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## Environmental Law

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# ENVIRONMENTAL LAW

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## I. INTRODUCTION

**T**HIS Article reviews judicial developments in Texas environmental law between October 1, 1994 and October 1, 1995. This Article also reviews the new environmental legislation passed by the Texas Legislature during this same survey period.

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## II. JUDICIAL DEVELOPMENTS

During the survey period, Texas appellate courts heard several environmentally-related cases both under Texas environmental statutes and common law. The first case reviewed involved the liability of corporate officers and directors for environmental costs incurred by the State after a corporation loses its corporate privileges. The courts also reviewed two criminal convictions under environmental statutes. The two cases did not focus on what constitutes or who may be liable for environmental crimes. The courts in these cases focused more on general criminal law issues. Nonetheless, the fact that two appellate decisions were handed down during the survey period indicates, although not scientifically, that perhaps criminal prosecution under Texas environmental laws is more likely now than it was several years ago. The other cases reviewed in this Article involved several other environmental issues. One addressed the scope of the preemptive effect of the Federal Insecticide, Fungicide and Rodenticide Act on state common law claims involving products regulated under this statute. Another case addressed the issue of the liability of a property owner/waste generator for injuries to an independent contractor's employee allegedly caused by the waste generated by the property owner. Finally, a landowner's claims against a waste generator were rejected by a court because the disposal of waste on the landowner's property was carried out by an independent contractor.

### A. LIABILITY OF CORPORATE OFFICERS AND DIRECTORS FOR ENVIRONMENTAL COSTS INCURRED AFTER A CORPORATION LOSES ITS CORPORATE PRIVILEGES

Corporate officers and directors have faced potential personal liability for corporate environmental liabilities under federal environmental statutes for many years. Texas courts have also imposed liability for a company's failure to comply with Texas environmental statutes directly on corporate officers and employees.<sup>1</sup> During this survey period, in *Cain v. State*,<sup>2</sup> the question of officer and director liability was an issue faced by the Austin Court of Appeals. This case, however, focused on more narrow issues. The issue was the liability of corporate officers and directors for a company's environmental liabilities for a company that had ceased to exist. The court held that if the liability constituted a "debt" under the Texas Tax Code and the debt arose after the action or inaction that caused the loss of corporate privileges, then the corporate officers and directors would be liable for that debt.<sup>3</sup>

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1. See *State v. Malone Serv. Co.*, 853 S.W.2d 82 (Tex. App.—Houston [14th Dist.] 1993, writ denied). See also Scott D. Deatherage et al., *Environmental Law*, 47 SMU L. REV. 1131, 1136-37 (1994) (discussing *Malone* and its potential effect on corporate officers and employees).

2. 882 S.W.2d 515 (Texas App.—Austin 1994, no writ).

3. *Id.* at 519-20.

In *Cain*, the State sued Timber Creek Oil Company ("Timber Creek") and two of its officers, Larry Cain ("Cain") and Larry McKay, for the costs the Texas Railroad Commission ("Railroad Commission") incurred to plug certain oil wells operated by Timber Creek. Before plugging the wells, the Railroad Commission had ordered Timber Creek to plug the wells. Timber Creek did not comply with this order. The Railroad Commission authorized the expenditure to plug the wells on December 19, 1989. Subsequently, the annual franchise tax report for Timber Creek was not filed. This report was due on March 15, 1989. Under operation of Texas law, the corporate charter of the company was forfeited on June 23, 1989. Between July 1989 and December 1989, the Railroad Commission expended over \$49,000 to plug the Timber Creek wells. The State then filed suit against Timber Creek and the two officers to collect the plugging expenses and the costs of bringing the cause of action. The State brought suit under section 89.083 of the Texas Natural Resources Code.<sup>4</sup>

The opinion handed down by the Austin Court of Appeals upheld personal liability imposed by the trial court on Cain for Timber Creek's liability for well plugging costs.<sup>5</sup> The State based its theory of liability against Cain on section 171.255(a) of the Texas Tax Code.<sup>6</sup> Under this provision, if the corporate privileges are forfeited for failure to file a report or pay a tax or penalty, then the officers or directors may be liable for the debts of the corporation.<sup>7</sup> For the officers or directors to be personally liable, the debt must be created or incurred (1) *after* the date on which the relevant report, tax, or penalty is due and (2) *before* the corporate privileges are revived.

The trial court, in a bench trial, held Cain liable for the plugging costs.<sup>8</sup> Cain appealed, asserting that the debt was incurred prior to March 15, 1989, when the franchise-tax report was due.<sup>9</sup> On that basis, he claimed that he was not personally liable for the plugging costs.<sup>10</sup>

Cain argued that section 171.255(a) should be strictly construed because it is penal in nature. He further asserted that the debt was created when the event that authorized the debt occurred.<sup>11</sup> He argued that the debt was created when the Railroad Commission issued its order to require well plugging by Timber Creek in December 1988.<sup>12</sup>

The Austin Court of Appeals was thus faced with the question of whether the "debt" was "created" after the date the franchise report was due. The first issue the court had to determine was the meaning of the term "debt" under section 171.255(a) of the Texas Tax Code. To resolve

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4. TEX. NAT. RES. CODE ANN. § 89.083 (Vernon 1993 & Supp. 1996).

5. 882 S.W.2d at 516.

6. TEX. TAX CODE ANN. § 171.255(a) (Vernon 1992).

7. *Id.*

8. 882 S.W.2d at 516.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

this question, the court looked to section 171.109 of the Tax Code,<sup>13</sup> which addresses the definition for purposes of calculating corporate surplus. The definition found in section 171.109 provides that the term debt means "any legally enforceable obligation measured in a certain amount of money which must be performed or paid within an ascertainable period of time or on demand."<sup>14</sup> Cain argued this definition does not apply.<sup>15</sup> The court rejected Cain's argument and determined that the definition under section 171.109 applied to section 171.255(a).<sup>16</sup>

The determination of the meaning of the term debt for purposes of section 171.255(a) was just the first step. The next issue was when the debt was "created." A judicial device known as the "relation back doctrine" had to be addressed. In several prior cases, courts used this doctrine to avoid imposing direct liability on corporate officers and directors. These cases also involved claims under section 171.255(a) of the Tax Code or a predecessor statute. In these cases, in deciding whether corporate officers or directors were personally liable, the courts determined that the liabilities were created *after* the corporation forfeited its corporate privileges. However, the courts concluded that the debt "related back" to an event *prior* to forfeiture. Based upon this conclusion, the corporate officer or director was not held liable by virtue of the relation-back doctrine.<sup>17</sup>

The Austin Court of Appeals was critical of this approach. The court stated that the relation-back doctrine originated in equity and was used to effectuate justice while maintaining the appearance of equity.<sup>18</sup> The court concluded that the prior decisions "have not engrafted upon section 171.255(a) an appendage holding that officers and directors are never personally liable whenever it may appear that a post-forfeiture debt has some connection to a pre-forfeiture event, cause, or circumstance."<sup>19</sup> The relation-back doctrine was generally used to maintain parties' lawful intentions, preserve rights, and afford otherwise non-existent remedies.<sup>20</sup> The Austin Court of Appeals construed *Curry* and its progeny to maintain the status quo at the time contracts were entered. The party seeking payment expected that the debt would be placed on a corporation with limited liability.

The Austin Court of Appeals then refused to relate the debt of Timber Creek for plugging costs back to a point before the forfeiture of Timber

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13. TEX. TAX CODE ANN. § 171.109 (Vernon 1992).

14. *Id.*

15. 882 S.W. 2d at 516 n.1.

16. *Id.*

17. The Austin Court of Appeals reviewed the decisions in *Schwab v. Schlumberger Well Surveying Corp.*, 145 Tex. 379, 198 S.W.2d 79 (1946), and *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.2d 109 (Tex. App.—Dallas 1984, no writ). Several other cases were cited by the Austin Court of Appeals as having followed the *Curry* case.

18. 882 S.W.2d at 518.

19. *Id.*

20. *Id.*

Creeks corporate privileges.<sup>21</sup> It did not believe that any equitable basis existed for doing so.<sup>22</sup> The court cited a Texas Supreme Court decision in concluding that the statutory provision allowing recovery of corporate debts created after forfeiture of corporate privileges was designed “to prevent wrongful acts of culpable officers and directors” and to protect the public and those dealing with the corporation.<sup>23</sup> The Austin Court of Appeals believed imposing the debts on Cain served that purpose. The court concluded Cain was responsible for the failure of the corporation to plug the wells.<sup>24</sup> The court did not believe Cain denied his “culpability” but merely sought to avoid responsibility by arguing a particular statutory construction.<sup>25</sup>

The court then turned to the strict construction argument. Cain proposed that this doctrine be used to determine that the debt was not created after the corporate privileges were revoked.<sup>26</sup> The court was perplexed. It believed the strictest construction was that a debt only arises when it is liquidated.<sup>27</sup> Any other reading, according to the court, would be expansive.<sup>28</sup> It concluded, then, that the plugging costs became *liquidated* when the Railroad Commission expended funds to plug the wells, not when it approved the expenditure of those funds.<sup>29</sup> In other words, the Railroad Commission could not have sought recovery until it actually *incurred* the costs.

For corporate officers and directors, particularly of small corporations that may be dissolved at some point, this case, if adopted more broadly, could have important ramifications. This is particularly true because the Austin Court of Appeals hears many, if not most, cases brought under Texas environmental statutes. A corporate officer or director may face potential liability for the debts allegedly arising for acts or omissions that happened many years before but only become liquidated obligations many years later. Events that lead to environmental liabilities often do not result in environmental harm or such harm is not discovered for many years or decades. For a variety of reasons, it is not unexpected that small corporations will have ceased to exist during the time it takes for environmental harms to manifest themselves. If the Austin Court of Appeals position is widely applied in environmental cases, officers and directors may be exposed to liability for the costs incurred today to remediate environmental harms arising from a corporation’s acts or omissions that occurred decades before.

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21. *Id.* at 519.

22. *Id.* at 519-20.

23. 882 S.W.2d at 519-20 (citing *Schwab*, 145 Tex. at 383, 198 S.W.2d at 81.)

24. *Id.* at 520.

25. *Id.*

26. *Id.* at 516.

27. *Id.* at 518.

28. 882 S.W.2d at 518-19.

29. *Id.* at 519-20.

## B. CRIMINAL CASES

In *State v. Empak, Inc.*<sup>30</sup> the question of a corporation's right to a speedy trial was the main issue before the Fourteenth District Court of Appeals in Houston. The case involved three counts of misdemeanor water pollution violations against Empak, Inc. ("Empak"). The district court granted Empak's motion to dismiss the information based on violation of the speedy trial requirements of the federal and state constitutions.<sup>31</sup> The State appealed the dismissal.

The appeal raised two issues. First, the State contended that no speedy trial right enured to the benefit of a corporation.<sup>32</sup> Second, even if it did, the State argued that the speedy trial right of Empak had not been violated.<sup>33</sup>

The first issue was the question of whether a corporation has a right to a speedy trial under the federal and Texas constitutions. In this regard, the court determined that corporations have the same speedy trial rights as an individual.<sup>34</sup> In construing this right, the court recognized that the Texas courts look to the federal court decisions interpreting the federal constitution in determining state constitutional rights.<sup>35</sup> The State argued that no speedy trial right applies to a corporation because this right is a "personal right."<sup>36</sup> The State's argument was founded on the fact that a corporation cannot be imprisoned prior to trial.<sup>37</sup>

The court, however, pointed out that federal courts have applied this right to corporations.<sup>38</sup> The court believed that a delay in bringing the matter to trial can have numerous serious adverse effects on corporations.<sup>39</sup> These include being forced to live under a cloud of anxiety, suspicion, and hostility; a draining of resources; subjection to public and commercial obliquity; restraint on liberty; and loss of contracts, customers, and public good will.<sup>40</sup>

In determining whether this right was violated, the court used the *Barker* test created by the U.S. Supreme Court.<sup>41</sup> The first issue was whether the length of the delay was presumptively unreasonable. The court concluded a delay exceeding 8 months meets the test.<sup>42</sup> The second prong of this test was the examination of the cause of the delay in bringing the company to trial. The State offered no evidence and no justifica-

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30. 889 S.W.2d 618 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

31. *Id.* at 621.

32. *Id.*

33. *Id.*

34. *Id.*

35. 889 S.W.2d at 621.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 622.

40. *Id.* 889 S.W.2d at 622 (citing *United States v. Sears, Roebuck and Co.*, 677 F. Supp. 1042, 1046 (C.D. Cal., 1988), *rev'd on other grounds*, 877 F.2d 734 (9th Cir. 1989)).

41. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

42. 889 S.W.2d at 623-34.

tion for the delay.<sup>43</sup> At oral argument, the Assistant District Attorney admitted that the case had simply "fallen through the cracks."<sup>44</sup> The court concluded that when the delay arises through the government's negligence and when presumed prejudice is uncontroverted, the court should grant the defendant relief.<sup>45</sup>

The next question was timely assertion of the company's speedy trial right. The government's position was dismissed out of hand. The court pointed out that the company could not assert this right until it received the summons.<sup>46</sup>

Finally, the court turned to the delay's prejudicial effect on the defendant. The court concluded that Empak had presented some evidence of delay and the State had failed to controvert that evidence.<sup>47</sup> Thus, the court ruled that potential prejudice had been demonstrated.<sup>48</sup> In so holding, the court identified three types of prejudice: (1) vexing pre-trial incarceration; (2) an accused's anxiety and concern while awaiting trial; and (3) the possibility the defense will be impaired.<sup>49</sup> The court concluded that a corporation can be vexed by at least two of these issues.<sup>50</sup> To be in business, Empak needed to be in compliance with environmental laws and regulations. Given the time between the issuance of the notices of violation and the summons, Empak had not informed its clients of the investigation. The summons would subject Empak to suspicion, public and commercial disrepute, and the possible loss of customers and contracts previously negotiated.<sup>51</sup>

The court pointed out that potential, not actual, prejudice is all that needs to be shown.<sup>52</sup> Empak put on evidence that it had closed its files with respect to the incident. The court concluded that the 29 to 42 month delay between receiving the notices of violations and service and the 28 month delay between being charged and being served was presumptively unreasonable.<sup>53</sup> The State provided no justification for this delay and it did not even attempt to rebut the presumption. Since the evidence of some potential prejudice was uncontroverted by the State, the court upheld dismissal of charges because of the violation of the speedy-trial rights of Empak.<sup>54</sup>

*State v. Dean*,<sup>55</sup> the second criminal environmental case handed down during the review period, again focused more on criminal procedure than

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43. *Id.* at 624.

44. *Id.*

45. *Id.*

46. *Id.*

47. 889 S.W.2d at 624-25.

48. *Id.* at 625.

49. *Id.* at 624.

50. *Id.*

51. *Id.*

52. 889 S.W.2d at 624-25.

53. *Id.* at 625.

54. *Id.*

55. 895 S.W.2d 814 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd).



the nature of environmental crimes. In *Dean* two men were sentenced after entering pleas of no contest to charges of unlawfully disposing of hazardous waste without a permit and unlawful transportation for disposal of hazardous waste to an unpermitted location. The laws allegedly violated were sections 361.221(a)(1) and (2) of the Texas Solid Waste Disposal Act.<sup>56</sup> Both men were convicted and sentenced to three years in prison and a fine of \$2,500. The defendants then filed a motion for "shock probation." "Shock probation" arises under the Texas Code of Criminal Procedure, which allows the judge to suspend further execution of the sentence and to place the defendant on probation under the terms and conditions of the Criminal Code.<sup>57</sup> The judge may grant "shock probation" if the judge does not believe the defendant would benefit from further incarceration. The trial court granted shock probation.<sup>58</sup>

The single issue of the State's appeal was that the Criminal Code required that the defendants have served at least some time in the State prison system before shock probation could be granted.<sup>59</sup> The Houston Court of Appeals for the Fourteenth District held that the Criminal Code in effect at the relevant time would allow imprisonment served in the county jail to meet the prior incarceration requirement.<sup>60</sup>

### C. SCOPE OF FIFRA PREEMPTION OF STATE LAW CLAIMS

In *Elam v. Quest Chemical Corporation*,<sup>61</sup> the question of the preemptive effect of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") on state law claims based upon "inadequate labeling" or "failure to warn." This case involved a woman's claims for damages against a weed killer manufacturer for personal injuries allegedly resulting from exposure to the weed killer during her employment with the City of Beaumont.<sup>62</sup> The trial court had granted summary judgment in favor of Quest Chemical Corporation ("Quest Chemical").<sup>63</sup> The Beaumont Court of Appeals upheld the summary judgment with respect to negligence claims.<sup>64</sup> However, the court of appeals reversed and remanded the grant of summary judgment with respect to claims that the weed killer was unreasonably dangerous for its intended purpose and therefore defective and claims for breach of implied warranty of merchantability.<sup>65</sup> On application to the Texas Supreme Court for writ of error, the Supreme Court reversed the Beaumont Court of Appeals. The Supreme Court concluded that all of the plaintiff's claims were founded

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56. TEX. HEALTH & SAFETY CODE ANN. § 361.221(a)(1) & (2) (Vernon 1992).

57. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 6(a) (Vernon 1979 & Supp. 1996).

58. 895 S.W.2d at 815.

59. *Id.*

60. *Id.* at 816.

61. 884 S.W.2d 907 (Tex. App.—Beaumont 1994).

62. *Id.* at 909.

63. *Id.* at 910.

64. *Id.* at 911.

65. *Id.* at 909 (citing and quoting *Wisconsin Public Intervenor v. Martinez*, 501 U.S. 597 (1991); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994)).

upon a failure to warn claim that inherently involved labelling issues. On that basis, the supreme court ruled the plaintiff's claims were preempted by FIFRA.<sup>66</sup>

The issue before the Beaumont Court of Appeals and subsequently the Texas Supreme Court was the preemptive effect of 7 U.S.C.A. § 136v. This section of FIFRA provides as follows:

(a) In General. A state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity. Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

The U.S. Supreme Court and the Fifth Circuit Court of Appeals determined that this provision of FIFRA only preempted labelling or packaging requirements under state law that differed from federal standards.<sup>67</sup> Thus, the first issue for the Beaumont Court of Appeals was the question of whether the improper labelling and failure to warn claims were preempted by FIFRA. Relying on the U.S. Supreme Court and Fifth Circuit Court decisions, the court concluded that the claims were precluded by the statute. The court also dismissed a related argument that the weed killer was not properly registered with the U.S. Environmental Protection Agency, because the Agency had given conditional approval based upon instructions to change the proposed label.

Although unnecessary to reach its conclusion, the court held that an individual who was an industrial hygienist and analytical chemical engineer was not qualified to opine on the legal question of whether the labelling on the product was consistent with FIFRA requirements.<sup>68</sup> The expert had no experience relevant to opining about compliance with FIFRA requirements. The court also concluded that the bare assertion without any basis in an affidavit that the labelling did not comport with FIFRA requirements was insufficient to contest a motion for summary judgment.<sup>69</sup>

The next issue was whether FIFRA preempted the claim that the product was not reasonably safe for its intended use and was therefore defective. The court held that this claim did not involve labelling. In reaching this result, the court thought it "inconceivable" that the Congress intended that through FIFRA manufacturers of chemical products "should carte blanche escape socio/economic accountability where evidence preponderates that said products are unreasonably dangerous or that implied warranties have been violated."<sup>70</sup>

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66. *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995).

67. 884 S.W.2d at 911-12.

68. *Id.* at 910.

69. *Id.*

70. *Id.* at 911.

The court also concluded that claims for breach of warranty were not predicated on labelling and packaging deficiencies.<sup>71</sup> Thus, the trial court's granting of summary judgment on this issue was reversed as well.

The defendant filed an application for writ of error to the Texas Supreme Court. The Supreme Court reviewed the detailed basis of the plaintiff's claims that the chemical was defective and its breach of implied warranty claims.<sup>72</sup> After reviewing briefly federal court precedent on the issue of FIFRA preemption of claims based upon labelling, the Texas Supreme Court turned to the evidence of the basis of plaintiff's claims. The court would have let stand causes of action for negligent testing, manufacturing, and formulating, but it held Elam's strict liability and implied warranty claims were based solely upon Quest's alleged failure to provide adequate warnings and instructions on the chemical product.<sup>73</sup> In Elam's answers to interrogatories, she stated that the product was defective because the defendant did not warn persons situated like plaintiff. She also stated that the defendant failed to warn the user of the product, therefore rendering it defective. In her brief filed with the court of appeals, she claimed that the trial court's granting of the defendant's motion for summary judgment denied her the ability to submit to the jury the adequacy of the warning on the product and her resulting damages.<sup>74</sup> The court reversed the judgment of the Beaumont court of Appeals, without hearing oral argument, and rendered judgment that Elam take nothing.

The result of the Elam case is that plaintiffs bringing claims for pesticides or other products registered under FIFRA cannot base their claims directly or indirectly on labelling requirements. To do so risks summary judgment. For defendants, the best strategy may be to couch plaintiff's claims as being based directly or indirectly upon labelling deficiencies.

#### D. PROPERTY OWNER'S LIABILITY FOR INJURIES TO INDEPENDENT CONTRACTOR'S EMPLOYEES

In *Hammack v. Conoco, Inc.*<sup>75</sup> the Houston Court of Appeals for the First District reviewed a summary judgment granted to a landowner who was sued by an employee of an independent contractor. The employee alleged that he was injured from exposure to hydrogen sulfide gas generated from waste produced by the landowner and transported and disposed of by the independent contractor. The ultimate question was what duty, if any, was owed by the landowner to the employee of an independent contractor for the risks inherent in the work of the independent contractor. The court concluded that summary judgment was proper because a landowner does not owe any such duty to an independent contractor's

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71. *Elam*, 884 S.W.2d at 911.

72. 898 S.W.2d at 819.

73. *Id.* at 820.

74. *Id.*

75. 902 S.W.2d 127 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

employee.<sup>76</sup>

The facts of the case begin with the hiring by Conoco, Inc. ("Conoco") of a company to haul produced water from several of its oil and gas production operations. The employee injured, John Hammack ("Hammack"), and another employee of the hauler picked up the produced water and hauled it to a disposal facility. The two men then drove the tanker truck back to the waste hauler's facility. There, the sludge in the bottom of the tank was removed by using an acid wash consisting of hydrochloric acid and water. It was asserted that two persons, including the operations managers, informed Hammack and his coworker not to climb on top of the truck. Hammack asserted that, as the tank truck was being drained after adding the acid wash, his coworker ordered him to climb up on the truck to determine whether the tank was emptying properly. It was undisputed that Hammack did in fact climb on top of the tank truck, where he stuck his head inside the open hatch. Minutes later, he was found lying on his back behind the truck. He was hospitalized and treated for the injuries he sustained.

Hammack filed suit and claimed that he was injured by hydrogen sulfide gas present in the produced water hauled from Conoco's operations.<sup>77</sup> The basis for the suit was that Conoco had failed to warn Hammack and his employer about the dangers of the hydrogen sulfide gas.<sup>78</sup> Conoco succeeded in obtaining a summary judgment. The summary judgment was granted because: (1) undisputed evidence showed that Hammack was not exposed to hydrogen sulfide gas; (2) Conoco did not owe a duty to warn Hammack of dangers arising on the premises of the waste hauler and under the waste hauler's exclusive control; (3) Conoco warned Hammack's employer of the dangers of hydrogen sulfide gas; and (4) Hammack himself was warned of the dangers of hydrogen sulfide gas.<sup>79</sup>

On appeal the plaintiffs asserted two errors: (1) the trial court erred in granting summary judgment because Conoco failed to disprove any element of the Hammack's claims as a matter of law; and (2) the summary judgment evidence revealed genuine issues of material fact.<sup>80</sup> The appellate court upheld the granting of summary judgment against the plaintiffs. The basis was that the defendant had negated an element of the plaintiffs' cause of action.<sup>81</sup> Once a defendant offers evidence in its motion for summary judgment negating a necessary element of the nonmovant's cause of action, the burden shifts to the nonmovant to introduce evidence that raises an issue of fact on that element.<sup>82</sup>

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76. *Id.* at 131.

77. *Id.* at 129.

78. *Id.*

79. *Id.*

80. 902 S.W.2d at 129.

81. *Id.* at 131.

82. *Id.* at 129-30.

In reviewing the summary judgment, the appellate court first examined the plaintiffs' cause of action. The cause of action was negligence. The threshold question in such a case is whether the defendant owed a duty to the plaintiff.<sup>83</sup> This issue is a question of law.<sup>84</sup> The court concluded no duty was owed Hammack.<sup>85</sup> The basis was that an owner or occupier of land is not required to protect an independent contractor's employees from hazards incidental to, or part of, the work the independent contractor is hired to perform.<sup>86</sup> The duty to protect the employees of the independent contractor is that of the independent contractor alone.<sup>87</sup> The undisputed evidence showed that Hammack was working for the waste hauler, not Conoco, and that Conoco did not retain control over any part of the waste hauler's work.<sup>88</sup>

In addition, any duty regarding hydrogen sulfide gas would have been fulfilled.<sup>89</sup> Conoco informed the waste hauler of the dangers of hydrogen sulfide gas with respect to the well in question. Conoco also required the waste hauler to certify that all of its employees had been trained with respect to hydrogen sulfide dangers. Conoco did not have any of its employees at the well site while Hammack and his coworker were there. Hammack worked solely under the supervision of his coworker.

More importantly, the accident did not occur on Conoco property. It occurred on the premises of the waste hauler. Although a land owner owes the independent contractor and its employees a safe place to work, according to the court, this is irrelevant to this case because of the location of the accident.<sup>90</sup> The court also rejected the argument that Conoco exercised joint control over safety procedures for the wastehauler's work. The court found no evidence to support this claim.<sup>91</sup> Finally, the plaintiffs asserted that the duty to warn arose because the work was inherently dangerous. The appeals court rejected this argument as well. The duty, in the court's view, arises only to third parties, not the independent contractor or its employees, when a party engages an independent contractor to perform inherently dangerous work.<sup>92</sup>

The case was even weaker because Hammack admitted in his deposition that he was aware of the risks of hydrogen sulfide gas. He also admitted that he looked for safety devices when he arrived at the Conoco well and questioned his coworker about exposure to the gas at the well site on the date of the accident.

The court concluded that the accident occurred at the waste hauler's

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83. *Id.* at 130.

84. *Id.*

85. 902 S.W.2d at 131.

86. *Id.* at 130.

87. *Id.*

88. *Id.*

89. *Id.*

90. 902 S.W.2d at 131.

91. *Id.*

92. *Id.*

property, not Conoco property.<sup>93</sup> The danger was incidental to or inherently a part of the independent contractor's work it was hired to perform.<sup>94</sup> Thus, Conoco was not obliged to warn the employees of the independent contractor about the danger.<sup>95</sup> Having negated the duty to warn element of the negligence cause of action, summary judgment was deemed proper by the court of appeals.<sup>96</sup>

*Hammack* is important in the environmental context for several reasons. Industrial and commercial entities engage waste haulers, environmental consultants who investigate and oversee remediation of contaminated properties, and remediation contractors to address environmental concerns on their property. The question often arises as to potential legal exposure to lawsuits by employees of those independent contractors alleging personal injury from performing environmental services. This case may provide helpful precedent for protecting those individuals or entities hiring environmental consultants and environmental contractors.

#### E. COMMON LAW LIABILITY FOR INDEPENDENT CONTRACTOR'S DISPOSAL OF WASTE

In an interesting case involving the potential liability of a generator of waste disposed of by an independent contractor, the Corpus Christi Court of Appeals upheld summary judgment granted to a company who purchased goods from a manufacturer and the manufacturer itself which generated the waste. In *Crow v. TRW, Inc.*<sup>97</sup> Ford Motor Company ("Ford") purchased seat belts from TRW, Inc. ("TRW"), which manufactured the seat belts in Mexico. TRW contracted with Anglo Iron to remove and dispose of waste seat belt parts and materials from the TRW plant. Anglo Iron reclaimed the metal parts and disposed of the non-metal scrap material. However, on one occasion one of Anglo Iron's employees disposed of the materials on Arthur Crow's ("Crow") property.

Crow subsequently filed suit against Anglo Iron, TRW, and Ford. The trial court granted summary judgment for Ford and TRW. Crow appealed. The Corpus Christi Court of Appeals first examined the appeal of the summary judgment granted to Ford. Crow alleged: (1) Ford was negligent for failure to properly supervise the disposal of the scrap materials; (2) Ford failed to require TRW to hire a reputable scrap disposing firm; and (3) Ford could not lawfully delegate its duty to properly dispose of its waste and was therefore liable for any acts of TRW and Anglo Iron.<sup>98</sup> Crow also asserted claims of trespass, intentional infliction of emotional distress, and negligence per se under the Texas Litter Abate-

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93. *Id.*

94. *Id.*

95. 902 S.W.2d at 131.

96. *Id.* at 131-32.

97. 893 S.W.2d 72 (Tex. App.—Corpus Christi 1994, no writ).

98. *Id.* at 76.

ment Act for disposing of litter in an unauthorized facility.<sup>99</sup>

In filing its motion for summary judgment on these claims, Ford argued that it had no relationship with Crow and owed him no duty with regard to TRW's scrap materials.<sup>100</sup> Although there were problems with Crow's affidavit filed in response to Ford's motion for summary judgment, the basis for the court's upholding the summary judgment was that the relationship between Ford and TRW was of manufacturer and purchaser.<sup>101</sup> Thus, the question was whether Ford owed Crow some duty to protect him from the acts or omissions of TRW. The court ruled that in order for such a duty to arise there must be some special relationship between Ford and either TRW or Anglo Iron.<sup>102</sup> Since the evidence demonstrated that no such relationship existed and Crow did not produce any evidence of a special relationship, the court concluded that summary judgment was proper for Ford.<sup>103</sup>

Turning to the issue of TRW's liability, the issues became somewhat more complex. Crow asserted four causes of action against TRW: (1) negligent hiring and supervision; (2) negligence per se; (3) trespass; and (4) intentional infliction of emotional distress.<sup>104</sup> The court concluded that TRW had failed to address the negligent hiring and supervision claim in its motion for summary judgment and reversed the granting of summary judgment on that claim.<sup>105</sup>

With respect to the other claims, TRW asserted that Anglo Iron was responsible for the disposal and that it was not liable because Anglo Iron was an independent contractor.<sup>106</sup> The evidence presented through an affidavit of a TRW employee showed: (1) TRW loses all control of and authority over the scrap material once Anglo Iron picks up the material; (2) TRW provides no instructions to Anglo Iron regarding managing or disposing of scrap material; (3) the frequency of use of Anglo Iron depends upon the amount of scrap generated; (4) delivery to Anglo Iron is on a non-regular, need basis; (5) TRW pays Anglo on a job basis, not weekly or monthly, and no deductions are made for Anglo Iron employees; and (6) TRW provides no fuel for Anglo Iron trucks used for the disposal of scrap seat belt material.<sup>107</sup> The court refused to give weight to the fact that TRW contacted Anglo Iron after the dumping of scrap material on Crow's land and instructed Anglo Iron to remove it. The court concluded this was insufficient to create an employee relationship as opposed to an independent contractor relationship.<sup>108</sup>

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99. *Id.* The Texas Litter Abatement Act is found at TEX. HEALTH & SAFETY CODE ANN. § 365.001-.034 (Vernon 1992 & Supp. 1996).

100. 893 S.W.2d at 77.

101. 893 S.W.2d, at 77.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 893 S.W.2d at 78.

107. *Id.* at 79.

108. *Id.*

In reviewing the evidence before it, the court determined that the question of whether a party is an employee or an independent contractor is a question of law.<sup>109</sup> In reviewing the evidence provided by TRW, the court concluded that the relationship between TRW and Anglo Iron was one of an independent contractor.<sup>110</sup> Thus, the court overruled the points of error raised by Crow with respect to the summary judgement granted on the other claims brought by Crow.

Again, this case may provide helpful precedent to individuals and entities engaging environmental consultants and service companies—particularly waste haulers. Even if liable under federal or state environmental statutes, the generator of waste may be able to avoid liability to third parties. Waste haulers may not be liable for injuries to third parties allegedly caused by independent waste haulers or disposers.

This case is interesting because the question arises as to how, if at all, environmental statutes have changed common law theories of recovery for environmental harm arising by virtue of the disposal of hazardous waste or solid waste by independent contractors. Under certain relevant environmental statutes, the generator generally remains liable for waste for which it arranges for disposal or transportation for disposal.<sup>111</sup> The Texas Solid Waste Disposal Act (TSWDA) imposes such liability.<sup>112</sup> The Austin Court of Appeals in a case reviewed in last year's Environmental Law Survey article determined that waste constitutes "property" under the Texas Motor Carrier Act and the Texas Railroad Commission thus had jurisdiction to govern its transportation.<sup>113</sup> One basis, albeit perhaps dicta, was that one could not abandon property such as asbestos-containing material, because a continuing duty exists under the Texas Solid Waste Disposal Act to ensure its proper disposal.<sup>114</sup>

In *Crow*, a careful analysis of statutory law was not carried out by the court. The court only passingly discussed the Texas Litter Abatement Act. This act, however, imposes criminal punishment on those who engage in improper disposal or let it occur on their land.<sup>115</sup> This act would not appear to impose any liability on the generator of the litter. On the other hand, under certain circumstances, liability may be imposed on a generator of solid waste under the Texas Solid Waste Disposal Act.<sup>116</sup> But, absent in *Crow* was any discussion of the Texas Solid Waste Disposal

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109. *Id.* at 78 (relying upon *Sherard v. Smith*, 778 S.W.2d 546, 548 (Tex. App.—Corpus Christi 1989, writ denied)).

110. 893 S.W.2d at 79.

111. See 42 U.S.C. § 9607(a)(3) (1988). This liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or "Superfund" is commonly referred to as "generator liability."

112. TEX. HEALTH & SAFETY CODE ANN. § 361.271(3) (Vernon 1992) [hereinafter TSWDA].

113. *Railroad Comm'n of Texas v. Waste Management of Texas, Inc.*, 880 S.W.2d 835 (Tex. App.—Austin, n.w.h.); Scott D. Deatherage, *Environmental Law*, 48 SMU L. REV. 1206, 1206-10, 1223 (1995).

114. *Railroad Comm'n of Texas*, 880 S.W.2d at 837.

115. TEX. HEALTH & SAFETY CODE ANN. § 365.012 (Vernon 1992).

116. TEX. HEALTH & SAFETY CODE ANN. § 361.271(3) (Vernon 1992).



Act, which may have applied to the waste generated by TRW and disposed by Anglo Iron. Perhaps plaintiff's counsel was not aware of or simply did not raise the potential violation of the Texas Solid Waste Disposal Act as a negligence per se claim.

The question ultimately may be whether in a relevant case the independent contractor status of the party actually improperly disposing of the waste shields the generator. The fact that the generator may be liable to the State under statutory law for environmental harm caused by the waste it generates, may not be sufficient under common law to show that the generator is negligent per se by virtue of the disposal or other management of the generator's waste by an independent contractor. First, the TSWDA may not provide the basis for a relevant standard of care. If the liability of a generator is properly construed as strict, it may not be relevant to a *negligence* standard. Second, the question of what duty is owed the third party still arises for the actions of an independent contractor. Interesting legal issues in certain cases may arise as the interplay between environmental statutes and common law claims continues to be determined by Texas courts.

### III. LEGISLATIVE DEVELOPMENTS

The state legislature met in regular session during the survey period. The following is a summary of the major environmental legislation enacted into law during this period. Unless otherwise noted, the effective date of all statutes is September 1, 1995.

Environmental legislation passed by the state legislature in 1995 differed from bills considered by previous legislatures in one important way: the most important bills focused on procedure. Although many bills dealt with substantive issues, such as jurisdiction over spills on the Texas coast, the underground storage tank reimbursement program, and recodification of groundwater provisions, the most important changes involved issues of procedure and rights. Befitting a legislative session dominated by tort reform, the legislature showed a keen interest in the impact of administrative proceedings on defendants in toxic-tort suits and focused much of its attention on how administrative and judicial procedures affect the rights of respondents or defendants.

#### A. MAJOR ENVIRONMENTAL LEGISLATION

##### 1. *The Audit Privilege Act*

House Bill 2473 creates a self-evaluation privilege that protects voluntary environmental and occupational health and safety audits from discovery and from admissibility in legal actions.<sup>117</sup> The widely-given rationale for this bill is that companies often undertake audits to deter-

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117. House Bill 2473 is codified at TEX. CIV. STAT. ANN. art. 4447cc (Vernon Supp. 1996). The TNRCC issued a Guidance Document interpreting House Bill 2473 on July 24, 1995. The Audit Privilege Act became effective on May 23, 1995.

mine their compliance with environmental requirements, but have learned to avoid such audits because of the danger that agencies and third parties will gain access to the audit results to use against the company. Thus, House Bill 2473 was drafted to remove a disincentive from companies performing voluntary audits of their compliance with health and safety regulations.

An audit report that meets the requirements of the act is privileged and not admissible as evidence.<sup>118</sup> Such reports are also not subject to discovery in a civil action, a criminal proceeding or an administrative proceeding.<sup>119</sup> A person who conducted the audit may not be compelled to testify regarding the audit.<sup>120</sup>

The bill provides that a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative, civil, or criminal penalty for the violation disclosed.<sup>121</sup> In order to qualify to receive immunity, however, a facility conducting an audit must give prior notice of the fact that it is planning to commence an audit, disclose when the audit uncovers a violation, and attempt to bring the facility into compliance.<sup>122</sup>

The audit privilege must be expressly waived.<sup>123</sup> Waiver does not include disclosure of audit information for the purpose of correcting violations found through the audit or disclosure subject to a confidentiality agreement.<sup>124</sup>

There are several exceptions and conditions. First, the audit privilege act only applies to the requirements of Texas statutes and regulations, not federal ones.<sup>125</sup> In addition, to being privileged, the information must have been derived through an audit.<sup>126</sup> Finally, the information cannot be disclosed to outside parties, that is, to those who are not involved in correcting the violations.<sup>127</sup>

A court may require disclosure of audit information if it finds that the privilege is asserted for a fraudulent purpose, that the material is not eli-

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118. TEX. CIV. STAT. ANN. art. 4447cc, § 5 (Vernon Supp. 1996).

119. *Id.*

120. *Id.*

121. *Id.* § 10.

122. *Id.* Jim Marston of the Environmental Defense Fund has suggested that there are likely to be court challenges to the bill's language providing that a person who voluntarily discloses a violation discovered as a result of an audit is immune from penalties if the disclosure is made "promptly" and corrective action taken within a "reasonable" time. See G. Hunter, *Legislature's Handiwork Includes Many Legal Hairballs*, TEXAS LAWYER, Dec. 18, 1995.

123. TEX. CIV. STAT. ANN. art. 4447cc, § 6 (Vernon Supp. 1996).

124. *Id.*

125. The EPA has issued its own audit policy, statement entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations." 60 Fed. Reg. 66706 (1995). The EPA policy does not provide a privilege or a blanket indemnity against agency enforcement. *Id.* at 66710. The EPA will, however, reduce civil penalties and not make criminal referrals if the company performs an audit under the requirements of its policy. *Id.* at 66706, 66707.

126. TEX. CIV. STAT. ANN. art. 4447cc, § 5 (Vernon Supp. 1996).

127. *Id.*

gible for the privilege, or that the material shows the owner/operator did not take reasonable steps to correct noncompliance with environmental or health and safety laws.<sup>128</sup>

The law excludes information that is otherwise required by law to be reported to regulatory agencies, information regulatory agencies collect through their own inspection activities, and information obtained from a source not involved with the preparation of the audit.<sup>129</sup>

Thus, House Bill 2473 offers strong protection from discovery of the information compiled during a voluntary audit and from such information being used against the company by a state regulatory agency, either in administrative or court proceedings. It is essential, however, that a company comply with all the conditions of the Act or the audit will not be privileged.

In order to gain the most protection for documents compiled during an environmental audit, an audit should be undertaken under the attorney-client privilege, in compliance with the conditions of both the State Audit Privilege Act and the EPA's audit policy. To obtain the attorney-client privilege, the audit should be requested by corporate or outside counsel to form the basis of legal advice. Any outside environmental consultants should be retained by counsel and all documents prepared by the consultants should be directed to counsel.

## 2. *The Voluntary Cleanup Bill*

House Bill 2296, codified as Subchapter S, Chapter 361, of the Texas Health and Safety Code, establishes incentives to clean contaminated sites voluntarily by releasing future landowners and future lenders from liability.<sup>130</sup> Just as with the Audit Privilege Act, the underlying concern motivating the passage of House Bill 2296 was the potential liability of private parties.

One rationale for the bill has been that the fear of liability has encouraged companies to develop previously undeveloped land (greenfields) outside of cities, while many contaminated sites within cities (brownfields) remain abandoned or underutilized.<sup>131</sup> Before now, land that was contaminated by hazardous wastes could only be certified as having been remediated in accordance with TNRCC and EPA standards if it was cleaned in accordance with (1) a TNRCC enforcement order, (2) federal or state Superfund (CERCLA) programs, or (3) the Resource Conservation Recovery Act (RCRA). Many companies prefer a voluntary cleanup program that protects them against penalties for past violations and releases future lenders and landowners from liability to the state for future cleanups.

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128. *Id.* § 7.

129. *Id.* § 8.

130. See TEX. HEALTH & SAFETY CODE ANN. § 361.601-.613 (Vernon Supp. 1996).

131. See TEX. NAT. RES. CONS. COMM'N, 20 Tex. Reg. 9255 (1995) (to be codified at 30 TEX. ADMIN. CODE §§ 333.1-.11).

Under the Voluntary Cleanup Bill, parties may notify the TNRCC of their intent to clean up a site under the existing TNRCC risk reduction rules or other applicable cleanup standards.<sup>132</sup> After the successful completion of the cleanup, the TNRCC grants the parties a certificate of completion.<sup>133</sup> This certificate releases future landowners and future lenders from liability for the area covered by the certificate.<sup>134</sup> If a person who is not a responsible party submits an application and completes the cleanup, the certification can provide a release for that party as well.

The immunity from liability for future cleanups is a release from liability to the state, not immunity from federal enforcement, but it is generally believed that once one cleans up to state standards, it is unlikely that the federal authorities will come after one for additional cleanups.<sup>135</sup> A potentially responsible party is not eligible for release from liability for future cleanups.<sup>136</sup>

House Bill 2296 also provides that a landowner that is otherwise not a responsible party that cleans up a contaminated property under the supervision, review and approval of the TNRCC receives an enforcement shield for the contamination or release and the activity that caused it.<sup>137</sup> The enforcement shield means that the TNRCC will not seek fines or penalties for past violations for the contamination that is the subject of the voluntary cleanup agreements. An applicant must be accepted into the program, come to an agreement with the TNRCC regarding the cleanup and other issues, pay TNRCC for its oversight and clean up to the standard of the risk-reduction rules or other applicable standards.<sup>138</sup>

Another potential benefit of the legislation is that it allows one who participates in voluntary cleanup to avoid the potentially higher transaction costs that may arise in negotiating with the Agency and investigating and cleaning up property under a TNRCC enforcement order.

### 3. *The Takings Legislation*

The Takings Legislation represents a major victory for the "Property-Rights Movement." Senate Bill 14, codified as Chapter 2007 of the Government Code, gives private property owners the right to sue a governmental entity for compensation if the government has, by ordinance or rule, taken an action that constitutes a taking of private property.<sup>139</sup> A taking is defined as governmental action that affects private or real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of governmental action and which is the producing cause of a reduction of at least 25% in the market

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132. TEX. HEALTH & SAFETY CODE ANN. § 361.609 (Vernon Supp. 1996).

133. *Id.*

134. *Id.* § 361.610.

135. *Id.*

136. *Id.*

137. TEX. HEALTH & SAFETY CODE ANN. § 361.606(e) (Vernon Supp. 1996).

138. *Id.* § 361.603.

139. TEX. GOV'T CODE ANN. § 2007 (Vernon Supp. 1996).

value of the affected real property.<sup>140</sup>

Whether a governmental action constitutes a taking is a question of fact.<sup>141</sup> Sovereign immunity is waived under the Act.<sup>142</sup> If a private property holder prevails in a suit, the governmental entity may either pay the judgment or repeal the action.<sup>143</sup> The property owner may recover costs and attorney fees.<sup>144</sup>

Moreover, a property owner also has a cause of action to invalidate a governmental action when the government failed to conduct a required takings impact assessment (whether or not the government action would constitute a taking).<sup>145</sup> The government's action is void if a required takings impact assessment was not performed.<sup>146</sup>

There are various exemptions for actions that are not takings under the Act.<sup>147</sup> These include such things as some acts of municipalities, except for actions that disproportionately affect areas within their extra-territorial jurisdictions; actions taken to fulfill federal mandates; actions taken to prevent public or private nuisance; actions necessary "to prevent a grave or immediate threat to life or property;" formal exercises of eminent domain powers; actions to prevent oil and gas pollution; many parks and wildlife protection rules; and actions to regulate floodplain construction.<sup>148</sup> Actions by counties are exempt until September 1, 1997.<sup>149</sup>

The Office of the Attorney General of Texas is responsible for preparing guidelines to assist government entities in identifying and evaluating actions that would constitute a taking under the Act.<sup>150</sup> The guidelines for the Takings Impact Assessments that are required by the agencies under the new law are due January 1, 1996.

A wide range of government actions, such as the construction of prisons and powerplants could be construed as takings under the new law. Thus, government contractors should evaluate proposed government action themselves according to the requirements of Senate Bill 14 to determine if the proposed action would trigger a takings impact analysis. Second, government contractors should negotiate to obtain a liquidated damages provision in their contracts so that if an injunction is sought or if a governmental act is declared void, the risk falls upon the governmental body.

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140. *Id.* § 2007.002 (5)(B).

141. *Id.* § 2007.023.

142. *Id.* § 2007.004.

143. *Id.* § 2007.024.

144. TEX. GOV'T CODE ANN. § 2007.026 (Vernon Supp. 1996).

145. *Id.* § 2007.044(a).

146. *Id.*

147. *Id.* § 2007.003(b).

148. *Id.*

149. TEX. GOV'T CODE ANN. § 2007.003(d) (Vernon Supp. 1996).

150. *Id.* § 2007.041(a).

#### 4. *The Agreed Orders Bill*

Senate Bill 1660, the Agreed Orders Bill, clarifies the TNRCC's authority to include certain provisions in agreed orders settling enforcement cases.<sup>151</sup> The bill amends several subsections to the administrative penalty sections of the Texas Water Quality Control Act, the Texas Solid Waste Disposal Act, and the Texas Clean Air Act.<sup>152</sup>

The Agreed Orders bill evolved out of the concern that agreed orders including detailed findings of fact and conclusions of law, beyond merely jurisdictional findings, encourage tort actions by private parties against the respondent.<sup>153</sup> Because Texas recognizes a cause of action in negligence per se, adverse findings and conclusions that one violated a statute or regulations could be used by plaintiffs in tort litigation.

Under the new statute, agreed orders may include statements that:

- (1) the order is not an admission of a violation of any statute or rule;
- (2) the occurrence of a violation is in dispute; and
- (3) the order is not intended to become part of a party or a facility's compliance history.

In addition, the bill provides that an agreed order is generally not admissible against a party to that order in a civil proceeding.<sup>154</sup> Finally, Senate Bill 1660 provides that the TNRCC is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction, in an agreed order compromising or settling an alleged violation.

According to the TNRCC's draft interim guidance document on the Agreed Orders bill issued September 1, 1995, the TNRCC plans to make broad use of its provisions.<sup>155</sup> The TNRCC anticipates that all of the provisions offered by Senate Bill 1660 will be incorporated into the majority of enforcement cases (over 90% of enforcement cases).<sup>156</sup> The remaining 10% will include cases that the Executive Director is preparing for litigation, and thus feels that Senate Bill 1660 language should not be available.<sup>157</sup>

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151. See TEX. WATER CODE ANN. § 26.136(p), (q) (Vernon Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. § 361.251(v), (w) (Vernon Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. § 361.252 (v), (s) (Vernon Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. § 382.088(k)(7) (Vernon Supp. 1996).

152. TEX. WATER CODE ANN. § 26.136(p), (q); TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), (w), 361.252(v), (s), 382.088(k)(7).

153. TEX. WATER CODE ANN. § 26.136(p), (q); TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), (w), 361.252(v), (s), 382.088(k)(7).

154. TEX. WATER CODE ANN. § 26.136(p), (q); TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), (w), 361.252(v), (s), 382.088(k)(7).

155. At this writing, it is not known if the TNRCC will promulgate rules to implement Senate Bill 1660 or if it will conclude that the guidance document is sufficient.

156. TEX. WATER CODE ANN. § 26.136(p), (q); TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), (w), 361.252(v), (s), 382.088(k)(7).

157. TEX. WATER CODE ANN. § 26.136(p), (q); TEX. HEALTH & SAFETY CODE ANN. §§ 361.251(v), (w), 361.252(v), (s), 382.088(k)(7).

## B. OTHER PROCEDURAL CHANGES

The TNRCC is continuing to revise its procedural rules. On July 28, 1995, it published proposed rules to implement the requirements of several bills passed during the legislative session and to consolidate the procedural rules for the agency.<sup>158</sup> As Phase I of the TNRCC's rules revision project, the rules were adopted in September 1995, with a sunset date of May 31, 1996.<sup>159</sup> Under Phase II, the TNRCC will review and revise the Phase I rules.

Provisions of the following bills passed during the 1995 legislative session are being implemented in the course of the rules revision project:

### 1. *State Office of Administrative Hearings*

Senate Bill 12 abolished the hearings division of the TNRCC and provided that hearings will be conducted by administrative law judges of the State Office of Hearings Examiners. This law became effective on May 15, 1995. Amended Chapters 261, 263, 264 and 265 of 30 TEX. ADMIN. CODE implement Senate Bill 12.<sup>160</sup>

### 2. *Delegation of Uncontested Matters to the Executive Director*

Senate Bill 741 allows the TNRCC to delegate certain uncontested matters to the Executive Director. For example, the Executive Director may issue a permit if the authorization is uncontested and notice of the application has been approved.<sup>161</sup>

### 3. *Requirements for Standing*

Senate Bill 1546 makes the requirements for legal standing in contested cases more strict. The TNRCC was directed to adopt rules specifying the factors that must be considered in determining whether a person or an association is entitled to standing in contested case hearings.<sup>162</sup>

Under section 263.25 an affected person is one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest."<sup>163</sup> The section also lists factors that shall be considered in determining if one is an affected person.<sup>164</sup>

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158. 20 Tex. Reg. 5601 (1995).

159. See TEX. NAT. RES. CONS. COMM'N, 20 Tex. Reg. 7290-7300 (1995) (codified at 30 TEX. ADMIN. CODE Chapters 261, 263, 264, and 265).

160. See TEX. NAT. RES. CONS. COMM'N, 20 Tex. Reg. 5015 (1995).

161. See TEX. NAT. RES. CONS. COMM'N, 20 Tex. Reg. 5020-5022 (1995) (to be codified at 30 TEX. ADMIN. CODE §§ 263.1 - 263.12 (July 11, 1995)).

162. See *id.* at 20 Tex. Reg. 5022-23.

163. See 30 TEX. ADMIN. CODE § 263.25 (Vernon Supp. 1996).

164. See 30 Tex. Admin. Code § 263.25.

Section 263.27 provides that a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.<sup>165</sup>

This section incorporates virtually verbatim the three-prong test for associational standing announced by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Comm'n*,<sup>166</sup> and adopted by the Texas Supreme Court in *Texas Ass'n of Business v. Air Control Bd.*<sup>167</sup>

#### IV. CONCLUSION

The cases reviewed that were handed down in the survey period present interesting issues in several areas: corporate officer and director personal liability for the company's environmental violations; criminal enforcement of environmental laws; and the interplay between environmental statutes and common law claims of private parties. The Legislation enacted by the 1995 Legislature may have wide-reaching effects on environmental enforcement and rulemaking. It may be years before the complete impact of these legislative changes is fully appreciated.

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165. *See id.* at 20 Tex. Reg. 5023.

166. 432 U.S. 333, 343, (1977).

167. 852 S.W.2d 440, 447 (Tex. 1993).





# Articles

