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The purpose of the *Texas Environmental Law Journal* is to provide the members of the Environmental and Natural Resources Law Section of the State Bar of Texas and the public with legal articles and recent development columns on relevant environmental and natural resources law issues. The *Journal* also provides news of Section activities and other events pertaining to this area of law. The *Journal* is the leading source for articles on Texas environmental and natural resources law.

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The *Texas Environmental Law Journal* is an official publication of the Environmental and Natural Resources Law Section of the State Bar of Texas and is published jointly with the University of Texas School of Law's *Texas Environmental Law Journal*. In 1990, the Environmental and Natural Resources Law Section reached an agreement with this student organization at the University of Texas School of Law to co-produce the *Journal* as the *Texas Environmental Law Journal*. The students' involvement began with the summer issue in 1990.

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Journal Announcements

Due to the production demands of instituting a new format for the *Journal* and switching publishers, we did not publish Issue No. 4 for Volume 37 (Summer 2007).

Solicitation of Articles

The *Journal* is soliciting articles from authors on environmental and natural resources subjects that will assist Texas environmental and natural resource law practitioners and develop the advancement of environmental and natural resource law.

If you are interested in submitting an article, please contact:

1. Solicitations Associate Editor (lkalisek@lglawfirm.com); or
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From The Editors

Dear Readers,

With this *Journal*, you now have Issue Number One of the 2008-2009 publication year. As we noted previously, our actual publication dates are spilling over into following years. Our goal is to "catch up" during Volumes 39 and 40.

In our lead article, **Christopher R. Brown** and **Blake Farrar** examine the Eastland Court of Appeals decision in City of Aspermont v. Rolling Plains Groundwater Conservation District and its impact on the ability of groundwater conservation districts to regulate municipalities and on the State's groundwater management policies. The authors state that the Aspermont decision deprives Texas groundwater districts of a critical enforcement power against municipalities: the threat of litigation for damages if a city refuses to comply with the district's regulations. The Aspermont decision also weakens the "graduated sanctions" available to a groundwater district when a new system of groundwater regulation with real restrictions on groundwater production will increase the probability of non-compliance. The Aspermont decision demonstrates that Texas has not yet achieved another feature of effective groundwater regulation: efficient local mechanisms for conflict resolution. In successful common pool resource regulatory systems, the users typically recognize that their behavior is destroying the resource, at which point they agree to different rules of use and set up a system to enforce them. In Texas, other attitudes also drive the decision to form a groundwater district: the fear of state regulation and the desire to enact rules that preserve individual autonomy over groundwater use. This attitude may account for survey results that indicate a number of districts that seldom take enforcement actions even when faced with a number of violations. A number of districts take their regulatory responsibilities seriously as indicated by the number of districts that do engage in enforcement actions. The authors conclude that Texas needs to provide groundwater districts with clear and credible enforcement mechanisms, which means, in part, that the Texas Legislature needs to draft groundwater statutes that unambiguously confer enforcement power on local districts.

In the student note, **Kelly Davis** examines the effect of courts levying attorney fees against citizen groups on the public policy allowing citizen suits. Federal and state governments allow private law enforcement actions as a means of obtaining statutory objectives of environmental laws. Public interest organizations have used these citizen suit provisions to promote the public good by requesting court orders that require compliance and penalize violators. These suits comport with Congress' stated intent to "extend the concept of public participation to the enforcement process." However, the future of these actions is uncertain, as courts have begun punishing unsuccessful plaintiffs by awarding attorney fees to prevailing defendants in citizen actions. Because the majority of these actions are brought by non-profit and citizen groups, the substantial burden of paying high attorney fees can produce far-reaching negative consequences. What is now a powerful incentive for groups with limited resources to take action in the public inter-

est threatens to become a potent disincentive. To take the language from the very statute these litigants employ in promoting the public interest and use it as fodder for awarding attorney fees against them is to twist the spirit of the environmental statutes. With the threat of citizen enforcement actions effectively eviscerated, the enforcement powers are diluted, and polluters may continue to degrade the environment. Thus, Ms. Kelley posits that it is crucial that courts maintain a policy that does not foreclose citizen actions, before the "Davids are rendered helpless against the Goliaths."

In the next issue of the *Journal*, **Jeffrey S. Boyd** will discuss "Where Sovereign Immunity and Water Development Issues Collide" in the lead article. The student note, by **Will Ikard**, will discuss "Encouraging Conservation in the Lone Star State: How Texas Can Improve Incentives for Landowners to Preserve Private Property from Development."

As always, we hope that this issue provides you with educational insight and substance for discussion.

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A Hole in the Bucket: *Aspermont*'s Impact on Groundwater Districts and What It Says about Texas Groundwater Policy

by Christopher R. Brown and Blake Farrar

I. INTRODUCTION AND OVERVIEW

"[T]he stout man with mustaches came tearing down the river, a tin pail in his hand . . . dipped about a quart of water and tore back again. I noticed there was a hole in the bottom of his pail."[1]

To Texans, a man who runs to a river, fills a leaky bucket, and then loses the water as it leaks out on his return up the hill might not seem so strange. Had Joseph Conrad not depicted this scene decades ago in Africa, and had he described a well instead of a river, Texans might ask whether he was describing Texas groundwater policy.

Groundwater currently comprises roughly 59% of the state's water supply; approximately 20% of groundwater goes to industrial and urban uses; and urban use will likely double in the next forty years.[2] These facts alone underscore the need to regulate the resource effectively over time.[3]

As this article will note, after the 2005 session of the Texas Legislature,[4] Texas instigated a more restrictive and sophisticated groundwater planning regime. The state was divided into sixteen Groundwater Management Areas (GMAs) that began work with local groundwater districts (and areas without districts) to estimate "desired future conditions" for an aquifer in a given GMA for the next fifty years.[5]

Given the scope and complexity of this new regulatory system, it is not surprising that many leaky points in the bucket still remain. For example, appropriators face possible impacts from production caps that groundwater conservation districts ("districts") will create in concert with GMAs based on desired future conditions.[6] If the caps are construed as legally binding, one wonders how many sticks will remain in the property rights bundle that the "rule of capture" safeguards and how many of those sticks a landowner must lose before he suffers a regulatory taking given the property rights the landowner continues to possess under the rule of capture.[7]

Uncertainties regarding the administration of the new system are not the only "leaks" in the groundwater regulatory bucket. By now, *City of Aspermont v. Rolling Plains Groundwater Conservation District*[8] is well-known. The Eastland Court of Appeals concluded that, as written, Section 36.102 of the Texas Water Code[9] did not clearly and

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1 JOSEPH CONRAD, HEART OF DARKNESS, (McClure, Phillips ed., 1903), *reprinted* in The Portable Conrad 520-21 (Morton Dauwen Zabel 1975).

2 Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252-53 (2001).

3 TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS 2007 Ch.1 (2007).

4 *See* H.B. 1763, Act of May 30, 2005, 79th Leg. R.S. (creating the GMA system); *see also* S.B. 1, Act of June 2, 1997, 75th Leg. R.S.; S.B. 2, Act of May 28, 2001, 77th Leg. R.S. (strengthening groundwater district authority).

5 R. E. Mace, R. Petrossian, R. Bradley, W. F. Mullican, III, and L. A. Christian, *A Streetcar Named Future Desired Conditions: The New Groundwater Availability for Texas (revised), in* STATE BAR OF TEX. PROF. DEV. PROGRAM, 7TH ANNUAL CHANGING FACE OF WATER RIGHTS IN TEXAS 2008, chs. 2.1 and 2.2 (2008) (herinafter Mace).

6 Tex. Water Code Ann. §§ 36.112, 36.108(d) (Vernon 2008).

7 *See, e.g.,* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729 (Tex. 2007).

8 City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W.3d 231 (Tex. App.—Eastland 2008, pet. filed).

9 Tex. Water Code Ann. § 36.102 (Vernon 2008).

unambiguously waive a municipality's governmental immunity from liability when a groundwater conservation district (Rolling Plains)[10] sought damages to enforce its regulations: for example, to collect unpaid fees.[11] Because the Texas Water Code did not contain a clear, unambiguous waiver of immunity, the Texas Government Code and Texas Supreme Court precedent both dictated that sovereign immunity (here, governmental immunity) precluded liability for damages.[12] Governmental immunity also precluded the District's attempt to elevate a declaratory judgment claim into a de facto claim for damages.[13]

However, the court of appeals in *Aspermont* concluded that a municipality did not enjoy immunity from suit with regard to declaratory relief to ascertain the legal duties of the groundwater appropriator. The groundwater district could seek such a judicial determination as part of its duty to carry out the mandate to conserve natural resources that Article XVI, Section 59 of the Texas Constitution imposes.[14] The opinion focuses on declaratory judgment actions to clarify the rights of the parties in relation to the statute. In the miasma of decisions concerning when a party may pursue injunctive relief in addition to a declaratory judgment against a governmental entity, it is possible that *Aspermont* suggests that a governmental entity enforcing a statute may pursue equitable relief as well as a declaratory judgment. Thus, Rolling Plains and similarly situated groundwater districts could possibly seek injunctive relief against municipalities. After *Aspermont,* groundwater districts lost one form of enforcement power that Chapter 36 of the Texas Water Code appeared to grant them, but for the absence of an explicit waiver of governmental immunity.

It is not surprising that *Aspermont*'s consequences garner less attention than other immediate, pressing groundwater issues with potentially dramatic economic consequences. If one views the *Aspermont* decision solely in terms of its immediate impact on groundwater regulation, this assessment makes some sense. The survey of groundwater districts conducted for this article indicates that districts themselves have largely stayed out of court when enforcing their rules, for example.

Nevertheless, this article argues that enforcement mechanisms such as those at issue in *Aspermont* play an important role in the long-term success of groundwater regulation. One needs to view this issue at several levels. First, one should consider the frequency with which contemporary groundwater districts enforce their rules against violators, and the manner in which they do so. This article addresses current-day, actual practices of groundwater districts through survey data collected from throughout the state. The survey discussion will reflect one unintended consequence that may result from *Aspermont*. For example, if a municipality fails to pay groundwater district fees and then fails to reach an agreement with the groundwater district to compensate the district for them, the district will not have a practical way

10 This article will refer to all special purpose districts created to regulate groundwater as "groundwater districts" or "districts." This category will include groundwater conservation districts, underground water conservation districts, subsidence districts, and analogous entities.

11 *Aspermont*, 258 S.W.3d at 234-36.

12 Tex. Gov't Code Ann. § 311.034 (Vernon 2008), *construed in Aspermont*, 258 S.W.3d at 233-34 (citing, *inter alia*, Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex. 2006); and, Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 466, 469 (Tex. 2007)).

13 *Aspermont*, 258 S.W.3d at 235-36.

14 *Id.*

to collect those unpaid fees. This status of the law creates a disincentive for cities to pay fees upfront, then a disincentive later to settle by paying delinquent fees. For those districts reliant on fees for their budgets, the less cities pay, the less the districts can enforce their rules. This possible scenario is discussed in more specific terms below.

Second, one needs to consider the long-term impact of weakening groundwater enforcement mechanisms given the projected volume and location of groundwater use. This article will argue that the *Aspermont* decision affects precisely those groundwater districts that will face the greatest pressure in the coming years. Because urban areas are projected to double their groundwater use by 2050, regulation of municipalities will play a critical role in groundwater regulation, precisely the appropriator that *Aspermont* addresses. Regardless of the violations they face and enforcement actions they take today, groundwater districts will face larger challenges requiring effective enforcement as the urban population burgeons and urban groundwater use mushrooms.

Third, this article argues that one should evaluate a system of groundwater regulation, not just in terms of current Texas groundwater regulation, but in light of regulatory mechanisms that have proven necessary to preserve common pool resources in general. The extensive literature on common pool resources provides insight into this question. With respect to *Aspermont*, does the court's elimination of an enforcement mechanism affect the ability of groundwater districts to carry out their objectives? Case histories provide a strong indicator of what characteristics make groundwater regulation succeed. This article looks at a few analogous case histories and tries to shed light on a larger question: whether Texas has devised a system with elements that will allow it to succeed in preserving the resource in the long term.

Fourth, this article analyzes the legal analysis that formed the basis for the decision in *Aspermont:* how the court determined that a doctrine shielding governmental entities from liability would constrain the manner in which groundwater policy would be enforced. This section will suggest that *Aspermont* reflects an issue with which courts have grappled that has important consequences for groundwater districts: how various units of state and local government can sue one another and thereby affect the policy goals of governmental entities.

Fifth, this article will suggest that a system of groundwater regulation can break down when the legislative body that creates it fails to define the regulator's powers and responsibilities unambiguously. In the case of enforcement mechanisms for Texas groundwater districts, the Texas Legislature had available to it legislative history and principles of statutory construction that could have produced a better statute and avoid the problem in *Aspermont*.

Sixth, this article discusses its appendices that contain statistical data regarding population trends, volume and geography of groundwater use, and municipalities. These issues will be discussed as they bear on the issues that *Aspermont* raises.

Finally, as already mentioned, this article discusses an appendix containing the results of a Public Information Act survey that elicited information regarding the funding mechanisms, rule violations, and enforcement actions of groundwater districts throughout the state. As already noted, such information from present-day groundwater districts provides insight into the issues that *Aspermont* created.

II. Effective Regulation of Groundwater as a Common Pool Resource

"[W]hat is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest."[15]

A. Common Pool Resource Regulation: Case Histories and Concepts

The spate of references to the "tragedy of the commons" in the literature of natural resources law and policy makes another such discussion seem unnecessary or even unkind. Before considering the issues that *Aspermont* raises, though, one should briefly consider how "commons" concepts apply to Texas aquifers. Case histories of other aquifers in the United States suggest that, in the absence of regulation, so-called default rules of use create the incentive for each landowner to pump as much water as possible for his or her own gain. Eventually the cost of pumping increases and the water itself may face exhaustion or contamination from salt- or brackish water intrusion.

The rule of capture represents such a default usage rule. As a respected student of common pool resources writes:

> The rule of capture grants [pumpers] exclusive rights to that portion of groundwater that they pump. What an operator does not withdraw today will be withdrawn, at least in part, by rival[s]. The fear that [pumpers] cannot capture tomorrow what they do not pump today undermines the incentive to forego current pumping for future pumping.[16]

The approach to the rule of capture described here is the default rule of use in Texas. A critical issue outside the scope of this article concerns whether Texas water law protects groundwater ownership rights in situ, un-pumped, or only recognizes these rights after the landowner reduces the water to possession. The two interpretations lead to different results as to the extent of groundwater regulation the law allows. If groundwater becomes the landowner's property only after it is captured, regulation that would sustain the resource would become more likely. However, at present, the Texas version of the rule of capture protects groundwater before it is pumped.[17]

In response to default regulation like the rule of capture, case histories document a number of different responses. Elinor Ostrom, a leading common pool resources theorist, documents changes in aquifer governance that resulted from aquifer users themselves de-

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15 Aristotle, Politics, (Oxford Clarendon Press, 1946) 1261b.

16 D.H. Negri, *The Common Property Aquifer as a Differential Game*, 25 Water Resources Research.9, 9-15 , *cited in* Ostrom at 109. *infra* note 22.

17 *Compare* Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 756-57 (Tex. App.—San Antonio 2008, pet. filed) (landowner possesses ownership rights in groundwater before reducing it to possession), *with* City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613, 616 (Tex. App.—San Antonio 2008, pet. denied)(City of Del Rio's unsuccessful argument that property rights attach to groundwater only after reduced to possession).

vising and implementing new rules.[18] These case histories contrast with those situations in which a higher unit of government mandated new rules of aquifer use unilaterally, what Ostrom calls "Hobbesian" regulation.[19] The rule of capture is not the only default rule that can lead to aquifer exhaustion. Ostrom provides a number of useful case histories, including three aquifer basins in Southern California. Two different categories of groundwater users existed in the Raymond, West, and Central Basins of Southern California. Because each group operated under a different rule of use, a competition to maximize pumping developed. Landowners directly over an aquifer operated according to a modified version of the "correlative rights" rule; in times of drought a court would treat landowners as "co-owners" and divide the groundwater proportionately among them.[20]

Competing with the landowners' correlative rights rule, so-called appropriators — users located away from the aquifer's physical location who used the water for municipal or commercial purposes operated under the rule of "first in time, first in right."[21] The two contradictory rules operated in tandem to create a pumping competition.

By the 1950s, municipalities, other appropriators, and landowners agreed that pumping rates exceeded the safe yield of each basin, that pumping costs were steadily increasing, and that saltwater intrusion from the coast had already started to destroy portions of the West Basin.[22] The threatened destruction of the groundwater, coupled with scientific information that suggested the need for dramatic cutbacks in pumping to preserve safe yields, and legal actions together produced a striking result: outside the context of legal proceedings that pertained to basins, the users of each basin created new governance new rules of use. In essence, the new rules dictated that each pumper would share cutbacks proportionately as defined by starting usage levels upon which all parties agreed. Some commentators have dubbed the rule "mutual prescription."[23]

All users complied with the new rules by reducing pumpage, a measure that had become necessary due to the previously noted decreased water supply, increased pumping costs, and saltwater intrusion from the coast that could have destroyed the aquifers.[24] Both landowners and appropriators recognized that pumping the safe yield of the respective aquifer was necessary to ensure a usable future water supply. With the exception of very few users, all the users of each aquifer signed the respective agreements.[25] Thus, almost everyone played under the new rules.[26]

Compliance with the new agreements in each basin has proven successful given the existence of effective state and local enforcement mechanisms.[27] The California Department of Water Resources provides a water master service to monitor groundwater extraction among users in public districts, two-thirds the cost of which falls on the groundwater extractors

18 ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTIONS 103-42 (Cambridge 1990).
19 *Id.* at 41.
20 *Id.* at 107.
21 *Id.*
22 *Id.* at 106-24 and 114-15.
23 *Id* at 113-14.
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id* at 125-26.

themselves. Groundwater users provide the water master with annual reports that reflect its, his, or her total extractions; all groundwater users receive these reports from every other user through the water master. Several agencies, local and state, audit these reports for accuracy. All of the water master's work is done in a public and obvious manner. The water master has legal authority to sanction groundwater users who violate the rules of the local agreements, and the local districts can also sue violators. The Raymond Basin agreement is 45 years old; the West Basin agreement is 35 years old, and the Central Basin agreement is now 45 years old. In those periods of time, the number of violators has been small, but the water master and the local districts dealt with violations with prompt legal action and sanctions.[28]

Based on her study of regulations governing a diverse array of common pool resources — aquifers, agricultural land, irrigation systems, and rivers, for example[29] — Ostrom gleaned eight characteristics that effective, long-enduring common pool regulations had in common. The fifth and sixth characteristics she observed are most relevant to the controversy in the *Aspermont* case. Ostrom called her fifth such characteristic "graduated sanctions,"[30] which she described as follows:

> Appropriators who violate operational rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offense) by other appropriators, by officials accountable to these appropriators, or both.[31]

The same extensive case histories also led Ostrom to describe a sixth characteristic she observed among effective common pool regulatory systems: effective mechanisms for conflict resolution, which she described as follows:

> Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials.[32]

Subsequent sections of this article suggest that, among the eight traits Ostrom observed in enduring common pool resource regulations, these two apply most directly to the issues encountered the dispute leading to the *Aspermont* decision. In addition to these general traits that Ostrom gleaned from a wide array of common pool relations, her specific examples of aquifer regulation in southern California also prove useful with regard to *Aspermont* factual situation. Ostrom's aquifer case histories follow a familiar pattern: groundwater users, whose rules of use threaten their commonly held resource with extinction, recognize and react to the threat by collectively agreeing to adopt and enforce new rules that limit use and preserve the resource. To what extent Texas state and local governments recreate such traits of successful aquifer regulation remains in question.

28 *Id.*
29 *Id.* at 58-90.
30 *Id.* at 90-92.
31 *Id.* at 90.
32 *Id.*

B. The Commons and Texas Groundwater Regulation: Some Initial Observations

This section suggests peculiarities in Texas groundwater regulation that could pose obstacles to enforcing a new regime. The focus is on enforcement because the controversy in *Aspermont* speaks directly to this issue. As many experts have observed, the Texas approach to groundwater is anomalous compared with other states and becomes increasingly complicated with every new legislative session. This section does not purport to provide an exhaustive lay of the land with regard to Texas groundwater regulation, but does offer preliminary observations on the Texas approach in light of common pool resources concepts.

Anomaly One: The Rule of Capture. First, any system of groundwater regulation that continues to embrace the rule of capture and also creates local districts to regulate pumping is a peculiar institution, perhaps with the same prospects for success as that first peculiar institution. Section 36.002 of the Texas Water Code nevertheless declares that, despite the extensive groundwater regulation it contains, "nothing in this code deprives or divests owners or their lessees or assigns of ownership rights in groundwater."[33] As the California case histories suggest, most successful changes in common pool regulation involve the adoption of rules that change the focus from maximizing short-term individual benefit to ensuring future availability. Additionally, in these success stories, the local regulatory body rejects a default rule that could exhaust the resource or has already come close to doing so. Here is the first and most obvious anomaly in Texas: the State has moved forward with groundwater regulations to sustain the resource while retaining a rule of individual groundwater ownership alien and often hostile to regulations that reduce groundwater withdrawals.

The primary anomaly of Texas groundwater law today is the remarkable attempt to reconcile individual groundwater ownership with a system of limits or "caps" placed on the amount of production in a given groundwater district.[34] Without question, the law abounds with examples of individually-owned property subject to restrictions that the government imposes. Here, however, historical expectations, necessity based on current usage patterns, and an ideological commitment to full ownership rights will likely result in problems not seen in jurisdictions in which parties agree on new rules of use.

Anomaly Two: Localism and Persuasion Rather than Regulation. Texas groundwater regulation evinces another anomaly; this one is attitudinal and may not pervade the state as a whole. In the case histories just discussed, an aquifer's appropriators collectively recognized indications of the aquifer's decline: saltwater intrusion or increased pumping costs, for example. Because their pumping practices caused the damage, the appropriators began negotiations that culminated in new rules of use and a new regulatory entity. The change in attitude led to the change in regulation. In at least one Texas region, however, the motives that led to local groundwater regulation differed drastically from this pattern. Professor Mark Somma[35] concluded on the basis of thorough studies that many appropriators of Ogallala groundwater in the Texas High Plains region organized underground water conservation districts, not primarily because they realized that they and Ogallala appropriators in other

33 Tex. Water Code Ann. § 36.002 (Vernon 2008).

34 Conrad, *supra* p. 1 (discussion of GMAs).

35 Mark Somma, *Local Autonomy and Groundwater District Formation*, 24 PUBLIUS: THE JOURNAL OF FEDERALISM 53, (Spring 1994.

states were mining the aquifer, but because they feared outside regulation.[36] On one side, these appropriators feared the type of stringent groundwater regulations that Arizona had enacted;[37] on the other side, they feared encroachment from the erstwhile Texas Water Commission.[38] Somma described the motivation of these appropriators as rising to the level of an ideology committed to local control.[39] The districts they formed possessed "little regulatory power" and almost "no sanctioning power."[40] What resulted were districts that used persuasion, incentives, education, and an attempt to alter social expectations about groundwater use, an approach Somma saw as unique to common pool resource regulation.[41] According to Somma, this fierce ideological commitment coupled with the non-regulatory efforts to persuade the community did slow aquifer depletion.[42] Given the time frame of Somma's study and the nature of the Ogallala, one does not know whether this decreased depletion was long-lasting or contributed to preserving the resource.

Ostrom focused on changes in groundwater rules that local appropriators achieved on their own accord, resorting to judicial or other government intervention only to ratify their agreements or prosecute violators. Ostrom's concept of "local control' differed from what Somma documented: the creation of local groundwater districts with minimal power to avoid state intervention. The Texas High Plains form of local control seeks to protect local decision making *per se*, regardless of what those decisions are.

In Texas, one hesitates to extrapolate the attitudes of Texas High Plains irrigators to appropriators in the rest of the state. However, if appropriators in other regions of the state also fear state regulation and fight for local control, these attitudes could motivate people to form groundwater districts not just in the High Plains but elsewhere. Preserving local control to maximize the options available to local appropriators may well play a role in Texas groundwater regulation. Observers in 1973 and 2001 documented that groundwater districts allowed the priorities of local political entities in areas other than the High Plains to compromise their groundwater management responsibilities.[43] In the context of *Aspermont,* such attitudes may influence the manner in which groundwater districts choose to enforce their rules.

The groundwater districts that comprise the sixteen GMAs in Texas have already met and conferred regarding the groundwater demand of their respective areas. Some GMAs have completed their reports for submission to the Texas Water Development Board (TWDB); others have not. The most important observation in this context: if the spirit of localism that Somma described has caused districts to submit inflated estimates of their demand, it is clear that Texas groundwater users have not reached the point that the California users described above did when they changed their regulations. If a successful change in usage rules occurs, history suggests that the users of a given aquifer segment

36 *Id.* at 6.
37 *Id.* at 2.
38 *Id.* at 6.
39 Mark Somma, *Institutions, Ideology, and the Tragedy of the Commons*, 27 PUBLIUS: THE JOURNAL OF FEDERALISM 1 (Winter 1997).
40 *Id.* at 6.
41 *Id* at 1 *passim.*
42 *Id.* at 1.
43 *See* Kaiser & Skillern, *supra* note 2 at 252; *see also* Steven E. Snyder, *Groundwater Management: A Proposal for Texas,* 51 TEX. L REV. 289, 298 (1973).

first have to see that indicators that the aquifer is in decline, that their source of water is endangered. Once the users realize the resource is in danger, "local pride" and "resistance to regulation" give way to more practical considerations, even cutbacks on use.

Anomaly Three: Bottom Up, Then Top Down. As Ostrom documented, students of common pool resources have observed many different ways parties have replaced destructive rules of use with sustaining ones. In broad terms, these efforts reduce "top-down" approaches, in which higher governmental or judicial authorities impose a change on aquifer regulation, and increase "bottom-up" approaches, in which appropriators recognize that their usage rules are destroying the resource. Ostrom focused on "bottom-up" solutions, in part, because she believed that agreements local appropriators make would be better adapted to the local conditions and better enforced.[44]

As already discussed, Texas has enacted a hybrid new, "top-down" and "bottom-up" scheme in which:

(1) Local citizens petition the Texas Commission on Environmental Quality (TCEQ) under the Texas Water Code[45] to create a groundwater district.[46] The Texas Legislature can also create statutory groundwater districts.[47] Chapter 36 of the Texas Government Code then defines the powers and responsibilities of the groundwater district alongside the rules the district enacts. However, the law does not *require* anyone to create a groundwater district barring special circumstances. Thus, swaths of an aquifer or aquifer segment can remain unregulated by a local district.

(2) Once created, groundwater districts are located in one of sixteen Groundwater Management Areas.

(3) The groundwater districts in each GMA meet and arrive at estimated demand, ultimately for 50-year period.

(4) The TWDB uses these numbers to arrive at managed available groundwater levels (supply minus demand, roughly) for each of the sixteen areas.

(5) The groundwater districts within the GMAs arrive at total allocations for each district.

(6) If a groundwater district does not exist for a geographical region, the groundwater districts in that GMA confer with county officials in those areas and assign a quantity of water to that region as well.[48]

The system just outlined clearly does not look like what one would call a "top down" scheme to change groundwater regulation: for example, one that abolished the rule of capture and embraced conjunctive use. Instead, as Section 36.0015 of the Texas Water Code declares, groundwater conservation districts are the State's "preferred method of

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44 Ostrom, *supra* note at 13-57.

45 Tex Water Code Ann. §§36.013 (Vernon 2008) (citizen petitions to create groundwater districts).

46 Tex. Water Code Ann. §§ 35.012(b), 36.011, and 36.0151 (Vernon 2008)(addressing the authority of Texas Commission on Environmental Quality to create groundwater districts).

47 *See, e.g.*, Tex. Loc. Gov't Code Ann. §§ 8846.001 et seq. (Vernon 2008)(codifying statutes forming and amending Kinney County Groundwater Conservation District).

48 *See generally* Robert E. Mace, Ken Petersen, Rima Petrossian, Robert Bradley, Brenner Brown, THE CURRENT CONDITION OF DESIRED FUTURE CONDITIONS, JANUARY 2009, STATE BAR OF TEXAS, 10TH ANNUAL CHANGING FACE OF WATER RIGHTS ADVANCED COURSE, April 3-2, 2009, Austin, Texas.

groundwater management."[49] State law and a state agency serve as a conduit for local landowners to create districts that function with little supervision, yet state law calls local districts the *State's* method for groundwater management. This ambiguity played a role in the *Aspermont* dispute.

In Texas these processes are now the *status quo*. However, in the larger context of common pool resource regulation, the Texas model contains some anomalies. On the one hand, Texas appropriators do not coalesce and negotiate new rules for a district, seeking judicial intervention only to resolve disputes or ensure enforcement in a truly "bottom up" sense. One does not know why one of the ninety three established districts, or the four currently pending districts, decided to ask the TCEQ or the Texas Legislature to create them. It could be the collective realization that the basin of an aquifer on which they rely faces serious damage without new regulation. Or, the landowners could request the creation of a groundwater district preemptively to maintain local autonomy without regard to the condition of the aquifer, a decision reminiscent of Somma's case history. Either way, the landowners must use a state statute and agency or the Legislature to create their district.

Federal and state government subjected one Texas aquifer to "top-down" regulation with a vengeance. Without question, the creation of the Edwards Aquifer Authority (EAA) resulted from coercion from other governmental entities rather than the negotiated, "bottom-up" user agreements that Ostrom described, or even the landowner-initiated, state-blessed model that Texas otherwise now follows. In fact, some form of governmental or judicial coercion marked each phase of the EAA's formation.[50] Nevertheless, if one gauges effective groundwater management in Texas, the EAA possesses a number of qualities with the potential, at least, to make it effective in managing such a large common pool resource.[51] One commentator at the time of the Edwards Aquifer endangered species

49 Tex. Water Code Ann. §36.0015 (Vernon 2008).

50 Some of the "top down" governmental actions included an Endangered Species Act lawsuit that resulted in an order to regulate the aquifer, followed by state legislation to create new aquifer governance, followed by a Voting Rights Act challenge to formulate an equitable governing board, followed by state legislation to create the board the Legislature required, followed by a state court order rejecting a facial challenge to the constitutionality of the new statute. *See* accounts outlined at The Edwards Aquifer Authority website, http://www.edwardsaquifer.net/rules.html (last visited Jan. 20, 2010) and http://www.edwardsaquifer.net/judge.html (last visited Jan. 20, 2010).

51 The EAA is a single entity that governs the use of a 170-mile long section of the Edwards Aquifer, which is the vast majority of the basins considered part of the Edwards Aquifer (the "Balcones Fault' zone). Upstream and downstream users have representation on the entity's board; each discrete population has very different uses for the water: irrigation, municipal use, and spring preservation/ecotourism. Seats on the governing board of the Edwards Aquifer Authority are not apportioned strictly according to population, so that the most populous section of the Edwards Aquifer region does not control all of the Board's decisions. The Board reflects some consideration of population, but a single entity representing all groundwater user groups makes decisions for the virtual entirety of the aquifer. As with Ostrom's examples from California, the governance of the Edwards Aquifer does not fragment among different governing bodies and different rules of use.

Aside from a governing board that seeks to protect three very different appropriator groups, the EAA stands out as the unique groundwater district in the state. The EAA regulates ap-

litigation predicted that the EAA's extensive geographical coverage and relatively stringent regulations would motivate other communities in the state to seek less restrictive, local groundwater districts; an observation consistent with Somma's observations.[52]

Anomaly Four: Ambiguous Boundaries and Effective Regulation. According to the TWDB, groundwater conservation districts or their equivalent regulate over 90% of the groundwater produced in Texas.[53] A clear problem, however, concerns the configuration of those districts in relation to the boundaries of the aquifers or discrete basins within them. Earlier this article alluded to eight characteristics Ostrom observed in a wide range of common pool resource regulations that made them effective. One of those eight characteristics, not discussed above, was *clearly defined boundaries*, by which she meant: "Individuals or households who have rights to withdraw resource units from the [common pool resource] must be clearly defined, as must be the boundaries of the [common pool resource] itself."[54]

With regard to GMAs, Texas has enacted statutes to regulate aquifers in a manner that clearly conforms district boundaries to natural aquifer formations to the extent possible, in part to ensure that the users in one groundwater district do not infringe on another district's use and regulation. The Texas Water Code defines a "groundwater management area" as an area the TWDB has identified as coinciding with the boundaries of a groundwater reservoir,[55] which, in turn, is defined as a "specific subsurface water-bearing reservoir having ascertainable boundaries containing groundwater." Two other definitions are also relevant in this context. A "subdivision of a groundwater reservoir" is a definable part of a groundwater reservoir whose water supply will not be appreciably affected by withdrawing water from any other part of the reservoir based on geological and hydrological data along with economic forecasts for development in the area.[56] A "priority groundwater management area" is one anticipated to experience critical groundwater problems.[57] These definitions prove relevant because they determine the configuration of groundwater management areas. Section 36.012(c) of the Texas Water Code requires GMA boundaries to be coterminous with or inside, the boundaries of a groundwater management area or priority groundwater management area.[58]

Discrepancies exist, however, between these provisions relating to GMAs and the groundwater districts themselves. As of 2001, Ronald Kaiser and Frank F. Skillern observed: "Generally the local groundwater management districts are organized around

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proximately 570,000 acre feet of water per year for approximately 1.7 million households, agricultural, industrial, and residential users, seeks to protect springs containing endangered species by maintaining minimum spring flows, sets usage levels based on rainfalls, among its other duties.

52 Telephone interview with Joe Moore, Water Monitor for Judge Lucious Bunton in *Edwards v. Babbit*, 995 F. 2d 571 (5th Cir. 1995).

53 Kevin Ward, Executive Administrator, TWDB, Testimony at the Organizational Meeting of the Senate Select Committee on Water Policy, 78th Leg., interim session (Jan. 14, 2004), *cited in* Susan M. Maxwell, "Buying and Leasing Groundwater Rights," October 4, 2007, Austin Bar Association, Environmental, Natural Resources, and Water Law Section p.3 (presentation paper)(copy on file with the Authors).

54 Ostrom, *supra* note 18, at 90.

55 Tex. Water Code Ann. §§ 35.002 (11), 35.004 (Vernon 2008).

56 *Id.* §§ 36.001(6), (7).

57 *Id.* § 36.001(14).

58 *Id.* §36.012.

political boundaries and do not encompass aquifer boundaries."[59] Past experience from aquifer case histories suggests that regulatory districts need to conform to the resource's boundaries for practical reasons. Ostrom explained that local appropriators risked losing the benefit of their efforts to preserve the resource because "outsiders" would use the subject aquifer without abiding by the appropriators' agreement. The resource may continue to decline. Further, if abiding by the agreement fails to produce positive returns, the appropriators' incentive to comply with it declines.[60]

The regional planning contemplated in the Texas Water Code may address the need for regulation that covers the entirety of an aquifer or aquifer segment.[61] At present, however, TWDB data may suggest that much of the state's groundwater is not regulated by the people who use it. As Horace R. Grace, an Executive Committee Member of Region G Water Planning Group indicated, those areas in which a groundwater district does not exist likely find themselves with usage levels based on desired future conditions into which the area with without a district provided little input.[62]

Just a few statistics make the paucity of groundwater districts clear. Texas recognizes thirty aquifers, twenty-one of which are defined as "minor" and nine which are defined as "major" based on production.[63] Of these thirty aquifers, significant geographical portions remain altogether unregulated. The areas overlying two major aquifers –the Pecos Valley and the Hueco–Mesilla — remain less than 20% regulated. The surface area overlying another two major aquifers —the Carrizo-Wilcox and the Trinity — remain an average of 63% unregulated. These aquifers serve as major water sources.[64] When one looks at the surface area over the minor aquifers of the state, nine aquifers remain at least 40% or more unregulated.[65] Regardless of the percentage of groundwater local groundwater districts now govern, it appears at least that the users of a given segment may not be ones who establish the rules for using it. No matter what powers a groundwater conservation district may possess – such as enforcement powers the *Aspermont* court restricted – the rules to be enforced may originate outside the appropriators' geographical area. That certain groundwater districts technically regulate *more than one* aquifer only makes this picture more complicated.[66]

All these so-called "anomalies" form a useful backdrop when one considers the *Aspermont* decision and its consequences.

III. *Aspermont*: The Decision

A. *Aspermont*'s Impact on Two Traits of Effective Groundwater Management

Before analyzing the specific reasoning and conclusions of the court in *Aspermont*, one should take note of the decision's likely impact on effective aquifer management.

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59 Kaiser & Skillern, *supra* note 2 at 252.

60 Ostrom, *supra* note 18, at 91.

61 Tex. Water Code Ann. §§36.1132, 36.108 (Vernon 2008).

62 Horace Grace, State Bar of Texas, The Changing Face of Water Rights: Water Rights Advanced Course (April 2, 2009).

63 *Water for Texas 2007*, *supra* note 3 at 153-54.

64 *See generally* TWDB, *Water for Texas 2007*, *supra* note 3 at 154-218.

65 *Id.*

66 *See infra* Appendix D.

Three of the eight characteristics exhibited by successful common pool resource management programs prove especially relevant to the *Aspermont* decision. First, the court restricted the ability of Rolling Plains to subject appropriators to *graduated sanctions* based on the severity of the offense. This restriction resulted from the court's application of the sovereign immunity doctrine. Second, the result in *Aspermont* stands in stark contrast to the California examples, in which both local groundwater districts and watermasters could seek legal enforcement when appropriators broke the rules. Third, in *Aspermont*, one appropriator exploited uncertainty regarding the law in relation to groundwater district rules to extend the district's attempt to enforce its rules into circuitous litigation that still languishes in the courts.

Clearly, the rules and the law that governed the district did not provide a "low-cost local arena to resolve conflicts," an element conducive to successful common pool resources regulation. The application of sovereign immunity to municipal appropriators will only perpetuate complicated dispute resolution between groundwater districts and non-compliant municipalities. That this case reached a Texas Court of Appeals and that a party has filed a petition for review with the Texas Supreme Court indicates just how uncertain the rules are and the lack of a low-cost, local mechanism to resolve the conflict.

B. Competing Concepts of the Law and Their Impact on Groundwater Regulation

Based on the statutory language that it analyzed in light of the precedent that controlled its decision, the *Aspermont* court got it right, and this decision could have significant repercussions for the way that groundwater conservation districts are able to enforce their rules. As Ostrom points out, a groundwater authority needs graduated sanctions for effective enforcement, and the current *Aspermont* decision deprives a groundwater conservation district of the ability to impose more serious sanctions if necessary.

But the *Aspermont* decision offers another perspective: by debating the circumstances under which a groundwater conservation district may sue a municipality for noncompliance with district rules and then receiving the court's opinion, the parties outlined competing versions of the optimal relationship among different levels of government for regulating groundwater. This section explores these competing versions.

C. The Factual Background

The City of Aspermont withdrew or "appropriated" water from three wells in Haskell County, which adjoins Stonewall County in which the City is located.[67] These wells produced an amount of water equal to 66% of the water demand in the City.[68] The Rolling Plains Groundwater District sued the City of Aspermont for water withdrawn

67 City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W.3d 231, 234 (Tex. App.–Eastland 2008, pet. filed).

68 *Id.*

from the wells. The district court granted the City's plea to the jurisdiction, which alleged that sovereign immunity shielded the City from paying production fees on the wells. The Rolling Plains Groundwater Conservation District disagreed, arguing that a 2003 statute removed Aspermont from such protection, including fines.[69] The City had initially complied with the District's groundwater conservation rules after 2003, but after May 2004, had refused to do so.

One important and limiting characteristic of groundwater conservation districts is immediately apparent when one reads this history. The City of Aspermont relied on three wells to produce 66% of the water demand of its residents. Further, the data contained in the appendices to this article demonstrate the huge percentage of groundwater that municipalities consume relative to other appropriators.[70] Because municipalities are among the largest appropriators in a groundwater conservation district, the rules regarding their groundwater pumping and use need to be clear and enforceable. As the rest of this article reflects, however, groundwater districts currently face the most serious barriers when they attempt to enforce their rules against municipalities.

One should assess here whether the enforcement action against the City of Aspermont conformed to two of the eight elements that Ostrom identified in successful common pool resource regulation: graduated sanctions and effective conflict resolution mechanisms. The possibility of fines as high as $10,000 per day dating from 2004 to 2007 could violate the need for *graduated* sanctions; the groundwater conservation district needed to take the size of the fine into account when negotiating with the City. An exorbitant fine decreases the incentive to negotiate. In terms of an efficient conflict resolution mechanism, the City clearly was questioning the groundwater district's legitimacy given its longstanding refusal to comply. But even assuming a good faith actor, the legal ambiguities surrounding the relationship between cities and groundwater conservation districts would preclude the efficient, local conflict resolution that Ostrom described.

D. Local Governments, the Right to Sue, and Groundwater District Enforcement

In urging that it possessed the authority to pursue civil penalties against the City of Aspermont for violating its regulations regarding water usage and exportation, Rolling Plains relied on the following groundwater conservation district provision from the Texas Water Code:

> § 36.102. Enforcement of Rules
> (a) A district may enforce this chapter and its rules by injunction, mandatory injunction, or other appropriate remedy in a court of competent jurisdiction.
> (b) The board by rule may set reasonable civil penalties for breach of any rule of the district not to exceed $10,000 per day per violation, and each day of a continuing violation constitutes a separate violation.
> (c) A penalty under this section is in addition to any other penalty provided by the law of this state and may be enforced by complaints filed in the appropri-

69 *Id.*

70 *Compare infra* Appendix A with *infra* Appendix C.

> ate court of jurisdiction in the county in which the district's principal office or meeting place is located.
> (d) If the district prevails in any suit to enforce its rules, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.[71]

According to Rolling Plains, sovereign (governmental) immunity did not pose any barrier to a groundwater conservation district's ability to enforce its regulations. Implicitly Rolling Plains urged that Section 36.102 referred solely to one species of lawsuit, not to the right to sue or be sued in general: it referred to a lawsuit a groundwater conservation district brings to enforce its regulations. If one analyzed the structure of the state's natural resource regulations, it became clear that the groundwater conservation district shared the same power to sue regulated entities as statewide natural resource agencies possessed, such as the Texas Commission on Environmental Quality (TCEQ). First, the Texas Water Code itself defined local groundwater management districts as a tool of state water policy: according to Section 36.0015 of the Texas Water Code, groundwater conservation districts are the State's preferred method of groundwater management.72

Second, the Legislature had charged both state agencies and local groundwater districts with the same responsibilities outlined in Article XVI, Section 59(a) of the Texas Constitution, which declares:

> (a) The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass *all such laws* as may be appropriate thereto.[73]

The question arises whether the constitutional responsibility to "conserve and develop" the resources of the State resides with special purpose districts alone or also with state government as determined by the Legislature. Article XVI, Section 59(b) provides for dividing the state into conservation and reclamation districts to carry out the purposes outlined in the section. One might conclude that the authors of Section 59 intended these districts *alone* to effectuate purposes of this section. However, at least three interpretive guides indicate Rolling Plains was right: the State's constitution imposed the public rights and duties of natural resource conservation

71 Tex. Water Code Ann, §36.102 (Vernon 2008).
72 *Id.*
73 Tex. Const. art. XVI, § 59(a) (emphasis added.).

on both state and local governments. First, Article XVI, Section 59(a) states that the Legislature "shall pass all laws as may be appropriate," rather than shall pass "all laws necessary for conservation and reclamation districts." The amendment itself leaves the passage of laws that would impose natural resource conservation duties on the State to the Texas Legislature.

Second, the interpretive principle of *ejusdem generis* applies: when one encounters a list of statutory or constitutional subsections, the first subsections on the list establish the broadest possible reach of the provisions on the list that follow.[74] Since Article XVI, Section 59(a) establishes the broadest interpretation of the duty to conserve natural resources, the narrower focus on conservation and reclamation districts in Article XVI, Section 59(b) cannot serve to narrow the scope of the duty.

Third, Texas courts have concluded that the Legislature may decide whether to create natural resources regulation pursuant to Article XVI, Section 59 on a statewide or local basis. In *Beckendorff v. Harris-Galveston Coastal Subsidence District*, the plaintiff brought an Equal Protection challenge to the creation of a subsidence district on the basis that the counties regulated by the new district were unfairly burdened compared with those outside the district.[75] In an opinion that the Texas Supreme Court affirmed, the Fourteenth Court of Appeals held:

> [I]t is well established that constitutional equal protection relates to persons as such, and not to areas. [Citing authorities]. States have wide discretion in determining whether laws shall operate statewide or only in certain counties, the legislature "having in mind the needs and desires of each." [Citing authorities]. [W]e see no constitutional requirement that the subsidence district extend beyond Harris and Galveston Counties, even though legitimate objects of regulation exist outside them.

Rolling Plains correctly concluded that state agencies charged with natural resource protection and groundwater conservation districts both resulted from the duties outlined in Article XVI, Section 59. For Rolling Plains this common origin carried important consequences. Statutory provisions that define the TCEQ's enforcement powers — primarily those found in Chapter Seven of the Texas Water Code — simply refer to a "person" who violates a law or commission rule and then outlines the punishment or fine that the TCEQ may seek in court.[76] In none of these statutory provisions did the Legislature include a provision waiving sovereign immunity to enable the agency to enforce its rules in court against municipalities and other political subdivisions

74 *See, e.g.*, Martinez v. Harris County, 808 S.W.2d 257, 259 (Tex. App. –Houston [14th Dist] (1991 no writ).

75 558 S.W.2d 75, 81 (Tex. App. — Houston [14th Dist.] 1977), *aff'd*, 563 S.W.2d 239 (Tex. 1978).

76 *See, e.g.*, Tex. Water Code Ann. §7.162 (Vernon 2008) ("person" who transports or stores hazardous wastes in an illegal manner faces prosecution for specified criminal offenses). It should be noted that Section 311.034 of the Texas Government Code cautions against attributing significance to the word "person" when ascertaining legislative intent with regard to sovereign immunity. Tex. Gov't Code Ann. §311.034 (Vernon 2008).

of the State. Similarly, Chapter 36 of the Texas Water Code contains provisions subjecting "persons" to liability for violating district rules.[77]

Rolling Plains' argument — that the law treats enforcement actions by groundwater districts and statewide environmental agencies alike because they share common constitutional origin — founders in certain respects. First, Article XVI, Section 59 leaves the Legislature free to exercise its discretion in formulating entities under the amendment. Under the this provision of the Texas Constitution, the language that the Legislature employs to enable state agencies or local districts to enforce their mandates can be dissimilar. Second, whereas Chapter 7 of the Texas Water Code employs "person" to refer to anyone who violates the law or agency rules, Chapter 36 differentiates among different entities: persons, landowners with or without permits, firms, and corporations. Third, the enforcement provision at issue in *Aspermont* never states that "persons" who violate the rules will be subject to the enumerated penalties.[78] Except for the absence of "person," this provision otherwise resembles many of the provisions in Chapter 7 proscribing certain conduct and outlining penalties.

Still, as a policy matter, Rolling Plains' fundamental premise deserves consideration: that state agencies or special purpose districts whose authority to protect natural resources emanates from legislation based on Article XVI, Section 59 should be treated analogously. Specifically, enforcement actions that such entities bring to enforce their regulations should not be barred by sovereign or governmental immunity.

The City of Aspermont disagreed with Rolling Plains' argument that governmental immunity did not apply to suits which groundwater districts brought to enforce their regulations. The City returned to the basics: sovereign immunity protects state government from suit and liability;[79] governmental immunity does the same for municipalities.[80] Although the Aspermont decision does not discuss the governmental versus proprietary function distinction, the Court's conclusion indicates that it regarded the water-related functions at issue as governmental and therefore enjoying immunity from liability.[81] The Legislature itself had declared that it alone had the discretion to waive sovereign or governmental immunity for specific governmental acts, and that any such waiver had to be clear unambiguous.[82] This article will discuss just how very "clear and

77 *See* Tex. Water Code Ann. §36.115(a) (Vernon 2008) ("No person, firm, or corporation may drill a well without first obtaining a permit from the district"); *see also,* Tex. Water Code Ann. §36.119 (Vernon 2008)(a landowner or "other person" with the required permits to produce groundwater in the district may sue may sue a landowner who illegally pumps within a half mile of the complying person's wells).

78 *See* Tex. Water Code Ann. §36.102 (Vernon 2008).

79 *See, e.g.,* City of Galveston v. State, 217 S.W.3d 466, 469 (Tex. 2007).

80 City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W.3d 231, 232-33 (Tex.App.–Eastland 2008, pet. filed)(citing Reata Const. Corp. v. City of Dallas, 19 S.W.3d 371-374 (Tex. 2006))(The Eastland Court of Appeals agreed with the City of Aspermont that cities, as "political subdivisions" of the State, enjoyed immunity from liability); *see also* Wichita Falls State Hospital v. Taylor, 106 S.W.3d 692, 694 & n.3, 695 (Tex. 2003); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(B)(Vernon 2008).

81 City of El Paso v. Heinrich, 198 S.W.3d 403, 405 (Tex. App. - El Paso 2006, pet. filed) (contains a pertinent discussion of the governmental/proprietary distinction).

82 Tex. Gov't Code Ann. § 311.034 (Vernon 2008).

unambiguous" Texas courts have required the Legislature to be in waiving sovereign or governmental immunity.[83]

In practice, Texas law has characterized municipal functions as "proprietary" or "governmental" inconsistently. The City of Aspermont relied on provisions of the Texas Tort Claims Act and cases under that statute to maintain that a municipality's providing a water supply for its inhabitants — imported well water that the City itself pumped — constituted a governmental function.[84] The City of Aspermont took issue with the notion that the common constitutional origin of state agencies and local groundwater districts affected basic principles of sovereign or governmental immunity. The City urged that, for purposes of sovereign or governmental immunity, one could not compare a state agency with a local groundwater district. A state agency could sue a local entity for failing to carry out governmental functions.[85] Between two units of local government, however, Texas law addresses sovereign or governmental immunity differently. One unit of local government can sue another unit of local government only for its proprietary functions.[86] Because the City located two decisions in which the provision of water to the residents of a city constituted a governmental function, governmental immunity protected the City of Aspermont from suit and from liability in any suit that Rolling Plains filed.[87]

The Eastland Court of Appeals concluded that Section 36.102 of the Texas Water Code did not "clearly and unambiguously" waive sovereign immunity.[88] When one compares this Water Code provision with the section of the Texas Tort Claims Act that waives

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83 Tex. Civ. Prac. & Rem. Code §§ 101.025- (Vernon 2008)(The Texas Tort Claims Act is the most conspicuous example of such a waiver).

84 Aspermont relied on Section § 101.0215 of the Texas Civil Practice & Remedies Code, which contains categories observed under the Texas Tort Claims Act, including the following defined as governmental services: (1) waterworks and (2) water and sewer services. *Id.* at § 101.0215(a)(11) & (32). Aspermont also relied on a suit brought under the Tort Claims Act: Bishop v. City of Big Spring, 915 S.W.2d 566, 568 (Tex. App. - Eastland 1995, no writ) (maintenance of city water system is a governmental function). Non-Tort Claims Act cases have also recognizes water supply provision as a governmental function. *See* City of Alton v. Sharyland Water Supply Corp., 145 S.W.3d 673 (Tex. App. – Corpus Christi, no writ).

85 It should be noted that, even with respect to suits the State brings against municipalities, the Texas Supreme Court has held that the State must rely upon a statutory waiver of immunity, not simply a failure to carry out a governmental function). City of Galveston v. State, 217 S.W.3d 466, 471-72 (Tex. 2007).

86 *See e.g.* City of Houston v. Northwood Mun. Util. Dist. No. 1, 73 S.W.3d 304, 313 (Tex. App. - Houston [1st Dist.] 2001 no pet.) (city immune from suit brought by utility district); Texas Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides I.S.D., 221 S.W.3d 732 (2007) WL 274068 #5 (Tex. App. - San Antonio, Jan. 31, 2007, no pet. h.) ("sovereign immunity principles are to be applied horizontally between governmental entities").

87 The court of appeals disagreed with the City of Aspermont as to the extent of governmental immunity to which the City was entitled, concluding that immunity from suit had been waived but that Rolling Plains could pursue declaratory and injunctive relief. Rolling Plains could not pursue a declaratory judgment, however, that would cause the City of Aspermont to lose immunity from liability for civil penalties.

88 City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W.3d 231, 233 (Tex.App.–Eastland 2008, pet. filed).

tort immunity, one sees without question that the Water Code could have been more explicit. Section 101.025 of the Texas Tort Claims Act provides:

> Waiver of Governmental Immunity; Permission to Sue
> Sovereign immunity is waived and abolished to the extent of liability created by this chapter.
> A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Section 101.0215, which applies specifically to municipalities, explicitly declares municipalities to be "liable" according to the terms of the statute.[89]

The Texas Water Code provision at issue in *Aspermont* clearly enables a groundwater district to bring suit to enforce its rules: it spells out remedies, provides the district can enforce monetary penalties, directs the district to file suit in a court of competent jurisdiction, and empowers the district to seek attorney's fees if it prevails.[90] But, these enforcement provisions lack any statement authorizing the collection of fees from noncompliant municipalities analogous to the explicit language of the Texas Tort Claims Act: that "sovereign immunity is waived and abolished to the extent of liability created by this chapter." Because the subject Water Code provisions did not contain an explicit statement that waived a municipality's governmental immunity for violating a groundwater district's rules, the court of appeals concluded that the Legislature had not waived governmental immunity for these enforcement provisions.[91]

The Eastland Court did not, however, conclude that City of Aspermont was immune from suit. The court concluded that Rolling Plains bore the responsibility to carry out its duties under Article XVI, Section 59 and that local governments were generally subject to the regulations that special purpose districts enact to protect natural resources.[92] If Rolling Plains brought a declaratory judgment action to establish that the City of Aspermont had to comply with Rolling Plains' rules, the City would not enjoy governmental immunity.[93]

In fact, the Legislature came closer to waiving governmental immunity than the parties or the court believed. Section 36.066(a) of the Texas Water Code states with regard to groundwater districts that a "district may sue and be sued in the courts of this state in the name of the district by and through its board. . .[a]ll courts shall take notice of the creation of the district and its boundaries."[94] Neither the parties nor the court mentioned this section that arguably comes closer to creating a legislative waiver of governmental immunity than the enforcement provision in Section 36.102 of the Texas Water Code standing alone.

By virtue of precedent, however, the "sue and be sued" language ultimately made it more certain that the Eastland court was correct in its holding. In *Mexia v. Tooke*,[95] Tooke

89 Tex. Civ. Prac. & Rem. Code Ann. §101.0215 (Vernon 2008).
90 Tex. Water Code Ann. § 36.102 (Vernon 2008).
91 *Aspermont*, 258 S.W.3d at 234.
92 *Id.* at 236.
93 *Id.*
94 Tex. Water Code Ann. § 36.066(a) (Vernon 2008).
95 197 S.W.3d 325 (Tex. 2006).

won a competitive bid to collect curbside brush for the City of Mexia.[96] Tooke subsequently sued Mexia, a home-rule city, for discontinuing the brush collection contract.[97] The City of Mexia claimed that Tooke performed the brush collection as part of the City's governmental functions delineated in Section 101.0215(a)(6) of the Texas Tort Claims Act,[98] which provides that solid waste collection and removal constitutes a governmental function.[99] As such, the City of Mexia claimed governmental immunity from suit and from liability. Tooke relied on Section 51.075 of the Texas Local Government Code, which declares that a home-rule city "may plead and be impleaded in any court."[100] The Texas Supreme Court held that this language did not waive the City's immunity from suit: it failed to provide the clear and unambiguous waiver of immunity that Section 331.034 of the Texas Government Code requires.[101] The supreme court also concluded that other statutory phrases such as "implead or be impleaded," "sue or be sued," "answer and be answered," "complain and defend," or some combination of these phrases[102] did not serve to waive a local government's governmental immunity.[103]

The *Tooke* opinion acknowledged the vast number of cases that had concluded the opposite: that such phrases as "sue and be sued" indeed constituted a waiver of governmental immunity.[104] In a 2005 article,[105] Jeffrey S. Boyd provides excellent documentation of the split in Texas courts of appeals on this very issue in the years leading up to the *Tooke* opinion.[106] *Literally scores of decisions came down in opposite directions on this issue, and dozens of decisions have applied the Tooke* decision to local government disputes since the Texas Supreme Court issued that opinion. Clearly, decisions like *Tooke* alongside the Legislature's pronouncement in Section 311.034 of the Texas Government Code have brought clarity on a formalistic level to the waiver of governmental immunity problem: apparently, short

96 *Id.* at 329-30.

97 *Id.* at 330.

98 Tex. Civ. Prac. & Rem. Code $101.2015(a)(6) (Vernon 2008).

99 *Tooke,* 197 S.W.3d at 343.

100 *Id.* at 330-31.

101 *Id.* at 328-29.

102 One of these opinions bears striking resemblance to the *Aspermont* opinion. In *Seureau v. ExxonMobil Corp.* , the Fourteenth Court of Appeals refused to interpret Texas Water Code language pertaining to navigation districts as a waiver of governmental immunity. 276 S.W.3d 206, 313 (Tex. App. - Houston [14th Dist.] 2008 no pet.). This language bears a striking resemblance to that found in Section 36.066 of the Texas Water Code pertaining to groundwater conservation districts. Section 61.082 of the Texas Water Code provides:

> § 61.082. Court Actions
>
> (a) The district, by and through its commission, may sue and be sued in any court in this state in the name of the district.
>
> (b) The courts of this state shall take judicial notice of the establishment of the district.

103 *Tooke,* 197 S.W.3d at 334-35, 337.

104 *See id.* at 339.

105 *See* Jeffrey S. Boyd, *An Ace in the Hole and a Jack of All Trades: Recent Developments in Sovereign Immunity and Pleas to the Jurisdiction,* 6 TEX. TECH J. OF TEX. ADMIN. L. 3, at. 59-114 (Spring 2005).

106 *Id.* at 80-84.

of talismanic language similar to that in the Texas Tort Claims Act, a court may not imply a waiver of immunity. The question remains what impact this approach to governmental immunity and its application in the *Aspermont* decision could mean for effective groundwater regulation in Texas.

IV. LEGISLATIVE AMBIGUITY AND HOBBLED GROUNDWATER DISTRICTS

The preceding section of this article cited Article XVI, Section 59 of the Texas Constitution, which imposes an overarching duty on state government to conserve and develop all the natural resources of the State; this constitutional provision leaves to the Legislature discretion as to the units of government that should discharge the duty, including conservation and reclamation districts.[107] With respect to groundwater regulation — unlike water pollution [108]or surface water rights[109] — the Legislature chose local districts as its preferred method of conservation.[110] With this shift to local, "bottom-up" regulation came the responsibility to create laws that would enable local districts to carry out responsibilities vital to protecting groundwater.

Frankly, when a plaintiff calls upon the Texas judiciary to determine whether a statute is valid, the courts invest legislators with more wisdom than they may actually possess. Familiar principles of statutory construction confirm this observation. If one evaluates the Legislature's actual performance based on the ideal standards one assumes when reading a statute, it becomes clear that the difficulties groundwater districts face as a result of the *Aspermont* decision resulted in large measure from legislative ambiguity. Some of the principles of statutory constructions the courts assume when reading statutes are:

1. Absent strong evidence to the contrary, the courts assume that the Legislature intended the statute as a whole to have effect and to be intended for the public good.
2. The courts assume the legislators knew the current requirements of the Texas Constitution and laws at the time the new law was enacted.
3. Courts assume the Legislature did not intend to pass legislation that produced a useless or foolish result.

Applying these principles to Sections 36.066 and 36.102 of the Texas Water Code, one wonders if the Legislature actually performed as assumed.

A simple observation suggests that the Legislature failed to enact the legal provisions necessary to create effective groundwater districts. in 1995 and 2001, the Legislature passed and then amended Section 36.066 of the Texas Water Code — which provides, in part, that groundwater conservation districts may sue and be sued.[111] As Jeffrey S. Boyd points out, even before 2001, some Texas Courts of Appeals had reached opposite conclusions as to whether a "sue and be sued" provision waived governmental immunity.[112] Statutory construction principles dictate that the Legislature is presumed

107 *See* discussion *supra* note 79.
108 Tex. Water Code Ann. §§ 26.001-.562 (Vernon 2008).
109 Tex. Water Code Ann. §§ 11.001-.561 (Vernon 2008).
110 Tex. Water Code Ann. §36.0015 (Vernon 2008).
111 Tex. Water Code Ann. §36.066 (Vernon 2008).
112 *See* Boyd, *supra* note 105, at 80-84.

to know the current state of the law at the time it enacts a statute.[113] One, therefore, presumes that the legislators understood that courts were having problems with "sue and be sued" provisions. As a result, the Legislature should have made it abundantly clear whether Chapter 36 of the Texas Water Code waived the governmental immunity of municipalities'. The omission of any reference to sovereign or governmental immunity in Section 36.102 of the Texas Water Code made it necessary under statutory construction principles to conclude that the Legislature did not intend to waive any sovereign immunity.[114]

If this conclusion is true — that the Legislature did *not* intend to waive governmental immunity in 2001 — another principle of statutory construction arises: that the Legislature is not presumed to do useless or foolish things; for example, to create provisions that constitute a mere surplusage of words.[115] Sections 36.066 and 36.102 of the Texas Water Code contain highly specific provisions premised on the ability of groundwater districts to sue other entities. Although Section 36.066 refers to more than one type of litigation, Section 36.102 applies specifically to suing those who violate a district's rules. Its provisions refer to attorney's fees, expert witnesses, and other litigation costs, for example. Municipalities are among the largest groundwater consumers in the state. If the Legislature created highly specific provisions for litigation against those persons who violate groundwater rules, including the maximum dollar amount to be assessed against noncompliant permitted entities, it would follow that groundwater conservation districts could sue the largest consumers — cities. If not, the provisions enabling a groundwater district to collect penalties from groundwater users in court create an absurd result: groundwater conservation districts can sue small users for noncompliance, but not large ones.

When one considers that the Legislature met in 2003, 2005, and 2007 — all years during which the "sue and be sued" controversy had already reached a pitch — one questions whether the Legislature's drafting of Sections 36.066 and 36.102 of the Texas Water Code amounted to a "useless or foolish thing." The fact that the Texas Supreme Court decided *Tooke* in 2006 — before the 2007 legislative session — only strengthens this suspicion.

Yet another Legislative act suggests an inadvertent disregard of statutory construction principles. The Legislature enacted Section 311.034 of the Texas Government Code — the provision that requires a clear and unambiguous waiver of sovereign immunity — first in 2001 and then in 2005. The Legislature is presumed to know the state of the law at the time it enacts a provision. But, the Legislature enacted the current version of Sections 36.066 and 36.102 of the Texas Water Code in 2005, during the same session it amended the already-existing 'Section 311.034 of the Texas Government Code. The Legislature precluded waivers of sovereign immunity absent clear and unambiguous language, and then used unclear and ambiguous language as to whether groundwater conservation districts could sue noncompliant appropriators. In 2005, the Legislature amended 'Section 311.034 of the Government Code, but left Sections 36.066 and 36.102 of the Water Code untouched. Again, the Legislature is presumed to know the state of the law and is not presumed to do useless or foolish things.

113 Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990); In re Commitment of Lowe (Tex. App. – Beaumont 2004, pet. ref'd).

114 In re M.N., 262 S.W.3d 799, 802 (Tex. 2008); Tex. Gov't Code §311.021 (Vernon 2008).

115 Del Indust. Inc. v. Tex. Worker's Comm'n Ins. Fund, 973 S.W. 2d 743, 747-48 (Tex. App.—3d Dist 1998) *aff'd,* 35 S.W.3d 591 (Tex. 2000).

Were it not for the fact that Section 36.102 (b) and (c) of the Texas Water Code specifically outline procedures for a groundwater district to set penalties and then collect them *in court*, one might conclude that the Legislature did not providea waiver of immunity because it did not intend to provide one. But, the contradictions with the other provisions are just too great to reach this conclusion.

In drafting Chapter 36 of the Texas Water Code, the Legislature failed to assist local populations dependent on groundwater in at least three of the eight ways that Elinor Ostrom outlined. First, the relevant Water Code provisions failed to provide clear guidance as to the most serious sanctions a noncompliant groundwater user could face. The concept of "graduated sanctions" requires clarity as to what the spectrum of sanctions will be. Second, the ambiguity in the Water Code impairs a district's ability to engage in effective conflict resolution. In the case of *Aspermont*, a noncompliant user exploited ambiguities in the law to avoid paying groundwater district fees and then exempted itself from this obligation in the future by employing a legal doctrine, governmental immunity. Finally, the ambiguity of Section 36.102 of the Water Code coupled with the *Aspermont* decision may affect the ability of groundwater conservation districts to enforce their rules or collect their fees in the future.

This article has focused primarily on case histories of effective groundwater regulation in other jurisdictions, and how recent legislative and judicial decision making in Texas has affected groundwater conservation districts' ability to exercise those effective regulatory measures. In other words, no matter what may be happening "on the ground" with actual groundwater districts, the focus has been on drafting, enforcing, and adjudicating effective groundwater rules. The question remains whether the *Aspermont* decision will actually affect groundwater conservation districts or the preservation of groundwater. To gain some sense of the possible impact on Texas groundwater conservation districts, the next section of this article provides data on projected future groundwater demand in Texas, as well as information regarding the funding and enforcement activities of forty-nine groundwater districts throughout the state.

V. TEXAS GROUNDWATER DISTRICTS: A PICTURE OF REGULATION IN 2009 AND CONDITIONS IN THE FUTURE

This section relies on Appendices A-G, based in part on TWDB projections for 2010-2060. Appendix A provides groundwater supply and demand for each Regional Water Planning District in the state. Appendix B provides projected population growth in Texas by region. Appendix C provides projections for municipal groundwater use statewide.

Appendix D shows the number of groundwater conservation districts by aquifer, and Appendix E shows the number of groundwater conservation districts in each Regional Water Planning District. This appendix distinguishes between districts completely within a single region from districts partially within a region. The total number of districts, both partial and complete, is provided for each region.

For 2006, 2007, and 2008, Appendix F contains the results of a Public Information Act survey containing information on the districts' funding, appropriator violations, enforcement actions, and other relevant information.

Finally, Appendix F also provides data as to the primary funding sources for the districts, whether taxes or fees, and the number of enforcement actions each category

undertook. Appendix F also provides the groundwater management area in which the districts are located.

A. Future Urban Growth, Increased Groundwater Demand, Need for Regulation

If one discusses the ability of groundwater conservation districts to regulate effectively in the future, one must start with some basic statistics.[116] The state currently relies on groundwater for approximately 59% of its total supply, or approximately 9.2 million of the state's total 15.6 million acre-feet of water used. Between 2000 and 2060, experts project the population of Texas will more than double: from almost 21 million in 2000 to almost 46,000,000 in 2060. Together Dallas-Fort Worth, Houston, El Paso, and the San Antonio-Austin corridor account for over 15 million, or nearly 75% of all projected population growth. Collectively, municipalities as a whole will see a jump from approximately 4,047,661 to 8,258,942 inhabitants during this time period.[117] Clearly, municipal use will constitute the vast majority of increased demand. Appendix C provides data on projected municipal water use according to water planning region, which the TWDB expects to increase to 38% of total use for the state by 2060.

Appendix A demonstrates that, in most regions, groundwater will comprise a significant percentage of that total. Appendix A provides statistics for overall region-by-region groundwater demand from 2010 until 2060.[118] Appendix A also indicates that, while groundwater supply is projected to remain relatively constant for most of the state, together Regional Water Planning Districts C (North Texas), D (Northeast Texas), H (Houston-Galveston and surrounding counties), and I (East Texas) will greatly increase their demand for groundwater.

Certain regional planning districts face the odd predicament of decreased groundwater supply that outstrips a decrease in demand. Groundwater supply is estimated to decrease 43% for Regional Water Planning District A (Panhandle) with a 25% projected decrease in total demand. Planning District O (Llano Estacado) projects a 57% decrease in groundwater supply with only a 15% decrease in total demand.

Despite the increased municipal demand for groundwater by 2060, the TWDB estimates that groundwater production will decrease 32% from 2010 to 2060, from 8.5 million acre feet to 5.8 million acre feet. The total amount of groundwater actually available should decrease from 22% from 2010 to 2060, from 12.7 million acre feet to 9.9 million acre feet. Despite the predicted decrease in groundwater use for agricultural purposes,[119] pressures on groundwater will increase.

These statistics reflect a dramatic increase in urban groundwater use and underscore what may be *Aspermont*'s most serious impact. Ronald Kaiser and Frank F. Skillern predict certain groundwater controversies that will intensify as groundwater use continues to shift toward cities. One example: as cities grow, they reach out to rural groundwater sources to increase their water supply. Rural communities see this tendency as a threat to their own economies.[120] Overdrafting and mining of groundwater will also increase in the future,[121]

116 *See* Mace, *supra* note 5, at 120-22.
117 *Id.*
118 *Id.* at 176.
119 *Id.* at 176.
120 Kaiser & Skillern, *supra* note 2 at 249.
121 *Id.* at 252.

practices in which high-demand groundwater users like cities may well engage. Well interference is perhaps the clearest example of conflicts facing groundwater users and Texas cities in the future, a phenomenon that results when irrigation or municipal wells disrupt supply from shallow, low capacity wells located nearby.[122] San Antonio alone has ninety-four such high capacity wells,[123] estimated by two experts to pump up to 1.4 million gallons of water per day.[124]

These future conditions underscore the relevance of decisions like *Aspermont*, which declared municipalities immune from liability for violating groundwater district regulations. Pressure to produce adequate groundwater supplies will increase most dramatically in the same urban regions where municipal water suppliers are immune from groundwater district liability. Ostrom's "graduated sanctions" will be handicapped at the time and place they are most needed.[125]

B. Fifty-One Groundwater Districts

The table in Appendix F contains survey responses from the fifty-one groundwater districts that responded to Public Information Act (PIA) requests for this article. Given the *Aspermont* decision, five issues assumed particular importance for the three years in question, 2006, 2007, and 2008:

First, to what extent did a district rely on fees versus ad valorem taxes to support its operations?

Second, how many rule violations did the district document for the three years?

Third, how many enforcement actions of any kind did the district undertake in the three years?

Fourth, did a correlation exist between the source of funding and the number of violations or enforcement actions?

Fifth, did any of these enforcement actions ultimately go to court?

The following are excerpts from Appendix F.

1. Funding

Ten districts reported approximately 70% or more of their total funding from fees.

Thirty-six districts reported funding from taxes as approximately 70% or more of their total funding.

Two districts reported a roughly 50%-50% split from taxes and fees, while one district reported zero revenue from either source.

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122 *Id.* at 253-55.

123 COUNCIL FOR ENVIRONMENTAL EDUCATION, SAN ANTONIO H20: KNOW YOUR CITIES' WATER FACTS. WET IN THE CITY: TEAM WET SCHOOLS, at 3, *available at http://*www.saws.org/education/h2o_university/h2o_heroes/askanswer.cfm (last visited Jan. 23, 2010).

124 Paul Burmeister. & Paul Didier, *The Case of a High Capacity Well Near Lake Beulah*, at 3, *available at* http://www.dnr.state.wi.us/org/water/dwg/gac/presentations/Burmeister060106.pdf.

125 This article does not discuss an additional pressure on groundwater appropriators to decrease consumption and associated withdrawals: the new legislatively-authorized caps that groundwater districts will place on permitting based on the estimated quantity of water available. *See* Tex. Water Code Ann. §36.1132 (Vernon 2008).

2. Violations

Thirty-six districts reported funding from taxes as approximately 70% or more of their total funding. Seventeen of these districts reported a combined minimum of 353 violations[126] for the three-year period while nineteen districts reported zero violations.

Ten districts reported approximately 70% or more of their total funding from fees. Seven of these districts relying of fees reported 1,572 violations, while three districts reported zero violations.

Two districts reported revenue approximately one-half from taxes and one half from fees. These districts reported 91 violations.

One district reported zero revenue, zero violations, and zero enforcement actions.

3. Enforcement Actions

Seven districts relying mostly on taxes accounted for twenty-three enforcement actions, while twenty-nine reported zero enforcement actions.

Seven districts relying on fees accounted for 242 enforcement actions, while two districts reported zero enforcement actions.

Only one groundwater district – Rolling Plains — reported that an enforcement action went to court.

4. Analysis

Although a larger number of districts rely on taxes than fees, they reported 353 violations compared to 1,572 reported violations by fee-reliant districts. Also, tax-reliant districts reported only 23 enforcement actions, while the smaller number of fee-reliant districts reported 242 enforcements. Fee-reliant districts appear more likely to report violations and enforcement of these violations than districts that rely mainly on taxes.

Two districts reported a roughly 50%-50% split from taxes and fees, while one district reported zero revenue from either source. The two districts reliant on both taxes and fees reported a combined 91 violations and 10 enforcement actions. These two districts reported a quarter of the total violations reported by the seventeen tax-reliant districts and almost half the number of enforcement actions. The district without any revenue from taxes or fees reported zero violations and zero enforcement actions. These numbers suggest that districts reliant on a substantial, if not a majority, portion of revenue from fees are more likely to report violation and enforcement actions.

One might surmise without support that the most fee-dependent districts engage in more enforcement action because their budgets rely on it. If this conclusion is true, then the *Aspermont* decision would have a serious impact on these districts. If a municipality fails to pay groundwater district fees and then fails to reach an agreement with the groundwater district to compensate the district for them, the district will not have any practical way to collect the fees that other users are paying. This legal system creates a disincentive for cities to pay fees upfront, then a disincentive later to settle by paying delinquent fees. For those districts reliant on fees for their budgets, the less cities pay, the less the districts can enforce their rules.

If a groundwater district sought a declaratory judgment and injunctive relief – as *Aspermont* appears to allow — then any injunction that might issue would place the

126 The Neches and Trinity Valleys Groundwater Conservation District reported its number of violations as "uncertain."

offending appropriator under a court that presumably recited a violation of a rule the groundwater had enacted to support the injunction. If the appropriator then violated the order and was placed in contempt, any fines would go to the State, not the groundwater district.

VI. CONCLUSION

The *Aspermont* decision deprives Texas groundwater districts of a critical enforcement power against municipalities: the threat of litigation for damages if a city refuses to comply with the district's regulations. Projections show that the size of Texas cities will burgeon in the coming decades, as will their groundwater use, so that effective enforcement tools will become increasingly important to protect groundwater. Extensive case studies of regulatory entities that govern common pool resources like aquifers suggest the necessity of a graduated system of sanctions.

The *Aspermont* decision also weakens the "graduated sanctions" available to a groundwater district at a time when Texas has shifted to a new system of groundwater regulation that will place real restrictions on groundwater production, and therefore, increase the probability of non-compliance.

The *Aspermont* decision itself reflects the fact that Texas has not yet achieved another feature of effective groundwater regulation: efficient local mechanisms for conflict resolution. As long as something as basic as litigation to enforce a rule can become a protracted legal battle, the legitimacy of local groundwater rules are clearly in question.

In successful common pool resource regulation, the users typically recognize that their behavior is destroying the resource, at which point they agree to different rules of use and set up a system to enforce them. In Texas, other attitudes also seem to inform the decision to form a groundwater district: the fear of state regulation and the desire to enact rules that preserve individual autonomy over groundwater use. If this attitude is present, it may account for the survey results indicating a number of districts that seldom took enforcement actions even when faced with a number of violations. The number of districts that did engage in enforcement actions, however, also suggests that a number of districts take their regulatory responsibilities seriously. Other barriers exist that frustrate effective groundwater regulation, as this article suggests.

Finally, Texas needs to provide groundwater districts with clear and credible enforcement mechanisms. In part, this requirement means that the Texas Legislature needs to draft groundwater statutes that unambiguously confer enforcement power on local districts.

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Appendix A

Regional Groundwater Supply, Total Supply and Demand Projections 2010-2060

2007 TWDB State Water Plan (p. 123)

Region	Groundwater Supply 2010	Groundwater Supply 2060	Supply Total 2010	Supply Total 2060	Percent Ground 2010	Percent Ground 2060	Demand Total 2010	Demand Total 2060	Demand Change
A - Panhandle	1,806,776	1,031,462	1,893,932	1,130,851	95%	91%	1,864,748	1,399,412	-25%
B - Region B	58,668	58,615	209,683	157,761	28%	37%	171,164	169,153	-1%
C - Region C	93,650	92,632	1,513,839	1,379,109	6%	7%	1,768,464	3,311,217	87%
D - North East Texas	83,545	93,503	1,000,165	1,002,145	8%	9%	561,076	838,977	50%
E - Far West Texas	395,458	395,458	524,301	524,301	75%	75%	662,608	721,071	9%
F - Region F	478,929	479,250	613,969	608,859	78%	79%	807,453	825,581	2%
G - Brazos G	279,757	254,682	1,150,098	1,112,155	24%	23%	835,691	1,150,973	38%
H - Region H	661,078	509,715	2,712,744	2,562,755	24%	20%	2,314,094	3,412,457	47%
I - East Texas	222,638	222,208	1,158,261	1,154,161	19%	19%	896,455	1,261,320	41%
J - Plateau	88,681	88,681	107,950	107,950	82%	82%	51,844	58,559	13%
K - Lower Colorado	267,034	265,533	1,182,078	887,972	23%	30%	1,078,041	1,301,682	21%
L - South Central Texas	685,136	657,404	1,049,769	1,018,410	65%	65%	985,237	1,273,003	29%
M - Rio Grande	79,732	79,163	1,107,563	1,074,942	7%	7%	1,474,242	1,661,657	13%
N - Costal Bend	51,768	46,650	261,446	262,487	20%	18%	226,691	308,577	36%
O - Llano - Estacado	3,057,600	1,324,108	3,155,216	1,421,987	97%	93%	4,388,459	3,716,727	-15%
P - Lavaca	207,599	207,599	209,431	209,431	99%	99%	225,561	206,908	-8%
Total	8,518,049	5,806,663	17,850,445	14,615,276	48%	40%	18,311,828	21,617,274	18%

APPENDIX B

STATE AND REGIONAL POPULATION GROWTH PROJECTIONS 2010-2060

2006 TWDB REGIONAL WATER PLAN (P. 121)

Region	Population 2010	Population 2060	Percent Change
A - Panhandle	388,104	541,035	39%
B - Region B	210,642	221,734	5%
C - Region C	6,625,282	13,087,849	98%
D - North East Texas	772,163	1,213,095	57%
E - Far West Texas	855,466	1,527,713	79%
F - Region F	618,889	724,094	17%
G - Brazos G	1,882,896	3,332,100	77%
H - Region H	5,775,097	10,897,526	89%
I - East Texas	1,090,382	1,482,448	36%
J - Plateau	135,723	205,910	52%
K - Lower Colorado	1,359,677	2,713,905	100%
L - South Central Texas	2,460,599	4,297,786	75%
M - Rio Grande	1,581,207	3,826,001	142%
N - Coastal Bend	617,143	885,665	44%
O - Llano Estacado	492,627	551,758	12%
P - Lavaca	49,491	49,663	0%
Texas State Total	24,915,388	45,558,282	83%

http://www.twdb.state.tx.us/DATA/popwaterdemand/2003Projections/Population%20Projections/STATE_REGION/region_pop.htm

Appendix C

State and Regional Municipal Use 2010-2060
2006 TWDB Regional Water Plan

Region	Municipal 2010	Municipal 2060	Total 2010	Total 2060	% Municipal 2010	% Municipal 2060
A - Panhandle	77,605	104,242	1,864,748	1,399,412	4%	7%
B - Region B	40,964	38,696	171,164	169,153	24%	23%
C - Region C	1534,703	2,915,773	1,768,464	3,311,217	87%	88%
D - North East Texas	119,951	178,178	561,076	838,977	21%	21%
E - Far West Texas	162,132	251,974	662,608	721,071	24%	35%
F - Region F	141,965	157,632	807,453	825,581	18%	19%
G - Brazos G	347,389	595,482	835,691	1,150,973	42%	52%
H - Region H	980,544	1,732,608	2,314,094	3,412,457	42%	51%
I - East Texas	189,559	233622	896,455	1,261,320	21%	19%
J - Plateau	29,320	39,632	51,844	58,559	57%	68%
K - Lower Colorado	252,637	484,170	1,078,041	1,301,682	23%	37%
L - South Central Texas	395,996	637,235	985,237	1,273,003	40%	50%
M - Rio Grande	279,633	625,743	1,474,242	1,661,657	19%	38%
N - Coastal Bend	111,495	151,474	226,691	308,577	49%	49%
O - Llano Estacado	99,437	105,940	4,388,459	3,716,727	2%	3%
P - Lavaca	7,171	6,541	225,561	206,908	3%	3%
Texas State Total	4,770,501	8,258,942	18,311,828	21,617,274	26%	38%

http://www.twdb.state.tx.us/data/popwaterdemand/2003Projections/DemandProjections/Region_demand.htm

APPENDIX D

AQUIFER REGULATION BY PLANNING REGION																
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	TOTAL
Pecos Valley						X											1
Seymour	X	X					X										3
Gulf Coast							X	X	X		X	X	X	X		X	8
Carrizo-Wilcox			X	X			X		X		X	X	X	X			8
Hueco-Mesilla Bolson					X												1
Ogallala	X					X									X		3
Edwards BFZ							X			X	X	X					4
Trinity		X	X	X		X	X			X	X	X					8
TOTAL	2	2	2	2	2	4	6	1	2	3	5	5	2	2	1	1	

Appendix E

Water Conservation Districts by Region			
Region	**Complete**	**Partial**	**Total**
A - Panhandle	4	2	6
B - Region B	0	3	3
C - Region C	1	3	4
D - North East Texas	0	0	0
E - Far West Texas	5	0	5
F - Region F	14	1	15
G - Brazos G	10	3	13
H - Region H	2	3	5
I - East Texas	5	2	7
J - Plateau	4	0	4
K - Lower Colorado	8	4	12
L - South Central Texas	14	1	15
M - Rio Grande	2	1	3
N - Costal Bend	5	1	6
O - Llano - Estacado	5	1	6
P - Lavaca	2	1	3
Complete = Within a single Planning Region			
Partial = District within Multiple Regions			
Total = Total Districts (Partial and Complete) Within Region			

APPENDIX F

TEXAS GROUND WATER DISTRICT BUDGETS, REVENUE SOURCES, VIOLATIONS AND ENFORCEMENTS 2006-2008

District Name	RWPA	GMA	2006 Budget	Taxes	Fees	2007 Budget	Taxes	Fees	2008 Budget	Taxes	Fees	Viol.	Enforc.
Anderson County UWCD	I	11	†	†	†	†	†	†	†	†	†	†	†
Bandera County RA and GD	J	9	437,490	81%	•	471,400	82%	7%	486,673	83%	5%	3	3
Barton Springs/Edwards Aquifer CD	K	10	1,700,000	0%	•	1,570,000	0%	82%	1,670,000	0%	85%	352	13
Bee GCD	N	15,16	90,787	100%	0%	105,787	100%	0%	102,440	100%	0%	0	0
Blanco-Pedernales GCD	K	9	194,511	95%	3%	228,603	91%	4%	248,798	93%	4%	2	2
Bluebonnet GCD	H,G	14	146,100	0%	100%	144,250	0%	100%	168,000	0%	100%	0	0
Brazoria County GCD	H	14	•	•	•	206,334	0%	100%	229260	0%	100%	0	0
Brazos Valley GCD	G	12, 14	†	†	†	†	†	†	†	†	†	†	†
Brewster County GCD	E	4	†	†	†	†	†	†	†	†	†	†	†
Central Texas GCD	K	8	†	†	†	†	†	†	†	†	†	†	†
Clear Fork	G	6	†	†	†	†	†	†	†	†	†	†	†
Clearwater UWCD	G	8	440,778	96%	1%	442,959	96%	0%	510,005	93%	14%	0	0
Coastal Bend GCD	K,P	15	342,322	91%	0%	308,182	84%	0%	278,418	74%	0%	31	1
Coastal Plains GCD	K	15	141,626	100%	0%	153,837	100%	0%	166,557	100%	0%	1	1
Coke County UWCD	F	7	28,225	100%	0%	32,960	100%	0%	33,085	100%	0%	0	0
Colorado County GCD	K	15	†	†	†	†	†	†	†	†	†	†	†
Corpus Christi ASRCD	N	16	†	†	†	†	†	†	†	†	†	†	†

Appendix F (cont.)

District Name	RWPA	GMA	2006 Budget	Taxes	Fees	2007 Budget	Taxes	Fees	2008 Budget	Taxes	Fees	Viol.	Enforc.
Cow Creek GCD	L	9	250,645	56%	•	280,331	53%	47%	306,486	56%	43%	89	8
Crockett County GCD	F	7	199,350	92%	•	226,640	82%	0%	209,684	91%	0%	0	0
Culberson County GCD	E	4	†	†	†	†	†	†	†	†	†	†	†
Edwards Aquifer Authority	L	10,7, 9,13	16,573,159	0%	•	11,220,333	0%	97%	13,883,128	0%	97%	870	7
Evergreen UWCD	L	13,15	533,888	94%	6%	746,864	95%	5%	693,556	97%	3%	2	0
Fayette County GCD	K	12,15	97,100	102%	1%	221,692	67%	20%	184,052	121%	3%	17	0
Fox Crossing WD	K	8	†	†	†	†	†	†	†	†	†	†	†
Garza County UWCD	O	2	†	†	†	†	†	†	†	†	†	†	†
Gateway GCD	B,A	6	†	†	†	†	†	†	†	†	†	†	†
Glasscock GCD	F	7	143,005	100%	0%	149,816	100%	0%	152,318	100%	0%	0	0
Goliad County GCD	L	15	71,990	95%	•	100,000	93%	2%	160,000	95%	2%	5	5
Gonzales County UWCD	L	13	162,983	50%	46%	185,530	48%	36%	198,980	47%	49%	2	2
Guadalupe County GCD	L	13	†	†	†	†	†	†	†	†	†	†	†
Hays Trinity GCD	K,L	9	†	†	†	†	†	†	†	†	†	†	†
Headwaters GCD	J	9	†	†	†	†	†	†	†	†	†	†	†
Hemphill UWCD	A	1	†	†	†	†	†	†	†	†	†	†	†
Hickory UWCD	F,K	7	301,266	95%	2%	312,909	95%	2%	339,306	95%	2%	0	0
High Plains UWCD	O,A	2,1	2,383,069	84%	•	2,453,269	85%	1%	2,732,089	85%	1%	166	0
Hill Country UWCD	K	7	205,284	78%	10%	215,337	76%	11%	226,316	78%	10%	32	0

APPENDIX F (CONT.)

District Name	RWPA	GMA	2006 Budget	Taxes	Fees	2007 Budget	Taxes	Fees	2008 Budget	Taxes	Fees	Viol.	Enforc.
Hudspeth County UWCD	E	4	†	†	†	†	†	†	†	†	†	†	†
Irion County WCD	F	7	112,920	96%	0%	118,853	65%	0%	120,853	98%	0%	0	0
Jeff Davis County UWCD	E	4	†	†	†	†	†	†	†	†	†	†	†
Kenedy County GCD	N	16	240,260	100%	0%	200760	100%	0%	213,883	100%	0%	0	0
Kimble County GCD	F	7	47,300	100%	0%	45,050	100%	0%	51,020	100%	0%	0	0
Kinney GCD	J	7,10	†	†	†	†	†	†	†	†	†	†	†
Lipan Kickapoo WCD	F	7	230,375	100%	0%	269,621	100%	0%	259375	100%	0%	16	0
Live Oak UWCD	N	16	63,087	100%	0%	63,000	100%	0%	63,000	100%	0%	0	0
Llano Estacado UWCD	O	2	265,085	95%	0%	310,481	95%	0%	334,858	95%	0%	0	0
Lone Star GCD	H	14	1,036,882	0%	100%	1,893,206	0%	100%	2,227,308	0%	100%	272	194
Lone Wolf GCD	F	7	117,600	100%	0%	146,200	100%	0%	138,100	100%	0%	6	0
Lost Pines GCD	K,G	12	511,945	0%	100%	488,000	0%	100%	553,500	0%	100%	3	0
Lower Trinity GCD	H,I	14	•	•	•	88000	0%	99%	109180	0%	99%	52	2
McMullen GCD	N	13,16	18,237	100%	0%	18,487	100%	0%	21,425	100%	0%	0	0
Medina County GCD	L	10,9,13	145,547	71%	3%	184,230	81%	4%	184,230	69%	4%	0	0
Menard County UWD	F	7	70,672	100%	0%	72,720	100%	0%	76,400	100%	0%	2	0
Mesa UWCD	O	2	†	†	†	†	†	†	†	†	†	†	†
Mesquite GCD	A	6	†	†	†	†	†	†	†	†	†	†	†
Mid-East Texas GCD	H,C	12	†	†	†	†	†	†	†	†	†	†	†
Middle Pecos GCD	F	7,3	304,404	98%	1%	308,254	97%	1%	312,601	91%	6%	0	0

Appendix F (cont.)

District Name	RWPA	GMA	2006 Budget	Taxes	Fees	2007 Budget	Taxes	Fees	2008 Budget	Taxes	Fees	Viol.	Enforc.
Middle Trinity GCD	G	8	325,578	100%	0%	358,096	100%	0%	401,267	100%	0%	3	3
Neches & Trinity Valleys GCD	I,C	11	181,777	0%	99%	186,500	0%	94%	274,751	0%	93%	0	0
North Plains GCD	A	1	†	†	†	†	†	†	†	†	†	†	†
Northern Trinity GCD	C	8	†	†	†	†	†	†	†	†	†	†	†
Panhandle GCD	A	1	1,343,589	87%	5%	1,273,951	93%	5%	1,188,531	86%	6%	13	0
Panola County GCD	I	11	†	†	†	†	†	†	†	†	†	†	†
Pecan Valley GCD	L	15	117,268	99%	1%	125,009	99%	1%	137,440	98%	2%	0	0
Permian Basin UWCD	F	2	†	†	†	†	†	†	†	†	†	†	†
Pineywoods GCD	I	11	125,323	0%	100%	132,045	0%	100%	162,774	0%	100%	17	6
Plateau UWC and Supply Dist.	F	7	†	†	†	†	†	†	†	†	†	†	†
Plum Creek CD	L	13	700,966	99%	1%	796,275	99%	1%	1,418,783	99%	1%	0	0
Post Oak Savannah GCD	G	12,8	359,806	0%	100%	527,643	0%	100%	1,148,032	0%	100%	6	6
Presidio County UWCD	E	4	†	†	†	†	†	†	†	†	†	†	†
Real-Edwards C and R D	J	7	†	†	†	†	†	†	†	†	†	†	†
Red Sands GCD	M	16	†	†	†	†	†	†	†	†	†	†	†
Refugio GCD	L	15	†	†	†	†	†	†	†	†	†	†	†
Rolling Plains	G,B	6	149,700	92%	•	157,000	87%	2%	157,000	87%	2%	1	1
Rusk County GCD	I	11	162,000	100%	0%	177,600	92%	2%	232,000	94%	2%	0	0
Salt Fork UWCD	G	6	†	†	†	†	†	†	†	†	†	†	†

APPENDIX F (CONT.)

District Name	RWPA	GMA	2006 Budget	Taxes	Fees	2007 Budget	Taxes	Fees	2008 Budget	Taxes	Fees	Viol.	Enforc.
San Patricio GCD	N	16	5,000	0%	0%	2,000	0%	0%	1,000	0%	0%	0	0
Sandy Land UWCD	O	2	257,497	81%	0%	280,950	80%	0%	338,173	72%	0%	0	0
Santa Rita UWCD	F	7	†	†	†	†	†	†	†	†	†	†	†
Saratoga UWCD	G	8	3,000	100%	0%	3,000	100%	0%	3,000	100%	0%	0	0
South Plains UWCD	O	2	153,000	95%	5%	180,000	95%	5%	230,000	95%	5%	51	0
Southeast Texas GCD	I	14	†	†	†	†	†	†	†	†	†	†	†
Starr County GCD	M	16	†	†	†	†	†	†	†	†	†	†	†
Sterling County UWCD	F	7	†	†	†	†	†	†	†	†	†	†	†
Sutton County UWCD	F	7	180,121	90%	0%	198,249	89%	0%	239,776	92%	0%	0	0
Texana GCD	P	15	†	†	†	†	†	†	†	†	†	†	†
Trinity Glen Rose GCD	L	9	†	†	†	†	†	†	†	†	†	†	†
Upper Trinity GCD	C,B,G	8	†	†	†	†	†	†	†	†	†	†	†
Uvalde County UWCD	L	10,7,13	†	†	†	†	†	†	†	†	†	†	†
Victoria County GCD	L	15	433,985	100%	0%	474,403	71%	0%	512,999	100%	0%	0	0
Wes-Tex GCD	G	7	81,352	100%	0%	95,482	100%	0%	119,520	100%	0%	2	0
Wintergarden GCD	L	13	†	†	†	†	†	†	†	†	†	†	†

• Data unavailable or not provided

† District Nonresponsive

Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?

by Kelly Davis

Since the 1970s, federal and state governments have relied on private law enforcement actions as a means of obtaining statutory objectives of environmental laws. This reliance has developed by virtue of the inclusion of a citizen suit provision in nearly every major federal environmental statute. Public interest organizations have made use of these provisions in countless actions in an effort to promote the public good by bringing into compliance and penalizing statutory violators. The work of these groups seems to fall in line with Congress' stated intent to "extend the concept of public participation to the enforcement process."[1] However, the future of these actions is uncertain, as courts have recently begun punishing unsuccessful plaintiffs by awarding attorney fees to prevailing defendants in citizen actions. Because the majority of these actions are brought by non-profit and citizen groups, the substantial burden of paying high fees can produce far-reaching negative consequences.

In 2006, one organization in central Texas felt these consequences when it was hit with a losing judgment that awarded hundreds of thousands of dollars in attorney fees to its opponents. For Save Our Springs Alliance (SOS), this judgment marked the first time attorney fees had been levied against it, despite decades of filing citizen suits pursuant to environmental statutes. After multiple appeals, SOS was able to reverse the judgment against it, but the message is clear that it is not immune from such judgments in the future. It is doubtful that the current level of citizen enforcement will maintain or continue with the expansion of attorney fee awards levied against public interest plaintiffs.

1 *See* 116 Cong. Rec. 32, 903 (1970) (statement of Sen. Muskie).

This note will examine the traditional use of citizen suits and the ramifications of this practice on future citizen enforcement actions. Part I lays the groundwork by tracing the origins of modern citizen suit and attorney fees provisions and the ways in which courts have historically interpreted these provisions. Part II will provide context by discussing two recent cases, the facts leading to the courts' conclusions and the courts' reasonings in awarding fees. Part III will analyze this turn in the law by discussing the potential impacts of widespread use of this practice in terms of individual organizations and frustration of congressional intent. This note will also discuss the reasoning the courts employed in levying fees and propose modifications to the law to accommodate the competing interests of deterring frivolous lawsuits while enabling citizens to pursue their claims. Part IV concludes the note with some final thoughts on the potential negative consequences of continuing to levy such fees.

I. AN INTRODUCTION TO CITIZEN SUITS AND ATTORNEY FEES

Beginning in the 1970s—the zenith of environmental legislation-making—citizens and Congress alike felt the need for stronger federal environmental statutes.[2] Responding to the "almost total lack of enforcement," of the Federal Water Pollution Control Act of 1948, Congress included a variety of new enforcement remedies in environmental statutes.[3] However, largely due to the Democratically-controlled Congress' fear of the enforcement intentions of a Republican administration, Congress had great interest in encouraging citizen participation in the enforcement of environmental law.[4] This interest culminated in the inclusion of a citizen suit in the 1972 amendments to the Clean Air Act (CAA).[5] The language in the CAA's citizen suit provision served as the model for all subsequent environmental statutes, holding that "any person may commence a civil action on his own behalf" against a private or governmental polluter or against the EPA Administrator for failing to perform a non-discretionary duty.[6] Since their inception, citizen suit provisions have become the norm in federal environmental legislation.[7] Today, at least ten federal environmental statutes allow citizens access to court to enforce the requirements of those statutes against both violations by the regulated public and failure to perform a mandatory duty by government entities.[8]

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2 CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, ENVIRONMENTAL POLICY DIVISION, 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1265 (1973) [hereinafter CWA LEGISLATIVE HISTORY].

3 *Id.* at 1423.

4 Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 366 (Winter 1988).

5 *Id.* at 366–67.

6 Clean Air Act § 304, 42 U.S.C. § 7604(a) (2007).

7 Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10309, 10311 (1983) [hereinafter Miller I].

8 Clean Air Act § 304, 42 U.S.C. § 7604 (2008); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (2008) [hereinafter cited as the Clean Water Act]; Marine Protection, Research, and Sanctuaries Act (MPRSA) § 105(g), 33 U.S.C. § 1415(g) (2008); Noise Control Act (NCA) § 12, 42 U.S.C. § 4911 (2008); Endangered Species Act (ESA) § 11(g), 16 U.S.C. §

Citizens were thus able to take action directly against polluters to seek injunctive relief to halt violations, as well as correct an administration's lax enforcement by permitting citizens to sue the EPA requesting the court to order the EPA to enforce the law.[9] By allowing a suit, and not merely a petition to enforce, Congress's intent to supplement governmental action when agencies had "failed to exercise their enforcement responsibilities" was clear.[10]

Simultaneously with the inclusion of the citizen suit provisions, Congress included fee shifting provisions allowing courts to award fees to the prevailing party. These provisions served as legislative exceptions to the American Rule holding that, absent express statutory language to the contrary, litigants must bear the burden of their own attorney fees regardless of the outcome of the case.[11] Such provisions are included in over 100 federal statutes, including the Clayton Act, the Civil Rights Act of 1964, and the Securities Act of 1933.[12] In the 1970s, as Congress amended the federal environmental statutes, it included similar fee award provisions in the newly enacted citizen suit provisions. The typical provision reads, "The court, in issuing any final order... may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[13] These new provisions differed from their predecessors in the non-environmental context because they provide for awards when "appropriate," rather than expressly predicating fee awards on some success by the claimant.[14]

The legislative history of these provisions indicates that Congress sought to serve the competing goals of ensuring compliance and deterring frivolous lawsuits by including the fee-shifting provisions. Because the legislative history leans both ways on the issue, in interpreting these provisions, courts have looked towards the overall purpose of the statute at issue in making fee award determinations.

1540(g) (2008); Deepwater Port Act (DPA) § 16, 33 U.S.C. § 1515 (2008); Resource Conservation and Recovery Act (RCRA) § 7002, 42 U.S.C. § 6972 (2008); Toxic Substances Control Act (TSCA) § 20, 15 U.S.C. § 2619 (2008); Safe Drinking Water Act (SDWA) § 1449, 42 U.S.C. § 300j-8 (2008); Surface Mining Control and Reclamation Act (SMCRA) 30 U.S.C. § 1270 (2008). Citizen suits against governmental entities are beyond the scope of this paper.

9 Clean Air Act §304.

10 CWA Legislative History, *supra* note 2, at 1498; *see also* Del. Citizens for Clean Air, Inc. v. Stauffer Chem. Co, 62 F.R.D. 353, 357 (D. Del. 1974) [hereinafter *Stauffer*].

11 Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 Envtl. L. Rep. 10407, 10407 (1984) [hereinafter Miller III]; *Stauffer*, 62 F.R.D. at 354.

12 *See* Clayton Act, 15 U.S.C. § 15; Civil Rights Act, 42 U.S.C. §§ 2000a-3(b), 2000(e)-5(k); Securities Act, 15 U.S.C. § 77k(e) (2007).

13 Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (2007). The original wording of the Senate bill authorized fees "whenever the court determines such action is *in the public interest*." Miller III, *supra* note 11, at 10409.

14 The exception is the CWA, which provides that the court may ward costs *to any prevailing or substantially prevailing party*, whenever the court determines such award is appropriate. 33 U.S.C. § 1365(d), CWA § 505(d). However, in *Ruckelshaus v. Sierra Club*, the Supreme Court held that the standards for awarding fees under the statutes would be identical. 463 U.S. 680, 682 n.1 (1983).

A. The Courts' Interpretation of Attorney Fee Provisions

The seminal case setting forth the standard for awarding attorney fees to defendants is *Christiansburg Garment Company v. Equal Employment Opportunity Commission* (EEOC).[15] Although this case was based on employment discrimination, the *Christiansburg* Court drew parallels between the statute at issue and other statutes containing citizen-suit provisions, including the major environmental statutes.[16] Accordingly, courts have employed this standard in analyzing whether attorney fees are warranted in cases involving environmental statutes.

At issue in *Christiansburg* was the EEOC's right to bring a claim against the defendant. Amendments to Title VII of the Civil Rights Act of 1964 authorized the EEOC to sue in its own name to prosecute charges pending with the EEOC on the effective date of the amendments.[17] The EEOC brought suit against an employer who had been involved in a suit that denied the complainant relief, but which the complainant chose not to appeal.[18] The district court granted the defendant's motion for summary judgment, concluding that though the charges were unresolved, they were not "pending" within the meaning of the statute.[19] The defendant-employer sought attorney fees under Section 706(k)[20] of Title VII.[21] This section authorized a district court in its discretion to award attorney fees to the "prevailing party" in a Title VII action.[22] The district court denied defendant's motion for fees, concluding that the EEOC's actions in bringing suit could not be characterized as "unreasonable or meritless."[23] The Fourth Circuit affirmed, and on certiorari the Supreme Court affirmed as well.[24]

Justice Stewart, writing for a unanimous court,[25] held that under Section 706(k), a district court could award attorney fees to a prevailing defendant only upon a finding that the plaintiff's actions were "frivolous, unreasonable, without foundation, or brought in bad faith," thus setting a high bar for assessing attorney fees against a public-interest plaintiff.[26] Even though the EEOC ultimately prevailed, the Court rejected its argument that attorney fees could only be awarded if the plaintiff brought the suit in bad faith.[27] The Court noted that under common law rules an award of attorney

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15 Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412 (1978).

16 *Id.* at 416 n.7 (The *Christiansburg* Court included the CWA in its list of "statutes that are more flexible, authorizing the award of legal fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts.").

17 *Id.* at 414.

18 *Id.* at 413.

19 *Id.* at 414.

20 42 U.S.C. § 2000e-5(k) (2007). This section provides: "In any action or proceeding under this title, the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee." .

21 *Christiansburg*, 434 U.S. at 415.

22 *Id.*

23 *Id.* at 416 (quoting EEOC v. Christiansburg Garment Co., 1975 U.S. Dist. LEXIS 11274 at *3 (W.D. Va. July 28, 1975)).

24 EEOC v. Christiansburg Garment Co., 550 F.2d 949 (4th Cir. 1977).

25 *Christiansburg*, 434 U.S. at 412 (Justice Stewart wrote for eight members of the Court; Justice Blackmun took no part in the consideration of the case.).

26 *Id.* at 416.

27 *Id.* at 417.

fees is allowed if the plaintiffs acted in bad faith, and if proof of bad faith were the only requirement, a new statutory provision would be unnecessary.[28] Thus, the Court determined that district courts can award attorney fees against a plaintiff upon a finding that the plaintiff's actions were "frivolous, unreasonable or without foundation," even though not brought in subjective bad faith.[29]

The Court received multiple amicus briefs urging that it employ different standards in making fee award determinations depending on whether the plaintiff was a private plaintiff or a governmental entity such as the EEOC.[30] In addressing this concern, the Court first noted that although the EEOC's status as a governmental entity prevented it from *collecting* fees, this distinction did not have any bearing on the analysis employed to determine fees sought by a private defendant.[31] Because the statute explicitly provided that "the Commission and the United States shall be liable for costs the same as a private person," the Court did not find any reason for applying a different standard.[32] Thus, the Court articulated a standard applicable to private persons that just happened to apply to the government in this case. Despite the lack of similar language in other statutes, subsequent cases have reinforced this view.[33]

The Court acknowledged that statutes with language such as the one at issue in *Christiansburg* are flexible, "entrusting the effectuation of the statutory policy to the discretion of the district courts."[34] To make future determinations, the Court instructed district courts to look at the entire course of the litigation.[35] In applying this test, however, the Court warned district courts to resist the temptation to engage in *post hoc* reasoning by determining that because the plaintiffs did not ultimately prevail, the action must have been unreasonable or without foundation.[36]

The Court subsequently clarified and elaborated upon this test in *Hughes v. Rowe*, stating that the "plaintiff's action must be meritless in the sense that it is groundless or without foundation.... The fact that the plaintiff may lose his case is not in itself a sufficient justification for the assessment of fees."[37] Further, the fact that a complaint cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney fees.[38] In *Hensley v. Eckerhart*, the Court added that a prevailing defendant may recover attorney fees where the suit was "brought to harass or embarrass the defendant."[39]

By contrast, the Court set a low bar for awarding fees to plaintiffs, holding that a prevailing plaintiff "is ordinarily to be awarded attorney fees in all but special

28 *Id.* at 419.
29 *Id.* at 421.
30 *Id.* at 422.
31 *Id.*
32 *Id.* at 423.
33 *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424 (1982); Nat'l Wildlife Fed'n v. Consumer Powers Co., 729 F. Supp. 62 (W.D. Mich., 1989).
34 *Christiansburg*, 434 U.S. at 416.
35 *Id.*
36 *Id.* at 421–22.
37 Hughes v. Rowe, 449 U.S. 5, 14 (1980).
38 *Id.* at 15.
39 Hensley v. Eckerhart 461 U.S. at 429 n.2 (citing H.R. Rep. No. 1558, 94th Cong. § 7 (1976)).

circumstances."[40] In drawing the distinctive standards for defendants and plaintiffs, the *Christiansburg* Court recognized that two equitable considerations support awards to a prevailing plaintiff that are "wholly absent" in the case of a prevailing defendant.[41] First, the plaintiff is the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'"[42] Second, when a district court awards fees to a prevailing plaintiff, it is levying those fees against a violator of federal law.[43] The legislative history of Title VII's attorney fee provision, though scanty, supported the Court's formulation of a more lenient standard in awarding attorney fees to prevailing plaintiffs.[44] That history contained a reference to a provision indicating that it was included to "make it easier for a plaintiff of limited means to bring a meritorious suit."[45]

Subsequent cases have demonstrated that it is proper for courts to interpret other fee shifting provisions according to these standards, and lower courts have followed suit.[46] The Tenth Circuit applied the *Christiansburg* standard in a case alleging several civil rights violations claims.[47] In denying a defendant's request for attorney fees, the court noted that the test employs "a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff."[48] The Ninth Circuit is likewise reluctant to award attorney fees to defendants. In *Mitchell v. Office of Los Angeles County*, the Ninth Circuit reversed a fee award to a defendant, noting "only in exceptional cases did Congress intend that defendants be awarded attorney fees under Title VII."[49] Addressing the defendant's arguments, the court recognized that the "chilling effect upon civil rights plaintiffs would be disproportionate to any protection defendants might receive against the prosecution of meritless claims."[50] To ensure proper application of the standard, appellate courts have required lower courts to provide a "concise but clear explanation of its reasons for the fee award," including the appropriate *Christiansburg* analysis.[51]

Such reasoning is not limited to civil rights case. The Court in *Christiansburg* stressed the similarities between the language in Title VII and environmental citizen suit provisions, intending that the standard be applied consistently across these statutes.[52] The first reported case of a defendant seeking attorney fees under an environ-

40 *Christiansburg,* 434 U.S. at 417.
41 *Id.* at 4218.
42 *Id.* (citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).
43 *Id.*
44 *Id.* at 420.
45 *Id.* (quoting remarks of Sen. Humphrey, 110 Cong. Rec. 12724 (1964)).
46 Pa. v. Del. Valley Citizens Counsel for Clean Air, 478 U.S. 546, 560 (1986).
47 Mitchell v. City of Moore, Okla., 218 F.3d 1190 (10th Cir. 2003).
48 *Id.* at 1203.
49 Mitchell v. Office of Los Angeles County, 805 F.2d 844, 848 (9th Cir. 1986).
50 *Id.*
51 *See* Houston v. Norton, 215 F.3d 1172, 1175 (10th Cir. 2000) (reversing a district court's assessment of attorney fees against a pro se prisoner plaintiff where the order was completely silent as to its rationale for imposing fees).
52 Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 415 (1978).

mental provision did not occur until 1981.[53] In that case, the plaintiff sued the owner of a building for violations of the CAA.[54] The suit had merit when commenced, but lost it when the EPA confirmed that the building was exempt from CAA standards.[55] Plaintiffs promptly dropped the suit, a fact the court emphasized in denying the defendant's motion for attorney fees.[56] Relying on legislative history, the court held that, "Congress' design of encouraging citizen suits would be substantially frustrated were Section 7604(d) read to permit prevailing defendants to recover attorney fees with the same relative ease that successful plaintiffs enjoy."[57] In fact, "the legislative history... makes clear that prevailing defendants may recover fees under Section 7604(d) only where the action may be fairly characterized as frivolous or harassing."[58] It is also worth noting that the court came to this conclusion notwithstanding the fact that the plaintiff, an electricity company, stood to gain economically if it won the suit.

Within the environmental context, the courts have applied the rigorous standards that the Supreme Court set in *Christiansburg* in denying awards in several cases.[59] In *Browder v. City of Moab*, the Tenth Circuit recently reaffirmed this practice, instructing the lower court that the attorney fee provisions were "sufficiently analogous [as between civil rights claims and environmental claims] to use case law in interpreting either statute interchangeably."[60] Thus, while it appears "axiomatic"[61] that courts should make attorney fee awards to successful citizen suit plaintiffs absent egregious circumstances, the granting of such awards to defendants is still being worked out in the courts. Despite the well-established case law, a considerable amount of litigation continues on the issue of determining when fee awards are appropriate and what fees are reasonable.[62] The controversy regarding the appropriateness and reasonableness of fees is expected to increase with the advent of attorney fees against environmental plaintiffs, as demonstrated by the two case studies below.

II. Case Studies

A. *Sierra Club v. Cripple Creek and Victor Gold Mining Company*

Gold mining is a notoriously dirty industry, involving long hours, explosives, literally tons of leftover ore, heavy metals, and toxic chemicals.[63] Both of the sides in this

53 Consol. Edison Co. v. Realty Inv. Assoc., 524 F. Supp. 150 (S.D.N.Y. 1981).
54 *Id.* at 151.
55 *Id.* at 152.
56 *Id.* at 155.
57 *Id.* at 153.
58 *Id.*
59 *See* Marbled Murrelet v. Babbit, 182 F.3d 1091, 1095–96 (9th Cir. 1999) (denying fees to defendant under the Endangered Species Act); Morris-Smith v. Moulton Niguel Water Dist., 44 F. Supp 2d 1084, 1086 (C.D. Cal. 1999) (denying fees under the Clean Water Act).
60 Browder v. City of Moab, 427 F.3d 717, 720 (10th Cir. 2005).
61 Miller III, *supra* note 11, at 10411.
62 *Id.* at 10408. At the time of this writing (1984), there were more reported decisions on attorney fees than on any other aspect of the citizen suit sections. *Id*
63 *See* Steve Raabe, *A Major Miner of Colorado Gold*, Denver Post (Jan. 20, 2002), *available at* http://www.goldencycle.com/dpo.html (describing the mining process) [hereinafter *A Major*

action know this fact well: the Sierra Club, as a national non-profit corporation whose purposes are, "to explore, enjoy, and protect the wild places of the Earth...and to use all lawful means to carry out these objectives,"[64] and AngloGold Ltd., parent company of the defendants and the world's largest gold producer.[65] Hence, in *Sierra Club v. Cripple Creek and Victor Gold Mining Company (CC&V)* ("*Cripple Creek*"), the Sierra Club (plaintiffs) brought suit against three gold mining corporations for several alleged violations of the Clean Water Act. The battle went on for six years, until 2006, when a federal district court concluded that the suit was frivolous and accordingly awarded over $300,000 in attorney fees to the defendant mining industries.

The Cresson Project, nestled in the valley between the small town of Victor and Cripple Creek, is Colorado's only remaining major gold mine.[66] Discovered in the 1890s, nearly all of the large, palpable gold is long gone from this site, located about 115 miles southwest of Denver.[67] Today, the gold exists in the form of microscopic particles wedged in volcanic rock formations.[68] To harvest the gold, the ore must be dug or blasted out in large chunks using some 9,000 pounds of explosives each day.[69] The rocks are then crushed and heaped into a huge pile, called a leach pad, where rubber hoses pour a cyanide solution at a rate of 10,000 gallons per minute over the rocks.[70] The cyanide and other chemicals[71] percolate through the ore, dislodging the metals.[72] What remains at the bottom of the pad is then pumped to a plant that filters out silver and gold.[73] The chemical leftover is deposited into a sediment pond before flowing into a tributary of Cripple Creek.[74]

These high-volume, chemical-intensive techniques are very efficient and cost-effective for the mine—and also extremely toxic.[75] As a result, environmentalists in Colorado have sharply criticized this method , and claim that the leach pads are not effective at preventing cyanide runoff into nearby waterways. These criticisms are not unfounded: in 1992, the release of cyanide and a "toxic cocktail" of other chemicals devastated seventeen miles of the Alamosa River in southwest Colorado in what came

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Miner].

64 Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining Co., 62 ERC (BNA) 2063 (D. Colo., 2006).

65 *A Major Miner, supra* note 63.

66 *Id.*

67 Cresson Mine History, Cresson Project History, *available at* http://www.ccvgoldmining.com/About/History/history.html.

68 *A Major Miner, supra* note 63.

69 *Id.*

70 *Id.*

71 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006). (These chemicals include arsenic, cadmium, copper, manganese, nickel, and zinc).

72 Christine McManus, *Mining Industry Files Suit Against Cyanide Ban*, SUMMIT DAILY NEWS, Mar. 1, 2004, *available at* http://www.summitdaily.com/article/20040301/NEWS/403010101 [hereinafter *Mining Industry Files Suit*].

73 *A Major Miner, supra* note 63.

74 *Mining Industry Files Suit*, *supra* note 72.

75 *Id.* (In fact, this process (along with operating 24 hours a day, 365 days a year) enabled Cripple Creek and Victor to break post-WWII records in gold extraction. In 2001, the company produced about 260,000 ounces of gold, bringing in a gross of seventy million dollars.).

to be known as the Summitville mine disaster.[76] The Colorado state legislature subsequently adopted mining regulations, and the EPA declared the mine a Superfund site.[77]

However, Victor is 200 miles and a thriving economy away from Summitville, and the Cresson project has pressed on despite this red flag. In fact, the mine expanded in 1998, 2000, and 2004, doubled its 2001 capacity in five years, and created a new ore-crushing facility.[78] For their part, mining officials say they pay very close attention to environmental concerns in preventing cyanide leaks and monitoring water discharges.[79] As well they should, for, pursuant to its discharge permit issued under the Clean Water Act, CC&V is required to conduct self-monitoring of heavy metal discharges twice per month as well as quarterly Whole Effluent Toxicity (WET) testing.[80] On several occasions between 1994 and 1999, CC&V exceeded its permit limit. Miners cited heavy rains and snowmelt, which caused unusually high volumes of water to flow off the mine property leading to excessive discharge of pollutants.[81] But, these excuses did nothing towards allaying locals' concern for water quality, and in 2000, the Sierra Club sought enforcement under the Clean Water Act.[82]

The Clean Water Act (CWA), as amended in 1972, was created "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[83] Under the CWA, discharges from point sources are prohibited without a permit (called an NPDES permit), which sets parameters on the amount of pollutants that can be discharged.[84] Recognizing the importance of enforcement and public input, the CWA declares that, "public participation in the development, revision, and enforcement of any...standard [or] effluent limitation...shall be provided for, encouraged, and assisted by the Administrator and the States."[85] Pursuant to this end, the CWA provides for broad citizen suit enforcement authority.[86] Section 505 of the CWA provides that "any citizen may commence a civil action on his own behalf against any person...who is alleged to be in violation of...an effluent standard or limitation [contained in the Act]."[87] In such cases, the statute imposes strict liability and does not require proof of

76 Douglas McDaniel, *County Commissioners Want 'Veil of Secrecy' Removed for Uranium Mining*, The Watch: Telluride and Mountain Village, Feb. 13, 2008, *available at* http://www.telluridewatch.com (search: Uranium mining).

77 Christine McManus, *Cyanide-leach Mining Regulations: Smoking Subjects of Public Meeting*, The Summit Daily News, (Jan. 25, 2004), *available at* http://www.summitdaily.com/article/20040125/NEWS/401250103.

78 *A Major Miner, supra* note 63.

79 Deedee Correll, *Mine Triumphs in Pollution Lawsuit*, Colorado Springs Gazette, May 5, 2006, *available at* http://www.gazette.com/articles/mine_6977___article.html/gold_cripple.html, [hereinafter *Mine Triumphs*].

80 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006).

81 *Mine Triumphs*, *supra* note 79.

82 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006).

83 33 U.S.C. § 1251(a), CWA § 101 (2007).

84 33 U.S.C. §§ 1311, 1342; CWA §§ 301, 402.

85 33 U.S.C. § 1251(e); CWA § 101(e).

86 Joel M. Gross and Lynn Dodge, Clean Water Act 119 (2005).

87 33 U.S.C. § 1365(a), CWA § 505 (a).

intent.[88] The CWA also gives jurisdiction to federal district courts. By virtue of the citizen suit provision, and worried that the defendants' gold and silver mining activities were resulting in violations of the CWA, the Sierra Club and the Mineral Policy Center (plaintiffs) initiated two actions against the defendants[89] in 2000 and 2001.[90] The plaintiffs alleged that: 1) the defendants violated the terms of their National Pollutant Discharge Elimination System (NPDES) permit and 2) the defendants discharged pollutants from other point sources without a permit.[91] The plaintiffs sought a monetary penalty payable to the U. S. Treasury.[92]

Shortly after the plaintiffs filed suit, the EPA and the Colorado Water Quality Control Division (WQCD) took administrative action against the mine regarding these exceedances.[93] The mine settled with the EPA in 2002 and paid a $125,000 fine, the maximum administrative penalty allowable under the CWA.[94] The mining companies also settled with the WQCD, resulting in the issuance of an injunction requiring the defendants to comply with the CWA and the permits issued under the CWA.[95] "When we settled with EPA, we recognized there were some exceedances, but we've put mitigation in place and there have not been any violations since then," said mine spokeswoman Jane Mannon.[96] The Sierra Club begged to differ. "The fact that the mine reached a settlement with the EPA doesn't mean they're meeting standards to our satisfaction," responded Roger Singer of the Sierra Club's Boulder office.[97] "It's sort of a witches' brew of heavy metals and high acid levels.... The discharges should be permitted, monitored, and maintained at safe levels."[98]

Unmoved by the Sierra Club's arguments, the defendants filed a motion for summary judgment, arguing that the outcome of the administrative actions barred the

88 *See* Kelly v. EPA, 203 F.3d 519, 522 (7th Cir. 2000); U.S. v. Winchester Mun. Utils., 944 F.2d 301, 304 (6th Cir. 1991).

89 Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining, Co., 509 F. Supp. 2d 943, 945 (D. Colo. 2006) (Order Granting, in Part, Motion for Attorney's Fees) (Defendant gold companies include AgloGold Corporation, AngloGold Ashanti North America, Golden Cycle Gold Corporation, and the Cripple Creek & Victor Gold Mining Company. Collectively they will be referred to as the "mining companies" or "defendants.").

90 *Id.* at 946. The court dismissed the Mineral Policy Center as a plaintiff, finding that it lacked standing.

91 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006)..

92 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d, at 946. (District courts are authorized to "apply any appropriate civil penalties," not to exceed $25,000 per day for each violation. The penalties are paid to the U.S. Treasury as a miscellaneous receipt. 33 U.S.C. § 1319(d), CWA § 309).

93 *Mine Triumphs, supra* note 79.

94 *Id.* In administrative enforcement actions, the EPA can pursue penalties for violations without resorting to the judicial process; *see also* Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., 528 U.S. 167, 175 (2000) (In cases involving serious violations such as the one at issue here, EPA may seek penalties of up to $10,000 per day, with a $125,000 cap).

95 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d., at 946.

96 *Mine Triumphs, supra* note 79.

97 *Id.*

98 *Id.*

plaintiffs from pursuing similar claims in court.[99] The court carefully denied the defendants' motion, explaining that, while it recognized the overlap among the claims, it would allow the case to go forward because: 1) the CWA authorizes a citizen action if it is brought before administrative proceedings begin, and 2) the monetary penalty that could be obtained through a citizen action is greater than the maximum penalty in an administrative action.[100] The court, however, did recognize that the administrative proceedings significantly narrowed the scope of the dispute and the recovery the plaintiffs could obtain.[101]

To prevail on their claim, the Sierra Club had to demonstrate that a discharge of a pollutant into navigable waters from a point source without a permit had occurred, and that the discharge was ongoing at the time the action began or was likely to recur.[102] Prior to trial, the defendants challenged the opinions of the plaintiffs' witnesses under Federal Rule of Evidence 702.[103] Due to the plaintiffs' failure to establish the prerequisites for admission of expert opinions,[104] the court excluded the opinions.[105] The Sierra Club continued to pursue their claims absent the experts' testimonies. After a seven day trial, the Court found that the plaintiffs had failed to prove essential elements of their claims, and entered judgment in favor of the defendants.[106]

Following the favorable judgment, the defendants requested an award of attorney fees and costs in excess of one and a half million dollars, contending that "the plaintiffs' claims lacked merit from the outset, and the plaintiffs continued to pursue them in bad faith even as it became increasingly clear they were groundless."[107] The defendants further contended that the plaintiffs were acting in bad faith by pursuing claims for which they did not have any evidence at trial. The Sierra Club objected to the fees, averring that it did not commence the litigation for an improper purpose, it had an evidentiary basis for all of their contentions, it proceeded in good faith, the court's ruling concerned novel issues, and an award of fees would be inequitable.[108]

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99 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d, at 946.

100 *Id.* at 946–47.

101 *Id.* at 947.

102 *Id.*

103 *Id.*

104 *Id.* at 947 (Federal Rule of Evidence 702 reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. FED. R. EVID. 702. The court ruled that one of the experts was not qualified, and the opinions of all three were not premised on reliable methodology.).

105 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d, at 947.

106 *Id.*

107 Motion of AngloGold for Attorney Fees, at *4, Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining Co., 509 F. Supp. 2d 943 (D. Colo. Apr. 13, 2006), 2006 U.S. Dist. LEXIS 27973 [hereinafter AngloGold's Motion for Attorney Fees].

108 Combined Response of Plaintiffs' in Opposition to Defendants' Motions for Attorney Fees at 5, Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining Co.,., 62 ERC

In analyzing the defendants' motion for attorney fees, the district court observed that the wording of the statute granting attorney fees does not make any distinction between plaintiffs and defendants.[109] The court also acknowledged that case law mandated an evaluation of different considerations based on the identity of the prevailing party.[110] Thus, the court began its analysis with *Christiansburg*, stating that the same standard for determining Title VII actions was to be used in evaluating CWA actions.[111] Under this standard, when a plaintiff prevails, the section is liberally construed and fees are typically awarded.[112] When a defendant prevails, however, fees cannot be awarded simply because the plaintiff lost at trial.[113] Otherwise, the court noted, plaintiffs with "legitimate, but not airtight, claims would be discouraged from pursuing such claims."[114] The court also acknowledged that this difference is particularly true with regard to CWA citizen suits, for the citizen-plaintiff "seeks no monetary relief for itself and instead acts to protect the public interest."[115] Thus, to obtain a fee award, the defendant must show the action was "frivolous, unreasonable, or without foundation," or that the plaintiff "continued to litigate after it clearly became so."[116]

In support of such a finding, the defendants embarked on a searing criticism of the plaintiffs' motives and methodology in bringing the suit. The defendants accused the plaintiffs of possessing ulterior motives, specifically to punish the defendants for having obtained approval for expansion of the mine.[117] The court declined to make an award based on the alleged bad faith, finding that the defendants' arguments actually amounted to a request for sanctions under Rule 11 of the Federal Rules of Civil Procedure, which the court would not entertain absent correct procedure.[118] The court also found that the defendants had not made any showing that the claims were unfounded

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(BNA) 2063 (D. Colo. Apr. 2006) (00-cv-02325-MSK-MEH, 01-cv-02307-MSK-MEH)[hereinafter Sierra Club's Response to Motion for Attorney Fees].

109 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d., at 947.

110 *Id.*

111 Browder v. Moab, 427 F.3d 717, 721 (10th Cir. 2005).

112 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d., at 949–50.

113 *Id.* at 950.

114 *Id.*

115 *Id*

116 *Id.* (quoting *Christiansburg* at 419–22); *see also* Browder v. Moab, 427 F.3d at 723.

117 AngloGold's Motion for Attorney Fees, *supra* note 107 at 8.

118 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d., at 950 (Rule 11 holds, "By presenting to the court a pleading, written motion, or other paper...an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. FED. R. CIV. P. 11(B)-(C)(1)).

when asserted.[119] It conceded that, although the plaintiffs were unable to produce factual support for their claims, they were not "out of line" in believing that ongoing violations were occurring based on past violations.[120]

However, the court cautioned, just because the claims were justified at their inception does not mean that they continued to be so after subsequent developments.[121] According to the court, these developments accumulated, causing the claims to reach a point at which they were "clearly without foundation."[122] First, the court noted, the controversy became narrower as a result of the settlements of the administrative proceedings, which afforded much of the relief originally sought in the matter.[123] Furthermore, the court found that the plaintiffs lacked adequate evidence to present a *prima facie* case.[124]

In its defense, the Sierra Club contended that the settlements entered into with the EPA and the WQCD and the ensuing mitigation measures that the defendants undertook after the Sierra Club had filed its complaint were sufficient to prove that their claims were supported in fact and law.[125] The Sierra Club also pointed out that its case had already survived three motions to dismiss and three motions for summary judgment, a procedural history indicating that the claims were not frivolous.[126] They contended that the district court's insistence on a showing of "human activity" was based on a novel and unresolved interpretation of the CWA, and therefore that it was improper to fault the Sierra Club for lack of such evidence.[127] Advancing a claim of equity, the Sierra Club pointed to the increasing price of gold and the defendants' ability to pass the costs of litigation on to its customers, in contrast to the Sierra Club's position as a non-profit that will not be able to recoup costs.[128] The Sierra Club also objected to the reasonableness of the fees and the hours expended.[129]

Ignoring the majority of these arguments, the court held that the plaintiffs "should have known," by virtue of the court's rulings on the proffered expert opinions, that they did not have any evidence to establish a connection between the defendants' discharge and the water samples, and the motions for summary judgment all occurred before the evidentiary ruling was made.[130] Rather than go on with trial, the court counseled, the plaintiffs could have sought to supplement the opinions, sought reconsideration in an interlocutory appeal, attempted to reopen discovery, dismissed the claims, or entered into a stipulated judgment to reserve the right to appeal the

119 *Sierra Club Order Granting Attorney's Fees*, 509 F. Supp. 2d., at 950.
120 *Id.*
121 *Id.* at 951.
122 *Id.*
123 *Id.*
124 *Id.*
125 *Sierra Club's Response to Motion for Attorney Fees*, *supra* note 108, at 4.
126 *Id.* at 5.
127 *Id.* at 6–7.
128 *Id.* at 23.
129 *Id.* at 26.
130 Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining, Co., 509 F. Supp. 2d. 943, 949-51 (D.Colo. 2006).

court's evidentiary rulings.[131] Having not taken any of these actions, the court characterized the Sierra Club's decision to pursue its claims as "unreasonable." Stated the court: "[t]heir dogged pursuit of factually unsupported claims is exactly the situation that the attorney fee provision in the Clean Water Act is designed to address."[132]

Having decided fee awards were appropriate, the court limited the fee awards to those that arose after November 15, 2006, the day the court made its Rule 702 rulings, holding that at this point the Sierra Club's pursuit became frivolous.[133] Aside from a few entries the court characterized as too vague, the court found the charges to be reasonable and necessary and assessed $324,644 in fees against the Sierra Club.[134] The plaintiffs filed a motion for stay of judgment pending appeal, which the court granted.[135] After the defendants' motion for reconsideration of this decision was declined, the Sierra Club and defendants reached a compromise.[136] The Sierra Club agreed to drop its appeal on both the merits and the fee rulings in exchange for being released of all monetary liability.[137] Although Tenth Circuit precedent was tipped in the Sierra Club's favor, the group felt that it would have been risky to increase the fees that would incur should it lose on appeal.[138]

B. *SAVE OUR SPRINGS ALLIANCE V. LAZY NINE*

Moving from the mountains of Colorado to the picturesque views of the Texas Hill Country, we find a similar concern for water quality, although this one arose from residential development and was addressed through a less conventional route. Similarly, however, the public interest plaintiff's efforts were thwarted, and dangerous precedent was created. In 2005, the Save Our Springs Alliance (SOS) brought suit against the individual members of a legislatively created municipal utility district, challenging the constitutionality of the bill that created the district.[139] The trial court concluded that SOS did not have standing to bring the suit and that the suit was brought

131 *Id.* at 951.

132 *Id.*

133 *Id.* at 953.

134 *Id.*

135 Sierra Club & Mineral Policy Ctr. v. Cripple Creek & Victor Gold Mining Co. 2007 U.S. Dist. LEXIS 19689 at *3 (Mar. 20, 2007) (Order Denying Motion for Reconsideration).

136 E-mail from Patrick Gallagher, Director of Environmental Law, Sierra Club, to Kelly D. Davis, Student, University of Texas School of Law (Mar. 31, 2008, 06:03:00 CST) (on file with author).

137 *Id.*

138 *See* Browder v. Moab, 427 F.3d 717 (10th Cir. 2005); Houston v. Norton, 215 F.3d 1172 (10th Cir. 2000); E-mail from Patrick Gallagher, Director of Environmental Law, Sierra Club, to Kelly D. Davis, Student, University of Texas School of Law (Mar. 31, 2008, 06:03:00 CST) (on file with author).

139 Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist., 198 S.W. 3d 300 (Tex. App.—Texarkana, 2006, pet. denied); SOS News, *Save Ours Springs Files for Reorganization*, *available at* http://www.sosalliance.org/?news&id=84 (Apr. 26, 2007) [hereinafter *SOS Files for Reorganization*].

for an improper purpose.[140] Under the Uniform Declaratory Judgment Act, the court awarded attorney fees to the defendants in the amount of $294,000.[141]

SOS is an Austin-based environmental non-profit group whose stated mission is "to protect the Edwards Aquifer, its springs and contributing streams, and the natural and cultural heritage of the Hill Country region and its watersheds, with special emphasis on Barton Springs."[142] The watersheds that SOS strives to protect provide drinking water and recreational opportunities to Austin and surrounding communities.[143] However, because of the particular sensitivity of the Edwards Aquifer (the Aquifer), and its susceptibility to non-point sources of pollution, the CWA provisions do not operate to adequately protect the Aquifer. In the absence of traditional environmental remedies, SOS uses creative litigation tactics in order to limit the amount of development—and its resulting pollution—in the Aquifer's watershed.

Lazy Nine, the adverse party in this case, is a municipal utility district (MUD). The Texas Legislature can create a MUD by a special act, or the Texas Commission on Environmental Quality can create a MUD by its orders.[144] Over 1,500 MUDs have been created in Texas, which are generally created to facilitate the expeditious building of new neighborhoods in areas that do not fall under the jurisdiction of a municipality.[145] These "engines of hyper-sprawl" enjoy a quasi-governmental status that allows them to collect taxes to compensate for expenses incurred in building utility infrastructure such as wastewater systems.[146] MUDs have been criticized as government-by-developer as they operate virtually without any oversight.[147] In the last several years, more than a dozen MUDs have cropped up in the ecologically sensitive area of western Travis County, much of which is located in the watersheds of the Edwards Aquifer recharge zone. This region falls outside of the City of Austin's extraterritorial jurisdiction and thus is not subject to Austin's growth restrictions, and counties have little power in Texas to limit or regulate new neighborhoods.[148] The combination of these factors along with the proliferation of MUDs has led to alleged irresponsible growth that is plaguing western Travis County and causing pollution of streams that feed the Aquifer.

The Lazy Nine MUD was born in 2003 out of an act of the Texas Legislature to enable the creation of a new subdivision in Western Travis County.[149] During the trial in the SOS suit, one of the developers testified that without the creation of the Lazy Nine MUD, Sweetwater, the development company heading up the project and shar-

140 *Lazy Nine*, 198 S.W. 3d at 310.

141 *Id.* at 308.

142 Save Our Springs Alliance, *available at* http://www.sosalliance.org (last visited Feb. 6, 2009).

143 Edwards Aquifer Authority, *available at* http://www.edwardsaquifer.org (last visited Feb. 6, 2009).

144 Tex. Const. art. XVI, § 59.

145 Interview with Andrew Hawkins, Staff Attorney, Save Our Springs Alliance, in Austin, Tex. (Mar. 27, 2008).

146 Wells Dunbar, *SOS Files for Bankruptcy*, The Austin Chronicle, Apr. 10, 2007, at 30.

147 *SOS Files for Reorganization*, *supra* note 139.

148 Interview with Andrew Hawkins, *supra* note 145.

149 Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist., 198 S.W. 3d 300, 304 (Tex. App. Texarkana, 2006, pet. denied); *see also* H.B. 3565, 78th Leg. R.S. (Tex. 2003).

ing the same CEO/General Manager as Lazy Nine, could not have afforded to develop the land.[150] Sweetwater plans to build 1,800 homes on a thousand acres of pristine Hill Country land above Little Barton and Bee Creeks.[151] Shortly after the Texas Legislature enacted the Lazy Nine MUD bill, SOS, fearful of further degradation of these watersheds, brought a claim against Lazy Nine under Texas' Uniform Declaratory Judgment Act (UDJA).[152] This act provides that a declaration, which can be either affirmative or negative, has the force and effect of a final judgment or decree.[153] SOS sought a judicial declaration that the bill creating the MUD was unconstitutional and void.[154] After a bench trial presided over by a visiting judge, the court concluded that SOS lacked standing to bring suit and the bill was constitutional.[155] The court then awarded $294,000 in attorney fees to Lazy Nine and sanctioned SOS' attorney, William Bunch, in the amount of $5,000 for filing a frivolous lawsuit and for filing a lawsuit for an improper purpose.[156]

The creation of MUDs is governed by Article XVI, section 59 of the Texas Constitution.[157] This provision holds that before the Legislature can create a MUD, notice must be given of such intention and published pursuant to the standards set forth in the Constitution.[158] SOS contended that the bill was unconstitutional because the bill's authors provided inadequate notice of the bill, and the bill made an unconstitutional delegation of authority to Lazy Nine by allowing the MUD to create additional districts within its area.[159] Lazy Nine challenged SOS' claim on procedural grounds, arguing that the formation of the district could only be challenged in a *quo warranto*

150 *SOS Files for Reorganization*, *supra* note 139, at 1.

151 Interview with Andrew Hawkins, *supra* note 145.

152 TEX. CIV. PRAC. & REM. CODE § 37.002 (b) (2007). The UDJA reads, in pertinent part: [t]his chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered. A person...whose rights, status, or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. *Id.* at § 37.004 (a). In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney fees as are equitable and just. *Id.* at § 37.009.

153 *Id.* at § 37.003(b).

154 *Lazy Nine*, 198 S.W. 3d at 308.

155 *Id.*

156 *Id.* at 309.

157 *Id.*; *see also* TEX. CONST. art. XVI, § 59.

158 TEX CONST. art. XVI, § 59(e) ("No law creating a conservation and reclamation district shall be passed unless at the time notice of the intention to introduce a bill is published...a copy of the proposed bill is delivered to the commissioners' court... and the governing body of each incorporated city or town in whose jurisdiction said district or any part thereof is or will be located. Each such commissioners' court and governing body may file its written consent or opposition to the creation of the proposed district.... Each special law creating a conservation and reclamation district shall comply with the provisions of the general laws then in effect relating to consent by political subdivisions to the creation of conservation and reclamation districts and to the inclusion of land within the district.").

159 *Lazy Nine*, 198 S.W. 3d at 310.

proceeding.[160] *Quo warranto* is a common law writ available to question the existence of a public corporation or district and its right to act.[161] In general, the legality of a public corporation or district must be challenged through a *quo warranto* proceeding brought by the Attorney General or a district attorney.[162] Because the districts are described in the Constitution as "governmental agencies and bodies politic," the trial judge held that this doctrine applied, and that SOS lacked standing to challenge the creation of the district.[163] On appeal, the Court of Appeals held that the *quo warranto* doctrine did not prevent SOS from bringing the suit, citing an exception for attacking legislative acts that may be voided on constitutional grounds.[164]

Assuming the plaintiff could establish standing, however, the trial court ruled that SOS' evidence supporting its claim was excluded under the enrolled bill rule.[165] The enrolled bill rule bars the admission of extrinsic evidence surrounding the validity of a bill other than the wording of the bill itself.[166] "The enrolled bill rule has been repeatedly stated to be that a duly authenticated, approved, and enrolled statute imports absolute verity and is conclusive that an act was passed in every respect according to constitutional requirements."[167] Because the bill creating Lazy Nine expressly states that all Constitutional requirements had been met,[168] evidence relating to deficiencies in the notice or the unconstitutional delegation of power had to be excluded.[169] The court of appeals affirmed, albeit somewhat reluctantly, stating that "although this case illustrates the dangers of the enrolled bill rule which may produce results inconsistent with the actual facts," precedent required the exclusion of the evidence.[170]

Having ruled in favor of the defendants, the trial court awarded attorney fees to SOS' opponents under the UDJA.[171] Under this statute, the court may award attorney fees to either party.[172] However, "a prevailing party in a declaratory judgment action is not entitled to attorney fees simply as a matter of law; entitlement depends on what

160 Brief of Respondent-Appellee at 18, Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist., 198 S.W.3d 300 (Tex. App.—Texarkana, July 18, 2006) (No. 06-05-00058).

161 *Lazy Nine*, 198 S.W. 3d at 304.

162 *Id.*

163 *Id.*; Tex. Const. art. XVI, § 59(b).

164 *Lazy Nine*, 198 S.W. 3d at 306.

165 *Id.* at 308.

166 Williams v. Taylor, 19 S.W. 156 (Tex. 1892); Teem v. State, 183 S.W. 1144 (Tex. Crim. App. 1916); Jackson v. Walker, 49 S.W.2d 693 (Tex. 1932).

167 Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W. 2d 75, 78 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

168 H.B. 3565, 78th Leg., R.S. (Tex. 2003) ("The Legal Notice of the intention to introduce this Act, setting forth the general substance of this Act, has been published as provided by law, and the notice and a copy of this Act have been furnished to all persons, agencies, officials, or entities to which they are required to be furnished under Section 59, Article XVI, Texas Constitution, and Chapter 31, Gov. Code.") *Id.* at § 21(a).

169 *Lazy Nine*, 198 S.W. 3d at 325.

170 "The enrolled bill rule has yet to be abandoned by the Texas Supreme Court, and we are bound by precedent until the Texas Supreme Court decides to modify or create additional exceptions to the rule." *Lazy Nine*, 198 S.W. 3d at 326.

171 *Id.*

172 Tex. Civ. Prac. & Rem. Code § 37.009.

is equitable and just, and the trial court's power is, in that respect, discretionary."[173] SOS argued that ordering a local non-profit organization to pay an arm of the local government's attorney fees is not equitable and just.[174] It argued that the practice was unprecedented in Texas and would lead to financial ruin of an organization that existed to protect drinking water and recreational swimming holes for local residents.[175] Ignoring SOS' arguments, the appellate court simply said, "Because reasonable minds can differ concerning whether the attorney fees are just and equitable, we cannot say the trial court abused its discretion in awarding such fees to Lazy Nine."[176]

On a motion for rehearing, SOS pointed out that the appellate court reversed the trial court's conclusion in several important respects, holding that: 1) SOS had standing to bring its lawsuit, 2) the lawsuit was not frivolous, 3) the evidence that the lawsuit was brought for an improper purpose was insufficient, and 4) SOS' attorney should not have been sanctioned.[177] SOS contended that in light of these decisions, the case should be remanded to the district court for a reassessment of attorney fees because the trial court's erroneous determinations on these matters played some role in the level of attorney fees that it determined to be equitable and just.[178] The appellate court stated that the relevant case law only requires a remand after a complete reversal of the trial court's holding.[179] Because the appellate court agreed with the trial court that SOS lost on the UDJA claim, "the trial court's judgment was correct overall."[180]

SOS runs on donations and intermittent grants, and after trying unsuccessfully to strike a deal with its creditors, the non-profit filed bankruptcy in federal bankruptcy court in April of 2007.[181] Hearings followed in November, and on April 11, 2008, the bankruptcy judge denied SOS' proposed reorganization plan. The bankruptcy judge recognized that SOS' plan would provide more to its creditors than if the organization's assets were liquidated, but stated that SOS had failed to demonstrate the feasibility of its plan in terms of securing funding.[182]

But, SOS was not ready to give up just yet. On the heels of the adverse bankruptcy ruling, SOS filed suit in Travis County District Court seeking to declare the original judgment as void because the visiting judge was not qualified to hear the case.[183] The district judge agreed with SOS, holding the judgment null and void.[184] Sweetwater has

173 *Lazy Nine,* 198 S.W.3d at 317.
174 *Id.* at 318.
175 Interview with Andrew Hawkins, Staff Attorney, *supra* note 145.
176 *Lazy Nine,* 198 S.W.3d at 321.
177 *Id.* at 327.
178 *Id.*
179 *Id.*
180 *Id.*
181 Dunbar, *supra* note 146, at 30.
182 *In re* Save Our Springs Alliance, Inc., 388 B.R 202 (Bankr. W. D. Tex. 2008) (Memorandum Opinion on Confirmation of Debtor's First Amended Plans and Related Matters).
183 Plaintiff's Original Petition and/or Attack on Judgment and Brief in Support Thereof, Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist. (W. D. Tex.), *available at* http://www.sosalliance.org/library/judgment.challenge.st.ct.new.suit.pdf.
184 Judge Bender, who presided over the first trial, had lost a Republican primary in his district of Seguin in 1998 and was therefore ineligible to sit as a visiting judge in Travis County.

appealed, and the case is set to be heard in spring 2009. The fight over the development is long since over, the Sweetwater developers broke ground last fall, already leading to pollution of Bee Creek and violations of the CWA.[185]

III. Analysis and Proposed Solutions

In analyzing these cases, two preliminary points should be made. First, the importance over these cases must not be understated. Because of the uncertainty inherent in the great discretion of trial courts, the mere prospect of assessing fees against a public interest plaintiff could greatly discourage citizens from bringing citizen suits to enforce federal statutes of paramount importance.[186] Also, in both of the decisions to award attorney fees, neither court cited to precedent, indicating a sharp break in the law. Although the ruling in *Cripple Creek* was from a federal district court, the area of law was novel. Neither the CWA nor case law addressed the circumstances presented in that case, in which a citizen action triggers a regulatory enforcement proceeding that results in both an injunction and a fine, and the citizen action proceeds nonetheless. Because this ruling will not be appealed pursuant to the Sierra Club's settlement, it stands as a guide for future courts' rulings. Although SOS avoided its obligations on a technicality, Texas' highest court implicitly approved the SOS final judgment in its decision to deny the petition for review, and it has already been cited in subsequent cases making fee determinations.[187] Also, though these fee awards may represent the views of only a few judges at present, the rulings in these cases threatened to shut down (at least temporarily) the continued operation of the organizations.

Secondly, although the Texas' Uniform Declaratory Judgment Act does not bear much resemblance to federal environmental statutes at first glance, the provisions of the attorney fee awards and court decisions are sufficiently analogous to allow a contemporaneous analysis. The courts in both actions share similar boundaries of discretion: an award of attorney fees is not dependent on a finding that a party "substantially prevailed," and a party is not entitled to fees solely because it won.[188] Moreover, similar to seeking civil penalties under the CWA, a party need not recover damages or even seek affirmative relief to be awarded attorney fees under the UDJA, so long as they are "reasonable."[189] Further, the federal statues provide a mechanism for environmental plaintiffs to challenge violators, similar to the UDJA's purpose in enabling a party to vindicate her legal rights.[190] A fee provision was included so that legal rights

185 SOS News, *Bee Creek Polluted After Rain*, *available at* http://www.sosalliance.org/?page=69.

186 Painewebber Income Prop. Three Ltd. P'ship v. Mobil Oil Corp., 916 F. Supp. 1239, 1243 (M.D. Fla. 1996).

187 *See* Thottumkal v. McDougal, 251 S.W. 3d 715 (Tex. App.—Houston [14th Dist.] Jan. 15, 2008); Hong Kong Dev., Inc. v. Nguyen, 229 S.W.3d 415, 2007 Tex. App. LEXIS 4494 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

188 Barshop v. Medina County Underground Conservation Dist., 925 S.W.2d 618, 637 (Tex. 1996); Del Valle Indep. Sch. Dist. v. Lopez, 863 S.W.2d 507, 512–13 (Tex. App.—Austin 1993, writ denied); Envtl. Def. Fund. v. EPA, 672 F.2d at 49.

189 Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1997);Hong Kong Dev., Inc. v. Nguyen, 229 S.W.3d at 452.

190 Tex. Civ. Prac. & Rem. Code Ann. § 37.003(a) (Vernon 1997).

could be determined even if the party could not afford litigation, as well as to deter frivolous suits, much like the legislative intent surrounding the federal environmental statutes. Finally, the policy considerations and criteria that courts should consider in making fee determinations apply equally under both statutes.

A. Assessing Attorney Fees Against Plaintiffs: Impact & Policy

It is not difficult to see the detrimental effects that the decisions described above can lead. The threat of being slapped with substantial debt will, without a doubt, make citizens more hesitant to file suit in cases of potential non-compliance. However, given the limited resources of governmental agencies, citizen enforcement actions are crucial in attaining an optimal level of compliance. While courts should have the authority to deter frivolous and harassing lawsuits, the values at stake in environmental citizen suits warrant a cautious approach in how courts go about this task. This section will explore the potential impacts of irresponsible attorney fees assessments on the organizations involved as well as look at how such decisions can run astray from congressional intent. This section will then examine solutions to satisfy the competing interests of encouraging citizen suits and discouraging frivolous litigation, addressing issues brought up in the case studies as well as more general issues.

Many organizations such as Save Our Springs and the Sierra Club exist for the very purpose of promoting environmentally responsible behavior. Shutting the door to citizens suits could render these organizations obsolete, and deny the public the resources and expertise these groups can provide. On a more personalized level, when a plaintiff suffers an environmental injury, he or she should be able to go to court to redress that injury. If plaintiffs are deterred from going to court for fear of becoming bankrupt, then many injuries could go unrelieved.[191] This result was clearly not Congress' intent. As one Senator remarked, "Perhaps more than in any other federal program, the regulation of environmental quality is of fundamental concern to the public. It is appropriate, therefore, that an opportunity be provided for citizen involvement."[192] The Congressional approval of public participation is evinced by the numerous avenues for public participation delineated in the statutes.[193]

But, this practice affects more than the individuals and organizations involved. The practice can affect the entire nation by impeding the enforcement of environmental statutes. In enacting the federal environmental statutes, it was Congress' objective to restore the purity of the environment, "for in the final analysis, it is this natural

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191 Some may argue that citizen suit provisions that lead to fines going to the U.S. Treasury do nothing to abate a plaintiff's harm, but this argument was firmly put to rest in *Laidlaw*. "It can scarcely be doubted that, for a plaintiff who is injured due to illegal conduct, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 187 (2000).

192 CWA LEGISLATIVE HISTORY *supra* note 2, at 1306 (statement of Sen. Cooper).

193 33 U.S.C. § 1319(g)(4)(A); CWA § 309(g)(4)(A). For example, in the CWA, before issuing an administrative penalty, the EPA Administrator is required to provide "public notice of and reasonable opportunity to comment on the proposed [administrative penalty]." In any hearing held on a proposed penalty, any person who comments shall be given notice of the hearing and "shall have a reasonable opportunity to present evidence." *Id.* at § 1319 (g)(4)(B).

state on which man is dependent."[194] The citizen suit provision was a conscious decision to expand the enforcement potential of these statutes beyond that of the executive "as a substitute... for its own political oversight."[195] A Senate committee discussing the CWA amendments recognized that if the goals of the statute were to be met, "the threat of sanctions must be real, and enforcement provisions must be swift and direct."[196] Congress was well aware in enacting citizen suit provisions that regulatory agencies in general, and the EPA in particular, face various hurdles that can limit their ability to effectively police all federal statutes. Clearly, Congress expected citizens to supplement government enforcement of environmental statutes.[197] As one court put it, "Congress intended citizens to step into the shoes of government agencies that failed to act"[198] and thus "the scope of citizen enforcement powers...must be viewed as co-extensive with the enforcement powers of the EPA."[199]

But, the fear of having to pay an adversary's legal costs may dissuade citizens from bringing suit, lessening the chances that governmental failure to implement legislation will be redressed by the affected public. Without the threat of suits, the potency of the standards could be diluted to the point of non-effectiveness. As the EPA's shrinking budget makes clear, citizen suits are needed to supplement government enforcement more than ever. Especially in an unfriendly political climate, citizen suits may be the last resort to ensure that industry complies with the laws.[200] If the executive does not commence enforcement proceedings, and the courts effectively bar citizens from court, the citizen standing to benefit under the statute is bereft of a means to enforce Congress' policies. The Supreme Court recognized this in *Christiansburg*, in which it grounded its disparate standard for awarding attorney fees in the idea that "the plaintiff is the chosen instrument of Congress to vindicate a policy that Congress has considered of the highest priority" and when the plaintiff prevails, the defendant is proven a "violator of federal law."[201] Thus, the crucial step in awarding attorney fees lies in recognizing the policy considerations supporting the award of fees to a prevailing plaintiff that are not present in the case of a prevailing defendant. These policy considerations should apply with even more force in the case of environmental statutes, a notion that is supported by equitable concerns, legislative history, and existing judicial practices.

194 CWA Legislative History, *supra* note 2, at 1307.

195 Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L.Rev. 1251, 1324-25 (1992).

196 S. Rep. No. 92-414, at 9 (1971) (1972 Fed. Water Pollution Control Act Amendments).

197 Anthony Z. Roisman, *The Role of Citizen in Enforcing Environmental Laws*, 16 Envtl. L. Rep. 10163 (1986).

198 Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 311 (4th Cir. 1986).

199 *Id.* at 310.

200 Though public pronouncement, proposed legislation, and presidential votes, the Reagan administration attacked fee awards and sought to eradicate them from legislation. Miller III, *supra* note 11, at 10424.

201 Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 418 (1978).

First, most environmental citizen-suit provisions provide only for injunctive relief and legal costs. Thus, unlike plaintiffs in traditional civil actions, "plaintiffs in environmental suits do not seek to vindicate personal rights and they obtain no financial benefit if they win."[202] A polluting defendant's wrongdoing is often deliberate and even profitable.[203] Moreover, these violations affect human health and degrade natural resources upon which people depend. However, polluters are often powerful industries with vast resources and can wield political leverage to circumvent or manipulate legal standards. The courtroom provides a neutral forum for plaintiffs to litigate their rights, and the liberal allowance of attorney fees to prevailing plaintiffs allows fair access to legal processes on an equal basis, regardless of wealth.[204] Because levying attorney fees against plaintiffs can damage this "leveling of the playing field," courts should take the disparate economic and political clout of defendants into account.

Furthermore, courts should bear in mind that environmental plaintiffs are faced with many reasons not bring a frivolous suit that are wholly distinct from the threat of attorney fees. Environmental plaintiffs already have financial incentives to avoid frivolous litigation. For one, these organizations must worry about their reputation. A spate of unsuccessful lawsuits would damage their reputation and make supporters question the propriety of the use of their funds. Secondly, these organizations also depend greatly on the award of attorney fees from bringing successful suits. Even absent the fear of having to pay defendant's attorney fees, the high costs of litigation make it less likely that groups will bring suits with little chance of success and compensation for their own fees. Moreover, litigants are already aware of the common law bad faith exception to the American rule, codified as Rule 11. In *Christiansburg*, the Court recognized that were attorney fees to be awarded based on this exception, the statutory language would be unnecessary.

In response to these concerns, it has been suggested that, in determining awards of attorney fees, courts should take the entirety of the statute at issue into account, focusing on its overall objectives.[205] Reviewing the legislative history, one has little doubt that, in enacting the citizen suit provisions, Congress wanted to encourage citizens to fight aggressively against pollution.[206] Foreclosing such suits would frustrate the intent of Congress and usurp policy-making authority from Congress to the courts. Indeed, one may characterize these recent attorney fee awards against plaintiffs as an oblique attack on the underlying legislation and the policy goals of the organizations involved.

Even while respecting the immediate environmental objectives of the statute, some courts may believe that once a violation is abated, any subsequent suit that continues is presumptively brought in bad faith, just to punish the offender. Nevertheless, the inclusion of civil penalties in certain statutes indicates Congress' approval of citizen suits even after a violation has ceased. While the amount of civil penalty recoverable in a

202 Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 317 (4th Cir. 1988).

203 Blomquist, *supra* note 4, at 362.

204 *Id.* at 348.

205 *See e.g.* Chesapeake Bay Found. Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 310 n.11 (4th Cir. 1986).

206 Edward E. Yates, *Federal Water Pollution Laws: A Critical Lack of Enforcement by the Environmental Protection Agency*, 20 SAN DIEGO L. REV. 945 (1983).

citizen action does not have a statutory cap, EPA administrative penalties are capped at $137,500.[207] The higher amount of liability available in a citizen suit demonstrates the separate purpose of these suits—to deter future violations.[208] Without this deterrence, the regulated community could postpone implementing compliance measures until an enforcement action was brought, knowing that the expense of coming into compliance outweighed the costs a court could impose under the relevant statute.[209]

To be sure, while Congress wanted to "clear the way for suits to be brought, it also wanted to protect defendants from burdensome litigation having no legal or factual basis."[210] Attorney fees awards utilized as a prophylactic against a flood of harassing and unfounded litigation should not be cast aside. However, courts can effectuate this intent in a way that will avoid harsh results. The next section will suggest ways in which a court can satisfy these competing interests of guarding against vexatious litigation while maintaining a forum for citizen enforcement. The first part discusses issues that arose in the two case studies, and the latter half discusses other possible measures available to courts.

B. Proposals for a More Appropriate Fee Determination

1. Determining Whether to Award Fees

The overriding theme in each of the case studies presented above is the exclusion of evidence based on technical grounds, leading the courts in both cases to conclude that plaintiffs presented insufficient evidence to support their claims.

In *Cripple Creek*, to prove permit exceedances, the Sierra Club directed the attention of the court to records of discharge amounts tht the defendants created. The court was dissatisfied, stating that "none of these documents identify what discharge exceeded what limit or the date," and the notice letters that did contain this information were not offered into evidence.[211] Consequently, the court could not determine that exceedances of the original permit limits occurred. The Sierra Club also pointed to court the remediation steps that the defendants took in 2000 in response to a failed WET test.[212] The court stated that remediation steps were not sufficient to prove permit limitations were violated. For many of the water samples, which the court conceded contain zinc, arsenic, cadmium, copper, and manganese, the court dismissed this evidence because "no evidence was presented that addresses the significance of these constituents or from which the court can determine whether they arise naturally or as a result of human activity."[213] In addition, for discharges in which the Sierra Club alleged that the defendants did not have a permit, the court ruled that the Sierra Club had not established a hydrological connection between the observed water flows and the alleged point sources.[214] This failure of proof was largely due to the fact that three

207 40 C.F.R. §§ 19.2 & 19.4 (2009).
208 *See* U.S. v. Tull, 769 F.2d 182, 186 (4th Cir. 1985).
209 Roisman, *supra* note 197, at 10163.
210 Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 420 (1978).
211 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006).
212 *Id.* at *27.
213 *Id.* at *31–32.
214 *Id.* at *59.

of the Sierra Club's expert witnesses were precluded from testifying because they had not established their credibility or demonstrated reliable methodology.[215] Even more starkly in the other case, though SOS had substantial evidence to support its claim, the enrolled bill rule barred the admission of any of its evidence.[216]

When the court excludes evidence, it is easier to describe a plaintiff's case as frivolous, for the only proof the plaintiff may be able to offer has been stricken from the record, which often happens as a surprise. This failure of admissibility in face of some good faith offer of evidence, or technical nitpickiness, has been rejected in a motion for attorney fees before, when the court stated that, imposing attorney fees and costs on a citizens' plaintiff for a technical error and dismissal would seriously impede the effectiveness of these federal statutes. Because the excluded evidence may mean the difference between a frivolous and a non-frivolous suit in certain circumstances, the court should consider evidence excluded on technical grounds in making an attorney fees determination.

The counter-argument would be that the plaintiffs knew or should have known that their evidence would be excluded, and to go forward with the suits without pursuing other forms of evidence would indicate a lack of good faith. This argument does have merit, and in cases in which a non-controversial rule of evidence clearly prohibits the parties' most probative evidence, a strong argument can be made to exclude the consideration of the evidence. However, each of the case studies exhibits a strong reason to make an exception. In *Cripple Creek*, the exclusion of the Sierra Club's expert witness came as a surprise the Sierra Club could not have foreseen, and the judge's rigid standard to establish causation was based on an unresolved question of law.[217] For SOS, the exclusion of its evidence was a result of an ancient and much-criticized exclusionary rule that even the appeals court only begrudgingly accepts, acknowledging its flaws but declaring that it is bound by precedent. In cases in which the lawsuit is rendered frivolous by technical and anachronistic rules, the legislative purpose of encouraging citizen suits should override the defendants' interest in avoiding "frivolous" lawsuits.

Another issue brought up in the *Cripple Creek* case was the court's duplicity in its summary judgment and attorney fee rulings. After the defendants had settled with the EPA and the WQCD, the defendants moved for summary judgment, claiming all issues were resolved. In rejecting the motion, the court explained that the CWA authorized the continuance of the suit because the Sierra Club filed its petition before the administrative agencies acted, and the fines sought are much higher than can be obtained through administrative agencies.[218] In the separate opinion awarding fees, the court reframes these two considerations as working against the Sierra Club. The court states that the matters at issue were greatly reduced compared to those in the original complaints because any civil penalty the Sierra Club would have recovered

215 Sierra Club's Response to Motion for Attorney Fees, *supra* note 108, at 8. The Sierra Club argued that it is not required "to prove the origin of the pollutants in order to establish liability."

216 Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist., 198 S.W. 3d 300, 308 (Tex. App.–Texarkana, 2006, pet. denied).

217 Sierra Club's Response to Motion for Attorney Fees *supra* note 108, at 16.

218 *Sierra Club & Mineral Policy Ctr.*, 62 ERC (BNA) 2063 (D. Colo., 2006).

would be reduced by the amount the defendants already paid in civil penalties, and the settlement agreements had resulted in an injunction to cease violations. Thus, the Sierra Club acted unreasonably in continuing to bring the suit. The court indicated that, had the Sierra Club dismissed, it would not have levied any fees against it. But, as the court explained earlier, *the statute authorizes the suit.* Thus, the court let the case proceed because it felt like it had to, but revealed in a footnote that "it leads to a curiosity of the citizen action continuing after the administrative action is concluded."[219] The court did concede that the settlements did not include factual admissions, and thus were not determinative of the issues in the pending action.[220] However, the court said, the scenario "potentially leads to unnecessary litigation and inconsistent outcomes" while only resulting in a *de minimus* benefit for the substantive claim.[221] "In essence, the continuing citizen action challenges the adequacy of the administrative enforcements" and subjects a polluter to two proceedings with duplicative costs and potentially different outcomes.[222] It is as if the court were saying that Congress authorized frivolous suits in structuring the CWA provision as it did—an interpretation to which Congress and the plaintiffs would surely object. If the court had felt so strongly that after the administrative proceedings the suit was unwarranted, it should have granted defendants' motion for summary judgment. While that decision would not be a correct ruling under the statute, at least it would have saved all the parties time and trouble to come to essentially the same conclusion. Similarly, because the trial court in *Lazy Nine* found that SOS did not have standing, the judge could have dismissed the complaint rather than allowing an expensive trial to go forward.

Perhaps courts, as zealous managers of their dockets, are attempting to reduce the absolute amount of cases that are filed on their dockets by creating a huge disincentive to file complaints. If creating this disincentive is the courts' intentions, they are misdirected. This contrary consequence is clear in the case of SOS. After a bench trial, numerous appeals, a trip to bankruptcy court, and a second trial that will likely result in another round of appeals; it is plain to see that awarding attorney fees against the plaintiffs does not lighten the court's load. The Sierra Club forfeited an appeal only as a condition of avoiding liability, but no one has any assurances that defendants in other cases will agree to such a compromise. Organizations that cannot afford to pay these fees will most likely try to fight them. Overall, one can expect the amount of litigation over attorney fees to increase with the increase in awards to industry defendants. Strengthening and enforcing existing procedural safeguards would better serve to improve the quality of cases brought and encourage agency enforcement—without bankrupting public interest plaintiffs. Many of these safeguards were adopted in part to counter those who opposed the citizen suits provisions for fear that that the courts would be flooded with suits.[223] Although these safeguards are presently toothless,

219 *Id.*

220 *Id.* at *10.

221 *Id.*

222 *Id.*

223 Natural Res. Def. Council v. Train, 510 F.2d 692, 726–27 (D.C. Cir.) (quoting Sen. Hruska's remarks in Senate debates, Sept. 21, 1970).

courts and agencies have the ability to put bite in them to achieve the winnowing out of cases before either party has put substantial time and effort into a case.[224]

For example, a requirement common among citizen suit provisions holds that, prior to filing a petition with the court, a citizen group must serve a sixty day notice of intent to file such action on the EPA, the state environmental agency, and the alleged polluter.[225] This requirement may already serve to avoid needless litigation by alerting the prospective defendant, allowing it, him, or her to avoid suit either by complying with the violated requirement, by reaching an early settlement, or by convincing the plaintiffs that the suit is not warranted.[226] This time lapse was also intended to provide the government a last opportunity to perform its enforcement function before private litigants step in. However, in practice, the government rarely steps in.[227] It has been contended that this time period is too short for government to inspect, investigate, and otherwise prepare an enforcement action.[228] Therefore, Congress could increase the notice period to give government more time to act, or allow the agency to issue a pre-enforcement notice that enforcement is forthcoming. The problem with these solutions, though, is that the pollution may go on unabated as citizens anticipate agency action. A better solution may be for the agency, upon notice, to review the evidence presented by citizens, and either join the suit or make a recommendation as to the viability of the suit. Thus, the plaintiffs would be on guard about the quality of the suit, and may be able to point to the agency's approval in the case of a losing judgment.

In addition, to avoid redundancies, the citizen plaintiff is precluded from bringing suit if "the Administrator or state has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a state, to require compliance with the standard, limitation, or order."[229] This prohibition was intended to provide the government with primary enforcement powers. Unfortunately, the statutes are not worded with adequate clarity to determine what actions are barred by a particular government action.[230] The "diligently prosecuting" bar rarely constitutes a barrier to bringing suit, for many courts read the provision narrowly, which is reinforced by the relaxed enforcement processes. The bargaining, compromisem and accommodation involved in this process is rarely viewed as "diligent prosecution."[231] Courts should more broadly construe the provision so as to keep dockets in check, employing an ex-

224 Miller I, *supra* note 7, at 10313–14. The disparity between the number of notices and number of cases filed indicated that this already happens to some degree.

225 Clean Water Act § 505(b)(1)(A), 33 U.S.C § 1365(b)(1)(A).

226 Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10063, 10067 (1984) [hereinafter Miller II].

227 *Id.* at 10064.

228 *Id.*

229 Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

230 Miller II, *supra* note 225, at 10064.

231 W.H. Rodgers, Jr., 2 ENVTL. LAW: AIR & WATER 5, 75 (1986). *See also* Baughman v. Bradford Coal Co., 592 F.2d 215, 219 (3rd Cir. 1979) (In interpreting a similar diligent prosecution provision in a CAA case, held that a "court" must be empowered to award relief that would be the substantial equivalent of that obtainable in a federal enforcement action); Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1478, 1482 (D. N.J. 1985) (EPA administrative action does not provide equivalent relief in a citizen penalty suit brought under the CWA).

pansive definition for "courts" as well as what constitutes "diligent prosecution." For example, the Third Circuit has held that administrative enforcement bodies should be considered "courts" for the purpose of the citizen suit sections if the "powers and characteristics" of those bodies allow it to "achieve statutory goals."[232] By setting forth determinate factors, courts could employ a more predictable and useful tool to weed out duplicative cases. This solution, however, may frustrate citizen plaintiffs unsatisfied with agency-industry agreements. The agency could, therefore, allow the citizen a seat at the bargaining table whenever the court determines that agency action bars her from bringing suit.

2. Calculating Award Fees

After the number of cases has been reduced using the techniques above, the quality of cases would likely be improved, while still leaving courts broad discretion in awarding fees. The statutes authorize the award of "reasonable" attorney fees, but the statutes do not define "reasonable," nor does legislative history shed light on what Congress' intended in authorizing "reasonable" fees.[233] This uncertainty can dissuade public interest plaintiffs who are not prepared to pay attorney fees. Therefore, Courts should factor economic considerations into their determinations of what fees are "reasonable," and cap fees accordingly. This approach would allow citizen groups to pursue actions without fear that an unfavorable judgment will lead to financial ruin. Nevertheless, the possibility that they still might be subject to paying some attorney fees would assuage fears that these groups continually bring frivolous lawsuits.

In assessing attorney fees against public interest plaintiffs, courts should also take into account the resources of both of the parties. In ruling against plaintiffs, courts could cap attorney fees at a certain percentage of the paying party's annual budget. Taking economic factors into account is not foreign for courts; they already do so in a variety of contexts. For example, under the CWA, in applying civil penalties, the courts shall consider, inter alia, "the economic benefit (if any) resulting from the violation, the economic impact of the penalty on the violator, and such other matters as justice may require."[234] Under these standards, courts have refused to order relief that would bankrupt the defendant.[235] If courts consider the costs to a defendant in these circumstances, surely they can consider costs for a plaintiff working in the public interest. Also, in considering whether to require a bond or other security from a plaintiff seeking a preliminary injunction,[236] courts have balanced the potential damage to a defendant against the strength of the plaintiff's case and its ability to vindicate its

232 Baughman v. Bradford Coal Co., 592 F.2d at 217 (3d Cir. 1979).

233 122 Cong. Rec. 8300–01 (1976) (remarks of Sen. Tunney). Of the major federal environmental statutes, only TSCA mentions the term in its debates. Sen. Tunney asserted that the section specified a "general rule forth amount of fees to be awarded" and required "the method of calculating fees be no different than that now being utilized in other fields of law, as, for example, antitrust and securities regulation litigation."

234 Clean Water Act § 309(d), 33 U.S.C. § 1319(d).

235 U.S. v. Am. Capital Land Corp., 5 Envtl. L. Rep. 20705 (S.D. Miss. 1975).

236 *See* Clean Air Act § 304(d) (2008), Clean Water Act § 505(d) (2008), Resource Conservation and Recovery Act § 7002 (2008), Safe Drinking Water Act § 1449 (2008), Outer Continental Shelf Lands Act § 23 (2007), Surface Mining Control and Reclamation Act § 520 (2008). Six

legal rights if required to post bonds.[237] In determining whether to mandate an injunction, courts have considered the reasonableness and feasibility of the environmental restoration requests as well as the financial ability of the defendant to perform it.[238] Courts should employ the same kind of balancing in considering attorney fee awards, especially the plaintiff's ability to vindicate its rights in the future if made to pay exorbitant fees. Courts should also look to the defendant's resources in determining reasonable fees to be paid. Of course, critics will contend that this approach is unfair; a defendant should be compensated for being harassed regardless of the respective party's resources. However, the federal government already provides for this considerations in the Equal Access to Justice Act (EAJA). This act authorizes compensation to defendants from unreasonable government prosecutions, but caps the hourly rates attorneys will be paid to $125 per hour, and only compensates defendants whose net worth is below two million for individuals, and seven million dollars for businesses.[239] Although this provision applies to the federal government and not to private plaintiffs, the reasoning behind it holds, for Congress intended for citizens to step into the government's shoes.

To accommodate public interest plaintiffs while still allowing for attorney fee awards, courts should make a distinction between public interest plaintiffs and economic competitor plaintiffs in considering fee awards.[240] This distinction is supported by legislative history and administrative practice. A statement made on the Senate floor regarding the Toxic Substances Control Act indicated that an award should not be made to a party that stood to gain economically if its position was successfully advocated.[241] The EPA takes the position that awards are not appropriate for advocates of non-environmental positions when the action taken is against the government, and the D.C. Circuit has hinted that it may conduct an analysis of attorney fees differently if the petitioner were a for-profit corporation out to advance its own economic interests.[242] The Fifth Circuit found the EPA's position to have both logical and policy support, but rejected it for lack of statutory support.[243] In a CWA case, a district court made a substantial fee-award to a for-profit corporation bringing the action, passing over the issue of the appropriateness of making an award to a commercial plaintiff.[244] However, another court refused an award to a profit-seeking plaintiff that had success-

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of the eleven citizen suit provisions authorize a court to require a bond or other security from the plaintiff if they are seeking a restraining order or preliminary injunction.

237 Miller II, *supra* note 225, at 10074.

238 U.S. v. Moretti, 526 F.2d 1306, 1310 (5th Cir. 1976); U.S. v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1300 (5th Cir. 1976).

239 5 U.S.C. § 504 (b)(1)(A)–(B) (2007).

240 *See* Pound v. Airosol Co., Inc., 440 F. Supp. 2d 1241, 1247(D. Kan. 2006) (refusing to award attorney fees to competitor that brought suit, suggesting suit was for personal financial gain rather than for environmental purposes); Wash. Trout v. Scab Rock Feeders, 823 F. Supp. 819, 821 (E.D. Wash. 1993) (same). Some courts have already performed such analysis.

241 Envtl. Def. Fund v. EPA, 672 F.2d 42, 49 (D.C.Cir. 1982) (quoting remarks of Sen. Magnuson).

242 Alabama Power v. Gorsuch, 672 F.2d 1,7 (D.C. Cir. 1982).

243 Fla. Power & Light Co. v. Costle, 683 F.2d 941, 942-43 (5th Cir. Unit B 1982).

244 Citizen Coordination Comm. of Friendship Heights v. Wash. Metro. Transit Auth., 568 F. Supp. 825 (D.D.C. 1983).

fully defended against governmental action brought under the Endangered Species Act.[245] The court stated that granting an award in such cases would "twist the spirit of the private attorney general action."[246] Courts should take these equitable considerations in mind not only in *not* awarding fees to non-environmental plaintiffs, but also in awarding fees *against* public interest plaintiffs.

On similar grounds, the Sierra Club and SOS both objected to the reasonableness in the hourly rate charges and the time spent by the defendants' attorneys, based on the parties' respective statuses.[247] Although the courts ignored these objections in these cases, courts could look to these arguments in determining what fees are "reasonable" in the future. In calculating fees, courts usually begin with the "lodestar" amount, which is the amount of hours spent on a case multiplied by the prevailing rate for attorneys performing similar work.[248] This amount may then be adjusted upward or downward based on skill and other factors. Early on in the history of suits, some courts would adjust attorney fees downward for public interest attorneys, reasoning that these lawyers act in the public interest and not for the purpose of remuneration.[249] Although courts have largely abandoned this technique and relied on the prevailing market rates of private attorneys in calculating fees,[250] the method would not be entirely inappropriate in assessing fees *against* public interest litigants. That is, courts could adjust the fees of corporate counsel downward to reflect what a public interest lawyer would get paid. Equalizing fees is justifiable as part of the court's practice of adjusting fees according to skill level, because it most likely does not take a disproportionate amount of skill to defend an action as to bring one. To counter arguments that starting with the public interest wage is unfair, courts could allow upward adjustments for defendants' attorneys, but put the burden of supporting those requests on the petitioners.

Citizen suits have a corrective force in allowing enforcement actions to be brought against polluters that might not otherwise be brought. However, assessing fees against plaintiffs undermines the viability of private enforcement by effectively chilling citizen enforcement actions. Courts should maintain the integrity of the regulatory structure established by Congress, and establish reliable and consistent criteria based on equitable concerns, taking economics as well as policy into account, while still maintaining safeguards against frivolous litigation.

245 Carpenter v. Andrus, 499 F. Supp. 976 (D. Del. 1980).

246 *Id.* at 979.

247 In calculating the lodestar amount, the *Sierra Club* court used fee rates from $155 to $425 per hour. *Sierra Club Order Granting Attorney's Fees*, *supra* note 89, at 953.

248 Miller III, *supra* note 11, at 10417.

249 Natural Res. Def. Council v. EPA, 484 F.2d 1331 (1st Cir. 1973) (in awarding low hourly fees, court stated that counsel has an obligation to bring suits in the public interest). There is a remark in the legislative history of the TSCA attorney fees provisions indicating that this practice is not condoned by Congress. Senator Tunney states that fees should not be lowered because the attorneys involved were "salaried employees of public interest and/ or foundation funded law firms." 122 Cong. Rec. 8300-01 (1976).

250 Envtl. Def. Fund v. EPA, 672 F.2d 42, 58 (D.C. Cir. 1982); Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982).

IV. CONCLUSION

What is now a powerful incentive for groups with limited resources to take action in the public interest threatens to become a potent disincentive. Citizen suit provisions allow the powerless citizen to challenge a powerful, well-connected industry and win, much like David slaying the mighty Goliath. The corporations that often are the target of these suits are in a better position to influence the political branches through their massive lobbying efforts backed up by dollars. The courtroom has historically provided a forum where these two entities can, presumably, achieve equal footing. But, the prospect of detrimental fees strips the Davids of the environmental arena of any incentive to initiate enforcement proceedings. The loss of the ability or will to bring such suits will allow more corporations to manipulate the legal structure to escape accountability for their actions, and continue to violate standards despite the negative effects on public health.

A law is only as strong as the degree to which it is enforced. As the late Judge Skelly Wright noted, citizen suits are aimed "to see that the important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy."[251] The goal in interpreting this provision is not to devise the most judicially efficient enforcement system imaginable, but to implement the system that Congress created, in the way that Congress intended. To take the language from the very statute these litigants employ in promoting the public interest and use that as additional fodder for awarding attorney fees against them is to twist the spirit of the environmental statutes. These statutes were put in place to further environmental protection, not to help industrial defendants avoid frivolous lawsuits. With the threat of citizen enforcement actions effectively eviscerated, the enforcement powers are diluted, and polluters may continue to degrade the environment with impunity. Thus, it is crucial that courts maintain a policy that does not foreclose citizen actions, before the Davids are rendered helpless against the Goliaths.

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251 Calvert Cliff's Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

Recent Developments

Air Quality

Recent Implications for the Houston-Galveston-Brazoria Eight-Hour Ozone Nonattainment Area

I. Overview

The Houston-Galveston-Brazoria (HGB) nonattainment area was reclassified from moderate to severe under the 1997 eight-hour ozone standard set by the Environmental Protection Agency (EPA), effective October 31, 2008. As a result of the reclassification, the Texas Commission on Environmental Quality (TCEQ) must submit revisions to the State Implementation Plan (SIP) to EPA by April 15, 2010, and the new deadline for attainment is June 15, 2019. Additionally, in March of 2009 the EPA further lowered the eight-hour ozone standard to protect public health and welfare. While the strengthening of the standard will have implications for the HGB area's nonattainment classification in the future, at this time the 1997 standards and implementation rules will remain in place as the EPA undertakes rulemaking to address the transition from the 1997 to the 2008 ozone standards. This new cycle of SIP revisions continues a process that began in 1972 with the first SIP submittals by Texas and other states in an effort to attain the ozone NAAQS and improve air quality in urban areas nationwide.

II. Background

Under the federal Clean Air Act (CAA), the EPA is required to promulgate national ambient air quality standards (NAAQS) that protect the public health from the effects of ozone. *See* 42 U.S.C. §§ 7408–7409 (2008). The EPA also must review this standard every five years and revise it as the Agency finds necessary to meet the statutory mandate. *See id.* at § 7409(d)(1). Areas failing to meet the designated ozone NAAQS are determined to be nonattainment areas. *Id.* at § 7407(d). Nonattainment areas are further classified according to severity in order to assign attainment deadlines. *Id.* at § 7502(a).

When the EPA revises a standard, each state must revise its SIP to show how it will comply with the updated standard. *Id.* at § 7410. In Texas, the TCEQ is the agency re-

sponsible for creating and revising the State's SIP. Texas Commission on Environmental Quality, SIP: Introduction to the Texas State Implementation Plan (SIP), http://www.tceq.state.tx.us/implementation/air/sip/sipintro.html (last visited Feb. 3, , 2009). The EPA initially approved Texas' SIP in May 1972. *Id.* Rather than re-writing the entire SIP regularly, parts of the SIP are simply revised as needed. With the recent reclassification of the HGB nonattainment area and the revised eight-hour ozone standard, SIP revisions will be required of the TCEQ. It is unclear at this time how the transition from the 1997 to the 2008 eight-hour ozone standard will affect those revisions.

III. OZONE NAAQS REVISION: EIGHT-HOUR OZONE STANDARD

As part of its required review of NAAQS under the CAA, the EPA recently revised the 1997 eight-hour ozone standard from 0.08 parts per million (ppm) to 0.075 ppm. 40 C.F.R. § 50.15 (2008). The EPA updated the ozone standard "to provide increased protection for children and other 'at risk' populations" against an array of ozone-related adverse health effects. 73 Fed. Reg. 16,436 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50 and 58). This final rule became effective May 27, 2008. *Id.* Under the CAA, it is now up to the states, subject to EPA oversight, to begin specified steps to ensure that the revised standard is met. *See* 42 U.S.C. § 7410 (2008). This process will start with identifying areas in the country that exceed the new standard as nonattainment areas. *Id.* § 7407(d)(1)(B). Additionally, proposed rulemaking will address the classification of nonattainment areas with the purpose of assigning attainment dates. 73 Fed.Reg. at 16,503.

IV. THE HOUSTON-GALVESTON-BRAZORIA EIGHT-HOUR OZONE NONATTAINMENT AREA

A. RECLASSIFICATION UNDER 1997 STANDARD: FINAL ORDER

Effective October 31, 2008, the Houston-Galveston-Brazoria (HGB) area is reclassified as a severe nonattainment area under the 1997 eight-hour ozone standard, with an attainment date of not later than June 15, 2019. 73 Fed. Reg. 56,983, 56,993 (Oct. 1, 2008) (to be codified at 40 C.F.R. part 81). It was previously classified as a moderate nonattainment area, with an attainment date of not later than June 15, 2010. *Id.* at 56,983. This action by the EPA was based on a request by the Governor of Texas to voluntarily reclassify the HGB nonattainment area. *Id.* Under the CAA, the EPA must approve a State's request for voluntary reclassification of a nonattainment area. 42 U.S.C. § 7407(d)(1)(B)(iii).

The EPA set April 15, 2010 as the date for Texas to submit a revised SIP addressing the severe ozone nonattainment area requirements of the CAA under the 1997 standard. *Id.* Many comments received by the EPA expressed that the April 15, 2010 deadline was unnecessarily long. 73 Fed. Reg. at 56,988. The EPA responded that the HGB area has certain unique complexities, including: (1) a meteorology impacted by both a land and sea breeze interaction and a bay breeze function, making modeling difficult; (2) a large urban population; (3) a large industrial area; and (4) apparent underestimation issues of industrial emissions. *Id.* at 56,985. The EPA concluded that this SIP revision date allows for the best information to be used to produce a more robust attainment demonstration plan relying on better data and modeling. *Id.*

The EPA also received comments expressing concern that the HGB area has never attained any standard and that further delay in attaining the standard by granting the reclassification is not warranted. *Id.* at 56,987. The EPA responded that voluntary

reclassification is a valid option under the CAA, and it is an appropriate option if the state is unable to develop a plan demonstrating that an area will come into attainment within the time period assigned for its classification. *Id.* Furthermore, the TCEQ was cited as believing that the extended time period will allow the development of the most effective SIP possible, noting that developing a quality SIP should avoid delays in implementation. *Id.* Either way, as stated above, the EPA was required to grant the voluntary reclassification under the CAA.

A revised SIP for the HGB area must include all the requirements for both serious and severe ozone nonattainment plans. *Id.* at 56,983. These requirements include: (1) enhanced ambient monitoring; (2) an enhanced vehicle inspection and maintenance program; (3) a clean fuel vehicle program or an approved substitute; (4) gasoline vapor recovery for motor vehicle refueling emissions; (5) an attainment demonstration; (6) provisions for reasonably available control technology (RACT) and reasonably available control measures (RACM); (7) reformulated gasoline; and (8) contingency measures to offset emissions from growth in vehicle miles traveled. *Id.* at 56,983–84. Ultimately, the revised SIP for the HGB area must contain adopted measures sufficient to address the applicable severe area requirements and to attain the 1997 eight-hour ozone NAAQS as expeditiously as practicable, but not later than June 15, 2019. *Id.* at 56,994.

B. HGB Under the New 2008 Standard

The reclassification occurred under the 1997 eight-hour ozone standard. Under the strengthened 2008 standard, the HGB area will remain in nonattainment. Until further rulemaking, it is unclear what nonattainment classification and attainment deadline that EPA will assign under the new 2008 standard. However, the EPA has determined that the 1997 standards and implementation rules will remain in place for implementation purposes as the EPA undertakes rulemaking to address the transition from the 1997 ozone standards to the 2008 ozone standards. 73 Fed. Reg. at 16,503. Meanwhile, states are required to continue to develop and implement their SIPs for the 1997 standard as they begin the process of recommending designation under the 2008 standard. *Id.* Therefore, until further EPA rulemaking to address the transition, the HGB area will remain a severe nonattainment area and the State must submit its revised SIP addressing this reclassification by April 15, 2010. 73 Fed.Reg. at 56,983.

V. Conclusion

The EPA's recent rulemaking to strengthen ozone standards means that all states will need to develop further SIP revisions. To this end, Texas must develop and submit to the EPA its SIP revisions that address the reclassification of the HGB nonattainment area. Until further EPA rulemaking, it is unclear how the transition from the 1997 to the 2008 eight-hour ozone standard will impact Texas' SIP for the attainment of ozone NAAQS.

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NATURAL RESOURCES

THE GLOBAL NUCLEAR ENERGY PARTNERSHIP (GNEP) AND NUCLEAR REPROCESSING DEVELOPMENT IN THE UNITED STATES

GLOBAL NUCLEAR ENERGY PARTNERSHIP (GNEP)

In 2006, the U.S. Department of Energy (DOE) proposed the creation of the Global Nuclear Energy Partnership (GNEP), an international effort to promote nuclear power and fuel reprocessing in a way that reduces waste as well as the danger of nuclear proliferation. Press Release, U.S. Dep't of Energy, Department of Energy Announces New Nuclear Initiative (Feb. 6, 2006), http://www.energy.gov/news/3161.htm. The ultimate goal of GNEP is to develop nuclear technology and utilize a closed nuclear fuel cycle, eventually leading to a worldwide system of "fuel supplier" nations and "user" nations. *Id.* As of October 2008, the organization consisted of twenty-five partners: Armenia, Australia, Bulgaria, Canada, China, Estonia, France, Ghana, Hungary, Italy, Japan, Jordan, Kazakhstan, Republic of Korea, Lithuania, Morocco, Oman, Poland, Romania, the Russian Federation, Senegal, Slovenia, Ukraine, United Kingdom, and the United States. Press Release, Global Nuclear Energy Partnership Joint Statement, Second Executive Committee Meeting, (Oct. 1, 2008), http://www.gneppartnership.org/docs/JointStatement.pdf.

Since its inception, GNEP has come under heavy criticism. This criticism has focused on the program's potentially exorbitant price tag, environmental consequences, the troubling framework of supplying nations and dependent nations, and the inherent uncertainty in the outcome of required research and development activities. Memorandum from Eugene Aloise, Director, Dep't of Natural Res. and Env't, U.S. Gov't Accountability Office, to Congressional Committees (Apr. 22, 2008), http://www.gao.gov/news.items/d08483.pdf. In response to these criticism, Congress continues to underfund the requested budget for GNEP, giving only $179 million of the requested $395 million for the fiscal year 2008. Consolidated Appropriations Act of 2008, H.R. 2764, 110th Cong. (1st Sess. 2008). The Committee on Appropriations characterized the GNEP a controversial initiative that would "cost tens of billions of dollars and last for decades" with only "weak support from the industry." Press Release, Committee on Appropriations, FY 2008 Omnibus Summary: Energy and Water Development Subcommittee (Dec. 17, 2007), http://appropriations.house.gov/pdf/EnergyandWaterOmnibus.pdf. Despite this, recent developments show that the GNEP continues to grow, with an increasing possibility of reprocessing within the United States.

GNEP DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (PEIS) REVEALS PLANS FOR NUCLEAR FUEL REPROCESSING

Congress enacted the National Environmental Policy Act (NEPA) in 1970 to promote efforts to prevent or eliminate damage to the environment, focus on public health and welfare, and to create a Council on Environmental Quality. 42 U.S.C. § 4321 (2000). NEPA requires government agencies taking any action that may impact the environment to prepare an Environmental Impact Statement (EIS), a document that describes in detail the environmental impact of the proposed action, adverse environmental effects that cannot be avoided, alternatives to the proposed action,

short-term and long-term plans, and any irreversible commitments of resources if the proposed action should be implemented. *Id.* at § 4332.

The GNEP's Draft Programmatic Environmental Impact Statement (PEIS) was finally released on October 17, 2008 for a sixty-day period of public review and comment. Press Release, U.S. Dep't. of Energy, Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement Summary, DOE/EIS-0396 (Oct. 19, 2008) (on file with author). Due to the extensive interest expressed in the Draft GNEP PEIS, the comment period was later extended to March 16, 2009. Press Release, U.S. Dep't of Energy, DOE Extends Deadline for Draft GNEP PEIS Comment Period (Dec. 8, 2008), http://www.ne.doe.gov/newsroom/2008PRs/nePR120808.html. As statutorily required, the PEIS discusses the possible alternatives to the GNEP goals of spent nuclear fuel reprocessing. It covers six domestic alternatives: a continuation of the once-through open fuel cycle (no action), three different closed-fuel cycles (fast reactor recycle, thermal/fast reactor recycle, and thermal reactor recycle), a thorium once-through fuel cycle, and a heavy water reactor/high temperature gas-cooled (HW/HGT) reactor alternative. *Id.* at 6–19.

When evaluating the potential environmental threat, an important consideration is the amount of nuclear waste that would be generated as a result of each alternative. With respect to annual waste in the form of spent nuclear fuel, the no-action alternative is projected to generate 4,340 metric tons; the thorium alternative is projected to generate 2,050 metric tons; and the HW/HGT reactor alternative is projected to generate 10,600 and 1,540 metric tons, respectively. *Id.* at 37–38. The three closed-fuel alternatives would result in no nuclear spent fuel waste, but a substantial amount of high-level radioactive waste. *Id.* at 38. It is estimated that as a result of recycling processes, there would be approximately 50 to 1840 cubic meters of high-level radioactive waste. *Id.*

The issue has become whether the United States has the capacity to store this nuclear waste. At present, only the Yucca Mountain site is currently projected to be available for disposal of high-level nuclear waste and spent nuclear fuel, but its waste disposal capacity is capped by statute at 70,000 metric tons.. Nuclear Policy Waste Act of 1982, 42 U.S.C. §10101 et seq. (2000). The DOE has projected that this capacity will be reached in 2010. Press Release, U.S. Dep't. of Energy, Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement Summary, DOE/EIS-0396 at 58–59. Any of the above alternatives, even the no action option, may result in the need to raise the current limit at Yucca Mountain and/or the need for an additional permanent geological repository. *Id.* A current statement released by DOE in July 2009 reveals that Yucca Mountain potentially could store up to 130,000 metric tons of spent nuclear fuel, which is equal to the amount of waste projected from existing commercial power reactors. Press Release, U.S. Dep't of Energy, Final Supplemental Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE/EIS-0250-S1 (July 11, 2008) (on file with author).

The Future for Nuclear Reprocessing

The draft PEIS indicates that the three closed-fuel cycle alternatives offer the best option for the future of nuclear energy. Press Release, U.S. Dep't. of Energy, Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement

Summary, DOE/EIS-0396. According to the PEIS, use of this option would result in preservation of uranium natural resources, a reduction of spent nuclear fuel, and a reduction of the environmental impact associated with spent fuel disposal. *Id.* The problem cited by the PEIS with use of this option is that, because of past hurdles for reprocessing, the transition into a closed-fuel cycle would require considerable research and development for new technology. The research and development period is anticipated to be around five to ten years for any of the three closed cycles This lack of certainty is one of the controversial issues surrounding nuclear reprocessing. *Id.* at 62.

Moreover, no matter which alternative is selected, it is clear that additional planning is needed for nuclear waste disposal. *Id.* at 61. The reprocessing alternative, while reducing the amount of spent nuclear fuel waste, would still result in a large amount of low-level and high-level radioactive waste. *Id.* at 63. The draft PEIS does not discuss the lifecycle of the high-level waste that would result from recycling processes. Nor does it project the quantity of low-level waste that would require disposal, which would depend on which of the three fuel closed cycle alternatives the DOE selects to implement and the results of the program's research and development.

This information may be available in the final PEIS when the DOE selects which closed cycle alternative it will develop. It is evident from the draft that the open fuel cycle and no action alternatives, while beneficial in some ways, are not the direction in which the DOE currently seeks to move. From the draft PEIS, it appears the DOE would like to move forward with its plans to develop domestic reprocessing facilities. With a new administration in place and the ongoing energy crisis, it is difficult to predict what role nuclear energy will play in the plan for alternative energy. The final PEIS is projected to be released later in 2009, but it appears likely that the move will be toward reprocessing.

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SOLID WASTE

LESS JUNK IN AMERICA'S TRUNK: THE EPA'S NEW DEFINITION OF SOLID WASTE

The U.S. Environmental Protection Agency (EPA) has recently relaxed its definition of solid waste to exclude certain secondary hazardous waste if the waste is reclaimed and recycled. This change represents an attempt to encourage hazardous waste producers to take responsibility for and recycle their waste products.

On October 30, 2008, the EPA published a new definition section for its solid waste rule. According to the preamble of the rule, the revised definition allows for secondary hazardous waste to be excluded from the Resource Conservation and Re-

covery Act (RCRA) covering hazardous waste, if the secondary waste is reclaimed and recycled. Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008) (to be codified at 40 C.F.R. pts. 260, 261, and 270). Secondary waste material means material that "when discarded, would be identified as hazardous waste under part 261 of this chapter." 40 C.F.R. § 260.10 (2008). The revision excludes "from regulation under Subtitle C of RCRA (42 U.S.C. 6921 through 6939(e)) certain hazardous secondary materials which are being reclaimed." 73 Fed. Reg. 64,669.

Along with the exclusion of secondary hazardous waste that is being reclaimed at the location where it was created, the EPA has also provided a conditional exclusion of secondary hazardous waste that applies to the materials "that are generated and subsequently transferred to a different person or company for the purpose of reclamation." 73 Fed. Reg. 64,670. As long as the conditions and restrictions to the exclusion are satisfied, this hazardous secondary material is also not subject to RCRA. *Id.*

Before this new definition, the rule defined solid waste as, "...any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*... resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 73 Fed. Reg. 64,675 (citing Resource Conservation and Recovery Act § 1004(27), 42 U.S.C. § 6905 (2008)). This definition is important because "materials that are not solid waste are not subject to regulation as hazardous wastes under RCRA Subtitle C. Thus, the definition of 'solid waste' plays a key role in defining the scope of EPA's authorities under Subtitle C of RCRA." 73 Fed. Reg. 64,671.

While the definition of "solid waste" is crucial, the EPA continues to believe that the concept of discard is the most important organizing principle governing determinations made under this rule. 73 Fed. Reg. 64,676. "Discard" has consistently been defined as "disposing, abandoning or throwing away." *Id.* This final rule is consistent with that definition. *Id.*

The EPA made this change "to encourage safe, environmentally sound recycling and resource conservation and to respond to several court decisions concerning the definition of solid waste." 73 Fed. Reg. 64,668. Certain secondary hazardous waste is not considered solid waste because the "recycling of these materials often closely resembles industrial manufacturing rather than waste management." 73 Fed. Reg. 64,670.

The EPA plans to regulate this new rule through a non-waste determination process that provides an administrative process for receiving a formal determination that hazardous secondary materials are not discarded and are, therefore, not solid wastes when legitimately reclaimed. 73 Fed. Reg. 64,670. The process will be voluntary and is available in addition to two self-implementing exclusions included in the rule. *Id.* Two types of non-waste determinations are available: "(1) A determination for hazardous secondary materials reclaimed in a continuous industrial process; and (2) a determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate." *Id.*

The EPA will regulate the recycling of the secondary hazardous waste , and persons claiming to be "engaged in reclamation must be able to demonstrate that the recycling is legitimate." 40 C.F.R. §260.43(a) (2008). Any material that is found to not be "legitimately recycled is discarded material and is a solid waste" subject to RCRA

provisions. *Id.* This rule will also have an impact on companies who plan to move the secondary hazardous waste, as it "requires generators to make reasonable efforts to ensure that their hazardous secondary materials are properly and legitimately recycled before shipping or otherwise transferring them to a reclamation facility or any intermediate facility." 73 Fed. Reg. 64,685.

The revision of this rule is expected to affect "approximately 5,600 facilities in 280 industries in twenty-one economic sectors that generate or recycle hazardous secondary materials that are currently regulated as RCRA Subtitle C hazardous wastes." 73 Fed. Reg. 64,668. The revised rule will save these industries anywhere from $19 million to $333 million per year. *Id.* It is estimated that 1.5 million tons per year of hazardous secondary materials currently managed as RCRA hazardous waste will be rerouted to recycling. 73 Fed. Reg. 64,754. This change will have an enormous effect on RCRA because, "these affected hazardous secondary materials consist of about 98% that are currently reclaimed as RCRA hazardous waste, and about 2% of hazardous waste that is currently disposed of (*e.g.*, landfilled, incinerated, or deepwell injected)." *Id.*

However, several problems could arise by excluding recycled secondary hazardous waste material from the definition of solid waste. First,

> [E]xcluding all hazardous secondary materials destined for recycling would allow materials to move in and out of the hazardous waste management system depending on what any person handling the hazardous secondary material intended to do with them. This seems inconsistent with the mandate to track hazardous wastes and control them from 'cradle to grave.'

73 Fed. Reg. 64,671. In response to this potential problem, the EPA has interpreted the statute to confer jurisdiction over at least some hazardous secondary materials destined for recycling. *Id.*

A second problem foreseen by critics of the revised rule is the EPA's failure to conduct a study of the potential impacts of the proposed regulatory changes. 73 Fed. Reg. 64,673. The concern is that deregulation of hazardous secondary materials that are reclaimed in the manner proposed could result in mismanagement of these materials and, in turn, would create new cases of environmental damage that would require remedial action by federal or state authorities. *Id.* To prevent mismanagement of materials, the EPA plans to "establish an expectation for the owner/operators of [storage] facilities that they must manage hazardous secondary materials in at least as protective a manner as they would an analogous raw material, and in such a way that materials would not be released into the environment." 73 Fed. Reg. 64,691.

Finally, some commenters pointed to a number of examples of environmental damage attributable to hazardous secondary material recycling, including a number of sites listed on the Superfund National Priorities List (NPL). 73 Fed. Reg. 64,673. Other commenters countered that "cases of 'historical' recycling-related environmental damage are not particularly relevant or instructive with regard to modifying the current RCRA hazardous waste regulations for hazardous secondary materials recycling" because today's generators and recyclers are much better environmental stewards than those in the pre-RCRA/CERCLA era. *Id.*

In sum, the EPA's new definition of "solid waste" excludes secondary hazardous waste that is reclaimed and recycled by the producer or a legitimate recycling facility.

This exclusion will encourage the producers of these materials to recycle and reuse their waste product, which will ultimately result in greater profits due to lower costs of waste regulation.

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Water Rights

Recent Developments in Groundwater Rights

Recent litigation revolving around Chapter 36 of the Texas Water Code has limited the type of permitting allowed by groundwater districts and, in one case, interpreted Chapter 36 as not containing a clear waiver the sovereign immunity of municipalities faced with suits to collect unpaid fees or recover fines for violation of groundwater district rules. Two recent cases, *City of Aspermont v. Rolling Plains Groundwater Conservation District* and *Guitar Holding Company, L.P. v. Hudspeth County Underground Water Conservation District No. 1*, are discussed below.

City of Aspermont v. Rolling Plains Groundwater Conservation District, 258 S.W.3d 231 (Tex. App.—Eastland 2008, pet. filed)

The Eastland Court of Appeals recently recognized the sovereign immunity of the City of Aspermont in defense of a suit by the Rolling Plains Groundwater Conservation Distric under the Chapter 36 of the Texas Water Code for failure to file monthly reports and pay export fees for transporting water out of the District. The court prevented the groundwater district from recovering monetary damages from the City, holding that the City of Aspermont's sovereign immunity was not clearly and unambiguously waived in Chapter 36. At the same time, however, the appellate court held that the trial court did have jurisdiction to determine whether Aspermont must file reports and pay export fees in the future, if the claim seeks declaratory relief and is not merely a disguised suit for damages. Thus, while the groundwater district was unable to recover for monetary damages for past acts and omissions in the present case, it could seek injunctive relief in future cases.

The Texas Legislature created the Rolling Plains Groundwater Conservation District in 1993. The nearby City of Aspermont operates several wells within this District that supply approximately 66% of the City's water supply. *Id.* at 234. In 2003, the Legislature amended provisions relating to the Rolling Plains district and in doing so eliminated an exemption from regulation for the wells owned and operated by the City of Aspermont. *Id.* at 233. Rolling Plains asserted that the removal of this exemption subjected the City' wells to the regulations of the District. *Id.* Rolling Plains filed

suit against the City of Aspermont after the City failed to file monthly reports and refused to pay export fees for the water that it transported out of the district. *Id.* at 232. Rolling Plains sought to recover monetary damages for overdue fees and penalties. *Id.* Aspermont then filed a plea to the jurisdiction in which it asserted sovereign immunity. *Id.*

Sovereign immunity from suit cannot be circumvented "by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim." *Id.* at 235.

Although Chapter 36 of the Texas Water Code contains provisions that specifically relate to municipalities, neither Chapter 36 nor in the 2003 Rolling Plains legislation have provisions that clearly and unambiguously waive the immunity of a municipality from suit. *Id.* Furthermore, Section 36.102 does not specifically authorize the assessment of penalties against a political subdivision or municipality; damages that would be "astronomical" for the City of Aspermont. *Id.* at 234.

After review of the 2003 legislation, the court did not find a clear and ambiguous waiver of sovereign immunity from suit and that the City was not liable money damages. *Id.* at 235. However, the court concluded that Aspermont was not immune "from the causes of action asserted by Rolling Plains for the construction of the applicable legislation and for a declaration regarding whether Aspermont is subject to and must comply with the rules and regulations of Rolling Plains." *Id.* at 236. The court found that "conservation districts must have some recourse to seek a determination as to whether a certain political subdivision or municipality is exempt under Chapter 36 or other applicable legislation and to enforce rules and regulations against those political subdivisions and municipalities that are not exempt." *Id.* The court did declare that the City was immune from suit for the damages claims for the past due fees, penalties, and costs. *Id.*

Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910 (Tex. 2008).

Under Chapter 36 of the Texas Water Code, local districts may protect existing wells and production by continuing 'historic or existing use' to the extent possible under its comprehensive management plan. *Id.* at 912. The extent of these exemptions was at issue in the appeal of *Guitar Holding Co.*

The court concluded that the amount of groundwater used and its beneficial purpose are components of "historic and existing use." *Id.* The Hudspeth County Underground Water Conservation District exceeded its rule-making authority in grandfathering existing wells without regard for both the amount and purpose of the water taken from the well. *Id.* The supreme court declared invalid the District's scheme for issuing permits for the transfer of groundwater out of the District's boundaries. *Id.*

When adopting a groundwater management plan, a groundwater conservation district must consider all groundwater uses and needs to develop rules that are fair and impartial. Texas Water Code Ann. § 36.101(a) (Vernon 2008). Since its inception, the Hudspeth County District was largely unsuccessful in satisfying this statutory standard. Recently, the District took on a new management plan committed to sustaining the subject aquifer at a historically optimal level by regulating the withdrawal

of groundwater. *Guitar Holding Co.* at 913. Groundwater production was divided among three core classes of users: (1) statutorily exempt users, (2) existing and historic users, and (3) new users, which also might include historic users seeking to increase consumption. *Id.* at 914. The District also adopted new rules in 2002 that recognized three types of permits: (1) validation permits, (2) operating permits, and (3) transfer permits. *Id.* Wells that were operating before the adoption of the new rules were generally entitled to validation permits. *Id.* If not eligible for validation, the landowner may apply for an operating permit. *Id.* Transfer permits were required to transfer water out of the District. *Id.*

Validation permit holders could withdraw 3 to 4 acre-feet per year (depending on aquifer's elevation) for every acre irrigated during a designated historic and existing use period. *Id.* Transfer permits were available to any holder of either a validation or operating permit. *Id.* An operational permit holder did not have a right to withdraw groundwater until the aquifer reaches a designated water level. *Id.* Validation permit holders received substantially greater transfer rights under the rules than other landowners because they received substantially greater allocations of groundwater than other landowners. *Id.* Thus, the landowners with validation permits, typically those who grandfathered in irrigation rights, could transfer greater amounts of water out of the District's boundaries.

Guitar Holding Co, L.P., a large landowner in Hudspeth County, argued, "the Water Code only authorizes a district to preserve historic or existing use of the same type or purpose. Because transferring water out of the district is a new use, it cannot be preserved or 'grandfathered' under section (b) which extends only to the preservation of an existing or historic use." *Id.* at 915. The District argued for the idea that "use" only refers to the amount of water, not its purpose. *Id.*

To resolve the dispute, the court had to determine the meaning of the term "use" within the Texas Water Code. In 2005, the Texas Legislature added a new definition for "evidence of historic or existing use" as meaning "evidence that is material and relevant to a determination of the amount of groundwater beneficially used" during the relevant time period. Tex. Water Code Ann. § 36.001(29) (Vernon 2008). This new definition, in combination with the definition of "use for a beneficial purpose," which included a list of specific purposes and "any other purpose that is useful to the user," indicates that the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. *Guitar Holding Co.* at 916. Thus, both the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to "preserve historic or existing use." Once water is transferred out, the existing use ends, as does the justification for protecting that use. *Id.* at 918. Hence, the District's transfer rules, in essence, granted franchises to some landowners to export water while denying that right to others.

Guitar Holding Co., L.P. also challenged the new rules on the grounds that, since all transfer permit holders were issued "new" permits, the District could not discriminate in the permit holders' ability to exercise those rights. Since validation permit holders were allowed to extract more groundwater than operational permit holders, the restrictions on new transfer permits were not uniformly applied. *Id.* at 918. Texas Water Code §36.113(e)(1)-(3) states:

More restrictive permit conditions may be imposed on new applications when the limitations (1) are applied uniformly to all subsequent new permit applications, (2) bear a reasonable relationship to the existing district management plan, and (3) are reasonably necessary to protect existing use.

Tex. Water Code Ann. §36.113(e)(1)-(3) (Vernon 2008). In light of the statute, the court agreed with Guitar Holding Co., L.P. that the transfer permits are new permit applications since no landowner in Hudspeth County District had ever transferred water outside the District or obtained a permit to do so before the adoption of these rules. *Id.* at 917. Thus, Section 36.113(e) is applicable to all of the transfer permit applications because they are new.

Consequentially, when applying Section 36.113(e), the court found that the District's transfer rules exceeded statutory authorization and were invalid because the limitations were not uniformly applied to new applications and were not necessary to protect existing use. *Id.* at 912.

Conclusion

It is important that groundwater conservation districts structure their permitting systems in a manner that dose not discriminate against certain groups of permit holders. Districts should also take into account both the amount and purpose of water use when acknowledging existing and historic uses. In addition to these concerns, municipalities should take note of the effect of legislative changes that may subject them to regulation under a groundwater conservation district as was seen in the *Aspermont* case. Although municipalities may get a free pass when it comes to back pay in damages, courts may not be reluctant to issue an order placing a municipality's wells under regulation by a groundwater conservation district.

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FEDERAL CASENOTES

DETERMINING THE EFFECT OF *BARNES V. KOPPERS* ON TOXIC TORT CASES IN TEXAS

I. Summary

In *Barnes v. Koppers*, 534 F.3d 357 (5th Cir. 2008, no pet.), the Fifth Circuit Court of Appeals interpreted the Mississippi statute governing the accrual of a cause of action in a latent injury or disease case. Reversing the district court, the Fifth Circuit held that under this Mississippi statute, the statute of limitations commences when a plaintiff has knowledge of his or her injury but does *not* require knowledge of the injury's cause. With this interpretation, the court held that plaintiff's tort claims were time-barred. This statute is distinguishable from the applicable statute in Texas, which

expressly states that the cause of action for a latent injury or disease does not accrue until the plaintiff has knowledge of *both* his or her injury *and its cause*. Thus, had the *Barnes* case originated in Texas, the court would have likely permitted the plaintiff's claims.

The Fifth Circuit also explained the preconditions a plaintiff must establish to prevail on federal preemption claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in toxic tort cases. The court held that Barnes had failed to satisfy this burden and thus denied her claim. However, because the Texas accrual standard mirrors that under CERCLA, the effect of this holding on toxic tort cases in Texas will be negligible.

II. *Barnes* Facts

In this wrongful death suit, the appellee, Kenesha Barnes, asserted state-law tort claims against appellant companies, Koppers, Inc. and Beazer East, Inc. She alleged that appellants' operation of a wood treatment plant released dioxins and polycyclic aromatic hydrocarbons, which resulted in environmental contamination that caused her mother's terminal breast cancer. *Barnes*, 534 F.3d at 358–59. Barnes' mother lived throughout her life in a home adjacent to the plant. *Id.* at 359. A jury in the U.S. District Court in the Northern District of Mississippi found in favor of the daughter. *Id.* at 359. The companies appealed, arguing that Barnes' negligence and conspiracy claims were time-barred under Mississippi's three-year statute of limitations because Barnes had filed her claims more than three years after her mother was diagnosed with breast cancer. *Id.*

III. Analysis

A. Accrual of cause of action in toxic tort cases

1. The Fifth Circuit interprets Mississippi's "Discovery Rule"

The court undertook a lengthy analysis of Mississippi's statute of limitations for toxic tort cases, known as the "discovery rule." Under Mississippi law, tort claims are governed by a three-year statute of limitations. *Id.* (citing Miss. Code Ann. § 15-1-49 (2008)). In actions that involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. *Id.* at 359–60 (citing Miss. Code Ann. § 15-1-49(2) (2008)). Barnes argued that the statute of limitations did not commence until her attorney's investigation first uncovered the alleged link between the plant's emissions and her mother's cancer. *Id.* at 360. The district court agreed, ruling that the cause of action did not accrue until Barnes knew of both the injury and its cause. *Id.*

The appellate court disagreed with the district court's interpretation, and held that because the statutory language explicitly required only discovery of the injury, discovery of the injury's connection to a wrongful act is irrelevant. *Id.* In support of this interpretation, the court also cited a Mississippi Supreme Court case holding that "[t]hough the cause of the injury and the causative relationship between the injury and the injurious act or product may also be ascertainable on this date, these factors are not applicable under § 15-1-49(2), as they are under Miss. Code Ann. § 15-1-36 (2008) [the limitations provision governing medical malpractice suits]." *Id.* (quoting *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990)). The court thus held that

because the cause of action accrues when the plaintiff has knowledge of the injury, Barnes' claims were time-barred under § 15-1-49. *Id.* at 361.

2. COMPARE: TEXAS "DISCOVERY RULE"

In Texas, a plaintiff must commence a suit for personal injuries within two years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 2008). In most cases, a cause of action accrues when a wrongful act causes an injury, regardless of when a plaintiff learns of the injury or the wrongful act. *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998). However, in cases where the injury is "inherently undiscoverable and the evidence of injury is objectively verifiable," an exception to the general rule known as the discovery rule applies. *Id.* at 37 (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994)). Under the Texas discovery rule, a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, "should have known of the *wrongful act and* resulting injury." *Id.* (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (emphasis added)).

Nearly every jurisdiction applies some formulation of the discovery rule, either legislatively or judicially, to cases involving latent injuries or diseases allegedly caused by exposure to a toxic substance, rather than applying the requirement that the cause of action accrues when the exposure occurs. *Id.* at 37. Thus, the statute of limitations in a latent disease case commences when some objective verification of a causal connection between the toxic exposure and the plaintiff's injury is discoverable. *Id.* at 43. In other words, the cause of action does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered: 1) the nature of his injury; and 2) the likelihood that it was caused by the wrongful acts of another. *Id.* at 40. It is this causation requirement that distinguishes the Texas rule from the Mississippi rule. Therefore, had *Barnes* originated in Texas, the Fifth Circuit likely would have permitted Barnes' claims.

B. FEDERAL PREEMPTION UNDER CERCLA

As an alternative to her state law argument, Barnes made a federal preemption claim based on § 309 of CERCLA, 42 USC § 9658. *Barnes*, 534 F.3d at 362. This section is a tolling provision that applies to some state-law tort actions resulting from exposure to toxic substances, which, if applicable, prevents a state limitations period from commencing until a plaintiff knows or should know of *both* her injury *and its cause*. *Id.* However, the court explained that CERCLA does not preempt toxic tort law in *all* state actions; rather, the plaintiff "must prove that her claims arose from a 'release' of 'hazardous substances' into the 'environment,' as well as other case-specific preconditions establishing that the defendant's 'facility' falls within CERCLA." *Id.* at 365. Here, the court held that because Barnes had failed to meet that burden, it would not toll the state statute. *Id.*

However, this holding as applied to Texas cases is negligible in practice, given that the action does not accrue under Texas law until both the injury and its cause are discovered. Thus, with respect to a limitations analysis, a Texas plaintiff's claim for federal preemption would in no way alter the outcome.

IV. Conclusion

The effect of *Barnes v. Koppers* on toxic tort suits in Texas will be minimal because: 1) the Texas discovery rule clearly requires knowledge of both plaintiff's injury *and* the causative wrongful act; and 2) this standard is the same as that set forth under CERCLA, thus rendering preemption irrelevant in this context. *Barnes* confirms that a federal court determining the limitations period in a state claim-based suit will afford great weight to the plain language of the applicable state statute, which may yield dramatically different results from state to state.

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State Casenotes

Forest Oil Corp. v. McAllen, 268 S.W. 3d 51 (Tex. 2008) *West v. TCEQ*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied) *Texas Disposal Systems Landfill, Inc. v. TCEQ*, 259 S.W.3d 361 (Tex. App.—Amarillo 2008, no pet.)

Forest Oil Corp. v. McAllen, 268 S.W. 3d 51 (Tex. 2008)

Forest Oil Corp. v. McAllen addresses whether a standard waiver-of-reliance provision in a settlement agreement defeats a fraudulent inducement claim as a matter of law. The Defendants moved to compel arbitration under the terms of a settlement agreement, and the Plaintiff responded that the agreement itself was void on the basis of fraudulent inducement. The settlement in question purported to bar future environmental claims. 268 S.W.3d 51, 53–54 (Tex. 2008). The Texas Supreme Court held that the settlements agreement's unambiguous waiver-of-reliance provision "negate[d] reliance on representations made by either side," and therefore the Plaintiff's fraudulent inducement claim could not defeat the settlement agreement's arbitration provision. *Id.* at 52–53. The court remanded the issue to the trial court to compel arbitration. *Id.* at 53.

The settlement agreement in this case resulted from a dispute between Forest Oil Corporation and James McAllen. *Id.* As part of the agreement, the settlement "released Forest Oil from 'any and all' claims 'of any type or character known or unknown' that [were] 'in any manner relating to' the McAllen Ranch Leases and the covered lands, whether the claims sound[ed] in contract, tort, trespass or any other theory." *Id.* This release resolved "royalty and nondevelopment disputes," but the parties reserved the right to arbitrate future disputes. *Id.* The arbitration would cover "claims for 'environmental liability surface damages, personal injury, or wrongful death occurring at any time relating to the McAllen Ranch Leases.'" *Id.* at 53–54. The

parties specifically disclaimed reliance "'upon any statement or any representation of any agent of the parties' in executing the release contained in the agreement." *Id.* Furthermore, "the parties also acknowledged they were 'fully advised' by legal counsel as to both the contents and consequences of the release." *Id.*

In 2004, McAllen sued Forest Oil, claiming that Forest Oil buried toxic mercury-contaminated material on the McAllen Ranch. *Id.* McAllen also claimed environmental and personal injuries related to oilfield drilling pipe contaminated with radioactive material. *Id.* When Forest Oil moved to compel arbitration under the settlement agreement, McAllen argued that the arbitration provision was induced by fraud and was unenforceable. *Id.* at 54–55. McAllen stated that they were assured during the 1999 settlement negotiations "that no environmental pollutants or contaminants existed on the property" and that an unidentified lawyer for one of the defendants assured McAllen that there were "no problems" and "no issues" to be concerned about. *Id.* McAllen alleged that it was upon these representations that he relied when agreeing to the settlement agreement. *Id.*

In reversing the court of appeals and remanding for arbitration, the Texas Supreme Court observed that both federal and Texas law strongly favor arbitration. *Id.* at 56. The court acknowledged that arbitration agreements that result from fraud are unenforceable, but that "the party opposing arbitration must show that the fraud relate[d] to the arbitration provision specifically, not to the broader contract in which it appears." *Id.* The court looked specifically to *Schlumberger Technology Corp. v. Swanson*, which held that "a disclaimer of reliance on representations, 'where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim.'" *Id.* (citing 959 S.W.2d 171, 179 (Tex. 1997)). The *Forest Oil* court held the disclaimer in this case was all-embracing in scope and illustrated the parties' clear intent for a "once and for all" settlement and agreement to arbitrate future claims. *Id.*

Clarifying *Schlumberger*, the court reiterated that "a disclaimer of reliance 'will not always bar a fraudulent inducement claim,' but that such "statement[s] merely acknowledge that facts may exist where the disclaimer lacks 'the requisite clear and unequivocal expression of intent necessary to disclaim reliance'" on the specific representation at issue. *Id.* at 60 (citing *Schlumberger*, 959 S.W.3d at 181). Furthermore, the court reiterated the facts that guided their reasoning in *Schlumberger*, including that: "(1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear." *Id.* These elements were present in *Schlumberger*, and the court found they were also present in the case at hand. *Id.* The court did limit its holding, stating that it "should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context." *Id.* at 61.

The *Forest Oil* decision was not unanimous, with Chief Justice Jefferson in dissent. *Id.* at 62. The Chief Justice primarily disagreed with the court's conclusion that "a party may intentionally misrepresent facts essential to the bargain to induce the other to sign, as long as the agreement says reliance [was] waived." *Id.* He added that this was "not sound policy," and "*Schlumberger* [did] not support [that] result." *Id.* According to the dissent, the majority had expanded *Schlumberger* from a narrow exception to the

rule "that integration clauses do not bar fraudulent inducement claims" in a way that would "force courts to honor contract indisputably induced by fraud on the basis of blanket reliance waivers." *Id.* at 64.

West v. Tex. Comm'n on Envtl. Quality, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied)

West v. Tex. Comm'n on Envtl. Quality addresses the timeliness of petitioners Walter West and the Sierra Club's lawsuit for judicial review of an uncontested decision by the TCEQ's Executive Director (ED). *West v. TCEQ*, 260 S.W.3d 256, 258 (Tex. App.—Austin 2008, pet. denied). The ED had granted a discharge permit to Abitibi Consolidated Corp. *Id.* The court ultimately found the appellants' suit was untimely, having been filed after the thirty-day window provided by Texas Water Code Chapter 5. *Id.*

Abitibi owned and operated a paper mill in Lufkin, Texas that had manufactured paper since 1940, and that had discharged wastewater under a state water quality permit since 1961. *Id.* In 2000, Abitibi filed an application with the TCEQ to renew and amend its permit, and the ED issued a preliminary decision stating that the application met the applicable requirements. *Id.* This also triggered a "public notice and comment" period on the application; after this period, affected persons could submit a request for a contested case hearing. *Id.* (citing Tex. Water Code Ann. § 5.115 (Vernon 2008)). The TCEQ granted a hearing to one individual, Jo Ellen Atkinson. Neither of the plaintiffs to this suit was granted a hearing because they were not "'affected persons' within the meaning of the Water Code." 260 S.W.3d at 258. Abitibi's application was forwarded to the State Office of Administrative Hearings (SOAH) for a contested case hearing, but Ms. Atkinson withdrew her request prior to the hearing. *Id.* at 259. Subsequently, the administrative law judge (ALJ) "cancelled the preliminary hearing and granted Abitibi's motion to remand the application to the Executive Director for further proceedings." *Id.* (citing 30 Tex. Admin. Code Ann. § 80.101). After remand, the application was deemed uncontested according to the Commission's rules. *Id.* The ED then granted Abitibi's permit. *Id.* (citing Tex. Water Code Ann. § 5.122).

The ED's decision is subject to judicial review if a petition is filed within "thirty days after the effective date of the decision." *Id.* (citing Tex. Water Code Ann. § 5.341). On December 9, 2005 the ED signed the permit, and there was no dispute that West and Sierra Club received notice of the decision. 260 S.W.3d at 259. West filed a petition for review on January 18, 2006 and Sierra Club filed a petition on February 17, 2006. *Id.* The district court held the petitions untimely, and the Court of Appeals agreed. *Id.*

The appellants contended that "the district court erred in determining that judicial review of the Commission's decision and the proceedings leading up to that decision were governed by the Water Code and not the Texas Administrative Procedure Act (APA). *Id.* (see Tex. Gov't Code Ann. § 2001.171 (Vernon 2008)). Appellants claimed that the APA provided them with an "independent right to judicial review of contested cases." *Id.* at 260. The Court of Appeals disagreed. *Id.* Relying on *Texas Natural Resource Conservation Commission v Sierra Club*, the court stated that "[a]n agency's enabling legislation determines the proper procedures for obtaining judicial review of an agency decision." *Id.* (citing 70 S.W.3d 809, 811 (Tex. 2002)). The court found that

the Texas Water Code required that affected persons file a petition challenging the ED's decisions within thirty days after the effective date of those decisions. *Id.* (referencing TEX. WATER CODE ANN. § 5.351).

The appellants relied on *Texas Department of Protective and Regulatory Services v. Mega Child Care, Inc.*, for the proposition that the APA provided an independent right to judicial review in this case. *Id.* (referencing, 145 S.W.3d 170 (Tex. 2004)). The Court observed, however, that *Mega* was limited to a statute that "neither specifically authorizes nor prohibits judicial review." *Id.* The court held that since the Water Code was not silent, *Mega Child Care* did not apply and that the Water Code controlled. *Id.* at 261.

Appellants further argued that "once the Commission granted Ms. Atkinson's request for a hearing and referred the Abitibi application to SOAH, there was an opportunity for an adjudicative hearing and, therefore, the judicial review provisions in the APA attached." *Id.* The Court rejected this claim because the appellants failed to "consider the withdrawal of Ms. Atkinson's hearing request and the Commission's rule providing for remand of uncontested matters." *Id.* Once Ms. Atkinson withdrew her request, and since neither West nor Sierra Club sought to be admitted as a party to the SOAH proceeding (although allowed by Commission's rules), the hearing was no longer a "contested case" under the definition of the APA. *Id.* (referencing TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon 2000)). Therefore, since the Commission's decision approving the Abitibi application was not "a final decision in a contested case," the Court concluded that "the APA provision for judicial review in contested cases" did not apply. *Id.* at 262.

Since the Court deemed Water Code Chapter 5 as the applicable law, and since neither appellant filed a petition for judicial review within the thirty-day window allotted by the Water Code, the Court of Appeals affirmed the dismissal of their claims. *Id.* at 264.

TEXAS DISPOSAL SYSTEMS LANDFILL, INC. V. TEX. COMM'N ON ENVTL. QUALITY, 259 S.W.3D 361 (TEX. APP.—AMARILLO 2008, NO PET.)

In this case, the Amarillo Court of Appeals addressed the standing of a landfill operator to challenge an order pertaining to the operation of another garbage company. *Tex. Disposal Sys. Landfill, Inc. v. TCEQ*, 259 S.W.3d 361 (Tex. App.—Amarillo 2008, no pet.). The Court affirmed the trial court's decision that the Texas Disposal Systems Landfill ("Texas Disposal") had no standing to bring the claim. *Id.* at 362.

In 2004, the TCEQ granted a permit modification to the Independent Environmental Services Incorporated (IESI) Texas Landfill, L.P. located in Weatherford, Texas. *Id.* at 362. The IESI landfill was located roughly two hundred miles away from the Texas Disposal landfill. *Id.* Despite the distance between the landfills, Texas Disposal moved to overturn the ED's ruling granting the modification. *Id.* at 363. The Commission held a public hearing and affirmed the ED's determination in January of 2005. *Id.* at 363. Texas Disposal sought judicial review of the decision. *Id.*

IESI intervened in Texas Disposal lawsuit, alleging that Texas Disposal "lacked standing to complain since it was not a direct competitor of IESI with respect to the Weatherford landfill." *Id.* Finding for IESI, the court stated that for a complainant to have standing, it must have a "dog in the hunt.' *Id.* More specifically, "one must be personally aggrieved or affected by the decision," *i.e.*, one must show a justiciable inter-

est. *Id.* (citing *Hooks v. Texas Dep't of Water Resources*, 611 S.W.2d 417, 419 (Tex. 1981)). To show that interest, the complainant "must show that a concrete, particularized, actual or imminent injury faces him due to the decision; a hypothetical or speculative injury was not enough." *Id.* (citing *Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008)).

Texas Disposal claimed that the way the permit was modified could "potentially" jeopardize relationships between it and its neighbors, and also potentially "interfere with the normal operations of its landfill." *Id.* The court found that this was too speculative, and that all of the potential harms were dependent upon at least four conditions; these included "whether 1) some entity with a permit to operate a landfill within an area serviced by Texas Disposal, 2) attempts to modify its permit, 3) in a way that exposes Texas Disposal to economic or other loss, 4) through use of the procedures applied to the IESI permit modification." *Id.* Using colorful language, the court held that "like the chance of a pig growing wings, the purported injury" was "mere speculation" and failed to establish "justiciable interest and standing." *Id.* at 364. It further held that appealing to public interest "was not enough to fill the void." *Id.*

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Washington Update

The EPA Offers Updated Self-Disclosure Incentives for New Owners

Introduction

On August 1, 2008, the U.S. Environmental Protection Agency (EPA) published its "Interim Approach to Applying the Audit Policy to New Owners" (Interim Approach). 73 Fed. Reg. 44,991 (Aug. 1, 2008). The Interim Approach provides new owners an opportunity to receive substantial penalty mitigation by voluntarily auditing recently acquired facilities, and reporting and correcting violations identified pursuant to such an audit. The Interim Approach is an extension of the EPA's April 11, 2000 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations" (commonly referred to as the "Audit Policy"). 65 Fed. Reg. 19,618. When all applicable conditions are satisfied, the Interim Approach allows new owners greater incentives to disclose violations beyond what is offered in the Audit Policy. Although the Interim Approach became effective on the date it was published, the EPA requested that comments on that document be submitted by October 30, 2008.

BACKGROUND

Since 2000, the EPA has used its Audit Policy as a tool to encourage regulated entities to voluntarily discover, report, correct violations of federal environmental law, and to prevent the reoccurrence of violations. 73 Fed. Reg. at 44,993. The Audit Policy allows regulated entities, upon meeting certain conditions, to receive gravity-based penalty mitigation and an EPA determination not to recommend criminal prosecution to the Department of Justice. *Id.* The EPA previously allowed some flexibility in applying the Audit Policy to new owners, but recognized that new owners face certain disincentives in applying for penalty mitigation under the Audit Policy. *Id.* at 44,993–94. Perhaps most significantly, under the Audit Policy new owners may still have to pay significant economic benefit penalties for violations that occurred before they acquired a facility. *Id.* at 44,994. The EPA sought to address this and other issues in issuing the Interim Approach. *Id.*

The EPA has stated that the two primary goals of the Interim Approach are "to secure the prompt correction of environmental violations, and to achieve significant pollutant reductions and improvements to the environment as efficiently and expeditiously as possible." *Id.* The EPA believes that providing incentives beyond those offered in the Audit Policy will encourage new owners to address environmental compliance issues at recently acquired facilities and substantially further these two goals. *Id.* The EPA also believes that new owners are well-positioned to bring facilities into compliance because they may already be auditing their recently purchased facilities, may have funding to fix the problems, and can manage and reduce future risk by reporting and attending to noncompliance issues. *Id.* The EPA emphasizes that although the Interim Approach is being fully implemented, it might be changed or discontinued based on practical experience and comments it receives. *Id.*

DEFINITION OF NEW OWNER

For purposes of the Interim Approach, an entity is considered a "new owner" when it certifies to the following criteria:

> 1. Prior to the transaction, the new owner was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence;
> 2. The violation which is the subject of the disclosure originated with the prior owner; and
> 3. Prior to the transaction, neither the buyer nor the seller had the largest ownership share of the other entity, and they did not have a common corporate parent.

73 Fed. Reg. at 44,995. In using these three criteria, the EPA intends for the Interim Approach to apply only to new owners that did not previously control operations at a facility and to violations that the new owner did not initiate. *Id.* The new owner must certify their relationship to the newly acquired facility. *Id.* The EPA intends to apply the "new owner" definition broadly and will assume that responsibility for compliance or violations may be shared by corporate entities, controlling stockholders, and opera-

tors, and that such responsibility does not rest solely with individual employees or contractors. *Id.* The second criterion is meant to emphasize that wholly new violations that began after the transaction will not qualify under the Interim Approach. *Id.* If a wholly new violation was disclosed to the EPA, it may be subject to penalty mitigation under the Audit Policy, but not under the Interim Approach. *Id.* The third criterion is intended to create an unambiguous rule that will allow regulated entities to easily determine their eligibility as new owners and help prevent the EPA from having to engage in a complicated and costly assessment of the extent of influence between the buyer and seller. *Id.*

Timing for Availability for New Owner Incentives

The Interim Approach offers a new owner the opportunity to enter into an audit agreement within nine months of closing, or to disclose individual violations within that nine-month window. 73 Fed. Reg. at 44,996. If the new owner chooses to enter into an audit agreement, the new owner is exempt from prompt disclosure requirements and may receive Interim Approach benefits for violations discovered within the scope of the auditing agreement, even if discovered more than nine months after closing. *Id.* New owners that enter into an audit agreement are also able to receive mitigation for penalties that involve required monitoring, sampling, or auditing, provided that the audit agreement was entered into before the action was required. *Id.*

Alternatively, a new owner may make individual disclosures as they are discovered, provided the new owner makes them within nine months of the closing on the purchase. *Id.* at 44,997. If a new owner chooses to use this method, the new owner must disclose violations within twenty-one days of discovery, or within forty-five days of the closing, whichever is longer. *Id.* at 44,996. An owner wishing to qualify under this approach must also disclose any violations that involve mandatory monitoring, sampling, or auditing before the first instance when such mandatory actions are required. *Id.* at 44,997.

Conditions for Utilizing the Interim Approach

As noted above, the EPA created the Interim Approach to address specific deficiencies in the Audit Policy as it applied to new owners. The Interim Approach largely retains the existing nine conditions for using the Audit Policy, but modifies five of those conditions as they apply to new owners. All nine conditions are discussed below with the changes noted where applicable. In addition to the new owner and timing requirements discussed above, each of the conditions outlined below must be met to qualify for Interim Approach benefits.

1. Systematic Discovery

To receive full gravity-based penalty mitigation, the Audit Policy requires that violations be discovered through either an environmental audit or a compliance management system for an entity. *Id.* at 44,999. The Audit Policy then requires that an environmental audit be a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. *Id.* A compliance management system, as discussed in the Audit Policy, is meant to encompass the regulated entity's documented systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations. *Id.*

The Interim Approach requires that this condition be met, but with the exception of the periodic review required in the environmental audit. *Id.* The EPA recognizes that due diligence review is a one-time event likely to satisfy this requirement, and thus, will waive the periodicity requirement for new owners. *Id.* at 44,999–45,000. However, the new owner must fulfill all other requirements of this condition, as stated in the Audit Policy. *Id.* at 45,000.

2. VOLUNTARY DISCOVERY

The Audit Policy generally prohibits penalty mitigation for violations found through a monitoring, sampling, or auditing program that is required by statute. *Id.* The Interim Approach significantly modifies this requirement. *Id.* As discussed above, the Interim Approach allows new owners to qualify for penalty mitigation as long as an environmental audit agreement is entered into or a violation is disclosed by the new owner before the first instance when the monitoring, sampling, or auditing was required by law. *Id.*

3. PROMPT DISCLOSURE

The Audit Policy requires that the disclosure of the specific violation be made in writing to the EPA within twenty-one days of discovery (or within a shorter time as provided by law). *Id.* at 45,001. The Interim Approach modifies this condition by allowing violations discovered pre-closing to be reported to the EPA within forty-five days of closing. *Id.* In addition, new owners must report violations discovered after closing within twenty-one days of discovery or within forty-five days after closing, whichever time period is longer. *Id.* If a new owner has entered into an audit agreement, violations discovered and disclosed pursuant to that agreement are governed by the disclosure schedule in the agreement. *Id.* As with the original Audit Policy, disclosure must be made within a shorter timeframe if required by law. *Id.*

4. OTHER VIOLATIONS EXCLUDED

The Audit Policy excludes certain violations that "(a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment, or (b) violates the specific terms of any judicial or administrative order, or consent agreement." *Id.* at 45,003. In an attempt to encourage new owners to report potentially more serious violations, the EPA has narrowed the "other violations excluded" condition in the Interim Approach to allow the application of its benefits to a violation that gave rise to serious actual harm or imminent and substantial endangerment if the violation began before the new owner acquired the facility. *Id.* However, violations that caused a fatality, community evacuation, or other serious, injurious or catastrophic event will still be ineligible for Interim Approach benefits. *Id.*

5. CORRECTION AND REMEDIATION

The Audit Policy requires an entity to correct the disclosed violation within sixty days from the date of discovery, certify in writing that the violation has been corrected, and take appropriate measures as required by law to remedy any environmental or human harm resulting from the violation. *Id.* at 45,002. The EPA may grant an extension for complicated violations that require more than sixty days to remedy. *Id.*

The Interim Approach does not modify this condition, but clarifies that the EPA will consider the closing date to be the date of discovery of the violation, and will require remedy within sixty days of the closing date unless the EPA agrees to an extension. *Id.*

The following four conditions in the Audit Policy were incorporated into the Interim Approach without change:

6. Prevent Recurrence

"The disclosing entity must agree in writing to take steps to prevent a recurrence of the violation after it has been disclosed and corrected." *Id.*

7. Discovery and Disclosure Independent of Government or Third-Party Plaintiff

The regulated entity must discover and report violations upon its own initiative "before the beginning of a federal, state, or local agency inspection, investigation, or information request; notice of a citizen suit; the filing of a complaint by a third party; the reporting of the violation to EPA (or other government agency) by a 'whistleblower' employee; or imminent discovery of the violations by a regulatory agency." *Id.* at 45,001.

8. No Repeat Violations

Repeat violations are not eligible for penalty mitigation, and the same or closely related violations must have not occurred at the same facility within the past three years. *Id.* at 45,003.

9. Cooperation

The disclosing entity must cooperate and must provide the EPA with information to determine Interim Approach applicability. *Id.* at 45,003–04.

Calculation and Assessment of Penalties

The EPA recognized that under the Audit Policy, new owners may be assessed significant economic benefit penalties for violations that occurred before they took possession. *Id.* at 44,998. The EPA sought to modify this under the Interim Approach by calculating penalties in a more equitable manner and provided certainty to new owners regarding economic benefit penalty assessments. *Id.* Under the Interim Approach, new owners are protected from economic benefit penalties associated with capital expenditures if the violations are promptly corrected. *Id.* Specifically, new owners will not be assessed penalties based on the "gains" on the returns on the amount of money that should have been spent on compliance. *Id.* Neither will they be assessed economic benefit penalties for any competitive advantage they gained by operating the facility while out of compliance. *Id.* However, new owners will still be assessed economic benefit penalties for the operation and maintenance costs that were avoided, calculated from the date of acquisition. *Id.* at 44,999.

Conclusion

The Interim Approach is intended to create economic incentives for the new owner of a facility to self-inspect and disclose violations promptly after acquiring a facility.

To the extent that the Interim Approach is utilized, it should serve to enhance the level of compliance and quicken the pace at which compliance is achieved at newly-acquired facilities.

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Changes in the Environment

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