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Diana C. Dutton

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ENVIRONMENTAL LAW

by

*Diana C. Dutton**

THIS article reviews developments in Texas environmental law during the period from October 1, 1989, to October 1, 1990. The article is divided into two parts: Part one discusses judicial developments with particular emphasis on the Texas Clean Air Act,¹ the Texas Solid Waste Disposal Act,² and the Texas Water Quality Control Act.³ Part one further examines significant pending litigation that may affect the assessment of administrative penalties by environmental regulatory agencies. Part two outlines the major amendments to the Texas Solid Waste Disposal Act which were codified in the Health and Safety Code during the review period.

I. JUDICIAL DEVELOPMENTS

A. Permit Holders Not Immune From Common Law Actions of Nuisance or Trespass

A recent appellate court case considered the issue of whether permit holders are immune from common law nuisance or trespass actions with regard to environmental claims.⁴ The court ruled that permit status afforded no special protection from common law actions of nuisance or trespass.⁵ In *Manchester Terminal Corp.* an owner of a marine terminal storage facility, Manchester Terminal Corporation (Manchester), sued the owners and operators of a petroleum coke refinery for \$12.5 million in damages resulting from the emission of large amounts of petroleum coke dust which settled on Manchester's property. Manchester also sought a permanent injunction to prevent further transportation and storage of petroleum coke at the refinery. Manchester characterized the intruding coke dust as a trespass and a nuisance. The refinery operators and owners, Texas Tx Tx Marine Transportation, Inc. (Texas Marine) and Lyondell Petrochemical Company (Lyondell), filed a plea to the jurisdiction contending that since the Texas Air Control

* B.S. Georgetown University, J.D. University of Texas School of Law. Partner, Akin, Gump, Strauss, Hauer & Feld. The author gratefully acknowledges the significant contributions made to this article by Allison K. Obermann, Esq., Akin, Gump, Strauss, Hauer & Feld, and Mr. Simon Whiting.

1. TEX. HEALTH & SAFETY CODE ANN. §§ 382.001-.115 (Vernon 1990).

2. *Id.* at §§ 361.001-.345.

3. TEX. WATER CODE ANN. §§ 26.001-.359 (Vernon 1988 & Supp. 1990).

4. *Manchester Terminal Corp. v. Texas Tx Tx Marine Transportation, Inc.*, 781 S.W.2d 646 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

5. *Id.* at 650.

Board (TACB) had authorized and permitted the storage of petroleum coke, TACB had exclusive jurisdiction to conduct administrative hearings on matters concerning the petroleum coke, even the adjudication of a third party's claim of a trespass or nuisance. Texas Marine and Lyondell also filed a plea in abatement alleging that since Manchester had failed to exhaust its administrative remedies, the suit should be abated. The trial court granted the plea of abatement and, finding no subject matter jurisdiction, dismissed Manchester's cause of action.⁶ The court of appeals reversed and clarified the jurisdiction of administrative bodies.⁷ The court defined the primary jurisdiction doctrine as standing for the proposition that courts should not address issues within an administrative agency's delegated powers until the agency has had an opportunity to consider and remedy the situation.⁸ However, the court held that "[t]he doctrine of primary jurisdiction does not apply when the issues are 'inherently judicial,' unless the legislature has explicitly granted exclusive jurisdiction to the administrative body."⁹ Applying this standard, the court held that trespass and nuisance actions were inherently judicial in nature.¹⁰ Furthermore, the court noted that the Texas Clean Air Act (TCAA) does not give the TACB exclusive jurisdiction over actions for injunctive relief or for damages caused by air pollution.¹¹ To the contrary, section 382.004 of the TCAA specifically reserves a party's right to bring private common law actions.¹² Section 382.004 states that "[t]his chapter does not affect the right of a private person to pursue a common law remedy available to abate or recover damages for a condition of pollution or other nuisance, or for both abatement and recovery of damages."¹³

The court held that even though the TCAA gives the TACB exclusive jurisdiction to issue permits and decide emission levels, it does not give the TACB power to authorize activities that would constitute trespass and nuisance to another's property under the common law.¹⁴ Thus, the court distinguished *State v. Associated Metals & Minerals Corp.*,¹⁵ in which the trial court modified a TACB permit, from *Manchester*. In *Associated Metals* the Texas Supreme Court found that the trial court lacked authority to modify a permit because the TACB had the exclusive authority to grant permits and to set emission levels.¹⁶ In the present case, however, Manchester sought common law remedies. The court pointed out that the issues involved in the present case were not issues that required the TACB's administrative expertise.¹⁷ Since Manchester sought only judicial remedies based on common

6. *Id.* at 648.

7. *Id.* at 649.

8. *Manchester*, 781 S.W.2d at 649.

9. *Id.* (citations omitted).

10. *Id.* at 650.

11. *Id.*

12. TEX. HEALTH & SAFETY CODE ANN. § 382.004 (Vernon 1990).

13. *Id.*

14. *Manchester*, 781 S.W.2d at 650, (citing *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971)).

15. 635 S.W.2d 407 (Tex. 1982).

16. *Manchester*, 781 S.W.2d at 650.

17. *Id.*

law actions of trespass and nuisance, the doctrine of primary jurisdiction was held inapplicable cable, meaning Manchester did not have to exhaust, or even pursue, its administrative remedies before asserting its common law claims.¹⁸

B. No Exemplary Damages in Inverse Condemnation Cases

Another case considered the issue of exemplary damages against a city resulting from a nuisance or trespass perpetrated by the city. In *City of Odessa v. Bell*¹⁹ the court recognized the right of an individual to pursue a common law remedy to abate or recover damages resulting from pollution or nuisance. Similar to TCAA section 382.004,²⁰ the Texas Water Quality Control Act section 26.133 specifically reserves the right of an individual to pursue common law remedies to abate or recover damages caused by pollution or nuisance.²¹ However, the court held "that as a matter of law, a property owner is not entitled to recover exemplary damages in an inverse condemnation case brought . . . for the taking or damaging of property for public use."²² In *City of Odessa* the Bells brought an inverse condemnation action against the City of Odessa for damages resulting from a flood of sewage water onto the Bells' property. The Bells sued for damages under article 1, section 17 of the Texas Constitution, which states that a city must provide compensation for property it takes or destroys.²³ The trial court awarded actual and exemplary damages and the city appealed.

The El Paso Court of Appeals first analyzed the city's liability under the Texas Tort Claims Act (Tort Claims Act), despite the fact that the Bells had not brought suit under this statute.²⁴ Under the Tort Claims Act, a city can be held liable for negligently performing its governmental functions, but is exempt from exemplary damages for such negligence.²⁵ Traditionally, a government is not liable for negligence in the performance of proprietary functions. However, in *City of Odessa* the court noted that a new amendment to the Tort Claims Act²⁶ characterizes most city activities as "governmental," while designating only a few as "proprietary." The court interpreted this revision to mean that the Tort Claims Act is applicable to all tort actions brought against a municipality.²⁷ The court further concluded that in negligence actions brought under the Tort Claims Act a city cannot be held liable for exemplary damages regardless of whether the function was governmental or proprietary.²⁸

The court then analyzed the city's liability under article 1, section 17 of

18. *Id.* at 651.

19. 787 S.W.2d 525 (Tex. App.—El Paso 1990, no writ).

20. TEX. HEALTH & SAFETY CODE ANN. § 382.004 (Vernon 1990).

21. TEX. WATER CODE ANN. § 26.133 (Vernon 1988).

22. *Odessa*, 787 S.W.2d at 529.

23. TEX. CONST. art. I, § 17.

24. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-109 (Vernon 1990).

25. *Id.* § 101.024.

26. *Id.* § 101.0215(a).

27. *Odessa*, 787 S.W.2d at 527.

28. *Id.* at 527-28.

the Texas Constitution, which reads, in part, that "no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation."²⁹ The court held that "[t]he term 'adequate compensation' did not encompass exemplary damages since such damages are punitive in nature and have nothing to do with compensating a party for his losses."³⁰

The *City of Odessa* court distinguished *San Antonio River Authority v. Jarret Bros.*³¹ and *Ostrom v. City of San Antonio*,³² which suggested that exemplary damages might be available in cases where the city ratified or concurred in the action giving rise to complaint.³³ The court held that the present case was not exceptional and that there was no showing of the city's malicious conduct or evil intent to damage the Bells' land.³⁴

The court went on to add that it could not imagine a case where "the facts would be sufficiently egregious to support an award of exemplary damages, in addition to adequate compensation, for damage to property done by a city within the concept of public use."³⁵ The court left the possibility of exemplary damages in an inverse condemnation case up to constitutional amendment.³⁶

C. Open Meetings Act

The Texas Supreme Court recently reconciled the Texas Open Meetings Act³⁷ (TOMA) with section 17 of the Texas Administrative Procedure and Texas Register Act (APTRA).³⁸ TOMA requires that each meeting of every government body be open to the public, while section 17 of APTRA allows private communications between agency members.

In *Acker v. Texas Water Commission*³⁹ Charles Acker had been given a

29. Tex. Const. art. I, § 17.

30. *Odessa*, 787 S.W.2d at 528.

31. 528 S.W.2d 266 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

32. 77 S.W. 829 (Tex. Civ. App.—San Antonio 1903, writ ref'd).

33. *Odessa*, 787 S.W.2d at 528.

34. *Id.* Interestingly, the court found no evidence of malicious conduct even though the director of the Odessa Utilities Administration testified that he thought it was all right for effluent to overflow a draw and flood private land during heavy rain, despite the fact that the Texas Water Commission (TWC) and the Environmental Protection Agency (EPA) require the city to obtain an easement before using private property. Furthermore, the court found no evil intent even though the city's environmental control manager was unaware of the permit restrictions and the fact that the Bells had complained about the flooding as early as 1977. Additionally, despite evidence that the environmental manager had acknowledged the flooding problem but had told a neighbor that the city would continue discharging water into the draw because the city could not do anything about it in the near future the court found no evil intent. *Id.* at 528-29. The court stated that the burden of proof was on the Bells to prove that evil and malicious intent was imputed to the mayor and city council. *Id.* at 529. Thus, it would be necessary for the Bells to show that the mayor and city council concurred in or ratified the malicious acts of its departmental officials. *Id.* The court found that there was no such proof in the present case. *Id.*

35. *Odessa*, 787 S.W.2d. at 529.

36. *Id.*

37. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1990).

38. *Id.* art. 6252-13a.

39. 790 S.W.2d 299 (Tex. 1990).

favorable recommendation for a permit for a waste treatment plant by a hearings examiner at the Texas Water Commission (TWC). However, during a recess of a TWC hearing conducted by a three member commission considering the recommendation, two of the commissioners were allegedly overheard conversing about Acker's application in a restroom. The conversation purportedly concerned Acker's cost in complying with a city subdivision ordinance. When the public meeting reconvened, these two commissioners voted to deny the application. Acker brought suit claiming a violation of TOMA. The trial court granted a summary judgment for Acker based upon the asserted violation.⁴⁰ The court of appeals reversed, however, on the grounds that section 17 of APTRA allows private communications between agency members.⁴¹ The Texas Supreme Court reconciled the conflicting statutes and remanded the case to the trial court for further proceedings.⁴²

The supreme court began its discussion by elucidating the purpose of TOMA: to assure "that the public has the opportunity to be informed concerning the transactions of public business."⁴³ The court stressed the importance of openness before the public in executive and legislative decisions.⁴⁴

TOMA requires that "every regular, special, or called meeting or session of every governmental body shall be open to the public."⁴⁵ A "meeting" includes any deliberation involving a quorum of the members of a governing body at which they act on or discuss any public business or policy over which they have control.⁴⁶ Furthermore, any verbal exchange between a majority of the members concerning any issue within their jurisdiction constitutes a "deliberation."⁴⁷ Thus, the Texas Supreme Court held that when a majority of a public decision making body is considering an issue, there can be no informal discussion. If the discussion is not in compliance with TOMA, then it is an illegal meeting, according to the court.⁴⁸ The court stated that it demands "exact and literal compliance" with TOMA.⁴⁹ The TWC has recently adopted a rule subjecting all of its proceedings to TOMA.⁵⁰

The court noted that a potential conflict arose between the provisions of TOMA and an amendment of section 17 of APTRA, enacted subsequent to TOMA. This amendment provides that "[a]n agency member may commu-

40. *Id.* at 300.

41. *Id.*

42. *Id.*

43. *Id.* (citing Acts 1967, ch. 271, § 7, 1967 Tex. Gen. Laws 597-598).

44. *Acker*, 790 S.W.2d at 300.

45. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(a) (Vernon Supp. 1990).

46. *Id.* § 1(a), (d).

47. *Id.* § 1(b).

48. *Acker*, 790 S.W.2d at 300.

49. *Id.*

50. Tex. Water Comm'n, 13 Tex. Reg. 276 (1988) (*adopted* 13 Tex. Reg. 3579 (1988) (codified at 31 TEX. ADMIN. CODE § 261.4).

nicate *ex parte* with other members of the agency."⁵¹ The court noted that the court of appeals created a "gaping hole" by interpreting that section of APTRA to authorize a quorum of a state commission to meet privately to discuss a pending proceeding.⁵² Instead of interpreting section 17 of APTRA as impliedly repealing TOMA, the Texas Supreme Court said that such new laws should be "harmonized" with the existing law so as to give effect to both.⁵³ Following its own instructions, the court held that section 17 of APTRA allows commission members to meet *ex parte*, but only when less than a quorum is present.⁵⁴ The court said this interpretation is in accord with APTRA and the goal of TOMA, which is "to forbid *ex parte* deliberations between a *majority* of governmental decision-makers."⁵⁵

The court remanded the case back to the trial court to further develop the factual evidence as to whether an improper meeting had taken place.⁵⁶ The court indicated that upon finding an improperly closed meeting by two of the three members of the TWC, a summary judgment for Acker should be rendered.⁵⁷

D. Annexations and the Location of Landfills

In *City of Bells v. Greater Texoma Utility Authority*⁵⁸ the Dallas Court of Appeals addressed issues arising out of a controversy over where to locate a landfill. The court addressed annexation by a city and whether an outside district could properly locate a landfill within the city's annexed boundaries.

1. Facts and Case History

In 1980, Texoma Utility (Texoma)⁵⁹ was looking for a landfill location. In early 1981, Texoma approached Ken Grantham (Grantham) and sought permission to conduct tests on his land to determine the suitability of his property as a landfill site. In April of that year the City of Bells (Bells) began annexing properties adjacent to the Grantham tract. On May 26, 1981, Texoma applied for a landfill permit to be located on the Grantham property. Approximately one year later, on May 10, 1982, Bells passed an ordinance annexing the Grantham property. In 1984, Bells passed a solid waste disposal site ordinance restricting disposal site size and location if located within Bells's extraterritorial jurisdiction and city limits. Texoma and Grantham filed suit seeking a declaratory judgment. The trial court held that

51. *Acker*, 790 S.W.2d at 301 (citing Acts 1977, ch. 780, § 17, 1977 Tex. Gen. Laws 1959, 1960).

52. *Id.* at 301.

53. *Id.*

54. *Acker*, 790 S.W.2d at 301. This interpretation would forbid a three person commission, such as the TWC, from meeting *ex parte*, since any meeting of more than one commissioner would constitute a majority. *Id.* at 301 n.3.

55. *Id.* at 301 (emphasis added).

56. *Acker*, 790 S.W.2d at 302.

57. *Id.*

58. 790 S.W.2d 6 (Tex. App.—Dallas 1990, writ denied).

59. Texoma Utility is a public agency formed to provide water, sewer, and waste disposal services to member cities.

the ordinance restricting disposal sites was not enforceable against Texoma.⁶⁰ The trial court also held that Bells's ordinance annexing Grantham's property was invalid and, thus, Grantham's property was not within the Bells city limit.⁶¹ Bells appealed these rulings.

2. *Validity of the Annexations*

The appeals court noted that it was undisputed that Bells had failed to comply with statutory regulations governing annexations.⁶² For example, Bells failed to comply with the notice provision requiring notices to be published in a newspaper of general circulation.⁶³ The court then went on to consider whether such annexations were validated notwithstanding Bells's noncompliance with the annexation statutes.⁶⁴ The court explained the role of validating statutes, which are periodically enacted by the Texas legislature, as validating the boundary lines of certain cities, including subsequent annexations.⁶⁵ Specifically, the court addressed former article 974d-34 of the Texas Revised Civil Statutes,⁶⁶ which expressly provided that attempted annexations "may not be held invalid because they were not performed in accordance with law."⁶⁷ The court stated that the clear intent of article 974d-34 was to validate governmental acts and proceedings of cities pertaining to annexations or attempted annexations. Accordingly, the court held that Bells's attempted annexation of the Grantham tract must be upheld.⁶⁸ The court interpreted article 974d-34 to validate any annexation, even if the annexation is noncontiguous or beyond the limits of a city's extraterritorial jurisdiction.⁶⁹ Drawing conclusions from express language in a similar validating statute, article 974d-28,⁷⁰ which provides that "boundaries . . . are validated in all respects, even though the . . . extension of [the boundaries] was not in accordance with law," the court held that the Bells annexation was valid even though Bells did not comply with the law in performing the annexation.⁷¹

With respect to the annexation of the Grantham tract, the court found that there was factual evidence that Grantham had petitioned Bells for annexation.⁷² Additionally, the court found article 974d-34 validated the annexation of the Grantham tract, regardless of any procedural

60. *City of Bells*, 790 S.W.2d at 8.

61. *Id.*

62. *Id.* at 13.

63. *Id.*

64. *City of Bells*, 790 S.W.2d at 13.

65. *Id.*

66. Act of June 19, 1983, ch. 848, § 1983 Tex. Gen. Laws 4815, *repealed by* Act of August 31, 1987, ch. 149, § 49, 1987 Tex. Gen. Laws 707, 1306. Section 50(a) of the repealing legislation makes clear that the repeal of former article 974d-34 is executed law and does not affect the validations that occurred under that law.

67. *City of Bells*, 790 S.W.2d at 14.

68. *Id.*

69. *Id.* at 15.

70. TEX. REV. CIV. STAT. art. 974d-28, *repealed by* Acts 1987, ch. 149, § 49(1)(1987).

71. *City of Bells*, 790 S.W.2d at 15 (emphasis omitted).

72. *Id.* at 16.

noncompliance.⁷³

3. *Validity of the Ordinances Restricting the Size and Location of Landfills*

Notwithstanding its finding that the annexation was valid, the court noted that Bells did not comply with statutory notice provisions when it adopted the ordinance restricting the location of landfills. Bells was required to publish the proposed ordinance in a newspaper of general circulation for two weeks prior to adoption. The court held, therefore, that Bells's failure to provide notice invalidated the ordinance, which, thus, could not be used to prohibit Texoma from locating a landfill on the Grantham property.⁷⁴

4. *Texoma Has No Authority to Locate its Landfill Within Nonmember City's Boundaries*

At the heart of this lengthy case is the issue of whether a conservation and reclamation district can invade a nonmember city and locate a landfill there against that city's wishes. Texoma is a public agency of the state, created by the legislature through the "District Act"⁷⁵ to provide services to member cities. Bells is not a member city of Texoma. The court noted that in its creation, Texoma was given the authority to operate landfills within or without its district boundaries.⁷⁶ However, the court stated that neither the District Act nor the Texas Water Code grant Texoma the power to invade the boundaries of a nonmember city and locate a landfill on that site. The court explained that "authority to locate an activity outside of one's jurisdiction is not unlimited authority to locate the activity inside someone else's jurisdiction."⁷⁷ The court strengthened its argument by negative implication, noting that the Texas Solid Waste Disposal Act (TSWDA) sets forth the conditions under which a municipality may *not* restrict the operation of a solid waste facility.⁷⁸ In order to be immune from municipal restrictions limiting the operation of a facility, "the facility must have been in existence at the time the municipality was incorporated or at the time the land on which the facility sits was annexed, and the facility must be operating in substantial compliance with the applicable regulations."⁷⁹ The court held that in the present case neither of the conditions had been met and thus Bells could restrict the operation of a solid waste facility.⁸⁰

5. *City of Bells Holdings*

The court reversed the trial court, holding first that the Grantham tract

73. *Id.*

74. *Id.* at 16.

75. Act of May 2, 1979, ch. 97, 1979 Tex. Gen. Laws 177, amended by Act of June 17, 1983, ch. 398, 1983 Tex. Gen. Laws 2160.

76. *City of Bells*, 790 S.W.2d at 18.

77. *Id.*

78. TEX. HEALTH & SAFETY CODE ANN. § 361.166 (Vernon 1990).

79. *City of Bells*, 790 S.W.2d at 18.

80. *Id.*

was annexed into Bells regardless of procedural violations and by virtue of validating statutes that were in effect at the time of the annexation. Second, the court found that Bells had the authority to prevent Texoma from placing a landfill within Bells despite the invalidity of the ordinance involved. Accordingly, the court held that although the legislature granted Texoma the right to purchase land outside the geographical boundaries of its district, the legislature did not grant Texoma unilateral authority to place a landfill within the city limits of a nonmember city.

E. One-Stop Permitting and Finality of Administrative Orders

In *People Against Contaminated Environment v. Envirosafe Services of Texas, Inc.*⁸¹ Envirosafe Services of Texas (Envirosafe) applied for permits from the TWC and the TACB for the construction of a hazardous waste management facility. After a hearing, TACB denied Envirosafe's application. The order provided, however, that Envirosafe would be permitted to reopen its case before TACB within 180 days to present evidence addressing TACB's objections to the permit. People Against Contaminated Environment (PACE) intervened and appealed this provision of the order to the district court. The district court dismissed the appeal because the administrative order was not final.⁸² The Austin Court of Appeals affirmed in *People Against Contaminated Environment v. Texas Air Control Board*.⁸³ Within the 180-day period, Envirosafe filed a response and requested that the hearing be reopened. While waiting for its second hearing at TACB, Envirosafe determined that the facility design would require modifications to comply with numerous statutory and regulatory changes that had occurred during the interim. Envirosafe sought technical consultation with TWC and made a series of revisions with respect to the applications pending before both agencies.

1. One Stop Permitting

The TWC suspended its processing of the application because it was unsure whether the matter could proceed under the one-stop permitting provisions of the Solid Waste Disposal Act (TSWDA).⁸⁴ The TWC further refused Envirosafe's request that the matter be addressed in an open meeting and sought an Attorney General's opinion concerning the jurisdiction of the respective agencies to entertain the proceeding. Envirosafe then brought the present suit seeking a declaratory judgment that one-stop permitting applied to its facility. The district court held that one-stop permitting was not available since evidentiary hearings had already begun on the application at

81. 797 S.W.2d 138 (Tex. App.—Austin 1990, no writ).

82. *Id.* at 139.

83. 725 S.W.2d 810 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

84. TEX. HEALTH & SAFETY CODE ANN. §§ 361.061-.112 (Vernon 1990). These provisions allow the permit applicant to obtain only one permit for a hazardous waste management facility with the TWC as the "lead" agency, even though TACB requirements may be included in the permit requirements. *Id.* § 361.086.

TACB.⁸⁵

2. *Finality of Administrative Orders*

PACE again requested a declaratory judgment that the TACB order denying EnviroSAFE's application was now a final order. The district court declared that the TACB order was not a final administrative order. PACE again appealed.

The Austin Court of Appeals referred to its earlier decision in *TACB*,⁸⁶ wherein it first addressed this issue.⁸⁷ In this first opinion, the court ruled that the TACB order was not final because the case could be reopened within 180 days.⁸⁸ The court stated that a final administrative order is one that leaves nothing open for future disposition.⁸⁹ Following its earlier decision, the court denied PACE's appeal and held that "[s]o long as matters remain open, unfinished or inconclusive, there is no final order."⁹⁰

The court refuted PACE's argument that the TACB order was a "contingent order" that becomes final upon the happening of another event. The court noted that the TACB order did not identify an event that would cause the order to become final. Rather, the order itself provided that upon EnviroSAFE's additional proof, the matter would be reopened. The court noted that EnviroSAFE had filed additional proof and modifications and had requested that the matter be reopened. As the TACB had not yet made a disposition of EnviroSAFE's modified application, the court held that the order was not yet final.⁹¹

F. *Challenges to Landfill Permits*

In *City of Missouri City v. Texas Department of Health*⁹² the Texas Department of Health (TDH) granted Browning-Ferris, Inc. (BFI) a permit to construct and operate a solid waste landfill. The City of Missouri City, Texas (Missouri City) challenged the issuance of the permit in Travis County District Court. The district court affirmed the decision of TDH. Missouri City then appealed the lower court decision, asserting a number of objections to the issuance of the permit that the Austin Court of Appeals considered and rejected in turn.

1. *Standard of Review*

Initially the court determined the standard of review for TDH's decision to issue a solid waste landfill permit. The court stated that the permit was governed by TSWDA and, thus, "the issue on appeal 'is whether the action

85. *EnviroSAFE*, 797 S.W.2d at 140.

86. *TACB*, 725 S.W.2d 810.

87. *EnviroSAFE*, 797 S.W.2d at 140.

88. *TACB*, 725 S.W.2d at 811.

89. *EnviroSAFE*, 797 S.W.2d at 140.

90. *Id.* (citing *Railroad Comm'n v. Air Prod. & Chems., Inc.*, 594 S.W.2d 219 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)).

91. *EnviroSAFE*, 797 S.W.2d at 140.

92. No. 388-264-CV (Tex. App.—Austin 1990).

is invalid, arbitrary or unreasonable.’”⁹³ Therefore, the court argued, the scope of judicial review of TDH’s issuance of the landfill permit is governed by the substantial evidence rule.⁹⁴ “Substantial evidence” is defined to be “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁹⁵ The court noted, however, that an agency decision may be supported by substantial evidence and still be held invalid due to arbitrariness. Such arbitrariness is found when the treatment accorded parties in the administrative process denies them due process of law.⁹⁶

2. Evidence of Financial Responsibility

Missouri City contended that the record contained insufficient evidence of financial responsibility as required by TSWDA.⁹⁷ Section 361.085(c) of TSWDA requires that an applicant submit evidence of financial responsibility as assurance that the applicant has the ability to properly operate the site or provide proper closure. The TDH rule provides that evidence of financial responsibility “may be in the form of performance bonds, letters of credit from recognized financial institutions, [or] company stockholder reports.”⁹⁸

BFI submitted, among other items, annual reports of its parent corporation and the parent corporation’s assurance that it would provide full financial support for the facility if necessary. Missouri City contended that the evidence relating to the corporate parent was irrelevant to BFI’s financial responsibility because of the difficulty of piercing the corporate veil to hold the parent company liable.

The court ruled that the TDH regulation did not require one particular kind of proof of financial responsibility.⁹⁹ Moreover, the court found that the parent corporation’s financial condition was not the only evidence submitted and, thus, the record contained substantial evidence upon which a reasonable person could have concluded that BFI provided sufficient assurances of its financial responsibility.¹⁰⁰

3. Landfill Liner Design

Missouri City next attacked the approved landfill bottom liner design. Missouri City argued that TDH approved the liner without substantial evidence supporting the sufficiency of the proposed design. The court, however, deferred to TDH conclusions that the liner was designed in compliance with applicable laws and regulations. The court stated that “[w]hen the con-

93. *City of Missouri City v. Texas Dep’t of Health*, No. 388-264-CV at 3 (Tex. App.—Austin 1990) (citing TEX. HEALTH & SAFETY CODE ANN. § 361.321(e) (Vernon 1990)).

94. *Missouri City*, No. 388-264-CV at 3.

95. *Id.*

96. *Id.* at 4.

97. TEX. HEALTH & SAFETY CODE ANN. § 361.085(c) (Vernon 1990).

98. 25 TEX. ADMIN. CODE § 325.74(b)(6)(M) (1989).

99. *Missouri City*, No. 388-264-CV at 5.

100. The court noted that BFI had also submitted evidence of ownership of heavy equipment costing in excess of \$8 million, evidence that BFI currently owned and operated six landfills in Texas, “and evidence asserting that BFI offer[ed] the citizens of Texas historical competence with regard to solid waste landfill management in Texas.” *Id.* at 5.

struction of an agency rule is in issue, we accord deference to the agency's construction."¹⁰¹ Finding the TDH rule governing liners to be reasonable, the court accepted TDH's expertise in the construction of its rule. Additionally, the court found that the sufficiency of the liner design was supported by substantial evidence in the record.¹⁰² BFI provided an extensive amount of evidence to support its liner, including geotechnical reports, a Soil Liner Quality Control Plan, a Soil Management Plan, and a Concept of Operation.

4. Rule Making Authority

Missouri City next argued that TDH erred in exercising its rulemaking authority. At issue is a TDH rule that states:

The *primary concern* of the department is that the use of any land for a municipal solid waste site *does not adversely impact on public health*. However, the impact of the site upon a city . . . will be considered in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.¹⁰³

Missouri City alleged that the regulation did not comply with the mandate of TSWDA, which states that "[i]t is this state's policy and the purpose of this [act] to safeguard the health, welfare, and physical property of the people."¹⁰⁴ Missouri City argued that the TDH regulation had relegated site impact on property owners, and land use, to a role secondary to public health considerations. The court agreed with Missouri City's contention, but ruled that TDH did not abuse its discretion in adopting section 325.74(b)(5)(A).¹⁰⁵ The court held that TSWDA did not prescribe the weight an agency must give to the criteria it set forth or the priority in which they must be considered.¹⁰⁶ Furthermore, the court held that Missouri City had failed to prove that section 325.74(b)(5)(A) of the agency rules was inconsistent with the TSWDA.¹⁰⁷

5. Land Use

Missouri City contested TDH's decision about future and current land use. However, the court held that the agency had provided ample evidence such that reasonable minds could have reached findings of fact that justified TDH's decision.¹⁰⁸ Such evidence included a Land Use and Analysis Report that showed significant preexisting development (oil production and chemical manufacturing facilities) that made the area incompatible with future residential development.¹⁰⁹ Missouri City tried to argue that the landfill would have a discriminatory racial effect that would accelerate

101. *Id.* at 6.

102. *Id.* at 7.

103. 25 TEX. ADMIN. CODE § 325.74(b)(5)(A) (1989) (emphasis added).

104. TEX. HEALTH & SAFETY CODE ANN. § 361.002 (Vernon 1990).

105. *Missouri City*, No. 388-264-CV at 9.

106. *Id.*

107. *Id.*

108. *Id.* at 10.

109. *Missouri City*, No. 388-264-CV at 10 n.4.

segregation of subdivisions near the site because blacks are less able to move than whites. The court rejected this argument because Missouri City failed to cite any legal authority that suggested that a landfill permit should not be granted on the basis of negative racial effects.¹¹⁰

6. *Traffic Impact*

Missouri City contested TDH's findings with regard to traffic impacts. Specifically, it alleged that the daily trash hauling truck estimate was pure conjecture and that the agency's decision with respect to traffic impacts ignored the estimated additional 220 trucks that would haul away excavated dirt. Furthermore, the city asserted that TDH failed to comply with its regulation that requires consultation with the State Department of Highways. The court reviewed the rules in chapter twenty-five of the Texas Administrative Code, sections 325.74(b)(5)(A)(i) and 325.74(b)(5)(B), and the findings of fact of the agency.¹¹¹ The court accepted the agency conclusion that expected traffic increases due to the landfill were acceptable even including Missouri City's estimates.¹¹² Furthermore, the court concluded that there was ample evidence in the record to support the agency's decision with respect to the projected traffic impact. Finally, the court noted that TDH had consulted with the Texas Highway Department whose recommendations were not binding on the TDH anyway.¹¹³

7. *Participation of the Bureau of Solid Waste Management*

Finally, Missouri City alleged that the party status of the Bureau of Solid Waste Management (BSWM) denied the city due process of law because BSWM "became an active advocate on behalf of the applicant."¹¹⁴ The court struck down this argument, stating that the city had not explained how BSWM's participation had prejudiced the applicant and how the city had been denied due process. The court concluded that the admission of BSWM as a party to the agency proceeding to defend its own technical review during the hearing process did not violate constitutionally protected due process.¹¹⁵

Finding no error in any of the city's contentions, the court affirmed the district court and the granting of a permit to BFI for the construction of the landfill. This case illustrates typical challenges to a permit and how they may be treated by a court.

G. *Constitutional Challenge to the Assessment of Administrative Penalties*

On direct appeal, currently awaiting a decision by the Texas Supreme Court, is a case that challenges the constitutionality of administrative penal-

110. *Id.* at 11.

111. *Id.* at 11-12 (citing 25 TEX. ADMIN. CODE § 325.74(b)(5)(A)(i), (b)(5)(B) (1989)).

112. *Id.* at 12.

113. *Missouri City*, No. 388-264-CV at 13.

114. *Id.*

115. *Id.* at 14.

ties. In *Texas Association of Business v. Texas Air Control Board*¹¹⁶ the Texas Association of Business (TAB) sought a declaratory judgment that certain sections of the TCAA, Texas Water Code, and TSWDA that provide for the assessment of administrative penalties¹¹⁷ violated the Texas Constitution and, thus, were invalid and unlawful. In addition, TAB requested a permanent injunction against the enforcement of the contested statutes and rules. The district court denied relief and held, without explaining its reasons, that the challenged statutes and regulations were constitutional.¹¹⁸ TAB has appealed directly to the Texas Supreme Court contesting the constitutionality of the penalty provisions.

In its brief, TAB contends that the statutes empowering TWC and TACB "to assess administrative penalties violate the right to jury trial guaranteed by article 1, section 15 of the Texas Constitution, by failing to make jury review available at any stage in the proceedings."¹¹⁹ Additionally, TAB contends that the penalty provisions "violate the 'Open Courts' provision of the Texas Constitution, article I, section 13, by creating impermissible financial barriers to judicial review."¹²⁰

TAB's brief points out that up until 1985, the assessment of civil penalties for violations of TCAA, TSWDA, and Water Quality Act (WQA) was made exclusively through the district court.¹²¹ Those charged with violations of the acts could obtain a jury trial for the penalty assessment proceedings. In 1985, however, the Texas Legislature made sweeping changes in the enforcement schemes of TCAA, TSWDA, and WQA. The resulting amendments gave direct enforcement power to TACB and the TWC and the authority to assess civil penalties of up to \$10,000 per day per violation.¹²² Although the new statutory schemes give the state the option to pursue penalties in district court, the agencies can now assess civil penalties on their own without any allowance for a jury trial at any stage in the proceeding. TAB further notes that the only judicial review afforded to a party contesting a penalty is a proceeding before the Travis County District Court without a jury, "where the penalty is evaluated under the 'substantial evidence' rule."¹²³ Furthermore, a party cannot obtain any judicial review until that party has first paid into escrow, or posted a supersedeas bond for, the full amount of the pen-

116. No. 393,120 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Oct. 24, 1989).

117. The TACB administrative penalty authority is found in the Texas Clean Air Act, TEX. HEALTH & SAFETY CODE §§ 382.088-.089 (Vernon 1989) (formerly TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.041). The Texas Water Commission administrative penalty authority is found in TEX. WATER CODE §§ 26.136, 27.1015 (Vernon 1988), and the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.252 (Vernon 1989) (formerly TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8b).

118. *Texas Ass'n of Business v. Texas Air Control Bd.*, No. 393,120 at 2 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Oct. 24, 1989).

119. Brief for Texas Association of Business at 2, *Texas Ass'n of Business v. Texas Air Control Bd.*, No. C-9556 (Tex. filed Feb. 21, 1990) [hereinafter TAB Brief].

120. *Id.*

121. *Id.* at 4.

122. *Id.* at 4-5.

123. TAB Brief, *supra* note 119, at 5.

alty.¹²⁴ When a party fails to pay the full amount or post a bond in the full amount, the party is expressly deemed to have waived its right to any judicial review. TAB asserts that by taking away this right to a jury trial, the legislature has violated article 1, section 15 of the Texas Constitution, which unequivocally states that "[t]he right of trial by jury shall remain inviolate."¹²⁵ Furthermore, by requiring a party to pay the full amount of the penalty beforehand, the legislature has erected formidable financial barriers to the narrowest form of judicial review.¹²⁶ TAB asserts that these financial barriers to judicial review constitute a violation of the Texas Constitution's "Open Courts" provision, which guarantees all litigants the right of access to the courts.¹²⁷

1. Right to Trial by Jury

TAB cites *State v. Credit Bureau of Laredo, Inc.*¹²⁸ for the proposition that "where the State seeks to recover civil penalties, the accused is entitled to trial by jury."¹²⁹ Following *Credit Bureau of Laredo*, TAB asserts that the right to a trial by jury depends on whether the present action involves rights and remedies of a sort typically enforced in an action at common law for which a jury trial was afforded.¹³⁰ Since actions for civil penalties existed at common law, the court in *Credit Bureau of Laredo* held, and TAB now asserts, that if the State seeks civil penalties, the accused is entitled to a jury trial. TAB concludes that under *Credit Bureau of Laredo*, the right to a jury trial arises where the state pursues civil penalties through the administrative proceeding rather than a district court proceeding.¹³¹ TAB admits that not all administrative proceedings must be afforded a jury review. For example, certain matters that are merely administrative or ministerial in nature need not be reviewed by a jury.¹³² However, TAB asserts that if the matter being decided by the administrative agency is one that was historically afforded a jury trial and is one for which the state still allows jury trial, then the Texas Constitution mandates that a jury trial be afforded.¹³³

The brief of the Sierra Club, an intervenor on behalf of TACB and TWC, responds to the TAB brief by distinguishing administrative penalties from other situations where there is a clear right to a jury trial. The Sierra Club counters that the right to a jury trial is afforded only to those who had such a right at the time the Texas Constitution was adopted.¹³⁴ The Sierra Club argues that since the administrative state was not in existence when the

124. *Id.* at 6.

125. TEX. CONST. art. I, § 15.

126. TAB Brief, *supra* note 119, at 6-7.

127. *Id.* at 7.

128. 530 S.W.2d 288 (Tex. 1975).

129. TAB Brief, *supra* note 119, at 10.

130. *Id.* at 9-10.

131. *Id.* at 12.

132. *Id.* at 15.

133. *Id.*

134. Brief for the Sierra Club at 2, *Texas Ass'n of Business v. Texas Air Control Bd.*, No. C-9556 (Tex. filed Feb. 21, 1990) [hereinafter *Sierra Club Brief*].

Texas Constitution was adopted, there is no constitutional right to a jury trial in administrative proceedings.

The Sierra Club further asserts that affording a jury trial would undercut the Legislature's desire to provide a quick and flexible administrative remedy to address violations of state environmental laws. It argues that TACB and TWC were given the power to assess penalties to increase the agencies' ability to obtain quicker compliance and provide additional deterrence to violators.¹³⁵

The Sierra Club distinguishes *Credit Bureau of Laredo* by reasoning that administrative penalties are not civil penalties and, therefore, *Credit Bureau of Laredo* does not apply to the present case. Administrative penalties, the Club explains, are a creature of an administrative state, while civil penalties have to be brought in an action before a court. Since the assessment of an administrative penalty does not require an action, it should not require a jury trial.¹³⁶

Furthermore, the Sierra Club points out that article I, section 15 of the Texas Constitution provides for a jury trial only if the right to such a trial existed under common law at the time the Constitution was adopted.¹³⁷ Since administrative penalties did not exist at common law, the right to a jury trial does not attach.

2. Financial Barriers Violate the "Open Courts" Provision

In its brief, TAB sets forth the "Open Courts" provision of the Texas Constitution. This provision states that "[a]ll courts shall be open, and every person for an injury done to him . . . shall have remedy by due course of law."¹³⁸ TAB asserts that this provision guarantees all litigants the right of access to the courts.¹³⁹ TAB alleges that the requirement of payment in escrow or posting of a supersedeas bond in the full amount of the penalty prior to judicial review creates an impermissible financial barrier to judicial review. TAB cites *Dillingham v. Putnam*¹⁴⁰ for the proposition that "a party's right to appeal . . . cannot be made to depend on his ability to give a bond which will within itself secure . . . full satisfaction of his judgment."¹⁴¹

The Sierra Club responds to TAB's argument by stating that the "Open Courts" provision protects the right of access to the courts only for common law causes of action.¹⁴² The Sierra Club raises *Stanfield v. Texas Department of Public Safety*,¹⁴³ wherein the court held that the right to appeal an administrative order does not exist unless specifically granted by statute.¹⁴⁴

135. *Id.* at 6.

136. *Id.* at 13.

137. *Id.* at 14.

138. TAB Brief, *supra* note 119, at 16 (citing TEX. CONST. ART. I, § 13).

139. *Id.* at 17.

140. 109 Tex. 1, 14 S.W. 303 (1890).

141. TAB Brief, *supra* note 119, at 18 (citing *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303, 304 (1890)).

142. Sierra Club Brief, *supra* note 134, at 16.

143. 422 S.W.2d 14, 17 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

144. Sierra Club Brief, *supra* note 134, at 16.

Furthermore, the Sierra Club asserts that the escrow and supersedeas bond mechanisms created to secure the payment of a penalty are reasonable and protect against a violator using the judicial review process in an attempt to delay payment through a meritless appeal.¹⁴⁵ The Sierra Club warns that if the Texas Supreme Court grants a right to a jury trial in administrative penalty proceedings, eventually the court will have to extend such a right to administrative permit proceedings.

This case stands to test the constitutionality of the 1985 amendments granting TACB and TWC the power to assess penalties. It will mark the first time the Texas Supreme Court has ruled on the constitutionality of the administrative scheme enacted in 1985.

II. LEGISLATIVE DEVELOPMENTS

During its sixth session, the 71st Legislature amended the Texas Solid Waste Disposal Act and the Texas Comprehensive Municipal Solid Waste Management, Resource Recovery and Conservation Act.¹⁴⁶ The amendments were first enacted in 1989 in the regular session of the 71st Legislature, finally codified in the Health & Safety Code, and effective on September 6, 1990. Although the amendments were not officially part of the Health and Safety Code, they had previously been given effect. Set forth below are the major amendments, first adopted in 1989 and made effective during the review period.

A. *Texas Solid Waste Disposal Act*

1. *Sections 361.002 and 361.0231: Policy Statements*

The Texas Legislature amended section 361.002 to include a provision on the state's policy regarding the storage, processing, and disposal of hazardous waste. Section 361.002(b) states that "it is in the public interest to require hazardous waste to be stored, processed, and disposed of only at permitted hazardous industrial solid waste facilities."¹⁴⁷ Likewise, section 361.0231 was added to provide that it is state policy to provide adequate capacity for industrial and hazardous waste generated in Texas, and to eliminate, wherever feasible, the generation of hazardous waste.¹⁴⁸

2. *Section 361.013: Solid Waste Disposal and Transportation Fees*

Revised section 361.013 replaces the former section entitled "Facility Fee." The new section provides that TDH will charge a fee for all solid waste disposed of in Texas.¹⁴⁹ Transporters who are required to register with TDH will also be charged an annual registration fee set by TDH.¹⁵⁰

145. *Id.* at 17.

146. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.345, 363.001-.145 (Vernon 1990).

147. *Id.* § 361.002(b).

148. *Id.* § 361.0231.

149. *Id.* § 361.013(a).

150. *Id.* § 361.013(c).

This registration fee may not be less than \$25 or more than \$500.¹⁵¹ Finally, the statute provides that operators of municipal solid waste facilities must maintain records and annually report to TDH the amount of solid waste brought through the facility.¹⁵²

3. *Sections 361.0151 and 361.0861: Recycling; Separate Recycling Permit Not Required*

The Legislature added two new sections on recycling. Section 361.0151 provides for a waste minimization and recycling office within TDH.¹⁵³ This office will provide technical assistance to local governments concerning recycling matters.¹⁵⁴ Additionally, TDH is directed to work with the Texas Department of Commerce to pursue the development of markets for recycled materials.¹⁵⁵ Section 361.0861 states that a permit holder or solid waste management facility that plans to recycle is not required to obtain a separate permit for that recycling from TDH.¹⁵⁶ However, such a facility must register with TDH.¹⁵⁷ Additionally, TDH is directed to expedite permit proceedings if the applicant seeking the permit employs recycling methods.¹⁵⁸

4. *Sections 361.0215 and 361.0216: Waste Reduction Advisory Committee; Waste Minimization and Reduction Group*

New section 361.0215 provides for an advisory committee composed of nine members to advise TWC and the inter-agency coordination counsel.¹⁵⁹ The statute directs the committee to advise on matters such as promoting waste reduction and minimization, developing public awareness programs to educate citizens about hazardous waste, and providing technical assistance to local governments for development of waste management strategies and other possible programs to help implement the state's preferred waste management technologies as set forth in section 361.023(a).¹⁶⁰ Section 361.0216 provides for the establishment of "a waste minimization and reduction group to assist in developing waste minimization and reduction programs."¹⁶¹

5. *Section 361.0635: Preapplication Meeting*

The legislature amended this section to provide that a person who intends to file a permit application must meet jointly with members of TDH, TWC, and TACB to discuss the permit application.¹⁶² The potential applicant

151. *Id.*

152. *Id.* § 361.013(d).

153. *Id.* § 361.0151(a).

154. *Id.*

155. *Id.* § 361.0151(b).

156. *Id.* § 361.0861(a).

157. *Id.* § 361.0861(b).

158. *Id.* § 361.0861(c).

159. *Id.* § 361.0215(a).

160. *Id.* § 361.0215(b).

161. *Id.* § 361.0216.

162. *Id.* § 361.0635(a).

must request the pre-application meeting in writing from the state agency who has jurisdiction over the permit and that agency will coordinate a meeting with the other agencies.¹⁶³ This meeting must be held before the applicant files the permit application.¹⁶⁴

6. Section 361.064: Permit Application Form and Procedures

The legislature amended section 361.064 by adding subsection (b), which provides that state agencies that have the authority to permit a solid waste management facility must provide a thorough and timely review of an issuance or denial of any permit application.¹⁶⁵

7. Section 361.0665: Notice of Intent to Obtain Municipal Solid Waste Permit

New section 361.0665 provides that applicants for a municipal solid waste permit must publish notice of their intent to obtain such a permit "at least once in a newspaper of the largest general circulation that is published in the county in which the facility is . . . proposed to be located."¹⁶⁶ The applicant's notice must include a description of the location of the proposed facility, the statement that affected persons may request a hearing from TDH, the manner in which TDH may be contacted for further information, and any other information required by TDH rules.¹⁶⁷ If no newspaper is published in the county, notice must be published in a newspaper of general circulation in the county and in a newspaper circulated in the immediate vicinity in which the facility is proposed to be located.¹⁶⁸ Furthermore, TDH will publish a notice in the Texas Register.¹⁶⁹

8. Section 361.081: Notice of Hearing Concerning Application for Landfill Permit

The legislature deleted subsections (a), (b), and (e) from section 361.081. TDH is no longer required to give public notice of a hearing on an application for a landfill permit in a newspaper of general circulation for two consecutive weeks. However, TDH must notify each residence, business, and owner of real property located within three-fourths mile of the proposed landfill by certified or registered mail, return receipt requested, not less than thirty days or more than forty-five days before the hearing.¹⁷⁰

The elimination of some of the notification requirements under section 361.081 most likely takes into account the addition of section 361.0665 discussed above. In effect, the changes shift the burden of notice for a municipal solid waste permit from TDH to the applicant since section 361.0665

163. *Id.* § 361.0635(b).

164. *Id.* § 361.0635(c).

165. *Id.* § 361.064(b).

166. *Id.* § 361.0665(a).

167. *Id.* § 361.0665(b).

168. *Id.* § 361.0665(c).

169. *Id.* § 361.0665(d).

170. *Id.* § 361.081(a).

now requires each applicant for a landfill permit to publish a notice of intent to obtain a municipal solid waste permit.

9. *Section 361.0885: Denial of Application; Involvement of Former Employee*

Section 361.0815 directs a state agency to deny any permit application when it determines that a former employee of the state participated in the agency's review and, after leaving employment with the agency, provided assistance on the application for the permit.¹⁷¹ As long as the former employee did not provide assistance, the application will not be prejudiced.¹⁷² A former employee is defined as anyone who was previously employed by a state agency as a supervisory or exempt employee and whose duties during employment with the state agency included involvement in the agency's review, evaluation, or processing of applications.¹⁷³

10. *Section 361.111: Department may Exempt Certain Municipal Facilities*

New section 361.111 provides that TDH may exempt certain municipal solid waste management facilities from permitting requirements if the facility transfers waste from a small service area to a processing or disposal site and if the facility is in compliance with board of health regulations.¹⁷⁴

11. *Section 361.112: Storage, Transportation, and Disposal of Used or Scrap Tires*

The legislature added section 361.112 to provide for the disposal of used tires. It provides that a person may not store more than 500 tires unless the person registers the storage site with TDH.¹⁷⁵ A person may not dispose of used tires in a facility that has not received a permit from TDH for that purpose.¹⁷⁶ If more than 500 tires are stored, they must be shredded, split, or quartered unless TDH authorizes otherwise.¹⁷⁷ Furthermore, a person who transports used tires must maintain records of tires disposed of or stored.¹⁷⁸

12. *Section 361.138: Commercial Hazardous Waste*

This section imposes a fee on commercial hazardous waste facility operators who receive hazardous waste generated off-site.¹⁷⁹ This fee is in addition to any other fees.¹⁸⁰ The statute, however, exempts certain facilities:

171. *Id.* § 361.0885(a)(1)-(2).

172. *Id.* § 361.0885(b).

173. *Id.* § 361.0885(c).

174. *Id.* § 361.111.

175. *Id.* § 361.112(a).

176. *Id.* § 361.112(c).

177. *Id.* § 361.112(f).

178. *Id.* § 361.112(g).

179. *Id.* § 361.138(a).

180. *Id.*

facilities whose sole off-site waste is received from affiliates;¹⁸¹ facilities that store waste from off-site generators for fewer than 60 days;¹⁸² and, finally, facilities permitted under chapter 26 of the Water Code¹⁸³ or the Federal National Pollutant Discharge Elimination System program.¹⁸⁴ The statute also sets forth how the collected fees shall be credited.¹⁸⁵

13. *Section 361.139: Factors to be Considered in Setting Fees*

This section sets forth criteria TWC must consider when setting fees. The criteria include:

- (1) the variation in risks to the public associated with different waste management methods . . . ;
- (2) the funding needed to support the adequate regulation of industrial solid waste and hazardous waste generation . . . activities . . . ;
- (3) promoting the efficient and effective use of existing hazardous waste storage . . . facilities within the state;
- (4) whether . . . waste received by a commercial facility has been or will be assessed a . . . fee at other commercial facilities . . . ; and
- (5) the prevailing rates of similar fees . . . charged in other states to which wastes from this state may be exported or from which wastes may be imported¹⁸⁶

14. *Sections 361.181-.202: Subchapter F Registry and Cleanup of Certain Hazardous Waste Facilities*

The legislature completely amended subchapter F. Section 361.181 now provides that TWC will publish annually an updated state registry that identifies each facility constituting an "eminent and substantial endangerment to public health and safety."¹⁸⁷ The registry also prioritizes the actions at each listed facility.¹⁸⁸

Section 361.182 allows the executive director to conduct investigations of the facilities listed on the registry or facilities the executive director believes should be included on the registry.¹⁸⁹ Furthermore, the director may request information and documents from such facilities.¹⁹⁰ Requested documents remain open to the public except upon a showing by the owner that to do so would divulge trade secrets.¹⁹¹

Section 361.183 provides that before a facility can be listed on the state registry, the executive director must determine whether the potential endangerment to public health and safety or to the environment can be resolved by the owner or operator under the federal Resource Conservation and Recov-

181. *Id.* § 361.138(f).

182. *Id.* § 361.138(g).

183. TEX. WATER CODE ANN. §§ 26.001-.407 (Vernon 1991).

184. TEX. HEALTH & SAFETY CODE ANN. § 361.138(h) (Vernon 1990).

185. *Id.* § 361.138(k).

186. *Id.* § 361.151.

187. *Id.* § 361.181(a).

188. *Id.* § 361.181(b).

189. *Id.* § 361.182(a).

190. *Id.* § 361.182(b).

191. *Id.* § 361.182(c).

ery Act¹⁹² or by any of the potentially responsible parties (PRPs) pursuant to a TWC administrative order.¹⁹³

Section 361.184 provides that once the executive director determines a facility is eligible for listing on the state registry, TWC must publish notice of its intent to list the facility in the state registry, in the Texas Register, and in a newspaper of general circulation in the county where the facility is located.¹⁹⁴ If the facility is eligible to be on the state registry, the executive director must make reasonable efforts to identify all PRPs for this facility.¹⁹⁵ Each PRP must be given written notification of the proposed facility listing and the procedures for requesting a public meeting.¹⁹⁶

If a PRP requests a public meeting, the TWC must publish the date, time, and location of the meeting in the Texas Register and in the same newspaper as above.¹⁹⁷ This notice cannot be provided later than thirty-one days before the meeting.¹⁹⁸ Notice must also be provided to each identified PRP.¹⁹⁹ Failure to receive any notice does not affect the liabilities imposed upon the party.²⁰⁰ The executive director must also make available to all interested parties all public records regarding the facility.²⁰¹

Section 361.185 allows all PRPs the opportunity to conduct a "remedial investigation/feasibility study."²⁰² The PRPs must make a good faith offer to conduct such a study within ninety days of the notice being issued.²⁰³ If the good faith offer is received by TWC within that period, those PRPs have an additional sixty days to negotiate an agreed administrative order from TWC.²⁰⁴

To encourage PRPs to conduct such remedial investigation/feasibility studies, section 361.185 further provides that costs for the commission to oversee the study will not be charged to those parties who fund or perform the study.²⁰⁵ Non-participating PRPs who are ultimately found liable or who enter into an agreed order to remedy the facility may be charged up to the full cost of the study.²⁰⁶

The legislature completely amended section 361.186, which now allows the executive director to authorize removal actions at facilities eligible for listing on the state registry.²⁰⁷ Owners or operators of eligible facilities must provide written notice of any substantial change in their use of the facil-

192. 42 U.S.C. §§ 6901-6992 (1990).

193. TEX. HEALTH & SAFETY CODE ANN. § 361.183(a) (Vernon 1990).

194. *Id.* § 361.184(a).

195. *Id.* § 361.184(b).

196. *Id.*

197. *Id.* § 361.184(c).

198. *Id.*

199. *Id.*

200. *Id.* § 361.184(d).

201. *Id.*

202. *Id.* § 361.185(a).

203. *Id.*

204. *Id.*

205. *Id.* § 361.185(c).

206. *Id.*

207. *Id.* § 361.186(a).

ity.²⁰⁸ If it is determined that a change in use will expose the public or environment to increased harm, the facility may not be changed.²⁰⁹ However, a request for a hearing may be made.²¹⁰

Section 361.187 has also been entirely amended. It now specifies that after completion of the remedial investigation/feasibility study, a remedial action will be selected and a public hearing will be held to discuss the proposal and identify additional PRPs.²¹¹ All records relating to the facility must be made available to the public, including a summary of such records.²¹²

The PRPs may make a good faith offer to participate in the remedial action; such parties may negotiate an agreed administrative order.²¹³ Costs for the commission to oversee this remedial action will not be assessed against the parties participating in the remedial action.²¹⁴ If the director determines that a release is divisible, a party may conduct a partial removal at a portion of the facility.²¹⁵

Amended section 361.188 requires TWC, after consideration of all offers, to issue a final administrative order meeting eight requirements.²¹⁶ If an additional PRP is later identified, an amendment or a separate order may be negotiated.²¹⁷ Likewise, amended section 361.190 now states that a facility listed on the registry may not change the manner in which it is used without notifying the executive director and receiving approval.²¹⁸

Section 361.191 now provides that TWC may immediately undertake a removal action if the situation is so critical that a delay resulting from an issuance of an administrative order would cause irreparable damage to the public or the environment.²¹⁹ After alleviating the danger, TWC must proceed with the issuance of an order.²²⁰ The expenses incurred as a result of the immediate removal action shall be recoverable from the identified PRPs.²²¹

Section 361.192 now specifies that persons failing to heed an order by TWC to eliminate an existing or impending danger within the stated time period will be responsible for the cost incurred by TWC in implementing a remedial action program.²²²

Amended section 361.193 states the goal of remedial action: to eliminate substantial endangerment to the public and the environment by utilizing the lowest cost, technologically reliable alternative that effectively minimizes

208. *Id.* § 361.186(b).

209. *Id.* § 361.186(c).

210. *Id.*

211. *Id.* § 361.187(a), (c).

212. *Id.* § 361.187(b).

213. *Id.* § 361.187(d).

214. *Id.* § 361.187(e).

215. *Id.* § 361.187(f).

216. *Id.* § 361.188(a)(1)-(8).

217. *Id.* § 361.188(c).

218. *Id.* § 361.190(a).

219. *Id.* § 361.191(a).

220. *Id.* § 361.191(b).

221. *Id.* § 361.191(d).

222. *Id.* § 361.192(a)-(b).

damage and affords protection to the public and the environment.²²³

Section 361.194 provides that remediation costs will constitute a lien on the real property affected in favor of the state.²²⁴ The lien continues until either the liability is satisfied or becomes unenforceable.²²⁵ The lien may be foreclosed only by a court judgment.²²⁶

A section 361.194 lien is not enforceable if an encumbrance on or against the property is acquired before the affidavit for the lien imposed by this section was filed unless the person acquiring such property had, or reasonably should have had, notice or knowledge that the property was subject to remedial action.²²⁷ The owner of the property against which the lien is fixed may file a bond to indemnify himself against the lien.²²⁸

Amended section 361.195 provides that costs accrued by the TWC in connection with the elimination of imminent damages including costs for inspection, sampling analysis, and identification of PRPs will be the responsibility of identified PRPs before expenditure of state or federal funds.²²⁹

Section 361.196 instructs PRPs to coordinate with federal and state hazardous waste programs even though a state or local permit may not be required for removal or remedial actions.²³⁰ One who assists in a remedial action plan is not liable for additional remediation costs resulting from his or her non-negligent acts or omissions.²³¹

Section 361.197 now states that the TWC will file an action to recover costs against all PRPs who do not comply with the terms of an administrative order.²³² Moreover, a PRP who does not comply with the terms of an administrative order is subject to administrative or civil penalties under section 361.198.²³³

15. *Section 361.227: Venue*

This section was amended to allow suits brought under this chapter and involving unpermitted municipal solid waste facilities to be brought in Travis County.²³⁴

16. *Section 361.230: Fees and Costs Recoverable*

Section 361.230 provides that the prevailing party may recover its reasonable attorneys fees, court costs, and reasonable investigative costs when the Attorney General or local government institutes a suit for injunctive relief or

223. *Id.* § 361.193(a).

224. *Id.* § 361.194(a).

225. *Id.* § 361.194(b).

226. *Id.* § 361.194(f).

227. *Id.* § 361.194(g).

228. *Id.* § 361.194(h).

229. *Id.* § 361.195(a)-(b).

230. *Id.* § 361.196(a).

231. *Id.* § 361.196(d).

232. *Id.* § 361.197(a).

233. *Id.* § 361.198(a).

234. *Id.* § 361.227(3).

to recover a civil penalty.²³⁵ The amount recovered, however, may not exceed \$250,000.²³⁶

17. Section 361.322: Appeal of Administrative Order Issued Under Section 361.372; Joinder of Parties

The new amendments to section 361.322 are organized as follows: subsection (c) provides that, in order to appeal an administrative order, it is not necessary to file a motion for rehearing under APTRA;²³⁷ subsection (e) provides that the filing of a petition does not prevent the state agency from proceeding with remedial action;²³⁸ and subsection (h) provides that the standard of review for a court addressing the appropriateness of selected remedial action is whether said action is "arbitrary or unreasonable."²³⁹

18. Section 361.341: Cost Recovery by State

Amended section 361.341 includes subsection (c), which provides that all costs recovered by the state under subchapter F will be given to TWC and deposited in the hazardous waste disposal fee fund.²⁴⁰ The section further provides that costs recovered by the state under sections 361.271 through 361.277 are to be given to TWC and deposited in the hazardous waste generation and facility fees fund.²⁴¹ Subsection (d) has been added to provide that if the court finds that an appeal or third party claim is frivolous, the court may assess damages against the party in an amount up to twice the cost incurred by the state or the third party defendant.²⁴²

19. Sections 361.401-.405: Subchapter M Removal and Remedial Action Agreements

Under the newly created subchapter M, five sections allocate the contractual responsibilities and liabilities between the Commission, the federal government, and engineers or contractors.²⁴³ The new sections are as follows: section 361.401 sets out definitions; section 361.402 lists commission duties and powers; section 361.403 outlines terms and conditions of agreements and costs; section 361.404 explains cooperations with the federal government; and section 361.405 delinates the indemnification of engineers or contractors.²⁴⁴

235. *Id.* § 361.230.

236. *Id.*

237. *Id.* § 361.322(c).

238. *Id.* § 361.322(e).

239. *Id.* § 361.322(h).

240. *Id.* § 361.341(c).

241. *Id.*

242. *Id.* § 361.341(d).

243. *Id.* §§ 361.401-.405.

244. *Id.*

B. Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act

1. Section 363.0615: Responsibility for Regional Planning

Section 363.0615 organizes the planning and subplanning regional councils, which provide for solid waste management plans of the region's local government.²⁴⁵ Section 363.0635 provides a time schedule for each planning region in existence on September 1, 1989 to develop a regional solid waste management plan, and for each local government within those regions to develop local plans.²⁴⁶

2. Section 363.064: Contents of Regional or Local Solid Waste Management Plan

Section 363.064 now includes three new sections encouraging cooperative efforts between local governments for transporting waste between municipalities and locating suitable landfills.²⁴⁷

245. *Id.* § 363.0615(a)-(d).

246. *Id.* § 363.0635(a)-(d).

247. *Id.* § 363.064(4)-(6).