92. Bonnie Blue, Inc. v. Reichenstein, 127 S.W.3d 366 (Tex. App.—Dallas 2004, no pet. h.).
93. *Id.* at 368.
94. 896 S.W.2d 156, 159, 161 (Tex. 1995).
95. *Bonnie Blue*, 127 S.W.3d at 370.
96. *Id.* at 369.
97. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.343(a)(1) (Vernon 2001).
98. 125 S.W.3d 784 (Tex. App.—Dallas 2004, pet. denied).
99. *Id.* at 788, 792.
100. *Id.* at 792.
101. *Id.*
102. *Id.* at 794.

house caused their physical injuries and property damage.[103]

The court noted that:

> there are several exceptions to the general rule . . . [that] a lessor generally has no duty to tenants or their invitees for dangerous conditions on the leased premises . . . [For example,] a lessor who makes repairs may be liable for injuries resulting from the lessor's negligence in making the repairs. In addition, a lessor who conceals defects on the leased premises of which [he] is aware may also be liable. The lessor need not have actual knowledge of a dangerous condition. It is enough that he has reason to know that the condition exists . . . that is, that he has information from which a person of reasonable intelligence . . . would infer that the condition exists . . . and in addition would realize that its existence will involve an unreasonable risk of physical harm to persons on the land.[104]

The Caldwells presented summary judgment evidence that Curioni "had reason to know, and should have known, of the infestation of mold and its potentially harmful effects."[105] They offered the opinion of a construction expert that there was

> widespread mold growth throughout the house which had probably resulted from flooding caused by a ruptured water heater before the Caldwells had moved [into the house]. . . . The expert noted that the carpet tackboards had been freshly painted, which he interpreted as an attempt to cover up a serious problem.[106]

Furthermore, the lessor advertised the property as "freshly redone" which the expert observed indicated an attempt to deceive. The Caldwells also offered evidence that Curioni should have known of the mold problem and made inadequate preparations for renting the house for occupancy. Under these circumstances, the court concluded that "Curioni failed to conclusively negate he owed a duty to the Caldwells."[107]

D. Unaccepted Offer by Defendant to Purchase Land Is Not Evidence of Market Value

The means to determine market value and what the court or an appraiser may consider in environmental cases in which property damages are sought is an important and often tricky issue for many reasons. In some cases, prior offers to purchase property are raised by parties to the litigation, and the issue of their admissibility and use by experts may become an issue. In *Mieth v. Ranchguest, Inc.*,[108] the offer made by the defendant stated that it was not an offer of settlement. Therefore, the court ruled that it was not barred by Rule 408 of the Texas Rules of Evi-

103. *Id.*
104. *Id.* at 790.
105. *Id.*
106. *Id.* at 790-91.
107. *Id.* at 791.
108. Mieth v. Ranchguest, Inc., No. 01-02-00461-CV, 2004 Tex. App. LEXIS 4601, at *13-14 (Tex. App.—Houston [1st Dist.] May 20, 2004, no pet. h.).

dence regarding offers of settlement.[109] The offer to purchase by the defendant matched the fair market value of the property before the injury that the plaintiffs' appraiser stated in his testimony. The defendants argued to the jury that the offer to purchase by the defendant proved there was no diminution in value to the property as a result of contamination of only a portion of the plaintiffs' property. The court stated that an unaccepted offer to purchase is not reliable evidence of market value, and the jury had no basis to conclude there was not diminution in value of the property.[110]

E. Texas Environmental, Health, and Safety Audit Privilege Act

In one of the first cases to consider the privilege under Texas Environmental, Health, and Safety Audit Privilege Act,[111] the Houston Fourteenth Court of Appeals in *Waste Management of Texas, Inc. v. Blackwell*[112] decided that the more traditional audit reports were properly protected, but daily note-taking on company activities did not constitute an "audit" under the Act.[113] Mandamus was denied by the appeals court and production of the notes and testimony of employees would have to go forward.[114]

In that case, the plaintiffs sued Waste Management for state law causes of action alleging that the expansion of Waste Management's recycling and disposal facility interfered with the use and enjoyment of Blackwell's property. In connection with the suit, Blackwell sought to discover audits of the facility and the testimony of one of Waste Management's employees about events of noncompliance at the facility.[115]

The trial court ordered that audits conducted under the facility's Environmental Compliance Program and audits to complete the Environmental Compliance Representation were privileged under the Texas Environmental, Health, and Safety Audit Privilege Act ("Audit Privilege Act" or "Act").[116] On the other hand, the trial court held that neither the audit conducted to evaluate compliance with the provision of the state air emissions regulations that prohibit a regulated party from causing a nuisance nor the employee's testimony about acts of noncompliance with this provision fell under the statutory privilege provided by the Act.[117] To attempt to preserve its assertion of the Act's privilege, Waste Management filed an interlocutory appeal and a petition for writ of

109. *Id.*
110. *Id.*; *see also* Lee v. Lee, 47 S.W.3d 767, 785 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
111. Tex. Rev. Civ. Stats. Ann. art. 4447cc, §§ 1-13 (Vernon Supp. 2004-2005),
112. 130 S.W.3d 337, 341-43 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).
113. *See id.*
114. *Id.* at 343.
115. *Id.* at 338-39.
116. *Id.* at 339; *see also* 30 Tex. Admin. Code § 101.4 (2001) (Tex. Comm'n on Envtl. Quality).
117. *Waste Mgmt.*, 130 S.W.3d at 339.

mandamus.[118]

The appellate court first determined whether it had jurisdiction to hear the interlocutory appeal.[119] The court held that it had jurisdiction to hear an interlocutory appeal under the Audit Privilege Act only when the audit disclosure is ordered for one of the reasons enumerated in Section 7 of the Act.[120] Under Section 7, a court may order disclosure of an audit report if it determines: (1) the privilege is asserted for an improper use, (2) the portion of the audit report is not subject to the privilege under Section 8 of the Act, or (3) the portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued.[121] The court held that it did not have jurisdiction to consider the interlocutory appeal because the trial court did not determine that the alleged audit to evaluate compliance with the nuisance regulation were required to be disclosed by Section 7 of the Act.[122]

With regard to the mandamus petition, the appellate court stated that if the trial court abused its discretion in ordering the production of the privileged information, then mandamus relief would be appropriate.[123] The party claiming the privilege bears the burden of producing proof to support its contention that the documents in question qualify for the privilege. The court held that Waste Management's affidavits did not sufficiently raise and prove the privilege under the Act.[124] Waste Management's counsel agreed that the audits consisted solely of field notes and records of observations. The court held that the trial court did not abuse its discretion in determining that the audits did not qualify as privileged audits or in ordering the limited testimony of Waste Management's employee.[125] Thus, the court denied the request for mandamus.[126]

F. Relationship of CERCLA Consent Decree and Evidence of Causation

In *Martin v. Commercial Metals Co.*,[127] the plaintiff sued a number of companies that sold raw materials to a lead smelter alleging personal injury caused by exposure to toxic substances. The companies were parties to a CERCLA consent decree assigning clean-up responsibility for the smelter site. Each defendant moved for summary judgment on the ground that it did not cause plaintiff's injuries. The trial court granted summary judgment and the plaintiff appealed.[128] The court noted that

118. *See id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 341-42.
123. *Id.* at 342-43.
124. *Id.*
125. *Id.*
126. *Id.* at 343.
127. 138 S.W.3d 619 (Tex. App.—Dallas 2004, no pet. h.).
128. *Id.* at 621-23.

the plaintiff, to prevail on his personal injury claim, must show that the conduct of a defendant caused an event that caused the plaintiff to suffer compensable injuries.[129] The court concluded that the mere selling of raw materials did no more than "furnish a condition which made the injury possible," and that is insufficient, by itself, to establish cause in fact.[130] To avoid summary judgment the plaintiff was required to offer evidence "that there was a causal link between . . . selling scrap metal to the smelter's operators and the release . . . of toxic byproducts into the environment."[131]

In his summary judgment response, the plaintiff relied on the CERCLA consent decree as evidence of causation.[132] The court concluded that this reliance was misplaced: CERCLA "is directed toward the unique ends of cleaning up hazardous sites and apportioning costs for the clean-up. Its standards are very different from the standard of common law negligence in Texas."[133] The court thus found that the CERCLA consent decree was not evidence that the defendants were the cause of the plaintiff's injuries.[134] Accordingly, the court declined to overturn the trial court's rulings.[135]

G. Expert Testimony and Causation

Causation was the main challenge in two other cases claiming personal injury.[136] The appellate court reviewed the appeal of the lower court's decision on the use of expert testimony to establish causation. In the first case, the court upheld the jury finding that a party was liable for the personal injury to a resident caused by the release of benzene from a landfill and migration through the ground to the plaintiff's home.[137] Test wells showed that benzene was present near the home. Even though there was never any measurement of the levels of benzene in the home, inferences were allowed as to the expert's calculation of those concentrations and that those concentrations were capable of causing acute lymphocytic leukemia.[138]

In the second case, the court ruled that the plaintiff must show that the chemicals she was exposed to in her workplace originated from the defendant's operations and caused her illness.[139] The plaintiff's experts testi-

129. *Id.* at 625.
130. *Id.* at 626.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 626-27.
135. *Id.* at 627.
136. *See* City of San Antonio v. Pollock, No. 04-03-00403-CV, 2004 Tex. App. LEXIS 7391, at *15-17 (Tex. App.—San Antonio Aug. 18, 2004, pet. filed); Feria v. Dynagraphics Co., Inc., No. 08-00-00078-CV, 2004 Tex. App. LEXIS 2366, at *2-3, *15-16 (Tex. App.—El Paso Mar. 15, 2004, pet. denied).
137. *Pollock*, 2004 Tex. App. LEXIS 7391, at *5.
138. *Id.* at *15-17.
139. *Feria*, 2004 Tex. App. LEXIS 2366, at *2-3, *15-16.

fied that the exposure to solvents from a print shop caused the illness but did not specifically testify that no other source of chemicals in the building did not cause the disease and did not establish a nexus between the illness and the defendant's conduct at the print shop. The court appeared to conclude that even if the testimony would have passed a Daubert test on the issue of the chemicals causing the illness, there was no testimony to prove that the chemicals the plaintiff was allegedly exposed to originated from the defendant's print shop.[140]

III. DIRECTOR AND OFFICER LIABILITY FOR ALLEGED FAILURE TO PROPERLY DISCLOSE CORPORATE ENVIRONMENTAL LIABILITIES

In a case that may have important implications for directors and officers of publicly traded companies, the Fifth Circuit Court of Appeals held that an insurance policy designed to protect directors and officers from claims by shareholders would not protect such parties' alleged failure to disclose environmental liabilities in filings with the Securities and Exchange Commission and in press releases because the policy excluded environmental claims.[141]

In the underlying lawsuits, the plaintiff shareholders alleged the company on whose board the defendants served had acquired other waste management businesses without regard to their environmental liabilities and without disclosing the environmental practices or liabilities of these companies to shareholders. An FBI investigation of the operations of one of the acquired companies alleged the knowing discharge of hazardous wastes into a city sewage system and the knowing illegal transport and disposal of hazardous waste. This investigation led to an expensive cleanup and the closure of one of the acquired company's waste management facilities. The shareholder plaintiffs alleged the directors and officers actively concealed the illegal activities of the acquired company from the shareholders and the public. When this information became known to the public, the price per share of the company fell $10.75. Trading of the company's stock was halted for six days, and analysts downgraded the stock's rating.[142]

The court concluded that the pollution exclusion in the director and officer policy applied to any loss in connection with a claim "alleging, arising out of, based upon, attributable to, or in any way involving, directly or indirectly" pollution matters.[143] The exclusion specifically stated "including but not limited to a Claim alleging damage to the Company or its securities holders."[144] The holding was bolstered by the rule in Texas

140. *Id.* at *15-16.
141. Nat'l Union Fire Ins. Co. v. U.S. Liquids, Inc., No. 03-20542, 2004 U.S. App. LEXIS 2694, at *1-3 (5th Cir. Feb. 17, 2004).
142. *Id.* at *3-5.
143. *Id.* at *2-3, *16-17.
144. *Id.* at *3.

that an insurance exclusion "need only bear an incidental relationship to the described conduct for the exclusion to apply."[145] The court applied a "but for" test and concluded that "but for" the underlying illegal activities related to pollution, there would be no shareholder claims against the officers and directors.[146]

Directors have become extremely concerned about incurring personal liability after the Enron and Worldcom debacles. The *National Union* case raises an additional concern for officers and directors: to the extent claims are made against them for failure of the company to make proper environmental disclosure, the insurance designed to protect them from personal liability may not cover such claims.[147]

IV. CITIZENS SUIT UNDER THE PIPELINE SAFETY ACT

In a rather intriguing case, several landowners in east Texas sued pipeline companies under the citizens suit provision of the Pipeline Safety Act[148] alleging that they were injured as a result of alleged violations of the Act and requesting that the district court appoint a special master to take over the operations of the pipeline.[149] Issues of standing prevented the court from considering some of the plaintiffs' claims. The court declined to consider granting much of the relief requested.[150]

The first issue under this suit and many, if not most, citizen suits is standing under the Constitution. Under Article III, the U.S. Supreme Court has ruled that standing requires some proof of injury.[151] In applying this rule to the landowners' citizens suit, the district court concluded that with respect to the pipeline crossing their land, a citizens suit would not be dismissed based on a standing challenge alone.[152] The court would not allow the citizens suit to continue with respect to land in the states of Mississippi, Louisiana, Alabama, or Florida, or on other distant property in Texas not owned by the plaintiffs, where the locations were remote to the plaintiffs and the plaintiffs suffered no direct injury.[153] The court granted standing to the extent the plaintiffs demonstrated sufficient injury to their property traceable to the defendants and which could be redressed by the court.[154]

The court also considered the relief sought in the pleadings. The plaintiffs argued the pipeline was old and had not been properly maintained, in addition to a variety of other problems with the pipeline and its operation. Despite these allegations of mismanagement of the pipeline and the

145. *Id.* at *8 (quoting Scottsdale Ins. Co. v. Tex. Sec. Concepts & Investigation, 173 F.3d 941, 943 (5th Cir. 1999).
146. *Id.* at *17.
147. *See id.*
148. Pipeline Safety Act, 49 U.S.C. § 60101-60133 (1996).
149. Wyble v. Gulf S. Pipeline Co., 308 F. Supp. 2d 733 (E.D. Tex. 2004).
150. *Id.* at 754.
151. *Id.* at 744-45 (citing Bennett v. Spear, 520 U.S. 154, 163 (1997)).
152. *Id.* at 750.
153. *Id.* at 754.
154. *Id.* at 753-54.

dangers that existed as a result, the court ruled that it would not appoint a special master to "run the business of the pipeline," but rather that these broader regulatory issues were better left to the legislative branch and the regulatory agency with jurisdiction over the industry.[155]

V. CRIMINAL CASES

The state courts considered appeals from a variety of criminal convictions that were challenged on various grounds and produced interesting opinions touching issues such as double jeopardy, passive disposal, and the scope of "water in the state." Many of the opinions also addressed the legal and factual sufficiency of convictions.

A. DOUBLE JEOPARDY

The issue of double jeopardy arose in *Romero v. State*.[156] In this case, the City of El Paso issued a notice of violation to Ms. Romero for illegally storing construction debris on her property on January 14, 2000. Ms. Romero was later charged with and convicted in municipal court of zoning and debris violations that allegedly occurred on February 19, 2000. During the same time frame, the Texas Commission on Environmental Quality ("TCEQ") had been conducting their own investigation. Ms. Romero was eventually charged with and convicted of violating the Texas Health and Safety Code based on disposal of litter or solid waste that allegedly occurred on or about November 27, 2000. Ms. Romero challenged the state conviction, arguing that it was not legally or factually sufficient and that it constituted double jeopardy because she had already been convicted in municipal court.[157]

Ms. Romero argued that the state conviction was not legally or factually sufficient because "there was no testimony from anyone who actually saw her dumping the waste."[158] The court noted that the State did not have to show that Ms. Romero actually placed the waste on her property, only that she was reckless in allowing the waste to be placed there.[159] The court pointed out that Ms. Romero had a business relationship with the person actually dumping the waste, that she knew by January of 2000 that there was illegal dumping at the site, that she visited the property in March of 2000 and knew the illegal dumping was continuing, and that she was able to clean up her property after she was charged with the state violations.[160] The court reasoned that this evidence indicated that "the proof of guilt is not so obviously weak as to undermine confidence in the

155. *Id.* at 754.
156. 129 S.W.3d 263 (Tex. App.—El Paso 2004, no pet. h.).
157. *Id.* at 264-65.
158. *Id.* at 266.
159. *Id.* at 265. Although illegal dumping is a strict liability crime in Texas as of September 1, 2001, because the complaint was filed in 2001 and the alleged actions occurred in November of 2000, the court used the previous code provisions that required proof of a reckless mental state. *Id.*
160. *Id.* at 266.

jury's determination, nor was it manifestly unjust" and thus the evidence was both legally and factually sufficient.[161]

The court also rejected Ms. Romero's argument that her conviction for the state offense following her municipal court conviction constituted double jeopardy.[162] The court applied the test set forth by the United State Supreme Court in *Blockburger v. United States*,[163] namely whether each of the penal provisions requires proof of a fact that the other does not.[164] The court pointed out that the municipal violation required proof that the disposal created a public nuisance, while the state violation required proof that that the disposal took place at a site that is not an approved waste site and proof of disposal of more than a threshold amount of waste.[165] The court thus held that there were no double jeopardy concerns and affirmed Ms. Romero's conviction.[166]

Unlike the defendant in *Romero*, the Defendants in *Ex Parte Canady*[167] relied on a specific statutory prohibition against double jeopardy found in the Water Code. And, unlike the defendant in *Romero*, the defendants in *Ex Parte Canady* sought and received relief via habeas corpus at the trial court level. In *Canady*, pursuant to agreed orders, the Texas Natural Resource Conservation Commission ("TNRCC") (now known as the Texas Commission on Environmental Quality) assessed administrative penalties against two corporations for violations of the Solid Waste Disposal Act, the Health and Safety Code, and the Water Code. After the penalties were paid, the four appellees were indicted in their individual capacities for the same acts for which the administrative penalties were paid. The appellees were employed by one of the corporations at the time of the alleged violations. The appellees sought habeas relief from the trial court from prosecution based on a provision in the Texas Water Code that prohibits the State from pursuing additional civil or criminal penalties for a violation for which an administrative penalty has been paid. The trial court granted relief and the state appealed.[168]

The court held that the payment of the administrative penalty by the corporations prevented further prosecution against only the corporations.[169] The court quoted the language of section 7.162 of the Water

161. *Id.*
162. *Id.* at 267.
163. 284 U.S. 299 (1932).
164. *Romero*, 129 S.W.3d at 266.
165. *Id.* at 266-67. The court also pointed out that the state and municipal violations alleged different dates, although the court did not clearly indicate the relevance of the different dates. *Id.* If the court meant that different acts on the different dates gave rise to the separate violations, then double jeopardy is not implicated. *Id.* On the other hand, if the state and municipal violations are based on the same act or omission, the mere fact that different dates were alleged does not show that the state and municipal violations contain independent elements. *Id.*
166. *Id.* at 267.
167. *Ex Parte Canady*, 140 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).
168. *Id.* at 847-48.
169. *Id.* at 849.

Code and reasoned that "when two persons act in concert to commit an offense under 7.162, each person commits a single violation, resulting in two violations."[170] The court noted that "[t]he State alleged six people violated section 7.162 . . . . When six people are involved in an act prohibited by the statute, six separate violations have occurred, even though each one stems from the same act."[171] The court also found an analogous interpretation of the Penal Code: "a corporation and its employees may each be criminally responsible for the same acts which constitute a violation of the law."[172] The court also examined the legislative history of the Water Code and found support in it for its proposition.[173] The court noted that the corporations each were assessed and paid administrative penalties for their violations and thus the State was barred from further prosecution of the corporations.[174] The court held that the appellees, however, committed separate violations for which no administrative penalty had been paid, and thus the State was not barred from prosecuting those violations.[175] The court reversed the trial court's grant of habeas relief and remanded the case.[176]

B. Passive Disposal

The Fourteenth District Court in Houston took the opportunity to reinforce a recent case from the First District Court in Houston regarding passive disposal in the criminal context in *Slott v. State*.[177] In *Slott,* the defendant challenged criminal convictions under the Water Code for knowingly or intentionally storing and disposing of hazardous waste. One of the challenges was to a conviction for disposing contaminated sand in June 1998. Because the indictment was presented on July 20, 2001 and because the statute of limitations for the offense is three years, the court required proof of disposal on or after July 20, 1998 and before July 20, 2001. Although the defendant disposed of the sand in June, the State argued that because the sand continued to leak hazardous compounds into the soil after initial disposal, the defendant continued to dispose of the waste by allowing it to passively migrate into the soil.[178]

The court rejected the State's argument, however, following the rea-

170. *Id.* (citing Tex. Water Code Ann. § 7.162 (Vernon 2000)).

171. *Id.* It is unclear from the court's opinion whether the TNRCC alleged all six violations from the outset, and if so, why they were not addressed in the original agreed order, and if not, why the State chose not to pursue the allegations against the individuals from the outset.

172. *Id.* at 850 (citing Tex. Pen. Code Ann. § 7.23(a) (Vernon 2003)).

173. *Id.* at 850-51. The legislative history cited by the court is not particularly persuasive because (1) as the court points out, the legislative history does not address the provision in question, and (2) the legislative history indicates that separate acts by different persons give rise to separate violations and does not indicate that a single act or acts will give rise to multiple violations. *See id.*

174. *Id.* at 851.

175. *Id.*

176. *Id.*

177. 148 S.W.3d 624 (Tex. App.—Houston [14th Dist] 2004, no pet. h.).

178. *Id.* at 626-27.

soning in *L.B. Foster Co. v. State*.[179] Although the State argued that the court in *L.B. Foster* failed to consider certain RCRA cases discussing the term "disposal," the court in this case distinguished those cases because they involved the civil liability of polluters and did not involve the application of a statute of limitations in a criminal context.[180] The court concluded that, for criminal prosecutions under the Water Code, "the term 'disposal' does not include the passive disposal of hazardous wastes. Instead, some form of affirmative human conduct must accompany a disposal for it to rise to the level of criminal culpability."[181]

The court was also presented with a challenge to the trial court's jury instruction.[182] The trial court instructed the jury that it was not required to show that the defendants knew the waste was a hazardous waste, but only that the defendants knew the material was waste and had the potential to be harmful to others or the environment.[183] The defendants claimed that this effectively created a strict liability statute for the disposal of waste by removing the culpable mental state. The court disagreed, noting the traditional distinction between knowledge of the facts and knowledge of the law.[184] The court concluded that it was not necessary for the State to demonstrate that the defendants knew their waste was hazardous as defined in the state regulations, but only that the waste was hazardous in the sense that the waste had the potential to harm others or the environment.[185] The court thus held that the jury instruction was proper.[186]

C. Scope of the Definition of "Water in the State"

In an interesting case involving the propriety of the trial judge's comment to a jury, the court in *Watts v. State*,[187] examined the scope of the term "water in the State." The court overturned a criminal conviction under the Water Code for discharge into a "water in the state" because of the potential harm caused by the trial court's instruction to the jury that a "drainage ditch was one of the types of surface water the legislature sought to protect under the Water Code Act."[188] There was a difference in opinion among the Justices on the Panel regarding why the statement was harmful.[189] Two of the three Justices concluded that the instruction was a correct statement of law and that the harm arose because, "without the benefit of the trial court's instruction, it is conceivable appellant's

179. *See id.* at 628 (discussing L.B. Foster Co. v. State, 106 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)).
180. *Id.* at 629.
181. *Id.* (citing *L.B. Foster*, 106 S.W.3d at 207).
182. *Id.* at 632.
183. *Id.*
184. *Id.*
185. *Id.* at 633.
186. *Id.*
187. 140 S.W.3d 860 (Tex. App.—Houston [14th Dist] 2004, pet. ref'd).
188. *Id.* at 862; *see also* Tex. Water Code Ann. § 7.145 (Vernon 2000).
189. *Watts*, 140 S.W.3d at 867.

counsel might have induced the jury to believe otherwise."[190] On the other hand, Justice Frost concluded that the trial court's instruction was not necessarily correct and the harm was that the "[a]ppellant had a right to a jury verdict based on the jury's determination of the meaning of the undefined statutory terms [in the definition of water in the state], in accordance with common parlance and understanding."[191] This case is of interest because of the competing constructions of "water in the state."

The majority concluded that a drainage ditch *is* water in the state based primarily on the broad definition of "water in the state."[192] The majority pointed out that the beds and banks of all watercourses are included in the definition of water in the state, even if the watercourse contains water only intermittently.[193] Justice Frost, on the other hand, pointed out that while "many ditches may fall within the definition of water in the state, all ditches do not, as a matter of law, constitute water in the state."[194] Beds and banks of watercourses and bodies of water qualify, but this presupposes that there is some water present, even if only intermittently.[195] Dry ditches that do not qualify as watercourses or bodies of water thus do not qualify as waters in the state.[196] And while the Texas Legislature did not include the term "ditch" in the definition of "water in the state," the Legislature used the term "ditch" in other sections of the Water Code.[197] Furthermore, the Legislature used the terms "ditch" and "watercourse" separately in some of those other sections, implying that the a ditch is not necessarily always a watercourse.[198] The term "ditch" is also included as an example in the Water Code's definition of "point source" and there are prohibitions on discharging wastes from point sources into any water in the state.[199] These provisions do not support the notion that a point source is itself necessarily water in the state.[200] Justice Frost stated that "it is logical to conclude that all ditches do not necessarily fall under this definition [of water in the state], only those that otherwise come within the language of the definition."[201]

One reason for the difference in opinion is the difference in the use of terms. The majority queries whether a drainage ditch is a water in the state.[202] On the other hand, Justice Frost is answering whether a ditch, drainage or otherwise, is categorically a water in the state.[203] The opin-

190. *Id.* at 868.
191. *Id.* at 870 (Frost, J., concurring).
192. *Id.* at 866-67.
193. *Id.* at 866.
194. *Id.* at 868 (Frost, J., concurring) (internal quotation marks omitted).
195. *Id.* at 868-69 (Frost, J., concurring).
196. *See id.* at 870 (Frost, J., concurring).
197. *Id.* at 869 (Frost, J., concurring) (citing TEX. WATER CODE ANN. § 36.001(8)(E) (Vernon 2000)).
198. *Id.* (Frost, J., concurring).
199. *Id.* (Frost, J., concurring).
200. *Id.* (Frost, J., concurring).
201. *Id.* (Frost, J., concurring).
202. *See generally id.* at 865.
203. *See id.* at 870 (Frost, J., concurring).

ions can be reconciled if one assumes that a drainage ditch necessarily contains surface water or is a watercourse. The question then becomes whether a specific ditch is a "drainage ditch" or not. Considered in this light, the trial judge's comment may have had the potential to lead the jury to believe that the specific ditch it was considering was conclusively a drainage ditch and accordingly a water of the state.[204]

D. Miscellaneous Cases Involving Violations of the Water Code

1. *Proof of Disposal of Used Oil*

Although the case was decided on procedural grounds, the court provided clear indications of its thoughts on the appellant's substantive arguments in *Alli v. State*.[205] Defendant Alli raised a number of arguments in challenging his conviction for disposing of used oil on land. First, Alli argued that his convictions were legally and factually insufficient. The court, however, was not provided with any of the exhibits admitted at trial. The court requested a supplemental record but did not receive one. Because the appellant failed to present a complete record for review, the court held that he waived any challenge to the sufficiency of the evidence.[206] Nonetheless, the court indicated in a footnote that an argument similar to the defendant's argument, namely that the evidence failed to establish that he "directly disposed" of used oil, was rejected by the First District Court of Appeals.[207]

The defendant also argued that the indictment was jurisdictionally defective in that a corporation could not be criminally liable for the Water Code provision under which defendant was convicted. The court held that defendant waived any defect in the indictment because there was no indication that the objection was raised prior to trial.[208] But the court pointed out, again in a footnote, that this argument too had been rejected by the First District Court of Appeals in another case.[209]

2. *Failure to Render Continuous and Adequate Water Service*

In a case regarding the provision of a safe water supply, the meaning of "adequate" and how the State may demonstrate that water is not "adequate" were both considered by the court.[210] The operator of a retail public utility appealed his conviction under the Water Code for willfully and knowingly failing to render continuous and adequate water service on or about March 19, 1997. TNRCC testing of the defendant's water

204. *See id.*
205. Alli v. State, No. 11-02-00030-CR, 2004 Tex. App. LEXIS 3242 (Tex. App.—Eastland Apr. 8, 2004, pet. ref'd)
206. *Id.* at *3-4.
207. *Id.* at *3 n.2 (citing L.B. Foster Co. v. State, 106 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)).
208. *Id.* at *5.
209. *Id.* (citing *L.B. Foster*, 106 S.W.3d at 194).
210. McClevey v. State, 143 S.W.3d 522, 532 (Tex. App.—Austin 2004, no pet. h.).

wells in 1996 and 1997 indicated benzene in excess of the Maximum Contaminant Level ("MCL") established by the U.S. Environmental Protection Agency under the Safe Drinking Water Act[211] in one of the wells. The issues in the case were twofold: what amount of monitoring was sufficient to allege a violation and what was considered safe under the relevant statute.[212]

McClevey first argued that the evidence was legally insufficient because the State did not have quarterly monitoring reports indicating benzene in excess of the MCL. The court pointed out that the purpose of the quarterly monitoring was to determine the necessary monitoring frequency, not to exempt persons from criminal prosecution.[213] Furthermore, "[t]he State is not required to wait a year until the completion of quarterly monitoring before taking administrative action to protect public drinking water or to seek criminal prosecution. . . ."[214] The court also noted that there were tests showing that well water contained benzene in excess of the MCL before, during, and after the quarterly monitoring period for the date alleged by the State.[215] The court thus rejected defendant's legal sufficiency challenge.[216]

The second challenge was more fundamental: the defendant claimed that the evidence was factually insufficient to support his conviction because the evidence failed to demonstrate that the water was not "adequate," meaning it was not "safe."[217] The court rejected the defendant's argument for two reasons.[218] First, the court rejected the argument because the case was tried on a different theory.[219] Second, the court held that the evidence supporting the verdict was not too weak to support the finding of guilty beyond a reasonable doubt; while the defendant presented opinion testimony that the water was safe despite exceeding the MCLs, the prosecution presented its own opinion testimony and there was testimony by the defendant's employees that they would not want to drink or provide their children water with benzene in it.[220] The court thus held that the evidence supporting the conviction, both on its own and balanced against the contrary evidence, was factually sufficient.[221]

211. *See* TEX. WATER CODE ANN. § 13.250(a) (Vernon 2000).
212. *McClevey*, 143 S.W.3d at 533-34.
213. *Id.* at 534.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 534-35.
218. *See id.* at 536-37.
219. *Id.* at 537.
220. *Id.*
221. *Id.*

VI. AIR EMISSIONS CASES

A. Agency Authority Related to Control Measures in the Houston-Galveston Nonattainment Area

1. Statutory Authority

In *Brazoria County v. Texas Commission on Environmental Quality*, Brazoria County raised statutory authority and Administrative Procedure Act ("APA")[222] challenges to measures adopted by the Texas Transportation Commission and the TCEQ as part of the state's implementation plan ("SIP") to attain the federal-national ambient-air-quality standards ("NAAQS") in the eight-county Houston-Galveston Area ("HGA").[223] EPA classifies the HGA, which includes Brazoria County, as a severe nonattainment area with respect to the one-hour standard for ozone.[224]

The TCEQ's SIP mandated the adoption of environmental speed limits not to exceed 55 miles per hour within all eight counties of the HGA.[225] Brazoria County first challenged the statutory authority granted to the Transportation Commission under section 545.353 of the Transportation Code[226] to adopt environmental speed limits. When the Transportation Commission adopted the environmental speed limits, its authorizing statute empowered the commission to declare a prima facie "reasonable and safe" speed limit for any part of a highway system. In 1995, the Legislature granted the Transportation Commission authority to alter the prima facie speed limit if engineering and traffic studies indicate that the speed limit is unreasonable or unsafe and directed the Commission to consider road conditions and "other circumstances" related to the "safety of the motoring public."[227] The Transportation Commission thereafter adopted rules establishing procedures for adopting "regulatory" speed zones and "environmental" speed zones and, in 2000, issued minute orders establishing environmental speed limits in the HGA not to exceed 55 miles per hour.[228] In 2003, the Legislature amended the Transportation Code to prohibit the Commission from declaring a prima facie speed limit for environmental purposes, but provided that the restriction did not affect speed limits approved before the effective date of the act.[229] The Austin Court of Appeals held that this limitation served as ratification of the Transportation Commission's existing environmental speed limits.[230]

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222. Administrative Procedure Act, Tex. Govt. Code Ann. § 2001.001-.902 (Vernon 2000).

223. Brazoria County v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet. h.).

224. *Id.* at 733.

225. *Id.*

226. *See* Tex. Transp. Code Ann. § 545.353 (Vernon Supp. 2004-2005).

227. *Brazoria County*, 128 S.W.3d at 736 (citing Tex. Transp. Code Ann. § 545.353(b), (e) (Vernon 1996)).

228. *Id.*

229. *Id*; *see also* Tex. Transp. Code Ann. § 545.353(j) (Vernon 1996); Act of June 2, 2003, 78th Leg., R.S., ch. 1331, § 27(c), 2003 Tex. Gen Laws 5993, 6000.

230. *Brazoria County*, 128 S.W.3d at 736.

The court rejected the County's challenge that the Transportation Commission impermissibly considered the potential for federal funding cuts in adopting the environmental speed limits, concluding that that the Transportation Commission's concerns over public health fell within its statutory authority to protect the safety of the motoring public.[231] The court also rejected the County's challenge that the Transportation Commission had impermissibly delegated its speed limit-setting authority to the TCEQ on the grounds that, although the TCEQ served in an advisory capacity, the Commission retained final authority to adopt or reject the TCEQ's recommendations.[232] The County also claimed the Transportation Commission's minute orders adopting the environmental speed limits were "rules" subject to the rulemaking procedures of the APA.[233] The court rejected this challenge on the grounds that the Transportation Code expressly authorized the Transportation Commission to alter prima facie speed limits by order recorded in the minutes.[234]

Brazoria County challenged the statutory authority of the TCEQ's enhanced vehicle Inspection and Maintenance Rules ("I/M rules") on the grounds that, when adopted, the statute authorized I/M rules for specified counties only, not including Brazoria County.[235] The court rejected this challenge, finding that, at the time, two statutes granted TCEQ authority, and although one mandated adoption of I/M rules in certain counties, the other granted the TCEQ discretion to act in other areas, such as Brazoria County, consistent with federal law.[236]

2. *Reasoned Justification*

Brazoria County also raised an APA challenge to the I/M rules on the grounds that TCEQ failed to provide a reasoned justification for requiring I/M in Brazoria County in 2003 when the statutory date to attain the NAAQS was not until 2007 and for the absence of an opt-out provision for Brazoria Country that was available to three rural counties in the HGA.[237] With respect to the 2003 phase-in date, the court found TCEQ provided a reasoned justification for beginning the phase-in with areas with the most emissions and providing sufficient time to revise its models to ensure the area would timely achieve attainment.[238] The court rejected Brazoria County's claim of no reasoned justification to deny Brazoria County an opt-out clause on the grounds that elected officials from the three counties that were granted the opt-out clause had requested it and that the I/M program in those counties could contribute only a "tiny"

231. *Id.* at 737.
232. *Id.*
233. *Id.* (discussing TEX. GOV'T CODE ANN. § 2001.003(6) (Vernon 2000)).
234. *Id.* (discussing TEX. TRANSP. CODE ANN. § 545.353(a) (Vernon 1996)).
235. *Id.* at 739.
236. *Id.*
237. *Id.* at 740-41.
238. *Id.* at 741.

fraction of the reductions needed to attain the NAAQS.[239]

3. *Regulatory Impact Analysis*

One of the more interesting aspects of the *Brazoria County* case is the court's analysis of the County's claim that TCEQ failed to conduct a regulatory impact analysis of the I/M rules as required by the APA. Under Section 2001.0225(a)(1) of the APA, state agencies must conduct a regulatory impact analysis of major environmental rules if the outcome of the rule will "exceed a standard set by federal law, unless the rule is specifically required by state law."[240] Brazoria County claimed because the TCEQ I/M rules covered more vehicles than is required in federal I/M rules and are more stringent that the federal I/M rules, the TCEQ is required to prepare a regulatory impact analysis of the rules. "The court rejected this argument, finding that the I/M rules are not 'standards' but are instead 'methods and control strategies' chosen by the State to achieve, not exceed, the federal National Ambient Air Quality Standards."[241]

B. Allocation of Nitrogen Oxide Emission Credits To Operator

In *Phillips Petroleum Company v. TCEQ*,[242] the owner of boilers at a refinery challenged TCEQ's allocation of nitrogen oxide emission credits for the boilers to a co-located cogeneration plant that operated the boilers. The appeal followed Phillips' unsuccessful appeal to the district court. In December 2000, TCEQ created the Mass Emission Cap and Trade Program (MECT) to reduce nitrogen oxide emissions in the HGA. Under the MECT, TCEQ would allocate nitrogen oxide allowances to existing facilities based upon their emissions from 1997 through 1999. Phillips owned eight boilers that were located within the boundaries of its refinery. Sweeny Cogeneration LP ("Sweeny") operated the boilers as part of its cogeneration plant that was also located within the boundaries of the refinery. Both Phillips and Sweeny applied to TCEQ for the allowances.[243]

TCEQ allocated the allowances to Sweeny, relying on the 1995 permitting action authorizing construction of the cogeneration units. In that action, Sweeny avoided nonattainment new source review for the cogeneration units by offsetting the new emissions from those units with

239. *Id.*

240. *Id.*; *see also* Tex. Gov't Code Ann. § 2001.0225(a)(1) (Vernon 2000).

241. *Brazoria County*, 128 S.W.3d at 742. The court also rejected the County's claim that TCEQ failed to conduct a regulatory impact analysis of its lawn-maintenance rules on the same basis. *Id.* at 743-44. The court rejected the County's claim against TCEQ's fiscal note on the lawn-maintenance rule APA section 2001.024(a)(4)(C), finding the note estimated the costs to state and local governments and does not affect state and local revenues. *Id.* at 742-43.

242. 121 S.W.3d 502 (Tex. App.—Austin 2004, no pet. h.).

243. *Id.* at 504.

emission reductions from the eight existing boilers at the Phillips refinery. Initially, TCEQ found Sweeney's application deficient as to Sweeney's "ultimate operational control" over the boilers. But TCEQ issued the permit after Phillips represented that it "has no authority independent of the Partnership's authority under the permit to cause emissions from the boilers."[244] The permit TCEQ issued to Sweeney included authorization to operate the boilers.[245]

Phillips challenged TCEQ's grant of allowances to Sweeney, claiming that the agency should take into account its ownership of the boilers. In its award of the allowances from the boilers to Sweeney, TCEQ relied on the longstanding definition of "source" in the Clean Air Act, which requires that a building, structure, facility or installation that emits or may emit any regulated air pollutant source be under the control of the same person or persons or under common control to be part of the same source. Phillips claimed TCEQ erred in considering "operational control" and policy concerns, neither of which are required in the MECT rules.[246] Phillips urged the court to take into account its ownership and ability to "flip the switches" of the boilers and to ignore the assurances it provided in 1995 for nonattainment new source review netting purposes.[247]

The court affirmed the judgment of the district court that upheld TCEQ's award of allowances to Sweeney.[248] In doing so, the court relied on the history of the definition of "source" and its use in both the MECT and nonattainment new-source review regulations. The court also noted that the record reflected the boilers were part of Sweeney's source under the nonattainment new-source review permit.[249]

244. *Id.* at 505.
245. *Id.*
246. *Id.* at 508.
247. *Id.*
248. *Id.* at 509.
249. *Id.*