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## Environmental Law

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# ENVIRONMENTAL LAW

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## I. CASE LAW DEVELOPMENTS

### A. ADMINISTRATIVE PENALTY FORFEITURE PROVISIONS OF TEXAS CLEAN AIR ACT, TEXAS SOLID WASTE DISPOSAL ACT, AND TEXAS WATER QUALITY ACT VIOLATE THE OPEN COURTS PROVISION OF TEXAS CONSTITUTION

#### 1. Background

**I**N *Texas Association of Business v. Texas Air Control Board*<sup>1</sup> the civil penalty provisions of the Texas Clean Air Act (TCAA), the Texas Solid Waste Disposal Act (TSWDA), and the Texas Water Code (Water Code) were at issue. Pursuant to these statutes, the Texas Air Control Board and the Texas Water Commission have the power to directly assess civil penalties, without court approval, of up to \$10,000 per day for each violation.<sup>2</sup> The statutes provide that subsequent to the assessment of a penalty, the offender must either: (1) pay the penalty, or (2) make a cash deposit or file a supersedeas bond pending suit in district court.<sup>3</sup> Failure to make the cash deposit or file the bond would result in forfeiture of the offender's rights to judicial review.<sup>4</sup>

Plaintiff Texas Association of Business (TAB) is a not-for-profit corporation whose members do business throughout Texas. Claiming that some of its members had been assessed civil penalties by either the Texas Air Control Board (TACB) or the Texas Water Commission (TWC),<sup>5</sup> and that the rest

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1. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993).

2. *Id.* at 442 (citations omitted).

3. *Id.* at 443 (citing TEX. HEALTH & SAFETY CODE ANN. § 382.089(a), (b) (TCAA); § 361.252(k), (l) (Vernon 1992) (TSWDA); TEX. WATER CODE ANN. § 26.136(j) (Vernon 1988)).

4. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. §§ 361.252(m) (TSWDA); 382.089(c) (Vernon 1992) (TCAA); TEX. WATER CODE ANN. § 26.136(k) (Vernon 1988)).

5. The TWC and the TACB have now been merged into the Texas Natural Resource Conservation Commission.

of its members that are subject to the TCAA, Water Code, or TSWDA were at "substantial risk" of being assessed civil penalties, the TAB sued on behalf of its members. Filing under the Uniform Declaratory Judgments Act,<sup>6</sup> the TAB claimed that the civil penalty provisions of the TCAA, Water Code, and TSWDA, and any rules or orders issued thereunder, were facially unconstitutional.

## 2. Standing

The Texas Supreme Court began its analysis by considering whether the TAB had standing to challenge the constitutionality of the statutes and regulations. The court explained that allowing a party without standing to sue would violate the separation of powers doctrine of the federal and Texas constitutions<sup>7</sup> as well as the open courts provision of the Texas Constitution.<sup>8</sup>

Contrary to both parties' arguments, the court held that standing cannot be waived by the parties.<sup>9</sup> The court first stated that standing is a component of subject matter jurisdiction.<sup>10</sup> Since subject matter jurisdiction is non-waivable, standing also cannot be waived and may be raised for the first time on appeal by the parties or the court.<sup>11</sup> In this case, the court raised the standing issue for the first time on appeal.

The primary standing issue in this case was whether the TAB, as an organization of businesses, had standing to sue on behalf of those businesses. Since Texas had no test for organizational standing, the Texas Supreme Court adopted the federal standard, holding that an association has standing to sue when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>12</sup> Applying the federal *Hunt* test, the Texas Supreme Court concluded that the TAB had standing to pursue the case.<sup>13</sup>

## 3. Open Courts

The TAB's first major contention was that the statutes and regulations at

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6. TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-37.011 (Vernon 1986 & Supp. 1993).

7. The court found that the separation of powers doctrine limits the courts' jurisdiction in that it prohibits courts from issuing advisory opinions, an executive branch function. Any opinion rendered in a case brought by a party without standing is advisory because it does not address an actual or imminent harm. *Texas Ass'n of Business*, 852 S.W.2d at 444 (citing TEX. CONST. art. II, § 1) (other citations omitted).

8. *Id.* (finding that "standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury.") (citing TEX. CONST. art. I, § 13).

9. *Id.* at 445.

10. *Id.*

11. *Id.* (overruling *Texas Indus. Traffic League v. Railroad Comm'n*, 633 S.W.2d 821 (Tex. 1982) (per curiam)).

12. *Texas Ass'n of Business*, 852 S.W.2d at 447 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

13. *Id.*

issue violated the open courts provision of the Texas Constitution. The challenged statutes and regulations provided that subsequent to the assessment of a penalty, and in lieu of paying the penalty, the offender must either tender a cash deposit or post a supersedeas bond within 30 days. If neither option is taken, the offender would forfeit his right to judicial review.<sup>14</sup> The court explained that one of the three guarantees of the open courts provision applied here: citizens must have access to courts without having to encounter unreasonable financial barriers.<sup>15</sup> In analyzing this issue, the court viewed the reasonableness of the deposit/bond requirement in light of (1) the state interest involved and (2) the barrier the payment posed to access to the courts.<sup>16</sup>

The state argued that the penalty provisions furthered the state interest of protecting Texas' natural resources by increasing the deterrent effect of the penalties and by aiding in their collection. The court agreed that the immediate payment component of the penalty requirement did further the state's interest and did not implicate the open courts provision.<sup>17</sup> However, the court found that the statutory component providing for forfeiture of appeal rights upon nonpayment was "an unreasonable restriction on access to courts."<sup>18</sup> The court reasoned that the forfeiture provision added no additional incentive for payment beyond that provided by the provision requiring payment to stay enforcement.<sup>19</sup> The court stated that the state could "accomplish its goals by enforcing the prepayment requirements" alone.<sup>20</sup> The court also pointed out that this scheme would be in accordance with the appeals procedure normally used in Texas cases.<sup>21</sup>

It is important to note that the court did not strike down the provisions dealing with penalty assessment and collection by the agencies. The court held only that it is unconstitutional to condition judicial review on the payment of the penalty or posting of bond.<sup>22</sup>

#### 4. Jury Trial

The TAB also argued that the statutes and regulations allowing the agencies to assess civil penalties violated the right to a jury trial guaranteed by the Texas Constitution.<sup>23</sup> Specifically, the TAB argued that the lack of a

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14. See *supra* notes 3 and 4.

15. *Texas Ass'n of Business*, 852 S.W.2d at 448 (citing *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986)).

16. *Id.* at 449.

17. *Id.*

18. *Id.* at 450.

19. *Id.*

20. *Texas Ass'n of Business*, 852 S.W.2d at 450.

21. *Id.* at 449.

22. *Id.* at 449, 450 n.17.

23. The Texas Constitution provides: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." TEX. CONST. art. I, § 15. The court did not discuss the TAB's claim that the lack of a jury trial before the agency violated the Texas Constitution, as the court claimed that this issue had been decided before. *Texas Ass'n of Business*, 852 S.W.2d at 449, 450 n.19 (stating that trial by jury cannot be claimed "with respect to proceedings before an

trial de novo, as well as the lack of a jury trial before the agency, violated the Texas Constitution.

The court stated that the right to a jury trial is guaranteed by the Texas Constitution only for those types of cases tried to a jury at the time of the adoption of the 1876 Texas Constitution.<sup>24</sup> The court found that the agencies' assessments of environmental penalties were not analogous to any type of action tried in 1876, as the current environmental statutes are relatively new on the legal scene.<sup>25</sup> No similar governmental schemes existed in 1876. Because of this fact, the court held that "no right to a jury trial attaches to appeals from administrative adjudications under the environmental statutes and regulations at issue here."<sup>26</sup>

### 5. *Dissenting Opinion*

Justice Doggett dissented from "today's manipulation of the law to paralyze anti-pollution efforts tragically announced at a time when protecting the quality of the air we breathe and the water we drink is so critical."<sup>27</sup> He argued that the opinion opened up a watershed of problems in a wide range of areas, including tax collection and nursing home laws.<sup>28</sup> He further said that the majority's opinion left a question as to whether the penalties that the agencies have collected over the years must be returned.<sup>29</sup> However, the majority specifically said, albeit in a footnote, that this would not be the case.<sup>30</sup>

Justice Doggett strongly disagreed with the majority's determination that the challenged forfeiture provisions violated the Texas open courts provision. He believed that the State met its burden of showing a compelling interest in employing administrative penalties because the protection of natural resources is constitutionally mandated.<sup>31</sup> He found that the judicial review forfeiture provision was not unreasonable, as the penalty usage is "substantially limited" by provisions of the TCAA, TSWDA, and the Water Code.<sup>32</sup> He thought that the majority's opinion would serve as a green light for unscrupulous polluters to get out of any imposed punishment or to avoid remedying the damage they have caused, allowing a "perhaps deliberately undercapitalized corporation" to declare bankruptcy during pendency of suit, thereby escaping any responsibility to remedy damage.<sup>33</sup>

Justice Doggett pointed out that time and resources would limit the State's ability to initiate and pursue an enforcement action to collect any

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administrative board") (citing *Middleton v. Texas Power & Light Co.*, 185 S.W. 556, 561-62 (1916)).

24. *Id.* at 450 (citations omitted).

25. *Id.* at 451.

26. *Id.*

27. *Id.* at 453 (Doggett, J., dissenting).

28. *Texas Ass'n of Business*, 852 S.W.2d at 453.

29. *Id.*

30. *Id.* at 450 n.17.

31. *Id.* at 455 (citing TEX. CONST. art. XVI, § 59(a)).

32. *Id.* at 456.

33. *Texas Ass'n of Business*, 852 S.W.2d at 456.

penalties assessed that are not paid within the prescribed time.<sup>34</sup> He also claimed that the majority had not shown any evidence suggesting a restrictive effect, caused by the forfeiture provision, on access to the courts. He went on to say that "[w]hile the enormity of some future penalty could in fact unconstitutionally bar judicial access, that is certainly not the case here."<sup>35</sup> He criticized the majority for according "our state's largest businesses the same treatment as indigents in avoiding financial responsibility for court and other litigation costs,"<sup>36</sup> and he was concerned with the far-reaching effect the majority's decision would have with respect to similar provisions in non-environmental statutes.<sup>37</sup>

Justice Doggett also took issue with "the severe blow struck against our fundamental right of trial by jury."<sup>38</sup> While he ultimately found that the TAB was not entitled to a jury trial in this case, Justice Doggett was disturbed by the majority's broad language and refusal to clearly mark the boundaries of its denial of a jury trial for administrative proceedings.<sup>39</sup> After going into some depth about the "central role of the jury as a democratic institution,"<sup>40</sup> he found that the majority had seriously misconstrued the jury trial standard.<sup>41</sup> He pointed to early anti-pollution laws as evidence that an analogous cause of action with a right to jury trial has existed for over a century.<sup>42</sup> He insisted that the majority was attaching too much importance to the form, rather than substance, of the cause of action, and that the majority wrongly gave too much weight to the fact that the administrative state was not yet created in 1876.<sup>43</sup> He found the "wholesale transfer of authority for fact-finding from juries to the bureaucracy" to be "offensive" to the rights guaranteed by the Texas Constitution.<sup>44</sup>

Justice Doggett also argued that the right to a jury trial is broader than the majority claimed, as article V, section 10 of the Texas Constitution does not limit the right to jury trial to causes in existence in 1876.<sup>45</sup> He believed that there should be only narrow exceptions to the right to a trial by jury,

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34. *Id.*

35. *Id.* at 457.

36. *Id.*

37. *Id.* at 457-58. For example, Justice Doggett pointed to similar provisions in the statute protecting residents in nursing homes. *Id.* at 457-58 & n.12 (citing TEX. HEALTH & SAFETY CODE ANN. § 242.066 (administrative penalty for statutory violations); § 242.069 (Vernon 1992) (prepayment of penalty required before judicial review)).

Justice Doggett also pointed to the criminal law requirements for the forfeiture of vehicles and other property alleged to have been used in violating criminal laws (e.g., assets from drug dealers which could otherwise finance their defense). *Texas Ass'n of Business*, 852 S.W.2d at 458-59.

38. *Texas Ass'n of Business*, 852 S.W.2d at 459 (referring to the majority's determination that the penalty provisions did not violate the right to a jury trial).

39. *Id.* at 466-67.

40. *Id.* at 459-60.

41. *Id.* at 461.

42. *Id.* at 461-62 (pointing to common law nuisance claims and criminal pollution laws).

43. *Texas Ass'n of Business*, 852 S.W.2d at 463.

44. *Id.* at 464.

45. *Id.* at 465 (citing *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975)). The majority did not discuss the implications of this right to jury trial provision, focusing only on Article I, section 15 of the Texas Constitution.

with the only one in the administrative proceedings area being where the state is enforcing a regulation or statute protecting the public.<sup>46</sup> In his view, the TAB was not entitled to a jury trial because the state was protecting the public by imposing administrative penalties pursuant to public regulations.<sup>47</sup>

Finally, Justice Doggett derided the majority for even considering the standing issue when neither of the sides in the litigation disputed the TAB's standing.<sup>48</sup> He claimed that the majority merely wanted to "close access to our courts to those citizens who choose to challenge environmental degradation, neighborhood destruction and consumer abuse."<sup>49</sup>

**B. CORPORATE OFFICERS AND PLANT MANAGERS MAY BE HELD  
PERSONALLY LIABLE FOR CORPORATE VIOLATIONS OF TEXAS  
ENVIRONMENTAL LAW IF THEY PARTICIPATE IN  
OR DIRECT SUCH ACTIVITY**

Setting precedent for corporate officer and supervisor liability under Texas environmental laws, the Houston Court of Appeals for the Fourteenth District upheld a trial court's judgment holding the president and plant manager liable for violations of the company's environmental permit.<sup>50</sup> The violations in this case were egregious and intentional. Current and former employees testified that they covertly pumped sludge into a pit despite the Texas Water Commission's and its predecessor agency's actions prohibiting the pit's use and requiring closure.<sup>51</sup>

On appeal the company officials argued they could not be held personally liable because they did not own the permit that was violated. The defendants relied upon a case concluding that liability could not be imposed on an individual where a corporation engaged in usury.<sup>52</sup> However, the court in *Malone Services* distinguished that case where a violation of the usury statute was considered contractual in nature while the violation of an environmental statute more resembled a tort.<sup>53</sup> Under tort law in Texas, "a corporate officer who participates in or directs the commission of a tort may be held *personally liable*."<sup>54</sup> In support of this conclusion, the court cited several federal cases reaching a similar result, even though the corporate officials

46. *Id.* at 466.

47. *Id.*

48. *Texas Ass'n of Business*, 852 S.W.2d at 467. Justice Doggett further argued that the standing issue may *not* be raised for the first time on appeal — by anyone. *Id.* at 468 (citing *Texas Indus. Traffic League v. Railroad Comm'n of Tex.*, 633 S.W.2d 821, 822-23 (Tex. 1982)). Justice Doggett claimed that to reach the majority's result, it must overrule six Texas Supreme Court cases. *Id.*

49. *Id.* at 467.

50. *State v. Malone Services Co.*, 853 S.W.2d 82 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The trial court had awarded the State over \$3 million in penalties against Malone Service Company and the two company officials.

51. *Id.* at 84.

52. *Id.* at 85 (citing *Wartman v. Empire Loan Co.*, 101 S.W. 499 (Tex. Civ. App.—Dallas 1909, no writ).

53. *Id.*

54. *Malone Services*, 853 S.W.2d at 85 (emphasis added).

were not "permit holders."<sup>55</sup>

In addition to their challenge of personal liability, the defendants appealed the decision on several other largely evidentiary grounds. The appellate court rejected these arguments as well.<sup>56</sup> First, the defendants contended that no or insufficient evidence was introduced to show the earthen pit was unlawfully used on 417 occasions. However, the court cited numerous examples of oral or written evidence of these violations to justify its finding.<sup>57</sup> Second, the defendants argued that no evidence existed to prove 360 of the violations because the facility was permitted for on-site storage of hazardous waste until a specific date. The court concluded the on-site exclusion would not apply because (1) wastes generated off-site were mixed with those generated on-site, (2) the jury found, and the evidence supported, that more than on-site storage processing or disposal occurred, and (3) other permits "explicitly prohibited continued use of the earthen pit."<sup>58</sup> In another evidentiary point, the defendants challenged the jury's finding that old waste was discharged into groundwater for 3,495 days. On this point, the court upheld the jury's decision largely because a state expert testified continual contamination was occurring and also because the defendants' expert testified groundwater contamination probably existed as early as 1982.<sup>59</sup>

The court's holding on this point of error could prove damaging to defendants in groundwater contamination cases and perhaps other cases where direct evidence of a release, discharge, or emission is not possible due to physical limitations. In such cases "in which subsurface discharge is not readily substantiated by direct observation," the court concluded "the jury could reasonably infer continual seepage in lieu of credible evidence of a force or event that would have stopped the seepage."<sup>60</sup>

The amount of the penalties was challenged as well. The defendants asked the appellate court to overturn the award of over \$3,000,000 by the trial court, arguing the award was excessive. The court dismissed the defendant's arguments by stating, "[a]ssessing the maximum penalty against [the defendants] cannot be considered extreme in light of blatant conduct."<sup>61</sup> An example of this "blatant conduct" cited was "that [the defendants] knew it was unlawful and unsound to pump into the pit, yet company policy authorized illegal use of the pit, to be stopped when investigators came on site."<sup>62</sup>

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Malone Services*, 853 S.W.2d at 84.

59. *Id.* at 85-86.

60. *Id.* at 85.

61. *Id.*

62. *Id.*



C. SUPREME COURT APPLIES "LOCALITY NORMALITY" TEST TO  
DETERMINE WHETHER HUMAN INVOLVEMENT NEGATES THE  
NATURAL PROCESS EXEMPTION UNDER THE TEXAS  
CLEAN AIR ACT

In a case decided by the Supreme Court of Texas, the justices struggled with the sublime issue of when the odor of the bovine digestion process is "natural" and when human involvement in this process reaches a point that it becomes "unnatural."<sup>63</sup> This classification determines the jurisdiction of the state's air pollution control agency, in this case the Texas Air Control Board (TACB), now the Texas Natural Resource Conservation Commission, to issue a permit to regulate the natural odors or "pollutants."<sup>64</sup>

The Supreme Court of Texas adopted two prior decisions by the courts of appeals in Dallas and Tyler.<sup>65</sup> The rule of law established in those two cases prohibited TACB permitting on a cattle or agricultural operation if it 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."<sup>66</sup> The Texas Clean Air Act provides that the State can regulate "air contaminants," which includes odors that are "produced by processes other than natural."<sup>67</sup> The Supreme Court was concerned that adopting a literal reading of the statute would exempt all agricultural activities in contravention of the term "natural" in the statute's purpose, while the state's position that any human involvement means a process cannot be natural would unduly expand the jurisdiction of the statute.<sup>68</sup> The court's proffered solution engaged the location normality standard first enunciated in *Europak*.<sup>69</sup>

The court concluded application of this standard was a factual rather than a legal exercise.<sup>70</sup> The court of appeals, in applying the *Europak* and *Southwest Livestock* standard, ruled as a matter of law the F/R feeding lot was not a natural process regardless of where located.<sup>71</sup> The Supreme Court disagreed with this ruling and remanded the case to the court of appeals for review of the sufficiency of the trial court's factual findings.<sup>72</sup> The Supreme Court noted that some evidence existed in the record "that F/R's use is consistent with similar operations in the area."<sup>73</sup>

Rejecting the majority of the court's decision, as well as those of the Dallas and Tyler courts of appeals in *Europak* and *Southwest Livestock*, Justice Spector wrote a dissenting opinion joined by Justices Gammage and Dog-

63. *F/R Cattle Co. v. State*, 866 S.W.2d 200 (Tex. 1993).

64. *Id.* at 202 n.2.

65. *Europak, Inc. v. County of Hunt*, 507 S.W.2d 884 (Tex. Civ. App.—Dallas 1974, no writ); *Southwest Livestock and Trucking Co. v. Texas Air Control Bd.*, 579 S.W.2d 549 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

66. *F/R Cattle*, 866 S.W.2d at 204 (quoting *Europak*, 507 S.W.2d at 891).

67. TEX. HEALTH & SAFETY CODE ANN. § 382.003(2) (Vernon 1992).

68. *F/R Cattle*, 866 S.W.2d at 204.

69. *Id.*

70. *Id.* at 205.

71. *Id.*

72. *Id.*

73. *Id.*

gett. Justice Spector criticized the majority for ignoring proper standards of literal statutory interpretation and laboring to find unwritten exceptions and undisclosed intentions in the Texas Clean Air Act.<sup>74</sup> Under the dissent's approach, location would have nothing to do with determining whether a process is "natural."<sup>75</sup> "The only role that location plays under the Clean Air Act is the determination of remedies — a function that the legislature deliberately assigned to the Board, subject only to limited review in court."<sup>76</sup> Finally, the dissent criticized the majority for establishing "a nonsensical approach to environmental protection: as the air quality deteriorates, so does the Board's jurisdiction [under the Texas Clean Air Act]."<sup>77</sup>

Both the majority and dissent failed to recognize another absurd result of the *Europak*, *Southwest Livestock*, and now the *F/R Cattle* standard: the more human involvement in natural processes, that is, the more humans concentrate cattle and create odors, the more *natural* the process becomes. Surely, this is not what the legislature intended. The Supreme Court appears to have adopted a standard that has no foundation in the statute and certainly no basis in common sense.

#### D. PERMIT APPLICANT MUST EXHAUST ADMINISTRATIVE REMEDIES BEFORE SEEKING JUDICIAL REVIEW

In *Texas Water Commission v. Dellana*<sup>78</sup> the Supreme Court of Texas refused to exempt a private party from the well-established rule of administrative law requiring all administrative remedies be exhausted before seeking judicial review.<sup>79</sup> The court conditionally granted the TWC's writ of mandamus and ordered the district court to vacate its order requiring the TWC staff officers to appear at depositions.<sup>80</sup> The court held that the trial court abused its discretion in allowing the plaintiff to circumvent the exhaustion of administrative remedies requirement before proceeding with judicial review.<sup>81</sup>

##### 1. Background

The plaintiff Hunter Industrial Facilities (Hunter) submitted an application "for permission to receive, process, and store hazardous and nonhazardous waste in this state."<sup>82</sup> In November of 1991, Hunter filed suit in district court alleging that the TWC was delaying the processing of Hunter's application. On January 28, 1993, the TWC denied Hunter's application, issuing its final written order on January 29, 1993. On February 3, 1993, Hunter amended its petition in the district court, alleging that the TWC's denial of

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74. *F/R Cattle*, 866 S.W.2d at 207 (Spector, J. dissenting).

75. *Id.* at 208.

76. *Id.*

77. *Id.* at 209.

78. *Texas Water Comm'n v. Dellana*, 849 S.W.2d 808 (Tex. 1993).

79. *Id.*

80. *Id.* at 810.

81. *Id.*

82. *Id.* at 809.

its application was arbitrary and capricious, was contrary to the evidence, denied Hunter its civil rights, and resulted from procedural irregularities. Hunter also served nine TWC staff members with deposition notices. At a hearing in the district court, Hunter argued that the depositions were necessary in order to provide evidentiary support for Hunter's motion for rehearing, which was to be filed with the TWC by February 17, 1993. The trial court ordered the staff members to appear at the depositions by February 13, 1993. The TWC then filed a petition for writ of mandamus with the Texas Supreme Court, requesting it to vacate the district court's order.

## 2. Analysis

The TWC argued to the Texas Supreme Court that Hunter had impermissibly bypassed the exhaustion of administrative remedies requirement in seeking judicial intervention in the district court. Hunter argued that such judicial review was proper because Hunter was irreparably harmed by the TWC's actions. Hunter further contended that the discovery granted by the trial court was necessary in order for Hunter to preserve error for its anticipated appeal. Hunter based this claim on its fear that any complaints not fully presented to the agency might be deemed to be waived for purposes of any appeal to the courts.

The general rule regarding the appeal of agency decisions is that a party may only seek judicial review if it has exhausted all available administrative remedies.<sup>83</sup> A party must file a motion for rehearing before it can be deemed to have exhausted all its remedies.<sup>84</sup> The court found that Hunter could not seek judicial review before obtaining a final agency decision on its matter.<sup>85</sup>

The court dismissed Hunter's argument that its complaints might be deemed waived if it did not set forth enough detail in its motion for rehearing. First, the court said that the motion for rehearing need only be "sufficiently definite to apprise the regulatory agency of the error claimed."<sup>86</sup> Next, the court said that the Administrative Procedure and Texas Register Act<sup>87</sup> permits the reviewing court to go beyond the administrative record when reviewing the case.<sup>88</sup> The court concluded that the trial court had abused its discretion by allowing the discovery and by allowing Hunter to circumvent the exhaustion of remedies requirement.<sup>89</sup>

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83. *Dellana*, 849 S.W.2d at 810 (citing *City of Sherman v. Public Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983)).

84. *Id.* (citing TEX. REV. STAT. ANN. art. 6252-13a, §§ 19(e)(1)-(6) (Supp. 1993)).

85. *Id.*

86. *Id.* (quoting *Suburban Util. Corp. v. Public Util. Comm'n*, 652 S.W.2d 358, 365 (Tex. 1983)).

87. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon 1987 and Supp. 1993).

88. *Dellana*, 849 S.W.2d at 810 (citing TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(3) (Supp. 1993)).

89. *Id.*

E. DETERMINATION BY TWC THAT A PARTY IS A POTENTIALLY RESPONSIBLE PERSON UNDER THE TSWDA CONSTITUTES "DECISION OR OTHER ACT OF THE AGENCY," WHICH MAY ONLY BE CHALLENGED IN TRAVIS COUNTY DISTRICT COURT

The main issue in *Texas Water Commission v. Lindsey*<sup>90</sup> was whether the plaintiffs, who were contesting their classification by the TWC as a potentially responsible person (PRP) under the TSWDA, were challenging an agency action or were merely attacking the constitutionality of a statute. The court's findings on this issue determined whether the trial court had jurisdiction to hear the case.

Following the abatement of an appeal by the appeals court<sup>91</sup> and the subsequent declaration by the Jasper County District Court of the rights of the parties on all issues, the appeals court finally determined that the main thrust of the case involved a challenge by the plaintiffs to the application of legislation by the TWC.<sup>92</sup> Because an agency action was involved, the court found that venue was proper only in Travis County District Court pursuant to the TSWDA.<sup>93</sup> The appeals court directed that the trial court dismiss the case for want of jurisdiction and that any further action be brought in Travis County.<sup>94</sup>

1. Background

The plaintiffs in this case were three individuals who had purchased a tract of land in Lufkin, Texas from a creosoting company. They owned the land for only a few months before selling it in 1975. In September of 1990, the plaintiffs received notice that the land they previously owned was being proposed by the TWC for listing on the "state registry."<sup>95</sup> The notice further designated the plaintiffs as "potentially responsible persons."<sup>96</sup> Following initiation of the suit, the plaintiffs filed a motion for summary judgment in the trial court, arguing that 68 provisions of the TSWDA<sup>97</sup> were unconstitutional.<sup>98</sup> The trial court struck down 63 of the statutory provisions,<sup>99</sup> find-

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90. *Texas Water Comm'n v. Lindsey*, 850 S.W.2d 183 (Tex. App.—Beaumont 1992); 855 S.W.2d 750 (Tex. App.—Beaumont 1993, writ denied).

91. 850 S.W.2d at 189 (Lindsey I).

92. 855 S.W.2d at 752 (Lindsey II).

93. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 361.321 (Vernon 1992)).

94. *Id.* at 753.

95. The state registry identifies "to the extent feasible, each facility that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment." TEX. HEALTH & SAFETY CODE ANN. § 361.181(a) (Vernon 1992).

96. 855 S.W.2d at 752 (citing TEX. HEALTH & SAFETY CODE ANN. § 361.271 (Vernon 1992)).

97. TEX. HEALTH & SAFETY CODE ANN. Ch. 361 (Vernon 1992).

98. Plaintiffs argued that sections 361.181 through 361.405 were unconstitutional, though plaintiffs evidently made very generalized claims of unconstitutionality.

99. Those sections declared unconstitutional by the trial court were sections 361.181 through 361.345 of the Texas Health & Safety Code. *Lindsey*, 850 S.W.2d at 184.

ing that they violated the Texas and United States Constitutions.<sup>100</sup> Because the lower court did not give specific grounds for finding these provisions unconstitutional, the appellate court abated the appeal, ordering the trial court to "render judgment declaring the right of the parties on all matters."<sup>101</sup>

The appellate court in *Lindsey I* also spent a fair amount of time discussing jurisdictional issues raised by the TWC. The TWC argued that the TSWDA set venue in Travis County, Texas<sup>102</sup> because the disputed issue involved an appeal of actions taken by the TWC. The appellate court rejected the TWC's argument, finding that the disputed issue was merely the constitutionality of the statute provisions, not the applicability or validity of an agency rule.<sup>103</sup> Thus, the appellate court reasoned, the general residuary clause of the Texas Constitution<sup>104</sup> gave the Jasper County District Court jurisdiction over the case.<sup>105</sup> Finally, the court found that the Declaratory Judgments Act provided a remedy for the plaintiffs to attack the constitutionality of the statutory provisions.<sup>106</sup>

Following abatement by the appellate court, the trial court issued a Final Declaratory Judgment setting forth a more reasoned analysis as to why it found the TSWDA provisions unconstitutional. Specifically, the trial court found that the relevant provisions violated the plaintiffs' rights of due process and due course of law under the Texas Constitution because: (1) the plaintiffs were not given notice prior to the TWC's determination that they were "potentially responsible parties" (PRPs) for a state Superfund site, and (2) this determination imposed upon the plaintiffs duties and liability for costs that already had been incurred and accrued.<sup>107</sup>

## 2. Analysis

Following the trial court's determinations, the main issue for the appeals court in *Lindsey II* was whether the case was tried in the proper court. This in turn depended on the exact nature of the plaintiffs' complaint. Based on the findings set forth in the Declaratory Judgment, the appeals court decided that the basic complaint went directly to the TWC's determination that the plaintiffs were PRP's.<sup>108</sup> Finding this complaint to be a clear attack upon "a

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100. *Id.* at 184-85.

101. *Id.* at 189.

102. TEX. HEALTH & SAFETY CODE ANN. § 361.321 (Vernon 1992). This section provides that "[a] person affected by a ruling, order, decision, or other act of the department or the commission may appeal the action by filing a petition in the district court of Travis County." *Id.*

103. *Lindsey*, 850 S.W.2d at 188.

104. TEX. CONST. art V, § 8 provides in part: "District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body."

105. *Lindsey*, 850 S.W.2d at 188.

106. *Id.*

107. *Lindsey*, 855 S.W.2d at 751 (citing the district court's Final Declaratory Judgment of Oct. 28, 1992).

108. *Id.* at 752.

decision or other act of the Agency,"<sup>109</sup> the court held that jurisdiction lay exclusively in Travis County pursuant to the TSWDA.<sup>110</sup>

The TSWDA provides the sole avenue for appealing an agency decision made pursuant to the TSWDA: "[t]here is no power in a district court to review an administrative decision unless a proper statute vests special jurisdiction in that particular district court to review administrative decisions."<sup>111</sup> The TSWDA vests such special jurisdiction in Travis County.<sup>112</sup> The court did not overrule the holding in its earlier opinion that jurisdiction would be proper in Jasper County if the action were merely brought pursuant to the Uniform Declaratory Judgment Act.<sup>113</sup> Thus, if the only issue had been whether certain provisions of the Texas Solid Waste Disposal Act were constitutional, suit in Jasper County would not have been improper.

#### F. LESSEE RECOVERS UNDER FRAUD CLAIM FOR ENVIRONMENTAL DAMAGES

In *Holmes v. P.K. Pipe & Tubing, Inc.*<sup>114</sup> the First District Court of Appeals in Houston allowed an award of environmentally-related damages under a fraud claim but upheld denial of several other claims.<sup>115</sup> This case provides important precedent to those parties seeking to recover environmental cleanup costs from prior owners of contaminated property.

##### 1. Background

In 1981, Alton D. Holmes purchased a tract of land, part of which Rohm and Haas Texas Incorporated (Rohm and Haas) had used for disposal of methyl methacrylate tar residue during the 1960s. Holmes knew before he purchased the property that waste had been disposed there and had previously been the subject of a lawsuit because of failure to disclose the waste disposal between prior owners. In 1983, the Texas Department of Water Resources entered a compliance agreement by which closure, post-closure, and recordation of the location of the waste disposal area in the deed records would be performed. The closure completed by Rohm and Haas entailed construction of a landfill into which all of the wastes were placed, capping of the cell with six inches of clay, and installation of final cover, erosion protection, leachate control, waste seepage control, and groundwater monitoring wells.

In 1984, Holmes, who still retained ownership of part of the contaminated property, leased it to Tenneco Gas Pipeline Company (Tenneco). Holmes and Tenneco disagreed over whether Holmes had disclosed existence of the waste disposal area and showed the company the compliance agreement.

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109. *Id.*

110. *Id.* at 753.

111. *Id.* (citing *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385 (Tex. 1967)).

112. *Id.*

113. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1986).

114. 856 S.W.2d 530 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

115. *Id.* at 532.

Holmes recorded the location of the waste in the deed records the day after he received lease payments from Tenneco. A few months later in 1984, Tenneco sold the pipe it had stored on the site to P.K. Pipe & Tubing, Inc. (P.K. Pipe). P.K. Pipe then leased the property from Holmes. P.K. Pipe claimed that Holmes never disclosed the waste disposal site, and although he pointed out the monitoring wells, he did not explain their purpose.

Several weeks after signing the lease, Holmes began sending P.K. Pipe copies of letters to the Texas Water Commission from an attorney representing Rohm and Haas. These letters asserted storage of pipe over the waste cell threatened its cover and caused waste to ooze into the drainage ditch. Nonetheless, P.K. Pipe extended its lease of the property. Eventually, having met with the TWC, P.K. Pipe removed the pipe over the waste cell and restored the cover to its original condition.

P.K. Pipe then terminated its lease and later filed suit against Holmes. P.K. Pipe alleged breach of the lease agreement, misrepresentation, and violation of the Texas Deceptive Trade Practices Act (DTPA), premised upon failure to disclose the waste disposal cell under the pipe. P.K. Pipe was awarded approximately \$61,000 by the trial court, including about \$3,000 in exemplary damages.

## 2. *Statutes of Limitations*

The court of appeals considered Holmes' points of error on expiration of statutes of limitations. P.K. Pipe's claims under the DTPA, which included the claim for breach of implied warranty,<sup>116</sup> were barred by the applicable two-year limitations period.<sup>117</sup> The court rejected P.K. Pipe's assertion that its cause of action did not accrue until it incurred or learned it would incur damages,<sup>118</sup> concluding rather that such claims arise when a plaintiff discovered or should have discovered, with reasonable due diligence, a concealed deceptive act or practice.<sup>119</sup>

## 3. *Constructive Eviction*

P.K. Pipe's claim for constructive eviction survived limitations but ultimately failed. Unlike the claim for breach of implied warranty of suitability, the claim for breach of warranty of peaceable and quiet enjoyment was brought separately from the DTPA claim and was not barred by the two-year statute of limitations.<sup>120</sup> The court assumed, without deciding, that the defendant's acts deprived P.K. Pipe of the use and enjoyment of the entire land.<sup>121</sup> However, because P.K. Pipe did not abandon the property within a

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116. *Id.* at 538-39.

117. *Id.* at 536-39.

118. *Id.* at 537 (citing *Southwestern Bell Media, Inc. v. Lyles*, 825 S.W.2d 488, 492 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *California Fed. Mortgage Co. v. Street*, 824 S.W.2d 622, 633 (Tex. App.—Austin 1991, writ denied)).

119. *P.K. Pipe*, 856 S.W.2d at 537 (citing *California Fed. Mortgage*, 824 S.W.2d at 625).

120. *Id.* at 539.

121. *Id.*

reasonable time, the court found no constructive eviction.<sup>122</sup> In fact, the plaintiff had extended the lease after discovering the problem. For these reasons, the court of appeals ruled the claim was properly denied.<sup>123</sup>

#### 4. *Fraud and Misrepresentation*

As its last theory of recovery, P.K. Pipe claimed that Holmes engaged in fraud and misrepresentation. The trial court found that (1) Holmes knew of the chemical waste on the property, rendering it unsuitable for pipe storage, (2) a reasonable person would have disclosed this material fact, (3) Holmes knew of the duty to disclose this fact based upon a prior fraud suit involving the property based on this same material fact, and (4) his deliberate misrepresentation was relied upon by P.K. Pipe to its detriment.<sup>124</sup> The court of appeals, in upholding the trial court's findings, concluded that if circumstances place a duty on a person to disclose a fact and that person remains silent, "silence is equivalent to a false representation."<sup>125</sup>

Only one of the elements of fraud was challenged—detrimental reliance.<sup>126</sup> Holmes contended P.K. Pipe received constructive notice of the waste disposal unit based upon its recordation in the court property records and actual notice based on observation and disclosure of the groundwater monitoring wells. The court rejected both arguments. First, the court rejected the constructive notice motion relying upon a case in which the supreme court concluded that deed recordation statutes are designed to protect good faith purchasers from losing title, not perpetrators of fraud.<sup>127</sup> Second, the court concluded P.K. Pipe could not be said to have received actual notice of the disposal unit by observing the wells because they looked like recharge wells for the aquifer and were described in the lease only as "water wells."<sup>128</sup> The court relied upon a prior decision that concluded actual notice only includes those facts a reasonable inquiry would have disclosed, not circumstances that merely arouse suspicion.<sup>129</sup>

#### 5. *Damages*

Finally, Holmes challenged the trial court's assessment of damages. Holmes claimed the lease required P.K. Pipe to incur the costs complained of because the lease required at the end of its term (1) removal of the pipe, (2) restoring the property to pre-lease conditions, and (3) compliance with municipal, state, and federal authorities. The court of appeals held that damages under a claim of fraud are properly measured by the injury directly

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122. *Id.*

123. *Id.* at 540-41.

124. *P.K. Pipe*, 856 S.W.2d at 541.

125. *Id.* at 541-42.

126. *Id.* at 542.

127. *Id.* (citing *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 451 (Tex. 1988); *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504, 509 (Tex. App.—Dallas 1989, writ denied)).

128. *Id.*

129. *P.K. Pipe*, 856 S.W.2d at 542 (citing *University State Bank v. Gifford-Hill Concrete Corp.*, 431 S.W.2d 561, 570 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.)).



and proximately caused by the fraud.<sup>130</sup> The court allowed the costs of the environmental engineer, removal of the pipe from the cap over the waste unit, and remedying damage to the cap, but denied P.K. Pipe its lease payments because no loss was occasioned by leasing the property alone.<sup>131</sup> The court also upheld the award of exemplary damages because the trial court's factual finding of malice was supported by the evidence presented at trial.<sup>132</sup>

G. SUMMARY JUDGMENT ON THE AMBIGUITY OF THE POLLUTION EXCLUSION IN INSURANCE POLICIES MAY NOT BE GRANTED BEFORE DISCOVERY IS COMPLETED

In an important decision for parties seeking recovery of environmentally related damages and/or the costs of defense for such claims from their insurance companies, the First District Court of Appeals in Houston reversed a district court's granting of summary judgment for several insurance companies.<sup>133</sup> The insurers argued the pollution exclusion under insurance policies was not ambiguous and prohibited recovery of damages or costs of defense for environmental claims.

The plaintiff, CBI Industries (CBI) sued its insurers to obtain coverage for claims asserted in sixty lawsuits in various Texas courts for personal injury and property damages allegedly resulting from the release of hydrofluoric gas into the air. CBI had been engaged by Marathon Petroleum Company to assist in maintenance and other activities at a Texas City refinery. In performing this work, CBI's crane tipped and a metallic section of a unit being refurbished was dropped on a storage tank, releasing a hydrofluoric acid cloud and allegedly injuring Texas City residents. CBI's insurers denied CBI's claims for insurance coverage for claims arising from the accident. The insurers apparently relied upon what is known as the pollution exclusion found in many insurance policies.

CBI filed suit against the insurers in district court because of the denied claims. The trial court granted summary judgment to the insurers. In objecting to summary judgment, CBI presented its own affidavits and transcripts of testimony before the Texas State Board of Insurance.

The court of appeals reviewed the canons for interpreting insurance policies established largely by the supreme court. After such review, the court of appeals concluded that trial courts are to grant summary judgment as a matter of law where an insurance contract is not ambiguous, that is, "[w]here the policy is worded such that it can be given only one reasonable construction."<sup>134</sup> To the extent an ambiguity exists, it can be classified as

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130. *Id.* at 543.

131. *Id.*

132. *Id.*

133. *CBI Indus., Inc. v. National Union Fire Ins. Co.*, 860 S.W.2d 662 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

134. *Id.* at 664 (citing *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991); *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987); *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984); *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 917 (Tex. App.—Fort Worth 1988, writ denied); *Entzminger v. Provident*

one of two types: patent or latent. A patent ambiguity is apparent on the face of the contract.<sup>135</sup> On the other hand, a latent ambiguity arises when language is otherwise clear but application of extraneous or collateral facts makes it in effect unclear or ambiguous.<sup>136</sup> In such circumstances, parol evidence and the facts and circumstances under which the agreement was made may be introduced to ascertain the true intent of the parties.<sup>137</sup>

In applying the latent ambiguity rule, the court of appeals ruled CBI should have been allowed the opportunity of discovery to seek evidence of any latent ambiguity.<sup>138</sup> The court concluded the Texas Rules of Civil Procedure<sup>139</sup> clearly contemplated an opportunity to investigate facts before a party's suit may be resolved against it.<sup>140</sup> The court did not believe CBI had been allowed sufficient time to fully conduct discovery because only six months had elapsed since the suit was filed and the case involved unique and complex issues.<sup>141</sup> In addition, the insurers had filed a motion for protective order to preclude discovery by CBI until the summary judgment issue was decided.<sup>142</sup>

The inability to discover evidence on the application of the policies to the subject matter with which they dealt and thereby raise a factual issue on latent ambiguity, precluded CBI from having the opportunity to develop its case.<sup>143</sup> The appeals court, citing several statements from documents produced by CBI that raised questions on the ambiguity of the pollution exclusion, concluded the district court had abused its discretion in not allowing CBI sufficient discovery opportunity before granting summary judgment.<sup>144</sup>

## II. LEGISLATIVE DEVELOPMENTS<sup>145</sup>

The state's environmental agencies, the Texas Water Commission and the Texas Air Control Board, were consolidated into the Texas Natural Resource Conservation Commission (TNRCC) on September 1, 1993. The state legislature also met in regular session in 1993, during the survey period. The following is a summary of the major environmental legislation enacted into law during this period.<sup>146</sup> Unless otherwise noted, the effective date of

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Life & Accident Ins. Co., 723 S.W.2d 533, 537 (Tex. App.—Houston [1st Dist.] 1983, no writ).

135. *Id.* at 665 (citing *Universal Home Builders, Inc. v. Farmer*, 375 S.W.2d 737, 742 (Tex. Civ. App.—Tyler 1964, no writ)).

136. *Id.* (citing WILLISTON ON CONTRACTS 627 (3d ed. 1961); *Farmer*, 375 S.W.2d at 742).

137. *CBI Indus.*, 860 S.W.2d at 665 (citing *Bache Halsey Stuart Shields, Inc. v. Alamo Savings Ass'n*, 611 S.W.2d 706, 708 (Tex. Civ. App.—San Antonio 1980, no writ)).

138. *Id.*

139. TEX. R. CIV. P. 166a(c).

140. *CBI Indus.*, 860 S.W.2d at 665.

141. *Id.* at 666.

142. *Id.*

143. *Id.*

144. *Id.* at 666-67.

145. The authors would like to thank the House Research Organization and the Senate Research Center. Both organizations produce excellent legislative analyses, which they have generously provided for this paper.

146. There was also environmental legislation affecting oil and gas operations. See Act of

all statutes is August 30 or September 1, 1993.

## A. WASTE DISPOSAL

### 1. *Solid Waste*

The Texas Solid Waste Disposal Act was amended to increase maximum annual generation fees for hazardous and non-hazardous waste and maximum waste management fees for landfill waste.<sup>147</sup> The maximum annual generation fee for the generation of industrial solid waste and hazardous waste was increased from \$25,000 to \$50,000, and the maximum fee for the generation of non-hazardous waste from \$1,000 to \$10,000.<sup>148</sup> The waste management fee for waste generated in the state was increased from \$20 to \$40 per ton for waste that will be landfilled.<sup>149</sup> The legislation also instituted new fees: (1) current hazardous and solid waste remediation fees now apply to the commercial disposal of industrial solid waste, and (2) a management fee is imposed on owners and operators of a waste storage, processing, or disposal facility for industrial solid waste managed on site.<sup>150</sup> Management fees for the commercial disposal of a non-hazardous industrial solid waste may not exceed twenty percent of the fee established for the disposal of a hazardous waste by the same method of disposal.<sup>151</sup>

### 2. *Municipal Solid Waste*

#### a. Use of Land Over Municipal Solid Waste Landfills

House Bill 2537 prohibits the development of over one acre of a tract of land unless soil tests have been conducted by a registered professional engineer to determine whether any part of the tract overlies a closed municipal solid waste landfill facility.<sup>152</sup> "Development" is defined as "an activity on or related to real property that is intended to lead to the *construction or alteration* of an enclosed structure for the use or occupation of people for a commercial or public purpose or to the construction of residences for three or more families."<sup>153</sup>

The engineer performing the test must provide notification of discovery of

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May 28, 1993, 73d Leg., R.S., ch. 949, 1993 Tex. Sess. Law Serv. 4060 (Vernon) (to be codified as Title 11 of the TEX. NATURAL RESOURCES CODE) (regulating the storage of hazardous liquids in salt domes); Act of May 30, 1993, 73d Leg., R.S., ch. 882, 1993 Tex. Sess. Law Serv. 3508 (Vernon) (to be codified as an amendment to TEX. NATURAL RESOURCES CODE ANN. §§ 89.002(a) & 89.011) (regarding owner/operator responsibility for well plugging); Act of May 28, 1993, 73d Leg., R.S., ch. 810, 1993 Tex. Sess. Law Serv. 3233 (Vernon) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 401.003, 401.411 & 401.415) (regulating naturally occurring radioactive materials in oil and gas exploration).

147. Act of June 2, 1993, 73d Leg., R.S., ch. 379, 1993 Tex. Sess. Law Serv. 1676 (Vernon) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE § 361.131 *et seq.*).

148. *Id.* § 4, at 1678.

149. *Id.* § 5, at 1679.

150. *Id.*

151. *Id.*

152. Act of June 18, 1993, 73d Leg., R.S., ch. 770, 1993 Tex. Sess. Law Serv. 3016 (Vernon) (to be codified at Chapter 361, TEX. HEALTH & SAFETY CODE, Subchapter R).

153. *Id.* § 1, at 3017 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.531) (emphasis added).

closed municipal solid waste landfills to each owner and lessee of the tract, the TNRCC, and local government officials with the authority to disapprove an application for development.<sup>154</sup> If a closed municipal solid waste landfill is discovered, in addition to the notification requirements, other requirements include: (a) deed recordation by the owner and local government officials who receive notice of the soil test results; (b) a prohibition on leasing the property unless the development complies with these requirements; (c) at new and existing structures, installation of monitors with automatic alarms to detect methane gas generated by the landfill and structural modifications to minimize the effects of the accumulation of methane gas; (d) a prohibition on development unless the owner or lessee holds a permit issued by the TNRCC; and (e) submission of a permit application to the TNRCC by the owner or lessee at least forty-five days before development begins.<sup>155</sup> Finally, a \$10,000 fine may be imposed for each violation of these requirements.<sup>156</sup>

The TNRCC's interpretation of the bill is that it does not require testing until the Agency promulgates implementing regulations.<sup>157</sup> Once effective, the testing requirement may apply to practically any kind of development of a tract of land that is greater than one acre, such as construction or expansion of existing plant facilities, office buildings and apartments, and perhaps for any other kind of construction other than residences for less than three families.<sup>158</sup>

The legislation has far-reaching implications. To the extent that testing for closed municipal solid waste landfills becomes "customary" before acquiring real property, the environmental investigation necessary for the "innocent land owner" defense under the Federal Superfund Act and the Texas Solid Waste Disposal Act will change as well.

#### b. Certification of Landfill Capacity to a Municipality

House Bill 130 requires owners of state or county-authorized solid waste landfills to pre-certify that a landfill has sufficient capacity to accept municipal waste that it would accept under any proposed contract with the city.<sup>159</sup> If the landfill already has a municipal contract, it may not contract for waste generated outside the city's extraterritorial jurisdiction in an amount that would reduce the projected life of the landfill to less than the remainder of the duration of the contract with the city.<sup>160</sup> The owner or operator, if requested in writing, shall certify and report to the city annually the remaining solid waste disposal capacity, the contractually committed volumes or ton-

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154. *Id.* at 3018 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.538).

155. *Id.* at 3018-19 (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.536-361.539).

156. *Id.* at 3019 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.540).

157. Telephone interview with C. Talkington, Municipal Waste Division, Texas Natural Resource Conservation Commission (Sept. 7, 1993).

158. *Id.*

159. Act of June 2, 1993, 73d Leg., R.S. ch. 400, 1993 Tex. Sess. Law Serv. 1701 (Vernon) (to be codified at TEX. HEALTH & SAFETY CODE § 361.115).

160. *Id.* § 1, at 1701.

nages of waste accepted, and an assurance the landfill can fulfill its disposal commitment to the city.<sup>161</sup>

The bill was criticized as undercutting pending RCRA regulations promoting regional landfill usage. Critics argued that, by hindering a landfill's ability to accept waste from multiple municipalities, the bill would force cities to focus on a single landfill either by building a costly new one or finding a new private contractor.<sup>162</sup>

### c. Recycling Market Development

Senate Bill 1051<sup>163</sup> requires the TNRCC to develop a strategic state solid waste reduction plan for all solid waste under its jurisdiction.<sup>164</sup> Solid waste disposal fees are now \$1.25 per ton if the waste is measurable by weight; if measured by volume, the fee is now forty cents per cubic yard for compacted waste, and twenty-five cents per cubic yard for uncompacted waste.<sup>165</sup> The operator of a public or privately owned municipal solid waste facility is entitled to a refund of fifteen percent of solid waste fees for actively performing composting operations and returning the composted materials to beneficial reuse.<sup>166</sup> An operator is entitled to a twenty percent refund for voluntarily banning the disposal of yard waste in addition to composting.<sup>167</sup> TNRCC must also adopt rules establishing minimum standards and guidelines for the issuance of permits for facilities that compost mixed stream municipal waste.<sup>168</sup> In addition, state agencies are required to expend a portion of their consumable procurement budgets on materials that have recycled material content.<sup>169</sup>

### d. Municipal Solid Waste Management

Senate Bill 963 amended the Health and Safety Code to provide for a strategic plan for the reduction of solid waste, a solid waste education program, and an office of waste exchange.<sup>170</sup> The bill will fund local government studies of rates that reflect the actual cost of services.<sup>171</sup> It also restricts the authority of local governments to regulate solid waste in the

161. *Id.*

162. House Research Org., HB 130 Bill Analysis (4/28/93).

163. Act of June 19, 1993, 73d Leg., R.S., ch. 899, 1993 Tex. Sess. Law Serv. 3562 (Vernon) (to be codified at Chapter 481, TEX. GOV'T CODE ANN., Subchapter AA).

164. *Id.* § 2.02, at 3569 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.020).

165. *Id.* § 1.08, at 3564 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.013 (a)).

166. *Id.* § 1.09, at 3565 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.035).

167. *Id.*

168. *Id.* § 1.13, at 3567 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.428).

169. *Id.* § 1.02, at 3563 (to be codified as an amendment to TEX. REV. CIV. STAT. ANN. art. 601b).

170. Act of June 20, 1993, 73d Leg., R.S., ch. 1045, 1993 Tex. Sess. Law Serv. 4465 (Vernon).

171. *Id.* § 2, at 4465 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.014).

following ways:<sup>172</sup> a local government or political subdivision cannot (1) adopt an ordinance, rule or regulation to prohibit or restrict the sale or use of a product, container or package for solid waste management purposes in a manner that is not authorized by state law; (2) prohibit or restrict the processing of solid waste by a solid waste facility except for such a facility owned by the local government; or (3) assess a fee or deposit on the sale or use of a container or package.<sup>173</sup>

The legislation also requires the TNRCC to exempt from permit requirements certain waste transfer stations used to transfer municipal solid waste to a disposal facility, including (1) those in cities with a population under 50,000, (2) those in counties with populations under 85,000, (3) facilities that transfer 125 tons a day or less, or (4) materials recovery facilities that recycle 10% of their incoming non-segregated waste stream if the remaining nonrecyclable waste is transferred to a permitted landfill within 50 miles.<sup>174</sup>

### 3. *Low-Level Radioactive Waste*

The federal Low-Level Radioactive Waste Policy Act, as amended in 1985, encourages states to form compacts to establish new low-level waste disposal sites by providing that disposal facilities may be used exclusively by the compacting states.<sup>175</sup> Senate Bill 1206 established the Texas Low Level Radioactive Waste Disposal Compact to be composed of the host state, Texas, as well as Maine and Vermont.<sup>176</sup> The compact requires Texas to develop, operate and maintain a facility to manage and dispose of low level radioactive waste generated in the compact states.<sup>177</sup> Texas is required to develop a facility to manage or dispose of low level radioactive waste in a timely manner and operate and maintain the facility after it stops accepting additional waste.<sup>178</sup> Maine and Vermont will contribute \$25,000,000 each to Texas, of which \$2,500,000 will go to Hudspeth County, the disposal site, for community assistance projects.<sup>179</sup>

The Texas Low Level Radioactive Waste Disposal Authority was created to select, construct, and operate a disposal facility for low-level radioactive waste generated in Texas.<sup>180</sup> H.B. 2318<sup>181</sup> strengthens the role of the Citizens Advisory Committee, which recommends how impact assistance money should be allocated. The legislation also mandates a health surveillance study in the vicinity of the disposal site, authorizes the Authority to sell and

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172. *Id.* § 12, at 4470 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0961).

173. *Id.*

174. *Id.* § 10, at 4469 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.111).

175. 42 U.S.C.A. § 2021(c) (West Supp. 1992).

176. Act of June 9, 1993, 73d Leg., R.S., ch. 460, 1993 Tex. Sess. Law Serv. 1844 (Vernon) (to be codified as Chapter 403 of the TEX. HEALTH & SAFETY CODE ANN.).

177. *Id.* § 1, at 1847 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 4.01).

178. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 4.04).

179. *Id.* at 1849 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 5.01).

180. TEX. HEALTH & SAFETY CODE ANN. § 402.011 (Vernon 1992).

181. Act of June 18, 1993, 73d Leg., R.S., ch. 878, 1993 Tex. Sess. Law Serv. 3493 (Vernon) (effective June 18, 1993).

lease surplus lands, and allows the Authority to construct facilities or public projects in the area impacted by the disposal facility.<sup>182</sup> The legislation also authorizes the Authority's board of directors to transfer money in the low level waste fund to the county commissioners' court to be used to fund local public projects, and establishes a ten percent surcharge on the planning and implementation fee currently being collected from low level waste generators in Texas.<sup>183</sup> The surcharge will be designated for local public projects.<sup>184</sup>

## B. TNRCC PROCEDURES

### 1. *Solid Waste Facility Permits*

Senate Bill 639 amends solid waste facility permit application and notice requirements.<sup>185</sup> Once an application is administratively complete, the TNRCC may not revoke that determination.<sup>186</sup> The Commission can request additional information from the applicant only if the information is necessary to clarify, modify, or supplement previously submitted material, but the request for additional information cannot render the application incomplete.<sup>187</sup> An additional permit application fee may not be assessed for an industrial solid waste or hazardous waste draft permit that is returned for further processing.<sup>188</sup> The TNRCC is required to hold a public meeting on an application for a new municipal solid waste management facility in the county where the proposed facility is to be located.<sup>189</sup> Substantial compliance with the direct mail notice requirements required by § 361.081 of the Health and Safety Code is sufficient for the Commission to exercise jurisdiction over an application for a solid waste facility.<sup>190</sup>

### 2. *Reduction of Administrative Penalties for Supplemental Environmental Projects*

H.B. 2429 authorizes the TNRCC to partially reduce administrative penalties if the violator has undertaken eligible supplemental environmental projects.<sup>191</sup> Credit against the penalty payment would be given for a portion

182. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 402.058, 402.094(d) & 402.220(c)-(e)).

183. *Id.* (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 402.252 & 402.2721).

184. *Id.*

185. Act of June 20, 1993, 73d Leg., R.S., ch. 1044, 1993 Tex. Sess. Law Serv. 4463 (Vernon) (effective June 20, 1993).

186. *Id.* § 1, at 4463 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.068(b)).

187. *Id.*

188. *Id.* § 2, at 4463 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. 361.137(b)).

189. *Id.* § 3, at 4463 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.0791).

190. *Id.* § 4, at 4464 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.081(b)).

191. Act of June 8, 1993, 73d Leg., R.S., ch. 551, 1993 Tex. Sess. Law Serv. 2058 (Vernon) (effective June 8, 1993) (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), 361.252(o) & 382.088(j) and as an amendment to TEX. WATER CODE ANN. § 26.136(n)).

of the cost of appropriate projects.<sup>192</sup> Supplemental environmental projects are projects that are TNRCC-approved and benefit the community that suffered harm.<sup>193</sup> Eligible projects would prevent pollution, reduce pollutants into the environment, enhance environmental quality, or contribute to environmental public education, but do not include necessary action for compliance or remediation.<sup>194</sup>

### C. WATER

Traditional Texas groundwater law has been governed by the rule of capture.<sup>195</sup> Under the rule of capture, landowners have the right to take for use or sale all the water they can take from underneath their land. The rule of capture has been recently challenged on two fronts: in rulemaking by the Texas Water Commission and in a federal lawsuit to protect endangered species. The Texas Legislature responded to those challenges with two new statutes during the survey period.

#### 1. TNRCC Authority to Regulate Groundwater

In April 1992, the Texas Water Commission declared the Edwards Aquifer an "underground river" and its waters to be State water, and thus, subject to commission regulations.<sup>196</sup> The commission immediately adopted emergency rules and a moratorium on new wells tapping the Aquifer.<sup>197</sup> Suit was brought in state district court to challenge the rules and the plaintiffs were granted a summary judgment declaring the rules void.<sup>198</sup> The Legislature reacted to the new rules by enacting S.B. 1334,<sup>199</sup> which mooted *McFadin*. S.B. 1334 restricts the Commission's rulemaking authority over underground water to preserving water quality.<sup>200</sup> The Commission and its successor, the TNRCC, may not regulate the quantity of groundwater used.

#### 2. Management of the Edwards Aquifer and Protection of Endangered Species

In May 1991, the Sierra Club filed a lawsuit against the U. S. Fish and Wildlife Service (USFWS), based on the federal Endangered Species Act.<sup>201</sup> The suit asked the USFWS to insure minimum spring flow from the Ed-

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192. *Id.* § 1-4, at 2058-59.

193. *Id.*

194. *Id.*

195. See, e.g., *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 940 (Tex. 1935); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 26 (Tex. 1978); *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983).

196. 17 TEX. REG. 2913 (1992) (emerg. rule 31 TEX. ADMIN. CODE §§ 298.1-298.6, 298.11-298.13, 298.41-298.48) (Tex. Water Comm'n).

197. *Id.*

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

199. Act of June 19, 1993, 73d Leg., R.S., ch. 914, 1993 Tex. Sess. Law Serv. 3878 (Vernon) (to be codified as an amendment to TEX. WATER CODE ANN. § 28.011).

200. *Id.*

201. *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993).



wards Aquifer to protect endangered species that could be affected by aquifer flow. U. S. District Judge Lucius Bunton ruled in favor of the Sierra Club and ordered that spring flow must be maintained, that the Texas Water Commission must submit a plan to the court by March 1, 1993 to insure that Comal and San Marcos springs will not drop below jeopardy levels, and that the Legislature must enact a regulatory system to limit withdrawals from the Edwards Aquifer by May 31, 1993.<sup>202</sup>

In response to the Judge's ruling, the Texas Legislature enacted S.B. 1477.<sup>203</sup> The bill created the Edwards Aquifer Authority with the power to regulate underground water within the boundaries of the Edwards Aquifer as described in the bill and with the power of eminent domain.<sup>204</sup> The Authority is charged with all of the power provided to a local government to prevent pollution and enforce water quality standards within its jurisdiction and a buffer zone.<sup>205</sup> The Authority is authorized to hold permits under state law or the Federal Endangered Species Act and to execute contracts.<sup>206</sup>

The bill established pumping limits for the region.<sup>207</sup> Water may not be withdrawn without obtaining a permit from the Authority.<sup>208</sup> The Authority also has the power to regulate permits, manage all well construction and withdrawal from the Aquifer, and take action to insure compliance with all permitting, metering, and reporting requirements.<sup>209</sup> Existing users may apply for an initial regular permit by filing a declaration of historical use.<sup>210</sup> The Authority may issue additional regular permits on the basis of availability after it issues all existing user permits<sup>211</sup>. Violations could result in administrative penalties between \$100 and \$1000 per violation per day.<sup>212</sup> The Authority may also file a civil action for an injunction to enforce the provisions of this bill<sup>213</sup> for a civil penalty of between \$100 and \$10,000 per violation per day, and to recover reasonable attorneys' fees.<sup>214</sup>

### 3. *Non-Point Source Pollution from Agricultural Activities*

SB 502 and SB 503 designate the State Soil and Water Conservation Board as the lead agency for the State for programs regarding agricultural or silvicultural non-point source pollution.<sup>215</sup> The Board is made up of five

202. *Id.*

203. Act of June 11, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Sess. Law Serv. 2353 (Vernon) (effective date of September 1, 1993, except that § 1.35 (prohibiting a person from withdrawing water from the aquifer except as authorized by a permit) takes effect March 1, 1994).

204. *Id.*

205. *Id.* § 1.08, at 2359.

206. *Id.* § 1.11, at 2361.

207. Act of June 11, 1993 § 1.14, at 2362.

208. *Id.* §§ 1.15, 1.35 at 2363, 2369.

209. *Id.* § 1.11, at 2361.

210. *Id.* § 1.16 at 2363.

211. *Id.* § 1.18, at 2364.

212. *Id.* § 1.37, at 2369.

213. *Id.* § 1.38, at 2371.

214. *Id.* § 1.40, at 2371.

215. Act of April 29, 1993, 73d Leg., R.S., ch. 53, 1993 Tex. Sess. Law Serv. 116 (Vernon) (to be codified as an amendment to TEX. WATER CODE ANN. § 26.0135(a)-(d) & (h); Act of

members— all elected from soil and water conservation districts by adults or family farm corporations holding title to or living on farm or ranch lands.<sup>216</sup>

S.B. 502 provides that regional assessments involving agricultural or silvicultural non-point source pollution are to be coordinated through the Board with local soil and water conservation districts.<sup>217</sup> S.B. 503 authorizes the board to set up a water quality plan certification program for development, approval, and certification of water quality management plans for agricultural and silvicultural lands.<sup>218</sup> The bill also establishes the cost share assistance program to reimburse farm owners or operators for up to seventy-five percent of the costs of implementing soil and water conservation land improvement measures.<sup>219</sup> To be eligible under the cost sharing program, a pollution prevention project would have to be "consistent with the purposes of controlling erosion, conserving water, or protecting water quality."<sup>220</sup> Other state agencies are required to coordinate with the Board on any abatement programs and activities, but the TNRCC would continue to be the lead agency in matters relating to the state's overall participation in the federal national pollutant discharge elimination system (NPDES).<sup>221</sup>

#### D. CHEMICAL RIGHT-TO-KNOW LEGISLATION

In 1985, Texas enacted the Hazard Communication Act, establishing worker and community rights to know about the nature and effects of chemicals used by employers and other businesses in their communities.<sup>222</sup> Reporting and record keeping requirements were based on an impending OSHA Hazard Communication Standard. The OSHA standards for worker right to know were to apply only to manufacturers, so the state standard was worded to cover only public employers and certain other non-manufacturers.

Since then, the federal worker right to know law has been expanded to all businesses, and the community right to know law has also been broadened. Because federal OSHA standards pre-empt Texas regulations, much of the worker right to know law in the state had no effect on any group other than public employers. H.B. 1431 amended the Texas Health and Safety Code to conform state right to know provisions to federal law.<sup>223</sup> The most controversial aspect of the bill was that it increased reporting thresholds for hazardous chemicals from 500 pounds or 55 gallons to the federal threshold of 10,000 pounds for chemicals other than those classified as extremely hazard-

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April 29, 1993, 73d Leg., R.S., ch. 54, 1993 Tex. Sess. Law Serv. 117 (Vernon) (to be codified at Chapter 201, TEX. AGRIC. CODE ANN., Subchapter I and § 201.026).

216. TEX. AGRIC. CODE ANN. § 201.011 (Vernon 1982).

217. Act of April 29, 1993, 73d Leg., R.S., ch. 53, 1993 Tex. Sess. Law Serv. 116 (Vernon).

218. Act of April 29, 1993, 73d Leg., R.S., ch. 54, 1993 Tex. Sess. Law Serv. 117 (Vernon) (to be codified as an amendment to TEX. AGRIC. CODE ANN. § 201.026(c)).

219. *Id.* § 2, at 118 (to be codified at TEX. AGRIC. CODE ANN. §§ 201.301-201.311).

220. *Id.* (to be codified at TEX. AGRIC. CODE ANN. § 201.302).

221. *Id.* § 1, at 117 (to be codified as an amendment to TEX. AGRIC. CODE ANN. § 201.026(a)).

222. TEX. HEALTH & SAFETY CODE ANN. ch. 502 (Vernon 1992).

223. Act of June 8, 1993, 73d Leg., R.S., ch. 528, 1993 Tex. Sess. Law Serv. 1974 (Vernon).

ous, which are reportable at 500 pounds.<sup>224</sup>

### 1. *Worker Right to Know Provisions*

The bill clarifies that state worker right to know provisions apply only to public employers.<sup>225</sup> Instead of annual education and training sessions on chemicals, the new provision stipulates that employee training will be provided as often as an employer deems necessary.<sup>226</sup> Employers must report accidents involving chemical exposures or asphyxiation within forty-eight hours of the occurrence if it is fatal to an employee or results in the hospitalization of five or more employees.<sup>227</sup> The Health Department director may also assess administrative penalties against a public employer for violating the law or board rules or orders. These penalties are capped at \$500 per day for a violation.<sup>228</sup> Civil penalties are capped at \$2,000 per day for each violation up to a total of \$20,000 each; criminal penalties are punishable by a fine of not more than \$10,000 per violation per day up to \$100,000.<sup>229</sup> The award of a civil or criminal penalty does not affect the rights of an employee or other employer to recover damages under any other law.<sup>230</sup>

### 2. *Community Right to Know Provisions*

Except for fees and penalties, the community right to know provisions are generally identical for manufacturers, public employers, and non-manufacturing facilities. Facility operators covered by the law are required to compile, maintain, and submit to the Health Department information on hazardous chemicals present in the facility that exceed thresholds established by the EPA.<sup>231</sup> Citizens may now request copies of workplace chemical lists directly from the manufacturer or public employer rather than the Health Department.<sup>232</sup> Non-manufacturing employers would not be required to allow direct citizen access.<sup>233</sup> Fire department representatives may conduct on-site inspections of reportable chemicals for the purpose of emergency planning.<sup>234</sup> The Health Department may enter a facility at reasonable times for spot checks or to investigate complaints.<sup>235</sup>

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224. *Id.* § 2, at 1990 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.006).

225. *Id.* § 1, at 1976 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 502.003).

226. *Id.* at 1981 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 502.009).

227. *Id.* at 1982 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 502.012).

228. Act of June 8, 1993, § 1, at 1983 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 502.014).

229. *Id.* at 1985 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 502.015-016).

230. *Id.*

231. *Id.* § 2, at 1990 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.006).

232. *Id.* at 1990 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.007).

233. *Id.*

234. Act of June 8, 1993, § 2, at 1991 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.008).

235. *Id.* at 1991 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.009).

If a violation is found, the Department may assess administrative penalties of \$500 per day for violations up to a cap of \$5,000 for each violation by manufacturers; for public employers and non-manufacturers, the penalty would be \$50 per day up to \$1,000.<sup>236</sup> Manufacturing and public employers are subject to civil penalties of up to \$5,000 for knowingly disclosing false information or negligently failing to disclose the hazard as required.<sup>237</sup> A criminal penalty of up to \$25,000 is also possible when the false disclosure or negligence proximately caused an occupational disease or injury.<sup>238</sup> Non-manufacturing employers would not be subject to civil or criminal penalties. The bill also allows the Board of Health to collect annual filing fees from facility operators.<sup>239</sup>

## E. AIR

### 1. *The Texas Clean Air Act*

In July, 1992 the EPA published final rules to implement Title V of the 1990 Federal Clean Air Act Amendments.<sup>240</sup> Title V requires states to develop operating permit programs. House Bill 2049 amends the Texas Clean Air Act to bring the state into compliance with the requirements of Title V by giving the state adequate statutory authority to issue permits and promulgate rules that demonstrate the state's permit program complies with federal requirements.<sup>241</sup> The Texas Clean Air Act provisions enacted in 1991 to implement the federal Clean Air Act Amendments were based on the assumption that Texas' pre-construction permits would be rolled into the federally-mandated operating permit so sources would eventually have only one permit. House Bill 2049, however, provides for a two permit system: pre-construction permits and Title V operating permits co-exist as separate programs.<sup>242</sup>

The legislation provides for permit conditions of general applicability by rule.<sup>243</sup> It includes provisions for the reopening or revision of federal operating permits, notice and public hearing requirements, exemptions for certain federal sources from obtaining a federal operating permit, and provisions for revocations and permit exemptions.<sup>244</sup> It also contains a conflict of interest provision providing that the executive director of the board may not issue a

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236. *Id.* at 1991 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.010).

237. *Id.* at 1993 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.013).

238. *Id.* at 1993 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.014).

239. *Id.* at 1993 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 505.016).

240. *See* Operating Permit Program, 57 Fed. Reg. 32,250 (1992) (to be codified at 40 C.F.R. Part 70).

241. Act of June 9, 1993, 73d Leg., R.S., ch. 485, 1993 Tex. Sess. Law Serv. 1888 (Vernon) (effective June 9, 1993, except § 25 (striking provision in TEX. HEALTH & SAFETY CODE § 382.0622 (b) that unexpended money in the clean air fund at the end of each biennium shall be transferred to the general revenue fund) effective September 1, 1993).

242. *Id.* § 7, at 1890 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 382.0511(a) & (c)).

243. *Id.* § 8 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 382.0513).

244. *Id.* § 10-27, at 1891-1902 (to be codified as an amendment to Chapter 382, TEX. HEALTH & SAFETY CODE ANN.).

permit for a solid waste incineration unit if any member of the board or the executive director was responsible for the design, construction, or operation of the unit.<sup>245</sup> The bill also provides that an increase in annual operating hours is not considered a modification of a permit.<sup>246</sup>

## 2. *Area Emission Reduction Credit Organizations*

In non-attainment areas for ozone (Houston, Beaumont, Dallas and El Paso), the Federal Clean Air Act limits new construction and expansion of industrial facilities.<sup>247</sup> A company that wants to construct or expand must produce emissions offsets in an amount greater than the amount of new air pollution that it will create. Senate Bill 513 authorized the creation of regional organizations called Area Emission Reduction Credit Organizations.<sup>248</sup> The purpose of these organizations would be to acquire air pollution offsets to use for economic development in the nonattainment areas.<sup>249</sup>

## F. MISCELLANEOUS

### 1. *Exemption from Ad Valorem Taxes for Pollution Control*

House Bill 1920<sup>250</sup> was contingent on the passage of a constitutional amendment, House Joint Resolution 86, which was approved by the votes on November 2, 1993. The bill provides for an exemption from ad valorem taxes.<sup>251</sup> Property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States or Texas, or a political subdivision of Texas, for the prevention, monitoring, control, or reduction of air, water, or land pollution is exempt.<sup>252</sup> One seeking the tax exemption must apply to the Executive Director of the TNRCC, who then sends a copy of the application to the Chief Appraiser for the county where the property is located.<sup>253</sup> If the Executive Director determines that the facility, device, or method is used wholly or partly to control pollution, he then issues a letter to that effect.<sup>254</sup> The Executive Director's determination is conclusive.

### 2. *Liability Caps for Coastal Oil Spills*

Senate bill 1049 amends the Oil Spill Prevention and Response Act of

245. *Id.* § 22, at 1899 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 382.0591).

246. *Id.* § 4, at 1889 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. 382.003(9)(D)).

247. *See* 42 U.S.C.A. § 7401 (West 1983 and Supp. 1993).

248. Act of May 11, 1993, 73d Leg., R.S., ch. 128, 1993 Tex. Sess. Law Serv. 276 (Vernon) (to be codified at TEX. HEALTH & SAFETY CODE ANN. ch. 384).

249. *Id.* § 1, at 277 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 384.002).

250. Act of May 25, 1993, 73d Leg., R.S., ch. 285, 1993 Tex. Sess. Law Serv. 1324 (Vernon).

251. *Id.* § 1, at 1324 (to be codified at TEX. TAX CODE ANN. § 11.31).

252. *Id.* at 1325 (to be codified at TEX. TAX CODE ANN. § 11.31(b)).

253. *Id.* (to be codified at TEX. TAX CODE ANN. § 11.31(c)).

254. *Id.* (to be codified at TEX. TAX CODE ANN. § 11.31(d)).

1991 to cap liability for natural resource damage from coastal oil spills.<sup>255</sup> It limits the total liability for all natural resource damages for an actual or threatened spill from tank vessels, other vessels, and terminal facilities.<sup>256</sup> If the spill resulted, however, from gross negligence or misconduct, or from a violation of federal or state safety, construction, or operating regulations, the person responsible would be liable for the full amount of all damages to natural resources.<sup>257</sup> In addition, it requires the owner of a terminal facility or vessel to maintain evidence of financial responsibility.<sup>258</sup>

### 3. *Exempting Units of Local Government from Superfund Liability as Subsequent Owners*

Senate Bill 570 exempts local governments from the definition of potentially responsible parties under the state Superfund statute.<sup>259</sup> It provides that a political subdivision, or an officer or employee of the political subdivision, is not a person responsible for solid waste released or threatened to be released from a facility or site if the political subdivision acquired ownership or control through bankruptcy, tax delinquency, abandonment, or other circumstances in which the subdivision involuntarily acquired title by virtue of the subdivision's function as sovereign.<sup>260</sup>

### 4. *Preempting Local Government Regulation of Pesticides*

Senate Bill 609<sup>261</sup> amends the Agriculture Code and the Texas Structural Pest Control Act, in response to the United States Supreme Court's decision in *Wisconsin Public Intervenor v. Mortier*.<sup>262</sup> In *Mortier*, the Court held that local governments may pass stricter regulations than state and federal codes for the regulation of pesticides.<sup>263</sup> Senate Bill 609 prohibits cities, towns, counties, or other political subdivisions of the state from adopting any ordinance, rule, or regulation regarding pesticide sale or use.<sup>264</sup>

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255. Act of June 17, 1993, 73d Leg., R.S., ch. 776, 1993 Tex. Sess. Law Serv. 3032 (Vernon).

256. *Id.* § 9, at 3039 (to be codified as an amendment to TEX. NAT. RES. CODE ANN. § 40.203).

257. *Id.*

258. *Id.* § 8, at 3038 (to be codified as an amendment to TEX. NAT. RES. CODE ANN. § 40.201).

259. Act of May 16, 1993, 73d Leg., R.S., ch. 159, 1993 Tex. Sess. Law Serv. 313 (Vernon) (effective May 16, 1993) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361.271).

260. *Id.* § 1, at 314.

261. Act of May 7, 1993, 73d Leg., R.S., ch. 96, 1993 Tex. Sess. Law Serv. 185 (Vernon) (effective May 7, 1993).

262. 111 S. Ct. 2476 (1991).

263. *Id.* at 2479.

264. Act of May 7, 1993 (to be codified at TEX. AGRIC. CODE ANN. § 76.101(d) and TEX. REV. CIV. STAT. ANN. art. 1356-6, § 11-C (Vernon 1987)).

