# Texas Environmental Law Journal

Volume 38 Summer 2008 Number 4

ARTICLE



NOTE



RECENT DEVELOPMENTS



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State Bar of Texas

Environmental and Natural Resources Law Section

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# Texas Environmental Law Journal

Volume 38 Summer 2008 Number 4

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Volume 38 Summer 2008 Number 4

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## Statement of Purpose

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.

## Joint Publication

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.

## Other Information

The *Journal* is intended to be published quarterly.

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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:

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## From The Editors

Dear Readers,

Welcome to Issue Number Four of the 2007-2008 publication year. As noted previously, our actual publication has spilled over into 2009 for this. Our goal is to "catch up" during Volume 39.

David Frederick, Tracy Franklin, and Emily Collins address the issue of "public interest" in the context of decisions by the Railroad Commission of Texas on applications for waste injection wells. The Texas Legislature has long required the Railroad Commission and the Texas Commission on Environmental Quality to weigh the "public interest" in permitting waste injection wells. However, the scope of that consideration has rarely been defined outside of the agency's interpretation of the statutory enactments. The Austin Court of Appeals recently addressed the breadth of the "public interest" requirement in the context of waste disposal associated with gas development. Additionally, renewed attention is focused on the "public interest" variable at the Texas Commission on Environmental Quality in permitting injection wells for non-oil and gas wastes. The authors note that the issue of what is in the "public's interest" will probably find further vitality if carbon dioxide sequestration in subsurface formations is used to address global warming.

In her student note, Kristen Maule delves into the application of the commerce clause of the United States Constitution to legislation that the State of Oklahoma has enacted in its effort to control the amount of water that may leave Oklahoma and supply its neighboring state, Texas. She examines the current commerce clause doctrine regarding interstate transfers of water and water rights. Applying current commerce clause doctrines to Oklahoma's anti-export statutes, she concludes that those statutes are unlikely to withstand commerce clause scrutiny. She also examines the probable effect of a finding of unconstitutionality of the Oklahoma statutes on the many Western states that currently have discriminatory statutes, as well as what it means for the future of water regulation on a broader scale. She then discusses what sort of changes the new commerce clause doctrine and the new state regulations have had on the broader economy and regulatory framework. Finally, she considers "what actions states should be taking to adapt to these changes, including examining their own statutes for constitutionality, attempting to preserve water in a constitutional manner, and entering the water market on terms that are beneficial to citizens."

As always, we hope that you enjoy the issue and that it provides you with educational insight.

# The "Public Interest" Factor in Waste Disposal Well Permitting

by David Frederick, Tracy Franklin, and Emily Collins



The continued urbanization of the state brings industrial development increasingly into conflict with other values of society. Texas law has long required that the Texas Railroad Commission (RRC) and the Texas Commission on Environmental Quality (TCEQ) weigh the "public interest" in the permitting of waste injection wells. The Austin Court of Appeals recently addressed the breadth of this requirement in the context of waste disposal associated with gas development activities in the Barnett Shale Field that are regulated by the RRC. Additionally, renewed attention is focused on the "public interest" variable at the TCEQ in permitting injection wells for non-oil and gas wastes. The authors, here, review these judicial and administrative interpretations of the breadth of the "public interest" variable. This issue may find further vitality if carbon dioxide sequestration in subsurface formations is used as a control on global warming.

## I. The Source Of The "Public Interest" Inquiry For Disposal Well Permitting

The requirement that the regulator permitting a waste disposal well consider the "public interest" arises from two subsections of the Texas Water Code. However, the Texas Legislature has not defined the pivotal term, "public interest" in the Texas Water Code. Furthermore, the record is devoid of any explicit legislative history reflecting what any committee or legislator intended for the term to encompass. Generally, those persons who challenge the permitting of waste disposal wells see the term "public interest" to be a broad term, encompassing considerations such as impacts on pedestrian and automobile traffic, emergency services providers, and local roadways. The proponents of waste disposal wells see the term more narrowly limited to encompass only those aspects of the public interest over which the regulator has direct and express statutory authority. The relevant subsections are set out side-by-side in Table 1 on the following page.

**TABLE 1**

| TCEQ PERMITTING | RRC PERMITTING |
|---|---|
| TEXAS WATER CODE, § 27.051(a):<br><br>The TCEQ may grant an application in whole or part and may issue the permit if it finds:<br>(1) that the use or installation of the injection well is in the public interest;<br>(2) that no existing rights, including, but not limited to, mineral rights, will be impaired;<br>(3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution;<br>(4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073 of this code;<br>(5) that the applicant has provided for the proper operation of the proposed hazardous waste injection well;<br>(6) that the applicant for a hazardous waste injection well not located in an area of industrial land use has made a reasonable effort to ensure that the burden, if any, imposed by the proposed hazardous waste injection well on local law enforcement, emergency medical or fire-fighting personnel, or public roadways, will be reasonably minimized or mitigated; and<br>(7) that the applicant owns or has made a good faith claim to, or has the consent of the owner to utilize, or has an option to acquire, or has the authority to acquire through eminent domain, the property or portions of the property where the hazardous waste injection well will be constructed. | TEXAS WATER CODE, § 27.051(b):<br><br>The Railroad Commission may grant an application in whole or part and may issue the permit if it finds:<br>(1) that the use or installation of the injection well is in the public interest;<br>(2) that the use or installation of the injection well will not endanger or injure any oil, gas or other mineral formation;<br>(3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution; and<br>(4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073 of this code. |

Both the RRC and the TCEQ must find that the "use or installation of the injection well is in the public interest" prior to issuing a permit.[1] The only difference (other than the types of waste being injected) between the RRC and the TCEQ's public interest Underground Injection Control (UIC) consideration is the Legislature's guidance via a non-exclusive list of mandatory considerations for the TCEQ's public interest determination regarding hazardous waste wells.[2]

As further shown in this article, the RRC's position regarding the relevance to its permitting decisions of traffic hazards, strains on emergency responder services, or law-enforcement needs is that these types of "public interest" variables are not relevant; the Legislature explicitly identified them only for the permitting of hazardous waste injection wells in non-industrial areas. The RRC contends that silence as to the permitting of other wells should be interpreted to imply non-relevance to those other permitting decisions. While the three TCEQ Commissioners have not opined on the subject directly, the TCEQ's Executive Director has argued a similar position: that *Texas Citizens*, a RRC case discussed below, does not apply to the TCEQ's UIC permitting.

## II. The Contexts In Which The Issue Has Been Presented

The RRC case on point is *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas*.[3] Texas Citizens and Mr. Popp ("Protestants") appealed, first, to the district court and, then, to the appellate court challenging the RRC's decision to grant a permit to Pioneer Exploration, Ltd., to operate a commercial injection well for the disposal of oil and gas waste. Protestants argued that the RRC denied them due process[4] and failed to adequately consider the "public interest" evidence they had presented.[5] The Third Court of Appeals in Austin held that the RRC did not deny Texas Citizens and Popp due process in granting the permit, but the ocurt interpreted "the public interest" factor in the same manner as had Texas Citizens and Popp.[6] Thus, the court of appeals held that the RRC had failed to weigh relevant evidence (*i.e.*, certain of the "public interest" evidence) and that this failure was reversible error.[7] The RRC filed a motion for rehearing on January 18, 2008 and the court of appeals denied it on May 23, 2008.[8]

The TCEQ case involved a consolidated contested case proceeding for two applications by TexCom Gulf Disposal, LLC, for an industrial non-hazardous waste

1 Tex. Water Code § 27.051 (Vernon 2007).

2 *Id.* (requiring consideration of compliance history, alternatives to injection, and public liability insurance for hazardous waste disposal).

3 Tex. Citizens for a Safe Future and Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492, (Tex. App.–Austin 2007, pet. filed).

4 This facet of the case dealt with the power of an administrative tribunal to recess a "contested case" proceeding after the applicant has rested its direct case to allow the applicant to develop additional evidence necessary to meet its burden of proof.

5 *See* Tex. Citizens, 254 S.W.3d at 496.

6 *Id.*

7 *Id.* at 503.

8 *Id.*

storage and processing facility and four underground injection control wells in the Conroe oil field in Montgomery County, Texas.[9] The applications were about to be heard by the State Office of Administrative Hearings, when the *Texas Citizens* case was announced by the Third Court of Appeals. While the individual protestants[10] raised concerns regarding noise, property values, and traffic, the administrative law judges excluded evidence on property values as an "individual" interest for which the TCEQ did not have any jurisdiction, but allowed evidence on noise and traffic, due to the *Texas Citizens* case.[11]

### A. THE *TEXAS CITIZENS* CASE

Pioneer Exploration ("Pioneer") applied in early 2005 to the RRC for a commercial permit to dispose of oil and gas wastes by injection through an existing, but no longer used, well. Several Wise County residents opposed Pioneer's application, which lead to the RRC conducting an administrative hearing on the application. After an unusual two-part hearing,[12] the RRC's hearing examiners[13] issued a Proposal for Decision (PFD) recommending issuance of the permit. The RRC adopted the findings of fact and conclusions of law of the PFD and issued the permit.[14]

At the evidentiary hearing, the Protestants offered what they believed to be "public interest" evidence, such as that of a Department of Public Safety trooper, who testified to the inadequate conditions of local roadways for industrial traffic. They also offered evidence regarding the fact that trucks hauling saltwater waste would frequently be accessing the well site using the area's narrow, unpaved roads.[15] The proposed disposal well could operate 24 hours a day, 7 days a week, with 20 to 50 waste trucks—each carrying up to 100 barrels of oil and gas waste—accessing the site each day. Protestants took the position that, because the access roads were unpaved, included blind curves, and were often used by children and pedestrians, the presence of so many large, heavy trucks presented a public-safety issue.[16] Protestants also feared and offered testimony

9 State Office of Admin. Hearings, Application of TexCom Gulf Disposal, L.L.C. for TCEQ Underground Injection Control Well Permit Nos. WDW410, WDW411, WDW412, and WDW413, SOAH Docket No. 582-07-2673 (April 25, 2008) (proposal for decision) [hereinafter TexCom Gulf Disposal Application: PFD], *available at* http://www.soah.state.tx.uts/pfdsearch/pfds/582/07/582-07-2673-pfd1.pdf.

10 *See id.* at 2. Many individuals were named as parties to the case as well as three governmental entities, including the City of Conroe, Montgomery County, and the Lone Star Groundwater Conservation District.

11 *Id.* at 8. Another interesting aspect of the case that is beyond the scope of this article involves how the *Texas Citizens* holding could affect the nexus between public interest issues raised in hearing requests and personal justiciable interests.

12 Tex. Citizens for a Safe Future and Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492, 495-496 (Tex. App. – Austin 2007, pet. filed).

13 The RRC does not transfer its dockets to the State Office of Administrative Hearings for evidentiary hearings.

14 Tex. Citizens, 254 S.W.3d at 496.

15 *Id.* at 498.

16 *Id.*

regarding the lowering of their property values because of the installation of the commercial disposal facility.[17]

The hearing examiners declined to weigh the citizens' evidence on public interest. Noting that the RRC did not have jurisdiction to regulate truck traffic, they expressed sympathy for the citizens regarding their concerns about property values and other quality of life issues, but felt these concerns to be divergent from the statutory issues the RRC was required to consider.[18] They found the proposed disposal well to be in the public interest because it would provide an economical means for disposing of produced salt water from completed wells in the rapidly expanding Barnett Shale Field.[19] The hearing examiners further concluded that safe and proper disposal of produced salt water by injection wells serves the public interest.[20]

The Railroad Commissioners adopted the findings of fact and conclusions of law of the PFD, apparently accepting the hearing examiners' view of the limits of the RRC's duty to weigh public interest factors.

The district court upheld this action without opinion, seemingly agreeing with the hearing examiners and the Railroad Commissioners that the "public interest" inquiry is to be narrowly tailored: basically, limited to an inquiry as to whether a proposed waste disposal well facilitates increased recovery of oil and gas.

The Austin Court of Appeals, however, dissected the RRC's position and rejected it, saying the RRC took too narrow a view of the "public interest" in disregarding the public interest concerns that the *Texas Citizens* plaintiffs had presented at the evidentiary hearing.[21] The court noted that "[a]dministrative agencies have wide discretion in determining what factors to consider when deciding whether the public interest is served."[22] However, the court also went on to note that "[a]n agency abuses its discretion in reaching a decision, if it omits from its consideration factors that the legislature intended the agency to consider, includes in its consideration irrelevant factors, or reaches a completely unreasonable result after weighing only relevant factors."[23] The court determined that the RRC had abused its discretion in those ways in the *Texas Citizens* case.

Three things are worth noting about the Austin Court of Appeals' consideration of the case. First, the court explained why one of its earlier cases, *Grimes v. State*,[24] did not dictate the outcome of this case. The court said:

> the holding in *Grimes* was that the conservation of natural resources could be considered as one factor in making a public interest determination . . . *Grimes* does not hold that the conservation of natural resources should be considered as the *only* relevant factor, to the exclusion of any additional factors that might

17 *Id.* at 499.
18 *Id.* at 498-99.
19 *Id.* at 499 (quoting TexCom Gulf Disposal Application PFD).
20 *Citizens*, 254 S.W.3d at 499.
21 *See id.* at 494-95.
22 *Id.* at 499.
23 *Id.* (quoting Hinkley v. Tex. State Bd. Of Medical Examiners, 140 S.W.3d 737, 743 (Tex. App.—Austin 2004, pet. denied)).
24 Grimes v. State, 2005 Tex. App. LEXIS 6963 (Tex. App.—Austin 2005, *no pet.*).

affect the public interest, which the Commission appears to have done in the present case.[25]

Second, the RRC, as earlier noted, argued that the explicit reference to traffic and other quality-of-life concerns in the latter paragraphs of the TCEQ's statutory subsection on waste disposal well permitting, coupled with an absence of any reference to those concerns in the RRC's subsection, indicated that the Legislature did not want the RRC to weigh those concerns. In response to this argument, the court of appeals said the RRC ignored "the fact that § 27.051(a)(6) is limited in its applicability only to hazardous waste injection wells that are not located in areas of industrial land use."[26] The court went on to point out that "[t]he additional requirement found in § 27.051(a)(6) could easily be the result of the legislature's belief that hazardous waste injection wells in non-industrial areas require more careful oversight and explicit statutory requiring the issuance of permits."[27]

The court declined "to hold that public roadways and local law enforcement, emergency medical, and fire-fighting personnel are not to be afforded consideration unless a hazardous waste injection well is proposed that will be located in a non-industrial area."[28] The court concluded that Section 27.051(d), in stating that the TCEQ shall not be limited to the quality-of-life factors enumerated, emphasizes that a broad spectrum of factors should be employed in making a public interest determination.[29]

Third, at oral argument, Justice Waldrop queried counsel for the RRC as to a couple of scenarios involving permitting decisions. In one scenario, the disposal well was to be in a remote and isolated location, while in the other scenario, the disposal well was to be in a residential subdivision. The wells, in all other respects, were identical and complied with RRC rules for protecting ground and surface waters. Could the RRC grant a permit for the rural well and deny a permit to the subdivision well? Counsel answered that it could not. This position is, indeed, the RRC view, but it seemed just too divorced from common sense to pass muster with the justice system.

### B. THE *TEXCOM* CASE

The parties in the *TexCom* case were scheduled for an administrative hearing on the merits within weeks after the court of appeals issued its *Texas Citizens* opinion. The Applicant and the Executive Director (ED) of the TCEQ both withdrew their objections to the individual Protestant's prefiled testimony on traffic in light of the Third Court of Appeals' holding. The Administrative Law Judges (ALJs) overruled the Applicant's objections to testimony on noise, but sustained objections to testimony regarding property values and property taxes after oral argument from the parties on applicability of the *Texas Citizens* case to each issue. Property values and property taxes,

25 *Id.*
26 *Id.* at 501.
27 *Id.*
28 *Id.*
29 *Id.*

the ALJs opined from the bench, were individual interests rather than public interests for consideration under Section 27.051(a).[30]

At the hearing, protesting parties cross-examined an Applicant witness testifying on the *surface facility* application, not the UIC application, to further the evidence on traffic impacts. In response, the Applicant quickly hired an expert to analyze traffic impacts of the facility's operations over a weekend break in the hearing. The Applicant called the expert to the stand as part of its rebuttal case.[31]

In closing argument, the ED, much like the RRC, argued that the scope of the TCEQ's public interest considerations is limited to the purpose of the UIC program's statutory authority in the Injection Well Act.[32] After claiming that the *Texas Citizens* case did not apply to the TCEQ's UIC permitting decisions,[33] the ED concluded that the TCEQ's "public interest" considerations are limited to the Applicant's compliance history, the availability of alternatives, and the purpose of the Injection Control Act.[34] Yet, the ED opined that the evidence on traffic impacts (to which the ED had withdrawn his objections based on the *Texas Citizens* case) "supports a finding that the facility entrance...satisfied regulatory requirements."[35] The ED emphasized that the *Texas Citizens* court required consideration of public safety concerns for which evidence is in the record of a contested case hearing.[36] The ED may have highlighted this point to make the argument that the ED need not review public interest considerations outside of those issues specifically stated in the statute, but a party may raise such issues at a contested case hearing on the application. Such a position may also have implications on the burden of proof at a contested case hearing.[37]

Based on the Applicant's rebuttal evidence on traffic impacts, the Office of Public Interest Counsel (OPIC) argued that, if the TCEQ decided to issue a permit, a special condition should be placed in the permit to move the site entrance and exit to a road that appeared to pose less of a public safety issue as large trucks approached the facility.[38]

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30 The pre-hearing conference was taped by the State Office of Administrative Hearings, and a copy may be obtained from SOAH directly.

31 TexCom Gulf Disposal Application: PFD, at 47 (citing TexCom Ex. 80, Scott E. Graves, P.E., at 8).

32 The ED relied on *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), to argue that the use of the words "public interest" in a statute cannot be used to promote the general public welfare.

33 Transcript of Executive Director's Closing Statements, at 18, TexCom Gulf Disposal L.L.C., for TCEQ Underground Injection Well Permits Nos. WDW410, WDW411, WDW412, and WDW413 and TCEQ Industrial Solid Waste Permit No. 87758.

34 *Id.* at 20.

35 *Id.* at 25.

36 *Id.* at 16.

37 *See* Tex. Water Code § 27.051 (Vernon 2007) (relating to burden of proof). The Applicant in TexCom argued that the mandatory public interest considerations in Tex. Water Code § 27.051(d) were merely considerations without an accompanying burden of proof. TexCom Gulf Disposal Application: PFD, at 45.

38 Transcript of OPIC's Closing Argument, at 11-13, TexCom Gulf Disposal L.L.C., for TCEQ Underground Injection Well Permits Nos. WDW410, WDW411, WDW412, and WDW413

Montgomery County and the City of Conroe argued that moving the driveway did not eliminate the public safety traffic concerns posed by the TexCom facility and that too much uncertainty existed in the Applicant's ability to obtain needed TxDOT permits if the driveway were moved.[39] The difference between OPIC's argument and the County/City alignment's position may demonstrate the jurisdictional line between considering the effect of increased truck traffic and regulating road-safety issues.[40] The parties are awaiting a Proposal for Decision from the State Office of Administrative Hearings.

## III. CONCLUSION

The Applicant in the *TexCom* case was able to quickly adjust its case to avoid the need for an amendment to its application and potential remand to the ED due to the *Texas Citizens* holding. The ALJs and parties focused their implementation of the *Texas Citizens* case to the issues that the protestants had raised in their pre-filed direct testimony, apparently, to avoid a hypothetical "parade of horribles" regarding innumerable and unforeseen public interest issues that applicants may now need to anticipate in preparing their direct cases. Perhaps the more difficult question raised by the *Texas Citizens* case involves the weight the RRC and TCEQ staffs should give the impacts on pedestrian and automobile traffic, emergency services providers, local roadways, and other community assets and values during technical review. (The TCEQ's response to the *Texas Citizens* holding has been one of refusal to even consider any impacts beyond the explicit and mandatory considerations in Section 27.051(d) except to the extent protestants raise such issues at an evidentiary hearing. The agency apparently does not acknowledge any duty to pro-actively investigate other public interest issues.)

In a subsequent RRC disposal well application, *Application of Jerry Hess Operating Co.*, ("*Hess*")[41] the hearing examiners, *sua sponte*, weighed for the first time pre-*Texas Citizens* public interest testimony and found it less weighty that the would-be operator's evidence of the public's "need" for this well.[42] Clearly, the practical effect of the *Texas Citizens* decision can be reduced to zero if decision-makers, considering a broad range of public interest factors, place greater emphasis on the public's interest in waste disposal than on community quality-of-life concerns.

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and TCEQ Industrial Solid Waste Permit No. 87758.

39 Aligned Protestants Response to Closing Arguments at 37-38, TexCom Gulf Disposal L.L.C., for TCEQ Underground Injection Well Permits Nos. WDW410, WDW411, WDW412, and WDW413 and TCEQ Industrial Solid Waste Permit No. 87758.

40 *See* Tex. Citizens for a Safe Future and Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492, 502 (Tex. App.-Austin 2007, pet. filed) (stating that "[i]f the Commission is foreclosed from considering any matter that falls within the jurisdiction of another governmental agency when making public interest determinations, then the Commission's realm of inquiry is essentially limited to reviewing a proposed injection well's effect on oil and gas production. Such a limited scope of review cannot have been the legislature's intent....)".

41 Oil and Gas Docket No. 09-2549853, Application of Jerry Hess Operating Co. for Hwy 51, SWD No. 1 (Cooke County).

42 This case was another docket in which the permit applicant was saved from a burden-of-proof failure by a subsequent hearing at which to cure this failure. In this instance, it was the Commissioners who ordered the second hearing, rather than adopt the examiners' PFD recommending denial based on evidentiary failures by the applicant.

## IV. Postscript

The RRC's and Pioneer Exploration's motions for reconsideration *en banc* was denied.[43] In two concurring opinions accompanying the denial of the motions, Justices Pemberton and Waldrop provided support for the court's holding that the RRC construed the scope of its "public interest" powers and obligations too narrowly. Both Justices, however, pointed out that this holding did "not imply how the Commission should exercise . . . [that power] in determining the weight any particular proffered 'public interest' consideration should be given, as informed by its judgments of fact or policy."[44]

In his concurring opinion, Justice Waldrop explained that even if the RRC's authority to consider "public interest" issues under Section 27.051(b)(1) of the Texas Water Code is limited to matters engaging its expertise and charge to regulate the conservation and production of oil and gas, this limitation is not sufficient to answer the question "of whether some particular issue is within the public's interest with respect to the conservation and production of oil and gas."[45] Accordingly, he rejected the notion "that the legislature intended the Commission to consider only the merits of subsurface conditions or the value of having another injection well divorced from considerations of where that well is located and its potential impact on other aspects of our economy or the environment."[46] Ultimately, Justice Waldrop found that when the RRC decides that an injection well is in the public interest, it must consider whether the injection well "is a good idea in the location proposed."[47] And, in some circumstances, making this determination will require the RRC to consider public-safety related issues.[48]

Five of the six Justices of the Third Court of Appeals have now weighed in supporting the position of Texas Citizens and Mr. Popp. The RRC's light-weighting of traffic and public safety concerns in the *Hess* case reflects that little practical burden is associated with weighing those broader factors. Nonetheless, the RRC has petitioned the Supreme Court of Texas for review of the court of appeal's decision.

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43 *Texas Citizens*, 254 S.W.3d at 503.
44 *Id.* at 504 (Pemberton, J., concurring).
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*

# When Silence Speaks 1,000 Words: Negative Commerce Clause Restrictions on Water Regulations and The Case of *Tarrant Regional Water District v. Herrmann*

by Kristen Maule



The area of Texas known as Region C under the State's Water Plan, which includes Dallas, Fort Worth, and the surrounding metropolitan area, is expected to exhaust its existing water supplies by 2035, as the population will more than double

over the next 50 years.[1] The regional water districts serving the area are aware of the problem and are developing long-range plans to meet the growing demand for water.[2] However, none of the proposed measures offers an easy solution.

Several ideas have been suggested to help solve Region C's water problems. The most obvious proposal is conservation. In fact, conservation accounts for 11 percent of future water supply in the Texas Water Development Board's 2007 State Water Plan.[3] However, even ignoring the inevitable political burdens and difficulty of enforcement, conservation alone is not enough to solve Region C's water problems. Another possibility is reuse of water, not only through treatment plants, but also through the construction of artificial wetlands on the Trinity River to "naturally" clean wastewater.[4] The problem with this proposal is that the City of Houston relies on water from the Trinity River almost exclusively to fill its reservoirs. Other proposals involve pumping in water from other parts of Texas, either from existing reservoirs and aquifers or through the construction of new ones.[5] The difficulty with that source is that environmental groups, as well as residents of East Texas, where the new reservoirs would be constructed, are strongly opposed to the idea of Dallas and Fort Worth taking water from that area and disturbing the natural ecosystems of rivers such as the Neches and Sulphur, which Region C would like to see dammed.[6] Even if Region C were able to overcome local opposition, the cost of piping water in from such great distances is almost prohibitively expensive.[7] Expense is also a major stumbling block for proposals to buy Ogallala Aquifer water from "water ranchers" such as T. Boone Pickens. Pickens has purchased 200,000 acres of water rights in land over the Ogallala Aquifer in the hopes of selling it to cities such as Dallas and Fort Worth.[8] He has offered to sell his water rights to the Metroplex, but only after the water districts pay for a $2 billion pipeline to carry it.[9] At present, this option is economically unfeasible for Region C.

One final possibility, however, could solve Region C's water shortage problems single-handedly, and at a cost much lower than other proposals such as reusing water, building new reservoirs, or pumping water in from distant reservoirs.[10] This final option is to pipe water into the Dallas/Fort Worth area from Oklahoma.

It is not any secret that Oklahoma has plenty of water. In-state consumers use only 7 to 8 percent of the 34 million acre-feet of water that flows out of the state every day.[11] Southeastern Oklahoma water basins alone have over 5 billion gallons of water

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1 S.C. Gwynne, *The Last Drop*, TEXAS MONTHLY, February 2008, available at http://www.texasmonthly.com/preview/2008-02-01/feature3.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 Lorraine Woellert, *Pickens Water Plan Poised to Gain Bond, Condemnation Authority,* BLOOMBURG.COM, Nov. 6, 2007.

9 Gwynne, *supra* note 1.

10 *Id.*

11 Complaint at 4, Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007).

available every day, or four times as much as is used by New York City.[12] However, despite Oklahoma's excess supply, proposals by the Tarrant Regional Water District (TRWD) and the Upper Trinity Regional Water District (UTRWD) to buy Oklahoma water have met strong local opposition in Oklahoma.[13] Although the Texas districts claim that they want to purchase only water that is going to flow out of Oklahoma anyway, calling it a "spilled bucket plan," Oklahoma officials fear that North Texas will become dependant on Oklahoma water, thereby making it difficult to refuse sales in times of drought or to accommodate future population growth.[14] "We just want our chance to grow," says Oklahoma State Representative Jerry Ellis, "[When selling water rights], you're selling the future of your children."[15]

After negotiations broke down between Oklahoma and a consortium of North Texas water districts in 2001, the Oklahoma Legislature passed a law establishing a moratorium on out-of-state water sales.[16] The moratorium was initially set for three years but was extended an additional five years in November of 2004.[17] A potential problem for Oklahoma is that courts have struck down very similar statutes, claiming they are protectionist and in violation of the commerce clause of the U.S. Constitution.[18] And, that result is exactly how one Texas water district hopes Judge Heaton of the United States District Court for the Western District of Oklahoma will view Oklahoma's moratorium. The TRWD filed a lawsuit against members of the Oklahoma Water Resources Board (OWRB) and the Oklahoma Water Conservation Storage Commission (OWCSC) in early 2007, arguing that the moratoriums, as well as a handful of other Oklahoma laws addressing out-of-state water exports, are unconstitutional.[19]

The outcome of this case is important to more than just Texas and Oklahoma. Despite precedents suggesting that such statutes are at odds with the commerce clause, many Western states have retained legislation that discriminates against interstate

12 *See* U.S. Water News Online, *Texas, Okla. Water Deal Brings Competing Visions of Drought, Economic Boom* (Nov. 2001), available at http://www.uswaternews.com/archives/arcsupply/1texokl11.html; Dhaval Metha, *New York City Tap Water Better Than Bottled Water,* Oct. 15, 2008, available at http://nyc.metblogs.com/2008/10/15/nyc-drinking-water-better-than-bottled-water.

13 Eric Aasen, *Parched Texas looks to Oklahoma for Water,* DALLAS MORNING NEWS, Aug. 5, 2007, available at http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/080507dnmetoklawater.28025a2.html.

14 *See* Press Release, Tarrant Regional Water District, Tarrant Regional Water District Seeks to Negotiate with the State of Oklahoma for Excess Gulf-Bound Water (Jan. 9, 2007), www.trwd.com/webdocs/story_86.SWF (stating that Texas water officials wish to negotiate with Oklahoma for the rights to water that is flowing out of the state and eventually into the Gulf of Mexico); Max Baker, *Legislator Wants to Talk about Water Sale,* FORT WORTH STAR-TELEGRAM, available at http://okblawg.blogspot.com/2007/07/legislator-wants-to-talk-about-water.html.

15 Aasen, *supra* note 13.

16 S.B. 1410, 48th Leg., 2d Sess. (Okla. 2002).

17 Complaint, *supra* note 11, at 5.

18 *See* Sporhase v. Neb. *ex rel.* Douglas, 458 U.S. 941, 957-58 (1982); City of El Paso v. Reynolds, 597 F. Supp. 694, 704 (1984).

19 Complaint, *supra* note 11 at 9.

water transfers in a variety of different forms.[20] If the courts strike down Oklahoma's legislation, it is likely that these statutes would eventually follow in its path. And, on a broader scale, as water becomes an increasingly scarce and valuable commodity, it is important for the United States to develop a regulatory system that is capable of addressing the realities of the situation both fairly and efficiently.

In this note, this author will begin by examining the current commerce clause doctrine regarding interstate transfers of water and water rights. This author will explain how it has evolved over time with the changing environment and needs of the nation and how the developing trend emphasizes greater economic unity across the states as well as a decreased tolerance for protectionist legislation. Part II of this note focuses on the case of *Tarrant Regional Water District v. Herrmann*.[21] Part II provides a detailed description of the facts, including the statutes at issue and the procedural history. Part II also applies precedents discussed in Part I to analyze the claims that the TRWD makes, concluding that Oklahoma's anti-export statutes are unlikely to withstand commerce clause scrutiny. Finally, Part II examines what the probable unconstitutionality of the Oklahoma statutes means for the many Western states that currently have discriminatory statutes, as well as what it means for the future of water regulation on a broader scale. Part III examines a variety of statutes addressing the subject and considers what their chances are of withstanding a constitutional challenge, focusing particularly on recent efforts by states to protect state water while avoiding commerce clause interference. Part III then discusses what sort of changes the new commerce clause doctrine and the new state regulations have had on the broader economy and regulatory framework. The end of Part III considers what actions states should be taking to adapt to these changes, including examining their own statutes for constitutionality, attempting to preserve water in a constitutional manner, and entering the water market on terms that are beneficial to citizens.

## I. COMMERCE CLAUSE RESTRICTIONS ON STATE WATER REGULATION

### A. THE COMMERCE CLAUSE

The commerce clause of the United States Constitution states, "The Congress shall have Power...to regulate Commerce...among the several States."[22] This language reflects the central concern of the framers of the Constitution, that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[23] In fact, this concern was one of the principle reasons why the framers called the Constitutional Convention to meet in the first place.

Over time, interpretations of the commerce clause have evolved to include a large variety of goods and transactions in the realm of "commerce," and, therefore, within

20 *E.g.* CAL. WATER CODE § 1230; WYO. STAT. ANN. § 41-3-115 (2007); COLO. REV. STAT. § 37-81-104 (2007).

21 Tarrant Regional Water District v. Herrmann, No. CIV-07-45-HE, 2007 WL 3226812 (W.D. Ok. 2007) (order denying motion to dismiss).

22 U.S. CONST. art. I, § 8, cl. 3.

23 Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

reach of Congressional legislation. The Supreme Court has also found in the clause an implicit barrier to state legislation that interferes with the free flow of commerce, even in the absence of conflicting federal legislation.[24] This interpretation has come to be known as the "negative commerce clause." The definition of "commerce" under these complementary aspects of the clause is not two-tiered, but reaches to the same broad spectrum of economic activity.[25]

These evolving interpretations of the commerce clause reflect the changing nature of society. As our economic interactions become more complex and intertwined, it is necessary to broaden the reach of the commerce clause to effectuate its purpose. According to the Supreme Court, that purpose was to create a single economic unit in which each state is "made greater by a division of its resources, natural and created, with every other State."[26]

However, Congress' power over articles of commerce is not exclusive. States retain the right to regulate goods as long as the regulations do not unduly burden interstate commerce.[27] The Supreme Court has developed two tests to determine when state regulations have gone too far.[28] Both tests involve a balancing between the national interest in the free flow of commerce and the state's interest reflected in the regulation, but the test is much stricter when the regulation facially discriminates against interstate commerce.[29] For statutes that operate evenhandedly, the court will employ the test set out in *Pike v. Bruce Church, Inc.*[30] This test first asks if a "legitimate local public interest" exists.[31] If the court finds one, the statute will be upheld unless the burden it places on interstate commerce is excessive in relation to the local benefits.[32] Factors to consider in the balancing test include "the nature of the public interest involved, and whether it could be promoted as well with lesser impact on interstate activities."[33] On the other hand, if the statute is facially discriminatory, or is discriminatory in purpose or effect, the court will employ a "strictest scrutiny" test.[34] Under the strictest scrutiny test, the court will uphold the statute only if it reflects a legitimate local purpose, is narrowly tailored to meet that purpose, and the state does not have any practical alternatives to achieve the purpose without burdening interstate commerce.[35]

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24 West v. Kan. Natural Gas Co., 221 U.S. 229, 261 (1911) ("The inaction of Congress is a declaration of freedom from state interference").

25 *Hughes*, 441 U.S. at 326 (citing Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978)).

26 *West*, 221 U.S. at 255.

27 Nancy Nowlin Kerr, *Sporhase, the Commerce Clause, and State Power to Conserve Natural Resources–Is the Local Well Running Dry?*, 14 ST. MARY'S L.J. 1033 (1983).

28 Douglas L Grant, *Commerce Clause Limits on State Regulation of Interstate Water Export*, 105 WATER RESOURCES UPDATE 10, 10 Universities Council on Water Resources (Autumn 1996).

29 *Id.*

30 397 U.S. 137 (1970)

31 *Hughes*, 441 U.S. at 336.

32 City of El Paso v. Reynolds, 563 F. Supp. 379, 388 (1983).

33 *Id.*

34 *Id.*

35 *Id.*

### B. Application of the Commerce Clause to Water Regulation

The first case to apply the commerce clause to water and regulations of interstate transfers of water was *Hudson County Water Co. v. McCarter*.[36] At issue in *Hudson County* was a New Jersey statute prohibiting the export of surface water to any other state.[37] The statute was enacted in response to a contract that Hudson County Water Co. had entered to pipe water from New Jersey's Passaic River into New York City, and was followed up with a request for an injunction to prohibit fulfillment of the contract.[38] Justice Holmes summarily dismissed Hudson County's commerce clause challenge to the statute, basing his decision on the "public ownership" theory set forth in *Geer v. Connecticut*.[39]

*Geer* involved a Connecticut statute barring the interstate transportation of game birds killed in the state.[40] The Court held that interstate commerce was not involved because the state, as representative of the public, owned all wild animals, and therefore, could prohibit game from being removed from the state.[41] "The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was part of it."[42] This holding suggests that if a state can regulate possession of a resource by individuals (as in this case, in which the state was able to regulate when and how game birds could be reduced to possession by killing or capture), then the state can condition someone's ability to acquire possession on an agreement not to remove the item from the state.

Applying this doctrine to surface water in *Hudson County*, Holmes stated that "a man cannot acquire a right to property by his desire to use it in commerce among the States," meaning that Hudson County did not have any right to the water outside the limited grant New Jersey has given to use it within the state.[43] The state "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."[44]

In the decades that followed the decision in *Hudson County* many states enacted statutes restricting the interstate export of water, especially in the arid western half of the United States. No one had any reason to doubt that the matter had been settled, until fifty-eight years later when the issue of interstate water transfers came before the courts again in *City of Altus v. Carr*.[45]

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36 209 U.S. 349 (1908).
37 *Id.*
38 *Id.* at 353.
39 *Id.* at 356-57.
40 Geer v. Connecticut, 161 U.S. 519 (1896).
41 *Id.* at 531.
42 *Id.* at 532.
43 Hudson, 209 U.S. at 357.
44 *Id.*
45 City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966); *See* Charles E Corker, *Sporhase v. Nebraska ex rel. Douglas: Does the Dormant Commerce Clause Really Limit the Power of the State to*

In *City of Altus*, the Supreme Court summarily affirmed the District Court's judgment striking down a Texas statute that prohibited the interstate export of groundwater without legislative approval.[46] In 1963, the City of Altus, Oklahoma hired an engineering firm to make recommendations on how best to accommodate a projected future water shortage.[47] Noting a Texas Attorney General Opinion saying that it would be legal for a Texas property owner to sell water to an out-of-state user, the firm recommended that the City buy water from a nearby Texas resident.[48] The City followed this advice and entered into a contract with the Mocks to lease the water rights of their land.[49] However, during the process of completing the contract, the Texas Legislature passed Article 7477b, which conditioned the withdrawal of groundwater on only one requirement—that it remain within Texas.[50] To overcome this restriction, a landowner would have to request special permission from the Legislature.[51] But, the Legislature promptly adjourned for two years after passing the statute, preventing any such applications in the near future.[52]

In overturning the statute, the district court relied on two cases addressing the regulation of natural gas, *Pennsylvania v. West Virginia*[53] and *West v. Kansas Natural Gas Co.*[54] In both cases, states where natural gas was produced attempted to restrict the ability of companies who mined the gas to sell to out-of-state consumers.[55] Oklahoma achieved this through a statute that denied the right of eminent domain and the use of highways to anyone transporting natural gas outside of the state.[56] West Virginia required that in-state consumers be given a preferred right of purchase.[57] The defendant states in each of these cases offered arguments based on the public ownership theory and the conservation purpose of the regulations, which the Supreme Court rejected.[58] The Supreme Court struck down both statures on the grounds that they interfered with interstate commerce. Texas tried these same arguments in *City of Altus*, at the same time attempting to distinguish the case from *West* and *Pennsylvania*, but the Federal District Court for the Western District of Texas also deemed the Texas statute to be unconstitutional.[59]

In response to the first argument, the right to conserve the resource, the district dourt noted that it was not a novel contention, quoting from both of the gas cases in

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*Forbid (1) The Export of Water and (2) The Creation of a Water Right for Use in Another State?*, 54 U. Colo. L. Rev. 393 (1983).

46 Carr v. City of Altus, 385 U.S. 35 (1966).

47 *See City of Altus v. Carr*, 255 F. Supp. at 831.

48 *Id.*

49 *Id.* at 832.

50 *Id.*

51 *Id.* at 834.

52 *Id.* at 832.

53 262 U.S. 553 (1923).

54 221 U.S. 229 (1911).

55 Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911).

56 *West*, 221 U.S. at 249-250.

57 *Pennsylvania*, 262 U.S. at 582.

58 *Pennsylvania*, 262 U.S. at 598; *West*, 221 U.S. at 250-51, 254.

59 City of Altus v. Carr, 255 F. Supp. 828, 838-40 (W.D. Tex. 1966).

its response.[60] First turning to *West*, the court noted that the state's conservation purpose "is in a sense commercial."[61] That "Article 7477b does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States," forbidding interstate commerce but "indulging in the substantial discrimination" of allowing intrastate transfers, no matter how distant.[62] In other words, the conservation purpose was neither legitimate nor was it narrowly tailored. Going beyond that, the court went on to say that the State did not have any right to interfere with interstate commerce regardless of the purpose.[63] Quoting from *Pennsylvania*, the court said that even if the State was experience a water shortage leading to a legitimate conservation purpose, "it affords no ground for the assumption of the state of the power to regulate commerce ... That power is lodged elsewhere."[64]

Texas' second argument was that since the State retained ownership of water while it remained underground, groundwater was not an article of commerce.[65] The court noted that if the statute had tried to regulate water after it had been pumped from a well it would undoubtedly have been unconstitutional because under the general law of Texas "water withdrawn from underground sources [is] personal property subject to sale and commerce."[66] The court then went on to find that although this particular statute sought to regulate the water before it was taken from the aquifer, it had the "effect of prohibiting the interstate transportation of such water after it has become personal property."[67] The court held that:

> Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone... or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result...is the same. In both situations the purpose and intent of the state and the end result thereof is to prohibit the interstate transportation of an article of commerce.[68]

The *City of Altus* court did not expressly overrule *Hudson*, as a district court did not have that authority, but its opinion was clearly contradictory to it.[69] As the Supreme Court did not offer any additional insight, summarily affirming the lower court's decision,[70] the status of the law in this area remained uncertain until the decision in *Sporhase v. Nebraska*.[71] Even though *City of Altus* did not expressly overrule *Hudson*, the

60 *Id.* at 838-39.
61 *Id.* at 839.
62 *Id.* at 839-40.
63 *Id.* at 839.
64 *Id.* (citing Pennsylvania v. West Virginia, 262 U.S. 553, 598 (1923)).
65 *City of Altus,* 225 F. Supp. at 838.
66 *Id.* at 840.
67 *Id.*
68 *Id.*
69 West v. Kan. Natural Gas Co., 221 U.S. 229, 255 (1911).
70 *Id.*
71 458 U.S. 941 (1982)

opinion provides an example of the changing views regarding the commerce clause and how it should be applied to natural resources.

The Supreme Court took the opportunity to clarify the law with the *Sporhase* case in 1982. This case involved a farmer who owned land spanning the Nebraska-Colorado border, and who was using water from a well on the Nebraska side of the farmer's property to irrigate the entire property, in violation of a Nebraska law regulating the export of water.[72] This law required anyone who wished to export water to obtain a permit and placed four requirements on the granting of the permit: (1) "[t]he withdrawal of the ground water requested is reasonable," (2) the withdrawal "is not contrary to the conservation and use of ground water," (3) the withdrawal "is not otherwise detrimental to the public welfare," and (4) "[t]he state in which the water is to be used grants reciprocal rights to withdraw and transport ground water."[73]

Distinguishing *City of Altus*, the Nebraska Supreme Court upheld the entire statute, noting that unlike Texas, where landowners have a right to capture underlying groundwater, Nebraska does not recognize any comparable property interest.[74] However, the U.S. Supreme Court rejected this reasoning, observing that its memorandum decision in *City of Altus* indicated a concurrence in the result reached by the lower court but not necessarily in the reasoning.[75] Instead, the Supreme Court held that all groundwater is an article of commerce, regardless of what legal system is employed.[76] This ruling was based on the correlation between the positive and negative aspects of the commerce clause: groundwater must be an article of commerce because Congress is able to regulate it, and if Congress can regulate groundwater at all, "its regulation need not be more limited in Nebraska than in Texas."[77]

The Supreme Court also tackled the theory of public ownership, holding that in overruling *Geer* (on which *Hudson* relied) it had "traced the demise of the public ownership theory and definitively recast it as 'but a fiction'" expressing the state's power to regulate an important resource.[78] The case that overruled *Geer*, *Hughes v. Oklahoma*, pointed out that the *Geer* analysis had been undermined many times, with courts dismissing the public ownership argument in everything from gas to landfills to shrimp.[79] In expressly overruling *Geer*, the *Hughes* Court noted the importance of having the same general rule for all natural resources and cited with approval the rationale set forth in *West*:

> If the States have such power [to prohibit a resource from being the subject of interstate commerce] a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals ... To

72 *Sporhase*, 458 U.S. at 944.
73 *Id.*
74 *Id.* at 944 and 949-50.
75 *Id.* at 949.
76 *Id.* at 953.
77 *Id.*
78 *Id.* at 950-51 (quoting Hughes v. Oklahoma, 441 U.S. 322, 334 (1979)).
79 *Hughes*, 441 U.S. at 329-35; *see also* Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911).

> what consequences does such power tend? Embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce...each State is made greater by the division of its resources, natural and created, with every other State ... This was the purpose, as it is the result, of the commerce clause of the Constitution of the United States.[80]

Nevertheless, Nebraska offered two arguments why its groundwater was distinguishable from other natural resources, meriting a greater ownership interest in the State. The first argument was that individuals in Nebraska have a lesser ownership interest in groundwater, because intrastate market for water does not exist except to the extent utilities may charge for the cost of distribution.[81] Although this fact may not be irrelevant to commerce clause analysis, explained the Court, it did not remove Nebraska groundwater from scrutiny altogether, as the argument was still based on the fiction of public ownership.[82] In fact, the Court continued, all prices are ultimately based on costs of production, and the cap placed on groundwater prices was merely a form of price regulation, the authority for which does not depend on public ownership and does not negate the existence of a market.[83]

Nebraska's second argument was that "water, unlike other natural resources, is essential for human survival," and, therefore, the state has a greater interest in conserving and preserving it.[84] Once again, the Court stated that while this fact was not irrelevant in commerce clause analysis, it did not preclude groundwater from scrutiny, noting that "the State's interests clearly have an interstate dimension" since most water supplies are used for economic activities such as agriculture, rather than for survival.[85] Both the State's interest in conserving and preserving, as well as its asserted ownership interest, said the Court, are "factors [that] inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable."[86]

The second question before the Court was whether the Nebraska statute in question imposed an impermissible burden on interstate commerce.[87] Because the fourth part of the statute, the reciprocity clause, facially discriminated against other states and operated as a barrier to commerce between Nebraska and Colorado, the strictest scrutiny test was applied.[88] Although the Court found that the State had demonstrated a legitimate conservation and preservation interest, the reciprocity requirement did not significantly advance that interest.[89] Also, since the requirement blocked exports

80 *Hughes*, 441 U.S. at 329-30 (quoting *West*, 221 U.S. at 255-56).
81 *Sporhase*, 458 U.S. at 951-52.
82 *Id.* at 951.
83 *Id.* at 952.
84 *Id.*
85 *Id.* at 953.
86 *Id.*
87 *Id.* at 954.
88 *Id.* at 958.
89 *Id.*

even when water was in abundance, it was not narrowly tailored to serve the State's purpose.[90]

The Supreme Court did indicate, however, that it was not impossible for a state to defend a facially discriminatory statute such as Nebraska's reciprocity requirement.[91] If a state could show that it suffered a water shortage as a whole, that intrastate transport of water to areas of shortage was economically feasible, and that imports would roughly compensate for any exports, a conservation purpose might be credibly advanced to defend a reciprocity provision.[92] The Supreme Court also introduced what is known as the "arid state defense," suggesting that a demonstrably arid state might be able to support even a total ban on exports.[93]

The Supreme Court found that the other three sections of the Nebraska statute, requiring that the transfer of water be reasonable, not contrary to conservation, or otherwise detrimental to the public welfare, were evenhanded because similar restrictions were placed on intrastate transfers of water.[94] This part of the statute thus came within the *Pike* test, requiring the balancing of a legitimate local interest against the burdens placed on interstate commerce. [95]

Easily determining that the conservation interest that Nebraska espoused was legitimate, as Nebraska imposed similar severe restrictions on the withdrawal and use of water by its own citizens, and also that the regulations advanced this purpose, the Court moved on to the balancing test. In performing this test, the Court noted four "realities" that made it "reluctant to condemn as unreasonable, measures taken by a state to conserve and preserve for its own citizens this vital resource in times of severe shortage."[96] These four realities are:

> (1) A State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens-and not simply the health of it economy-is at the core of its police power.
>
> (2) The legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts.
>
> (3) [The State's] claim to public ownership of . . . ground water . . . may support a limited preference for its own citizens in the utilization of the resource.
>
> (4) Given [the State's] conservation efforts, the continuing availability of ground water . . . is not simply happenstance; the natural resource has some

90 *Id.* at 957-58.
91 *Id.* at 958.
92 *Id.*
93 *Id.*
94 *Id.* at 955-56.
95 *Id.* at 954.
96 *Id.* at 956-57.

> indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage. [97]

Based on these realities, the Court determined that the first three requirements of Nebraska's anti-export statute did not impermissibly burden interstate commerce, and were therefore constitutional.[98] However, the Court did not give any additional insight to help interpret these realities. Questions regarding how severe a shortage would have to be to threaten citizens' health, to what extent interstate compacts would be allowed to interfere with commerce, what scope the "limited preference" encompasses, and to what extent the state must be a "market participant" to favor its citizens under the fourth reality, were left to be decided by later cases.[99]

*City of El Paso v. Reynolds* (hereinafter *El Paso I*)[100] was the first case to interpret some of the potential "defenses" to discriminatory statutes suggested in *Sporhase.* In *El Paso I*, the State of New Mexico offered two primary arguments to support its total ban on interstate exports of water.[101] The first argument was based on an interstate compact (reality No. 2), the Rio Grande Compact, and the second was based on the "arid state defense," which the court conflated with reality No. 1 (protecting the health of citizens in times of shortage).[102]

In its compact defense, New Mexico argued that the Rio Grande Compact had already apportioned the surface waters of the Rio Grande River, and that it also controlled apportionment of hydrologically connected groundwater, because takings of groundwater affected the level of water in the river, and therefore, the water available under the surface apportionments.[103] Looking at the history and text of the Rio Grande Compact, the Federal District Court for the New Mexico District found that it had done neither of these things.[104]

For its second argument, New Mexico advanced a general conservation purpose based on the State's general aridity and on a predicted shortage of at least 626,000 acre feet of water per year by the year 2020.[105] As in *Sporhase,* the court did not have any problem finding the objective legitimate, noting the comprehensive system of conservation measures enforced by New Mexico and suggesting that these efforts would likely justify non-discriminatory burdens on interstate commerce.[106]

But, New Mexico's justifications were not enough to validate a facially discriminatory statute such as its absolute ban on interstate exports.[107] In so ruling, the court essentially wiped out the "arid state defense," focusing on the first of the *Sporhase* realities and the "longstanding Commerce Clause distinction 'between economic

97 *Id.*
98 *Id.* at 957.
99 Grant, *supra* note 28, at 12-13.
100 563 F. Supp. 379 (D.N.M. 1983).
101 *Id.*
102 *Id.* at 383 and 389-90.
103 *Id.* at 383-84.
104 *Id.* at 384.
105 *Id.* at 389-90.
106 *Id.* at 389.
107 *Id.* at 390-91.

protectionism, on the one hand, and health and safety regulation, on the other.'"[108] The court inferred from this statement that a state could discriminate in favor of its citizens only to the extent that water was necessary for human survival.[109] The court explained that outside of survival needs, water is merely an economic good and should be treated the same as other natural resources (*i.e.,* without special exceptions allowing states to favor their citizens).[110] As New Mexico's shortage was based on what it defined as "public welfare" needs, including industry, agriculture, energy, environment, and recreation, it was not a legitimate basis for a total ban on exports.[111] Not stopping there, the court went on to state that even if New Mexico had a true shortage in its future, the statute would not have been upheld because it did not place any restrictions on in-state use, and therefore, was not narrowly tailored to the purpose.[112]

New Mexico responded to the court's decision by creating new regulations modeled after the part of the Nebraska statute that the district court upheld in *Sporhase.*[113] New Mexico also updated all but one of its regulations of in-state appropriations to include similar provisions and enacted a two-year moratorium on exports from the two basins for which El Paso sought appropriation permits.[114] El Paso promptly challenged these new regulations in *City of El Paso v. Reynolds* (hereinafter *El Paso II*).[115]

The new statutes conditioned both intrastate and interstate appropriations on the State Engineer's finding that it "would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico."[116] The interstate regulations also listed six factors for the State Engineer to consider when deciding whether to grant an out-of-state application.[117] The first four factors required an evaluation of whether the water could be used to alleviate shortage within the state, and the last two focused on the export applicant's available water supply.[118]

El Paso argued that the conservation and public welfare criteria were inherently discriminatory because they sought to benefit only New Mexico residents, and therefore, they were only superficially evenhanded.[119] But, the court found that these provisions fit into the "limited preference" for state citizens allowed in *Sporhase* (reality No. 3).[120]

Attempting to provide some guidelines on what sort of preferences are acceptable, the Federal District Court for the New Mexico District said that the line fell somewhere in between limiting the preference to survival interests, as is required under

108 *Id.* at 389 (quoting Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982)).
109 *Id.*
110 *Id.*
111 *Id.* at 390.
112 *Id.*
113 City of El Paso v. Reynolds, 597 F. Supp. 694, 696-97 (1984) (memorandum opinion).
114 *Id.* at 697.
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.* at 698-99, and 702.
120 *Id.* at 700, 702.

facially discriminatory statutes, and allowing restrictions that merely protect local economic interests. The court explained that "if the public welfare criterion is used to effectuate simple economic protectionism, a per se rule of invalidity will be applied."[121] The State is allowed to protect a broad spectrum of public interests in between, including health and safety, recreational, aesthetic, and environmental.[122] However, whenever a state exercises a preference for its citizens in the name of the public welfare, and economic interests are implicated, the resulting burden on interstate commerce must be weighed against the noneconomic local benefits using the *Pike* balancing test.[123] And, since "every aspect of the public welfare has economic overtones," the *Pike* test is therefore inevitable for any statute claiming to regulate for the benefit of the public welfare.[124]

Reality No. 1 and the State's right to prefer its citizens in times of shortage was also addressed. On this issue. the court concluded that a state should not have to wait until a water shortage was upon it before enacting a statute giving preference to its citizens.[125] Instead, these statutes would also be evaluated based on a balancing test, informed by factors including "the proximity in time of a predicted shortage, the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage."[126]

The court also upheld the conservation criterion on the same grounds as public welfare, stating that "a state may...'conserve' water within its borders...to the same limited extent that it may prefer its citizens in the utilization of the resource," and upheld the six factors as useful considerations in performing the necessary balancing tests.[127] However, the court ultimately determined that it was impossible to weigh any of the local benefits discussed against the burden on commerce until the state actually exercised a preference for its citizens.[128] Until that time, the statutes would be upheld.[129]

Two other new laws were also at issue in this case. The first was an exception to the evenhanded regulation discussed above. For transfers from domestic wells, the New Mexico Legislature had placed the public welfare and conservation requirements on interstate transfers but not intrastate transfers.[130] The court found that requiring interstate commerce to shoulder the entire burden of furthering these interests was facially discriminatory and therefore unconstitutional.[131]

The last statute to be discussed was the moratorium.[132] New Mexico rationalized that the moratorium was necessary to ensure competent administration of the subject groundwater because (1) current hydrological information was deficient thus requiring

121 *Id.* at 700-01.
122 *Id.* at 700.
123 *Id.* at 700-01.
124 *Id.* at 700.
125 *Id.* at 701.
126 *Id.*
127 *Id.* at 702-03.
128 *Id.* at 701.
129 *Id.* at 701-02.
130 *Id.* at 703.
131 *Id.* at 703-04.
132 *Id.* at 704-07.

further study before action could be taken, (2) the pending applications far exceeded supply, and (3) the allocation of Rio Grande surface water between New Mexico and Texas needed further clarification.[133] The court said that if the purposes were bona fide the moratorium would be legitimate, but that "a statute need not openly disclose 'an avowed purpose to discriminate'" to violate the commerce clause.[134] After examining both the circumstances surrounding the passage of the moratorium and it is provisions, the court determined that New Mexico's purposes were not legitimate. In making this decision, the court noted that the moratorium had been passed in the midst of a lawsuit, and that many of the provisions were not consistent with the espoused purposes – for example, the only thing that both basins had in common were El Paso's applications, many of the concerns listed did not apply to the Hueco Basin, the study would not be completed before the moratorium expired, and the duration was based on avoiding any economic impact within New Mexico.[135] The court also noted that even if the moratorium were not per se invalid because of its illegitimate purpose, it would fail under the *Pike* test because it was not narrowly tailored toward basins where its espoused purposes would be relevant.[136]

Finally, the last case in this history of the commerce clause doctrine and water regulation is the first to test the application of an otherwise valid regulation. Although *Ponderosa Ridge LLC v. Banner County*[137] did not reach the Supreme Court, as the most recent case involving commerce clause restrictions on water exports, it offers some insight on how the law is developing.

The statute at issue in *Ponderosa Ridge* involved a list of factors similar to those in *El Paso II.*[138] While the factors to be considered for interstate appropriations were different from those considered for intrastate appropriations, the Nebraska Supreme Court found that the differences did not require interstate commerce to bear a greater burden than intrastate commerce.[139] However, *Ponderosa Ridge* also challenged the statute as it was applied.[140] The State of Nebraska required *Ponderosa Ridge* to bear the burden of presenting evidence on the factors on which the Department of Water Resources (DWR) had considered and rejected its application because *Ponderosa Ridge* failed to demonstrate why water from its home state was not its first choice[141]. The court concluded that requiring an applicant to bear the burden of proof was permissible and that if the testimony in the record was conflicting and that the DWR was "free to believe one expert and disbelieve the other."[142]

133 *Id.* at 705.
134 *Id.*; *see also id.* at 707 ("A statute, however, may be invalid because of its protectionist purpose as well as its discriminatory effect.").
135 *Id.* at 705-07.
136 *Id.* at 707.
137 554 N.W. 2d. 151 (Neb. 1996).
138 Ponderosa Ridge v. Banner County, 554 N.W.2d 151, 156-57 (1996).
139 *Id.* at 164.
140 *Id.* at 165.
141 *Id.*
142 *Id.* at 168.

## II. *TARRANT REGIONAL WATER DISTRICT V. HAMMOND*

Despite the rulings in *Sporhase* and *El Paso I* and *II*, many Western states retained the anti-export statutes they had enacted in the years following *Hudson*. Others enacted new statutes that attempt to capitalize on potential loopholes in the commerce clause doctrine, that take on new untested forms of discrimination, or that simply ignore the commerce clause restrictions on interfering with interstate commerce. Oklahoma has a mix of these types of statutes. First, Oklahoma has several discriminatory statutes that have been on the books since 1972.[143] These statutes include an outright ban on sales combined with provisions requiring legislative approval for out-of-state exports and restrictions on the length of time out-of-state appropriations can cover.[144] Second, under a situation similar to the one behind New Mexico's moratorium in *El Paso II*, Oklahoma enacted a moratorium on all out-of-state water sales in 2002 that included expressly discriminatory provisions.[145] TRWD is challenging all of these laws in federal court, and a favorable outcome could mean trouble for the many other states with discriminatory statutes as they begin to look more vulnerable to constitutional challenges.

This section begins by discussing the background on TRWD's case against Oklahoma, examining the challenged statutes, and reviewing the procedural history. This section then looks at the commerce clause issues presented by the claim, concluding, based on comparisons with precedents, that Oklahoma's overall statutory scheme will probably not withstand a constitutional challenge.

### A. BACKGROUND TO *TARRANT V. HAMMOND*

The statutes at issue in this case fall into five categories: a moratorium on out-of-state water sales (two statutes), a legislative approval requirement (two statutes), a time limit (one statute), a direct prohibition on out-of-state permits from the Oklahoma Water Conservation Storage Commission (one statute), and a provision forbidding out-of-state public agencies from membership in Regional Water Distribution Districts (one statute).[146] The Oklahoma Legislature enacted all of the statutes in 1972, except for the moratorium, which it enacted in 2002.[147]

#### 1. THE MORATORIUM ON OUT-OF-STATE WATER SALES

The two statutes that compose the moratorium on out-of-state water sales are Title 82, Section 1B and Title 74, Section 1221A of the Oklahoma Statutes. Section 1B establishes a moratorium on any sales or exportations of water outside the state without the consent of the legislature, and Section 1221A creates a moratorium on any compacts or cooperative agreements authorizing or otherwise implementing sales or exportations of water outside the state. The Oklahoma Legislature enacted both of

143 OKLA. STAT. ANN. tit. 82, §§ 105.16 , 1085.2, 1085.22, 1266, 1324.10 (West 2007).

144 OKLA. STAT. ANN. tit. 82, §§ 105.16 , 1085.2, 1085.22, 1266, 1324.10 (West 2007).

145 OKLA. STAT. ANN. tit. 82, § 1B (West 2007); OKLA. STAT. ANN. tit. 74, § 1221.A (West 2007); *see also* Complaint, *supra* note 11, at 9.

146 OKLA. STAT. ANN. tit. 82, §§ 1B, 105.16, 1085.2, 1085.22, 1266, 1324.10 (West 2007); OKLA. STAT. ANN. tit. 74, § 1221.A (West 2007).

147 *Id.*

these statutes in 2002, soon after negotiations broke down between Oklahoma and North Texas over a potential sale of water, and both statutes were to expire after three years.[148] However, the Oklahoma Legislature amended both statutes in 2004, extending their life until November 1, 2009.[149] The timing of the enactment and extension of the moratorium suggest that the statute may have been enacted in response to the negotiations with Texas, rather than for the reasons stipulated in the statute itself. Section 1B also contains an exemption for industry related sales of Oklahoma water that, TRWD claims, limits any economic harm suffered by Oklahoma as a result of the moratorium.[150]

#### 2. Legislative Approval

The two statutes requiring legislative approval for out-of-state water sales are Title 82, Sections 1085.2 and 1324.10(B) of the Oklahoma Statutes. Section 1085.2 provides that the Oklahoma Water Resources Board (OWRB) shall not make a contract with anyone for the sale or use of water outside the state without the Legislature's approval, while Section 1324.10(B) places the same restriction on regional water districts.

#### 3. Time Limit Restriction

Title 82, Xection 105.16 of the Oklahoma Statutes places a seven-year time limit on out-of-state surface water appropriations, while allowing longer appropriations when the proposed use "promotes[s] the optimal beneficial use of water within the state." The TRWD claims this statute has the effect of prohibiting all out-of-state uses involving lengthy development periods, such as the municipal use for which the TRWD has applied.[151]

#### 4. Prohibition on Out-of-State Permits from the OWCSC

Title 82, Section 1085.22 of the Oklahoma Statutes, although primarily addressing the OWCSC's duties regarding the sale and lease of storage facilities, also contains a provision stating, "[t]he Commission shall not permit the sale or resale of any water for use outside the State of Oklahoma."

#### 5. Out-of-State Agencies Ineligible for Membership in Regional Water Distribution Districts

Title 82, Section 1266(1) of the Oklahoma Statutes defines regional water districts as a "body corporate and instrumentality of each of the public agencies which establish it." But, Section 1266(9) exempts out-of-state public agencies from entitlement to membership in these districts. This prohibition deprives them of rights accorded to

148 *See* Press Release, *supra* note 14, at 3.
149 Complaint, *supra* note 11, at 5.
150 *Id.*
151 *Id.*

agencies that *are* members of a district, such as the furnishing, transport and delivery of water.[152]

Also important to this case is a 1979 Oklahoma Attorney General Opinion, which answered the question of "whether a municipality has the authority to sell and transport water out of the state of Oklahoma."[153] The Attorney General interpreted the laws of Oklahoma to mean that an out-of-state water user is not a proper permit applicant before the OWRB.[154] In finding that the laws of Oklahoma did not support the permitting of out-of-state sales of water, the Attorney General relied on Section 1085.2, discussed above, which prohibits the OWRB from issuing permits for out-of-state water use without legislative approval, and other statutes that indicate Oklahoma public policy is "to benefit the general welfare and future economic growth of the State," to promote the "use and control of water to meet...needs of the people of Oklahoma," and to prevent out of out-of-state users from obtaining vested water rights.[155] The Attorney General also concluded that because in specific instances, the Oklahoma Legislature had approved out-of-state water sales, Oklahoma's laws did not constitute a total ban on interstate commerce and were therefore permissible regulations for the benefit of "the public health and general welfare."[156]

The TRWD is challenging all of these statutes on two separate bases. The TRWD claims the statutes violate (1) Oklahoma's obligations under the Red River Compact, and (2) the commerce clause of the U.S. Constitution.[157] The case has not yet gone to trial, but the court issued an order denying the defendants' (defendants are the individual members of the OWRB and the OWCSC, but will hereinafter be referred to as "OWRB") motion to dismiss on October 29, 2007.[158] An appeal on the order is scheduled for May 12, 2008.

### B. Commerce Clause Analysis of Oklahoma's Anti-Export Statutes

The TRWD offers two arguments to support its position that Oklahoma's water regulations are unconstitutional. The first is based on the Supremacy Clause and, in particular, the Red River Compact's status as federal law.[159] This argument affects only one of TRWD's permit applications, the Kiamichi River permit (the TRWD has also filed applications for water from Cache Creek and Beaver Creek), and is based on a construction of the Compact that says waters taken from the Kiamichi River count as "mainstem" diversions to which Texas claims an entitlement.[160] Although this argument falls somewhat outside the scope of this note, the Compact itself provides little support for this claim. The Compact explicitly states that all Red River tributar-

152 OKLA. STAT. ANN. tit. 82, § 1267 (West 2007).
153 10 Op. Att'y Gen. Okla. 288, *3 (1978).
154 *Id.* at *9.
155 *Id.* at *7-9.
156 *Id.* at *7-8.
157 Complaint, *supra* note 11, at 8-9.
158 Tarrant Regional Water District v. Herrmann, No. CIV-07-45-HE, 2007 WL 3226812 (W.D. Okla. 2007) (order denying motion to dismiss).
159 Complaint, *supra* note 11, at 8.
160 *Id.* at 4, 6-7.

ies within Oklahoma belong to Oklahoma alone, and the Kiamichi River is listed as one of these tributaries.[161] But, regardless of whether or how the court addresses this argument, the commerce clause issues will still need to be resolved as they relate to all three of the TRWD's permits.

This section will focus on the TRWD's second argument that Oklahoma's anti-export laws interfere impermissibly with interstate commerce in violation of the Commerce Clause.[162] This section looks at each category of challenged statutes and compares them to statutes challenged in previous cases to determine whether they will withstand commerce clause scrutiny.

The first statutes examined are the two that are most easily classified as unconstitutional and constitutional, respectively. The first is Title 82, Section 1085.22 of the Oklahoma Statutes—the direct ban on permits from the OWCSC. No direct ban on interstate commerce in water has ever been upheld since *Hudson*, and aside from the fact that this statute is not a narrowly tailored regulation, Oklahoma is not a "demonstrably arid state," which is the only possible reason for an outright ban like the one allowed under *Sporhase*.[163] This statute will most likely be struck down as unconstitutional.

On the opposite end of the spectrum is Title 82, Section 1266 of the Oklahoma Statutes, which prohibits out-of-state agencies from being members of regional water districts. Although this statute is expressly discriminatory, it does not explicitly interfere with commerce. Out-of-state public agencies are exempted from the automatic water rights that member agencies have, but they are not absolutely prohibited from receiving water from a district.[164] Many states employ water districts to help manage water, and they serve an important administrative function. Excluding out-of-state agencies does not block their access to water, but it does prevent them from interfering with state government. Therefore, this regulation may be held constitutional.

Section 105.16 presents a more difficult case, the seven-year time limit statute. The court's analysis of this statute could go one of two ways, but the practical outcome will be the same: Oklahoma will not be able to allow longer appropriations for in-state uses than for out-of-state uses. The first way that the court could view the statute is in the same way as the TRWD: a facially discriminatory statute that explicitly favors uses within the state.[165] If so, Oklahoma's conservation purposes will once again fail under *Sporhase* because Oklahoma is not an arid state and because the statute is not narrowly tailored.[166]

On the other hand, the court could view the statute the way it viewed New Mexico's conservation criterion in *El Paso II*.[167] This criterion required that exports of water

161 Tex. Water Code § 46.013 ( Vernon 2007).

162 Complaint, *supra* note 11, at 9.

163 *See* Gwynne, *supra* note 1, at 10.

164 Okla. Stat. Ann. tit. 82, § 1267 (West 2007).

165 Complaint, *supra* note 11, at 5-6.

166 Sporhase v. Nebraska *ex.rel.* Douglas, 458 U.S. 941, 956 (1982). For example, if it is not beneficial for any out-of-state use to cover more than seven years, why is it that some longer in-state uses *are* beneficial?

167 City of El Paso v. Reynolds, 597 F. Supp. 694, 698 (1984).

not be "contrary to the conservation of water within the state."[168] El Paso argued that this prohibited interstate transfers of water because if the water was transported out of the state then the water was not being "conserved" in the state.[169] But, the court said El Paso was reading it too literally. "The phrase 'water within the state' defines the water which is to be conserved; it does not dictate that all the State's waters must be retained within its borders."[170] The same conclusion could be gleaned from Oklahoma's statute (i.e., reading the exception for "beneficial use of water in the state" to define what waters are being beneficially used, rather than where they are being used, would remove all suggestions of discrimination).[171] This route is the likely one the court will take as this approach fits with the general principle that a court should not read a statute in a manner that would cause the statute to be unconstitutional if a constitutional interpretation is available.[172]

The last two categories of statutes, the moratorium and the regulations requiring legislative approval, are at the heart of the TRWD's case. These categories are also the most difficult to predict as the case law is not directly on point.[173] This section considers the regulations requiring legislative approval first.

Sections 1085.2 and 1324.10 state that person, organization, or government subdivision within the state may no sell, permit, or otherwise export water outside the state without legislative approval.[174] While a similar statute was the subject of *City of Altus v. Carr*, several factors limit the applicability of the court's decision in *City of Altus* to the present case.[175] One important consideration is that, although the Supreme Court affirmed the *City of Altus* decision, the Court did not necessarily adopt the district court's reasoning.[176] While the Court did not summarily adopt the reasoning, it did not completely reject it either. What the Court did reject was the *City of Altus* opinion's focus on particularities in the Texas water law system.[177] However, this limitation on the reasoning would not have changed the result of the case: the determination that Texas's legislative approval requirement was unconstitutional.[178] This result is what the Supreme Court affirmed.[179]

Some factors not present in the Oklahoma case may have influenced the *City of Altus* outcome.[180] First, the legislative approval requirements in *City of Altus* were adopted *in response* to Altus's attempts to buy water.[181] Second, the requirement placed an excessive burden on Altus, because it had already expended a significant amount

168 *Id.*
169 *Id.*
170 *Id.*
171 OKLA. STAT. ANN. tit. 82, § 105.16 (West 2007).
172 City of El Paso, 597 F. Supp. at 698.
173 *See* OKLA. STAT. ANN. tit. 82, §§ 1B, 1085.2, 1324.10 (West 2007); OKLA. STAT. ANN. tit. 74, § 1221.A (West 2007).
174 *See* OKLA. STAT. ANN. tit. 82, §§ 1085.2, 1324.10 (West 2007).
175 *See* City of Altus v. Carr, 255 F. Supp. 828, 830-31 (1966).
176 Sporhasev. Nebraska *ex.rel.* Douglas, 458 U.S. 941, 948 (1982).
177 *Id.* at 949-50.
178 *City of Altus*, 255 F. Supp. at 839-40.
179 *Sporhase*, 458 U.S. at 949.
180 *See City of Altus*, 255 F. Supp. at 828.
181 *Id.* at 832.

of money but would be unable to secure approval for two more years.[182] Last, the state did not have any approval requirements for in-state uses.[183] The TRWD, on the contrary, has not expended any money and is not in dire need of immediate approval.[184] Additionally, Oklahoma places considerable restrictions on its own residents, including requirements to obtain a permit, though legislative approval is not necessary. Thus, the *City of Altus* is not directly on point.[185]

The analysis of these statutes will ultimately come down to the sort of balancing tests used in *El Paso I* and *II*.[186] Since the legislative approval requirement is ultimately different and more burdensome than the requirements for in-state appropriations (this conclusion is bolstered by the 1979 Attorney General opinion which interprets one of the statutes in question as an absolute ban on permitting out-of-state appropriations),[187] the court will have to consider whether the disparity serves a legitimate local purpose, whether it is narrowly tailored to serve that purpose, and whether any nondiscriminatory alternatives are available.[188] Oklahoma has a declared public policy of putting water to use in the state to the maximum extent possible to prevent downstream users from acquiring vested rights.[189] This policy goal is undoubtedly not a legitimate purpose. Additionally, this proclamation of public policy will make it more difficult for Oklahoma to assert a conservation purpose per the requirement, since the policy statute opposes conservation. Even if Oklahoma were to succeed in asserting a conservation purpose, the court will probably find that the legislative approval requirement is not narrowly tailored as no reason exists as to why the statute should not also be applied to intrastate uses as well.[190] Therefore, ultimately, Oklahoma's legislative approval requirements will likely be declared unconstitutional, just as Texas' similar requirements were in *City of Altus*.[191]

Finally, we turn to Oklahoma's moratorium on out-of-state sales. A previous case, *El Paso II*, addressed a similar statute. The facts of *El Paso II* align with those surrounding Oklahoma's statute.[192] Both moratoriums were passed immediately after discussions involving major out-of state water transfers occurred.[193] The two moratoriums also expressed the need to perform studies to further understand the water at issue.[194] And, although these studies were the supposed motivation behind the moratoriums, in both cases the studies were not going to be completed until after the moratoriums

182 *Id.* at 832-37.
183 *Id.* at 830-31.
184 *See* Complaint, *supra* note 11, at 3 (TRWD was in the process of long-range future planning).
185 *See* City of Altus, 255 F. Supp. 828.
186 *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 388 (1983); City of El Paso v. Reynolds, 597 F. Supp. 694, 703 (1984).
187 10 Op. Att'y Gen. Okla. 288, *8-9 (978).
188 *See City of El Paso,* 597 F. Supp. at 704.
189 OKLA. STAT. ANN. tit. 82, § 1086.1(A)(3) (West 2007).
190 *See City of El Paso*, 563 F. Supp. at 391.
191 City of Altus v. Carr, 255 F. Supp. 828 (1966).
192 *City of El Paso,* 597 F. Supp. at 694.
193 *Id.* at 707; *supra* note 16.
194 *City of El Paso,* 597 F. Supp. at 705; Response to Motion to Dismiss at 3, Tarrant Regional Water District v. Herrmann, No. CIV-07-45-HE (W.D. Okla. 2007), 2007 U.S. Dist. Ct. Motions LEXIS 23305.

expired.[195] Finally, in both cases, exceptions were made to minimize economic harm to the state passing the moratorium.[196] In *El Paso II*, New Mexico based the length of the moratorium on its potential effects to the state economy.[197] Oklahoma's choice was even more discriminatory—it banned only out-of-state sales, rather than evenhandedly banning all new appropriations.[198]

However, the similarities between the two statutes do not necessarily mean that Oklahoma's moratorium will meet the same fate as New Mexico's. The court in *El Paso II* said that if New Mexico's purposes had been bona fide, they would have been legitimate.[199] This standard creates a fact issue as to whether Oklahoma's purposes are bona fide. However, considering the similarity to *El Paso II* and the fact that Oklahoma did not conduct the study until after the moratorium was extended, the court is likely to determine that Oklahoma's proffered purposes are in fact merely a screen for the true goal of preventing the TRWD from acquiring Oklahoma water.

Finally, since Oklahoma's statute is facially discriminatory, the OWRB bears the additional burden of proving that the moratorium is narrowly tailored to meet its purposes.[200] This argument is difficult, because the study is likely to provide insight on in-state appropriations to the same degree that it does for out-of-state appropriations.

Overall, it seems likely that *Tarrant Regional Water District v. Herrmann* will be added to the growing list of cases striking down state water regulation that interferes with interstate commerce. This trend began with *City of Altus* in 1966 and has since invalidated the discriminatory statutes of three Western states.[201] But, many other states still maintain similar statutes and for them *Tarrant* may mean that their regulations will no longer be ignored. As the increased value and scarcity of water have nurtured a demand for interstate transfers, and improvements in technology and greater economic interconnectedness of states have made such transfers possible, it is unlikely that discriminatory statutes will be ignored for much longer.

## III. WHAT DOES THE EMERGING COMMERCE CLAUSE DOCTRINE ON WATER REGULATION MEAN FOR WESTERN STATES?

As mentioned above, Oklahoma is not the only Western state that still has discriminatory water regulation statutes. In fact, a wide variety of such statutes exist, and almost every Western state has some form of questionable, if not outright unconstitu-

195 *City of El Paso,* 597 F. Supp. at 706; Response to Motion to Dismiss at 3, Tarrant Regional Water District v. Herrmann, No. CIV-07-45-HE (W.D. Ok. 2007), 2007 U.S. Dist. Ct. Motions LEXIS 23305.

196 *City of El Paso,* 597 F. Supp. at 707; Complaint, *supra* note 11, at 5-6.

197 *City of El Paso,* 597 F. Supp. at 707.

198 OKLA. STAT. ANN. tit. 82, § 1B (West 2007); OKLA. STAT. ANN. tit. 74, § 1221.A (West 2007).

199 *City of El Paso,* 597 F. Supp. at 707.

200 Hughes v. Oklahoma, 441 U.S. 332, 336 (1979) ("The burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce... is demonstrated, the burden falls on the State to justify it'" (quoting Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 353 (1977))).

201 Sporhase v. Nebraska *ex.rel.* Douglas, 458 U.S. 941 (1982); City of El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984); City of Altus v. Carr, 255 F. Supp. 828 (W. D. Tex. 1966).

tional, regulation. An unconstitutionality finding in *Tarrant Regional Water District v. Herrmann* could be the domino that starts all of these statutes falling. Many states see that a change is coming and are trying to develop new and innovative ways to avoid commerce clause restrictions while keeping more water in state.[202] Other states are already facing the prospect of either allowing proposed transfers or facing challenges to their own statutes.[203] But, a few states are embracing the idea of entering the water market, foreseeing the benefits that their citizens can derive from such an arrangement.[204]

This section will first look at what effects the emerging commerce clause doctrine has had on Western states' regulatory schemes. It examines the various types of regulations addressing interstate water transfers and appropriations that can be found in the Western United States and analyzes their chances of withstanding a commerce clause challenge. Some of these statutes are similar to those represented in the case law, while others represent attempts to either capitalize on potential loopholes in the commerce-clause doctrine or involve new concepts on how a state might retain water for in-state use without violating the commerce clause. Next, this section looks at what the changing situation means on a broader scale, including increases in water transfers and changes in the way that water is allocated. Finally, this author discusses what states can do to make the transition into the new paradigm of a national water market as smooth as possible, allowing their citizens to derive the maximum benefit from it.

### A. What Changing Doctrines Mean for the Statutory Schemes of Western States

Currently, Western statutes fall into several different categories based on the way they regulate out-of-state water use. Many states have followed the "Nebraska-New Mexico model," based on the statutes that were upheld in *Sporhase* and *El Paso II*.[205] Statutes that very closely mirror the statutes from these cases are undoubtedly constitutional. Examples of this include Section 73-3a-108 of the Utah Code and Section 42-108 of the Idaho Code, which are almost exact copies of the laws from *El Paso II*,

202 *See e.g.* Mont. Code Ann. §§ 85-2-311, 85-2-402 (2007) (attempting to take advantage of the market participant doctrine through state ownership and leasing of water resources); Tex. Water Code Ann. § 11.085 (Vernon 2007) (limiting transfers to within a basin); Margaret Z. Ferguson, *Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future*, 75 Geo. L.J. 1701 (1987) (explaining how states can use instream flow regulation to preserve water in-state, and listing state statutes that are already incorporating this).

203 *See e.g.* Joe Gelt, *Arizona-to-Nevada Water Export Plan Proposed, Contested*, Arizona Water Resource (Water Resources Research Center, Tucson, Ariz.), May-June 2007, at 1-2, (describing the details of a dispute about transferring water from the Northwest part of Arizona to Nevada), *available at* http://www.ag.arizona.edu/azwater/awr/mayjune07/may-june.2007.awr.newsletter-web.pdf.

204 *See e.g.* Terry L. Anderson & Clay J. Landry, *Exporting Water to the World*, Water Resources Update 60, Universities Council on Water Resources (January 2001) (describing how states can enter the water market on good terms, and how Alaska has already begun to do so), available at http://www.ucowr.siu.edu/updates/118/index.html.

205 *Sporhase*, 458 U.S. 941 (1982); City of El Paso v. Reynolds, 597 F. Supp. 694 (W.D. Tex. 1984).

including the conservation and public welfare criteria and the list of factors to be considered before a permit is granted.[206]

Other states started out with the Nebraska-New Mexico model, but have embellished it to include new and different factors for state water boards to consider. Some of these new requirements are based on statements within the case law, while others are more ambitious in developing new exceptions to the commerce clause doctrine. These new requirements often place additional burdens on interstate commerce and may not be constitutional.

One statute that covers both types of additional factors is Section 45-292 of the Arizona Revised Statutes. This statute is very similar to the Nebraska-New Mexico model, but it adds some extra factors. First, it requires that out-of-state applicants submit studies regarding the hydrological impact of the appropriation on the area from which the water will be taken.[207] Second, the statute prohibits any out-of-state transfers of water that has been allocated to Arizona in an interstate compact.[208] The first requirement is addressed in *Ponderosa Ridge*, which held that a permit applicant has the burden of proving that the proposed allocation meets all of the factors under consideration.[209] This requirement is clearly the purpose of the hydrological studies requirement. The second factor, however, raises more complicated issues about interstate compacts that will be discussed below.

Wyoming added even more "additional" factors to its statute regulating out-of-state water use.[210] In fact, Section 41-3-115 of the Wyoming Statutes may include the largest number of requirements placed on out-of-state applicants. To begin with, the statute has a direct prohibition on interstate appropriations used to transfer chemicals, minerals, or other products (e.g., water cannot be used to transport coal in pipelines called "slurries").[211] This prohibition is facially discriminatory, and Wyoming would have a difficult time defending the provision in court. Second, Wyoming has a legislative approval requirement, which will be discussed below.[212] Third, the statute mandates an expensive and time consuming process of reviews, reports, hearings, comments, and opinions, all at the applicant's expense.[213] This process may require interstate commerce to bear an unconstitutionally large burden, as these requirements are not placed on intrastate uses (so, it is not evenhanded) and the requirements are not insignificant (this additional burden may be more than a "limited" preference for citizens).[214] Finally, Wyoming gives not six, but ten, factors for the legislature to

206 UTAH CODE ANN. § 73-3a-108 (West 2007); IDAHO CODE ANN. § 42-108 (2007); *see also* City of El Paso, 597 F. Supp. at 700-01 ("'Public Welfare' is a broad term including health and safety, recreational, aesthetic, environmental and economic interests....A state may favor its own citizens in times and places of shortages").

207 ARIZ. REV. STAT. ANN. § 45-292 (2008).

208 *Id.*

209 Ponderosa Ridge v. Banner County, 554 N.W.2d at 168 (Neb. 1996).

210 WYO. STAT. ANN. § 41-3-115 (2008).

211 *Id.*

212 *Id.*

213 *Id.*

214 *See* City of El Paso v. Reynolds, 597 F. Supp. at 694, 704 (1984) ("While a State may constitutionally regulate water usage to promote the conservation of water and the public welfare of

consider before granting the proposed use.[215] Some of these factors seem to be aimed at preventing any out-of-state applications from being granted, such as the one asking whether the proposed use would adversely affect the quantity of water available for domestic use.[216] Apparently Wyoming is choosing to ignore the court's reminder in *El Paso II* that a statute "need not openly disclose 'an avowed purpose to discriminate'" to violate the commerce clause.[217]

A third category of regulations includes those resembling statutes that have already been declared unconstitutional. Statutes requiring legislative approval are the most prominent members of the group. Oklahoma, of course, has some of these, as did Texas before it was struck down in *City of Altus*.[218] Wyoming and Montana have also adopted this requirement.[219] As discussed above in regard to Oklahoma's statute, the constitutional fate of these statutes is currently uncertain, but the outlook is grim. Another type of statute that is still maintained by states today, despite its unfavorable history, is the reciprocity requirement. Notwithstanding the fact that this type of statute was held unconstitutional in *Sporhase*, two Western states, California and Washington, still have reciprocity requirements.[220] Finally, a third statute with doubtful viability based on case law is Colorado's export fee.[221] Section 37-81-104 of the Colorado Revised Statutes authorizes a fee of $50 per acre foot on out-of-state uses only.[222] Although export fees have not yet been held unconstitutional in the context of water regulation, they have been in other contexts. For example, in *Commonwealth Edison Co. v. Montana*,[223] the Supreme Court upheld a state tax on a natural resource (coal) only because it was "fairly apportioned, [and] does not discriminate against interstate commerce."[224] If the tax were discriminatory, as Colorado's is, it probably would not have been upheld.

Rather than copying the statutes from *Sporhase* and *El Paso II*, some states have attempted to capitalize on commerce clause exemptions hinted at in these cases. The first of these is the market participant doctrine discussed in the fourth "reality" the Court recognized in *Sporhase*.[225] This doctrine allows a state to discriminate in favor of its citizens if the state is a market participant rather than a market regulator.[226] The de-

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its citizens, it may not require interstate commerce to shoulder the entire burden of furthering those interests.").

215 WYO. STAT. ANN. § 41-3-115 (2008).

216 *Id.*

217 *City of El Paso*, 597 F. Supp. at 705 (quoting *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951)).

218 OKLA. STAT. ANN. tit. 82, §§ 1085.2, 1324.10 (West 2007); City of Altus v. Carr, 255 F. Supp. 828, 830-31 (W.D. Tex. 1966).

219 WYO. STAT. ANN. § 41-3-115 (2007); MONT. CODE ANN. §§ 85-2-311, 85-2-402 (2007).

220 CAL. WATER CODE § 1230 (West 2008); WASH. REV. CODE ANN. § 90.03.300 (West 2008).

221 COLO. REV. STAT. § 37-81-104 (2008).

222 *Id.*

223 453 U.S. 609 (1981).

224 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981).

225 Sporhase v. Nebraska *ex.rel.* Douglas, 458 U.S. 941, 957 (1982).

226 Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries*, 46 NAT. RESOURCES J. 601 (Summer 2006).

cision in *Reeves, Inc. v. Stake* provides an example of the market participant doctrine.[227] In *Reeves*, the state was allowed to limit cement sales to residents because the cement was publicly produced.[228] *Sporhase* indicated that conservation efforts by states already give water an element of public production, but some states have tried to take this restriction even further.[229]

Montana allows only the State to appropriate water, and anyone wishing to use water must lease it from the State.[230] New Mexico still allows private appropriations, but New Mexico also has an aggressive plan for building up state allocations of water, both through the regular permitting process and through purchases of water rights from existing holders. The appropriations are for a variety of purposes, including the promotion of economic development; appropriations may be retained by the State unexercised for up to one hundred years; and, as in Montana, private individuals may lease the rights from the government. Some commentators have suggested that if a state tried to sell water rights, the state would not be able to prevent re-sales out-of-state, but the leasing method may overcome this difficulty.[231] On the other hand, the fact that a state is granting rights rather than selling a product may negate its participation in the "market." Ultimately, the constitutionality of these plans is uncertain and will likely depend on how the courts define "produced." Just because water is owned by the state does not mean it has been produced by the state.

Related to the market participant doctrine is the concept of appropriating water for "instream" or "environmental" flows. An instream flow is water that remains in a stream or other source rather than being diverted and used. The ingenuity of instream flow regulation, however, is that it changes the status of this water from "not in use" to "beneficial use," giving the instream appropriator a prior right against any potential future applicants.[232]

Several states provide for either instream appropriations or reservations by the state or a state agency. It is important to note, however, the difference between these two provisions, as it could affect their constitutionality. Under the reservations approach, states reserve water by establishing minimum streamflow or water level requirements.[233] This method is more troublesome, constitutionally, because it is based on the fiction of state water ownership rejected in *Sporhase*.[234] However, it is not necessarily unconstitutional, as the Court did recognize a limited public ownership in water and, unlike the *Sporhase* statute, instream reservation requirements are facially evenhanded. Under the appropriations approach, on the other hand, instream appropriations are treated just like any other appropriation and they do not depend on the state's special status with regard to water.[235] In fact, some states allow private individu-

227 Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

228 *See Reeves*, 447 U.S. at 436-40 (discussing how the state can function as a market participant without violating the commerce clause).

229 *Sporhase*, 458 U.S. at 957.

230 MONT. CODE ANN. §§ 85-2-402, 85-2-311 (2007).

231 Matthews & Pease, *supra* note 226, at 626.

232 Ferguson, *supra* note 202, at 1730-31.

233 *Id.* at 1728.

234 *Sporhase*, 458 U.S. 941 (1982).

235 Ferguson, *supra* note 202, at 1728.

als or organizations to buy water rights and devote them to instream use.[236] This type of statute does not appear to run into any constitutional problems, as it is evenhanded and serves a legitimate conservation interest.[237]

Another potential loophole in the commerce clause doctrine involves the use of interstate compacts to get around the negative commerce clause and its requirement that states not interfere with interstate commerce in water. The idea behind this approach is that, as federal laws, interstate compacts are not subject to the negative commerce clause and therefore may constitutionally restrict interstate commerce. So, if two states were to create a compact saying that they would not export water, and Congress ratified the compact, the restriction would be constitutional.[238] The Court has given its approval of such compacts, but so far only one has been created: the Yellowstone River Compact, which declares that waters shall not be diverted from the Yellowstone River Basin.[239]

Attempts by states to read such intentions into existing compacts have not been as successful. New Mexico suggested that the Rio Grande Compact intended to apportion Rio Grande waters between Texas and New Mexico, and therefore New Mexico was entitled to keep the waters that had been apportioned to it.[240] The court declined to find such language in the Compact and rejected New Mexico's argument.[241] The problem for states trying to rely on existing compacts is that for courts to find a congressional authorization of export restrictions within a compact, the authorization must be unmistakably clear.[242] An allocation within a compact (if one is included, as was not the case between Texas and New Mexico in the Rio Grande Compact) is more likely to be viewed as an initial allocation, rather than a permanent one. This fact also creates a problem for states, such as Arizona, with statutes that prohibit exports of water allocated under a compact.[243] If the allocation was only meant to be the starting point, then the state does not have any special right to restrict commerce in the allocated water.

Colorado's statute requiring that all exports to states where, by compact, Colorado is required to "deliver" a certain amount of water (based on compacts that place minimum downstream flow requirements on upstream states), creates a whole new type of problem.[244] Can Colorado sell to downstream users the same water it was required to give to their state anyway under a compact? It seems contrary to the principles of the commerce clause that Colorado could require a downstream state to re-appropriate through individual permits all the water that had already been allocated to it under a compact before the downstream state can obtain any additional water from Colorado, simply because the water that already "belonged" to that state happens to pass through Colorado.

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236 *Id.* at 1730-31.
237 *Id.* at 1735.
238 Matthew & Pease, *supra* note 226, at 607.
239 *Supra* note 27, at 16.
240 City of El Paso, 563 F. Supp. at 383.
241 *Id.* at 384.
242 Kerr, *supra* note 27, at 16.
243 Ariz. Rev. Stat. Ann. § 45-292 (2008).
244 Colo. Rev. Stat. § 37-81-104 (2007).

Finally, some states have employed a new technique for avoiding commerce clause interference that case law has not addressed at all. Texas and Alaska have both enacted statutes prohibiting inter-basin transfers without special approval.[245] Although these types of statutes do not facially discriminate against interstate commerce, they have the effect of bolstering local commerce at the expense of non-local, including interstate, commerce. This underlying local preference probably means that statutes restricting inter-basin transfers would have to face the strict scrutiny test if challenged in court. Under this test, Texas, Alaska, and California would have to prove that their statutes are narrowly tailored and that alternatives do not exist. They will likely assert a conservation purpose, but the only possible way inter-basin use would promote this purpose is through groundwater recharge, which offers very limited benefits.[246] It is possible a court would find this reason enough to justify placing a greater burden on non-local commerce, but so far the strict scrutiny test has proven very difficult to overcome.

### B. What the Changing Situation Means to Western States on a Broader Scale

What these various types of statutes show is that the evolving commerce clause doctrine has changed the paradigm for how states must think about water and how states regulate it. States have been forced to consider and define what constitutes a beneficial use. The states have also had to develop ways to channel water into the most beneficial uses through regulation, but without the economic protectionism that limited the scope of this endeavor in past years. Finally, states have had to think about how to protect water for the future, with conservation requirements and minimum flows, so that the harms from all types of waste and over-appropriation are prevented from in-state as well as out-of-state use. If states do not change to meet this new regulatory paradigm, they should expect to face constitutional challenges in court.

The new status of water as an article of commerce will stimulate other changes as well. For one, more water interstate transfers will occur in the future. Already, several transfers are being considered. Besides the Texas-Oklahoma proposal, plans have been made to export water from Arizona to Nevada, and California has considered buying water from the Snake River in Idaho, or even from Alaska.[247] One company in Canada has already purchased an option to export water from Alaska.[248] And, as water scarcity becomes more severe in parts of the Western United States, and cities such as Las Vegas and Los Angeles continue to grow beyond the capacity of their water resources, the demand is only going to increase.

Ultimately, as with any free trade agreement, interstate water transfer availability will also lead to a better allocation of resources. Water will be moved from agricultural uses to more profitable municipal and industrial uses, flowing "uphill to money." For the states and cities receiving water imports, the supply will enable them to grow

245 TEX. WATER CODE ANN. § 11.085 (Vernon 2007); ALASKA STAT. § 46.15.035 (2008).

246 Gregory S Weber, *Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Law Challenges to Local groundwater Export Restrictions*, 34 SANTA CLARA L. REV. 373, 474-76 (1994).

247 *Supra* note 203.

248 Terry L. Anderson & Clay J. Landry, *Exporting Water to the World*, 118 WATER RESOURCES UPDATE 60, 63 Universities Council on Water Resources (January 2001).

beyond the natural limitations of their environment. For the states that export, they will have access to a market that enables them to profit from their natural resources, providing much needed revenue for underdeveloped areas. This sort of mutual benefit from efficient allocation of resources is precisely why the framers included the commerce clause in the Constitution. "So that each State is made the greater by a division of it resources, natural and created, with every other State, and those of every other State with it."[249] This principle should apply to water as well as to any other natural resource.

Finally, the new regulatory framework will encourage conservation in two different ways. First, conservation will be encouraged because state governments will be forced to think about how they can protect and conserve water without placing the entire burden on interstate commerce and ignoring in-state use. Second, putting a price on water will encourage conservation, because states, cities, and individuals will be faced with the opportunity cost of waste.[250] Studies show that by increasing the cost of water by just a small amount, conservation increases dramatically.[251] And, if state agencies, municipalities, farmers, and others could sell their water for a higher price, they are indirectly paying that price by using it themselves.

### C. What Should States do to Adapt to these Changes?

So, how should state governments respond to all of these changes in the way water is viewed? First, they need to examine their own water regulations. They should analyze them to see if they can withstand a constitutional challenge. State legislatures should also take this opportunity to make sure their regulations are doing the best possible job at protecting state water without interfering with commerce. With the increasing demand for water, states need to be sure that their water is used beneficently and efficiently, no matter where its destination.

Second, states need to consider ways of preserving water for non-economic uses such as environmental and recreational use, and to preserve its availability for future generations. These are not protectionist purposes, and regulations affecting them should not run afoul of the commerce clause if implemented evenhandedly. Some ways to achieve this goal include adding conservation measures as a requirement for appropriations, adding a requirement that new appropriations must not interfere with state conservation measures, or implementing instream flow regulations to reserve water within its source for the enjoyment of both citizens and visitors and for the protection of the environment.

Third, states should consider entry into the water market on terms that are favorable to their citizens. This policy means that when water is sold, individuals should reap the benefits through incentives such as lower taxes, local improvements such as better roads or public recreational opportunities, or even through lower water prices.[252] Such a system has worked in Sitka, Alaska, where citizens overwhelmingly sup-

249 West v. Kan. Natural Gas. Co., 221 U.S. 229, 255 (1911).

250 Anderson, *supra* note 248, at 60-61.

251 *Id.* at 60.

252 *Id.* at 64.

port water sales as they stand to reap millions of dollars worth of benefits.[253] This type of system could work in other states as well.

Ultimately, for individuals to support a water market, they, not governments and agencies, must reap the benefits of selling water, as well as face the opportunity costs if they choose not to sell, through both the loss of potential benefits and perhaps through the higher cost of their own water use as well. Although this kind of incentivizing is primarily aimed at potential export candidates, a corollary exists for importers as well. First, if individuals in states where water is scarce were faced with the true cost of their water, by allowing demand to raise prices, they would see the benefit of importing water, despite its steep costs. Second, aligning prices with supply and demand would provide incentives for individuals to stop channeling water toward inefficient uses, driving down overall consumption and the need for imports, while increasing the supply of water available for export. Overall, systems such as the one proposed here would stabilize the water market to a point at which the beneficial division of resources imagined by the founders would become a reality.

## IV. CONCLUSION

The way water is viewed by individuals, governments, and courts has changed drastically over the last 100 years. We have gone from a time when water was plentiful and states were free to hold onto their water if they so desired to a time where parts of the United States are facing eminent water shortages and are relying on their neighbors for support. As our Constitution is a living document, interpretations of the commerce clause have changed to match the changing environment and needs of the nation, ensuring that states do not place unreasonable burdens on commerce to the detriment of their neighbors and ultimately themselves. Many states have been slow to keep up with the changing doctrine and their regulations have faced challenges in court. The case of *Tarrant Regional Water District v. Hammond* is but the latest in a string of such cases, but it could lead to the downfall of even more protectionist statutes in its wake. Other states have begun to adapt to the new paradigm and are creating statutes that seek to conserve and preserve state water while eliminating protectionist distinctions between in-state and out-of-state use. As the demand for water continues to increase and state economies continue to become more interconnected, the Constitution will continue evolving to address such changes and states must evolve, too. State governments need to re-examine their regulations to ensure that they are protecting water to the maximum extent possible while at the same time making sure they are adapting to take advantage of the benefits of a national water market.

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253 *Id.*

# Recent Developments



## Air Quality

### How the EPA's New Ozone Standard May Affect Texas

To improve the protection of both public health and ecosystems, the EPA significantly strengthened its national ambient air quality standards (NAAQS) for ground-level ozone (smog) on March 12, 2008. Environmental Protection Agency, EPA Fact Sheet: Final Revisions to the National Ambient Air Quality Standards for Ozone 1 (2008), http://www.epa.gov/groundlevelozone/pdfs/2008_03_factsheet.pdf (last visited Apr. 25, 2008). The EPA decided to lower the eight-hour primary and the eight-hour secondary standards from their previous 1997 levels of 0.08 parts per million (ppm). *Id.* The new standard for both primary and secondary is 0.075 ppm. *Id.* The new standard is measured out to three decimal places, while the old one was only measured out to two decimal places, and therefore, allowed rounding that effectively raised the standard to .084. *Id.* The EPA decided to make this change after its studies showed that some parts of the country that are actually meeting the 1997 standards still have concentrations of ozone that are damaging to vegetation and ecosystems. These concentrations may also give cause for concern regarding human health problems, such as bronchitis, aggravated asthma, hospital and emergency room visits, non-fatal heart attacks, and premature deaths. *Id.*

An area will be in compliance with the new standard if "the three-year average of the annual fourth-highest daily maximum eight-hour average at every ozone monitor is less than or equal to the level of the standard." *Id.* at 2. Thus, each of the several ozone monitors in an area must be at or below 0.075 ppm for the area to demonstrate attainment. Telephone Interview with Kelly Keel, SIP Team Leader, Texas Commission on Environmental Quality (TCEQ) in Austin, Tex. (Apr. 14, 2008). The EPA's finalization of the new standard in March 2008 was the first step in the process of implementation. The next step requires each state to provide recommendations for which areas of the state will be classified as non-attainment according to the new standard; the states must submit these recommendations to the EPA by March 2009. EPA Fact Sheet: Final Revisions to the National Ambient Air Quality Standards

FOR OZONE at 3. By March 2010, the EPA will move forward on the states' recommendations. *Id.* at 4. If states have insufficient information to determine whether an area has reached attainment, the EPA will make such designations by March 2011. Finally, by 2013, states must submit State Implementation Plans (SIPs) incorporating strategies to reach the new standard to the EPA. *Id.* The most important part of the SIP is the Control Strategy section, which sets out the substantive programs designed to attain the NAAQS, including the targets, plans, and emission controls for each non-attainment area. TCEQ, SIP: INTRODUCTION TO THE TEXAS STATE IMPLEMENTATION PLAN 1, http://www.tceq.state.tx.us/implementation/air/sip/sipintro.html (last visited Apr. 25, 2008).

Based on the current design values available on the TCEQ website, currently two major areas in Texas are designated as non-attainment based on the old 1997 standards: the Dallas-Forth Worth area and the Houston-Galveston-Brazoria County area. TCEQ, TEXAS CITIES' COMPLIANCE WITH EIGHT-HOUR OZONE STANDARD, http://www.tceq.state.tx.us/cgi-bin/compliance/monops/8hr_attainment.pl (under the drop-down menu for "year," select "2007"; then click the button that says "generate report") (last visited Apr. 25, 2008). Additionally, five other areas of Texas are currently at or close to attainment but are likely to be designated as non-attainment when the new standard takes effect. These areas are Northeast Texas, Beaumont/Port Arthur, San Antonio, Austin, and El Paso. Telephone Interview with Kelly Keel, SIP Team Leader, TCEQ.

These design values for 2007 are based on an average of the data from 2005, 2006, and 2007. TEXAS CITIES' COMPLIANCE WITH EIGHT-HOUR OZONE STANDARD, at 1. The data from 2007 has not yet been quality-assured, so it is possible that the 2007 design values could change before Texas submits the data to the EPA in March 2009. Telephone Interview with Kelly Keel, SIP Team Leader, TCEQ. While information about ozone levels from 2008 is available on the TCEQ website as well, this data is both preliminary and insufficient to support reliable conclusions. *Id.* Because the height of ozone season in Texas is during the summer and early fall, the data from the first few months of 2008 cannot tell us much at this point. *Id.*

On August 13, 2008, the U.S. Court of Appeals for the Fifth Circuit heard a challenge to the EPA's final rulemaking action approving the Mid-Course Review State Implementation Plan ("MCR SIP") that the State of Texas submitted for the Houston/Galveston/Brazoria Severe Ozone Nonattainment Area ("HGB area"). *Galveston-Houston Ass'n for Smog Prevention (GHASP) v. U.S. E.P.A.*, No. 06-61030, 2008 WL 3471872 (5th Cir. Aug. 13, 2008). The Galveston-Houston Association for Smog Prevention (GHASP) filed the challenge. GHASP contended that:

(1) the EPA acted arbitrarily and capriciously in approving the MCR SIP because it does not demonstrate attainment of specified emissions reductions; (2) the EPA acted arbitrarily and capriciously in relying on weight of evidence analysis to excuse modeled nonattainment; and (3) by approving the MCR SIP, the EPA violated the non-interference or anti-backsliding provision of the Clean Air Act.

*Id.* at 746. The court denied the petition for review of the rulemaking action. *Id.* at **8. The court held that EPA did not act arbitrarily and capriciously in any of the above circumstances and that, in fact, the EPA offered rational reasons for all of the decisions made in approving the SIP. *Id.* at **1.

The specific decisions challenged were: (1) the exclusion of three days from the photochemical modeling analysis of the Houston-Galveston-Brazoria area's air pollution by the TCEQ; (2) the exclusion of a particular day from the attainment demonstration, when the temperature on that date was a record high, and the heat, when taken together with atypical wind patterns, created an unusually high ozone level in the area; and (3) the determination that the new strategy contained in the MCR SIP performed better under the eight-hour standard than the original SIP (despite the argument that several monitors showed higher ozone levels under the MCR SIP). *Id.* at **3-8. Based on the court's decision, it is likely that any further challenges to EPA final rulemaking action will also give deference to the EPA's approval of SIPs.

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## Natural Resources

### Environmental Impact of the Waiver Legislation and the Construction of the U.S./Mexico Border Wall

The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which Congress enacted on September 30, 1996 and has amended several times, paved the way for the U.S./Mexico border wall currently under construction. *See* 8 U.S.C. § 1103 (2008). This column provides background on the legislation that led to construction of the border wall as well as the recent litigation involving the environmental impacts associated with the wall. The column also summarizes the research that the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Patrol (CBP), and U.S. Border Patrol (BP) conducted and published on the potential environmental impacts the wall and its construction may have and the mitigating techniques being employed.

#### Border Wall Legislation

##### IIRIRA of 1996

Section 102 of the IIRIRA, titled "Improvement of Barriers at Border," is the catalyst for most of the litigation involving environmental issues that the wall causes. *See County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp.2d 58 (D.D.C. 2008). Section 102(a) confers power on the United States Attorney General to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 §102(a), 8 U.S.C. § 1103 (2006). Additionally, Section 102(c) provides a waiver from the requirements of both the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 "to the extent the Attorney General determines neces-

sary to ensure expeditious construction of the barriers and roads under this section." *Id.* § 102(c).

#### REAL ID ACT OF 2005

TheREAL ID Act of 2005 amended several sections of the IIRIRA, including Section 102(c). The amendment widened the scope of the waiver authority—now providing that the Secretary of Homeland Security (Secretary) "shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." REAL ID Act, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 3068; *see* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2309, 2311 (2002) (authorities of the AG in Section 102 of the IIRIRA are transferred to the Secretary). The amendment also granted exclusive jurisdiction to hear claims arising from the actions of the Secretary of Homeland Security to the district courts of the United States and limited the cause of action to those alleging a violation of the U.S. Constitution. REAL ID Act, § 102(c)(2).

#### SECURED FENCE ACT OF 2006

The Secured Fence Act of 2006 ordered the construction of hundreds of miles of additional fencing (or "wall") along the southern border of California, New Mexico, Arizona, and Texas in areas that are prone to immigration and drug trafficking. Pub. L. No. 109-367, §3, 120 Stat. 2638, 2639 (2006).

The end result of these three acts is to afford the Secretary the authority to waive all environmental laws deemed necessary to ensure the expeditious construction of over seven hundred miles of double-reinforced fence along the border.

### RECENT LITIGATION PERTAINING TO THE LEGISLATION

Relatively few cases to date have addressed the waiver provision in the legislation. However, the cases that have been brought follow the Secretary's filing of a petition waiving environmental laws for the sake of construction. In each of these cases, the plaintiffs requested an injunction, and in each case, the court denied injunctive relief. *See County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp.2d 58 (D.D.C. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp.2d 119 (D.D.C. 2007), *cert. denied*, 128 U.S. 2962 (2008).

The litigation has included constitutional challenges that the waiver legislation is a violation of the Presentment Clause because it allows the Secretary to amend and alter environmental laws and disrupts the balance between the federal power and state power. *County of El Paso*, 2008 WL 4372693 at *3–10, *Save Our Heritage*, 533 F. Supp.2d at 62–64, 527 F. Supp. at 123–29. Litigants have also asserted that the delegation of authority is unconstitutional because of the lack of boundaries provided. *Id.* The courts repeatedly have denied all three bases for the challenges.

The plaintiffs in *County of El Paso v. Chertoff* went further in their claim for an injunction, claiming irreparable injury and significant environmental harm if construction were permitted to go forward.

### Claim of Irreparable Injury

The plaintiffs claimed that if the court did not grant them an injunction, irreparable injuries to both the El Paso Water Improvement District No. 1 (District) (a political subdivision of Texas that delivers surface water from the Rio Grande to lands in El Paso County) as well as to specific species would result. 2008 WL 4372693 at *10.

Damage to the Water District. The plaintiffs alleged that waiver of the requirements of environmental laws would impair the District's ability to deliver water to the City of El Paso and to farmers in the surrounding area. *Id.* Upholding the waiver right, according to the District, would cause debris to build, damaging the facilities and infrastructure of the District. *Id.* The court rejected this claim, finding the allegations of harm to be conclusory and without proof. *Id.*

Threaten the Survival of Certain Species. The plaintiffs also contended that the waiver of environmental laws applicable to the construction would cause irreparable damage to the Lower Rio Grande Valley's wildlife corridor. *Id.* They claimed that the impenetrable wall would be a barrier to many species that frequently roam the land, including the endangered ocelot and jaguarundi. *Id.*

The defendants countered that DHS was aware of these dangers and had three mitigating measures in place to address these concerns: (1) installation of over 400 'cat holes' that allow for the passage of small animals, including both the ocelot and jaguarundi cats, along with a four-inch gap between the ground and the wall allowing for the passage of small animals; (2) Environmental Stewardship Plans (ESPs) that analyzed the environmental impacts of the fence and provided Best Management Practices (BMP) to help mitigate such impacts; and (3) a $ 24 million fund that was appropriated to help mitigate impacts to threatened and endangered species, wetlands, and cultural resources. *Id.* at *11. Based on the mitigating measures, the court found the plaintiffs did not have a sufficiently compelling case of irreparable injury to justify a preliminary injunction. *Id.* at *12.

### Environmental Harms Outweigh the Harms to the DHS

The plaintiffs' final argument was that the harm DHS would suffer through the granting of the injunction would merely be economic whereas the environmental harm that would result from allowing the construction to continue would be much more severe. *Id.* at *11.

In response, the defendants offered proof that the public interest in enforcement of immigration laws is substantial and would help increase safety and reduce the threat to public health. *Id.* The defendants also argued that the reduction of illegal immigration would have a beneficial environmental impact by eliminating the adverse environmental effects associated with illegal immigration, including trash, human waste, abandoned vehicles, the creation of roads and trails, and the destruction of sensitive vegetation. *Id.* Furthermore, the defendants contended that the reduction of illegal immigration would help reduce the risk of parasite infestation and the spread of disease that could potentially impact native fish and wildlife. *Id.* The court found that these benefits outweighed the potential harm, and rejected the injunction. *Id.* at *12.

### Environmental Stewardship Plans

As noted in the *County of El Paso* case, one of the tools the DHS has implemented to evaluate the environmental impact of the border wall and the BMPs necessary to

mitigate such impacts is Environmental Stewardship Plans (ESPs). *Id.* at *11. DHS has subdivided the border into thirteen U.S. Border Patrol Sectors, each of which is evaluated as a resource area. DHS has completed EPSs for eight of the sectors —Yuma, El Centro, San Diego, Rio Grande Valley, Tucson, Del Rio, El Paso, and Marfa.

For each resource area considered, the EPSs examine the effects of the construction project as well as the BMPs.

The following is a brief summary of conclusions of the eight ESPs published to date taken from the DEP'T OF HOMELAND SECURITY, ENVIRONMENTAL STEWARDSHIP PLAN FOR CONSTRUCTION, OPERATION, AND MAINTENANCE OF TACTICAL INFRASTRUCTURE (2008), *available at* http://www.borderfenceplanning.com (follow hyperlinks for individual geographic sectors).

#### AIR QUALITY

DHS concludes that the expected air quality impact is mostly minor and temporary in nature. DHS plans to mitigate these effects through equipment maintenance, a low speed limit at construction sites, a dust control plan, and a fire prevention and suppression plan.

#### NOISE

DHS also concludes that the expected noise impacts will be minor and temporary in nature and will only occur during construction. Equipment maintenance, use of tools such as mufflers and baffle boxes, and construction away from population centers are the planned mitigating techniques.

#### LAND USE AND VISUAL RESOURCES

DHS feels that no additional impacts will affect land use and visual resources and expects more beneficial effects such as reduced vandalism, habitat degradation, debris, and wildfires.

#### GEOLOGY AND SOILS

The ESPs predict mostly minor adverse impacts to the topsoil layers. Mitigating plans include a floating fence design, equipment remaining on the roads rather than the soil, avoidance of highly erodible soils, only using preexisting roads, implementing a dust control plan, stockpiling surface soils and replacing the soil after construction, as well as implementing a storm water pollution prevention plan (SWPPP) and a spill prevention control and countermeasure plan (SPCCP).

#### WATER USE AND QUALITY

Water Resources: The ESPs conclude that minor erosion impacts are possible. DHS plans to mitigate erosion through the implementation of a SWPPP and a SPCCP.

Hydrology and Groundwater: Moderate hydrology and groundwater impacts are expected according to the ESPs, including a reduced flow to areas that support threatened species. Re-vegetating the area to abate runoff and wind erosion, the SWPPP, the SPCCP, and use of the construction mitigation and restoration plan (CMRP) are all being considered by DHS to help abate this issue.

Surface Waters and Waters of the U.S.: The EPSs indicate that adverse effects to surface waters are expected. DHS plans to implement the following practices to help reduce the impact of the border wall construction on the waters: returning top soil to preserve root growth, stopping construction during heavy rains, using a fence type that will allow water passage, minimizing construction on wetlands, and implementing the DHS SWPPP and SPCCP.

Floodplains: A direct impact to floodplains due to construction of the border wall is expected in some locations according to the ESPs. The DHS will utilize appropriate fence design and placement to allow the flow of water to mitigate this adverse effect.

#### Biological Resources

Vegetation Resources: DHS is projecting minor to major disturbances to the vegetation around the construction. Biological monitoring, flagging of certain vegetation to help avoid it during construction, salvaging certain vegetation such as agave, harvesting the seeds of certain vegetation, keeping brush removal to a minimum, and minimizing weeds in fill material are some mitigating techniques that DHS has planned. DHS also expects some benefits to result from the construction activity, such as removal of invasive plants and less disturbance of vegetation in some areas due to a reduction in illegal immigrant traffic.

Wildlife and Aquatic Species: The ESPs reflect the construction may cause a major impact to wildlife and aquatic species. To help minimize the impact, DHS plans to conduct surveys, flag and avoid nests, construct the fencing to allow for passage of certain animals, cover steep-walled holes or equip them with ramps to prevent entrapment, and cover vertical poles to prevent roosting and entrapment.

Threatened and Endangered Species: The ESPs report that threatened and endangered species in the examined areas are expected to suffer minor impacts, if any, that will have short and long term effects on certain species due to the loss of habitat. DHS plans to flag certain natural areas and stop construction if certain species are spotted.

#### Cultural Resources

DHS does not expect any impacts to cultural resources indicated in the ESPs, but DHS plans to halt construction to investigate if these resources are found.

The original deadline for the construction of the border wall was December 2008. However, in some sectors this deadline has been pushed back. The effects of Congress' grant of authority through the waiver legislation, as well as any environmental effect of the construction made possible by the waivers, both have yet to be fully recognized.

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## SOLID WASTE

### NEW STANDARDS REGARDING ASSESSMENT OF VAPOR INTRUSION

This article was written based on the information provided from: *Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions*, The American Society for Testing and Materials, ASTM E 2600-08.

#### INTRODUCTION

In March 2008, the American Society for Testing and Materials (ASTM) introduced "Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions." The Vapor Intrusion (VI) standard may be applied independent of, or in combination with, ASTM's commonly used Phase I environmental site assessment.

Vapor intrusion into structures is a recently identified problem that has left federal and state agencies scrambling for solutions. The Texas Commission on Environmental Quality (TCEQ) has yet to publish vapor intrusion assessment guidance, but the United States Environmental Protection Agency (EPA) issued draft guidance in 2002. The VI standard was created in response to the increasing litigation arising from Phase I assessments that did not consider vapor intrusion. ASTM's purpose in publishing the standard is "to define good commercial and industry practice" for conducting a vapor intrusion assessment of property involved in a real estate transaction. The VI standard is voluntary and "is not a requirement of and does not constitute, expand, or in any way define 'all appropriate inquiry' as defined and approved by U.S. EPA under CERCLA..."

ASTM has also introduced new terms with the VI standard. Chemicals of Concern (COC) are harmful chemicals in the subsurface environment that are known or expected to be present and can intrude into a structure as a vapor. A Vapor Intrusion Condition (VIC) refers to:

> the presence or likely presence of any COC in the indoor air environment of existing or planned structures on a property caused by the release of vapor from contaminated soil or groundwater on the property or within close proximity to the property, at a concentration that presents or may present an unacceptable health risk to occupants.

A Potential Vapor Intrusion Condition (pVIC) exists when screening tests suggest the presence of a VIC, but not enough data is available to determine the presence or likely presence of COC.

The VI standard consists of four tiers: Tier 1 relies on public records and data to screen the property for potential vapor intrusion conditions; Tier 2 is a further screening step that uses invasive and non-invasive procedures at the site; Tier 3 uses interior and exterior testing and applies the results to agency guidelines to determine whether vapor intrusion results in an indoor air quality that can threaten human health; and Tier 4 provides three options to mitigate a potential or actual vapor intrusion condition. The standard starts with the Tier 1 screening evaluation, after which it is up to

the client and the environmental professional performing the assessment to decide whether they should perform further tests or to proceed to Tier 4 mitigation.

### Tier 1

Tier 1 is the initial screening step and can either supplement a Phase I assessment, in that the data relied upon during a Tier 1 assessment is the data collected in a Phase I assessment, or be performed independent of the Tier 1 assessment. Tier 1 assessment considers groundwater flow direction, depth to groundwater, soil characteristics, information about the source of contamination, information about the target property, and potential subsurface pathways that may accelerate vapor migration. Three tests can be performed in Tier 1: (1) a search of the surroundings to determine if any known or suspect contaminated sites are present in the area, (2) a COC test to see if any of the known or suspected sites have released COC, and (3) a plume test to determine if the plume associated with a source of contamination is close enough to buildings on the target property to cause an indoor vapor release.

The search distance test looks for known or suspected sources of contamination located within the primary and secondary Areas of Concern (AOC). The primary AOC surveys everything surrounding the target property with the search distance depending on the source of contamination. For sources of non-petroleum contamination the search extends one-third of a mile from the property. For sources of petroleum contamination the search extends one-tenth of a mile. The secondary AOC search looks for potential contamination sources that are up gradient from the target property with the search distance between one-third and half of a mile surrounding the property depending on whether non-petroleum or petroleum contamination is suspected.

If the search distance test reveals known or suspected contaminated sites nearby, a COC evaluation is done to determine if any of those contaminants are COC. If COC are not present, then the assessment report will indicate that a pVIC is not a likely concern at the property. If COC are present and soil sampling data is available and relevant, a plume test will be conducted. While plume tests are normally part of a Tier 2 assessment, if the requisite information has already been gathered as part of a Phase I assessment, it will be included in Tier 1. If COC are present but soil data is not available, a plume test cannot be conducted and instead the assessment report will presume that a pVIC exists. The client and the professional can then decide to move on to Tier 2 for more investigation or move directly to Tier 4 mitigation.

### Tier 2

Tier 2 is a more refined screening assessment that uses both non-invasive and invasive measures. The non-invasive step is the plume test, which determines whether the nearest edge of the contamination plume is within the critical distance. Critical distance is evaluated by assessing the distance from the nearest edge of the plume to the nearest structure on the target property or the property boundary if the property does not have any structures on it. If the distance between these two points is less than 100 feet (for most COC) or 30 feet (for non-dissolved petroleum contaminants) then a pVIC exists. If the plume is close enough, the environmental professional should compare contaminant concentrations to regulatory guidelines to determine if a VIC is present. If the distance is greater than or equal to those measured distances, the assessment report will presume that a pVIC is not a likely concern at the property. It

should be noted that the environmental professional performing the test may modify the critical distance based on site conditions, his or her experience, or applicable regulation. If the environmental professional makes this modification, then the justification for the modification needs to be included in the report.

The non-invasive plume test can be performed only if certain information is available. That information, which is typically gathered in a Phase II assessment, includes the sites remediation status, the size of the contaminant plume, the plume's behavior, and the specific COC present and their levels of concentration. If this information is not available, it will need to be gathered by the invasive step of Tier 2, which requires soil sampling at the target site and surrounding properties.

### TIER 3

If neither the Tier 1 nor Tier 2 assessments result in a conclusive finding, the client may choose to go directly to Tier 4 remediation or to Tier 3 for more sophisticated testing and analysis. Tier 3 provides a "toolbox" of investigative processes that can be used, including soil sampling, groundwater sampling, sub-slab sampling, and indoor air sampling (if property has structures). In determining the scope of the investigation, the VI standard tells assessors in Tier 3 to refer to federal or state vapor intrusion guidance. Because Texas does not have vapor intrusion guidance, the assessor would need to refer to the 2002 EPA draft guidelines. Comparing the test results with the regulatory guidance will allow the environmental professional to determine if a VIC exists.

### TIER 4

Tier 4 presents mitigation strategies that can be taken as a precautionary measure in the finding of a pVIC or out of necessity in the event a VIC is found. Mitigation options include: institutional controls, such as land use or deed restrictions; engineering controls, such as COC source removal or treatment, or vapor barriers; and building design measures, such as open air parking or HVAC design. The scope of mitigation is determined by the client and the environmental professional.

### CONCLUSION

Litigation involving vapor intrusion and its impact on indoor air quality and human health is on the rise. ASTM's new VI standard can be an effective screening and mitigation tool for property owners, prospective buyers, and lenders concerned about liability for health problems that indoor air quality causes in their properties. Nonetheless, neither Texas nor the EPA have adopted the VI standards (the EPA has its own draft guidance on the matter) and "is not a requirement of and does not constitute, expand, or in any way define 'all appropriate inquiry' as defined and approved by U.S. EPA under CERCLA." ASTM wants environmental professionals to remind their clients that vapor intrusion is a non-scope consideration in the frequently used Phase I assessment, and that the new VI standard can be used to supplement the Phase I assessment or can be performed independently.

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## Water Quality & Utilities

### Austin City Council Amendment to SOS Ordinance

On November 8, 2007, the Austin City Council unanimously approved an amendment proposed by council member Lee Leffingwell, which added section 25-8-27 to the 1992 Save Our Springs (SOS) Ordinance (Chapter 25-8 of the City Code). Austin, Tx., City Code § 25-8, art. 12 (2008). The amendment was the product of an advisory group consisting of neighborhood interests, environmentalists, and developers, and is intended to allow redevelopment of certain properties in the Barton Spring Zones in a manner that could improve water quality protection. Transcript of Public Hearing, Item No. 121, Austin City Council, Nov. 8, 2007.

The original 1992 SOS Ordinance enacted water quality protections and was applicable only to new development. Austin, Tx., City Code § 25-8. The SOS Ordinance currently limits the amount of impervious cover on all new development projects to fifteen to twenty-five percent of the project. However, older, grandfathered commercial and office properties are allowed more impervious cover. *Id.* This new amendment limits the amount of impervious cover for redevelopment projects to current levels of impervious cover on the site, which includes buildings, roads, and parking lots. Austin, Tx., City Code § 25-8, art. 12.

The amendment is designed to improve water quality protection in the Barton Springs Zone by allowing redevelopment at existing levels of impervious cover only if developers, at their own expense, put in place additional water quality protection. *Id.* In exchange for redeveloping property, developers can implement certain measures, including adding water quality controls (sedimentation-filtration or non-degradation systems) and/or setting aside land or providing funding to the Barton Springs Zone Mitigation Fund to acquire land that would be preserved as open space. Austin, Tx., City Code § 25-8, art. 12. For a site with more than forty percent impervious cover, the project must also have sedimentation-filtration ponds for the entire site. *Id.* The Watershed Protection and Development Review will adopt rules to ensure that these proposed mitigation measures will offset the potential environmental impact of the redevelopment. *Id.*

Some members of the advisory committee had concerns that the redevelopment generated by the amendment would negatively impact neighborhoods in the Barton Spring Zone. Transcript of Public Hearing, Item No. 121, Austin City Council, Nov. 8, 2007. To address these concerns, the amendment provides for certain conditions of redevelopment projects that will trigger council review and a vote by council. Austin,

TX., CITY CODE § 25-8, art. 12. If a redevelopment project does not trigger a council review and vote, it will be administratively approved. *Id.* However, if the project does trigger a council review, the project will be treated as a zoning change and a majority vote by the council is needed for approval. *Id.* Council review is triggered by any potential redevelopment projects of land zoned as industrial or civic, projects in Austin's extra-territorial jurisdiction, and projects that increase traffic on the site (by 2,000 trips per day). *Id.* Additionally, redevelopment projects that will add twenty-five or more apartments or multi-family units and projects inconsistent with neighborhood plans will also come before the City Council. *Id.* In determining whether or not to approve a proposed redevelopment, Council will consider:

(1) benefits of the redevelopment to the community; (2) whether the proposed mitigation or manner of development offsets the potential environmental impact of the redevelopment; (3) the effects of offsite infrastructure requirements of the redevelopment; and (4) compatibility with the city's long-range planning goals.

*Id.* Council can approve redevelopment projects with a simple majority vote. AUSTIN, TX., CITY CODE § 25-8, art. 12.

Previously, landowners were discouraged from redeveloping grandfathered property because that would have required compliance with the stricter SOS Ordinance. Thus, several older properties remained with inefficient water quality systems. Letter from Lee Leffingwell to Member Constituents, Nov. 9, 2007. The amendment aims to encourage redevelopment that will improve water quality in the watersheds contributing to Barton Springs. *Id.*

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## Water Rights

### *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 04-06-00782-CV, 2008 Tex. App. LEXIS 1383 (Tex. App.—San Antonio Feb. 27, 2008, pet. review pending).

#### A. Background

The Clayton Sam Colt Hamilton Trust ("the Trust") owned a 3,200-acre tract of land in Val Verde County overlying the Edwards-Trinity Aquifer. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 2008 Tex. App. LEXIS 1383, at *1-2. In 1997, the Trust sold a fifteen-acre parcel of that land to the City of Del Rio ("the City"), expressly reserving for itself rights to the groundwater beneath the tract. *Id.* at *2. The Trust did not, however, expressly reserve a right of access to the groundwater beneath the fifteen-acre surface estate. *Id.* Instead, the deed stated that "Grantor RESERVES unto Grantor, its successors, heirs and assigns forever *all water rights associated with said tract*, however, Grantor may not use any portion of the surface of said tract for exploring, drilling or producing any such water" (emphasis added). *Id.* at *3.

Three years after the sale to Del Rio, the Trust's beneficiary discovered that the City had drilled several highly productive wells on its fifteen-acre tract, which were pumping hundreds of thousands of gallons of groundwater. *Id.* at *3-4. The Trust filed suit against the City seeking a declaratory judgment that 1) the Trust owned the groundwater beneath the City's fifteen-acre tract; and, 2) the City did not have any viable claim of ownership to the water beneath its tract. *Id.* at *4. The City counterclaimed for a declaration that "the warranty deed did not leave the Trust with 'right, title, or interest in any groundwater pumped to the surface by the City' on the fifteen-acre tract and that any groundwater pumped to the surface was the City's property." *Id.* at *4-5. Alternatively, the City sought condemnation of the Trust's reserved water rights. *Id.* at *5.

The Fourth Court of Appeals in San Antonio affirmed the trial court's ruling for the Trust, holding that 1) the water rights reservation to the Trust was valid and enforceable; 2) the City's argument that groundwater, until captured, cannot be the subject of ownership conflicted with Texas groundwater law; and, 3) ownership of the groundwater *in situ* beneath the fifteen-acre tract belonged to the Trust. *Id.* The Texas Supreme Court has granted the City's petition for review.

#### B. Reservation Of Water Rights Associated With The City's Tract

##### 1. A grantor of property may reserve water rights without reducing the subject water to possession: the "Rule of Capture" and "Absolute Ownership" doctrine

The City argued that the Trust's reservation did not prevent the City from drilling for groundwater on the fifteen-acre tract. *Id.* at *7. Invoking an often repeated interpretation of the Rule of Capture, the City claimed that "a corpus of groundwater cannot be 'owned' until it is reduced to possession," and because the Trust had never drilled on the fifteen-acre tract, it had never reduced the water beneath the tract to its possession. *Id.* at *7-8. It further argued that the "actual ownership" doctrine, also referred to as the Rule of Absolute Ownership of groundwater, merely gives the surface estate

owner the *right to acquire possession* of the water and does not refer to ownership of groundwater *in situ* beneath a tract. *Id.* at *8. According to the City's theory, because the Trust had never extracted the groundwater and reduced it to possession, the Trust had never acquired an ownership of the water it sought to reserve in its deed to the City. *Id.*

The Trust described the City's argument concerning the ownership of groundwater as the "bucket argument." The Trust contended that by the City's logic, reservations and groundwater conveyances would be impracticably limited to amounts that had been pumped and were ready for transport from the surface estate. *Id.* at *8-9. The Trust claimed that the City had "confused the interplay between the separate and distinct concepts of the Rule of Capture and Absolute Ownership theory." *Id.* at *9. The Fourth Court of Appeals agreed, and squarely rejected the City of Del Rio's interpretations of the Rule of Capture and Rule of Absolute Ownership.

The court of appeals described how the Rule of Capture, while a corollary to the Rule of Absolute Iwnership, has specific implications distinct from those of absolute ownership. *Id.* at *10. Under the Rule of Capture, a person may withdraw all of the water produced by a well located on their own land, even though the well may be extracting sub-surface substances from beneath property he or she does not own. *Id.* at *10-11. The court found that where absolute ownership exists, which creates the right to groundwater *in situ* under property law, the Rule of Capture is a rule of tort nonliability to neighbors for drainage. *Id.* at *11.

*Application of the Rule of Capture and Absolute Ownership Doctrine*

The court cited numerous cases in which it concluded that the Texas Supreme Court had held that groundwater *in situ* is part of the land and the landowner is the "absolute" owner of it. *Id.* at *10-11. In *Texas Co. v. Burkett*, for example, the court stated that groundwater is the "exclusive property" of the owner of the surface estate and is "subject to barter and sale as any other species of property." *Id.* at *10 (quoting *Texas Co. v. Burkett*, 296 S.W. 273, 277 (Tex. 1927)). Applying the Rule of Absolute Ownership, the court of appeals held that the Trust was entitled to sever, by reservation, the groundwater from the surface estate when it conveyed the surface estate to the City. *Id.*

The court further held that the City could not employ the Rule of Capture, because it never acquired ownership of the groundwater beneath its tract. *Id.* at *12. The rule shields from liability only landowners who withdraw groundwater they own, who incidentally drain water from beneath adjacent tracts. *Id.* at *10-11. The City did not have any right to withdraw groundwater from the tract of land that it purchased from the Trust. *Id.* at *12.

#### 2. A GRANTOR OF PROPERTY MAY SEVER THE GROUNDWATER ESTATE FROM THE SURFACE ESTATE EVEN WHERE GRANTOR RELINQUISHED ALL RIGHTS OF ACCESS

The City of Del Rio also argued that, because the Trust relinquished all rights of access to the fifteen-acre tract, its reservation of water rights beneath that tract violated both the Texas Constitution's prohibition of perpetuities and public policy. *Id.* at *13. It reasoned that, if the severance was upheld, the Trust effectively would have taken

"the exercise of that [water rights] interest, as well as the water itself, out of commerce forever.'" *Id.* The City claimed that the severance was therefore void and that the City had a right to drill on its tract. *Id.*

The court again disagreed. It concluded that because the Trust could still access that groundwater by pumping from its remaining land, "its relinquishment of its right to enter the surface estate of the fifteen-acre tract is not a relinquishment of its water rights reservation or of its right to capture the water beneath the tract." *Id.* at *14. On that basis, the court held that the severance did not violate the Constitution's prohibition against perpetuities. *Id.*

### C. Impact of Decision

In distinguishing the Rule of Capture from the Rule of Absolute Ownership, the court of appeals in *City of Del Rio* case resolved for now the heavily disputed issue of whether a landowner owns groundwater *in situ* even if it has never been pumped. *Id.* at *11. Even prior to extraction, the court held that groundwater is the exclusive property of the surface owner and may be transferred in the same manner as any other type of property. *Id.* at *10. Similarly, a grantor may transfer land but reserve all rights to the groundwater underneath without retaining rights of access on the surface estate. *Id.* at *14.

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## FEDERAL CASENOTES

### Septic Systems on Wetlands Cause Pollution: *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008)

In *United States v. Lucas*, a developer in Jackson County, Mississippi was convicted of violations of the Clean Water Act (CWA), mail fraud, and conspiracy. *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008). The defendants included: Robert Lucas; Lucas' companies, Big Hill Acres, Inc. and Consolidated Investments, Inc.; his daughter, Robbie Lucas Wrigley; and M.E. Thompson, Jr., an engineer that Lucas employed for the subject project. *Id.*

According to the United States Environmental Protection Agency and the Corps of Engineers, the defendants fraudulently sold property and septic tanks on wetlands they claimed were dry. *Lucas*, 516 F.3d at 322. The property, Big Hill Acres, was eight miles from the Gulf of Mexico. *Id.* The saturated land could not support the septic systems, and when many of the tanks failed, pollutants were discharged into the wetlands. *Id.* The defendants were convicted in the United States District Court for the Southern District of Mississippi for the scheme and resulting pollution. *Id.* at 323.

On appeal, the defendants argued that Big Hill Acres was not under the jurisdiction of the CWA because it was not adjacent to navigable waters. *Id.* at 323. They also argued that septic systems were not subject to the CWA's National Pollution Discharge Elimination System (NPDES) permitting requirements. *Id.* at 329. The court of appeals affirmed all convictions. *Id.* at 351.

### I. JURISDICTION OF THE CLEAN WATER ACT

The first basis of the defendants' appeal was the jury instructions regarding the applicability of the CWA. *Id.* at 323. The defendants complained that the proffered instructions did not properly state the requirement of a "significant nexus" between the wetlands at Big Hill Acres and "waters of the United States." *Id.* The CWA covers only "waters of the United States," that is, navigable waters, and any waters adjacent to them. *Id.* The court of appeals reviewed the jury instructions for abuse of discretion, relying on the plurality and concurring opinions in *Rapanos v. United States*, 547 U.S. 715 (2006), and found none. *Id.* at 324.

The defendants also contested the sufficiency of the evidence that led to the jury finding of proper CWA jurisdiction. *Id.* at 325. The court looked to *Rapanos* for guidance on the definition of "waters of the United States." *Id.* at 325-326. The plurality in *Rapanos* defined waters of the United States as "relatively permanent, standing or flowing bodies of water." *Id.* at 326 (*quoting Rapanos v. U.S.*, 547 U.S. 715, 732 (2006)). The court noted that under *Rapanos*, wetlands qualify as waters of the United States if they meet two conditions: (1) they must be adjacent to waters of the United States, and (2) a connection must exist between these waters and the wetland such that it is "difficult to determine where the 'water' ends and the 'wetlands' begin." *Id.* The court also looked to the *Rapanos* concurrence, which concluded that wetlands are subject to the CWA if a "significant nexus" exists, meaning that the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as navigable." *Id.* at 327 (*quoting Rapanos v. U.S.*, 547 U.S. 715, 779). Evidence presented at trial, including maps and on-the-ground and aerial photographs, showed continuous waterways from Big Hill Acres to the Gulf. *Id.* at 326. The court of appeals concluded that a rational trier of fact could have found this evidence met the *Rapanos* standard. *Id.*

Next, the defendants claimed that the CWA's definition of wetlands was unconstitutionally vague, and moved to dismiss the CWA charges. *Id.* at 323. The district court denied this motion, and the court of appeals reviewed the denial *de novo*. *Id.* at 327. The court first noted that several agencies had warned the defendants that they were building on wetlands. *Id.* at 328. Furthermore, the court concluded that "men of common intelligence" should have been aware of the possibility that they were building on wetlands. *Id.* (*quoting Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001)). The court of appeals thus rejected the constitutionality argument. *Id.* at 328.

### II. NPDES PERMITTING

The defendants further argued that septic systems were not subject to NPDES permits. *Id.* at 329. The NPDES covers the basic EPA permitting process under the CWA. 40 C.F.R. § 122 (2007). NPDES permits apply to both "point source[s]" and "treatment works treating domestic sewage." 40 C.F.R. § 122.1 (2007). A point source

is a "discernible, confined, and discrete conveyance...from which pollutants are or may be discharged." 40 C.F.R. § 122.2 (2007). The definition of "treatment works" explicitly excludes septic systems. *Id.* The defendants argued that septic systems were not point sources either, and that they therefore did not require NPDES permits. *Lucas*, 516 F.3d at 330. The Fifth Circuit had never considered whether the CWA's NPDES process applied to septic systems. *Id.* at 332. It considered this case unique in that multiple septic systems had been installed directly into wetlands, creating a point source for pollution. *Id.*

The defendants also argued that the jury instructions established that septic systems were point sources without requiring the jury to make that finding. *Id.* at 334. The indictment did contain the language "from a point source, to wit, a septic system," but the jury instructions stated "[f]irst, that the defendants knew that they were discharging or causing to be discharged pollutants, and second, *from a point source.*" *Id.* The court concluded that the jury instructions properly required the jury to find, beyond a reasonable doubt, that septic systems were point sources. *Id.*

Defendants' final argument was that the jury instructions, which allowed for conviction if the jury concluded the defendants had caused the discharge, were in error. *Id.* at 335. They claimed that the law requires the actual dischargers of pollutants to obtain NPDES permits and that they had not caused the discharge. *Id.* They instead placed the blame on Big Hill Acres residents, pointing to 40 C.F.R. § 122.21(b), which states that it is the operator's duty to obtain a permit when the owner and operator are different. *Id.*; 40 C.F.R. § 122.21(b) (2007). The prosecution countered that the CWA provides for broad criminal liability that includes those who "*cause the violation of*" its requirements. *Lucas*, 516 F.3d at 335.

The Fifth Circuit had never before considered whether NPDES permits were required of individuals or corporations causing discharges. *Id.* at 337. Accordingly, the court looked to other circuits for guidance. In *United States v. Evans,* a Florida district court held a defendant labor camp responsible for human waste from the camp's workers because the defendant had likely built the illegal bypass of the camp's septic system. 36 ENVTL. L. REP. 20, 165 (M.D. Fla. 2006). Similarly, the trial court in *Friends of Sakonnet v. Dutra* held a corporate developer responsible for a septic tank that served thirty-three homes. *Friends of Sakonnet v. Dutra* ,738 F. Supp. 623 (D. R.I. 1990). Drawing from these cases, and considering the fact that Lucas' engineer oversaw the installation of Big Hill Acres' faulty septic systems, the Fifth Circuit did not find error in the jury instructions concerning the "causing" of discharge. *Lucas*, 516 F.3d at 337.

### III. Other Convictions

In addition to their CWA violations, the defendants were convicted of mail fraud and conspiracy. *Id.* at 321. The defendants argued that a waiver signed by Big Hill Acres residents exempted them from the warranty of habitability. *Id.* at 338. The court concluded that the mail was employed in the overall scheme, including the misrepresentation of the lots as dry, and upheld the conviction for mail fraud. *Id.* at 342.

The court also upheld the conspiracy convictions. *Id.* at 350. Lucas had hired M.E. Thompson, the engineer who certified Lucas's septic systems, only after the Mississippi Department of Health (MDH) had denied multiple applications from Lucas . *Id.* at 322. Circumstantial evidence proved that Thompson was in on the conspiracy and that he ignored warnings from the MDH. *Id.* at 343. Lucas's daughter, Robbie Lucas

Wrigley, told the MDH not to interfere with Thompson's job. *Id.* Wrigley, who was in charge of advertising and selling the lots, also represented them as "high and dry." *Id.* at 340. The court affirmed all conspiracy convictions. *Id.* at 350.

### IV. Conclusion

This case clarifies important points of water quality law. Because the area at issue did contain wetlands, under the plurality or concurring opinions' analysis in *Rapanos*, the acts fell within the CWA's jurisdiction. *See id.* at 328. Moreover, septic systems may be considered to be point sources and subject to NPDES permit requirements. *See id.* at 334.

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## State Casenotes

### Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas

*Editor's Note: This Recent Development reviews the same case as the lead article in this issue with the analysis of a different author.*

In *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas*, the plaintiff, Texas Citizens for a Safe Future and Clean Water ("Texas Citizens"), challenged the decision of the Texas Railroad Commission ("Commission") to grant a permit to Pioneer Exploration, Ltd. ("Pioneer") to operate an injection well for the disposal of oil and gas waste in the Barnett Shale area. No. 03-07-00025-CV2007, 2007 Tex. App. LEXIS 9502, at *1 (Tex. App.—Austin Dec. 6, 2007). Texas Citizens argued that the Commission denied them due process and failed to sufficiently consider the public interest in granting the permit. *Id.* While the Austin Court of Appeals rejected Texas Citizens' due process argument, the court did find that the Commission abused its discretion by failing to include public safety concerns in its consideration of the public interest. *Id.* at *26-27.

Pioneer sought a permit from the Commission to convert a defunct gas well into a commercial injection well for the disposal of drilling waste. *Id.* at *1-2. Texas Citizens and other local residents opposed the granting of the permit, and the Commission's hearing examiners allowed all parties to present evidence at two Commission administrative hearings. *Id* at *2. To obtain a permit for an injection well, the Commission requires that the applicant identify any existing wells within a quarter mile of a proposed well site, so that the Commission may take steps to ensure that the waste will not migrate following injection. *Id.* Pioneer's initial application stated that no wells existed within a quarter-mile radius of the proposed site. *Id.* at *3-4. However, during

the course of the hearing, the parties discovered that Pioneer relied on Commission maps that were inaccurate, and an existing well was located within the quarter-mile radius. *Id.*

Texas Citizens urged that Pioneer's permit application be dismissed. *Id.* at *4. Instead, finding Pioneer's application incomplete, the Commission chose to recess the hearing to allow Pioneer more time to investigate the existing well and to supplement its application. *Id.* Pioneer amended its application and performed a "remedial cement squeeze job" on the well to prevent migration from the proposed injection well. *Id.* at *5. After the second hearing, the Commission granted Pioneer the permit. *Id.*

On appeal, Texas Citizens claimed that the Commission violated its procedural due process rights by failing to dismiss the application at the initial hearing and by recessing the hearing to allow Pioneer to amend its application. *Id.* at *7. The court of appeals rejected these arguments, finding that Pioneer was allowed to supplement its application under the Texas Administrative Code and that Texas Citizens had ample opportunity to present evidence at both hearings. *Id.* at *8-10. Under these circumstances, the court did not find any due process violation. *Id.* at *11-12.

Texas Citizens also argued that the Commission abused its discretion by failing to consider public safety issues when it determined that the well was "in the public interest," which the Commission was required to do prior to issuing an injection well permit. *Id.* at *12; TEX. WATER CODE ANN. § 27.051(b)(1) (West Supp. 2006). The Commission found that, because the injection well would facilitate increased oil and gas production, it was in the public interest. 2007 Tex. App. LEXIS 9502, at *14-15. At the hearing, Pioneer proposed plans to operate the well twenty-four hours a day, seven days a week, with twenty to fifty trucks depositing one hundred barrels of saltwater waste at the site each day. *Id.* at *12-13. Texas Citizens contended that the site presented a danger to public safety, because the trucks would be using public roads frequented by children and other pedestrians. *Id.* at *13; *see also* TEX. WATER CODE ANN. § 27.51(a)(1) (West 2000) ("The commission may grant an application in whole or in part and may issue the permit if it finds . . . that the use or installation of the injection well is in the public interest.").

In response, the Commission maintained that its limited jurisdiction enabled it to take into account only increased oil and gas production in considering the public interest, and therefore, public safety and traffic concerns were necessarily outside the scope of its public interest inquiry. *Id.* at *13-15. The Commission reached this conclusion by engaging in statutory analysis. *Id.* at *17-20. It compared the sections in the Texas Water Code controlling the Commission's issuance of permits for oil and gas waste injection wells with those governing the Texas Commission on Environmental Quality (TCEQ), which issues permits for hazardous waste injection wells. *Id.* While largely identical, the Texas Water Code imposes an additional requirement on the TCEQ to find:

> ...that the applicant for a hazardous waste injection well not located in an area of industrial land use has made a reasonable effort to ensure that the burden, if any, imposed by the proposed hazardous waste injection well on local law enforcement, emergency personnel, or public roadways, will be reasonably minimized or mitigated....

TEX. WATER CODE ANN. § 27.051(a)(6) (West 2000). The Commission concluded that the lack of a similar provision pertaining to injection well permits evidenced the Legislature's intention to exclude the effect on public safety and roadways from the Commission's permitting decisions. 2007 Tex. App. LEXIS 9502, at *20.

The court rejected this conclusion, hypothesizing instead that the Legislature might have merely wished to ensure that the TCEQ took extra precautions with hazardous waste injection wells located in non-industrial areas. *Id.* The court repudiated the notion that "public roadways and local law enforcement, emergency medical, and fire-fighting personnel are not afforded consideration unless a hazardous waste injection well is proposed that will be located in a non-industrial area." *Id.* at *21. Instead, the court held that "the scope of 'the public interest' must be broader than the effect on oil and gas production" and that the Commission should also consider "legitimate public safety concerns." *Id.* at *22-23.

The court also denied the Commission's claim that the evidence was insufficient to show that the hearing examiners did not take public safety into account when determining that the well was in the public interest. *Id.* at *23-24. Furthermore, the court rejected the Commission's contention that it lacked the power to consider public safety and traffic concerns because those areas fell under the jurisdiction of other governmental agencies. *Id.* at *24-25. The court concluded that such a limited interpretation of the Commission's authority would subvert the Legislature's intent in issuing the "broad mandate" to consider the public interest in the granting of permits. *Id.* at *24-25. In addition, the court observed that the Commission's final order placed a number of conditions on the well's operation intended to promote public safety, thus undermining its attempt to disclaim authority to regulate safety issues. *Id.* at *25.

The court upheld its decision on rehearing. *Tex. Citizens for a Safe Future v. R.R. Comm'n of Tex.*, No. 03-07-00025-CV, 2008 Tex. App. LEXIS 4040 (Tex. App.—Austin May 23, 2008). In a concurring opinion, Justice Pemberton recognized that the Legislature gave the Commission little or no guidance as to what it should consider when determining whether an injection well is in the public interest. *Id.* at *1-5. As Justice Pemberton observed: "A statutory mandate that an agency consider the 'public interest,' without further guidance, more closely resembles a restatement of general powers or goals of government than an express statutory directive." *Id.* at *2. Nevertheless, Justice Pemberton suggested this obstacle could be overcome by considering the "public interest" within the particular context of the statute being implemented, which would inherently limit the scope of that determination. *Id.* at *3-4.

In another concurring opinion, Justice Waldrop rejected the arguments that the Commission and several amicus curiae made that traffic safety issues were beyond the scope of what the Commission should consider when granting an injection well permit. *Id.* at *5-14. While Justice Waldrop acknowledged that the Commission's primary purpose is to regulate the conservation and production of oil and gas, he found that this authority encompasses the duty to ensure that these activities are carried out "safely" and in a manner "consistent with public health and welfare." *Id.* at *7. Ultimately, both justices concluded that while the Commission retains discretion in determining whether a well is in the public interest due to its impact on public safety, the Commission cannot totally avoid that determination by disclaiming statutory authority or jurisdiction. *Id.* at *4, *13-14.

In *Texas Citizens*, the court endorsed a much broader conception of the public interest than the Commission had previously recognized under the provisions in the Texas Water Code governing waste injection wells. It is possible that future litigants may be able to rely on this decision to expand the number of factors that agencies and courts consider when determining the public interest in other contexts, especially as they pertain to public safety concerns. Those entities most likely to be affected are the Railroad Commission and agencies like the TCEQ, which are required by statute to consider the public interest but are given little guidance on how to make that determination. *See, e.g., City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 112 (Tex. 2006) (holding that the TCEQ must consider the public interest when determining whether an amendment to a water-use permit would be "detrimental to the public welfare" due to its effect on matters such as habitat, water quality, and existing water rights.). If *Texas Citizens* is interpreted broadly, these and other Texas agencies may be required to take a much more expansive view of the public interest than they have in the past when making agency decisions in the future.

A petition for review was filed with the Texas Supreme Court on August 7, 2008. Although the court has not reached a decision as to whether it will hear the case, the court has requested briefing on the merits and in response to amici briefs.

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## Publications

### The Cost of the Proposed Lieberman-Warner Climate Security Act

American Council for Capital Formation & The National Association of Manufacturers, Analysis of the Lieberman-Warner Climate Security Act (S. 2191) Using the National Energy Modeling System (2008), http://www.accf.org/pdf/NAM/fullstudy031208.pdf.

The American Council for Capital Formation (ACCF) and the National Association of Manufacturers (NAM) recently published a study asserting that the Lieberman-Warner Climate Security Act (S. 2191) (the "Bill"), if passed, will involve significant costs for the U.S. economy and significantly increase future energy prices, both in the short-term and in the long-term. American Council for Capital Formation & The National Association of Manufacturers, Analysis of the Lieberman-Warner Climate Security Act (S. 2191) Using the National Energy Modeling System 8 (2008), http://www.accf.org/pdf/NAM/fullstudy031208.pdf. The Bill has been the most seriously discussed legislation before the Congress in 2008. The Bill proposes to

reduce greenhouse gas emissions by imposing a carbon dioxide emissions cap of 5,775 million metric tons in 2012 that drops steadily down to a cap of 1,372 million metric tons in 2030. *Id.* at 7. The Bill also provides various mechanisms to accomplish this difficult task, including requiring the use of zero emissions alternative energy sources, creation of carbon sinks corresponding to the amount in excess of the target emissions amounts, and buying or trading emissions permits for up to 30 percent of target emissions. *Id.*

The ACCF/NAM study was conducted by the Science Applications International Corporation (SAIC) using the same methodology that the U.S. Energy Information Administration (EIA) uses when the government requests analysis regarding environmental policy decisions. *Id.* at 3-4. This model is known as the National Energy Modeling System, or NEMS. *Id.* at 3. The SAIC has plenty of experience in both the design and use of this particular model, as the company has served as a leading consultant to the EIA in the past. *Id.* at 4. The NEMS model relies heavily on given assumptions about twelve energy industry sectors that the Bill most directly impactsl. *Id.* ACCF and NAM provided two sets of assumptions: a high-cost scenario and a low-cost one. *Id.* at 5. In both cases, the predicted result is a rise in energy costs and a slumping economy. *Id.* at 8. According to the study, if Congress enacts the Bill, gross domestic product and average household income is forecasted to drop, while unemployment is expected to rise. *Id.* Moreover, the cost of most kinds of carbon dioxide emitting energies (including gasoline, natural gas, electricity and coal) is predicted to increase in both industrial and residential sectors. *Id.* at 7.

This predicted rise in energy prices is predicted to have its greatest effect on the poor. Katherine Ling, *Energy Prices: Will Climate Change Law Leave Some Consumers Out in the Cold?*, EARTH NEWS, Apr. 3, 2008, http://www.earthportal.org/news/?p=999. Today, the average household spends about three percent of its income on energy bills, while the poorest households spend as much as fifteen percent. *Id.* Programs are currently in effect to help relieve this financial difficulty, such as the Low Income Home Energy Assistance Program (LIHEAP) and the weatherization program, but these programs are at risk. *Id.* Funds have been declining for LIHEAP, and have been completely cut for weatherization. *Id.* With the passage of the Bill, the ACCF/NAM study estimates that the cost of energy could rise up to 129 percent by 2030 for electricity and up to 146 percent by 2030 for natural gas. ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT at 4.

Notably, however, the Lieberman-Warner Climate Security Act attempts to alleviate the energy needs of low income households by allocating some proceeds back to the communities in need. Ling at 1. A small percentage of revenue from the auction of carbon emission allowances will be returned to fund the existing aid programs. *Id.* One concern, though, is that the auction will not occur all at once, but in a slow trickle over the course of the act. *Id.* Therefore, while the poor may eventually get this share of the proceeds, the help may be slow in coming; their energy costs may rise before they receive the benefits. *Id.* Mark Wolfe, the Executive Director of the National Energy Directors' Assistance Association, hopes that the negative results projected by studies like ACCF/ NAM's will prompt politicians to look at current policies regarding energy costs for the poor. *Id.* He believes legislators should revise the Bill so as to allot more aid for low income households. *Id.*

The ACCF/NAM study also has its critics. Daniel J. Weiss, *A Broken Crystal Ball: Global Warming Solution Studies Will Overestimate Costs, Underestimate Benefits*, Center for American Progress, Feb. 26, 2008, http://www.americanprogress.org/issues/2008/02/crystal_ball.html. Weiss argues that the NEMS model is based on assumptions that represent technological building constraints and capital requirements that ACCF and NAM *believe* will be applicable during the course of the Bill. ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT at 5-6. The study expressly notes that the NEMS method "forecasts only economic decisions and does not predict, or include in its calculations, technical, societal and political decisions." *Id.* at 5. In fact, ACCF and NAM make it clear that they believe the years 2012 to 2030 will not see enough advancement in technology for alternative energy sources and emissions reductions, nor in methodology for market mechanisms, to meet the emissions reduction targets proposed in the Bill, and the numbers provided for in the study reflect these expected limitations. *Id.* Weiss explains that the negative economic results were predicted to occur because the model assumed the availability of only contemporary technology and conditions. Weiss at 1. The study did not account for future innovations or later adjustments of current practices. *Id.* Weiss observes that many past public policy changes have been met with the foretelling of economic misfortune to come — later to be found erroneous — and that this Bill may not be any different. Marianne Lavelle, *Why Dealing With Climate Change Won't Bankrupt Us*, U.S. NEWS, Mar. 13, 2008, http://www.usnews.com/blogs/beyond-the-barrel/2008/3/13/why-dealing-with-climate-change-wont-bankrupt-us.html. New economic challenges often give rise to new cost-effective technologies and other methodologies to solve the crisis. *Id.* Other industries have faced similar problems from social health and welfare policy initiatives: the textile industry had cotton dust, the metal industry had formaldehyde, and the plastic industry had vinyl chloride. *Id.* In each case, economic forces and technological development led the respective industries to achieving the public policy objective without a detrimental impact to the industry. *Id.*

The pattern has seemed to hold true for many environmental problems as well, as demonstrated by some aspects of the Clean Air Act of 1990. Weiss at 1. The Clean Air Act provided the first cap-and-trade pollution reduction program adopted in the U.S. *Id.* Its proposal inspired many studies that claimed horrible economic outcomes would result. *Id.* In the end, those economic predictions were proven wrong because of technological innovation and appropriate deployment of economic incentives to bring about that innovation. *Id.* The hard caps and deadlines forced polluters to reduce pollutants or purchase credits from those who had. *Id.* In doing so, the affected entities developed techniques to achieve more cost-effective pollution reduction wherever possible. *Id.* Weiss argues that the Lieberman-Warner Climate Security Act will likely foster this same innovative atmosphere, putting many engineers to work in figuring out how to emit less carbon dioxide while maintaining energy output and profits. *Id.* With these new technologies and methodologies are likely to come new projects and new jobs. *Id.* The proposed bill is also likely to raise employment in renewable energy sectors and to create new positions for those making homes and other structures more energy efficient. *Id.*

Weiss also notes that, while the study measured the economic costs of the Bill's environmental protection policies, many considerations went unmeasured. *Id.* First, the study did not address the benefits to human health. *Id.* The Office of Manage-

ment and Budget found the Clean Air Act had saved over $70 billion a year as a result of its health benefits. *Id.* Second, the study did not calculate the economic costs of not taking action. *Id.* A British treasury official has suggested that the global GDP would drop five percent per year in perpetuity if climate change is not controlled, and that that number could even be as large as 20%. *Id.* Unquestionably, accurately forecasting many of the costs and benefits of the Bill in a scientific manner is extremely difficult and subject to interpretation. *Id.* Although reductions in greenhouse gas emissions certainly will be economically costly, history reminds us that the direct economic predictions do not always come true because technologies and markets often rise to meet new challenges.

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## Changes in the Environment

**Locke Lord Bissell & Liddell** has formed a national Climate Change Practice Team to advise clients in responding to the diverse legal and economic impacts of global climate change. The multidisciplinary team consists of attorneys from the Firm's Corporate, Energy, Environmental, Government Relations, Insurance, Intellectual Property, Litigation, Real Estate, Tax and Technology practices. The Team will include Austin partners James W. Checkley Jr. and J. Alan Holman; Dallas partner Elizabeth E. Mack; and Houston partners John Arnold, M. Benjamin Cowan (the team leader), Brandon Lobb, Mark Miller, Edward A. Razim and Bill Swanstrom. Locke Lord Bissell & Liddell LLP is a full-service, national law firm of approximately 700 attorneys with offices in Atlanta, Austin, Boston, Chicago, Dallas, Houston, London, Los Angeles, New Orleans, New York, Sacramento and Washington, D.C. For more information on the Climate Change Practice Team, visit www.lockelord.com/climatechange.

**Gerald J. Pels** has rejoined Locke Lord Bissell & Liddell as a partner based in the Firm's Houston office. Pels, whose practice focuses on environmental compliance, permitting and litigation, has spent all but two years of his 26-year legal career at Locke Lord. **Gerald D. Higdon** also has rejoined Locke Lord as a partner in the Houston office. For 18 years Higdon has concentrated his practice exclusively in the area of environmental law, with significant emphasis on brownfields redevelopment and environmental counseling. Both Pels and Higdon return to Locke Lord from Sutherland, where Pels was Chair of Sutherland's national Environmental Practice Group. They both were members of that firm's Energy and Environmental Practice Group. Both Pels and Higdon are recognized in the "Best Lawyers" publication, and Pels has been recognized in Chambers Guide to Leading Lawyers since 2004. A frequent writer and lecturer on environmental issues, as well as a member of several local professional organizations, Pels received his law degree from the Vanderbilt University School of Law, and his A.B. degree from St. Joseph's University. Higdon has also had a significant presence in selected publications, and has delivered numerous presentations on topics related to the environment. He received his law degree from The University of Texas School of Law, and his Bachelor of Business Administration degree in Finance from Texas Tech University.

**Andrew Strong,** formerly of Pillsbury Winthrop Shaw Pittman LLP, was named General Counsel for the Texas A& M University System in March 2009. Mr. Strong served on the Executive Committee of the Environmental & Natural Resources Law Section for the 2006-2005 Bar years.

## ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE AND OTHER CONTINUING LEGAL EDUCATION

The Environmental and Natural Resources Law Section holds its annual Texas Environmental Superconference on August 5–7, 2009. The theme of the conference this year is "Viva Las Vegas."

For details about this great event and other CLE opportunities in the environmental and natural resources area, please see the Section's website at www.texenrls.org.

## SPECIAL ANNOUNCEMENTS

Please see the Section's website, www.texenrls.org, for additional and more current information.