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Scott D. Deatherage

Becky Jolin

Elizabeth Webb

Matthew J. Knifton

Brendan Lowrey

See next page for additional authors

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Authors

Scott D. Deatherage, Becky Jolin, Elizabeth Webb, Matthew J. Knifton, Brendan Lowrey, and Chris Smith

ENVIRONMENTAL LAW

*Scott D. Deatherage**
*Becky Jolin***
*Elizabeth Webb****
*Matthew J. Knifton*****
*Brendan Lowrey******
*Chris Smith*******

I. INTRODUCTION

DURING the Survey period, a variety of environmental legal issues were addressed in Texas state courts and federal courts. Of particular interest, the U.S. Supreme Court decided two Texas cases involving the right of contribution under the federal Comprehensive Environmental Response, Compensation, and Liability Act and the issue of preemption of private tort claims by the Federal Insecticide, Fungicide, and Rodenticide Act. Other cases decided by federal and Texas state courts included further review of the extent of jurisdiction under the Clean Water Act, criminal environmental prosecution, many claims for property damages and cleanup costs, and contractual liability, among others.

II. COST RECOVERY CLAIMS AND ENVIRONMENTAL TORTS

A. STATUTORY COST-RECOVERY CLAIMS

1. CERCLA Claims

Significant decisions from both the U.S. Supreme Court and the Texas Supreme Court regarding environmental cost-recovery claims were handed down during the Survey period. Indeed one of the most signifi-

* B.A., University of Oklahoma, with Highest Honors, 1984; J.D., Harvard Law School, *cum laude*, 1987. Senior Partner, Thompson & Knight L.L.P., Dallas, Texas.

** B.S., University of Texas School of Allied Health Sciences, with honors, 1973; J.D., University of Houston, *cum laude*, 1988. Of Counsel, Thompson & Knight L.L.P., Austin, Texas.

*** B.A., University of Texas, 1972; M.A., University of Texas, 1977; J.D., Southern Methodist University, 1988. Senior Counsel, Thompson & Knight, Austin, Texas.

**** B.S., Ch.E., University of Texas; J.D., Texas Tech University, *summa cum laude*, 1996. Associate, Thompson & Knight L.L.P., Austin, Texas.

***** B.S., University of Dallas, 1997; J.D., Notre Dame Law School, *cum laude*, 2003. Associate, Thompson & Knight L.L.P., Austin, Texas.

****** B.S., B.A., University of Maryland, *cum laude*, 1999; M.P.Aff., Lyndon Baines Johnson School of Public Affairs, 2005; J.D., University of Texas School of Law, with Honors, 2005. Associate, Thompson & Knight L.L.P., Austin, Texas.

cant CERCLA[1] cases issued in recent years, *Cooper Industries, Inc. v. Aviall Services, Inc.*,[2] addressed the ability of a private party who had conducted remediation of hazardous-substance contamination to bring a contribution action against other liable parties. The *Aviall* case centers around the cleanup of four sites contaminated by the operations of both Cooper Industries, Inc. and Aviall Services, Inc. Aviall discovered contamination at the sites and notified the Texas Natural Resource Conservation Commission ("TNRCC"),[3] which ordered Aviall to clean up the site and threatened enforcement action. While neither the TNRCC nor the U.S. EPA took formal judicial or administrative action to compel Aviall to take action, Aviall cleaned up the sites and filed suit in federal district court seeking to recover its cleanup costs from Cooper. In its amended complaint, Aviall alleged that it was entitled to seek contribution under section 113(f)(1) from Cooper as a potentially responsible party ("PRP") under section 107(a).[4] The district court held that Aviall was not entitled to relief under section 113(f)(1) because Aviall had not been sued under section 106 or section 107.[5] A divided panel of the Fifth Circuit affirmed.[6] On rehearing en banc, however, a divided Fifth Circuit reversed and held that PRPs can seek contribution under section 113(f)(1) whether or not the PRP has been sued under section 106 or section 107. In a 7-2 decision, the U.S. Supreme Court reversed the en banc Fifth Circuit and held that a private party not sued under CERCLA section 106[7] or section 107(a)[8] cannot obtain cost recovery under CERCLA section 113(f)(1).[9]

The Court first considered the language of CERCLA section 113(f)(1): "Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under 9607(a) of this title . . . ."[10] The Court pointed out that the natural meaning of the provision is that a pre-existing civil action under CERCLA section 106 or section 107(a) must exist before a party may bring an action for contribution.[11] The Court also noted that if section 113(f)(1) authorized suits at any time, the explicit "during or following" language would be superfluous.[12] Similarly, the Court noted that a separate contribution provision, section 113(f)(3)(B), would be superfluous if section 113(f)(1) authorized contri-

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-75.

2. 543 U.S. 157 (2004).

3. In September 2002, the TNRCC changed its name to the Texas Commission on Environmental Quality ("TCEQ").

4. *Cooper*, 543 U.S. at 164.

5. *Id.* at 164-65.

6. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001).

7. 42 U.S.C.A. § 9606 (LexisNexis 2006).

8. *Id.* § 9607(a).

9. *Id.* § 9613(f)(1); *Cooper*, 543 U.S. at 159, 165.

10. *Cooper*, 543 U.S. at 166 (quoting 42 U.S.C. § 113(f)(1)) (emphasis in original).

11. *Id.*

12. *Id.*

bution actions at any time.[13] The Court reasoned that "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions."[14]

The Court also considered the limitations periods for contribution actions under CERCLA.[15] CERCLA provides corresponding three-year limitations periods for contribution actions, one beginning at the date of judgment[16] for contribution claims brought under section 113(f)(1) and one beginning at the date of settlement[17] for contribution claims brought under section 113(f)(3)(B).[18] The lack of a limitations period for voluntary cleanups indicates that voluntary cleanups do not trigger a right to contribution.[19]

For these reasons, the court held that CERCLA section 113(f)(1) does not support Aviall's suit.[20] The savings clause of section 113(f)(1) did not alter the Court's analysis; the court reasoned that the savings clause clarified that section 113(f)(1) did not alter a party's right to contribution that exists independently of section 113(f)(1).[21] The court explicitly declined to rule on some other issues related to CERCLA contribution, including whether Aviall was entitled to seek cost recovery under section 107(a)(4)(B) even though Aviall was a PRP;[22] whether Aviall has an implied right to contribution under section 107;[23] and whether an administrative order under section 106 would qualify as a civil action under section 106 or section 107 for purposes of seeking contribution under section 113(f)(1).[24]

Since the *Aviall* decision, these unanswered questions have been considered by other courts with inconsistent results. Some courts have found a right of contribution under CERCLA section 107(a)(4)(B).[25] Other

13. *Id.*
14. *Id.*
15. *Id.* at 167.
16. 42 U.S.C.A. § 9613(g)(3)(A) (LexisNexis 2006).
17. *Id.* § 9613(g)(3)(B).
18. *See Cooper*, 543 U.S. at 167.
19. *See id.*
20. *Id.* at 168.
21. *Id.*
22. *Id.* This issue was not fully explored after enactment of section 113 because courts generally allowed PRPs to bring contribution actions under section 113, even in the absence of a civil action under section 106 or section 107.
23. *Id.* at 170-71. The Court, however, made a point to note other instances in which it refused to recognize implied or common-law rights of contribution. *Id.*
24. *Id.* at 167-68, 168 n.5. One post-*Aviall* case has held that a CERCLA section 106 order is insufficient for a cause of action under CERCLA section 113(f)(3)(B). Pharmacia Corp. v. Clayton Chem. Acquisition LLC, 382 F. Supp. 2d 1079, 1086 (S.D. Ill. 2005).
25. *E.g.*, Vine Street LLC v. Keeling, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005), discussed *infra*; Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp., 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005). The Second Circuit has held that section 107(a) allows a party that would be liable under section 107 but has not been sued or made to participate in an administrative proceeding to recover necessary response costs incurred voluntarily. Con Edison Co. of New York v. UGI Utils., Inc., 423 F.3d 90, 100 (2d Cir. 2005).

courts have suggested that it may be difficult for PRPs to pursue actions under section 107.[26] In fact, on the remand of the *Aviall* case,[27] there are pending summary-judgment motions on the issue of whether Aviall has a right to cost recovery under section 107.

On an administrative level, in response to the *Aviall* decision, the EPA and some states have developed model language for use in administrative orders and settlements to facilitate the use of section 113(f)(3)(B) by those subject to the order or settlement.[28] From the standpoint of PRPs desiring to clean up properties and seek costs from other PRPs, reaching a negotiated settlement with the EPA or a state to preserve a CERCLA cause of action is a much more palatable option than asking the EPA or a state to bring an action under CERCLA section 106 or section 107 or simply abandoning a CERCLA cause of action altogether. To date, there have been only a few post-*Aviall* cases discussing the adequacy of settlement language or language in other documents to support a right to contribution under CERCLA section 113(f)(3)(B).[29]

One of the questions left open by the *Aviall* decision arose in the Eastern District of Texas in *Vine Street LLC v. Keeling*.[30] In *Vine Street*, the owner of a site that once had a dry cleaner sued a number of parties, including The Dow Chemical Company, under CERCLA and state law based on releases of perchloroethylene allegedly made and sold by Dow. Dow filed a 12(b)(6) motion seeking, inter alia, dismissal of Vine Street's CERCLA section 107(a) and section 113(f)(1) claims. The court, relying on *Aviall*, reasoned that because Vine Street did not allege that it had been sued under section 106 or section 107, or "otherwise been legally compelled to incur . . . cleanup costs," Vine Street had no legal basis for a contribution claim under section 113(f)(1) and accordingly dismissed Vine Street's section 113(f)(1) claim.[31]

With respect to the section 107(a) claim, Dow argued that Vine Street was barred from bringing the claim because Vine Street is a PRP. The court, however, pointed out that "while most section 107(a) claims are brought by innocent parties and most section 113(f) claims are brought by potentially responsible parties, that does not mean potentially responsible parties are barred from bringing claims under section 107(a)."[32] The

26. *E.g.*, Elementis Chems., Inc. v. TH Agric. & Nutrition, LLC, 373 F. Supp. 2d 257, 272 (S.D.N.Y. 2005).

27. Aviall Servs., Inc. v. Cooper Indus., Inc., No. Civ. A. 3-97-CV-1926-D, 2000 WL 31730 (N.D. Tex. Jan. 13, 2000) (not designated for publication).

28. *E.g.*, Memorandum from Susan E. Bromm, U.S. E.P.A., and Bruce S. Gelber, U.S. D.O.J., on Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under section 113(f) (Aug. 3, 2005), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf.

29. *See, e.g.*, *Con Edison Co.*, 423 F.3d at 95-96; W.R. Grace & Co. v. Zotos Int'l, Inc., No. 98-CV-838S(F), 2005 WL 1076117, at *2 (W.D.N.Y. May 3, 2005); Benderson Dev. Co. v. Neumade Prods. Corp., No. 98-CV-0241SR, 2005 WL 1397013, at *12 (W.D.N.Y. June 13, 2005).

30. *Vine St.*, 362 F. Supp. 2d at 760-64.

31. *Id.* at 761.

32. *Id.* at 762.

court recognized that most courts have held that a PRP's claim falls under section 113, not under section 107, but the court distinguished those cases, stating that they considered the issue of whether a PRP with a section 113(f) claim could concurrently bring a claim under section 107(a).[33] The court reasoned that a PRP is akin to a joint tortfeasor and that section 107(a)(4)(B) "serves as the pre-enforcement analog to the impleader contribution action permitted under section 9613(f)."[34] The court concluded that a PRP that cannot bring a claim under section 113(f) nevertheless has a claim under section 107(a).[35]

2. *Texas Solid Waste Disposal Act Claims*

In *R.R. Street & Co. v. Pilgrim Enterprises, Inc.*,[36] the Texas Supreme Court outlined the scope of arranger liability under the Texas Solid Waste Disposal Act ("TSWDA")[37] and provided guidance on a number of other issues under the TSWDA. In *Street*, the owner of several dry-cleaning facilities, Pilgrim, sought to recover costs incurred in addressing contamination resulting from releases of the solvent perchloroethylene ("perc"). Pilgrim sued Street based on a Street employee's advice regarding disposal of separator water containing perc and the employee's disposal of test-vial mixtures containing perc at the dry-cleaning facilities. The trial court awarded Pilgrim $1.5 million, and Street appealed. The court of appeals held that Street was liable under the TSWDA as an arranger based on both the employee's advice and disposal actions.

In considering the scope of arranger liability under the TSWDA, the court noted the lack of cases evaluating the issue.[38] In seeking guiding authority, the court pointed out that the Texas Legislature chose language very similar to CERCLA in defining arranger liability and accordingly looked to federal case law for guidance in interpreting the TSWDA provisions.[39] The court stated that the federal courts generally agree that a nexus between a party's conduct and disposal of a hazardous substance is necessary to demonstrate arranger status and a totality of the circumstances approach is used to evaluate the nexus.[40] The court stated that courts should consider whether a defendant: (1) owned or possessed the solid waste in question; (2) had the authority to make disposal decisions; (3) had the obligation to make disposal decisions; (4) exercised control over decisions regarding the waste's disposal; or (5) actually disposed of the solid waste.[41] The court pointed out that no single factor is necessa-

33. *Id.* at 762.
34. *Id.* at 763 (quoting In re Hemingway Transp., Inc., 993 F.2d 915, 931 (1st Cir. 1993)).
35. *Id.*
36. 166 S.W.3d 232 (Tex. 2005).
37. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.754 (2005).
38. *R.R. St. & Co.*, 166 S.W.3d at 241.
39. *Id.*
40. *Id.* at 242.
41. *Id.*

rily dispositive.[42]

In reviewing Street's advice on disposal of separator water, the court stated that it could not find any federal cases holding that providing technical services and advice resulted in arranger liability under CERCLA.[43] The court concluded that Street did not physically dispose of the separator water or have the authority to control disposal of the separator water, and merely provided advice regarding disposal that Pilgrim was free to ignore. Thus, the court concluded that no causal nexus had been established between Street's conduct and the disposal of perc at Pilgrim's sites.[44]

With respect to Street's disposal of test-vial mixtures containing perc, the court first considered the question of whether the mixtures fell within the definition of solid waste under the TSWDA. The court pointed out that the definition of solid waste under the TSWDA is limited by the domestic-sewage exclusion of RCRA.[45] The court held that there was a fact issue regarding whether the mixture fell within the domestic-sewage exclusion of RCRA,[46] so the court remanded this issue to the trial court.[47]

B. Contractual Claims for Remediation Costs

During the Survey period, several cases addressed contractual liability for environmental claims. In one of the more significant cases, the Fifth Circuit Court of Appeals ruled on whether an agreement on the transfer of certain natural-resource assets and liabilities of a former holding company to its former subsidiary included an indemnity for a refinery that had been sold before the transfer of all assets.[48] The company that subsequently purchased the refinery sued the former holding company under CERCLA. While that suit was pending, the former holding company, then known as Honeywell, sued the former subsidiary, then known as Phillips Petroleum, for indemnification for the CERCLA suit. Phillips argued that the refinery transfer occurred two years before the transfer of the natural-resource assets, so the liability for the refinery was not assumed, and it owed no indemnity obligation to Honeywell.

The operative language relating to the liabilities associated with the assets was as follows:

> The assets transferred under this Agreement are subject to all debts, obligations and liabilities of Grantor of every kind and description related to and/or arising out of or in connection with such assets, and Grantee does hereby undertake, assume and agree to pay, perform

42. *Id.*
43. *Id.* at 244.
44. *Id.* at 246.
45. *Id.* at 247.
46. *Id.* at 249.
47. *Id.* at 255.
48. Honeywell Int'l, Inc. v. Phillips Petroleum Co., 415 F.3d 429, 430-43 (5th Cir. 2005).

> and discharge as they mature, accrue and/or become payable, all such debts, obligations and liabilities.[49]

A supplemental agreement provided that the former subsidiary assume all of the debts, obligations, and liabilities, whether known or unknown, related to the said natural-resources business and assets. It further stated that the former subsidiary

> hereby confirms to and agrees with [the former holding company] that it has fully and unconditionally assumed and agreed to perform and pay . . . all liabilities (known and unknown, accrued, absolute, contingent, or otherwise) of any nature whatsoever, assigned to and assumed . . . by [the former subsidiary] pursuant to the . . . Master Agreement.[50]

The federal district court granted summary judgment to Phillips Petroleum, holding that it did not have any obligation to indemnify Honeywell. The Fifth Circuit reviewed this decision de novo and agreed with the district court that the Master Agreement and the Supplemental Agreement did not require Phillips to indemnify Honeywell for the claimed losses, concluding that the assumption of liabilities extended only to the liabilities arising from the assets transferred, which did not include the refinery because it had sold before the transfer to the subsidiary.

Honeywell argued that the intent was to transfer all of the subsidiary's liabilities. The Fifth Circuit, however, ruled that such intent must be found in the agreement's language. Honeywell further contended that the agreement's language should be read to include the transfer of the "business" of the former subsidiary and the liabilities associated with that business, which would include the liabilities for the assets previously transferred. The court ruled that this interpretation would require rewriting of the Master Agreement. As for the Supplemental Agreement, the court determined that the references were to the business or assets transferred in the Master Agreement, so the underlying premise of assumption of liability was not changed.[51]

Honeywell argued that in a similar case in the Western District of New York, the court had ruled that a subsidiary assumed all liabilities of the division transferred to that subsidiary.[52] The Fifth Circuit distinguished that case in that the agreement transferred liability "relating to or arising out of the Assets [transferred]."[53] "Assets" were defined as "[a]ll of the assets, properties, business, good will, rights, privileges and interests of whatever nature."[54] In the Honeywell set of facts, the agreement focused on the assets owned on the date of the transfer, whereas the liability in the New York case focused on liabilities arising from the assets or busi-

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49. *Id.* at 434.
50. *Id.*
51. *Id.* at 436.
52. Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 133 (W.D.N.Y. 1991).
53. *Honeywell*, 415 F.3d at 436 (quoting *Purolator*, 772 F. Supp. at 132).
54. *Id.*

ness of the division transferred, irrespective of when those assets were owned.

In another case involving a contractual claim for remediation costs, an oil-field operator lost its claim to recover the cleanup costs of the release of drilling fluids to the surrounding land against first the drilling contractor's insurance company and then against the drilling contractor.[55] This case demonstrates the need to both understand and negotiate the appropriate environmental contract provisions and to understand and negotiate the appropriate environmental insurance-coverage contract provisions.

In this case, the operator entered into a contract with the drilling contractor that provided that the drilling contractor would provide certain environmental insurance coverage. The contractor obtained the coverage required, but, once a claim arose and the operator filed, the insurance company denied the claim for reasons not entirely clear from the court's decision. The operator then turned to the drilling contractor to seek reimbursement of its environmental-response costs. The drilling contractor filed a declaratory-judgment action seeking a judgment that it did not owe the operator for the environmental costs. The appellate court reversed the trial court's summary judgment for the operator and rendered judgment for the contractor.[56]

The appellate court's decision first reviewed an indemnity provision in the contract. The indemnity contained two parts: first, the drilling contractor was required to indemnify the operator for pollution claims that originated above ground for specific types of releases; second, the operator was required to indemnify the drilling contractor for all other pollution or contamination claims.[57] The parties did not disagree that the provision requiring the drilling contractor's indemnification covered the pollution claims at issue.

The operator instead poorly argued that the drilling contractor was liable because the insurance company did not reimburse the operator since the claim fell below the policy's deductible and the contract provided that the drilling contractor was responsible for paying the deductible. However, the court ruled that the indemnity under the contract required the operator to indemnify the drilling contractor for the particular claims, notwithstanding any other contract provisions.[58] Thus, the court ruled that the operator did not have a claim against the drilling contractor.

In a third contractual case, *Finner v. Samson Resources Co.*,[59] a ranch owner sued oil companies that had entered into a lease for a plant site and leases for oil exploration and production. The main issue that the appellate court reviewed was whether the oil-company lessees had

55. Helmrich & Payne Int'l Drilling Co. v. Swift Energy Co., 180 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

56. *Id.* at 647.

57. *Id.* at 639.

58. *Id.* at 646-47.

59. No. 01-03-0049-CV, 2005 Tex. App. LEXIS 7286, at *5 (Tex. App.—Houston [1st Dist.] Aug. 31, 2005, pet. denied).

breached either lease. The first question related to the legal interpretation of the contracts, and the second related to whether the evidence supported the jury's verdict that the leases were not breached.

The main obstacle that the plaintiffs faced was the wording of their leases. The plant-site lease required the lessee "to generally restore the surface of the land."[60] The problem was that the environmental contamination was below ground from the operation of an old pit that had been drained and buried. The oil-and-gas lease required the lessee to be "responsible for all damages to the surface of the lands."[61] The court concluded that, since "surface" was not defined, its ordinary meaning was properly construed as the soil's upper boundary. Thus, the lease provision did not cover subsurface damage or contamination.

In an attempt to avoid this conclusion, the plaintiffs argued that the custom was for the lessee in these types of leases to be liable for remediating land contamination. The court did not adopt this argument, relying on the words in the contract to govern the lessee's duties rather than alleged industry custom.

In reviewing the jury's verdict, the court concluded that the jury's decision would not be overturned since the damages were below the surface.[62] There was no basis to overturn their decision that the contract had not been breached, and sufficient evidence supported the verdict.

C. Environmental Torts

1. Statute of Limitations

The issue of applying statute of limitations in environmental-tort suits arose in several cases over the Survey period. First, in *K-7 Enterprises, L.P. v. Jeswood Oil Co*,[63] the plaintiff landowner, K-7, brought suit against an adjoining convenience store for damage to land based on migration of gasoline chemicals that were released from underground storage tanks located on property across the street. Five years earlier, K-7 learned of contamination on its property and the defendants' insurer agreed to remediate K-7's property. Later, K-7 learned that subsequent leaks had continued to sporadically migrate onto its property. Since the property had not been remediated and more releases of fuel had occurred, K-7 sued; however, the trial court granted summary judgment based on the statute of limitations.[64]

On appeal, the appellate court first pointed out that the accrual date in such cases depends on whether the injury is permanent or temporary—an action for permanent damage accrues on discovery of the first actionable injury, while an action for temporary damage continues to accrue with

60. *Id.* at *9.
61. *Id.* at *15.
62. *Id.* at *29.
63. No. 2-03-312-CV, 2005 WL 182947, at *1 (Tex. App—Fort Worth Jan. 27, 2005, no pet.) (not designated for publication).
64. *Id.* at *2.

each injury—and damages may be recovered for injuries sustained within the two years before filing suit.[65] The appellate court ruled that K-7's summary-judgment evidence indicated multiple tank leaks on distinct occasions and sporadic migration onto K-7's property. Thus, the defendants failed to conclusively establish that the injuries to K-7's land were permanent.[66] Accordingly, the appellate court reversed the trial court's grant of summary judgment with respect to injuries to K-7's property occurring on or after January 15, 2001.[67]

With respect to damages occurring before that date, K-7 argued that summary judgment was improper because the defendants should be prevented from asserting a limitations defense based on the doctrines of equitable estoppel or fraudulent concealment,[68] since K-7 relied on the affirmative representations of the defendants' insurer and environmental consultant regarding the contamination and remediation of K-7's property. The court questioned whether the defendants' consultant, a nonparty, was under a duty to disclose information to K-7 and concluded that there was a lack of evidence regarding deception by the defendants themselves. Thus, the court held that K-7's reliance on the consultant's and insurance company's representations was unreasonable, and equitable estoppel and fraudulent concealment were not applicable.[69]

2. *Causation Issues*

Causation was essentially the main issue in *Quemado Plaintiffs v. Exxon Mobil Corp.*,[70] a case in which the plaintiffs sued oil companies, alleging that leaks from the defendants' underground storage tanks polluted the water supply, caused personal injuries, and devalued the plaintiffs' property. The plaintiffs further claimed that the defendants were liable for inadequate remediation activities. The trial court granted the defendants' motion for summary judgment with respect to the various tort claims, holding that the plaintiffs presented no evidence that the defendants owned, operated, or controlled the storage tanks at the time of the gasoline leaks. The appellate court found that the defendants had transferred ownership of the gasoline service stations at issue five to seven years before the first reported leak in the underground tanks, and that no evidence was presented that the defendants had knowledge of leaks at the time of their ownership transfer. The court also held that the defendants' display of brand signs on the premises did not equate to *control* of the premises.

In another case involving a causation question, the defendant landowners placed several truckloads of manure on their family farm, which the

65. *Id.* at *3.
66. *Id.*
67. *Id.* at *7.
68. *Id.* at *5.
69. *Id.* at *6.
70. No. DR-03-CA-19-OG, 2005 U.S. Dist. LEXIS 21279, at *11 (W.D. Tex. Mar. 31, 2005).

plaintiffs claimed polluted their water well.[71] The trial court granted summary judgment in favor of the defendants for the claims based on the theory of res ipsa loquitor, because the plaintiffs had not presented any evidence that groundwater contamination ordinarily does not occur in the absence of negligence under the facts and circumstances described by the plaintiffs. Moreover, the plaintiffs failed to present any evidence that their groundwater was contaminated by the manure on the defendants' farm. Finally, the court held that the plaintiffs' allegations that their groundwater would eventually become contaminated by the manure percolating through the soil did not state a current condition and thus did not support a current nuisance or nuisance per se cause of action.

3. *Negligence Per Se*

In *Mieth v. Ranchquest, Inc.*,[72] the property owners sued oil-and-gas-lease owners to recover damages caused to the surface estate by the alleged negligent operation of an oil-and-gas well. One of the most significant issues on appeal was whether the trial court erred by refusing to submit a jury instruction on negligence per se because the lease owners violated a Railroad Commission rule prohibiting the pollution of surface water.[73] This rule provides that "no person conducting activities subject to regulation by the commission may cause or allow pollution of surface or subsurface water in the state."[74] The court first explained that for an administrative rule to be a standard for negligence, a purpose of the rule must be to protect the class of persons to which the injured party belongs from the hazard involved in the particular case.[75] The court held that the rule "clearly affords protection to the class of persons to which appellants belong, *i.e.*, surface owners, against the hazard involved, *i.e.*, pollution of surface and subsurface water."[76]

4. *Measure of Damages for Injuries to Land*

The measure of damages for injuries to land in environmental tort cases was reviewed by the Eastland Court of Appeals in a case brought by a ranch owner against an oil company for surface damages to property.[77] In a second trial on only the oil company's liability, the jury decided that the oil company was liable for $2,110,000 in actual damages for the cleanup costs and diminution in value, $880,000 in prejudgment interest, and $86,000 in punitive damages. The oil company challenged, among other things, the evidence for the jury's verdict on cleanup costs

71. Aguilar v. Trujillo, 162 S.W.3d 839, 844 (Tex. App.—El Paso 2005, pet. denied).
72. 177 S.W.3d 296, 300 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
73. *Id.* at 305.
74. 16 TEX. ADMIN. CODE § 3.8(b) (2006).
75. *Mieth*, 177 S.W.3d at 305 (citing Cont'l Oil Co. v. Simpson, 604 S.W.2d 530, 534 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.)).
76. *Id.*
77. Primrose Operating Co., Inc. v. Senn, 161 S.W.3d 258, 260 (Tex. App.—Eastland 2005, pet. denied).

and value diminution.[78]

The appellate court considered the measure of damages for surface owners' claims for damages to land, recognizing that the type of compensation depends on the type of injury.[79] In applying another Eastland Court of Appeals case, it decided that the cost to restore the land was not reasonable, such that it could not be considered in the analysis of damages.[80] Thus, the court ruled that the measure of damages would be the diminution in market value regardless of whether the injury was temporary or permanent.[81] However, it was not clear how the diminution in value was to be determined.[82]

5. Standing to Sue for Injury to Land

In two cases, courts reviewed claims by landowners for injuries to land that occurred before the landowners purchased the property. In *West v. Brenntag Southwest, Inc.*,[83] the court ruled that for a landowner to have standing to sue for injury to land, one of two circumstance must exist: (1) if the injury occurred before the current landowner's purchase, the seller must have assigned the claim to the current landowner; or (2) the injury to the land must have occurred during the plaintiff's ownership of the land. Because there was no assignment of claims, the court had to determine whether there was evidence of a new and distinct injury that occurred after the plaintiff acquired the property. The plaintiff argued that the contamination's gradual leaking into the soil continued while he owned the property and that this fact was sufficient to show a new injury to support standing. The court disagreed, holding that the fact that the injury existed throughout the plaintiff's ownership did not create a new injury to the land. The court found that the injury was continuous and lingering and, without an assignment, would not support standing to bring suit for negligence or nuisance.

In another case, landowners sought damages for oil-field operations, in part occurring before they purchased the property.[84] The appellate court upheld a plea to the jurisdiction, ruling that the plaintiffs did not have standing to seek damages that were caused before they purchased the property because the claims were not transferred to them as part of the transaction.[85] However, the court ruled that the trial court erred in granting the plea to the jurisdiction to those claims for discharges of hydrocarbons and damages to plaintiff's farm equipment that allegedly occurred after the purchase of the property.[86] The plaintiffs also failed to assert a

78. *Id.*
79. *Id.* at 261.
80. *Id.*
81. *Id.*
82. *Id.* at 263-64.
83. 168 S.W.3d 327, 332-33 (Tex. App.—Texarkana 2005, pet. denied).
84. Denman v. SND Operating, L.L.C., No. 06-04-00061-CV, 2005 Tex. App. LEXIS 7795, at *6 (Tex. App.—Texarkana Sept. 23, 2005, no pet.).
85. *Id.* at *14-15.
86. *Id.* at *19.

cause of action under section 85.321 of the Texas Natural Resources Code.[87] Finally, the court ruled that the plaintiffs could not bring a claim under the Texas Litter Abatement Act[88] for solid waste arising from oil-and-gas operations.[89]

D. Preemption

1. *CERCLA Preemption of State Statute of Repose*

In *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*,[90] the Fifth Circuit held that section 9658 of CERCLA does not preempt the Texas statute of repose regarding a buyer's product-liability claims. Appellee argued that section 9658 preempted the statute of repose by superimposing the discovery rule on the running of the statute's period of repose. The court found that section 9658 did engraft a discovery rule on state statutes of limitation, but not on statutes of repose. Under the plain meaning of section 9658, the court held that section 9658 preempts state law when the applicable statute of limitations provides a commencement date that is earlier than the federally required commencement date, but does not preempt the statute of repose.[91]

2. *FIFRA Preemption*

In *Bates v. Dow Agrosciences LLC*,[92] the United States Supreme Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")[93] preempted certain common-law claims and claims under the Texas Deceptive Trade Practices Act.[94] The petitioners in the case were 29 Texas peanut farmers who alleged that their crops were damaged by the application of a Dow pesticide named "Strongarm."[95] The farmers' claims included breach of express warranty, fraud, violation of the DTPA, strict liability, negligent testing, and negligent failure to warn.

The Supreme Court held that the term "requirements" in section 136v(b) of FIFRA applied to both statutes and regulations and to common-law duties.[96] Thus, FIFRA could preempt state common law. However, the Court noted that the fact that FIFRA could preempt common law said nothing about the scope of the preemption. The Court then provided a two-part test for determining the scope of preemption. First, the state rule "must be a requirement '*for labeling and packaging*'; rules gov-

87. *Id.* at *22.
88. Tex. Health & Safety Code Ann. § 365.012(a) (2005).
89. *Denman*, 2005 Tex. App. LEXIS 7795, at *28.
90. 419 F.3d 355 (5th Cir. 2005).
91. *Id.* at 361-65.
92. 544 U.S. 431 (2005).
93. 7 U.S.C. § 136 *et seq.* (2000).
94. Tex. Bus. & Com. Code Ann. § 17.01 *et seq.* (2002).
95. *Bates*, 544 U.S. at 434.
96. *Id.* at 443.

erning the design of a product, for example, are not pre-empted."[97] Second, the state rule "must impose a labeling or packaging requirement that is '*in addition to or different from* those required under this subchapter.' A state regulation requiring the word 'poison' to appear in red letters, for instance, would not be pre-empted if an EPA regulation imposed the same requirement."[98] Applying this test, the Court found that most of the farmers' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted because they did not relate to "labeling or packaging."[99] However, the Court noted that the farmers' fraud and negligent-failure-to-warn claims were based on common-law rules that qualify as "requirements for labeling or packaging,"[100] and satisfied the first prong of the test; thereby, they were preempted by FIFRA. The Court concluded that the question of whether the farmers' fraud and failure-to-warn claims must be remanded to the appellate court to decide whether these claims violated the test's second prong and were preempted.[101]

III. WASTEWATER ISSUES

A. APPLICABILITY OF THE NATIONAL POLLUTANT DISCHARGED ELIMINATION SYSTEM TO OIL AND GAS OPERATIONS

The Fifth Circuit in *Texas Independent Producers and Royalty Owners Ass'n v. United States EPA*[102] determined that pre-enforcement review of an EPA rule deferring NPDES storm-water requirements for certain oil-and-gas construction sites was not proper. Shortly after this case was handed down, Congress addressed this issue in legislation that prohibited the EPA from exercising jurisdiction to issue storm-water permits for most oil-and-gas operations. As part of the 1987 Clean Water Act Amendments, Congress generally required regulation of storm-water discharges, but expressly prohibited the EPA from requiring a permit for storm-water discharges from oil-and-gas exploration and production unless the discharges were contaminated with materials on the site.[103] When the EPA issued its Phase II storm-water rules, extending the NPDES permit program to operators of construction sites disturbing more than one acre of land, the EPA assumed that few oil-and-gas operations would be affected by the Phase II rules.[104]

The EPA later learned that thousands of oil-and-gas sites could be affected and responded by deferring applicability of the Phase II rules to small oil-and-gas construction activities to June 12, 2006.[105] The Texas

97. *Id.* (quoting 7 U.S.C. § 136v(b)) (emphasis in original).
98. *Id.* (emphasis in original).
99. *Id.*
100. *Id.*
101. *Id.* at 457.
102. 413 F.3d 479 (5th Cir. 2005).
103. Clean Water Act § 402(l), 33 U.S.C. § 1342(l) (2005).
104. *Texas Independent*, 413 F.3d at 481.
105. *Id.* at 481-82.

Independent Producers and Royalty Owners Association petitioned the Fifth Circuit for review asserting that, in the deferral rule, the EPA interpreted the Phase II rules to apply to construction activities associated with oil-and-gas activities, which was inconsistent with the Clean Water Act.[106] The court analyzed the challenge under the ripeness test and evaluated whether delayed review would cause hardship, whether judicial intervention would inappropriately interfere with administrative action, and whether the courts would benefit from additional factual development.[107] The court was unconvinced that there would be hardship to the petitioner, given that the only changes to the rule would not become effective for approximately one year. The court was also uncomfortable cutting off the EPA's interpretive process in light of the fact that the EPA specifically stated its intention to examine how to resolve issues posed by section 401(l)(2) of the Clean Water Act.[108] Finally, the court stated that it would benefit from further factual development, especially because the EPA had not determined the scope of construction related to oil-and-gas development subject to the Phase II rules.[109] In summary, the court stated that "it is uncertain whether EPA will require permits from Petitioners and there is no immediacy to the requirements as they do not go into effect for a year."[110]

Shortly after the case was decided, Congress settled the issue with the passage of the Energy Policy Act of 2005.[111] In section 323 of the Act, Congress defined "oil and gas exploration and production" to include "all field activities . . . whether or not such field activities or operations may be considered . . . construction activities."[112] As a result of the Act, on January 6, 2006, the EPA proposed a rule to clarify that activities associated with oil-and-gas exploration, production, processing, or treatment operations, or transmission facilities are exempt from NPDES stormwater permit requirements.[113] The EPA interprets the "statutory exemption to include construction of drilling sites, drilling waste management pits, and access roads as well as construction of the transportation and treatment infrastructure such as pipelines, natural gas treatment plants, natural gas compressor stations and crude oil pumping stations."[114] Further, the proposed rule is applicable to all States, federal lands, and Indian Country regardless of the permitting authority.[115] States remain free, however, to regulate discharges under state law.[116]

106. *Id.* at 482.
107. *Id.* at 482-83.
108. *Id.* at 483.
109. *Id.*
110. *Id.* at 483-84.
111. Pub. L. No. 109-58, 119 Stat. 594 (2005).
112. *Id.* § 323 (codified at 33 U.S.C. § 1362(24) (2005)).
113. 71 Fed. Reg. 894 (Jan. 6, 2006) (to be codified at 40 C.F.R. pt. 122).
114. *Id.* at 897.
115. *Id.* at 898.
116. *Id.*

B. CWA Standing and Notice

In a case involving justiciability issues, *Environmental Conservation Organization v. City of Dallas*, the federal District Court for the Northern District of Texas considered when a party has standing to bring a citizen-enforcement action under the Clean Water Act and the notice requirements required to bring such an action.[117] In considering the capacity of an organization or association to sue in a representative capacity, the court required proof of three elements: (1) that one or more of the organization's members would have standing to sue individually; (2) that the organization is seeking to protect interests germane to its purpose; and (3) that neither the claim asserted nor the relief sought requires the members to participate in the lawsuit.[118] Regarding the first element, the court concluded that the Fifth Circuit has adopted an "indicia of membership" test to determine whether an organization has members whose interests it can represent in court. The Fifth Circuit had previously concluded that factors to consider in determining indicia of membership include: (1) whether the members elect the organization's governing body and support the organization financially; (2) whether the members voluntarily associate with the organization; (3) whether the organization has a clearly articulated and understood membership structure; and (4) whether the suit is within the organization's central purpose.[119] If the organization is sufficiently identified with and subject to the influence of its members, it will have associational standing.[120]

A question also arose at to whether the plaintiff association could establish that any of the members of ECO suffered an injury traceable to alleged violations by the City or that any injury would be redressed by a favorable decision. At the summary-judgment stage, affidavit testimony from a water-pollution-control engineer describing the water flow from the Dallas discharge point to certain waterways including White Rock Creek, Turtle Creek, and Cedar Creek, and affidavit testimony from a member of the association describing how her visits to Turtle Creek, White Rock Lake, and the Trinity River have been impacted by odors, trash, and debris was sufficient to demonstrate an injury-in-fact fairly traceable to the City's conduct.[121]

Regarding notice, the court held that a letter specifically describing certain alleged violations, the corresponding sections of the permit allegedly violated, and the date of the alleged violations satisfied the statutory notice requirements of the Clean Water Act;[122] thus, the court denied summary judgment. On the other hand, the court held that "[t]he allegation that the City is 'discharging pollutant-laden storm water and non-storm

117. No. 3-03-V-2951-BD, 2005 WL 1771289 (N.D. Tex. July 26, 2005).
118. *Id.* at *2.
119. *Id.* (citing Friends of the Earth, Inc. v. Chevron Chemical Co., 129 F.3d 826, 829 (5th Cir. 1997)).
120. *See id.* at *2-3.
121. *Id.* at *3-4.
122. *Id.* at *6.

water without a NPDES or TPDES permit, in violation of a NPDES or TPDES permit, and/or at levels far exceeding any discharge permitted under a NPDES or TPDES permit, is far too broad to give meaningful notice of ECO's complaint."[123] Failure to identify the pollutants allegedly discharged or the dates of the alleged discharges effectively deprived the City of the opportunity to correct the alleged problems.[124] Accordingly, the court dismissed those claims.[125]

C. Wetland Dredge and Fill Permits

During the Survey period, the Fifth Circuit provided further guidance on the U.S. Supreme Court's wetlands jurisdictional case, known as *SWANCC*.[126] The *SWANCC* case provided the Court's views on the scope of jurisdictional wetlands under section 404 of the federal Clean Water Act ("CWA").[127] In *City of Shoreacres v. Waterworth*, plaintiffs brought an action challenging the Army Corps of Engineers' issuance of a dredge-and-fill permit under section 404 of the CWA because the Corps declared that only 19.7 acres of a 146-acre tract were jurisdictional wetlands.[128] The plaintiffs claimed that the Corps had corrupted the entire decisional process by undercounting the wetlands' acreage within its jurisdiction for a new cargo- and cruise-ship terminal for the Port Authority on undeveloped land in Harris County.[129]

Before the Court's decision in *SWANCC*, the Corps had determined that there were 102 acres of jurisdictional wetlands at the site.[130] However, in *SWANCC*, the Court limited the Corps' jurisdiction to regulate wetlands.[131] After the *SWANCC* decision, the Corps reevaluated its jurisdiction and determined that "in this setting, the overland sheet flow was as a factual, scientific matter inadequate to establish a sufficient hydrological nexus with interstate waters" to establish jurisdiction, and, thus, the Corps reduced the area to which its jurisdiction extended to only 19.7 acres of wetlands.[132] This decision provides valuable guidance to the regulated community that, if the only hydrological connection with interstate waters is overland sheet flow, that sheet flow may not suffice to bring wetlands under the Corps' jurisdiction.

Because the mitigation provided by the Port Authority was so substantial, involving over 1,130 acres of wetlands and other habitat, the court found no abuse of discretion given that the Corps would have made the same decision even if it considered all of the wetlands at the site to be

123. *Id.*
124. *See id.*
125. *Id.*
126. Solid Waste Agency at N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
127. *Id.*
128. 420 F.3d 440, 446 (5th Cir. 2005).
129. *Id.* at 446, 444.
130. *Id.* at 446.
131. *SWANCC*, 531 U.S. at 160.
132. *Waterworth*, 420 F.3d at 446 n.3.

jurisdictional.[133]

The plaintiffs also challenged the Corps' issuance of the wetlands dredge-and-fill permit on grounds that the Corps failed to consider practicable alternatives that would have less environmental impact as required by the Clean Water Act guidelines.[134] The plaintiffs specifically complained that the Corps failed to consider two sites in southwest Galveston Bay at Pelican Island and Shoal Point.[135] The court rejected the plaintiff's claims that these sites were "practicable" under the test set forth in the Clean Water Act guidelines, section 230.19(a)(2) because Shoal Point is outside the condemnation power of the Port and was not "available" in that the Corps had recently issued a permit to Texas City to build a cargo- and cruise-ship terminal at that site.[136] Further, the court found neither site to be a logistically feasible alternative and, therefore, not "practicable" because the Port could not legally spend the proceeds from the Harris County bonds, which are intended to fund the project, outside of Harris County, and both of the alternative sites were outside Harris County.[137]

The court also rejected the plaintiffs' contentions that the decision ran afoul of section 230.10(c) of the guidelines, prohibiting significant degradation of U.S. waters, because the Port failed to consider the adverse effect that would flow from the eventual deepening of the Houston Ship Channel, which would increase the salinity of Galveston Bay's freshwater ecosystems.[138] The court was not convinced by this argument, finding that the regulatory provision requires consideration of the adverse effect on the cumulative impact of the discharges of dredged or fill material, and concluding that any future deepening of the Houston Ship Channel would not result from the project.[139]

In a related state court challenge of the State agency's action relating to these particular wetlands, *City of Shoreacres v. Texas Commission on Environmental Quality*,[140] the Port of Houston obtained a federal section 404 dredge-and-fill permit and began construction of a containerized cargo- and cruise-ship terminal. TCEQ had previously issued a water-quality certification in connection with the project. The plaintiffs sought judicial review of the administrative decision, which was lost at the district court level, before the Austin Court of Appeals.[141] The appellate court concluded that the Port was not required to obtain state authorization for the project independent of the federal dredge-and-fill permit issued by the Corps.[142]

133. *Id.* at 447.
134. *Id.* at 447-48; *see* 40 C.F.R. § 230.10(a) (2005).
135. *Waterworth*, 420 F.3d at 448.
136. *Id.*; *see* 40 C.F.R. § 230.19(a)(2) (2005).
137. *Waterworth*, 420 F.3d at 448.
138. *Id.* at 449; *see* 40 C.F.R. § 230.10(c).
139. *Waterworth*, 420 F.3d at 449.
140. 166 S.W.3d 825 (Tex. App.—Austin 2005, no pet.).
141. *Id.* at 829-30.
142. *Id.* at 839.

The court found that under the state statutory scheme, no separate state authorization was required for the issuance of a section 404 dredge-and-fill permit. While the State cannot issue its own dredge-and-fill permit, the court found that the State had veto power over the issuance of the federal dredge-and-fill permit because the State must decide whether to issue a certificate if there is reasonable assurance that the activity will meet state water-quality standards. The federal permit will not issue if the State denies certification.[143] However, once the federal permit has been issued, the court ruled that the project will proceed under the authority of that permit, and not the state-issued water-quality certification.[144] The city's arguments that independent state action was necessary in addition to the federal permit became moot once the federal permit was issued.[145] The court further held that an exception to the mootness doctrine did not apply in this case because the "dispute was not of such short duration that the cities could not have obtained review before the issue became moot."[146]

IV. ENDANGERED SPECIES AND WILDLIFE PROTECTION

A. Denial of Petition to List an Endangered Species

In *Save Our Springs Alliance v. Norton*,[147] the Save Our Springs Alliance ("SOSA") sued the United States Fish and Wildlife Service, alleging the Fish and Wildlife Service violated the "regular listing" and "emergency listing" provisions of the Endangered Species Act ("ESA"). SOSA filed a July 7, 2003 petition to add species of the karst invertebrate to the endangered-species list. The species at issue was a species of spider found only in two caves in Travis County.[148]

The ESA outlines the process that the Fish and Wildlife Service must follow when handling such petitions.[149] To "the maximum extent practicable," the Fish and Wildlife Service must make a finding within ninety days as to whether the petition presents "information indicating that the petitioned action may be warranted."[150] If the petition presents such information, then the Fish and Wildlife Service shall promptly review the status of the species concerned, and it must issue findings stating that the petition is warranted, not warranted, or is warranted but precluded by another factor within twelve months.[151] This procedure may be circumvented to list a species on an emergency basis.[152]

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143. *See id.* at 834.
144. *Id.*
145. *Id.* at 838.
146. *Id.* at 839.
147. 361 F. Supp. 2d 643 (W.D. Tex. 2005). The "regular listing" and "emergency listing" provisions of the ESA are codified at 16 U.S.C. § 1533(b)(3), (b)(7) (2000).
148. *Norton*, 361 F. Supp. 2d at 645.
149. 16 U.S.C. § 1533 (2005).
150. *Id.* § 1533(b)(3)(A).
151. *Id.* § 1533(b)(3)(A)-(B).
152. *See id.* § 1533(b)(7).

The court divided its analysis of the case between SOSA's emergency-listing claim and its regular-listing claim. The court found SOSA's emergency-listing claim to be moot, because eight months after the suit was filed, the Fish and Wildlife Service issued its ninety-day finding that emergency listing was not warranted.[153] With respect to its claim that the species should be listed under the regular-listing process, SOSA alleged that the Fish and Wildlife Service violated the ESA by issuing its ninety-day finding after ninety days, and by completely failing to issue the twelve-month finding.

The court first found that because the Fish and Wildlife Service had issued the ninety-day finding, that issue was moot, even though the finding was issued late.[154] The sole remaining issue was whether the Fish and Wildlife Service should be required to issue the twelve-month finding. The Fish and Wildlife Service argued that it could issue that finding by December 8, 2005, and that the delay in issuing the finding was due to budget constraints.[155] The court found this timetable reasonable and granted summary judgment in favor of the Fish and Wildlife Service—thereby establishing a new deadline for the twelve-month finding.[156] On December 19, 2005, the Fish and Wildlife Service issued its twelve-month finding, which concluded that listing the spider was not warranted.[157]

V. SOLID WASTE

In a low-key end to a long-running, high-profile challenge of the Sierra Club and Downwinders at Risk to the burning of hazardous waste fuels in TXI's cement plant in Midlothian, Texas, the Austin Court of Appeals upheld the dismissal for want of prosecution of the groups' challenge to TCEQ's issuance of the solid-waste permit.[158] This latest round began in June 1999, when the environmental groups timely filed a challenge to TCEQ's permit.[159] The district court dismissed the case for want of jurisdiction. The Austin Court of Appeals reversed the dismissal, and the Texas Supreme Court affirmed that decision.[160] On May 28, 2002 the supreme court remanded the cause.[161] Five months later, TXI filed a petition in intervention and a plea to the jurisdiction. One month later, appellants filed a motion to strike TXI's intervention and a response to the jurisdictional plea.[162] TCEQ promptly filed motion to dismiss the case for want of prosecution.

On January 7, 2004, the court granted TCEQ's motion and dismissed

153. *Norton*, 361 F. Supp. 2d at 647-48.
154. *Id.* at 648.
155. *Id.* at 648-49.
156. *Id.* at 649.
157. *See* 70 Fed. Reg. 75071 (Dec. 19, 2005) (to be codified at 50 C.F.R. pt. 17).
158. Sierra Club v. Tex. Comm'n on Envtl. Quality, 188 S.W.3d 220, 221 (Tex. App.—Austin 2005, no pet.).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

the case for want of prosecution.[163] The Sierra Club promptly filed an *unverified* motion to reconsider the order of dismissal, which the court denied after a hearing on the motion on January 9. Forty-eight days later, the Sierra Club filed a notice of appeal.[164] The court of appeals held that the notice of appeal was untimely because the Sierra Club failed to file a *verified* motion to reconsider the order of dismissal, which would have extended the time for filing the notice of appeal to ninety days.[165] The court rejected Sierra Club's argument that that the motion to reconsider was not a motion to reinstate that must be verified, finding that a motion to reinstate is the only remedy available to a party whose case is dismissed for want of prosecution.[166] Thus, the court concluded that it lacked jurisdiction over the appeal.

A. Landfill Permit Amendment

In *Citizens Against Landfill Location v. Texas Commission on Environmental Quality*,[167] a citizens' group challenged the TCEQ decision to amend a solid-waste-landfill permit to allow for a vertical expansion of a landfill in Hidalgo County. On appeal of TCEQ's decision to allow the expansion, a Travis County district court rejected the citizen-group's challenge that TCEQ's decision was not supported by substantial evidence. The district court upheld TCEQ's decision, which the citizens appealed to the Austin Court of Appeals.[168]

The citizens first asserted that the portion of TCEQ's order approving the establishment and maintenance of final cover was not supported by substantial evidence. The approved final cover design called for an erosion layer of at least twelve inches of soil and a financial-assurance bond. The court found that "[a]lthough the record contains evidence suggesting that more than twelve inches of soil may be necessary to successfully establish and maintain vegetative growth on the final cover, TCEQ's conclusion is supported by substantial evidence."[169] The court went on to state that even if the citizens had shown that the evidence "preponderates against TCEQ's finding," the fact that the record contained more than a scintilla of evidence supporting TCEQ's finding would meet the substantial-evidence test.[170] Applying this deferential standard to the citizens' other claims, the court found that TCEQ's decisions with respect to cost estimates for financial assurance, surface-water drainage, groundwater monitoring, and administrative completeness of the application were all supported by substantial evidence.[171]

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. 169 S.W.3d 258 (Tex. App.—Austin 2005, pet. denied).
168. *Id.*
169. *Id.* at 266.
170. *Id.* at 267.
171. *See id.* at 267-71.

In addition to considering issues of substantial evidence, in another case, the court clarified the scope of its holding in *BFI Waste Systems of North America v. Martinez Environmental Group*.[172] In *BFI*, the court held that an applicant's mere recitation of statutory requirements was insufficient to satisfy the applicant's burden of proving that it met each regulatory requirement.[173] In *Citizens Against Landfill Location*, the court concluded that the rules provided specific requirements on certain issues, and the record reflected how these requirements would be met; thus, sufficient evidence existed to approve this aspect of the permit expansion.[174]

The other significant issue considered in the case was whether TCEQ could consider the provisions of a civil settlement agreement between the applicant and a third party in its decision on the permit application. Before applying for the permit expansion, the applicant entered into a settlement agreement that specified a standard for storm-water-runoff features at the facility. TCEQ's order required less stringent storm-water standards than the settlement agreement. The citizens argued that TCEQ's failure to enforce the higher standard in the settlement agreement was error.[175] The court agreed with the ALJs, who concluded that the "[e]nforcement of the settlement agreement is more appropriately left to the civil court system that generated it."[176]

B. Challenge of Administrative Permitting Decisions

1. Saltwater-Disposal Wells

In *Grimes v. State*,[177] Grimes sought review of a judgment from the District Court of Travis County that affirmed a Texas Railroad Commission order granting a permit to Endeavor Energy Resources, L.P. to operate a saltwater-disposal well under Texas Water Code section 27.051(b).[178] In its administrative review of the application, the Commission found that the disposal operations would not endanger the natural energy resources or cause pollution of the freshwater stratum, provided operations were conducted under the pressure and volume conditions specified in the permit.[179]

Grimes challenged the permit on the grounds that the Railroad Commission's decision was not supported by substantial evidence and was arbitrary and capricious. In its opinion, the Austin Court of Appeals first determined that there was substantial evidence to support the Commission's order, that is, reasonable minds could have concluded that the pro-

172. 93 S.W.3d 570 (Tex. App.—Austin 2002, pet. denied).
173. *See id.* at 580.
174. *Citizens*, 169 S.W.3d at 268-69.
175. *Id.* at 273.
176. *Id.*
177. No. 03-04-00154-CV, 2005 Tex. App. LEXIS 6963 (Tex. App.—Austin Aug. 26, 2005, no pet.).
178. *Id.* at *1-2.
179. *Id.* at *3.

posed disposal well was sufficient to protect groundwater.[180] Second, the court held that an agency's decision generally is not arbitrary or capricious if it is supported by substantial evidence, but "instances may arise in which an agency's decision supported by substantial evidence, but is arbitrary and capricious nonetheless."[181] "An agency abuses its discretion in reaching a decision if it omits from its consideration factors that the legislature intended the agency to consider, includes in its consideration irrelevant factors, or reaches a completely unreasonable result after weighing only relevant factors."[182] The court concluded that granting the operating permit would result in conserving some natural resources, a matter within the statutory authority of the Railroad Commission, and it was therefore not arbitrary and capricious.[183] The court also rejected Grimes' arguments that the Railroad Commission did not consider Endeavor's compliance history and that the permit allowed disposal on adjacent property in which Endeavor had no real-property interest.[184]

VI. LIABILITY OF CORPORATE OFFICERS

The Austin Court of Appeals considered imposing liability on a former officer and director for violation of an agreed order by a corporation, L&HP, in *Lacey v. State*.[185] In *Lacey*, L&HP entered into an agreed order in November 1995 with the State of Texas regarding some underground storage tanks maintained by L&HP. In November 1996, the State filed suit alleging non-compliance with the agreed order. The State sought damages from the company and from its officers and directors individually based on the failure to file annual public-information reports.[186] To identify the officers and directors, the State used the last report filed by L&HP in 1992, which listed H.A. Lacey among the officers and directors. The trial court granted summary judgment against Lacey, and he appealed.[187]

In his appeal, Lacey asserted summary judgment was improper because he raised a fact issue regarding whether he was an officer and director of L&HP after December 1993.[188] Lacey introduced affidavit evidence that he resigned as an officer and director in December 1993, moved to North Carolina, and had no further contact with the corporation.[189] The court

180. *Id.* at *5-6, *8.
181. *Id.* at *9.
182. *Id.* at *10.
183. *Id.* at *12.
184. *Id.* at *12-13.
185. No. 03-02-00601-CV, 2005 WL 2312485 (Tex. App.—Austin Sept. 21, 2005, no pet.) (not designated for publication).
186. Under Texas Tax Code section 171.203, Texas corporations are required to file annual public-information reports, and under section 171.255(a), failure to file the report forfeits corporate privileges and subjects the directors and officers to individual liability for the corporate debts incurred after the date the report is due, TEX. TAX CODE ANN. § 171.203 (Vernon Supp. 2005).
187. *Lacey*, 2005 WL 2312485, at *1.
188. *Id.*
189. *Id.* at *2.

noted that the Tax Code does not require that changes to the public-information report be made immediately, and no presumption of continuity of officers is raised if later reports are not filed.[190] Further, the court pointed out that the 1992 report expired three years before L&HP violated the agreed order. Based on this information, the court held that the State had not conclusively established that Lacey was an officer or director of L&HP when the violations occurred and, accordingly, reversed the district court's summary judgment.[191]

VII. CRIMINAL CASES

In two cases, criminal convictions under the Texas Water Code were appealed. In *Griffin Industries, Inc. v. State*, the Corpus Christi Court of Appeals held that a Texas Water Code provision prohibiting discharge of waste or pollutants into the state waters was not unconstitutionally vague as applied.[192] A jury convicted the defendant of unauthorized discharge under section 7.147 of the Texas Water Code after chicken waste spilled from Griffin's truck onto the street and into the storm drain.[193] Griffin argued that the statute was unconstitutional because it fails to provide notice of what conduct is prohibited and leaves the determination of what constitutes an offense to the discretion of law-enforcement agencies of the State.[194] Applying the general rule that a statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden by statute or if it encourages arbitrary and erratic arrests and convictions, the court rejected Griffin's argument that the phrase "to discharge" as defined by the Code failed to give fair notice.[195] Finally, the court held that there was sufficient evidence to support Griffin's conviction and that the court did not commit reversible error in refusing Griffin's request for a jury instruction on causation.[196]

In the second case, *Copeland v. State*,[197] the El Paso Court of Appeals held that there was insufficient evidence to support the appellant's conviction for the offense of intentional or knowing unauthorized discharge.[198] The primary evidence in the case was a video tape showing the trailer-park owner setting up a pump at the trailer park's cesspool. The tape showed the appellant approach the pump, pick up a tool near the pump, and leave. He then pumped the contents of the cesspool onto the ground.[199] The court held that "[w]hile there might have been knowledge

190. *Id.*
191. *Id.* at *3.
192. 171 S.W.3d 414 (Tex. App.—Corpus Christi 2005, pet. ref'd).
193. *Id.* at 416.
194. *Id.* at 417.
195. *Id.* at 417-19.
196. *Id.* at 419-21.
197. No. 08-02-00505-CR, 2004 Tex. App. LEXIS 9836 (Tex. App.—El Paso Nov. 4, 2004, no pet.).
198. TEX. WATER CODE ANN. § 7.145 (Vernon 2005).
199. *Copeland*, 2004 Tex. App. LEXIS 9836, at *2.

of what [the trailer park owner] was about, and [the] Appellant was present during the offense, his actions [sic] in taking away a tool does not serve to demonstrate a contribution towards a common purpose."[200] Therefore, the court ruled that the evidence was legally insufficient to demonstrate the appellant's participation in the offense.

VIII. LEGISLATIVE DEVELOPMENTS

A. General Overview of Legislation

On one hand, the 79th Texas Legislature did not pass any new major environmental programs or initiatives, and some significant issues were addressed, including permit reform, the use of compliance history in enforcement, and environmental flows (also referred to as in-stream water rights). On the other hand, the session was eventful because the legislature passed many bills adjusting existing programs.

One of the programs that the legislature amended is the Dry Cleaner Remediation Program, originally passed in the 78th session. House Bill 2376 redefines the terms "chlorinated dry cleaning solvent," "dry cleaning drop station," and "dry cleaning facility" to broaden the scope of facilities that are eligible for the remediation fund.[201] The bill allows registration fees to be paid quarterly and extends the deadline to February 2006 for dry cleaners to opt out of the fund.[202] Finally, the bill requires distributors of solvents to register with TCEQ, adds certain enforcement powers, and directs TCEQ to adopt rules requiring dry cleaners to implement specified performance standards.[203]

The legislature also made changes to the Leaking Underground Petroleum Storage Tank Remediation Program. Senate Bill 485 and House Bill 1987 extend the deadline for submittal of site-closure requests until September 2007,[204] and extend the deadline for reimbursing eligible parties who have met the statutory deadlines until 2008.[205] These bills did not change other applicable corrective-action deadlines. The bills also remove the requirement that fuel transporters be held responsible for depositing motor fuel into underground storage tanks that lack TCEQ certification.[206]

Texas has continued to strive to be a part of the FutureGen project, a United States Department of Energy initiative to build the world's first integrated carbon-dioxide-sequestration and hydrogen-production-research power plant. House Bill 2201[207] provides financial incentives and a streamlined permitting process for clean-coal projects such as those

200. *Id.* at *14.
201. Tex. Health & Safety Code Ann. § 374.001 (Vernon 2005).
202. *Id.* § 374.102.
203. *Id.* § 374.103.
204. Tex. Water Code Ann. § 26.351(f)(6) (Vernon 2005).
205. *See id.* § 26.3573(s).
206. *Id.* § 7.156(c).
207. Tex. H.B. 2201, 79th Leg., R.S. (2005).

contemplated by FutureGen.[208] The bill defines a clean-coal project as a coal-based electric-generating facility in partnership with the United States Department of Energy's FutureGen project.[209] The bill gives TCEQ jurisdiction over clean-coal projects when carbon dioxide is injected into a zone below the base of usable-quality water and would not be productive of oil, gas, or geothermal resources.[210] The Railroad Commission has jurisdiction if the injection is into zones productive of oil, gas, or geothermal resources.[211] The bill also requires the Texas Water Development Board ("TWDB") to adopt rules to allow the maximum amount of flexibility possible to allow for the timely amendment or approval of a regional or state water plan to facilitate planning for water supplies, including water supplies needed for the demands of a clean-coal project.[212]

Another bill related to energy, Senate Bill 20, failed to pass during the regular session, but passed during the first special session. Senate Bill 20 increases the renewable-energy target from 2,000 megawatts of generation by 2009 to 5,880 megawatts by 2015.[213]

Other environmental bills that passed during the 79th Legislative session include:

B. Specific Legislation Affecting Specific Environmental Media

1. Air Emissions

- House Bill 2129[214] simplifies the reporting requirements for emission events by specifying that an emission event caused by one incident only has to be reported as one event rather than one for each source of emission.[215]
- House Bill 2481 extends the Texas Emission Reduction Plan by two years, to 2010.[216] In addition, the bill directs TCEQ to adopt and incorporate by reference EPA's finalized version of the Clean Air Interstate Rule and Clean Air Mercury Rule.[217] The bill incorporates the NO_X, SO_2, and Hg trading provisions to the Health and Safety Code, and requires TCEQ to promulgate rules for NO_X and SO_2 trading by September 2006, and Hg trading by October 2006.[218]
- House Bill 2793 created a program for the recovery of convenience light switches from cars and trucks that will be turned in to scrap metal.[219]

208. Tex. Water Code Ann. § 5.558 (Vernon Supp. 2005).
209. *Id.* § 5.001(4).
210. *Id.* § 27.022.
211. *Id.* § 27.038.
212. *Id.* § 16.053(r).
213. Tex. Util. Code Ann. § 39.904(a) (Vernon 2005).
214. Tex. H.B. 2129, 79th Leg., R.S. (2005).
215. Tex. Health & Safety Code Ann. § 382.0215 (Vernon 2005).
216. *Id.* § 386.002.
217. *Id.* § 382.0173.
218. *Id.*
219. *Id.* §§ 375.001-.151.

These switches, which are located under the hood or in the trunk, contain mercury and are a target of EPA's expanding Clean Air Act program to reduce mercury emissions.

• Senate Bill 1740 allows construction to begin before an air-quality-permit amendment is issued. However, the bill specifies that the applicant assumes responsibility for proceeding before a final decision.[220]

2. Water Use

• House Bill 1208 prohibits a municipal utility district from exercising its powers of eminent domain outside its boundaries for certain purposes, including the acquisition of sites for water- or wastewater-treatment facilities and recreational facilities.[221]

• House Bill 1225 provides an exemption from cancellation for nonuse of a water right to the extent that the nonuse resulted from the implementation of water-conservation measures, as documented by an implementation submitted by the holder.[222]

• House Bill 1763 sets forth uniform procedures to be utilized by groundwater conservation districts regarding the notice and hearings process for both rulemaking hearings and permit-application hearings.[223] The bill authorizes emergency rules under certain circumstances.[224] The bill also authorizes groundwater conservation districts to use alternative dispute-resolution procedures.

• House Bill 2430 requires the TWDB to establish a Rainwater Harvesting Evaluation committee to study the use of rainwater as a water supply and to report back to the legislature by December 1, 2006. The bill also requires TCEQ to establish standards for the domestic use of rainwater.[225]

• Senate Bill 1354 establishes a pilot program containing specific permitting and enforcement programs for a portion of the Brazos River. The bill requires individual or general permits for quarries, depending on their proximity to the river, and requires quarry operators to submit reclamation and restoration plans while providing financial assurances to mitigate damages from unauthorized discharges.[226]

3. Waste Issues

• House Bill 39 makes it a Class C misdemeanor to burn refuse in certain counties on a lot that is located in a neighborhood or is smaller

220. *Id.* § 382.004.
221. TEX. WATER CODE ANN. § 54.209 (Vernon 2005).
222. *Id.* § 11.173(b).
223. *Id.* § 36.101.
224. *Id.* § 36.1011.
225. TEX. HEALTH & SAFETY CODE ANN. § 341.042 (Vernon 2005).
226. TEX. WATER CODE ANN. §§ 26.551-.562 (Vernon 2005).

than five acres.[227]

- House Bill 580 authorizes a county to provide hazardous-materials services when hazardous materials have been leaked, spilled, released, or abandoned and charge the concerned party a reasonable fee.[228]
- House Bill 1287 allows a county to prevent illegal dumping in certain circumstances and expedites a county's ability to address illegal dumping and improve cost recovery.[229]
- House Bill 1609 clarifies that the twenty-ton-per-day limit for arid exempt landfills applies to each type of waste rather that to the cumulative quantity of waste.[230] The bill allows arid exempt landfills to occasionally accept large amounts of debris without preventing the landfill from accepting municipal solid waste.[231]
- House Bill 2131 allows certain political subdivisions and quasi-governmental entities to rely on their own financial strength to demonstrate financial assurance for solid-waste permitting before TCEQ.[232]
- Senate Bill 1281 prohibits a commercial industrial solid-waste facility from receiving industrial solid waste for discharge into a publicly owned treatment-works facility without first obtaining a permit from the TCEQ.[233]
- Senate Bill 1413 provides local governments with the authority to a establish a brownfields fund through a tax or fee assessment.[234]

227. TEX. HEALTH & SAFETY CODE ANN. § 382.018 (Vernon 2005); TEX. LOC. GOV'T CODE ANN. § 352.082 (Vernon 2005); TEX. CRIM. PROC. CODE ANN. § 42.12(16)(e) (Vernon 2005).
228. TEX. LOC. GOV'T CODE ANN. §§ 353.001-.005 (Vernon 2005).
229. *Id.* §§ 343.013, 343.021, 343.022, 343.0235.
230. TEX. HEALTH & SAFETY CODE ANN. § 361.123 (Vernon Supp. 2005).
231. *Id.*
232. *Id.* § 361.0855.
233. *Id.* § 361.0901.
234. *Id.* §§ 361.901-.912.