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ENVIRONMENTAL LAW

Scott D. Deatherage*
Caroline M. LeGette**

THIS Article reviews judicial developments in Texas environmental law between October 1, 1991 and October 1, 1992. The State Legislature was in session only briefly during this period and did not enact or amend any environmental legislation, thus, no new legislation is discussed.

In the most important environmental case decided during this period, a district court invalidated Texas Water Commission (TWC) rules that would have regulated the use of water from the Edwards Aquifer in central Texas.¹ The TWC issued these rules after four decades of negotiations among the parties that failed to resolve the disputes regarding the proper management of the aquifer.² In addition to this case, other environmental cases are discussed in this article, but the outcomes of several were determined, not by substantive law, but by the failure of the parties to preserve error at trial³ or to produce a record on appeal.⁴ Finally, the applicability of a recent criminal case may also be limited because the statute under which the defendant was convicted has been amended.⁵

I. JUDICIAL DEVELOPMENTS

A. DISTRICT COURT INVALIDATES TEXAS WATER COMMISSION (TWC) RULES ON THE EDWARDS AQUIFER

On April 15, 1992, the TWC, under emergency provisions of the Open Meetings Act⁶ and the Administrative Procedure and Texas Register Act,⁷

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1. *McFadin v. Texas Water Comm'n*, No. 92-05214 (Dist. Ct. of Travis County, 331 Judicial Dist. of Texas, Oct. 2, 1992).

2. *Tex. Water Comm'n*, 17 Tex. Reg. 2913, 2914 (1992) (emerg. amendment to 31 TEX. ADMIN. CODE § 298.1-.6).

3. *See, e.g., Barras v. Monsanto Co.*, 831 S.W.2d 859 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

4. *Fort Bend County v. Tex. Parks & Wildlife Comm'n*, 818 S.W.2d 898 (Tex. App.—Austin 1991, no writ).

5. *Southwest Utilities, Inc. v. State*, 822 S.W.2d 751 (Tex. App.—Corpus Christi 1992, pet. ref'd).

6. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1992).

7. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1992).

declared the Edwards Aquifer in Kinney, Uvalde, Medina, Atascosa, Bexar, Comal and Hays Counties to be an underground river, and its waters to be State water.⁸ The TWC's emergency rules were published in the Texas Register on April 24, 1992.⁹ The TWC emergency rules declared a moratorium on the drilling of new wells into the Edwards Aquifer by any person for any purpose other than livestock or domestic use.¹⁰ On the same day, the TWC also proposed permanent rules in the Texas Register.¹¹ These rules were designed to permanently establish the Commission's emergency declaration that the Edwards Aquifer is an underground river and required all well owners to file applications for permits with the TWC by September 1, 1992.

The significance of these rules is that if upheld, for the first time in Texas history, the waters of an aquifer would be considered State water subject to TWC regulation pursuant to Chapter 11 of the Texas Water Code.¹² The TWC's position states that under Texas law, all water below the surface of the land is presumed to be percolating groundwater, which is owned by the landowner, unless it is established that the water is in an underground stream or the underflow of a surface stream.¹³ The TWC argues that if such water can be characterized as an underground stream, then it should be governed by surface water law and subject to regulation by the TWC as State water.¹⁴

Suit was brought in the District Court of Travis County seeking a declaratory judgment that the emergency and proposed permanent rules were invalid as a matter of law.¹⁵ District Judge Pete Lowry granted the plaintiff's summary judgment motion and declared the TWC's rules void.¹⁶ In support of its motion for summary judgment, the plaintiff asserted the following independent bases: (1) the TWC has no legal authority to declare and adjudicate private property rights of owners of land overlying the Edwards Aquifer; (2) the TWC has no legal authority to declare the status of the Edwards Aquifer, or any other aquifer, to be an underground river and hence State water, and no authority generally to declare any underground river or stream; (3) as a matter of law, the Edwards Aquifer is groundwater, not an underground river or stream; (4) the actions of the TWC in declaring the Edwards Aquifer an underground river and hence State water are unconstitutional, for violation of the principle of separation of powers and as an unconstitutional taking without due process and without compensation; (5) the TWC is barred by principles of res judicata and collateral estoppel from declaring the Edwards Aquifer to be an underground river and hence State water.

8. Tex. Water Comm'n, 17 Tex. Reg. 2913-14 (1992).

9. Tex. Water Comm'n, 17 Tex. Reg. 2913-17 (1992).

10. *Id.*

11. Tex. Water Comm'n, 17 Tex. Reg. 2949-67 (1992).

12. TEX. WATER CODE ANN. §§ 11.001-.506 (Vernon 1992).

13. Tex. Water Comm'n, 17 Tex. Reg. 2913 (1992).

14. *Id.*

15. *McFadin v. Texas Water Comm'n*, No. 92-05214 (Dist. Ct. of Travis County, 331st Judicial Dist. of Texas, Oct. 2, 1992).

16. *Id.*

The summary judgment order does not state the specific grounds on which it was granted; thus, to prevail on appeal, the TWC must show that none of the independent arguments alleged in the motion is sufficient to support the order.¹⁷ In addition, it is likely that this very controversial issue will be the subject of extensive legislative debate during the 1993 legislative session.

**B. DISCRIMINATORY ENFORCEMENT DEFENSE REQUIRES SHOWING
NOT ONLY SINGLING OUT OF DEFENDANT FOR
PROSECUTION, BUT ALSO THAT THE SINGLING
OUT WAS BASED ON IMPERMISSIBLE
CONSIDERATIONS**

In the only Texas Supreme Court case reviewed that relates to environmental matters, *State v. Malone Service Company*,¹⁸ a defendant in the suit by the State, brought on behalf of the Texas Water Commission (TWC), asserted the defense of discriminatory enforcement. The court rejected this claim because the defendant failed to demonstrate not only that it was singled out for enforcement, but also that the government had purposely singled the party out based on impermissible considerations.¹⁹

1. Background

In 1977 the Texas Department of Water Resources (TDWR), the predecessor agency to the TWC, issued an administrative order prohibiting Malone Service Company (Malone) from using an earthen pit for waste management after an eighteen-month grace period.²⁰ Nonetheless, Malone continued to use the earthen pit and in 1983, Malone and the TDWR entered into a compliance agreement withholding statutory enforcement if Malone closed the earthen pit within one year.²¹ In 1986, because Malone continued to use the earthen pit, the State, upon request by the TWC, brought suit against Malone and other parties, including the president and plant manager (collectively Malone). The State alleged that despite the compliance agreement, Malone continued to discharge hazardous waste into the earthen pit in violation of the Texas Solid Waste Disposal Act (TSWDA)²² and the Texas Injection Well Act.²³ As part of its defense, Malone asserted that the enforcement action constituted discriminatory enforcement because the State was motivated solely to benefit one of Malone's competitors. Malone's competitor was Gulf Coast Waste Disposal Authority (Gulf Coast), a political subdivision created by the Texas legislature in 1969 to help develop a regional water quality management program in Chambers, Galveston, and

17. See David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 282 (1989).

18. 829 S.W. 2d 763 (Tex. 1992).

19. *Id.* at 766.

20. *Id.* at 765.

21. *Id.*

22. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.510 (Vernon 1992).

23. TEX. WATER CODE ANN. §§ 27.001-.105 (Vernon 1988 & Supp. 1992).

Harris Counties.²⁴

At trial, Malone attempted to offer as evidence of discriminatory enforcement, a TWC computer-generated log listing hundreds of companies against which the TWC sought enforcement under the TSWDA. With this evidence, Malone attempted to show that the TWC took enforcement action against only four of the six companies who were customers and investors of Gulf Coast and assessed no penalty against these six companies, even though the TWC classified these companies as large polluters. The State successfully convinced the trial court to exclude the columns in the log styled, Penalty Assessed, Penalty Collected, and Scheduled Compliance. Malone, however, was able to elicit testimony from TWC employees that all six companies had been subject to enforcement short of a lawsuit, that the State did not close down any of these companies' operations, and that none of the officers or directors of the companies had been fined for violations of environmental statutes.²⁵

Based on this evidence, the jury found that the TWC had not intentionally discriminated in the enforcement of its regulations against Malone.²⁶ Based upon the jury's verdict, the district court rendered a judgment against Malone of \$2,403,900, against the company's president of \$627,000, and against the company's plant manager of \$22,000.²⁷ The court of appeals reversed the district court, holding that the evidence should have been admitted.²⁸

2. Discriminatory Enforcement Doctrine

The Supreme Court of Texas began its analysis by stating that the discriminatory enforcement defense is based on equal protection guaranteed under the United States and Texas constitutions.²⁹ The court further stated that although the defense originated in the context of criminal proceedings, it also applies to civil proceedings involving State action.³⁰ In addition, the court stated that in order to establish a claim of discriminatory enforcement a two-part test must be met: (a) that the defendant "has been singled out for prosecution while others similarly situated and committing the same acts have not," and (b) "that the government has purposefully discriminated on the basis of such impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights."³¹

In terms of the evidence that may be admitted to prove discriminatory enforcement, the supreme court applied basic evidentiary rules. First, evi-

24. See TEX. REV. CIV. STAT. ANN. art. 7621d-2 (Vernon 1992).

25. *Malone*, 829 S.W.2d at 766.

26. *Id.*

27. *Id.*

28. *Malone Service Co. v. State*, 804 S.W.2d 174, 174 (Tex. App.—Houston [14th Dist.] 1991), *rev'd*, 829 S.W.2d 763 (Tex. 1992).

29. *Malone*, 829 S.W.2d at 766 (citing the U.S. CONST. amend. XIV, § 2, the TEX. CONST. art. I § 3, and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

30. *Id.* (citing *Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 71-76, 161 S.W.2d 1022, 1025-28 (1942), and *Colorado River W. Ry. v. Texas & Orleans R.R. Co.*, 283 S.W.2d 768, 776-77 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.)).

31. *Id.* at 766.

dence will generally be properly admitted as relevant to the defense if it tends to show either that the party was singled out or that the government has taken enforcement action on the basis of impermissible considerations.³² If the evidence is relevant, however, it can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, confusion of the jury, or by considerations of undue delay or needless presentation of cumulative evidence."³³ Assumedly based on these principles, the court reviewed Malone's position that the government took a strong enforcement action against Malone while taking little or no action against companies associated with Gulf Coast and considered the exclusion of part of the TWC computer log as evidence. The court ruled that this evidence might tend to show the singling out of Malone, but it would not demonstrate "the government has purposely discriminated on the basis of impermissible considerations."³⁴

The court stated that regulatory agencies must be allowed broad discretion.³⁵ Furthermore, the enforcement actions of the agency are presumed to be non-discriminatory even where a private party has sought enforcement for its own self interest.³⁶ With this heavy burden to be met, the court concluded that Malone failed to show either that any benefit to Gulf Coast would flow directly to the state or that the state's action was based on race, religion or any other impermissible motivation.³⁷ Therefore, as a matter of law, the evidence offered by Malone was insufficient to show discriminatory enforcement.³⁸ Because the evidence alone could not establish discriminatory enforcement, the court ruled that the district court did not abuse its discretion in excluding the penalty amounts in the enforcement log, and overruled the lower appellate court.³⁹

The concurring opinion by Justice Gonzalez provides a better description of why it is improper to allow evidence regarding penalties imposed in earlier, but related cases. Justice Gonzalez argues that such penalties are irrelevant to the case before the court. Moreover, if prior cases were allowed to be presented, the State would be required to "re-try unrelated cases."⁴⁰ Furthermore, absent the establishment of a *prima facie* case of selective enforcement, the trial court should not allow such evidence to be presented, and the determination of a *prima facie* case should be made outside of the hearing of the jury.⁴¹

32. *Id.* at 767 (citing TEX. R. CIV. EVID. 401).

33. *Id.* (citing TEX. R. CIV. EVID. 403).

34. *Id.*

35. *Id.*

36. *Id.* (citing Retail Merchants Ass'n. of Houston, Inc. v. Handy Dan Hardware, Inc., 696 S.W.2d 44, 53 (Tex. App.—Houston [1st Dist.] 1985, no writ), and SS Kresge Co. v. State, 546 S.W.2d 928, 930 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 769.

41. *Id.* at 770.

C. CHEMICAL MANUFACTURER NOT LIABLE ON A THEORY OF STRICT LIABILITY ON THE BASIS OF ABNORMALLY DANGEROUS ACTIVITIES

In *Barras v. Monsanto Co.*,⁴² the Fourteenth District Court of Appeals in Houston held that even though the trial court determined, as a matter of law, that a chemical manufacturer's (Monsanto's) activities were abnormally dangerous, homeowners could not recover their damages from Monsanto.⁴³ The court gave two rationales for its holding: (1) Texas law does not recognize the doctrine of abnormally dangerous activities as a basis for strict liability, and (2) the jury did not find the manufacturer to be negligent or find that any of its activities were a producing cause of the homeowners' or the homebuilders' damages.⁴⁴

After a four-month trial and a week of deliberation, the jury concluded that Monsanto was not negligent and had not engaged in any abnormally dangerous activity.⁴⁵ The trial court, however, granted the homeowners' motion to disregard the jury's negative answer, holding that Monsanto had engaged in an abnormally dangerous activity as a matter of law.⁴⁶ Monsanto did not appeal that ruling. The homeowners and the homebuilders, however, appealed, attacking the jury's answers to negligence and strict liability issues⁴⁷ and the use of Mary Carter agreements.⁴⁸

1. Background

In 1957, Monsanto promised Charles Hard and Ralph Lowe \$50,000 if within 90 days they could successfully regenerate 100,000 pounds of spent copper from wastes that Monsanto generated in the manufacture of acrylonitrile. The Hard-Lowe Chemical Company succeeded in the project and Monsanto became its first customer for refining and reprocessing chemical by-products. From 1957 to 1982, Hard-Lowe and its successors dumped toxic wastes from these projects into unlined pits on land next to property later occupied by plaintiff-homeowners. In October 1984, because of the toxic waste dumping, the federal government placed the plant site on the National Priorities List and it became known as the Brio Superfund Site, after the last company to operate the plant.

42. 831 S.W.2d 859 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

43. *Id.* at 859.

44. *Id.* at 865.

45. *Id.* at 859.

46. *Id.*

47. The homeowners raised 247 points of error on appeal; the builders raised 25.

48. The court describes a Mary Carter agreement as an agreement between a plaintiff and one or more, but not all defendants whereby the parties limit the financial responsibility of the settling defendants. *Barras*, 831 S.W.2d at 861 n.1. Because the settlement is reduced proportionately to the amount that the plaintiff recovers from the nonsettling defendants, a Mary Carter agreement offers the settling defendants an inducement to assist in the plaintiff's case. *Id.* There was an ongoing debate in Texas over whether evidence of Mary Carter agreements should be admitted at trial, and for what purposes that evidence should be admitted. *Id.* at 864. Recently, however, the Texas Supreme Court held Mary Carter agreements void as against public policy. See *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

The homeowners claimed that Monsanto's dumping of toxic waste at the site resulted in the loss of market value to the homeowners' properties. In addition, because of the toxic wastes, the homeowners alleged that they suffered from physical pain, mental anguish, and that they needed future medical monitoring. The homeowners and the homebuilders charged that instead of disclosing what it knew about the danger of the Brio site, Monsanto, working through a task force of potentially responsible parties, encouraged people to move into the subdivision.

2. *Strict Liability and Negligence Claims*

The jury found that Monsanto had not engaged in an abnormally dangerous activity and was not negligent. The trial court granted the homeowners' motion to disregard the jury's negative answer to the strict liability issue and held that an affirmative response was established as a matter of law.⁴⁹ Monsanto did not appeal that ruling, but it also did not admit that its activities were a producing cause of the homeowners' injuries.

The court of appeals noted that federal law identifies materials stored or disposed of at the site as hazardous substances.⁵⁰ Under the Restatement Second of Torts (Restatement), strict liability is imposed on one who carries on an abnormally dangerous activity. The Restatement provides:

(a) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(b) This strict liability is limited to the kind of harm the possibility of which makes the activity abnormally dangerous.⁵¹

The court held, however, that Texas has not adopted Section 19 of the Restatement.⁵² "[O]ur courts have rejected the doctrine of abnormally dangerous activities as a basis for strict liability. In the absence of some other showing, such as negligence, there is no basis for recovery."⁵³

The court identified an additional, independent reason for its decision: the jury's answer on the question of damages. Question Number Four asked whether Monsanto's activity in regard to the Brio site was abnormally dangerous, and the jury answered "No."⁵⁴ The next question was a conditional one. It asked whether such activity was a producing cause of damages to the homeowners and builders *if the jury answered yes to Question Four*. Thus the jury did not reach the question on producing cause. The court of appeals held that the homeowners' and homebuilders' failed to object to the form of the question at trial, and thus waived their objection.⁵⁵ Thus, although the trial court held as a matter of law that Monsanto's activities were abnor-

49. *Id.* at 859.

50. *Id.* at 865.

51. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 19 (1990)).

52. *Id.* at 865.

53. *Id.*

54. *Id.*

55. *Id.*

mally dangerous, the appellants could not recover because the jury did not find Monsanto's activities to be a producing cause of the appellants' damages.

On the negligence cause of action, the jury attributed 100% of the negligence to the developers. The court of appeals held that the evidence was sufficient to support the jury's finding that Monsanto was not negligent and that there was sufficient evidence to support the finding of 100% liability on the part of the developers for creating a residential subdivision at that location.⁵⁶ This is because (1) the developers created the subdivision next to a remote chemical plant whose operations were open and obvious; (2) they failed to inform potential home buyers that the plant stored chemical by-products in pits located on the premises; (3) the developers' own environmental impact statement put them on notice of styrene tars emitting unpleasant odors from the plant; and (4) the Texas Department of Water Resources notified the developers that waste material at the Brio site was surfacing and migrating toward the proposed subdivision.

3. *The Mary Carter Agreement*

The homebuilders also attacked the use of the Mary Carter agreement at trial. The court of appeals rejected these points of error because the homebuilders failed to preserve error at trial.⁵⁷ At a pretrial hearing on motions in limine, the homeowners and homebuilders argued that (1) the agreements should not be introduced until after voir dire and opening statements, (2) the amount of the agreements should not be disclosed, and (3) the agreements should not be used to impeach the testimony of the homeowners. Counsel for the homebuilders, however, stated that his clients were not a party to the agreements.

The next day the trial judge announced her intention to disclose the agreements in the initial part of voir dire by making a statement informing the jury of the relationship and alignment of the parties, and admitting the formula, but not the amount of the agreements. In her statement, the judge incorrectly described the homebuilders as a party to the agreements. Counsel for the homebuilders failed to object, and did not object until a point that the court of appeals described as 800 pages into the Statement of Facts. At that time, the trial judge instructed Monsanto's attorney to explain to the jury that the homebuilders were not a party to the Mary Carter Agreement.

The court of appeals held that the interchange at the pretrial hearing did not preserve error; a timely objection at trial was required.⁵⁸ The homebuilders, however, waived error at trial; at each point they either waived error by not objecting or by failing to follow up a sustained objection with a request for an instruction to disregard.

56. *Id.* at 867.

57. *Id.* at 859.

58. *Id.* at 864.

D. CATTLE-FEEDING OPERATION WITHIN THE TACB'S JURISDICTION
UNDER THE TEXAS CLEAN AIR ACT

In *State v. F/R Cattle Co.*,⁵⁹ F/R Cattle Company opened a calf-feeding facility in Erath County. The company picked up baby calves on a daily basis from dairies in the area. These calves were kept at the facility for about 110 to 120 days. When the one-day-old calves arrived, they were placed in cage-like wooden hutches, where they remained for about sixty days. Three calves were placed in each hutch. After about sixty days the calves were placed in small weaning pens. The Eastland court of appeals held that, without regard to location, it was abnormal or unusual to concentrate 6000 baby calves in 1500 small hutches and in weaning pens.⁶⁰ Thus, the odor at the defendant's calf-feeding facility was not produced by natural processes and the TACB had jurisdiction under the Texas Clean Air Act.⁶¹

The TACB received numerous complaints of the facility's odor which was described as "putrid," "sour," "rancid," and like an "open sewer pit." The State of Texas sued F/R Cattle Company on behalf of the TACB alleging that the odors violated the Texas Clean Air Act.⁶² The district court held that the TACB did not have jurisdiction under the Texas Clean Air Act and dismissed the State's petition.⁶³ The district court decided that the odors were produced by a natural process. This was apparently because the area in which the calf-feeding facility is located was described as a rural agricultural area and a residential retirement area, with many dairies located in the vicinity. There was also evidence, however, that the F/R facility was "the only one of its kind in Texas."⁶⁴ The district court made the following findings of fact:

16. Defendant's calf operation is normal, usual and natural in the *area and locality where it is situated.*

17. Any odor resulting from Defendant's operation is odor produced from a process that occurs in nature, and is affected or controlled by human devices only to an extent normal and usual *in the vicinity.*⁶⁵

The district court cited language contained in *Europak, Inc. v. County of Hunt*⁶⁶ and *Southwest Livestock and Trucking Company v. Texas Air Control Board*⁶⁷ for its conclusion that the natural process exclusion in the Texas Clean Air Act deprived the Board of jurisdiction. *Europak* and *Southwest*

59. 828 S.W.2d 303 (Tex. App.—Eastland 1992, writ granted).

60. *Id.*

61. *Id.* The purpose of the Texas Clean Air Act is "to safeguard the state's air resources from pollution and emissions of *air contaminants . . .*" TEX. HEALTH & SAFETY CODE ANN. § 382.002 (Vernon 1992) (emphasis added). "Air contaminant" is defined as: "particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or *odor*, including any combination of those items, *produced by processes other than natural.*" TEX. HEALTH & SAFETY CODE ANN. § 382.003(2) (Vernon 1992), *quoted in F/R Cattle Company*, 828 S.W.2d at 305 (emphasis added).

62. TEX. HEALTH & SAFETY CODE ANN. §§ 382.001-.141 (Vernon 1992).

63. *F/R Cattle Co.*, 828 S.W.2d at 303.

64. *Id.* at 305.

65. *Id.*

66. 507 S.W.2d 884, 884 (Tex. Civ. App.—Dallas 1974, no writ).

67. 579 S.W.2d 549, 549 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

Livestock, however, had both upheld the authority of the TACB in similar situations. In *Europak*, the court rejected the defendant's argument that no TACB permit was required because the odor of manure that would be emitted from a proposed horse slaughtering and packing plant would be produced from natural processes.⁶⁸ In *Southwest Livestock*, the court upheld a TACB order finding a livestock-holding facility in violation of the Texas Clean Air Act because of the offensive odors emitted from the facility.⁶⁹

In both cases, the location of the facilities indicated that the odors were not produced by natural processes within the meaning of the exclusion. In *Europak*, the Dallas court of appeals held that "[a] natural process is one that occurs in nature and is affected or controlled by human devices only to an extent normal and usual for the particular area involved."⁷⁰ In *Southwest Livestock*, the Tyler court of appeals concluded that "[i]t should not be considered normal, usual or natural to find odoriferous livestock pens situated in such close proximity to urban land uses"⁷¹

Similarly, the Eastland court of appeals in *F/R Cattle Company* rejected the company's argument that its facility was normal and usual in the area and vicinity.⁷² Instead, the court held that the company's interpretation of *Europak* and *Southwest Livestock* was too narrow because the location is not the only factor that determines if a facility is normal or usual and, therefore, produced by natural processes.⁷³ On this basis, the court rejected the argument that the facility should be considered normal and usual because it was located in a dairy region:

We hold that it is abnormal and unusual, without regard to location, to concentrate approximately 6,000 baby calves in 1,500 small hutches and in weaning pens The odor at the defendant's calf feeding facility was not produced by natural processes. The trial court erred in dismissing the State's petition. The Texas Clean Air Act is applicable, and the Texas Air Control Board has jurisdiction.⁷⁴

E. TEXAS AIR CONTROL BOARD STANDARD EXEMPTION FROM PERMIT REQUIREMENTS IS NOT A DEFENSE TO A CRIMINAL ACTION FOR AIR POLLUTION

In *Southwest Utilities, Inc. v. State*,⁷⁵ the Corpus Christi court of appeals ruled that a sewage facility's exemption from the Texas Air Control Board (TACB) permit requirements was not a defense to a criminal action under section 382.091(a) of the Texas Health and Safety Code.⁷⁶ At the time, section 382.091(a)⁷⁷ provided that "[a] person may not cause or permit the

68. *Europak*, 507 S.W.2d at 885.

69. *Southwest Livestock*, 579 S.W.2d at 549.

70. *Europak*, 507 S.W.2d at 891.

71. *Southwest Livestock*, 579 S.W.2d at 552.

72. *F/R Cattle Company*, 828 S.W.2d at 307.

73. *Id.*

74. *Id.*

75. 822 S.W.2d 751 (Tex. App.—Corpus Christi 1992, pet. ref'd).

76. *Id.*

77. This section has since been severely amended. See TEX. HEALTH & SAFETY CODE

emission of an air contaminant that causes or that will cause air pollution unless the emission is made in compliance with a variance or other order issued by the [Texas air control] board.”⁷⁸ In this case, Southwest Utilities, Inc. (Southwest) owned a sewage treatment facility near a residential area. The State filed a criminal action against Southwest and alleged and produced evidence at trial showing that on four occasions the plant emitted an odor strong enough to interfere with the normal use and enjoyment of the surrounding residential property. The jury found Southwest guilty on all four counts of air pollution and the court assessed punishment of four fines of \$750.00 plus court costs.⁷⁹

On appeal, Southwest argued that it was in compliance with a variance or other order issued by the board, and thus, exempt from criminal liability for its emission of air contaminants. Southwest argued that it was in compliance because its facility qualified as a sewage treatment facility exempt from TACB permit requirements under a TACB standard exemption.⁸⁰ The court acknowledged that the sewage treatment facility was exempt from a TACB permit requirement,⁸¹ but rejected the argument that an exemption from permitting also exempts the facility from criminal prosecution.

[The rule] merely eliminates the requirement that appellant acquire a permit before emitting air contaminants. It does not eliminate the § 382.091(a) requirement that emission of air contaminants must be in compliance with a variance or order of the Air Control Board. Thus, being exempt from permit requirements under Rule 116.6(a), or any order not relating to emissions, is not a defense to a criminal action under § 382.091(a). Rule 116.6(b) implicitly so provides.⁸²

It is not clear if the holding of *Southwest Utilities* will have any vitality beyond its impact on Southwest. Section 382.091, under which Southwest was convicted, has been so thoroughly amended that it is unlikely that the issues raised in *Southwest Utilities* will be presented in identical form again.⁸³ Section 382.091 no longer includes the phrase that Southwest unsuccessfully attempted to use as an affirmative defense. Instead, criminal liability now

§ 382.091(a) (Vernon 1992). The change in law, however, applies only to an offense committed on or after the effective date of the amendment (September 1, 1991). *Id.*

78. *Southwest Utilities*, 822 S.W.2d at 752.

79. *Id.*

80. The facilities or types of facilities listed in the TACB's Standard Exemption list are exempt from permit requirements provided that they meet certain other conditions. *See* Tex. Air Control Board, 31 TEX. ADMIN. CODE § 116.6(a) (West Aug. 11, 1989).

81. *Southwest Utilities*, 822 S.W.2d at 753 n.3.

82. *Id.* at 753. Section 116.6(b) has also been amended. The provision now states: “The emissions from the facility shall comply with all rules and regulations of the Texas Air Control Board (TACB) and with the intent of the TCAA [Texas Clean Air Act], including protection of health and property of the public” *Id.* at 752 n.2.

83. Section 382.091 now reads in relevant part:

(a) A person commits an offense if the person:

(1) intentionally or knowingly, with respect to the person's conduct, violates:

...

(E) an order, permit, rule, or exemption issued under this chapter

TEX. HEALTH & SAFETY CODE ANN. § 382.091 (Vernon 1992).

hinges on whether the company violated "an order, permit, rule or exemption," with no affirmative defense for compliance with a variance.⁸⁴ Thus, Southwest's affirmative defense argument is unlikely to be raised under the section as amended.⁸⁵

F. TACB DIRECTOR'S LETTER AN ACT OF THE BOARD FOR PURPOSES OF THE STATUTE REQUIRING THAT A PERSON WISHING TO APPEAL RULING OF THE BOARD MUST FILE A PETITION IN TRAVIS COUNTY

In *Spaw v. W. R. Grace & Co.—Conn.*,⁸⁶ the Fort Worth court of appeals held that the validity of the Executive Director's acting for the TACB was a matter for the district court of Travis County to determine.⁸⁷ The Executive Director (Spaw) wrote a letter to W.R. Grace & Co.—Conn. (Grace) changing the date by which Grace was to install certain air pollution control equipment at a plant Grace operated in Tarrant County. The date in the Spaw letter conflicted with the date already set in an agreed order between the TACB and Grace.

A district court in Tarrant County issued a temporary injunction prohibiting Spaw from enforcing the letter and from attempting to modify the agreed order of the TACB.⁸⁸ The court of appeals reversed the temporary injunction and dismissed the cause for want of jurisdiction.⁸⁹ The basis for the dismissal is the court's holding that the Texas Health and Safety Code establishes jurisdiction to determine the validity of Spaw's letter in the district courts of Travis County.⁹⁰ The Code states that "a person affected by a ruling, order, decision, or other act of the [Texas Air Control] board may appeal the action by filing a petition in a district court of Travis County."⁹¹

The court of appeals rejected Grace's argument that Spaw's letter was not an act of the board by holding that "such a letter, written . . . pursuant to authority granted by a Board order, is an act of the Board for the purposes of Section 382.032(a), even if such letter conflicts in some way with some other order of the Board."⁹² The court of appeals concluded that the Executive Director is generally authorized by the TACB to issue such letters, and

84. *Id.*

85. In addition, there are likely to be few arguments in the future concerning whether a standard exemption qualifies a facility to be in compliance with a variance or board order because many standard exemptions will be eliminated. The federal Clean Air Act, as amended in 1990, will require many facilities now operating under standard exemptions to obtain federal operating permits, which will eliminate many standard exemptions. Finn, *TACB Permitting Process*, paper presented at the 4th Annual Texas Environmental Superconference, Aug. 6-7, 1992. Section 382.091 provides that intentional or knowing violation of the federal operating permit requirements is punishable as a criminal offense. TEX. HEALTH & SAFETY CODE ANN. § 382.091(a)(1)(B) (Vernon 1992).

86. 815 S.W.2d 908 (Tex. App.—Ft. Worth 1991, no writ).

87. *Id.* at 908.

88. *Id.*

89. *Id.* at 909.

90. *Id.*

91. TEX. HEALTH & SAFETY CODE ANN. § 382.032 (Vernon 1992).

92. 815 S.W.2d at 909.

noted that the date set in the agreed order was originally provided in a similar letter written by Spaw, the contents of which were incorporated into the agreed order.⁹³

G. PARTY STATUS TO PARTICIPATE IN AN ADMINISTRATIVE HEARING IS INSUFFICIENT TO CONFER STANDING TO APPEAL AGENCY'S DECISION IN DISTRICT COURT

Superior Sand & Gravel Company applied to the Texas Parks and Wildlife Commission (Commission) for a permit to dredge sand and gravel from a part of the Brazos River on the boundary of Fort Bend County (County) in *Ft. Bend County v. Texas Parks & Wildlife Comm'n*.⁹⁴ The Commission held hearings on the application at which the County was granted party status. When the Commission issued the permit, the County filed suit in district court of Travis County, seeking judicial review of the decision. Superior Sand & Gravel Company intervened and filed a plea in abatement challenging the County's standing to maintain an administrative appeal. After a hearing, the district court granted the plea in abatement and dismissed the suit.⁹⁵

The Austin court of appeals affirmed the decision of the trial court.⁹⁶ The significance of the court of appeals' opinion is that it distinguishes the requirements for party status in an agency proceeding from the requirements for party status to obtain judicial review of the agency's decision. Under the regulations of the Commission, party status only requires the showing of a justifiable interest.⁹⁷ "As a matter of policy, the right to participate in agency proceedings is liberally construed to allow the agency the benefits of diverse viewpoints."⁹⁸ In contrast, the Texas Administrative Procedure and Texas Register Act provides that the district court must determine if the person seeking party status is "[a] person . . . who is *aggrieved* by a final decision in a contested case"⁹⁹ The court of appeals stated that "[t]he requirements for standing at the agency and standing before the court are different [t]herefore, standing to participate in the agency hearing does not necessarily confer standing to appeal the agency's decision in district court."¹⁰⁰

This is an unusual case because its outcome was predetermined by the County's procedural errors at both the trial and appellate stages. First, in district court the County failed to offer the agency record into evidence at the hearing, as required by the Texas Administrative Procedure and Texas

93. *Id.*

94. 818 S.W.2d 898 (Tex. App.—Austin 1991, no writ).

95. *Id.* at 899.

96. *Id.* at 900.

97. Tex. Parks & Wildlife Dept., 31 TEX. ADMIN. CODE § 51.30 (West April 1, 1992).

98. *Fort Bend County*, 818 S.W.2d at 899 (quoting *Railroad Comm'n of Texas v. Ennis Transp. Co.*, 695 S.W.2d 706 (Tex. App.—Austin 1985, writ ref'd n.r.e.)).

99. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(a) (Supp. 1993).

100. *Fort Bend County*, 818 S.W.2d at 899.

Register Act.¹⁰¹ Thus, the agency record was not available to either the district court or the court of appeals.

In addition, the County apparently failed to bring forward a statement of facts from the hearing or findings of fact by the trial court, because the appellate record did not contain a statement of facts or findings of fact. Thus, the County failed to meet its burden to bring forward a record on appeal that demonstrated the error about which it complained.¹⁰² Because no record was available to the court of appeals, it had to assume that the evidence at the hearing in district court supported the district court's judgment.¹⁰³

101. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(3) (Vernon Supp. 1992).

102. TEX. R. APP. P. 50(d).

103. Fort Bend County, 818 S.W.2d at 900.