A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions

By Eric Allmon & David Frederick

I. INTRODUCTION

The contested case hearing process reflects deeply held values of Texans who generally distrust the concentration of power in the hands of government and appreciate the value of providing a meaningful process for public participation in government decisions. Yet, in recent Legislative sessions, Industry groups have made several attempts to eliminate or constrain the contested case hearing process available to affected persons in the processing of an individual environmental permit by the Texas Commission on Environmental Quality (TCEQ). The contested case hearing process serves an important role by

providing an independent forum for the adjudication of factual disputes and subjecting TCEQ's permitting decisions to examination by persons particularly affected by a decision. By all indications, TCEQ's permitting process will continue to garner attention. In January of 2014, Speaker of the Texas House of Representatives, Joe Strauss, issued an interim charge to the House Committee on Environmental Regulation asking that the Committee study the environmental permitting processes at the TCEQ with particular attention on the contested-case hearing process.[1]

A wide range of stakeholders forged the basic contours of TCEQ's current permitting process through the development of compromise legislation in 1999, which balances the interests of the regulated community with those of the affected public. This permitting process allows for the early identification of issues of concern to facilitate dispute resolution, while also enabling TCEQ to benefit from the knowledge and expertise provided by affected persons. Ensuring that a meaningful opportunity exists for affected persons to participate in a contested case hearing improves the quality of decisionmaking in the permitting process by correcting flawed factual information sometimes contained in applications, and by often bringing to bear a level of expertise in the evaluation of an application that TCEQ, on occasion, simply does not possess.

Part II of this paper examines how the contested case hearing process represents a manifestation of Texans' distrust of concentrated power. Part III considers how the existing process developed legislatively. Part IV discusses how the hearing process plays out in practice. Finally, Part V examines various recent proposals offered to modify the contested case hearing process as used by TCEQ in the permitting process.

II. The Contested Case Hearing Process as a Reflection of Texas' Distrust of Government, Particularly the Strict Separation of Powers Clause Contained in the State Constitution

Before diving into the minutiae of the legislative and administrative development of the contested case hearing process, it is worthwhile to consider Texas' fundamental approach to the separation of powers as it informs the development of TCEQ's contested case hearing process. Society uses administrative law as a tool to maintain protections against the abuse of power by administrative agencies despite the blending of executive, judicial and legislative functions within those agencies.[2] The contested case hearing process exemplifies this role of administrative law.

In a manner reflective of the distrust of government held by Texas' citizenry, the Texas Constitution adopts a somewhat different approach to the separation of powers than that adopted in the United States Constitution. James Madison authored the federal constitution in response to the deficiencies of decentralized power under the Articles of Confederation and in a manner that reflects a qualified optimism regarding the

1 Letter from Joe Strauss, Speaker of the House, Texas Legislature, to House of Representatives, Texas Legislature (Jan. 31, 2014), *available at* http://www.house.state.tx.us/_media/pdf/interim-charges-83rd.pdf (listing interim committee charges for the 83rd Legislature).

2 Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 Tex. Tech. Admin. L.J. 287, 292 (2006).

role of government to improve society.[3] While Madison recognized that the accumulation of legislative, executive and judicial authority in the same hands constituted, "the very definition of tyranny,"[4] he also felt that a strict separation of powers could not be maintained as a practical matter.[5] So, he rejected as unnecessary an express declaration that the three branches of government may not be intermixed, such as Jefferson had proposed for the Constitution of the State of Virginia.[6]

The original Texas Constitution developed in 1836 reflects a much greater distrust of centralized government than did the federal constitution. Delegates to Texas' original constitutional convention chose to adopt language patterned after language earlier advocated by Thomas Jefferson that strictly separated the legislative, judicial and executive functions of government.[7] These delegates faced the task of developing a constitution for the Republic of Texas in the face of an advancing Mexican army, uncertain of when they may need to disband for safety, and while receiving pleas from assistance from others such as William Travis, who was at the same time battling Mexican troops at the Alamo.[8] Unsurprisingly, such circumstances imbued the Texas Constitution with a certain distrust of government power.

The Constitutional Convention of 1876 also occurred under conditions that hardly engendered support for the concentration of power in the hands of either government or economic special interests.[9] During this "Gilded Age," corruption characterized government at all levels.[10] At that time, memories of the Civil War were still fresh, and the citizenry had "suffered under a corrupt and autocratic regime that featured a carpetbag legislature, a despised governor, and his appointed judges."[11] Outside of Texas, a commentator at the time had noted that, in cooperation with the railroads, Standard Oil had done everything with the Pennsylvania Legislature but refine it.[12]

It is within these crucibles of 1836 and 1876 that Texas developed its strict constitutional separation of powers clause:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to

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3 Harold H. Bruff, *Separation of Powers under the Texas Constitution*, 68 TEX. L. REV. 1337, 1338 (1990).

4 THE FEDERALIST NO. 47, at 239 (James Madison) (Oxford World Classics ed., 2008).

5 THE FEDERALIST NO. 48 (James Madison).

6 *Id.*

7 TEX. CONST. art. I, § 1 (1836) ("The powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct."); State v. Rhine, 297 S.W.3d 301, 315–16 (Tex. Crim. App. 2009) (Keller, J., concurring).

8 John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH. L. REV. 1089–90, 1119–20.

9 Texas also revised its constitution in 1845 in its effort to gain statehood, at which time the separation of powers clause was modified to its current language maintaining an explicit strict separation of powers.

10 Bruff, *supra* note 3, at 1338.

11 *Id.* at 1339.

12 H.D. Lloyd, *Story of a Great Monopoly*, 47 ATLANTIC MONTHLY 317, 322 (Mar. 1881).

> another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[13]

Not coincidentally, relatively shortly after adopting this approach to limit the power of government, the Texas citizenry also took action to limit the power of economic interests by creating the Texas Railroad Commission (RRC)—arguably the first modern regulatory agency in the United States.[14] Thus began a long-running debate over how the separate functions may be combined within a single governmental entity while still maintaining the necessary safeguards against the abuse of this concentrated power. That debate continues to this day, as evidenced by conflicting testimony on Senate Bill 957 during the 2013 legislative session.[15]

The Framers of the Texas Constitution could not have imagined the complex statutory scheme that has evolved to address environmental issues, but they would have been familiar with analogous nuisance disputes that were then handled by the courts.[16] Twenty years before adoption of the 1876 constitution, the Texas Supreme Court had noted that what constitutes a nuisance "has been enlarged as refinements and sanitary movements have advanced" such that, "in fact everything which renders the air impure and disagreeable, which from its locality is inconvenient and offensive, is a nuisance that the law will abate."[17]

To a certain degree, TCEQ's consideration of permit applications fills a role previously played by the courts in resolving nuisance suits. The governing statutes for Texas' air, waste and water permitting programs define pollution in a manner that mirrors traditional nuisance concepts.[18] As the United States Fifth Circuit Court of Appeals has noted, "[n]uisance principles form the core doctrinal foundation for modern environmental statutes."[19] To a significant degree, judicial nuisance cases serve as the progenitors of the modern contested case hearing. As the Texas Supreme Court has noted, "[m]any disputes that were once litigated in the courts are now, for all practical purposes,

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13 TEX. CONST. art. II, § 1.

14 Ronald L. Beal, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE 1.1 at 1–2 (2009).

15 *See, e.g.*, Debate on Tex. S.B. 957 before the Senate Comm. on Natural Res., 83rd Leg., R.S. (Mar. 19, 2013).

16 *See* Burditt v. Swenson, 17 Tex. 489, 496 (Tex. 1856) ("What constitutes a nuisance is well defined."); Hamm v. Gunn, 113 S.W. 304, 305–06 (Tex. Civ. App. 1908, no writ) ("The right to abate nuisances is a well-established doctrine of courts of equity, for it is a maxim of our law that the owner of property must so use it as not to materially injure another.").

17 *Burditt*, 17 Tex. at 496.

18 *See* TEX. HEALTH & SAFETY CODE ANN. § 382.003(3) (West 2014) (contaminants that "are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property; or interfere[s] with the normal use and enjoyment of animal life, vegetation, or property"); *id.* § 361.003(39) ("contamination of, any land or surface or subsurface water in the state that renders the land or water harmful, detrimental, or injurious to humans, animal life, vegetation"); TEX. WATER CODE ANN. § 26.001(14) (West 2014) (contamination that "renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property"). *See also* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 463 (Tex. 1993) (Doggett, J., dissenting).

19 Cox v. City of Dallas, 256 F.3d 281, 289 (5th Cir. 2001).

litigated in the agencies."[20] Society has developed the environmental permitting process to more efficiently, comprehensively and prospectively address pollution issues than forcing such matters upon the courts through the proliferation of nuisance suits that can only address a problem after it has already occurred.[21]

The permitting process is intended to prospectively consider the adverse impacts of an activity in a manner that reduces the need for nuisance suits.[22] A meaningful contested case hearing process appropriately provides affected persons an opportunity to preemptively address the impacts of a facility in a manner that reduces the need for a nuisance suit after an activity has commenced. In fact, allowing robust public participation makes it more likely that a nuisance suit by an affected person will be unnecessary, thereby furthering one of the overall objectives of environmental statutes of reducing the need for such suits.

This is not to say that the permitting process has simply replaced nuisance suits, or renders nuisance suits unnecessary.[23] In issuing a permit, TCEQ is making a decision that often significantly impacts property rights, but the agency is not adjudicating property rights.[24] The TCEQ permitting process is premised on an educated guess as to the impacts of a proposed facility at best, and the agency's decision that a permit meets the minimum regulatory requirements of general applicability does not resolve whether a particular activity constitutes a nuisance under a specific set of circumstances.[25]

Even so, when considering a permit application, TCEQ must make certain determinations of fact and law to find that the applicable requirements have been met.[26] Several Texas Courts of Appeal have adopted a six part test in examining whether an agency is exercising a quasi-judicial power: 1) the power to exercise judgment and discretion; 2) the power to hear and determine or to ascertain facts and decide; 3) the power to make binding orders and judgments; 4) the power to affect the personal or property rights of private persons; 5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and 6) the power to enforce

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20 State v. Thomas, 766 S.W.2d 217, 219 (Tex. 1989).

21 City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317 (1981) (finding that federal Clean Water Act had displaced federal common law nuisance claims).

22 *Id.*

23 *Texas Ass'n of Bus.* 852 S.W.2d at 451.

24 Texas Comm'n on Envtl. Quality v. City of Waco, 413 S.W. 3d 409, 423 (Tex. 2013).

25 *See* 30 TEX. ADMIN. CODE § 305.122(d) (2013) (Tex. Comm'n on Envtl. Quality, Characteristics of Permits, Consolidated Permits) ("The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations."). *See also* City of Dallas v. Stewart, 361 S.W.3d 562, 570 (Tex. 2012) ("[T]he question of what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards.").

26 Miller v. R.R. Comm'n, 363 S.W.2d 244, 247 (Tex. 1962) (Greenhill, J., concurring); TEX. GOV'T CODE ANN. § 2001.141 (West 2014); 30 TEX. ADMIN. CODE § 80.17(a) (2012) (Tex. Comm'n on Envtl. Quality, Burden of Proof, Contested Case Hearings).

decisions or impose penalties.[27] The more an executive officer exercises these powers, the more judicial is the character of his or her action.[28]

III. TCEQ's Consideration of a Permit Application is Often Quasi-Judicial in Nature

Where both the facts and the law governing an application are undisputed such that consideration of the permit involves little adjudication of disputes or the exercise of discretion, and the decision is not challenged by persons holding vested rights, then TCEQ's consideration of a permit is less judicial in nature. As the majority of permit applications do not encounter opposition during the permitting process, concerns regarding whether TCEQ's action undermines the strong separation of powers set forth in the Texas Constitution are minimized. But, where affected persons raise issues of law and fact that require TCEQ to exercise judgment in deciding facts in a manner that impacts the rights of other persons, then TCEQ is exercising a more quasi-judicial function under this test. Under such circumstances, where TCEQ's permitting action is blending executive and judicial functions, greater concern is warranted with regard to the undermining of the checks and balances created by the separation of powers. As reflected in the legislative history of the Texas Administrative Procedure Act further discussed below, the contested case hearing process provides a valuable structural check on TCEQ's power that counterbalances this concern.[29]

A. Underlying Due Process Foundations of the Contested Case Hearing Process

It is wrong to assume that eliminating statutory requirements for contested case hearings would eliminate the need to hold evidentiary hearings. Neither Texas constitutional principles nor legislative history nor case law supports further relaxation of restraints on administrative action. It is generally accepted today that the process due in administrative hearings need not fully measure up to that accorded parties in court.[30] However, an objective review of the case law shows the gap is narrow.

This narrow gap is consistent with Texas's long tradition as a strong property-rights state. Well before the advent of the state's Administrative Procedure Act, the law was settled that, while the State through its administrative agencies may restrict private property rights under the State's police power, the processes by which the restrictions are

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27 Parker v. Holbrook, 647 S.W.2d 692, 695 (Tex. App.—Houston[1st Dist.] 1982, writ ref'd n.r.e.); Town of South Padre Island v. Jacobs, 736 S.W.2d 134, 144 (Tex. App.—Corpus Christi 1986, writ denied); Martinez v. Hardy, 864 S.W.2d 767, 773 (Tex. App.—Houston [14th Dist.] 1993, no writ).

28 *Parker*, 647 S.W.2d at 695; *Town of South Padre Island*, 736 S.W.2d at 144; *Martinez*, 864 S.W.2d at 773.

29 *See infra* Section III.

30 *See* Office of Pub. Util. Counsel v. Pub. Util. Comm'n, 185 S.W.3d 555, 576 (Tex. App.—Austin 2006, pet. denied).

imposed must not be unjust or unreasonable.[31] The action of an agency must be based on proof and must not be capricious.[32] The mere holding of a hearing cannot justify the restriction.[33] "The right to cross examination is a vital element in a fair adjudication of disputed facts. The right to cross examine adverse witnesses and to examine and rebut all evidence is not confined to court trials, but applies also to administrative hearings."[34] At the least, parties must "be accorded a full and fair hearing on disputed fact issues."[35]

B. Development of the Texas Administrative Procedure Act to Codify Due Process Protections and Provide Uniformity

For quite awhile, sparring over the proper type of judicial review for agency decisions served as the primary obstacle to passage of an administrative procedure act by the Texas Legislature. Ultimately, the Legislature's decision to abandon its insistence on imposing a *de novo* standard of judicial review was premised on the assumption that an opportunity would exist for an adversarial proceeding before the agency during which a more complete record would be developed than had historically often been the case. In other words, the Legislature felt that affected persons deserved an opportunity for a complete development of the facts, and if that development could not occur through the development of evidence by the trial court during a *de novo* review, then it would need to happen through a contested case hearing before the agency.

Even though the development of an administrative procedure act for Texas moved at a glacial pace, the need for one had been recognized by thoughtful analysts in Texas by the mid-1940s. They had early expressed concern over the manner in which the burgeoning administrative state of the 1930s and 1940s transcended the conventional executive-legislative-judicial system of dividing power in our governments. This period bred many nominally temporary social welfare and wartime agencies at the federal level. Many of these agencies proved to not be temporary. In the colorful analogy of attorney C.C. Small, writing in the Texas Bar Journal in 1947, "Great difficulty is experienced in ridding ourselves of the vast number of temporary bureaus that sprang up during the war. Once a barnacle gets rooted into the Ship of State, it takes a real political storm to displace it."[36] Mr. Small went on to reflect the sentiment of many in the Texas legal

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31 Brown v. Humble Oil & Refining Co., 87 S.W.2d 1069, 1070 (Tex. 1935) (finding in favor of Railroad Commission imposition of well-spacing regulation, although common law property right allowed a landowner an unlimited number of wells upon his or her land).

32 *Id.*

33 *Id.*

34 Richardson v. City of Pasadena, 513 S.W.2d 1, 4 (Tex. 1974).

35 City of Corpus Christi v. Pub. Util. Comm'n of Texas, 51 S.W.3d 231, 262 (Tex. 2001) (also noting that the requirement of a full and fair hearing "includes the right to cross-examine adverse witnesses and to present and rebut evidence"); Flores v. Employees Retirement Sys. of Tex., 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied). A full and fair hearing generally includes "notice of hearing; the opportunity to present argument and evidence and to rebut and test opposing evidence and argument by cross-examination or other appropriate means; appearance with counsel; and a decision by a neutral decision maker based on evidence introduced into the record of the hearing." Smith v. Houston Chemical Serv. Inc., 872 S.W.2d 252, 278 (Tex. App.—Austin 1994, writ denied).

36 C.C. Small, *Judicial Review of Administrative Orders*, 10 TEX. B.J. 362 (1947).

community at the time that, "[a]dministrative agencies lean too far toward the idea that 'the individual is nothing, the State is everything.'"[37]

Passage of the federal Administrative Procedure Act ("Federal APA") in 1946,[38] and the release that same year of a model state administrative procedure act,[39] set in motion efforts by Texas lawyers to develop and enact an administrative procedure act for Texas.

During the 1950s, Southern Methodist University Professor Whitney Harris ardently advocated for a state administrative procedure act. As Professor Harris couched it, "Left to its own devices, [the administrative process] threatens to convert traditional democratic processes into a new form of government by the few— an absolutism of bureaucracy. . ."[40] Another lawyer writing in the Texas Bar Journal in the early 1950s stated his belief that, "[t]he greatest danger in the extension of executive and administrative powers lies in the fact that it destroys the constitutional separation of the powers of government, which is the very basis of a republican form of government. The separation of the powers of government is the means by which the people in a democracy retain control of their government."[41] This level of apprehension about the risks to individual liberty that attend agency decisionmaking, combined with constitutional limitations on the power of the judiciary to rectify agency missteps, made forging an administrative procedure act particularly difficult.

1. Early Rumblings Within the Texas Bar for an APA

Professor Harris criticized the existing system of administrative law and procedure for its failure to make regulations easily accessible to the public[42] and for the "substantial evidence *de novo*" review standard by which the judiciary sought to correct errors made by administrative agencies.[43] As he saw it, "[p]erhaps the most serious defect in the system is the absence of uniform rules of procedure" in agency proceedings.[44] He published a proposed administrative procedure act for Texas in 1951 in the Southwestern Law Journal.[45] This draft was republished in the State Bar Journal the following year for comment by Texas lawyers, and the draft formed the basis of the State Bar's initial attempt at legislation.[46]

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37 *Id.* at 381.

38 Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559).

39 Model State Administrative Procedure Act of 1946, 9C U.L.A. 179 (1957). *See also* Whitney R. Harris, *An Administrative Procedure Act for Texas*, 5 Sw. L.J. 125, 127 (1951).

40 Harris, *supra* note 39. Professor Harris went on to invoke an allegedly-Aristotelian aphorism that democracies inevitably degenerate into oligarchies; in fact, Aristotle's thought was substantially more subtle than that. A reasonably accessible public-domain discussion of Aristotle's thinking in *Politics* may be found in Christopher Shields' *The Blackwell Guide to Ancient Philosophy* (2003).

41 Bennett B. Patterson, *Procedure Act Opposed*, 16 Tex. B.J. 377, 466 (1953).

42 Whitney R. Harris, *The Administrative Law of Texas*, 29 Tex. L. Rev. 213, 216 (1950).

43 *Id.* at 229–30.

44 *Id.* at 229.

45 Harris, *supra* note 39, at 125.

46 Whitney R. Harris, *Administrative Procedure Act*, 15 Tex. B.J. 7 (1952).

In its January 1952 volume, the State Bar's Committee on Administrative Law proposed to the Bar's membership a draft administrative procedure act for the state.[47] The draft called for a Division of Administrative Practice and Procedure to be established in Office of the Secretary of State.[48] One of the purposes of the proposed act was "to separate the prosecuting and adjudicating functions,"[49] and it, therefore, directed the Administrative Practice and Procedure Division to "maintain a staff of qualified hearing officers to be assigned to agencies for hearing contested cases."[50] These hearing officers were to be appointed by the governor.[51] In all cases not tried initially by the ultimate agency decisionmakers, the hearing examiners would serve as the "judges," though their decisions were to be, as they are now, advisory to the agency decisionmakers.[52]

The proposed act defined a "contested case" by first defining a "case," then slightly narrowing that definition:

"Case" means a proceeding in which the legal rights, duties, or privileges of specific parties, as distinguished from the rights, duties, or privileges of the class or group to which such parties belong or of the public generally, are to be determined by an agency in the exercise of its legislative or adjudicative powers, and any other proceeding in which by constitutional or statutory right parties are entitled to a full hearing on facts in controversy. "Contested case" is any case in which there are adversary parties. "Party" is any person entitled to appear in an agency proceeding, including the agency itself but not its members, officers or employees.[53]This is the "internal hearing rights" approach to determining a party's right to a contested hearing; the proposed act provided the hearing right, in this case supplemented by rights granted by statutes external to the proposed administrative procedure act.[54]

The proposed act provided for substantial evidence judicial review, except in cases where some form of *de novo* review was required by legal principles or statute.[55]

2. BAR-APPROVED BILL READIED FOR SUBMISSION TO THE LEGISLATURE

The 1952 proposal was massaged over the year, and when it was ultimately approved by the Bar membership for presentation to the Legislature, the term "contested case" had been replaced by the term "formal proceeding." The term "formal proceeding" was defined as "any proceeding in which an order of an agency is required by law or constitu-

47 *Id.*
48 *Id.* at 8.
49 *Id.*
50 *Id.*
51 *Id.* at 31.
52 *Id.* at 33. The proposed administrative procedure act also included a provision that, in the event of conflicts between the proposed legislation and an agency's organic statute, the latter would prevail. *Id.* at 35. So, a sufficiently-directive organic statute requiring in-house hearing examiners would presumably have overridden the proposed act's general directive regarding independent hearing examiners.
53 *Id.* at 30.
54 See discussion *infra* Section III.B.5, discussing the 1961 Model State Administrative Procedure Act.
55 Harris, *supra* note 46, at 34.

tional right to be based upon evidence regularly adduced at an agency hearing."[56] Thus, the right to a hearing was not granted by the proposed act itself, but was granted by external law.[57] The 1953 proposed act also retreated from the earlier draft's requirement that all contested cases must be heard by either the ultimate decisionmakers or by a hearing examiner from the division within the Office of the Secretary of State. The 1953 proposed act allowed hearings to be heard "by a hearing officer regularly employed by the agency to conduct hearings for it," so long as the hearing officer neither investigated the facts of the proceeding nor, if the proceeding involved a prosecution, performed any prosecuting functions.[58]

The judicial review provisions called for review as provided by other statutes and, in the absence of other statutory direction, directed that the review be on the record created before the administrative agency.[59] However, in specifying this agency record review, the proposal did not actually denote "substantial evidence review" as the standard of review.[60] The proposal specifically provided that, where the review was upon a new record adduced before the court, the court's review would be as in "an ordinary civil action."[61]

3. The Bar's Proposal Proved Controversial

The January 1953 Bar proposal attracted some strong criticism from members of the Bar.[62] The proposal's acceptance of *de facto* substantial evidence judicial review, in at least some circumstances, was the largest point of controversy. One critic declared, in a June 1953 Texas Bar Journal article, that:

> We therefore propose that instead of the proposed Administrative Procedure Act, a statute should be enacted which would provide that in all controversies before the administrative agencies in the state of Texas, in which private rights and property are involved and determined, an appeal de novo shall be permitted to the District Court in the county of the residence of the individual citizen, unless venue is otherwise provided by statute. Upon this trial de novo, the judgment of the court shall be based upon the preponderance of the evidence introduced before the District Court without reference to the evidence introduced before the administrative agency, and without the application of the substantial

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56 State Bar Comm. on Admin. Procedure, *Administrative Procedure Act*, 16 Tex. B.J. 14, 15 (1953).

57 The proposed administrative procedure act ultimately adopted in Texas altered this definition slightly, as discussed at length in Robert W. Hamilton and J.J. Jewett, III, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 Tex. L. Rev. 285, 286–92 (1976). Suffice it to say, the definition limits or expands the universe of proceedings in which trial-like adjudications are a right, so commentators, at least, labor mightily over its nuances.

58 State Bar Comm. on Admin. Procedure, *supra* note 56, at 46.

59 *Id.* at 48–49. The Bar's Administrative Law Committee wrote, in rebuttal to criticisms of its proposal, that most agency organic statutes required retrial of fact issues in court. Admin. Law Comm., *Administrative Procedure Act: Reply to a Critic*, 16 Tex. B.J. 736, 757 (1953).

60 *See* State Bar Comm. on Admin. Procedure, *supra* note 56, at 48–49.

61 *Id.* at 48.

62 *See, e.g.*, Bennett B. Patterson, *Procedure Act Opposed*, 16 Tex. B.J. 377 (1953).

> evidence rule, and that in the District Court a trial by jury shall be had, when demanded, upon all controverted issues of fact.[63]

This writer also criticized the proposed act as "an effort to dignify an arbitrary and bureaucratic administrative process with some semblance of legal procedure" and, thereby, to add power to the administrative estate at the expense of the judiciary.[64] In apparently acknowledging the widespread nature of this sentiment, the Administrative Law Committee of the State Bar wrote in defense of its proposal:

> There are many conscientious lawyers and laymen who would like to see administrative agencies of government abolished, and their functions either eliminated or turned back to the Legislature. Perhaps it is true that enactment of legislation establishing basic principles of due process of law at the administrative level constitutes an acceptance of the inevitability of some bureaucratic government in Texas.[65]

After this controversy, the 1953 Bar-proposed administrative procedure act was not submitted to the Legislature.

4. THE TEXAS CIVIL JUDICIAL COUNCIL WEIGHS IN

In 1956, the Texas Judicial Council initiated a study of state administrative procedure acts that became, in 1957, a report to the Governor.[66] That study reported that "members of the Bar Committee did not appear to be in favor of the broad Texas Administrative Procedures Act which had been proposed by that group earlier."[67] Therefore, the Council "drafted simplified bill proposals to provide for the 'adoption, filing, publication and distribution of rules and regulations of state administrative agencies authorized by law to make such rules and regulations.'"[68] It is not possible to know for sure, but likely that the Judicial Council's foray into the administrative procedure act issue was prompted by the then-Vice-Chair of the House Judiciary Committee, Representative L. DeWitt Hale. He strongly opposed substantial evidence judicial review of agency orders, and such a judicial review provision was a component, albeit vaguely stated, of the State Bar proposal.[69] As a part of its role as the policy-making body for the state judiciary, the Texas Judicial Council worked closely with the House Judiciary Committee on numerous matters bearing on court administration.[70]

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63 *Id.* at 467.

64 *Id.* at 465.

65 Admin. Law Comm., *supra* note 59, at 758.

66 Tex. Judicial Council, *Texas Civil Judicial Council 1929–1979*, 64 (Aug. 1997) *available at* http://www.courts.state.tx.us/tjc/publications/TJC_1929-1997.pdf.

67 *Id.*

68 *Id.*

69 *See* State Bar Comm. on Admin. Procedure, *supra* note 56, at 48.

70 The Texas Civil Judicial Council was established in 1929 "for the continuous study of and report upon the organization, rules, procedure and practice of the civil judicial system of this State, the work accomplished and the results produced by that system and its various parts, and methods for its improvement." Act of 1929, 41st Leg., R.S., ch. 19, § 1 (1929) (codified at TEX. GOV'T CODE ANN. § 71.031). The body was renamed as the Texas Judicial Council in 1975.

5. 1961 Model State APA

In 1961, the Uniform Law Commissioners released the Model State Administrative Procedure Act.[71] The 1961 Model State APA had a "contested case" definition that read: "'[C]ontested case' means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."[72] This definition includes what the Uniform Law Commissioners refer to as an "external hearing rights approach"—a party's right to a hearing must arise from a source other than the APA itself. The State Bar's 1953 proposed act relied on this same external hearing right approach in defining a "formal proceeding."[73]

The 1961 model act also provided for substantial evidence judicial review of the record created at the agency: "The review shall be conducted by the court without a jury and shall be confined to the record."[74]

6. The 1961–1962 Constitutional Amendment and the State Bar Efforts Supporting It

In 1959, a bill made it through the Legislature that, but for the Governor's veto, would have made *de novo* review of administrative decisions the rule for appeals from all such decisions.[75] During that session, there had also been a proposed constitutional amendment that, had it not failed in the Legislature, would have removed the separation-of-powers bar to true *de novo* review that the courts had repeatedly found existed.[76] The courts had repeatedly struck down laws directing that "appeals" of administrative agency orders test the reasonableness of the orders by true trial *de novo*.[77]

In the 1961 legislative session, Representative L. DeWitt Hale (by this time, Chairman of the House Judiciary Committee)[78] sponsored House Joint Resolution 32, which was ultimately approved by the Legislature and submitted to the voters in 1962 as a

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71 Nat'l Conference of Comm'rs on Uniform State Law, Revised Model State Administrative Procedure Act (1961).

72 *Id.* § 1(2).

73 State Bar Comm. on Admin. Procedure, *supra* note 56, at 15.

74 Nat'l Conference of Comm'rs on Uniform State Law, *supra* note 71, at § 15(f).

75 Tex. H.B. 440, 56th Leg., R.S., § 2 (1959); Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959) (vetoing Tex. H.B. 440 due to constitutionality concerns and fear of inconsistent application of the Railroad Commission's oil and gas conservation laws by the district courts), *available at* http://www.lrl.state.tx.us/scanned/vetoes/56/hb440.pdf.

76 Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959).

77 *See, e.g.*, S. Canal Co. v. State Bd. of Water Engineers, 318 S.W.2d 619, 623 (Tex. 1958) ("If the issue to be decided and on which evidence is to be heard is the reasonableness of the Board's order, decision cannot be made from a preponderance of the evidence or entirely free of the substantial evidence rule, for the legal test of the reasonableness of an order of an administrative agency is whether it is reasonably supported by substantial evidence and not whether it is supported by a preponderance of the evidence.").

78 House Comm. on Judiciary–57th R.S. (1961), Legislative Reference Library of Texas, http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=1856&session=57-0&from=&passsearchparams=submit=Enter**last=Hale&committeename=House%20Judiciary%20Committee&memberchecked=595&session=57&action=search (last visited May 25, 2014).

constitutional amendment.[79] This resolution provided in the clearest possible terms that the Legislature could enact laws prescribing whatever manner of judicial review of agency decisions the Legislature deemed appropriate, "and the courts of Texas shall have no power or authority to refuse, deny, or change the manner of such appeals, if brought in the manner provided by general law, even though such appeals shall be provided *de novo* as that term is used in appeals from Justice of the Peace Courts to County Courts."[80]

In 1962, the State Bar submitted the language of H.J.R. 32 to its membership for a referendum vote.[81] The referendum passed the Bar's membership.[82] Nonetheless, despite legislative and State Bar support, the constitutional amendment failed adoption in the November 1962 general election.[83]

7. Legislative Administrative Procedure Act Initiatives in the 1960s and Early 1970s

The 1960s and early 1970s could generally be characterized as a stalemate between those who favored codification of a substantial evidence review limited to the agency record and those who ardently opposed such an approach. During this timeframe, those opposed to the codification of a substantial evidence review limited to the agency record had an important ally in the House Judiciary Committee, and particularly in Representative L. DeWitt Hale, who served as chair or vice-chair of the Committee during much of this period.

Several bills introduced in this period provided for substantial evidence review of agency decisions. The administrative procedure act bill introduced in the House in 1963 provided for substantial evidence review of agency decisions, calling for contested case rights when "the legal rights, duties, or privileges were required by law or constitutional right to be determined after an agency hearing."[84] The bill died in the House Judiciary Committee.[85]

For the 1971 session, the State Bar again sponsored an administrative procedure act bill, H.B. 761, which was carried by Representative Tim Von Dohlen.[86] This bill was based on the 1961 Model State Administrative Procedure Act, but H.B. 761 altered the "contested case" definition of the Model State APA to drop the "required by law" basis for the right to a hearing.[87] H.B. 761 provided: "'Contested case' means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for hearing."[88] This deviation was carried through to the initially filed version of the 1975

79 Tex. H.J. Res. 32, 57th Leg., R.S. (1961).
80 *Id.*
81 *Bar to Vote in Oct.: De Novo Amendment*, 25 TEX. B.J. 745 (1962).
82 *Referendum: Bar members approve de novo issue, other two questions*, 25 TEX. B.J. 960 (1962).
83 Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876*, 10 (May 2014).
84 Tex. H.B. 967, 58th Leg., R.S. (1963).
85 *Id.*
86 Tex. H.B. 761, 62nd Leg., R.S. (1971).
87 *Id.*
88 *Id.*

bill that ultimately became the Texas Administrative Procedure Act.[89] H.B. 761 provided for nonjury judicial review on the agency record and did not specify a manner of review, but it explicitly did not change *de novo* review for the Railroad Commission's orders.[90] H.B. 761 was referred to the House Judiciary Committee, chaired by Representative Hale, where it died.[91]

In 1973, H.B. 248, authored by Representatives Von Dohlen and Finney, carried forward a slightly modified version of H.B. 761 from the previous session.[92] The "contested case" definition was altered to read: "'Contested case' means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for an adjudicative hearing."[93] So, the "required by law" language remained absent, but the "hearing" component of the definition was altered to specify that the hearing be an "adjudicative hearing."[94] The text regarding judicial review of agency decisions remained as it had been in H.B. 761 from the previous session.[95] The bill was referred to the House Judiciary Committee, where it died.[96] H.B. 248 had an identical companion Senate bill, S.B. 81, which made it through the Senate.[97] That Senate bill was referred to the House Judiciary Committee, still Chaired by Representative Hale, where it died.[98]

During this same period, Representative L. DeWitt Hale made his own attempts to counter use of substantial evidence reviews limited to the agency record. To this end, as Vice Chair of the House Judiciary Committee in 1965, he authored an administrative procedure act bill that would have nullified those agency decisions subject to *de novo* review while specifying an appeal on the agency record in other cases without explicitly

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89 Tex. S.B. 41, 64th Leg., R.S. (1975). But, as the Hamilton and Jewett article examines, the definition was altered during the 1975 legislative process, and the language ultimately adopted is open to conflicting interpretations. *See* Hamilton & Jewett, *supra* note 57.

90 Tex. H.B. 761, 62nd Leg., R.S. (1971). The Railroad Commission jealously guarded the process for judicial review of its decisions, and the Railroad Commission's opposition to the 1959 proposed administrative procedure act (Tex. H.B. 440) that passed the legislature was the first reason cited by the Governor in his veto proclamation on that bill. Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959).

91 *Id.*

92 Tex. H.B. 248, 63rd Leg., R.S. (1973).

93 *Id.*

94 This aspect of the definition is also a deviation from the model act, which ultimately found its way into the Texas APA adopted in 1975, where, as noted earlier, it provided considerable fodder for academic analysis. *See* Hamilton & Jewett, *supra* note 57.

95 Tex. H.B. 248, 63rd Leg., R.S. (1973).

96 *Tex. H.B. 248 Actions, 63rd Leg., R.S.*, Legislative Reference Library of Texas, http://www.lrl.state.tx.us/legis/BillSearch/actions.cfm?legSession=63-0&billtypeDetail=HB&billNumberDetail=248&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited May 25, 2014).

97 Tex. S.B. 81, 63rd Leg., R.S. (1973).

98 *Tex. S.B. 81 Actions, 63rd Leg., R.S.*, Legislative Reference Library of Texas, http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=63-0&billtypeDetail=SB&billNumberDetail=81&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited May 25, 2014).

calling for substantial evidence judicial review in such cases.[99] As for proceedings at the agency level, that bill provided for "formal proceedings" when "an order of an agency is required by law or constitutional right to be based upon evidence adduced at an agency hearing."[100] As otherwise amended, this bill passed out of the House Judiciary Committee but never received a floor vote.[101] In 1969, then-Chairman Hale re-introduced substantially the same bill, but it was referred to the House Committee on State Affairs, where it died.[102]

8. 1974 CONSTITUTIONAL CONVENTION

An argument can be made that it was the Texas Constitutional Convention of 1974 that finally cleared a path for those seeking to codify the substantial evidence review limited to the agency record. During 1974, Texas held a constitutional convention, to which the senators and representatives were the delegates.[103] Though the convention failed to agree on a document to submit to the voters for approval, the process of scrutinizing Texas's governance served as a legitimate educational experience for the delegates and their staffs. A parade of legal authorities testified before the Judiciary Committee of the convention, chaired by Representative Hale,[104] some explaining how they believed a true *de novo* review violated the separation of powers under the Texas Constitution. It is difficult to say that this testimony altered the deeply-held beliefs of some delegates that *de novo* judicial review of agency decisions was preferable, but passage of the Texas Administrative Procedure Act in the next legislative session with little opposition indicates that such testimony may have finally convinced the Legislature that true *de novo* review was not constitutional.[105]

9. 1975 PASSAGE OF THE TEXAS ADMINISTRATIVE PROCEDURE ACT

The 64th Regular Session of the Texas Legislature produced somewhat contradictory results with regard to the effort to reform Texas' administrative procedure. On the one hand, the Texas Administrative Procedure Act ("Texas APA") passed during that legislative session.[106] The Texas APA statutorily codified the substantial evidence standard of review based on the record created before the agency.[107] However, there were also eight constitutional amendments proposed by that legislature that, collectively, would have wholly replaced the 1876 Constitution, save for its Bill of Rights.[108] The omnibus package of amendments, S.J.R. 11, was a light re-working of the various constitutional

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99 Tex. H.B. 745, 59th Leg., R.S. (1965).

100 *Id.*

101 *Id.*

102 Tex. H.B. 706, 61st Leg., R.S. (1969).

103 Tex.H.R.J. Res. 61, 62nd Leg., R.S. (1971).

104 *See* http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=8966&session=64-0&from=session&passsearchparams=session=64**from=session (last visited June 29, 2014).

105 Texas Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61 (1975). The Texas APA passed the Senate on a voice vote, and it passed the House by a 134-0 vote. 1975 Tex. Sess. Law Serv. 148 (West).

106 Texas Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61 (1975).

107 Tex. Health Facilities Comm'n v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

108 Tex. S.J. Res. 11, 64th Leg., R.S. (1975).

articles that were almost adopted by the 1974 Constitutional Convention delegates. One of the failed efforts of the 1974 Constitutional Convention would have empowered the Legislature to require true judicial *de novo* review of administrative agency decisions, and this was carried forward in S.J.R. 11 as proposed text in a new Article V (Judiciary Article): "Notwithstanding any other provision of this constitution, the legislature may provide by law for the method of appeal to the courts from rulings, decisions, or other actions of state agencies or political subdivisions of the state."[109] The entire Article V amendment failed adoption in the November 1975 election.[110]

Unlike bills filed in previous sessions, the Texas APA quickly passed out of committee during the 1975 session. Senator Max Sherman sponsored the bill, S.B. 41, which became the state's APA.[111] It was considered at the first working meeting of the Senate Intergovernmental Relations Committee that session and was passed out of the committee without amendment that same day.[112] The bill had in it the same "contested case" definition that was in the enrolled version of the bill, which is codified today at § 2001.003(1) of the Texas Government Code.[113] Senator Sherman had the chair of the State Bar's Administrative Law Section, Dudley McCalla, in attendance to respond to questions from committee members.[114]

To allay concerns at the absence of a *de novo* standard of review, Mr. McCalla assured the committee members that the bill before them would result in more robust agency proceedings. In response to inquiry from Senator Ogg regarding how one could justify judicial review on the agency record, when some agencies, such as the Banking Board, limit the parties to 45 minutes per side to present their cases, Mr. McCalla laid out a broad administrative due process right arising from the bill. He said, "I am in total agreement with you [regarding the fairness the present process]. And, the practitioners before that agency and all others who are familiar with that don't feel that it is [fair] either, and that is why this bill has evolved as it has."[115] On being pressed about how the proposed bill would change the 45-minutes process at the Banking Board, McCalla replied that the process would be altered to ensure the development of a more complete record.[116] In response to Senator Ogg's question as to whether the Banking Board, under the bill, would still be able to arbitrarily limit a party to 45 minutes, Mr. McCalla said,

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109 *Id.*

110 Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876*, 10 (Mar. 2014).

111 Texas Administrative Procedure and Texas Register Act, Tex. S.B. 41, Act of April 22, 1975, 64th Leg., R.S. ch. 61, 1975 Tex. Gen. Laws 136.

112 *Tex. S.B. 41 Actions, 64th Leg., R.S.*, Legislative Reference Library of Texas, http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=64-0&billtypeDetail=SB&billNumberDetail=41&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited May 25, 2014).

113 Tex. S.B. 41, § 3(2) (as introduced) (Jan. 30, 1975), *available at* http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41_64R.pdf#page=1; Tex. S.B. 41, § 3(2) (enrolled version), *available at* http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41_64R.pdf#page=81 (last visited July 6, 2014).

114 Minutes, Senate Comm. on Intergov'tl Relations, 2 64th R.S. (Jan. 30, 1975).

115 Audio tape: Public Hearing of the Senate Comm. on Intergov'tl Relations, (Jan. 30, 1975), *available at* https://www.tsl.state.tx.us/sites/default/files/public/tslac/ref/senatetapes/64/640490a.mp3.

116 *Id.*

"Not under this bill."[117] Senator Ogg asked, "They cannot?" Mr. McCalla replied, "No sir! Full opportunity for cross-examination in order to determine the truth of the matter is provided . . . This act is designed to cure that sort of situation [where cross-examination would be unavailable]."[118]

Section 19 of the bill controlling judicial review of agency decisions was amended both in the House committee (Judicial Affairs) and on the House floor, but it essentially existed throughout this process as it exists today, requiring substantial evidence review, unless another statute directs *de novo* review.[119]

10. LOOKING BACK ON THE 1952–1975 EXPERIENCE

The struggle to adopt an administrative procedure act in Texas was, more than anything else, a struggle about how to review the actions of administrative agencies. From the comments of practitioners in the late 1940s and early 1950s, to Chairman Hale's resistance to a substantial evidence review limited to the agency record in the 1960s and early 1970s, through the comments of Senator Ogg in the process of adopting the current Texas APA, there is a clear trail of skepticism about the fairness of decisionmaking at administrative agencies. In the end, legislators who wanted opportunities for complete "do overs"—*i.e.*, true *de novo* reviews—of agency decisions in judicial courts were forced to accept an overlay of process guarantees at the agency level. These guaranties were premised, as the colloquy of Senator Ogg and Mr. McCalla shows, on an understanding that the historical, trial-like contested case adjudicatory process at agencies would define the floor for processes at agencies.

C. 74TH REGULAR SESSION (1995) – TRANSFER OF HEARINGS TO SOAH, LIMITING "AFFECTED PERSON" TEST, AND DECLINING TO ELIMINATE THE CONTESTED CASE HEARING PROCESS FOR TCEQ ENVIRONMENTAL QUALITY PERMITS

After passage of the Texas APA in 1975, implementation of the contested case hearing process in the environmental permitting context was largely similar to the implementation of the process in other contexts. In 1995, though, several efforts were made to reform the hearing process for environmental permits. In particular, three legislative actions of note occurred: (1) hearing functions were transferred from hearing examiners at the Texas Natural Resources Conservation Commission (TNRCC) to the recently-created State Office of Administrative Hearings (SOAH); (2) new constraints were imposed on standing to obtain a contested case hearing; and (3) efforts to replace the contested case hearing process with a notice and comment process failed.[120]

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117 *Id.*

118 *Id.*

119 All versions of the bill are available online from the Texas Legislature's website. *Tex. S.B. 41, 64th Tex. R.S.*, LEGISLATIVE REFERENCE LIBRARY OF TEXAS, http://www.lrl.state.tx.us/legis/billsearch/text.cfm?legSession=64-0&billtypeDetail=SB&billNumberDetail=41&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100.

120 Tex. S.B. 12, 74th Leg., R.S. (1995) (Transfer of hearing functions); Tex. S.B. 1546, 74th Leg., R.S. (1995) (Limitation on Affected Person); H.B. 2491, 74th Leg., R.S. (1995) (attempting to eliminate contested case hearing process).

In 1995, the Legislature dissolved the Office of Hearing Examiners in the TNRCC and created the SOAH Natural Resources division to take its place.[121] In doing so, the Legislature responded to a report by a TNRCC hearing examiner that her supervisors had pressured her to change her findings in a case involving a waste disposal company's request to expand a landfill.[122] By transferring TNRCC's hearing functions to SOAH, the Legislature intended to ensure that the determination of questions of fact in contested case hearings would be conducted by an independent decisionmaker.[123] As a result of this legislation, TCEQ must use SOAH to conduct all contested case hearings unless a majority of the TCEQ Commissioners decides to conduct a contested case hearing.[124]

During the same legislative session, the Texas Legislature also sought to clarify the scope of persons entitled to a hearing on a permit under consideration by the TNRCC. Prior to 1995, an "affected person" was entitled to a hearing for permits subject to a hearing, but there was no statutory definition of this term in the TNRCC context.[125] Some argued that the lack of a definition of this term had led to an overly broad interpretation of the term.[126] They supported Senate Bill 1546, which imposed a three-part test for determining whether a requester qualified as an affected person: (1) the requestor must have personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing not common with the general public; (2) the person's hearing request must be reasonable; and (3) the person's hearing request must be supported by competent evidence.[127] Others cautioned that the standard set forth in the bill would improperly restrict the ability of citizens to participate in the process and provide important information, but ultimately the bill passed.[128]

As discussed below, the second and third prongs of this test have since been removed. With regard to the requirement that the requestor have a personal justiciable interest, this language tracks that used by the courts to characterize constitutional standing, and so standing to obtain a contested case hearing is governed by the same principles governing judicial standing.[129]

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121 Act of May 28, 1995, 74th Leg., R.S., ch. 106, § 1, 1995 Tex. Gen. Laws 898.

122 House Comm. on Natural Res., Bill Analysis, Tex. S.B. 12, 74th Leg., R.S. (1995).

123 *Id.* (noting that SOAH "could provide a means for independent hearings for the commission's contested cases").

124 TEX. GOV'T CODE ANN. § 2003.047(b) (West 2014).

125 *See, e.g.*, TEX. WATER CODE ANN. § 26.028(c) (amended 1995) (Water Quality Permits); TEX. HEALTH & SAFETY CODE ANN. § 361.089(b) (amended 1995) (Solid Waste Permits); TEX. HEALTH & SAFETY CODE ANN. § 382.056 (amended 1995) (Air Quality Permits); Senate Comm. on Natural Res., Bill Analysis, Tex. S.B. 1546, 74th R.S. (1995). *See also* Texas Indus. Traffic League v. R.R. Comm'n of Tex., 628 S.W.2d 187, 196 (Tex. App.—Austin 1982), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982) (noting that the Texas APA "does not specify any criterion for admitting parties to hearings before administrative tribunals").

126 House Research Organization, Bill Analysis, S.B. 1546, 74th Leg., R.S. (1995).

127 Act of May 28, 1995, 74th Leg., R.S., ch. 882, § 1, 1995 Tex. Gen. Laws 4380, 4381 (current version at TEX. WATER CODE ANN. § 5.115(a), *amended by* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570.

128 *Id.*

129 City of Waco v. Tex. Comm'n on Envtl. Quality, 346 S.W.3d 781, 801 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409 (2013).

Also during the 74th Legislative Session in 1995, Representative Gerald Yost filed House Bill 2491, which would have eliminated the contested case hearing process and replaced it with a notice and comment process.[130] While this bill passed the Texas House, it died on the Senate intent calendar.[131] This bill would have allowed the Executive Director to issue a permit after a "public hearing" subject to Commission review, but provided no opportunity for a contested case hearing.[132]

D. 77TH REGULAR SESSION (1999) - DEVELOPMENT OF A COMPROMISE: PASSAGE OF HOUSE BILL 801

After the passage of Senate Bill 1546 in 1995, pressure continued to build in both the regulated community and the environmental community to somehow adjust TNRCC's permitting process. On the one hand, TNRCC's application of the new "affected person" standard set forth in Senate Bill 1546 had resulted in a steady decrease in the number of contested case hearings being held,[133] which had raised concerns in the environmental community. But, in the fall of 1998, as the 76th Regular Session of the Texas Legislature was approaching, it seemed unlikely that TNRCC would be able to continue this practice under existing law. In three separate cases, Travis County District Courts had found that TNRCC was applying a threshold for standing that exceeded the proper standard even under the new definition of "affected person."[134] In February of 1998, the Austin Court of Appeals had upheld the earliest of these rulings.[135] In late August of 1998, the Texas Supreme Court denied a petition for review of this decision, leading TNRCC's general counsel to publicly despair that, "If the commission cannot reject a hearing request that is as weak as this one, then the commission is in trouble."[136]

At the same time, it was growing increasingly clear that a bill to simply do away with the contested case hearing process could not make it through the legislative process. During the 1997 Legislative Session, Representative Robert Talton had filed a bill to do away with the contested case hearing process and solely provide a notice and comment process much like House Bill 2491 filed in the 1995 Legislative Session.[137] Representa-

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130 Tex. H.B. 2491, 74th Leg., R.S. (1995).

131 *Tex. H.B. 2491 Actions, 74th Leg., R.S.*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=74R&Bill=HB2491 (last visited May 25, 2014).

132 Tex. H.B. 2491, 74th Leg., R.S. (1995).

133 Robert Elder, Jr., *High Court Reignites Fight Over Permits*, WALL ST. J., Sept. 9, 1998, at T1.

134 West Dallas Coal. for Envtl. Justice v. Heat Energy Advanced Tech., Inc. and Tex. Natural Res. Conservation Comm'n, No. 96-05388 (126th Dist. Ct., Travis County, Tex. May 14, 1997), *aff'd*, Heat Energy Advanced Tech., Inc. & Tex. Natural Res. Conservation Comm'n v. West Dallas Coal. for Envtl. Justice, 962 S.W.2d 288 (Tex. App.—Austin, 1998, writ denied); Mary Louise Ladd Holton v. Tex. Natural Res. Conservation Comm'n, No. 97-06408 (261st Dist. Ct., Travis County, Tex. Nov. 13, 1998) (no appeal taken); Joe Grissom v. Tex. Natural Res. Conservation Comm'n, No. 99-00117 (98th Dist. Ct., Travis County, Tex Feb. 23. 1999.), *aff'd*, United Copper Indus. v. Grissom, 17 S.W.3d 797 (Tex. App.—Austin, 2000, pet. dism'd).

135 *Heat Energy Advanced Tech., Inc.*, 962 S.W.2d 288.

136 Robert Elder, Jr., *High Court Reignites Fight Over Permits*, WALL ST. J., Sept. 9, 1998, at T1.

137 Tex. H.B. 2444, 75th Leg., R.S. (1997).

tive Talton's bill passed out of Committee in the House, but died thereafter in the calendars committee of that chamber.[138]

As the 76th Legislative Session commenced, Tom Uher, Chair of the House Committee on Environmental Regulation, filed House Bill 801, which in its initial form would have also eliminated the contested case hearing process.[139] The Texas Chemical Council championed this bill.[140] While the bill as filed heavily favored regulated industry, Chairman Uher soon realized the need for a more balanced approach and called upon all of the stakeholders involved to negotiate a consensus committee substitute.[141] Organizations including the Texas Chemical Council, Texas Association of Business and Chambers of Commerce, and the Texas Oil and Gas Association represented interests of the regulated community in cooperation with with legal counsel who often represented regulated entities, such as Kinnan Goleman of Brown McCarroll & Oaks Hartline.[142] On the other hand, organizations including Consumers Union, National Wildlife Federation, and Texas Center for Policy Studies represented the interests of the public interest and environmental communities in coordination with legal counsel who frequently represented such interests, including Richard Lowerre of Henry, Lowerre, Johnson, Hess & Frederick.[143]

After much time and labor, these negotiations produced a consensus bill.[144] On April 6, 1999, a letter was signed by the various stakeholders (including entities as diverse as the Texas Chemical Council and Public Citizen) and jointly submitted to members of the legislature.[145] This letter stated that the Committee substitute was a bill "we all can support" and that it "provides for early public notice, issue-driven discovery and contested case hearings, and a more efficient, timely and economical process for all parties."[146] On the next day, the committee substitute was considered and passed out of the

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138 *Tex. H.B. 2444 History, 75th Leg., R.S.*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=75R&Bill=HB2444 (last visited May 25, 2014).

139 Tex. H.B. 801, 76th Leg., R.S. (1999) (proposing to amend TEX. WATER CODE § 5.552(a) to provide, "Subchapters C-H Chapter 2001, Government Code, do not apply to a proceeding to which [Texas Water Code Subchapter M governing Environmental Permitting Procedures] applies.").

140 Editorial Board, *No Comment,* HOUSTON CHRONICLE, Mar. 1, 1999, at 20A; Editorial Board, *Kill House Bill 801: Don't Let it Linger*, SAN ANTONIO-EXPRESS NEWS, Mar. 13, 1999.

141 Consensus letter to Tom Uher, Chairman, House Comm. on Envtl. Regulation (Apr. 6, 1999) (on file with author).

142 *See id.*

143 *See id.*

144 *Id.*

145 *Id.*

146 Signatories to this letter on behalf of regulated industry organizations included Mary Miksa on behalf of the Texas Association of Business & Chambers of Commerce, Jon Fisher on behalf of the Texas Chemical Council, and Cindy Morphew on behalf of the Texas Oil and Gas Association. *Id.* Signatories to this letter from firms frequently representing regulated entities included Kinnan Goleman of Brown McCaroll & Oaks Hartline, Jim Morriss of Thompson & Knight, Ken Ramirez of Bracewell & Patterson, and Paul Seals of Akin, Gump, Strauss, Hauer & Feld. *Id.* Signatories on behalf of environmental and public interest organizations included Reggie James on behalf of Consumers Union, Myron Hess on

House Committee on Environmental Regulation.[147] The bill subsequently passed out of the House after the adoption of relatively minor floor amendments offered by Chairman Uher.[148] Although the Senate attached a few amendments to the bill, each of these amendments was stripped from the bill prior to passage.[149]

Because it was a compromise Bill, House Bill 801 created a permitting process that all interests could find something to complain about. From the perspective of the regulated community, the bill had the advantage of producing a more "front loaded" process that facilitated identification of issues in dispute early in the process and provided more certainty in the scope of the contested case hearing process, but it also had the disadvantage of maintaining the contested case hearing process while removing then-existing limitations on who could prompt or participate in the hearing as an affected person. The environmental community and the public interest community could take solace that the contested case hearing process had been preserved, and the scope of persons entitled to a hearing had been clearly restored to that existing prior to 1995, but the requirement that all issues be specified during the comment period raised concerns as to whether the public would be able to meaningfully identify disputed issues so soon after the issuance of a draft permit.

E. 77TH REGULAR SESSION (2001)—ELIMINATION OF THE EXECUTIVE DIRECTOR AS A PARTY IN CONTESTED CASE HEARINGS AND CREATION OF THE DIRECT REFERRAL PROCESS

During the 77th Legislative Session, TNRCC underwent Sunset review, and so TNRCC's permitting process was again the subject of legislative attention.[150] But, having undergone such a thorough makeover during the previous session, the resultant changes to the permitting process were relatively limited. Of perhaps most significance, the TNRCC sunset bill removed the Executive Director as a party in hearings on a variety of environmental permit applications.[151] The Legislature took this action in light of the Sunset Commission's conclusion that having the agency serve as an advocate in contested case hearings on permits contributed to a sense of unfairness in the permitting

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behalf of National Wildlife Federation, and Tom "Smitty" Smith on behalf of Public Citizen. *Id.* Richard Lowerre signed the letter on behalf of Henry, Lowerre, Johnson, Hess and Frederick, a law firm that frequently represented protestants in proceedings before the TNRCC. *Id.* Signatories on behalf of local governments included J.D. Head on behalf of Chambers County and Cathy Sisk on behalf of Harris County. *Id.*

147 1999 H.J. of Tex. 1028, 75th Leg., R.S. .

148 1999 H.J. of Tex. 1378–80, 1441, 75th Leg., R.S. (Second & Third Readings).

149 Compare Tex. H.B. 801 as passed and engrossed in the House on Apr. 28, 1999, 1999 H.J. of Tex. 1567, 75th Leg., R.S., to Conference Comm. Rep. on Tex. H.B. 801 as adopted in the Senate on May 30, 1999, 1999 S.J. of Tex. 4200, 75th Leg., R.S., and as adopted in the House on May 30, 1999, 1999 H.J. of Tex. 4187, 75th Leg., R.S.

150 TEX. SUNSET COMM'N, SUNSET COMM'N DECISIONS: TEX. NATURAL RESOURCE CONSERVATION COMM'N (2000).

151 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 1.18, sec. 5.228(c), 2001 Tex. Gen. Laws 1933, 1940 (removing the Executive Director as a party to permit hearings), *repealed by* Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598 (reinstating the Executive Director as a mandatory party to permit hearings).

process.[152] Rather ironically, in the next Sunset cycle, the Legislature removed this prohibition and imposed a duty on the Executive Director to serve as an advocate in a contested case hearing.[153]

The Texas Legislature also passed Senate Bill 688 during the 77th Legislative session. This bill added an option for an applicant or the Executive Director to request direct referral of an application to SOAH at any point after the Executive Director has completed technical review of the application.[154] This procedure has allowed applicants to bypass the process by which the Commission considers briefing regarding a hearing request and considers the request in public meeting.[155] Alternatively, when a case is directly referred in this manner, no limitation beyond legal relevance applies to the scope of the issues that may be considered during the hearing, and the statute does not include an authorization for the Commission to provide a recommended duration for the hearing.[156]

F. 82nd Regular Session (2011)—Imposition of Discovery Limits, Elimination of State Agencies as Parties to Contested Case Hearings, and Requiring the Executive Director to Participate in Contested Case Hearings as an Advocate

After the 77th Legislative Session, the Legislature made adjustments to the types of applications subject to a contested case hearing, but did not make any significant changes in contested case hearing procedures until next sunset cycle in 2011. As initially filed, the TCEQ Sunset Bill made no changes to the permitting process.[157] Representative Chisum, however, offered two floor amendments to the TCEQ Sunset Bill impacting the TCEQ permitting process, both of which were adopted by the House.[158] The first amendment removed the right to a contested case hearing regarding a permit amendment application by an electric generating facility to establish permit conditions necessary for compliance with Clean Air Act hazardous air pollutant requirements.[159] The second amendment in large part grafted House Bill 3037 onto the TCEQ Sunset Bill.[160] House Bill 3037 had sought to make a number of changes to the contested case hearing process.[161] These changes included: (1) shifting the burden of proof to the protestant during a contested case hearing, (2) prohibiting a state agency from contesting a permit in the hearing process, (3) requiring the Executive Director to participate in the contested case hearing as an advocate for his or her preliminary decision, (4) prohibiting

152 Tex. Sunset Comm'n, *supra* note 150, at 48.
153 Tex. H.B. 2694, § 10.02, 2011 Tex. Gen. Laws 2579, 2598.
154 Tex. S.B. 688, Act of June 14, 2001, 77th R.S. ch. 935, §3, sec. 5.557, 2001 Tex. Gen. Laws 1873, 1875.
155 Tex. Water Code Ann. § 5.557(b) (West 2014) (exempting direct referral from the process for consideration of a hearing request set forth in Tex. Water Code § 5.556).
156 Tex. Water Code Ann. § 5.557 (West 2014).
157 Tex. H.B. 2694, 82nd Leg., R.S. (2011) (as filed Mar. 9, 2011).
158 2011 H.J. of Tex. 1969-72, 82nd Leg., R.S. (House Floor Amendment Nos. 39 & 40).
159 *Id.* at 1969–70 (House Floor Amendment No. 39).
160 *Id.* at 1970–72 (House Floor Amendment No. 40); Tex. H.B. 3037, 82nd Leg., R.S. (2011).
161 Tex. H.B. 3037, 82nd Leg., R.S. (2011).

the conduct of discovery after the deadline for pre-filed testimony, and (5) prohibiting the consideration of technical or scientific information in a contested case hearing that had not previously been provided to the Executive Director in the conduct of the staff's technical review of the application.[162] After being considered in a hearing of the House Committee on Environmental Regulation that continued until after two o'clock in the morning, House Bill 3037 passed out of Committee, but died in the House Calendars Committee.[163]

The committee substitute for the TCEQ Sunset Bill that passed out of the Senate Committee on Natural Resources did not include these changes to the permitting process, and discussion regarding the bill on the Senate floor made clear that this was intentional.[164] Senator Joan Huffman, sponsor of the TCEQ Sunset Bill in the Senate, discussed these amendments with Senator Watson during floor consideration of the bill.[165] Senator Watson noted that the provisions of House Bill 3037 added in the House would shift the burden of proof during a contested case hearing on a TCEQ permit.[166] Senator Huffman agreed that this shift was inappropriate, and pointed out that she had stripped both amendments from the bill when she presented it to the Senate Natural Resources Committee.[167] With regard to the elimination of contested case hearings for hazardous air pollutant permit amendments, Senator Huffman stated that she agreed, "it has no place on the Sunset Bill," and that "the concept is not a good one, that Representative Chisum was promoting."[168]

In Conference Committee, provisions regarding the shifting of the burden of proof and the limitation on submission of new technical or scientific information were stripped from the Sunset Bill.[169] The provision eliminating contested case hearings for MACT permit amendments was revised to allow a contested case hearing, but placed limitations on the length of such a hearing.[170] In the conference committee report for the bill, provisions that survived included: prohibiting a state agency from contesting a permit in the hearing process, requiring the Executive Director to participate in the contested case hearing as an advocate, and prohibiting the conduct of discovery after the deadline for pre-filed testimony.[171] Ultimately, the TCEQ Sunset Bill was passed as reflected in the Conference Committee Report.[172]

In this manner, while the most significant changes proposed to the contested case hearing process at that time were rejected by the 82nd Legislature—namely, those shifting the burden of proof and limiting the information allowed to be considered during a contested case hearing—several smaller changes were adopted.

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162 *Id.*
163 *Id.*; 2011 S.J. of Tex. 2254, 82nd Leg., R.S.
164 Tex. H.B. 2694, 82nd Leg., R.S. (2011) (as passed out of Senate Comm. on Natural Res. (May 5, 2011); 2011 S.J. of Tex. 1920 & 2252–58, 82nd Leg. R.S.
165 2011 S.J. of Tex. 2252-58, 82nd R.S.
166 *Id.* at 2252–53.
167 *Id.* at 2253.
168 *Id.* at 2254.
169 Conf. Comm. Report, Tex. H.B. 2694, 82nd Leg., R.S., 50–53 (May 24, 2011).
170 *Id.* at 30–32.
171 *Id.* at 50–53.
172 2011 H.J. of Tex. 6357, 82nd Leg., R.S.; 2011 S.J. of Tex. 4540, 82nd Leg., R.S.

G. Post-801 Changes in the Types of Applications Subject to Contested Case Hearings

Since the passage of House Bill 801, the Legislature has expanded the right to a contested case hearing in some respects, while imposing additional constraints on the process in other respects. In particular, the Legislature has expanded the right to a contested case hearing to include applications for concentrated animal feeding operations in the Bosque River Watershed,[173] sludge permits,[174] subsurface drip irrigation systems,[175] water quality permits for quarries on the John Graves Scenic Waterway,[176] the discharge of wastewater from commercial industrial solid waste facilities into publicly operated treatment works,[177] and the reopening of closed landfills.[178] In 2013, an unsuccessful effort was made to expand the right to a contested case hearing to include the land application of domestic septage.[179] The Legislature has also eliminated the right to a contested case hearing since passage of House Bill 801 in several instances, including what have been characterized as emission of *de minimis* quantities of air contaminants,[180]

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173 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 12.02, 2001 Tex. Gen. Laws 1933, **** (Adding Tex. Water Code § 26.503, which defines "sole source impairment zone" in a manner to include only the impaired portion of the Bosque River Watershed, requiring that a CAFO in a sole source impairment zone be authorized by a new or amended *individual* permit, and prohibiting the Commission from issuing a general permit authorizing the discharge of agricultural waste from a CAFO in the sole source impairment zone. This prevented the authorization of such CAFO's via a general permit authorization, a process that does not include the opportunity for a contested case hearing. Tex. Water Code § 26.040(l)).

174 *Id.* § 9.05, 2001 Tex. Gen. Laws 1933, ****(Adding Tex. Health & Safety Code § 361.121(b), requiring that a responsible person obtain a *permit* for the application of Class B Sludge. Permits issued under the Solid Waste Disposal Act are subject to a contested case hearing. Tex. Health & Safety Code § 361.089. Authorizations granted by registration instead of by permit are exempt from contested case hearings. 30 Tex. Admin. Code § 330.57(b). Prior to the implementation of this legislation, Class B sludge authorizations were granted through the registration process.).

175 Tex. H.B. 2651, Act of May 25, 2005, 79th Leg., R.S., ch. 637, § 1, sec. 32.056, 2005 Tex. Gen. Laws 1591, 1593.

176 Tex. S.B. 1354, Act of May 19, 2005, 79th Leg., R.S., ch. 374, § 2, sec. 26.559, 2005 Tex. Gen. Laws 1054, 1058.

177 Tex. S.B. 1281, Act of May 9, 2005, 79th Leg., R.S., ch. 362, § 1, sec. 1, 2005 Tex. Gen. Laws 1035 (Adding Tex. Health & Safety Code § 361.0901 to require a *permit* in order to *receive industrial solid waste for discharge into a publicly owned wastewater treatment plant. As noted above,* permits issued under the Solid Waste Disposal Act are subject to a contested case hearing. Tex. Health & Safety Code § 361.089).

178 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 9.04, 2001 Tex. Gen. Laws 1933, ***(Adding Tex. Health & Safety Code § 361.120(c) providing that, "the reopening of any such facility shall be considered a major amendment as such is defined by commission rules and shall subject the permittee to all of the procedural and substantive obligations imposed by the rules applicable to major amendments."

179 Tex. H.B. 3678, 83rd Leg., R.S. (2013).

180 Tex. H.B. 2518, Act of May 18, 2001, 77th Leg., R.S., ch. 1327, § 3, sec. 382.056(a) and (g), 2001 Tex. Gen. Laws 3267, 3268.

concrete batch plants with "enhanced" controls,[181] an application for the injection of non-hazardous brine water from a drinking water treatment plant,[182] and production area authorizations for uranium mines.[183]

H. POST-801 EFFORTS TO ELIMINATE THE CONTESTED CASE HEARING PROCESS FOR ALL PERMITS

Despite the failure to eliminate the contested case hearing process during the 74th, 75th and 76th Legislative Sessions, and the endorsement of House Bill 801 by groups representing the regulated community such as the Texas Chemical Council and the Texas Association of Business, efforts to replace the contested case hearing process with a notice and hearing process with no opportunity for an evidentiary hearing have continued. These efforts have included House Bill 2877, filed during the 78th Regular Session of the Legislature in 2003, and Senate Bill 957 during the 83rd Regular Session of the Legislature in 2013.[184] So, in all, legislation to eliminate the contested case hearing process has been filed and failed during five of the last ten regular sessions of the Legislature.

IV. IMPLEMENTATION OF THE CONTESTED CASE HEARING PROCESS

A. USE BY OTHER AGENCIES, AND THE REGULATED COMMUNITY'S SUPPORT FOR THE PROCESS WHEN SOMEONE ELSE'S AUTHORIZATION IS ON THE LINE

A wide range of administrative agencies in Texas use the contested case hearing process for a variety of proceedings. These include the Public Utility Commission (PUC), the RRC, the Office of the Comptroller, the Workforce Commission, the Department of Insurance, groundwater districts, and many others.[185] While the regulated

181 Tex. S.B. 1272, Act of June 1, 2003, 78th Leg., R.S., ch. 361, § 3, sec. 382.05199, 2003 Tex. Gen. Laws 1546, 1547.

182 Tex. H.B. 2654, Act of May 23, 2007, 80th Leg., R.S., ch. 901, § 3, sec. 27.023, 2007 Tex. Gen. Laws 2239, 2240.

183 Tex. H.B. 1079, Act of May 20, 2013, 83rd Leg., R.S., ch. 897, § 1, sec. 27.0513, 2013 Tex. Gen. Laws 2245.

184 Tex. H.B. 2877, 78th Leg, R.S. (2003); Tex. S.B. 957, 83rd Leg., R.S. (2013).

185 TEX. LABOR CODE ANN. §§ 410.151–.169 (West 2014) (regarding contested case hearings on workers' compensation disputes before the Texas Workforce Comm'n); TEX. WATER CODE ANN. §§ 36.401–.419 (West 2014) (providing for contested case hearings with regard to certain permits issued by groundwater conservation districts); TEX.UTIL. CODE ANN. § 102.006 (West 2014) (providing for contested case hearings with regard to regulation of rates and services of a gas utility); TEX. UTIL. CODE ANN. § 36.105 (West 2014) (providing for hearings on electric rate changes); TEX. UTIL. CODE ANN. § 53.105 (West 2014) (providing for hearings on rate changes by telecommunications utilities); TEX. INS. CODE ANN. § 2703.202 (West 2014) (requiring that the Commissioner of the Texas Department of Insurance order a contested case regarding a premium increase if requested by certain qualifying entities); TEX. INS. CODE ANN. § 2254.004 (West 2014) (requiring a contested case hearing on the request of an insurer to determine whether the rate order is excessive or unfairly discriminatory); TEX. NAT. RES. CODE ANN. § 85.205 (West 2014)

community opposes use of the hearing process in the consideration of TCEQ applications, the members of that same community frequently participate as protestants in contested case hearings before other agencies.

For example, members of the industrial community that advocate elimination of the contested case hearing process in TCEQ matters frequently participate in contested case hearings before the PUC. Texas Industrial Energy Consumers (TIEC) is a voluntary association of companies that operate industrial facilities in Texas, including refineries and chemical manufacturing facilities.[186] This organization has participated as a protestant in many contested case proceedings before the PUC to protest rates for electricity service.[187] These contested case proceedings are not subject to many of the limitations that apply to TCEQ proceedings. Yet, because powerful economic special interests participate in such hearings as both applicants and protestants, there is no legislative movement to limit such hearings. Applications for exceptions to the well spacing and density rules of the RRC serve as a similar example where business entities participate in proceedings both as applicants and as protestants.[188]

(providing that no rule or order pertaining to the conservation or the prevention of waste of oil and gas may be adopted by the Railroad Commission except after notice and hearing); TEX. NAT. RES. CODE ANN. § 92.004 (West 2014) (providing that the Railroad Commission shall hold a hearing on an application to create a qualified subdivision); TEX. TAX CODE ANN. § 154.1145 (West 2014) ("Unless otherwise provided by this [Tax Code Chapter 154 regarding cigarette taxes], the comptroller shall conduct all hearings required by this chapter in accordance with Chapter 2001, Government Code.").

186 *See* TXU Generation Co. L.P., et. al v. Pub. Util. Comm'n of Tex., 165 S.W.3d 821 (Tex. App.—Austin 2005, pet. denied), Amicus Curiae Brief of Texas Industrial Energy Consumers in Support of the Repondent's Brief on the Merits, 1 (Apr. 13, 2006).

187 *See, e.g.*, Tex. Pub. Util. Comm'n, *Application of CenterPoint Energy Houston Electric, LLC for Approval to Refund Unspent Envtl. Retrofit Funds*, No. 33823, 2007 WL 725034, Feb. 14, 2007 (Interim Order granting motion to intervene by TIEC); Tex. Pub. Util. Comm'n, *Review of Agreements Relating to the Transfer of Nuclear Decommissioning Trust Funds From AEP Tex. Central Co. to Tex. Genco, LP Pursuant to P.U.C. Subst. R. 25.303(d)*, Project No. 30749, 2005 WL 941740, Apr. 20, 2005 (Interim Order granting motion to intervene by TIEC); Tex. State Office of Admin. Hearings, *Petition of El Paso Elec. Co. to Reconcile Fuel Costs*, No. 473-05-0013, 2004 WL 2603756, Nov. 5, 2004 (SOAH Order No. 3 granting motion to intervene by TIEC); Tex. Pub. Util. Comm'n, *Application of Entergy Gulf States, Inc. to Revise Rider IPCR Rates and Implement an Interim Surcharge*, 2007 WL 2766732, Sept. 21, 2007 (Order granting motion to intervene by TIEC); Tex. Pub. Util. Comm'n, *Application of Golden Spread Elec. Coop., Inc. for Approval of Transmission Cost of Service and Wholesale Transmission Rates*, No. 39024, 2011 WL 2280282, June 30, 2011 (Interim Order granting TIEC's motion to intervene); Tex. Pub. Util. Comm'n, *Application of Sw. Pub. Service Company for Authority to Revise Its Fixed Fuel Factors Pursuant to the Formula Approved in Docket No. 34269*, No. 35538, 2008 WL 1841214, Apr. 18, 2008 (Interim Order granting motion to intervene by TIEC).

188 *See, e.g.*, Tex. R.R. Comm'n, *Application of Willowbend Investments, Inc. For a Rule 38 Exception to Drill The McKee's Port Unit, Well No. 1D, Newark, East (Caddo Lime) and Newark, East (Barnett Shale) Fields Tarrant County, Texas*, Docket No. 05-0250329 (application for exception to well density rule protested by Western Production Company, an operator of nearby acreage); Tex. R.R. Comm'n, *Application of Samson Lone Star LP for Exceptions to Statewide Rule 38 to drill the Isaacs 210 Lease Well No. 8 and the Isaacs 209 Lease Well Nos. 8*

The contested case hearing process at TCEQ serves a similar function to the hearing process at the PUC or RRC. The availability of the contested case hearing process regarding TCEQ permits furthers the protection of property rights and the health and safety of impacted persons. Industry's selective targeting of the hearing process at TCEQ, while making no effort to do away with the use of the hearing process before agencies such as the PUC or RRC, suggests that this effort has more to do with the political influence of the interests involved than with the merits of the process itself.

B. The Contested Case Hearing Process Provides an Avenue for Input From a Wide Range of Impacted Persons, including Property Owners, Businesses, and Local Governments

Since the passage of House Bill 801, the hearing process has proven valuable for a wide range of stakeholders who find themselves uniquely impacted by an application. In some cases, well-known environmental organizations represent the interests of affected persons during a hearing, but this is hardly the norm.

Often, a business will participate in a contested case hearing as a protestant to ensure that a permit under consideration by TCEQ complies with all regulatory requirements. For example, when Blue Ridge Landfill TX, LP, applied to the TCEQ seeking to significantly raise the height of its landfill, hearing requests were filed by three Houston television stations alleging that the expansion constituted an incompatible land use as it would block the ability of their nearby Doppler radar towers to monitor weather in the Gulf of Mexico.[189] The Executive Director had simply dismissed such concerns expressed by the public during the comment period, but through the contested case hearing process, these stations were able to develop information and reach an agreement that addressed their concerns.[190] Similarly, in response to the construction and operation of a new landfill in Webb County, an independent oil company joined in the contested case hearing to protect its mineral interests beneath the site.[191]

Quite frequently, nearby landowners find it necessary to pursue a contested case hearing to ensure that an application meets applicable regulatory requirements necessary to protect their property from harm. For example, in the case of an application by Synagro of Texas-CDR, Inc. to apply domestic wastewater treatment plant sludge to over

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and 9, Canadian, SW. (Granite Wash) and Wildcat Fields, Hemphill County, Texas, Docket Nos. 10-0220715, 10-0220717, 10-0220718 (application for exception to Texas Railroad Commission well density rule, protested by Chevron USA, Inc.).

189 Tex. Comm'n on Envtl. Quality, *Application by Blue Ridge Landfill TX, LP for an amendment to a Type I MSW Permit; Permit No. 1505A*, Docket No. 2007-0614-MSW, Aug. 2, 2007 (Interim Order).

190 Tex. State Office of Admin. Hearings, *Application by Blue Ridge Landfill TX, LP for an amendment to a Type I MSW Permit; Permit No. 1505A*, No. 582-07-3949, Order No. 13, Nov. 18, 2008 (Interim SOAH order granting withdrawal of KTRK and KHOU as parties due to agreement resolving incompatibility), Order No. 20, Apr. 9, 2009 (Interim SOAH Order granting withdrawal of KRIV as a party due to settlement resolving its concerns related to land use compatibility).

191 Tex. State Office of Admin. Hearings, *Application by Regional Land Management Services, Ltd., for a New Type I Municipal Solid Waste Landfill (MSW Permit No. 2286)*, No. 582-04-0975, Order No. 10, Mar. 13, 2007 (Interim Order admitting Rosetta Res. Operating L.P. as a protesting party).

900 acres in Colorado County, a group of nearby farmers and landowners, as well as the Lower Colorado River Authority, sought a contested case hearing after the Executive Director dismissed their comments.[192] These protesting landowners included a family that had owned the adjacent property since 1837, and this property had been accepted into the Texas Department of Agriculture's Family Land Heritage Program in consideration of its use for over one hundred years as a family farm.[193] These local farmers had much more knowledge regarding the agricultural suitability of the property in the area then did Synagro's asserted experts. Yet, the Executive Director had dismissed the concerns of these landowners as expressed during the comment period.[194] Soon after the submission of pre-filed testimony from these protestants, which included the testimony of a retired soil science professor at Texas A&M University explaining how the site was unsuitable for use as proposed in the permit, Synagro withdrew its application with prejudice rather than defend it at a hearing on the merits.[195]

The contested case hearing process has also played an important role in allowing governmental entities to provide input during the permitting process, particularly local governments. Such governmental entities often have in-house expertise that can assist TCEQ in making the most informed decision. For example, at one point, Tan Terra Environmental Services proposed to locate a landfill in Willacy County that would have been bisected by an existing irrigation canal owned and operated by Delta Lake Irrigation District.[196] The District participated in the hearing to present testimony of its engineering staff regarding the potential impact of the landfill on its canal.[197] In another case, Kinney County, the Cities of Brackettville and Spofford, a soil and water conservation district, and the United States Air Force participated in a contested case hearing to protest a new municipal solid waste landfill proposed near Del Rio.[198] These parties presented expert testimony on the potential for the landfill to increase bird strikes on Air Force planes.[199] This testimony led to the addition of a bird abatement plan.[200] The Commission ultimately denied the application after the administrative law judge refused to grant a request by the applicant to further amend its application to correct deficien-

192 Tex. Comm'n on Envtl. Quality, *Application by Synagro of Texas-CDR, Inc. for new Permit No. WQ0004672000,* No. 2005-0070-SLG, Apr. 5, 2005 (Interim Order granting hearing requests).

193 *Id.* at 2–3.

194 Executive Director's Response to Public Comment, Tex. Comm'n on Envtl. Quality, *Application by Synagro of Texas CDR, Inc., for Tex. Comm'n on Envtl. Quality Permit No. 04672* (Dec. 15, 2004).

195 Tex. Comm'n on Envtl. Quality, *Application by Synagro of Texas-CDR, Inc. for new Permit No. WQ0004672000,* TCEQ Docket No. 2005-0070-SLG, May 8, 2006 (Final order dismissing application).

196 Tex. State Office of Admin. Hearings, *Application of Tan Terra Envtl. Svs., Inc. for* MSW *Permit No. 2305*, SOAH Docket No. 582-05-0868, p. 4, (Jan. 17, 2006) (Proposal for Decision).

197 *Id.* at 23.

198 Tex. Natural Res. Conservation Comm'n, *An Order Denying Permit No. MSW 2253 to Adobe Eco-Systems, Ltd.,* TNRCC Docket No. 1997-0807-MSW, p. 3 (May 15, 2000) (Final Order denying application).

199 *Id.*

200 *Id.*

cies identified through the hearing process.[201] In denying the application, the Commission noted that the processing of the application had been repeatedly delayed through applicant's actions of amending its application and changing legal counsel.[202]

C. Few Applications are Subject to Hearing Requests, Much Less a Full Contested Case Hearing

Relatively few applications undergo the full contested case hearing process, while those that do generally involve larger facilities with a significant impact. When an application does undergo a contested case hearing, the hearing process often results in more stringent permit terms found necessary to ensure compliance with the minimum requirements of the TCEQ rules. This section only analyzes the statistics for certain types of air, solid waste, and water quality permits. Other types of permits are also subject to House Bill 801, but these categories of permits encompass the primary types of permits of concern in discussing the contested case hearing process at TCEQ.

TCEQ processes more applications for individual water quality permits than any other permitting program at the agency, and these are the least likely to undergo a contested case hearing. Of all applications for either new individual permits or major amendments to existing individual water quality permits submitted in fiscal years 2007 and 2008, only 0.5% underwent the entire House Bill 801 process to receive a decision on the application by the Commission.[203] While no applications for a major amendment of a permit in this period underwent the contested case hearing process, 0.8% of new permits were subject to the full hearing process.[204] TCEQ received no hearing request

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201 *Id.*

202 *Id.*

203 TCEQ received approximately 555 administratively complete applications for the issuance of a new individual water quality permit or the major amendment of an individual water quality permit in fiscal years 2007 and 2008. Tex. Comm'n on Envtl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed Feb. 6, 2014). Of these, three underwent the full contested case hearing process to a final decision by the Commission. Texas Comm'n on Envtl. Quality, *Application By Farmersville Investors, LP, For Tex. Pollutant Discharge Elimination Sys. (TPDES)Permit No. WQ0014778001*, TCEQ Docket No. 2008-1305-MWD (July 11, 2011) (Final Order granting permit); Tex. Comm'n on Envtl. Quality, *Application of South Central, Water Company for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014804001*, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final Order granting permit); Tex. Comm'n on Envtl. Quality, *Application By Oak Grove Management Company LLC for Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ001986000,* TCEQ Docket No. 2009-0398-IWD (Aug. 24, 2010) (Final Order granting permit). For purposes of this article, matters processed in a consolidated manner are counted as a single application. Thus, authorizations with multiple permittees are counted as a single application.

204 In fiscal years 2007 and 2008 combined, TCEQ received a total of 265 applications for new individual water quality permits and approximately 289 applications for the major amendment of a water quality permit. Tex. Comm'n on Envtl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed Feb. 6, 2014). TCEQ also received 1053 renewal applications. *Id.*

regarding the vast majority of water quality permit applications subject to House Bill 801 submitted in this period.[205] In many cases, hearing requests were withdrawn early enough for the Executive Director to issue the permit without a consideration of the application by the Commission at all, although in several cases the applicant withdrew its application after drawing several hearing requests.[206] In all, TCEQ referred only 6% of applications for new individual water quality permits to SOAH, while referring only 2% of applications for the amendment of a water quality permit to SOAH.[207] In most individual water quality permit applications referred to SOAH, the application was remanded to the Executive Director for issuance of the permit after protests were withdrawn, although in a few cases the remand occurred due to the withdrawal of an application.[208] Of the four applications referred to SOAH that underwent a full contested case hearing on the merits of the application, one was issued after a single hearing,[209] two of the permits

205 Of the approximately 265 applications for new individual water quality permits, hearing requests were received on forty-six applications, or 17% of applications. *Id.* Similarly, of 289 applications for the major amendment of an individual water quality permit, TCEQ received hearing requests with regard to only twenty-nine applications, or 10% of applications. *Id.*

206 In thirteen of the forty-six applications for a new permit subject to a hearing request on a new application, the applicant withdrew the application prior to processing of the hearing requests, and in eleven cases the hearing requesters withdrew their hearing request prior to its consideration by the Commission. *Id.* In five of the twenty-nine cases where hearing requests were filed on an application for a major amendment, the applicant withdrew the application prior to processing of the hearing requests, and in twelve other cases the hearing requesters withdrew their hearing requests and the permits were granted. *Id.*

207 Out of 265 applications for new individual water quality permits declared administratively complete in fiscal years 2007 and 2008, sixteen applications were referred to SOAH. Tex. Comm'n on Envtl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed Feb. 6, 2014). Out of two 289 applications for major amendments to individual water quality permits declared administratively complete in fiscal years 2007 and 2008, only five applications were referred to SOAH. *Id.*

208 Of the sixteen applications for new individual wastewater permits filed in this period referred to SOAH, nine were remanded due to a withdrawal of all protests, and two were remanded due to the withdrawal of the application. *Id.* One was remanded due to the absence of protestants at the preliminary hearing. *Id.* Of the five major amendment applications filed in this period referred to SOAH, three were remanded to the Executive Director for issuance of the permit due to withdrawal of all protests. *Id.*

209 Tex. Comm'n on Envtl. Quality, *Application By Oak Grove Management Company LLC for Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ001986000,* TCEQ Docket No. 2009-0398-IWD (Aug. 24, 2010) (Final Order granting permit).

were issued after being remanded to SOAH for a second hearing,[210] and the last has been dismissed as moot.[211]

Applications for the issuance of a new prevention of significant deterioration (PSD) air permit for a major source, or the major amendment of a PSD permit, were somewhat more likely to undergo the full H.B. 801 process, although TCEQ processed significantly fewer of these applications than water quality applications.[212] In particular, in fiscal years 2007 and 2008 combined, TCEQ received thirty-three administratively complete applications for new PSD permits, and fifty-five applications for the major amendment of a PSD permit, with two other applications categorized as applications for both a new permit and a major amendment.[213] Approximately one in three applications for a new PSD permit received at least one hearing request, and approximately one in six applications for the major amendment of a PSD permit received at least one hearing request.[214] Out of the thirty-three applications for new PSD permits submitted in fiscal years 2007 and 2008, five have been referred to SOAH.[215] Similarly, TCEQ referred to SOAH only two

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210 Texas Comm'n on Envtl. Quality, *Application By Farmersville Investors, LP, For Tex. Pollutant Discharge Elimination Sys. (TPDES)Permit No. WQ001477800l*, TCEQ Docket No. 2008-1305-MWD (July 11, 2011) (Final Order granting permit); Tex. Comm'n on Envtl. Quality, *Application of South Central, Water Company for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014804001*, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final order granting permit).

211 Tex. State Office of Admin. Hearings, *Application of Jeremiah Venture LP for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014785001*, SOAH Docket No. 582-09-1617 (March 20, 2014) Order No. 36 Granting Unopposed Motion to Dismiss. Unopposed Motion to Dismiss, Tex. State Office of Admin. Hearings, *Application of Jeremiah Venture LP for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014785001*, SOAH Docket No. 582-09-1617.

212 In fiscal years 2007 and 2008 combined, TCEQ received eighty-six applications for the issuance or amendment of a prevention of significant deterioration (PSD) permit, as compared to 554 applications for the issuance or amendment of an individual water quality permit. Tex. Comm'n on Envtl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed Feb. 22, 2014).

213 In this count, applications to both renew and amend an authorization have been counted as amendments. The applications of the U.S. Department of the Army for Permit No. PSDTX1112 and ExxonMobil Corporation for Permit No. PSDTX No. 1121 were each classified as both an amendment and a renewal. *Id.*

214 Of the thirty-three applications for a new PSD permit declared administratively complete in this period, at least one hearing request was received in each of eleven applications. Of the fifty-five applications for the amendment of a PSD permit declared administratively complete in this period, at least one hearing request was received in each of eight applications. *Id.* No hearing requests were filed with regard to the two applications categorized as involving both the issuance of an amendment and new permit. *Id.*

215 Tex. Comm'n on Envtl. Quality, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105,* TCEQ Docket No. 2008-1786-AIR, 2009 WL 755352 (Mar. 17, 2009) (Interim Order); Tex. Comm'n on Envtl. Quality, *Application of Aspen Power, LLC for Permit No. PSDTX1089*, TCEQ Docket No. 2008-1145-AIR, 2009 WL 2878497; Tex. Comm'n on Envtl. Quality, *Application of IPA Coleto Creek, LLC for Permit No. PSD-TX-1118*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010); Tex. Comm'n on

applications for the major amendment of a PSD permit out of fifty-five applications declared administratively complete in this period.[216]

In four of the five applications for a new PSD permit submitted in this period that were referred to SOAH, the contested case hearing process produced a more stringent permit. The sole exception was the application by Madison Bell Partners, L.P. to construct a natural-gas fired power generation plant.[217] This application was remanded to the TCEQ for issuance of the permit within two months of the preliminary hearing due to a withdrawal of all protests.[218]

In all four cases other than the *Madison Bell Partners* matter, the hearing process resulted in a finding by TCEQ that the Executive Director's draft permit did not contain conditions consistent with the requirements of TCEQ's regulations. An application by Aspen Power to install a new wood-waste-fueled boiler proceeded through a full contested case hearing.[219] At the close of that hearing, the ALJ issued a Proposal for Decision (PFD) recommending that the application be denied due to a finding that the draft permit did not meet all requirements of the TCEQ rules.[220] Prior to the consideration of

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Envtl. Quality, *Application of Tenaska Trailblazer Partners LLC for Permit No. PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR, 2010 WL 4021307 (Dec. 29, 2010); Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center LLC for Permit No. PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR, 2010 WL 2737018 (July 1, 2010) (all referred to SOAH). In one of the 33 applications for a new PSD permit, the applicant decided to pursue the project as a conventional Subchapter B construction permit instead of a flexible permit, and thus the application is not subject to a PSD review. Executive Director's Response to Hearing Requests, Tex. Comm'n on Envtl. Quality, *Application of Citgo Refining and Chemicals Co. for Permit No.80693*, TCEQ Docket No. 2013-2078-AIR, (March 5, 2014) Hearing requests were received with regard to this application, and it may still be referred to SOAH. *Id.*The Executive Director's Response to Public Comments in that matter was not issued until September 24, 2013. *Id.* Tex. Comm'n on Envtl. Quality, Commissioners' Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed July 14, 2014).

216 Tex. Comm'n on Envtl. Quality, *Application of ExxonMobil Corp. for Permit No. PSDTX992M1*, TCEQ Docket No. 2007-1460-AIR (Nov. 12, 2007) (Interim Order); Tex. Comm'n on Envtl. Quality, *Application of Flint Hills Res. for Permit No. PSDTX413M8*, TCEQ Docket No. 2008-0293-AIR (Sept. 26, 2008) (Interim Order).

217 Tex. Comm'n on Envtl. Quality, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105,* TCEQ Docket No. 2008-1786-AIR, Applicant Madison Bell Partners L.P.'s Response to Hearing Requests, p. 1 (Feb. 13, 2009), *available at* http://www7.tceq.state.tx.us/uploads/eagendas/hr-rfr/2008-1786-AIR-ApR.pdf (last visited May 25, 2014); Tex. State Office of Admin. Hearings, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105,* SOAH Docket No. 582-09-3280 (July 21, 2009) (Order No. 3 Granting Motion to Dismiss and Remand).

218 Tex. State Office of Admin. Hearings, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105,* SOAH Docket No. 582-09-3280 (July 21, 2009) (Order No. 3 Granting Motion to Dismiss and Remand).

219 Tex. State Office of Admin. Hearings, *Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, 2009 WL 2878494, *26 (Aug. 24, 2009) (Proposal for Decision).

220 *Id.*

this recommendation by the Commission, the applicant and protestants reached an agreement incorporating more stringent emission limits to address deficiencies in the application, and the matter was remanded to the Executive Director for issuance of the permit.[221]

SOAH also conducted a contested case hearing regarding an application by IPA Coleto Creek, LLC to construct a new pulverized coal-fired electric generating unit and related facilities at IPA's existing Coleto Creek Power Station.[222] In their PFD regarding this application, the ALJs found that TCEQ rules required a more stringent emission limit for PM/PM_{10} than that contained in the Executive Director's draft permit.[223] The final order issued by the Commission adopted this finding and incorporated the emission limit for PM/PM_{10} recommended by the ALJs.[224]

A similar outcome resulted from the consideration of an application by Las Brisas Energy Center (LBEC) to construct four electric generating units (EGUs) and related facilities in Corpus Christi. After an initial contested case hearing, the Executive Director took the position that the matter should be remanded to him for further consideration of the proposed material handling operations.[225] The ALJs, however, found that the flaws in the permit went deeper, and so concluded that "numerous aspects of [Las Brisas Energy Center's] air modeling were simply inadequate and provide insufficient assurance that the permits, if issued, would comply with all applicable air quality standards and be protective of human health and the environment."[226] Upon considering this PFD, the Commission remanded the matter for another hearing to, among other things, consider

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221 *Joint Motion for Remand re: Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, TCEQ Docket No. 2008-1145-AIR (Oct. 20, 2009); Marked Agenda, TCEQ Public Meeting Oct. 21, 2009, Item No. 2, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/agendas/comm/marked/2009/091021.mrk.pdf (last visited May 25, 2014).

222 Tex. State Office of Admin. Hearings, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309 (Feb. 8, 2010) (Proposal for Decision).

223 *Id.*

224 Tex. Comm'n on Envtl. Quality, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit); Tex. State Office of Admin. Hearings, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309 (May 3, 2010) (Finding of Fact No. 212, Conclusion of Law No. 30).

225 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket No. 582-09-2005, 2010 WL 1387854 (Mar. 29, 2010) (Proposal for Decision).

226 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, Docket No. 582-09-2005, 2010 WL 1387854, at *73, Mar. 29, 2010 (Proposal for Decision).

additional modeling by the applicant.[227] On remand, the ALJs found that the Applicant's modeling was still flawed, but that the Executive Director had performed modeling that did not suffer from the same deficiencies.[228] Ultimately, the Commission issued the Las Brisas permit in reliance on modeling performed by the Executive Director, with more stringent emission limits than those contained in the draft permit.[229] In its final order granting the Las Brisas Permit, the Commission found that:

> Many of the concerns addressed during the hearings on this matter were raised by the Protestants early in this proceeding and well before the original hearing. This demonstrates that the length of the hearings likely could have been shortened if LBEC had properly addressed those concerns before the original hearing.[230]

In this manner, the Commission itself formally acknowledged that the length of the process in the Las Brisas matter was largely due to the Applicant's failure to address problems in its application.

The conduct of a contested case hearing with regard to the application of Tenaska Trailblazer Partners, LLC (Tenaska) to construct a coal-fired electric power generating facility likewise resulted in a finding that the Executive Director's draft permit did not contain sufficiently stringent emissions limits. At the close of the contested case hearing, the ALJs found that emissions limits for nitrous oxides (NO_x), carbon monoxide (CO), volatile organic compounds (VOCs), particulate matter (PM), lead, mercury, and other hazardous air contaminants needed to be lowered for the permit to comply with applicable regulations.[231] Ultimately, the Commission did not adopt all of the ALJ's proposed

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227 Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No.2009-0033-AIR (July 1, 2010) (Interim TCEQ Order remanding matter to SOAH).

228 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket No. 582-09-2005 (Dec. 1, 2010) (Proposal for Decision on Remand).

229 Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). For example, the emission limit for PM/PM_{10} was more stringent in the final permit issued. Compare draft permit Total PM/PM_{10} emission limit of 0.033 lb/MMBtu with final permit limitation of 0.025 lb/MMBtu. Tex. State Office of Admin.Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket No. 582-09-2005, 2010 WL 1387854 (Mar. 29, 2010) (Proposal for Decision). Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit) (Finding of Fact No. 237).

230 Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR, p.41 (Feb. 22, 2011) (Final Order Granting Permit) (Finding of Fact No. 296).

231 Tex. State Office of Admin. Hearings, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, 2010 WL 4021306, *47 (Oct. 1, 2010) (Proposal for Decision).

revisions, but included in the final permit the stricter limits for NO_x, CO, and particulate matter found necessary by the ALJ.[232]

SOAH recommended granting the Tenaska application and the IPA Coleto Creek LLC Application if additional conditions were added to each permit in each case to meet the minimum requirements of TCEQ's rules.[233] In all three of these cases—Tenaska, Las Brisas, and Coleto Creek—the Commission ultimately issued the permits.[234] Considering these three permit applications and the Aspen Power application, four out of the thirty-three applications submitted to the TCEQ for a new PSD permit in the 2007 and 2008 fiscal years progressed through the entire contested case hearing process, and only three proceeded through the entire process to a final decision on the application. In all four of these cases that progressed through the hearing process, the permit ultimately issued contained additional conditions as recommended by SOAH that the TCEQ itself found necessary to ensure compliance with TCEQ's rules.[235]

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232 Tex. Comm'n on Envtl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order Granting Permit). Compare limitations for NO_x, CO, PM/$PM_{10(filter)}$, PM/$PM_{10(total)}$, and HF from Emission Point 54 (Pulverized Coal Burner) in draft permit and final permit.

233 Tex. State Office of Admin. Hearings, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, SOAH Docket No. 582-09-6185, *2 (Oct. 1, 2010) (Proposal for Decision). Tex. State Office of Admin. Hearings, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309, *67 (Feb. 8, 2010) (Proposal for Decision).

234 Tex. Comm'n on Envtl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR(Dec. 29, 2010) (Final Order Granting Permit). Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). Tex. Comm'n on Envtl. Quality, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit).

235 Tex. Comm'n on Envtl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR(Dec. 29, 2010) (Final Order Granting Permit). Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). Tex. Comm'n on Envtl. Quality, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit). *Joint Motion for Remand re: Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, TCEQ Docket No. 2008-1145-AIR (Oct. 20, 2009); Marked Agenda, TCEQ Public Meeting Oct. 21, 2009, Item

Of the two applications referred to SOAH for the amendment of a PSD permit, one was remanded prior to the preliminary hearing due to a withdrawal of all protests, and SOAH recommended the other for approval after a contested case hearing.[236] Thus, of the fifty-five applications for the major amendment of a PSD permit declared administratively complete in the 2007 and 2008 fiscal years, only one progressed through the entire House Bill 801 contested case hearing progress to a final decision on the application.

In fiscal years 2007 and 2008, TCEQ's Municipal Solid Waste Program received twenty-two administratively complete applications subject to the House Bill 801, with eight applications for new permits, thirteen applications for amended permits, and one application characterized as both a new application and an amendment.[237] Of the nine applications for a new permit, at least one contested case hearing request was received for five of the applications: an application by Republic Waste Services to construct and operate a new transfer station,[238] an application by Darling International, Inc. to authorize the processing of grease trap waste,[239] an application of GOPDQ NET LLC for the authorization of a new liquid waste processing facility,[240] an application by the Blossom Prairie Landfill for the construction and operation of a new landfill,[241] and an application by Fort Clark Springs Association for an arid-exempt landfill.[242]

Republic asked that its application be directly referred to SOAH.[243] All hearing requests were denied with respect to Darling's application,[244] Prairie Blossom Landfill and GOPDQ withdrew their applications. All hearing requests were withdrawn with

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No. 2, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/agendas/comm/marked/2009/091021.mrk.pdf (last visited May 25, 2014).

236 Tex. Comm'n on Envtl. Quality, *ExxonMobil Oil Corp. Application for Permit No. PSDTX992M1*, TCEQ Docket No. 2007-1460-AIR (Jan. 5, 2007); Tex. Comm'n on Envtl. Quality, *Flint Hills Res. Application for Permit No. PSDTX413*M8, TCEQ Docket No. 2008-0293-AIR (Aug. 9, 2006).

237 Tex. Comm'n on Envtl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at http://www10.tceq.texas.gov/epic/CCD/ (last accessed Feb 6, 2014).

238 Tex. Comm'n on Envtl. Quality, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. MSW-2356,* TCEQ Docket No. 2009-2058-MSW, 2011 WL 6778467, *1 (Dec. 15, 2011) (Final Order Granting Permit).

239 Tex. Comm'n on Envtl. Quality, *Application by Darling International, Inc. for new Municipal Solid Waste Permit No. 2353*, TCEQ Docket No. 2008-1446-MSW, 2009 WL 762309 (Mar. 3, 2009) (Final Order granting permit and denying all hearing requests).

240 Tex. Comm'n on Envtl. Quality, *Application by GOPDQ NET LLC for Municipal Solid Waste Permit Major Amendment for Permit No. 2350*, TCEQ Docket No. 2009-1637-MSW (Feb. 14, 2008).

241 Tex. Comm'n on Envtl. Quality, *Application by Blossom Prairie Landfill for Municipal Solid Waste Permit No. 2358*, TCEQ Docket No. 2009-1523-MSW (Aug. 22, 2008).

242 Tex. Comm'n on Envtl. Quality, *Application of Fort Clark Springs Association for new Municipal Solid Waste Permit No. 2354,* TCEQ Docket No. 2008-1247-MSW (July 26, 2007).

243 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Republic Waste Services of Texas, Ltd. for MSW Permit No. 2356*, SOAH Docket No. 582-10-2069, p. 2 (Sept. 26, 2011) (Proposal for Decision).

244 Tex. Comm'n on Envtl. Quality, *Application by Darling International, Inc. for new Municipal Solid Waste Permit No. 2353*, TCEQ Docket No. 2008-1446-MSW, 2009 WL 762309 (Mar. 3, 2009) (Final Order granting permit and denying all hearing requests).

regard to Fort Clark Springs Association's application.[245] Republic's permit application underwent a full contested case hearing, after which SOAH recommended that the permit be granted, and the Commission granted the permit.[246] In this manner, of the nine applications for new MSW permits submitted in the 2007 and 2008 fiscal years, only one progressed through the entire H.B. 801 process to a decision by the Commission.

Of the twelve applications for amended municipal solid waste permits declared administratively complete in the 2007 and 2008 fiscal years, two of the applications were subject to at least one hearing request: an application by Zapata County for a lateral and vertical expansion of its landfill,[247] and an application by Ruffino Hills for a transfer station.[248] TCEQ denied all requests for hearing on the Zapata County Landfill application.[249] The Ruffino Hills application was referred to SOAH after the Commission granted hearing requests[250] and then was remanded from SOAH to the Executive Director for issuance of the permit after all protests were withdrawn prior to the commencement of the hearing.[251] Thus, no application for the amendment of a municipal solid waste permit declared administratively complete in fiscal year 2008 underwent the full contested case hearing process.

D. THE SUBMISSION OF DEFICIENT APPLICATIONS AND TCEQ'S WILLINGNESS TO NEGOTIATE ON SUCH APPLICATIONS CONSTITUTE THE PRIMARY CAUSES OF DELAY IN THE PERMITTING PROCESS

While representatives of the regulated community frequently complain that the contested case hearing process unduly extends the time required to obtain a permit, the truth is that the applicants' and TCEQ's approach to the permitting process are the primary drivers of delays in the permitting process.

TCEQ's technical staff, as well as the Commissioners themselves, have demonstrated a tremendous willingness to allow the modification of permit applications at any point in the permitting process, which greatly reduces the incentive of applicants to provide a high-quality initial application. Even a consideration of the permits mentioned above reflects this pattern. The Commission found it necessary to remand all three water quality applications involved for a second hearing to allow the applicant to fully address

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245 Tex. Comm'n on Envtl. Quality, *Application of Fort Clark Springs Association for new Municipal Solid Waste Permit No. 2354,* TCEQ Docket No. 2008-1247-MSW (July 1, 2008).

246 Tex. Comm'n on Env. Quality, *Application of Republic Waste Services of Texas, LTD., for Type V Permit No. MSW-2356*, Docket No. 2009-2058-MSW (Final order granting permit).

247 Tex. Comm'n on Env. Quality, *Application of Zapata County for Major Amendment of MSW Permit No. 783,* Docket No. 2007-1792-MSW, 2009 WL 650458, Jan. 20, 2009 (Final Order Denying hearing requests and granting permit).

248 Tex. Comm'n Env. Quality, application of Ruffino Hills Transfer Station, LP for an amendment to Municipal Solid Waste Permit No. 1355A, Docket No. 2011-1071-MSW, 2011 WL 3805417 , Aug, 22, 2011 (Interim Order granting hearing requests).

249 Tex. Comm'n on Envtl. Quality, *Application by Zapata County for Major Amendment of Municipal Solid Waste Permit No. 783*, TCEQ Docket No. 2007-1792-MSW, 2009 WL 650458 (Jan. 20, 2009) (Final Order denying hearing requests and granting permit).

250 Tex. Comm'n Envtl. Quality, *Application of Ruffino Hills Transfer Station, LP for Amendment to Municipal Solid Waste Permit No. 1355A*, TCEQ Docket No. 2011-1071-MSW, 2011 WL 3805417 (Aug, 22, 2011) (Interim Order granting hearing requests).

251 *Id.* (SOAH Order No. 10, dated June 25, 2012).

issues that the Commission felt were not adequately resolved after an initial hearing on the merits.[252] With regard to the municipal solid waste matter undergoing a hearing, Republic Waste Services sought an extension of briefing deadlines[253] and was granted an abatement to modify its permit application.[254] Similarly, in the Las Brisas matter, a second hearing was prompted by deficiencies in the application.

In many more cases, the poor quality of applications submitted to TCEQ, and TCEQ's willingness to allow modification of those applications, delays the Executive Director's own technical review of the application and the time required to complete a response to comments. The technical review phase of the permitting process typically occupies the bulk of the time that a permit spends under consideration by the TCEQ. For example, most individual water quality permit applications for either a new permit or a major amendment take less than seven months from the date of application to the end of the Executive Director's technical review, while the total time spent from application to issuance for most of these applications is slightly more than ten months. If shortening the permitting process is the goal, then reforms should focus on how to enable the Executive Director's administrative and technical review to move more quickly since, for the vast majority of applications, these steps occupy far more time in the permitting process than does the public participation process. While TCEQ's limited resources constitute one factor in determining the length of the staff's technical review, other factors include time needed to develop critiques of deficient applications and time spent repeatedly reviewing applications due to changes in those applications. As applicants have full control over the quality of their initial applications, the most effective way to shorten the permitting process is to improve the quality of initial applications. Rather than blaming delays in the process on the public for pointing out flaws in the application, the more effective approach would be to find ways to increase the quality of initial applications and reduce the ability of applicants to alter applications as the permitting process moves forward.

E. TCEQ Encroachment on the Independence of SOAH

SOAH's purpose is to provide an independent administrative judiciary capable of objectively resolving administrative disputes.[255] As noted by the administrative law judges when recommending denial of an application by Las Brisas Energy Center, LLC,

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252 Tex. State Office of Admin. Hearings, *Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001*, SOAH Docket No. 582-09-2895, 2011 WL 457991, *2 (Feb. 7, 2011) (Proposal for Decision); Tex. State Office of Admin. Hearings, *Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001*, SOAH Docket No. 582-09-2895, 2011 WL 457991, *2 (Feb. 7, 2011) (Proposal for Decision).

253 Tex. State Office of Admin. Hearings, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. 2356,* SOAH Docket No. 582-10-2069, Order No. 18 (Interim Order granting request to revise schedule for reply briefs).

254 Tex. State Office of Admin. Hearings, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. 2356,* Docket No. 582-10-2069, Order No. 5 (Interim Order granting motion to abate).

255 Tex. Att'y Gen. Op. No. DM-231 (1993).

"as our agency's core values reflect, our role is simply to call balls and strikes."[256] To effectively perform this role, SOAH must operate with a certain level of independence. TCEQ's interactions with SOAH over the past several years call into question whether TCEQ respects this critical need to preserve SOAH's independence in the adjudicatory process.

Unfortunately, on several occasions in recent years the TCEQ Commissioners have taken it upon themselves to reverse the call of the umpires. One example involved the processing of applications by Texcom Gulf, Disposal, L.L.C. ("Texcom") for waste disposal well permits in Montgomery County near Conroe. Lone Star Groundwater Conservation District ("Lone Star") participated in the contested case hearing as a party, presenting evidence questioning Texcom's assumptions regarding permeability values and the behavior of nearby faults.[257] After the initial hearing and consideration of this evidence, the ALJs found that Texcom had based its groundwater modeling on improper assumptions.[258] Rather than recommend denial of the application, the ALJs proposed that the Commission require additional testing prior to operation of the facility.[259]

Upon considering this PFD, the Commission remanded the matter to SOAH to allow the applicant an opportunity to present additional modeling based on the more conservative permeability and transmissivity assumptions the ALJs had found appropriate, as well as alternative disposal options.[260] On remand, Denbury Onshore, LLC, a company holding oil, gas, and mineral interests for the acreage where Texcom proposed to operate the injection wells, joined the proceedings as a party.[261] Denbury presented evidence that the ALJs found persuasive, indicating that injected wastewater could move between geologic formations in a manner that Texcom had denied.[262] Further, the City of Conroe, participating as a party, presented evidence regarding the ability of its own wastewater treatment plant to serve as an alternate disposal option for the waste Texcom proposed to treat.

Upon the close of the hearing on remand, the ALJs issued an extensive PFD concluding that the preponderance of the evidence did not demonstrate that the injected

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256 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket 582-09-2005 (Dec. 1, 2010).

257 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 2, 33, 39-40 (Apr. 25, 2008) (Proposal for Decision).

258 *Id.* at 43–44.

259 *Id.* at 64.

260 Tex. Comm'n on Envtl. Quality, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, TCEQ Docket No. 2007-0204-WDW (Dec. 12, 2008) (Interim Order remanding matter to SOAH).

261 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 4, 15 (Apr. 25, 2008) (Amended Proposal for Decision after Remand).

262 *Id.* at 47–53.

waste would not migrate back to the surface.[263] Further, the ALJs found that the Conroe wastewater treatment plant constituted a reasonable alternative to the proposed injection wells.[264] Accordingly, the ALJs recommended that Texcom's application be denied.[265]

Despite the extensive factual record reflected in the PFD, the Commissioners reversed numerous proposed findings of fact on issues such as the character and behavior of the geologic formations and features involved, as well as the potential for migration of injected wastewater.[266] As for the availability of the Conroe wastewater treatment plant, the Commissioners concluded that the wastewater treatment plant was not a reasonable disposal alternative.[267] In short, the Commissioners disregarded the ALJs' factual analysis and instead substituted their own judgment of the facts.

In at least one case, a decision by the Commission to substitute its judgment for that of the ALJ on a factual question raised dissent between the commissioners themselves. In considering the application of Lerin Hills, Ltd. for a wastewater permit, a majority of the Commission voted to reject the ALJ's recommendation to deny the permit.[268] The ALJ had conducted an exhaustive review of evidence related to the lowering of water quality in the receiving waters resulting from the discharge and concluded that this change constituted a greater than *de minimis* change in water quality in violation of TCEQ's anti-degradation policy.[269] Chairman Shaw and Commissioner Garcia voted to reject this recommendation, and rejected and modified numerous findings of fact made by Judge Kilgore.[270] But Commissioner Soward voted against such a rejection of the ALJ's analysis, noting:

> You had expert witnesses and the ALJ sat there and listened to them and evaluated them, evaluated their testimony, observed their demeanor, evaluated the credibility, and still said no. So, I'm concerned about overruling the ALJ who I

263 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 96–97 (Apr. 25, 2008) (Amended Proposal for Decision after Remand).

264 *Id.* at 80–90 (reasonable alternatives analysis), 96–97 (groundwater analysis).

265 *Id.* at 118–119.

266 Tex. Comm'n on Envtl. Quality, *Application for Permit Nos. WDW410, WDW411, WDW412, and WWDW413 to Texcom Gulf Disposal, LLC*, TCEQ Docket No. 2007-0204-WDW (Apr. 7, 2011) (Final Order granting permits).

267 *Id.*

268 Texas Comm'n on Env. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

269 Tex. State Office of Admin. Hearings, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, Docket No. 582-08-0690, 2009 WL 635590 *17–*21 (Mar. 4, 2009) (Proposal for Decision recommending denial of permit).

270 Tex. Comm'n on Envtl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

> think did an excellent job of evaluating all of the evidence that she had in front of her. That's her job.[271]

The Commission's final order in the Lerin Hills matter indicated that its reversal of the ALJ was premised on a policy disagreement regarding the role of quantitative evidence in applying a narrative standard.[272] Even so, this rationale did not address all changes to findings of fact made by the final order.[273] Furthermore, the ability of the Commission to formulate after-the-fact policy rationales for its decisions does not entirely allay concerns when the Commission demonstrates a consistent pattern of reversing proposals for decision recommending denial of applications.

A broader view of TCEQ's consideration of SOAH proposals for decision for fiscal years 2009 through 2013 reveal that the *Texcom* and *Lerin Hills* cases are not isolated occurrences. During this period, TCEQ considered thirty contested SOAH proposals for decision on the merits of permits subject to House Bill 801.[274] In sixteen of these cases, SOAH initially recommended issuance of the permit, and TCEQ issued an order consistent with SOAH's recommendation.[275] In nine separate cases, however, the Commission

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271 Audio recording, May 20, 2009 TCEQ Agenda Meeting, at 1:00:14 – 1:00:40.

272 Texas Comm'n on Envtl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001,* TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

273 For instance, the final order issued by the Commission reversed several findings of fact related to changes in dissolved oxygen, for which numeric criteria exists. *Compare* Tex. State Office of Admin. Hearings, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001,* SOAH Docket No. 582-08-0690 (Mar. 4, 2009) (Proposed Order denying permit) *to* Tex. Comm'n on Envtl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001,* TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

274 *2013 Marked Commission Agendas*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceq.state.tx.us/agency/agendas/comm/mcindex13.html (last visited May 25, 2014).

275 Tex. Comm'n on Envtl. Quality, *Application of City of Aledo, for TPDES Permit No. WQ0010847001,* TCEQ Docket No. 2007-0020-MWD (Sept. 29, 2008) (Final Order issuing permit); Texas Comm'n on Envtl. Quality, *Application of Waste Management of Texas, Inc., for Permit No. MSW-66B,* TCEQ Docket No. 2006-1931-MSW (Oct. 1, 2008) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application by Hidden View Dairy for Amendment to TPDES Permit No. WQ0003197000,* TCEQ Docket No. 2007-0831-AGR (Jan. 23, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Regional Land Management Services, Ltd. for MSW Permit No. 2286,* TCEQ Docket No. 2003-0729-MSW (Feb. 27, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application by Marlin Atlantis White, Ltd. for TPDES Permit No. WQ0014570001,* TCEQ Docket No. 2006-1572-MWD (Apr. 17, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Galilee Partners, L.P., for a new TPDES Permit No. WQ0014640001,* Docket No. 2007-0016-MWD (Apr. 27, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of TCB Rental, Inc. for New Wastewater Permit, proposed TPDES Permit No. WQ0014725001,* TCEQ Docket No. 2007-1765-MWD (Sept. 16, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Flint Hills Res., L.P., for an Amendment to Air Quality Permit Nos. 8803A and PSD-TX-413M8 for the West Refinery in Nueces County, Texas,* TCEQ Docket No. 2008-0293-AIR (Oct. 16, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality,

moved ahead in either issuing a permit for which SOAH had recommended denying or issuing a permit with conditions SOAH had found inadequate.[276] In another four cases,

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Application of U.S. Ecology for Class 3 Modification to Permit No. HW-50052-001 and Compliance Plan No. CP-50052-001 for a Commercial Hazardous and Non-Hazardous Industrial Solid Waste Management Facility in Nueces county, Texas, TCEQ Docket No. 2008-1599-IHW (Nov. 24, 2009) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, Docket No. 2009-0032-AIR (May 3, 2010) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Oak Grove Management company, LLC for TPDES Permit No. WQ0001986000*, TCEQ Docket No. 2009-0398-MWD (Aug, 24, 2010) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application for Industrial Solid Waste Permit No. 87758 to TexCom Gulf Disposal, LLC*, TCEQ Docket No. 2007-0362-IHW (Feb. 17, 2011) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of the City of Patton Village for TPDES Permit No. WQ0014926001*, TCEQ Docket No. 2009-0913-MWD (Apr. 11, 2011) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Aggregate Industries – WCR for New Air Quality PErmit No. 83755*, TCEQ Docket No. 2009-1842-AIR (June 27, 2011) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of South Central Water Company for New Wastewater Permit, Proposed TPDES Permit No. WQ0014804001*, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final Order issuing permit); Tex. Comm'n on Envtl. Quality, *Application of Republic Services of Texas, Ltd., for Type V Permit No. MSW-2356*, TCEQ Docket No. 2009-2058-MSW (Dec. 15, 2011) (Final Order issuing permit).

276 Tex. Comm'n on Envtl. Quality, *Application by Williamson County for Permit No. MSW-1405*, Docket No. 2005-0337-MSW (Feb. 17, 2009) (Final Order issuing permit with operating hours contrary to findings of ALJ); Tex. Comm'n on Envtl. Quality, *Application of Waste Management of Texas, Inc., for Permit No. MSW-249D*, TCEQ Docket No. 2006-0612-MSW (Oct. 20, 2009) (Interim Order instructing SOAH to remove groundwater monitoring requirements found necessary by ALJ); Tex. Comm'n on Envtl. Quality, *Application for Permit Nos. WDW410, WDW411, WDW412, and WWDW413 to Texcom Gulf Disposal, LLC*, TCEQ Docket No. 2007-0204-WDW (Apr. 7, 2011) (Final Order granting permits, contrary to ALJ's recommendation of denial); Texas Comm'n on Envtl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit contrary to ALJ's recommendation of denial); Tex. Comm'n on Envtl. Quality, *Application by NRG Texas Power LLC for State Air Quality Permit 79188, Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072, and Hazardous Air Pollutant Major Source Permit No. HAP-14*, TCEQ Docket No. 2007-1820-AIR (Dec. 11, 2009) (Final Order granting permit contrary to ALJs' recommendation of denial); Tex. Comm'n on Envtl. Quality, *Application by Uranium Energy Corp. for Issuance of Class III Injection Well Permit No. UR030705, Aquifer Exemption Order, and Production Area authorization No. 1 in Goliad County, Texas*, TCEQ Docket Nos. 2008-1888-UIC and 2009-1319-UIC (Mar. 7, 2011) (Final Order granting permit in reversal of ALJ's recommendation of either remand or denial); Tex. Comm'n on Envtl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality PErmit Nos. 85013, HAP48, OAL41 and PSD-TX-1138*, Docket No. 2009-0033-AIR (Feb. 22 2011) (Final Order granting permit contrary to ALJ's conclusion that the applicant had not presented evidence sufficient to meet burden of proof); Tex. Comm'n on Envtl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air*

SOAH altered its position after issuance of its initial PFD without being under Commission order to do so, and the Commission's ultimate decision was consistent with SOAH's altered recommendation.[277] During this five-year period, TCEQ only adopted one recommendation by SOAH that a permit be denied and, in that case, the applicant had steadfastly refused to present evidence in support of its application.[278] In short, this trend shows that TCEQ has little reluctance in reversing an ALJ's finding that could lead to denial of a permit application. Such a lack of deference fails to respect SOAH's intended role as an objective trier of facts.

Texas courts have recognized the value of an independent decisionmaker on questions of fact and have expressed concern when an administrative agency appears to undermine this independence.[279] In the case of *State v. Mid-South Pavers*, the Austin Court of Appeals addressed such a circumstance.[280] Mid-South Pavers pursued an administrative hearing under Texas Transportation Code § 201.112 seeking additional compensation of $2,570,654.76 from the Texas Department of Transportation (TxDOT) after completion of a highway construction project, including $159,269 for claims related to microsurfacing.[281] This microsurfacing issue boiled down to conflicting testimony by a witness for the paving contractor, David Laumer, who claimed that a TxDOT inspector had instructed him to install multiple layers of microsurfacing, as opposed to testimony of the TxDOT inspector, who claimed to have issued no such instructions.[282] The ALJ found the witness for the contractor to be more credible, and issued findings of fact requiring TxDOT to pay the $159,269 for the full microsurfacing work.[283] When reviewing the PFD, TxDOT's Executive Director reversed the ALJ's findings of fact on this

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Quality Permit 84167, HAP-13, and PSD-TX-1123, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order granting permit without all permit conditions the ALJ had determined to be required by rule).

277 Tex. Comm'n on Envtl. Quality, *Application by IESI Texas Landfill LP for MSW Permit No. 2332*, TCEQ Docket No. 2007-1302-MSW, SOAH Docket No. 582-08-1804 (Nov. 2, 2009) (Final Order Granting Permit) (Initial Proposal for Decision issued May 5, 2009 recommended denial, while Amended Proposal for Decision issued Sept. 4, 2009 recommended that permit be granted); Tex. Comm'n on Envtl. Quality, *Application of Hays County Water Control & Improvement District No. 1 for Amendment to TPDES Permit No. WQ0014293001*, TCEQ Docket No. 2007-1426-MWD (Mar. 16, 2009) (issuing permit without all conditions recommended by ALJ in proposal for decision); Tex. Comm'n on Envtl. Quality, *Application of BFI Waste Systems of North America, LLC for Type I MSW Permit No. 1447A*, TCEQ Docket No. 2007-1774-MSW (Sept. 14, 2009) (Final Order granting application in part with longer operating hours than initially recommended by ALJ).

278 Tex. Comm'n on Envtl. Quality, *Application by Tommy Davis d/b/a Slick Machines for TCEQ Air Permit No. 821991002*, TCEQ Docket No. 2010-0660-AIR (Aug. 22, 2011) (Final Order denying application).

279 *See, e.g.*, Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 564 (Tex. 2000); State v. Mid-South Pavers, 246 S.W.3d 711 (Tex. App.—Austin, 2007, pet. denied).

280 *Mid-South Pavers*, 246 S.W.3d 711.

281 *Id.* at 715, 724.

282 *Id.* at 718–719.

283 *Id.* at 719.

issue based on his own finding that the TxDOT employee was more credible.[284] Consequently, TxDOT denied the claim related to this work.[285]

In considering this agency change to the ALJ's finding of fact, the Austin Court of Appeals found that Texas Transportation Code § 201.112 rendered the general statute governing agency review of an ALJ's PFD (Texas Government Code § 2001.058) inapplicable,[286] much like Texas Government Code § 2003.047(m) primarily governs TCEQ's review of an ALJ's PFD. Similarly, the Court found that the standard for review of the change was that set forth at Texas Government Code § 2001.174,[287] just as the Court noted this standard of review in *Slay v. TCEQ* with regard to § 2003.047(m).[288] As one consequence of this standard, the Austin Court of Appeals found that TxDOT would exceed its authority to modify or reverse a finding by the ALJ if the new finding was not supported by substantial evidence.[289]

Even so, in *Mid-South Pavers*, the Court found it significant that the resolution of disputed facts in a hearing requires weighing the evidence and evaluating the credibility of the witnesses, a role for which the ALJ is in a superior position than an agency head or board reviewing the decision because the ALJ has heard the evidence and observed the demeanor of the witnesses.[290] Further, a neutral decisionmaker is crucial to providing a fair adjudicatory hearing.[291] With regard to TxDOT's reversal of the ALJ's findings on microsurfacing, the Court found it significant that the question in dispute turned solely on a question of witness credibility.[292] Where the record contained no independent evidence to support the Executive Director's decision, the Austin Court of Appeals found that it was arbitrary and capricious for TxDOT to reverse the ALJ's decision on witness credibility.[293] Without having heard the witnesses' testimony while being present to evaluate the witnesses' demeanor, and given the absence of independent evidence to resolve the fact question at issue, the Executive Director was simply in no position to resolve such a question of credibility.[294]

Considering the similarity in the limitations imposed by Texas Transportation Code § 201.112(c) and Texas Government Code § 2003.047(m), governing TCEQ's review of a PFD as well as the similar delegation of the primary fact-finding role to an administrative law judge, TCEQ should exercise with caution its authority to reject the decision of an ALJ and preserve a meaningful role for SOAH as an independent fact-finder, just as the Austin Court of Appeals did in *Mid-South Pavers*.

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284 *Id.*
285 *Id.*
286 *Id.* at 721.
287 *Id.* at 722.
288 Slay v. Tex. Comm'n on Envtl. Quality, 351 S.W.3d 532 (Tex. App.—2011, pet. denied).
289 *Mid-South Pavers*, 246 S.W.3d at 724.
290 *Id.* at 723.
291 *Id.*
292 *Id.* at 726.
293 *Id.* at 727.
294 *Id.*

F. The Far Hills Utility District Saga: A Case Study Reflecting the Benefits of the Current Process

Far Hills Utility District ("Far Hills") encompasses approximately 320 acres with several residential subdivisions on a peninsula of Lake Conroe, within which it provides both water and wastewater service.[295] Until 2004, Far Hills had sent its wastewater to a treatment facility operated by Montgomery County Utility District No. 2 (MCUD No. 2).[296] Far Hills' contract for this service ran through 2012, but in early 2004, MCUD No. 2 notified Far Hills that the treatment facility was nearing capacity and needed major repairs.[297] Rather than contribute the funds necessary for the expansion and repair of the MCUD No. 2 plant, Far Hills' Board decided to construct its own plant.[298]

1. Far Hills Application Round 1: A Deficient Analysis of the Wetlands Issue

To this end, in May of 2004, Far Hills' Board voted to condemn property owned by Roy Zboyan, which was located just outside of the District's boundaries.[299] Shortly thereafter, Far Hills filed an application with the TCEQ for the construction and operation of a wastewater treatment plant at this site to discharge into Lake Conroe.[300] The application form submitted by Far Hills included a question of whether the facility would comply with the siting requirements of 30 Tex. Admin. Code § 309.13(a)–(d).[301] One of these requirements prohibits the location of any treatment plant unit in a wetland.[302] Far Hills checked this box "No," and did not address the presence of wetlands in any other fashion.[303]

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295 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *3 (Nov. 27, 2006).

296 *Id.*

297 *Id.*

298 *Id.*

299 Zboyan v. Far Hills Util. Dist., 221 S.W. 3d 924, 929 (Tex. App.—Beaumont 2007, no pet.).

300 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *1 (Nov. 27, 2006).

301 Far Hills Utility District New Domestic Discharge Wastewater Permit Application, Supplemental Permit Information Form, Attachment 2, Domestic Admin. Report 1.1, at 12 (Aug. 23, 2004).

302 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *2 (Nov. 27, 2006).; 30 TEX. ADMIN. CODE § 309.13(b) (2014).

303 Far Hills Utility District New Domestic Discharge Wastewater Permit Application, Supplemental Permit Information Form, Attachment 2, Domestic Admin. Report 1.1, at 12 (Aug. 23, 2004).

Upon learning of this application, the affected public submitted numerous and extensive comments to the TCEQ.[304] In early December 2004, Far Hills had published notice of its application in *The Courier*, a newspaper published and circulated in the Conroe area.[305] The next month, the Executive Director made a preliminary decision to issue the permit, and notice of that decision was likewise published in *The Courier* in late January 2005.[306] Mr. Roy Zboyan submitted several comments, as did Capps Concerned Citizens (CCC), an organization of which Mr. Zboyan was a member.[307] In these comments, Mr. Zboyan noted the location of wetlands within the area on his property where Far Hills intended to locate its wastewater treatment plant units as well as other concerns.[308] Mr. Zboyan and others specifically objected to Far Hills' claim of compliance with the siting requirements of the TCEQ rules.[309] The public comment period ended at the close of a public meeting on June 13, 2005.[310] In all, TCEQ received comments from almost 200 individuals and entities, along with twenty hearing requests.[311]

In November 2005, Far Hills requested that the matter be directly referred to SOAH.[312] SOAH held a preliminary hearing on January 11, 2006.[313] At that hearing, CCC was admitted as a protestant.[314] The Executive Director had not issued a response to comments prior to the initiation of the contested case hearing process.[315] After the preliminary hearing, the Executive Director subsequently issued its Response to Comments recommending issuance of the permit.[316] Although the Executive Director's office has a regulatory deadline to issue a response to comments within sixty days of the end of the comment period, the process had taken seven months.[317] With regard to comments

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304 Tex. Comm'n on Envtl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001,* TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

305 Tex. Comm'n on Envtl. Quality, *An Order Denying the Application of Far Hills Utility District for Proposed TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, SOAH Docket No. 582-06-0568 (Sept. 7, 2007) (Finding of Fact No. 4).

306 Tex. Comm'n on Envtl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001,* TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

307 *Id.*

308 *Id.*

309 *Id.*

310 *Id.*

311 *Id.*

312 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *1 (Nov. 27, 2006).

313 *Id.*

314 *Id.*

315 *Id.*

316 Tex. Comm'n on Envtl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001,* TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

317 30 TEX. ADMIN. CODE § 55.156(b)(3) ("The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days."). In this case, the comment period ended with the final public meeting on June 13, 2005, and the response to comments was not filed with the Chief

involving the location of wetlands on the property, the Executive Director merely noted that it may be necessary for Far Hills to obtain a permit from the U.S. Army Corps of Engineers, but the Executive Director made no effort to address whether the application complied with TCEQ's own prohibition on the location of wastewater treatment plant units within wetlands.[318] Later, in deposition testimony, the TCEQ permit writer asserted that the Water Quality Standards team evaluated the presence of wetlands, while another staff member from TCEQ's water quality standards team noted that her office had not determined the location of wetlands.[319]

At the time of its deadline to submit pre-filed testimony in April 2006, Far Hills presented Nicholas Laskowski, who said he was working on a study to determine the location of wetlands on the site that he expected would demonstrate compliance, and he would let the parties know of his conclusions when he was done.[320] Mr. Laskowski was a soil scientist in training, having recently graduated with a masters degree in soil science.[321] A few weeks later, Mr. Laskowski supplemented his testimony to say that, upon completing his study, he had found that the Far Hills plant would not be located in wetlands within the jurisdiction of the Corps of Engineers, just as he had anticipated concluding.[322] In the proceeding, Far Hills argued that only wetlands within the jurisdiction of the Corps of Engineers constituted wetlands.[323]

Subsequently, CCC submitted pre-filed testimony of Dr. John Jacob, who was a professor at Texas A&M University and a professional geoscientist with extensive experience in wetlands delineation.[324] Having performed his own study of the site, Dr. Jacob testified that wetlands were indeed present where Far Hills proposed to locate its treatment plant units.[325] CCC further provided testimony and photographs of an area resi-

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Clerk until January 25, 2006. Tex. Comm'n on Envtl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001,* TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

318 Tex. Comm'n on Envtl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001,* TCEQ Docket No. 2005-1899-MWD, Executive Director's Preliminary Response to Public Comment, at 22 (Jan. 21, 2005).

319 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658 Oral Deposition of June Ella Martinez (TCEQ Permit Writer), at 42–43 (Apr. 11, 2006);, *Id.*, Oral Deposition of Lori Hamilton (Water Quality Standards Reviewer), at 57—58 (Apr. 11, 2006).

320 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, Direct Testimony and Exhibits of Nicholas A. Laskowski, submitted on behalf of Far Hills Utility District, at 2–3 (Apr. 21, 2006).

321 *Id.* at 1.

322 *Id.*

323 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *9 (Nov. 27, 2006).

324 *Id.*

325 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket

dent demonstrating the frequency and degree to which the proposed wastewater treatment plant site flooded.[326]

Having considered this evidence and the arguments of the parties, on November 27, 2006, the ALJ issued a PFD recommending denial of the permit due to the proposed location of treatment plant units within wetlands.[327] Ultimately, the Commission considered the application on August 22, 2007.[328] At that meeting, the Commission adopted the ALJ's recommendation that Far Hills' permit be denied given that Far Hills was proposing to locate treatment plant units within wetlands in direct violation of TCEQ's rules.[329]

2. Far Hills Application Round 2: An Inaccurate Application Leads to Insufficient Notice

Soon after the issuance of the ALJ's PFD, Far Hills submitted a second application for an alternate wastewater treatment plant at a different location.[330] But, the public notice for this second application was more limited. Although TCEQ rules require that initial notice of such applications be published in the newspaper of largest circulation in the County,[331] Far Hills published notice of this second application in the *Montgomery County News*, even though it presumably knew that the *Conroe Courier* was the newspaper of largest circulation in Montgomery County.[332] The Executive Director questioned the initial affidavit of publication for this notice, noting that Far Hills had not used the form provided for this purpose.[333] In response, Far Hills submitted a modified affidavit stating that the *Montgomery County News* was "*a* newspaper of largest circulation" in Montgomery County.[334] Given its smaller circulation, presumably fewer members of the public received notice of this second application.

No. 582-06-0658, Supplemental Direct Testimony and Exhibits of Dr. John Jacob, submitted on behalf of Capps Concerned Citizens (June 9, 2006).

326 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, Supplemental Direct Testimony and Exhibits of Ms. Patsy Clemons, submitted on behalf of Capps Concerned Citizens (June 9, 2006).

327 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *9, *11 (Nov. 27, 2006).

328 Tex. Comm'n on Envtl. Quality, *Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, TCEQ Docket No. 2005-1899-MWD, Order Denying Application (Sept. 7, 2007).

329 *Id.*

330 Tex. State Office of Admin. Hearings, *Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket No. 582-09-5727, 2010 WL 2619349, *1 (June 21, 2010).

331 30 Tex. Admin. Code § 39.405(f)(1) (2014).

332 Tex. State Office of Admin. Hearings, *Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket No. 582-09-5727, 2010 WL 2619349, *4, *7 (June 21, 2010).

333 *Id.* at *4.

334 *Id.* at *4 (emphasis added).

This second application also contained a map of the facility indicating that it would be placed on a five acre piece of property owned by Far Hills with an intervening property between the facility and that owned by nearby property owners Suzanne O'Neal and Judy Spencer.[335] Consequently, Ms. O'Neal and Ms. Spencer did not receive mailed notice of the application.[336] However, Ms. Spencer and Ms. O'Neal in fact owned property adjacent to the tract upon which the facility was to be located.[337]

After notice of the Executive Director's decision to issue the second permit application was published in the *Montgomery County News*, TCEQ received no comments whatsoever regarding the application.[338] Therefore, a permit based on this second application was issued as an uncontested matter in November of 2007, fairly shortly after Far Hills' first application was denied.[339]

In September of 2008, Ms. Suzanne O'Neal first learned of this application when Far Hills began constructing the authorized facility.[340] In the spring of 2009, Ms. O'Neal filed a petition to revoke this second permit in consideration of the misrepresentations made by Far Hills in its application.[341]

The Commission granted Ms. O'Neal's request for a hearing on her petition to revoke.[342] After a contested case hearing on the matter, the Executive Director joined with Ms. O'Neal and the TCEQ Office of Public Interest Counsel (OPIC) in asking that the permit be revoked as a result of the false information related to notice that was provided by Far Hills during the application process.[343] In his PFD, the ALJ found it difficult to believe that Far Hills thought the *Montgomery County News* was the paper of largest circulation in the county, particularly given that Far Hills had claimed that the *The Courier* was the paper of largest circulation in the County in its prior application.[344] With regard to Far Hills' misrepresentations that led to the exclusion of Ms. O'Neal from the mailing list, the ALJ found that this mistake may have been merely a "serious blunder" on the part of Far Hills and its consultants.[345] Whether the representations were purposeful or not, the ALJ recommended that Far Hills' permit be revoked due to the "significant misleading statement in the application regarding ownership and configuration of the property and notice to the public."[346]

3. The Temporary Order: False Information from Applicant Only Discovered Through Cross-examination

During the pendency of the proceedings on the petition to revoke, Far Hills submitted an application for a temporary order to allow it to continue to discharge wastewater

335 *Id.* at *3.
336 *Id.* at *3.
337 *Id.* at *3.
338 *Id.* at *1.
339 *Id.* at *1.
340 *Id.* at *5.
341 *Id.* at *2.
342 *Id.* at *2.
343 *Id.* at *6.
344 *Id.* at *7.
345 *Id.* at *8.
346 *Id.* at *10.

even if its permit was revoked.[347] In light of this application, the Commission issued an interim order remanding the petition to revoke to SOAH for consideration of whether suspension would be appropriate rather than revocation and for consideration of Far Hills' application for a temporary order.[348]

This hearing revealed that Far Hills' most recent permit application had contained significant substantive flaws in addition to the false information related to notice that had already been uncovered. On the first day of the hearing on the merits on remand, cross-examination of Far Hills' engineer revealed that the discharge was at the head of the canal.[349] During the earlier permitting process, the Executive Director had worked under an assumption that the discharge would be at a different location into the main body of Lake Conroe.[350] In light of the information brought to light in the hearing, the Executive Director withdrew his endorsement of the current permit and the temporary order staff had approved, and instead recommended that any temporary order issued include more stringent effluent limitations to meet the requirements of TCEQ's rules, and that any new permit contain more stringent effluent limitations.[351] After a briefing on the matter, Ms. O'Neal and Ms. Spencer withdrew their petition to revoke and protest of the temporary order, and withdrew as parties to the matter.[352] However, OPIC and the Executive Director made clear that the hearing still presented contested issues given the information that had been revealed in the hearing.[353] Ultimately, Far Hills, OPIC, and the Executive Director submitted an agreed recommendation requiring submission of a major amendment within thirty days that would establish more stringent effluent limitations for the permit going forward, allow Far Hills to continue operating while its major amendment was pending, and dismiss the Petition to Revoke and Far Hills' request for a temporary order.[354] At a September 21, 2011 meeting of the TCEQ, the Commission decided to adopt this recommendation and issued an order accordingly.[355] Far Hills received its amended permit less than a year later.[356]

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347 *Id.* at *2.

348 Tex. State Office of Admin. Hearings, *Supplemental Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002*, SOAH Docket No. 582-09-5727, 2011 WL 3223773, *1 (July 21, 2011).

349 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District,* SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 1, at 73 (Nov. 15, 2010).

350 *Id.* at 178.

351 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District,* SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 2, at 472–473, 476–477 (Dec. 10, 2010).

352 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District for a Temporary Order Submitted by Far Hills Utility District,* SOAH Docket Nos. 582-09-5727, 582-11-0471, TCEQ Docket No. 2009-0290-MWD, 2011 WL 3223773, at *2 (July 21, 2011).

353 *Id.* at *2.

354 *Id.* at *3.

355 Tex. Comm'n on Envtl. Quality, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District and Application for Temporary Order submitted by Far Hills Utility* District, TCEQ Docket Ns. 2009-0290-MWD, Final Order (Sept. 29, 2011).

4. THE FAR HILLS CASE DEMONSTRATES HOW CONTESTED CASE PROCESS ENABLES BETTER AGENCY DECISIONMAKING

As an initial matter, the progress of the Far Hills case demonstrates the manner in which the contested case hearing process serves to remedy factual errors in an application. Even when citizens point out factual errors in an application during the permitting process, the Executive Director frequently disregards such critiques. The contested case hearing process allows citizens to present their case to an impartial fact-finder. It also allows the affected public to use tools such as cross-examination and discovery that often reveal that an applicant has selectively shared facts with the Executive Director.

Notably, corrections of fact made through the contested case hearing process do not necessarily reflect that an applicant intentionally deceived the TCEQ, or that the Executive Director's staff failed in its duty to review an application. A professional seal indicates diligence, but not infallibility. Consistent with the ALJ's initial evaluation of the petition to revoke, Far Hills' submission of false information related the location of wetlands on the Zboyan property, the configuration of the facility property adjacent to the O'Neal property, the circulation of the *Montgomery County News*, and the location of the discharge point for the temporary order application all could have reflected a lack of diligence by the applicant rather than any intent to deceive the agency. Further, the Executive Director's staff lacks the resources to double check every factual representation made by an applicant, nor should the staff be expected to do so. The integrity of the permitting process relies heavily on an assumption that applicants will honestly and accurately provide the relevant facts to the Executive Director's staff. Unfortunately, as the Far Hills case demonstrates, this is not always the case, and the contested case hearing process serves both as a check to detect inaccuracies in an application and as an incentive for applicants to provide accurate information in an application to avoid later problems when the public calls attention to such errors.

Additionally, the Far Hills case demonstrates the benefit that the contested case hearing process provides in allowing citizens to provide expert analysis that meaningfully supplements the analysis performed by the Executive Director's staff. As discussed above, the water quality division of the TCEQ lacks expertise to meaningfully evaluate the location of wetlands on a site and may not receive information adequate to independently perform such an evaluation. The comment process does not allow the public adequate time to fully evaluate many of the complex technical issues associated with permit applications, but given adequate time, the contested case hearing process provides an opportunity for a meaningful analysis of the issues. In the case of Far Hills, the protestants were able to present an analysis of the wetlands issue by an individual with expertise that far exceeded that of the Executive Director, and which the ALJ found to be more credible than the expert presented by the applicant.[357]

The Far Hills case further demonstrates the role of the contested case hearing process in facilitating meaningful oversight of the Executive Director's staff by the Commissioners. In performing its own technical review of the application, the Executive

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356 Tex. Comm'n on Envtl. Quality, *Permit to Discharge Waste, TPDES Permit No. WQ0014555002,* issued June 28, 2012.

357 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, *8 (Nov. 27, 2006).

Director's staff had made no independent determination regarding the site suitability requirements contained in the agency's own rules and had wrongfully assumed that the only wetlands of relevance were those under federal jurisdiction. The Far Hills case allowed the Commissioners to clarify for the staff that the site suitability rules warranted consideration and allowed the Commission to reiterate its position that TCEQ would not allow the U.S. Court or the Corps of Engineers to dictate the scope of a Texas agency's jurisdiction under Texas law.[358]

Finally, the Far Hills case demonstrates how the contested case hearing process can improve the quality of authorizations ultimately issued. Based on information submitted by Far Hills with its second permit application, the Executive Director had developed inadequate effluent limitations.[359] The hearing process allowed the Executive Director to develop more appropriate effluent limits that complied with TCEQ's rules.[360] Notably, recent legislation calls into question the Executive Director's ability to take such corrective action. The TCEQ Sunset Bill passed in 2011 imposed on the Executive Director a duty to participate as a party in contested case permit hearings to "support the executive director's position *developed in the underlying proceeding*."[361] Where the contested case hearing process reveals information that the Executive Director's staff believes calls into question its own recommendation, this statute potentially hampers the Executive Director's ability to modify or reverse its recommendation as new information warrants. In such a manner, this statutory duty that effectively prohibits the Executive Director from objectively considering information that comes to light in the hearing process undermines the ability of the agency to reach the most accurate decision.[362]

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358 *See, e.g.*, Tex. Comm'n on Envtl. Quality, *Matter of the Application of Tan Terra Envtl. Svs. Inc., L.L.C. for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305)*, TCEQ Docket No. 2004-0743-MSW, Final Order, at 5 (Apr. 20, 2006) (denying permit in part due to presence of wetlands regardless of whether considered "jurisdictional" wetlands).

359 Tex. State Office of Admin. Hearings, *Petition to Revoke Tex. Comm'n on Envtl. Quality Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 2, at 472–473, 476–477 (Dec. 10, 2010).

360 *Id.*

361 Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598 (emphasis added).

362 Furthermore, this statutory duty is contrary to TCEQ's representations to the Environmental Protection Agency as to how the Texas Pollution Discharge Elimination System Program will be implemented. TCEQ's rules for this program state that "evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of degradation under [the antidegradation policy]; the social and economic justification for lowering water quality; requirements and conditions necessary to preclude degradation; and any other issues that bear upon the implementation of the antidegradation policy." 30 TEX. ADMIN. CODE § 307.5(c)(2)(E) (2014). This opportunity seems meaningless if the Executive Director is precluded by Texas Water Code § 5.228(c) from changing his recommendation in light of such new information. In this manner, § 5.228(c) arguably constitutes a way in which Texas' current regulatory structure violates the conditions of its delegation of authority under the National Pollutant Discharge Elimination System Program.

V. EVALUATION OF POTENTIAL CHANGES TO THE CONTESTED CASE HEARING PROCESS

Over the course of the last few legislative sessions, various interest groups and legislators have proposed revisions to the TCEQ permitting process. While the permitting process established by House Bill 801 is not perfect from any perspective, most of the changes discussed in recent sessions come with drawbacks that outweigh any benefits they may provide. This section considers a few of the changes that have been recently considered and rejected by the Legislature and explains why the Legislature should continue to reject attempts at such changes.

A. ELIMINATION OF CONTESTED CASE HEARING PROCESS

Broadly speaking, on numerous occasions, industry representatives have suggested replacing the contested case hearing process with an opportunity for notice and comment where the TCEQ is still required to provide a response to comments.[363] As a practical matter, the Legislature's refusal to adopt such legislation despite repeated efforts since the 1980s suggests little appetite for this one-sided approach. Even in the 83rd Regular Session, held in 2013, the Committee Substitute for Senate Bill 957 only made it out of committee with the addition of a process labeled as a "contested case," although that process bore no resemblance to a true evidentiary hearing.[364]

As discussed above, the contested case hearing process has a demonstrated track record of correcting factual errors and legal deficiencies remaining after the public comment process. The full development of this information and analysis cannot occur in the span of the comment process, and the Executive Director's evaluation of this information may be limited. In many cases, an applicant has had years to develop its analysis of an application, and the public can hardly be expected to provide an equally thorough analysis in thirty days.

Importantly, additional permit conditions resulting from the hearing process typically reflect terms determined necessary for a permit to meet the minimum requirements of TCEQ's rules.[365] Requirements that merely require an applicant to comply with the law should not be characterized as overly burdensome. While the contents of most settlement agreements resulting in the withdrawal of protests are usually confidential, as a general matter, the primary thrust of the vast majority of such agreements is to implement regulatory requirements that reflect the law or the prior actions of the applicant.

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363 *See, e.g,* Tex. Ass'n of Business, *Our Priorities are Your Priorities: TAB Board Approves New State Agenda*, TEX. BUSINESS REPORT, Oct. 2012, at 1, 3 ("TAB supports replacing [TCEQ] contested case hearings with a notice and comment process like most states and even EPA now use."); House Comm. on Envtl. Regulation, Bill Analysis, Tex. H.B. 2491, 74th Leg., R.S. (1995) (noting that representatives of Texas Chemical Council, Texas Ass'n of Business, and Chambers of Commerce testified in support of H.B. 2491 to eliminate contested case hearing process and replace it with notice and comment process).

364 Tex. S.B. 957, § 1, 83rd Leg., R.S. (2013).

365 *See, e.g.*, Tex. Comm'n on Env. Quality, *Application of Republic Waste Svs. of Texas, LTD., for Type V Permit No. MSW-2356*, Docket No. 2009-2058-MSW (Final order granting permit) (Final Order refusing to include any recommended permit conditions determined unnecessary for applicant to meet its burden of proof).

Before the Legislature, representatives of the regulated community often attack these agreements as reflecting a flaw in the process. But, more often than not, protestants are willing to reach an agreed-upon resolution of the disputed issues that reflects a solution-oriented approach to the process that should be encouraged, not denigrated.

As reflected in the discussion above, the hearing process also provides a range of protections that are deeply rooted in Texans' attitudes towards government. In allowing a separation of the agency's adjudicatory functions under circumstances where factual disputes exist, the hearing process provides an important check on the power of the TCEQ. Further, while the hearing process does not involve the adjudication of property rights, it can serve a vital function in providing adequate protection against damage to the property of nearby landowners. It can help balance the rights of neighbors to use their lands where they get to decide how to strike that balance. The notice and comment process does not provide such an opportunity. This breadth of protected interests explains why, during the regular session of the 83rd Legislative Session, a bill filed to eliminate the contested case hearing process for sludge applications was killed on the house floor by a Republican member of the Tea Party caucus.[366]

B. Imposition of Statutorily-Mandated Time Limits

Some have also proposed the allowance of contested case hearings, but with mandatory time limitations from referral to the issuance of a PFD.[367] Notably, under the current process, the Commission may already provide SOAH with a recommended duration for each matter referred,[368] and SOAH makes every effort to meet these deadlines absent the agreement of the parties or extenuating circumstances.

The imposition of mandatory time limits would undermine the ability of the public to participate in the process by necessarily limiting discovery and analysis. It would unnecessarily tie the hands of the judges who need to assure a fair process for all parties in each unique controversy. In fact, it is often the applicant that seeks additional time to revise an application or develop responsive evidence.

TCEQ permitting cases often involve complex technical issues, and the permit application at issue at the contested case hearing may differ substantially from the application as available during the public comment period, limiting the utility of prior work. Furthermore, discovery regarding such issues can often be complex, resulting in legitimate disputes over the scope of discovery. The imposition of mandatory time limits would limit a judge's ability to resolve such disputes. In many cases, it would enable one party to gain advantage by unjustifiably resisting discovery in a manner that SOAH can currently address through adjustments to the procedural schedule.

The imposition of mandatory time limits could also allow applicants to gain an advantage by making changes to applications late in the hearing process. Under the current process, SOAH has the leeway to adjust a procedural schedule in light of such changes.[369] As generally proposed, SOAH would have no such authority and may have to simply recommend denial of a permit in that circumstance. When that recommenda-

366 2013 H.J. of Tex. 3001, 83rd Leg., R.S. (Point of Order of Rep. Geanie Morrison).

367 *See, e.g.*, Tex. S.B. 957, 83rd Leg., R.S. (2013) (requiring issuance of proposal for decision within 120 days of preliminary hearing).

368 Tex. Water Code Ann. § 5.556(e)(2) (West 2014).

369 30 Tex. Admin. Code § 80.4(c)(17) (2014).

tion went to the Commissioners, they might decide to remand the matter for the changes to the application, creating a more expensive and longer process than would normally occur.

Further, such strict time limitations often fail to account for the fact that much of the time from referral of an application to SOAH to the issuance of a PFD is dedicated to processes, such as the scheduling of the preliminary hearing around the judges' other hearings and providing adequate time for the judges to write a PFD. There is time built into the process that is not in the control of the parties.

In sum, the current process by which the Commission can recommend a hearing duration based upon its evaluation of case-specific factors such as the complexity of the case and the number of parties, combined with SOAH's ability to adjust the procedural schedule as appropriate to ensure a fair hearing for all parties, should not be replaced by a one-size fits all limitation on the duration of the hearing that removes the ability of TCEQ and SOAH to have flexibility to address the circumstances of each case.

C. LIMITS ON WHO MAY BE A PARTY

Some have also suggested that parties to a SOAH hearing should be limited to persons who previously filed comments or submitted a hearing request. This approach lacks merit for several reasons.

First, the agency procedures preceding a contested case hearing can take a substantial amount of time, during which period new persons may have moved into the area or may determine that they will be affected because of changes in the application or terms in the permit. It would be unfair, and potentially a violation of due process, to hold a contested case hearing while denying these persons an opportunity to participate merely due to the timing of when they acquired their affected interest or the changes in the application or permit.

Also, even with the best of efforts by the TCEQ and an applicant, the process for notice of applications is far from perfect. For instance, the television stations who protested the Blue Ridge application that would have potentially impacted the operation of their Doppler radar systems received no notice of the application prior to the end of the public comment period. They were not close enough neighbors to receive mailed notice.

Likewise, the independent oil producer who participated in the hearing on an Application by Regional Land Management Services in Webb County to protect its mineral rights did not learn of the application until after the contested case hearing had commenced, nor did the independent oil producer who participated as a protestant in the Texcom injection well matter.[370] To deny individuals in similar situations the right to participate in a contested case hearing merely due to flawed or inadequate notice would almost surely constitute a denial of due process. Instead, Texas law should be amended to improve notice through means such as requiring signs and making full use of electronic means of notice.

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370 Tex. State Office of Admin. Hearings, *Application by Reg'l Land Mgmt. Svs., Ltd.*, SOAH Docket No. 582-04-0975, Proposal for Decision (Sept. 2, 2008), Motion to Intervene by Rossetta Res. (Mar. 5, 2007); Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, WDW413*, SOAH Docket No. 582-07-2376, Amended Proposal for Decision after Remand, at 6 (Apr. 25, 2008).

Furthermore, the imposition of limits on who may participate in a hearing to persons who have previously participated in the permitting process could potentially have implications for Texas' ability to administer certain federally-delegated programs. For example, in obtaining authority to administer the water quality permitting program established by the Clean Water Act, Texas represented that standing requirements to seek judicial review of agency decisions was equally as broad as that under federal law,[371] consistent with the minimum requirements of federal law.[372] EPA's approval of the Texas permitting program was premised on this understanding.[373] Given the Attorney General's current position that participation in a contested case hearing is a prerequisite to the judicial appeal of an agency decision,[374] any limitation on standing to participate in a contested case hearing that would impose a burden not found under federal law would place Texas at risk of violating the conditions of its delegated authority over this program, as well as other programs with similar requirements.

D. Shifting of Burden of Proof

Both the Committee Substitute for Senate Bill 957, as passed out of committee during the 83rd Legislative Session, and House Bill 3037, as filed in the 82nd Legislative session, would have shifted the burden of proof during a contested case hearing to the protestants.[375] This type of change fundamentally alters the nature of the process and greatly increases the cost of the process for protestants, be they local governments, nearby landowners, or others. For example, under the current burden of proof, the Commission should deny an application that wholly fails to address an applicable requirement.[376] If this burden were shifted, then such an omission on the applicant's part would not necessarily warrant denial of an application. Rather, even in the absence of any evidence supporting the application, protesting parties would be required to hire experts to perform the analysis that the applicant should have performed itself when submitting the application. Particularly given that it is the applicant who seeks to alter the *status quo*, this allocation of the burden of proof would be inappropriate.

By the time an application reaches the contested case hearing process, both the applicant and the Executive Director have long been aware of the issues in dispute, and both have taken the position that the application affirmatively demonstrates compliance with all applicable regulatory requirements relevant to these issues. Under current law, an issue may not be considered in hearing unless it was raised during the comment

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371 Tex. Att'y Gen., Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program (Dec. 12, 1997). *See also* Memorandum of Agreement Between the Tex. Natural Res. Conservation Comm'n and the U.S. Envtl. Prot. Agency, Region 6 Concerning the National Pollutant Discharge Elimination System (Sept. 14, 1998).

372 40 C.F.R. § 123.30 (2013).

373 *State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas*, 63 Fed. Reg. 51,170 (1998).

374 Sierra Club & Pub. Citizen v. Tex. Comm'n on Envtl. Quality and Sw. Elec. Power, Cause No. D-1-GN-13-000678, (419th Dist. Ct., Travis County, Tex. Nov. 25, 2013), TCEQ's Brief in Support of its Plea to the Jurisdiction and, if Necessary, Brief on the Merits, at 6.

375 Tex. S.B. 957, 83rd Leg., R.S. (2013); Tex. H.B. 3037, 82nd Leg., R.S. (2011).

376 30 Tex. Admin. Code § 80.17(a) (providing that moving party bears burden of proof by a preponderance of the evidence).

period.[377] If an applicant and TCEQ staff have been diligent in performing the analysis required to reach this conclusion, then an applicant should easily be able to meet its burden of proof. If an application cannot stand on its own, or if an applicant is unwilling to defend its application, then it is proper for the application to be denied.

E. PROHIBITION ON DISCOVERY SUBSEQUENT TO SUBMISSION OF PRE-FILED TESTIMONY

The adoption of an amendment on the TCEQ Sunset Bill in 2011 that limits the ability to conduct discovery subsequent to the submission of pre-filed testimony is among the most transparent efforts to undermine the effectiveness of the contested case hearing process in getting to the truth of an applicant's claims.[378] The logic used to justify this limitation demonstrates a fundamental misunderstanding of the contested case hearing process with regard to environmental permits under consideration in TCEQ proceedings.

Those in favor of this discovery limitation argued that the submission of a party's direct pre-filed testimony should be considered perfectly analogous to the presentation of a direct case in a judicial trial.[379] Such logic ignores many of the critical differences between a judicial trial and a TCEQ contested case hearing. In a judicial trial, the case is generally submitted for decision by the judge or jury soon after the presentation of a party's direct case. In contrast, several months could pass after the submission of pre-filed testimony in an administrative proceeding and the closing of the evidentiary record. During this period, expert witnesses can—and often do—refine their opinions and positions. Ending discovery at the time of pre-filed testimony denies the parties an opportunity to determine such shifts. This particularly prejudices the proceedings against protestants, given TCEQ's ongoing tendency to allow the significant alteration of a permit application, or the permit itself, at any point in the proceeding.

Furthermore, in a judicial trial, expert reports are often required, disclosures are generally more detailed, and an opportunity exists to conduct discovery on an expert regarding the contents of the expert's report up until fairly shortly prior to the live trial. In judicial proceedings, protections exist against the presentation of new material at trial to ensure that these obligations are reasonably met, as the Texas Rules of Civil Procedure prohibit the presentation of material or information at trial that was not timely disclosed during discovery.[380] No such protection from unfair surprise has been provided to counterbalance the strict nature of the prohibition on discovery imposed in TCEQ proceedings. Even if a party provides new information pursuant to its duty to supplement discovery responses, the bar on the conduct of discovery after the submission of pre-filed testimony senselessly forbids the other parties from pursuing discovery with regard to these newly-disclosed facts.

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377 TEX. WATER CODE ANN. § 5.556(d) (West 2014).

378 Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598.

379 *See, e.g.*, Audio recording, Apr. 2, 2011 Meeting of House Comm. on Envtl. Regulation, Testimony of Christina Wisdom on behalf of Texas Chemical Council in favor of Tex. H.B. 3037, 82nd Leg., R.S., at 9:30 mark in recording.

380 Tex. R. Civ. P. 193.6 (prohibiting presentation of material or information not previously disclosed in discovery, and allowing continuance to permit discovery on any new material that results in unfair surprise or unfair prejudice).

Even though an applicant enters a contested case hearing having claimed that materials already in existence demonstrate that it has met its burden of proof, it is far from unusual for applicants to present entirely new experts during the hearing process, along with new materials, and perhaps even revisions to the application or the permit at issue. In some cases, the opinions of these experts, and the full nature of the materials that an applicant intends to rely upon are not disclosed until the filing of pre-filed testimony. In essence, pre-filed testimony in TCEQ proceedings often serves the same function as do expert reports in judicial proceedings. In this manner, the prohibition on discovery after the submission of pre-filed testimony in TCEQ proceedings actually creates a crucial disconnect between the conduct of discovery in judicial proceedings versus the conduct of discovery in TCEQ proceedings. In judicial proceedings, protections exist to ensure that discovery is meaningfully available regarding all evidence to be presented at trial. In TCEQ proceedings, quite the opposite is true—the process is actually structured to reward an applicant that withholds information up to, until, or after, the filing of pre-filed testimony.

If a prohibition on discovery after the submission of pre-filed testimony truly made the contested case hearing process more efficient without unduly prejudicing the rights of the parties, then this prohibition would have been applied across the board to cases such as those heard by the PUC, the RRC, or even TCEQ matters involving utility issues. But, this is not the case.

VI. Conclusion

The contested case hearing process serves a valuable role in protecting the rights of impacted persons as well as providing a check on the concentration of legislative, judicial, and executive functions within the TCEQ. The existing hearing process is not perfect from any particular stakeholder's perspective, but the process does represent a genuine effort to balance the interests of the various interests involved. TCEQ's decisions can be no better than the information upon which the decisions are based, and the hearing process enhances the quality of information available to the TCEQ by allowing the affected public an opportunity to correct factual errors or omissions in an application, as well as allowing the affected public an opportunity to provide meaningful expert analysis of issues to supplement that performed by the agency. Eliminating, or further constricting, the contested case hearing process would do away with a critical tool now used by persons whose health, property, and livelihoods stand to be impacted by permitting decisions, as well as by local governmental entities such as cities and counties. Taking this tool away would not only compromise protection of public health and the environment, but would also run contrary to the values of limited government, protection of private property rights, and local control that have long defined Texas.

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Managing Interstate Water Resources: *Tarrant Regional* and Beyond

By Alexandra Campbell-Ferrari

Water resources in the United States and throughout the world are rapidly being depleted.[1] States, while informed by federal law and agency regulations, have been left to manage the water resources within their state borders. As issues of water resources man-

1 Only 2.5% of the total volume of water on Earth (about 1.4 billion km_3) is freshwater. Less than one-half a percent of that freshwater is located in lakes and rivers, 30% is located in underground basins, and 70% is locked up in snow and ice. U.N., *Statistics: Graphs & Maps: Water Resources*, http://www.unwater.org/statistics_res.html. This limited amount of water is needed to supply depended-upon needs. Ten percent of freshwater is withdrawn for domestic use, 20% for industrial use (including water required to meet energy needs), and 70% for agriculture. U.N. World Water Assessment Programme, *World Water Development Report: Managing Water under Uncertainty and Risk*, 4th ed., vol.1, *available at* http://unesdoc.unesco.org/images/0021/002156/215644e.pdf (last visited March 19, 2014) [hereinafter *U.N. Water Development Report*]. The report makes a valuable distinction between physical water scarcity and economic water scarcity. *Id.* As the volume of water being removed from the source becomes a larger fraction of the renewable water available, and the quality of water declines, the greater the stress on the water supply. *Id.* at 123. This describes the physical diminishment of water resources. At the same time, there are infrastructural and financial limitations on certain communities' ability to access water resources. Therefore, while the water resources exist, the communities do not have the tools to exploit them. *Id.* at 125.

agement have been left in the hands of states, an artificial distinction between interstate and intrastate waters developed. States and countries have independently developed their own systems by which to manage their intrastate and interstate water resources. However, the management and use of interstate waters within the borders of one state directly affects the availability and use of those waters in other states. There are few truly "intrastate" waters, and the treatment of water resources must reflect that interstate character.

States, courts and Congress have all acknowledged the interstate nature of some intrastate located waters. States have voluntarily entered into interstate water compacts, which eliminate their exclusive authority over waters physically located within their state borders. Courts have branded water as an "article of commerce."[2] As an article of commerce, state laws acting upon water are subject to the Commerce Clause irrespective of whether Congress has acted in that area.[3] And Congress regulates the use and quality of water through federal legislation and has, in certain instances, directly allocated interstate waters between states through legislation. Given the interstate nature of water, the management of water resources is a federal interest. In order to effectuate a consistent and comprehensive rule of law managing water resources, this Article suggests that Congress should assume greater responsibility for managing water resources.

To fill this void in leadership, states and courts have had to legislate water resource management. Some states have adopted interstate water compacts to allocate and apportion interstate waters. While bringing some resolution to interstate disagreements over use, these state-negotiated interstate compacts often misrepresent the degree of influence states should have in the management of interstate waters. Courts have also been required to fill the void as the forum for resolving state conflicts over interstate water use and allocation in the absence of an interstate water compact, and the forum for interpreting interstate water compacts. However, the courts have neither applied a consistent doctrine for managing interstate water resources, nor served as a check on states' alleged sovereign right to manage interstate waters. Congress, in consenting to these state-negotiated compacts, has abdicated its responsibility to set forth a comprehensive water resource management plan for the United States. Conflicts continue to arise under interstate compacts because the compacts and the courts have failed to understand and clearly delineate the role of states and the federal government in the management of interstate waters. The dispute in *Tarrant Regional* and the courts' analysis reveal the continued misconception that the states hold the primary, unrestricted authority to regulate interstate waters.[4] Congress must assume responsibility for water resources management and enact a water management plan and policy for the United States.

Congressional action need not replace interstate water compacts. Congressional action is needed to set forth a clear, consistent doctrine of water resource allocation and management and to clarify the role of the state governments and regional bodies in this management. "Water is a fugitive resource, flowing through space and time across landscapes and through economies."[5] Given the hydrological and geological nature of water,

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2 Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953 (holding water to be an "article of commerce").

3 *Id.*

4 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2137 (2013).

5 *U.N. Water Development Report*, *supra* note 1, at 135.

the governance framework for water resource management must reflect the interstate character of waters while facilitating regional or watershed based collaboration. In fact, where interstate compacts are used to manage transboundary waters, regional commissions should be established and empowered to make binding decisions over management decisions and disputes. Such commissions would be best positioned to interpret the compact and the congressionally determined set of guidelines in the context of the hydrological and topographical realities they act upon. A comprehensive and sustainable approach to water resources management will require leadership by Congress and implementation by the states and regional bodies.

Part I of this Article provides a short primer on interstate compacts in general, briefly discussing where states derive the authority to enter into compacts and compacts' legal status. Part II analyzes why courts are not in the best position to interpret interstate water compacts, looking specifically at the Supreme Court's decision in *Tarrant Regional*. This section will analyze how *Tarrant Regional* is the most recent example of courts' bungled attempts to effectuate water resources management. In particular, this Article addresses how the courts' reasoning fails to interpret the Red River Compact in light of hydrologic and geographic realities. Further, the Article discusses how the courts' reasoning is falsely guided by an obligation to protect state sovereignty over water resources. Part III proposes the need for a national water resources management plan in light of courts' historical approach to interstate water apportionment and the current conflict between Florida and Georgia. This Article outlines why Congress must promulgate a water resources management plan and why interstate water agencies should play an important role in compact interpretation in the first instance.

I. Interstate Compacts—Generally

Without a permanent regional system of government to resolve issues with regional effect, the United States needed a mechanism by which states could address issues that traverse state boundaries. States' authority to enter into interstate compacts originated in the Articles of Confederation.[6] The Founding Fathers anticipated the need for regional governance and even upon restructuring the government into a dual federalism, included a similar provision in the new U.S. Constitution authorizing interstate compacts. In both instances the authority is tempered by a mandatory approval of the interstate compact by Congress. This tool has been used by states to address a wide variety of interstate concerns, including boundary disputes,[7] information sharing,[8] horse racing,[9]

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6 Articles of Confederation of 1781, art. VI, para. 2. "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."

7 Such compacts include the Virginia-Tennessee Boundary Agreement of 1803, Arizona-California Boundary Compact of 1963, Arizona-Nevada Boundary Compact of 1960, the Missouri-Nebraska Compact of 1990, and the Virginia-West Virginia Boundary Compact of 1998. *National Center for Interstate Compacts Database*, Nat'l Center for Interstate Compacts, http://apps.csg.org/ncic/ (last visited March 19, 2014).

the management of low-level radioactive waste,[10] and the management of interstate water resources.[11]

A. States' Authority to Enter Into Interstate Compacts

After restructuring the system of governance and properly empowering the federal government, the Founding Fathers still found value in granting states the power to coordinate state-to-state legally binding solutions to interstate issues. Article 1, § 10 of the U.S. Constitution authorizes states to enter into regional agreements with the consent of Congress: "No State shall, without the Consent of Congress. . .enter into any Agreement or Compact with another State."[12] Based on the plain meaning of these terms, it would seem that the Compact Clause requires states to obtain the consent of Congress before they formally enter into *any* interstate agreement, regardless of the interests affected by the compact provisions or the subject matter of the compact. However, the Supreme Court has interpreted the Compact Clause to require congressional consent only when the interstate compact tends to "increase political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[13] If the compact

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8 For example, the National Crime Prevention and Privacy Compact sets up a system for sharing criminal history records for non-criminal justice purposes such as background checks. Nat'l Crime Prevention and Privacy Compact, Oct. 9, 1998, 42 U.S.C. § 14616, *available at* http://apps.csg.org/ncic/Compact.aspx?id=123.

9 For example, the Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutual Wagering establishes uniform requirements for the licensing of participants in live horse-racing with pari-mutual betting. *Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutual Wagering*, NAT'L CENTER FOR INTERSTATE COMPACTS, http://apps.csg.org/ncic/Compact.aspx?id=78 (last visited March 19, 2014).

10 Such compacts include the Central Interstate Low-Level Radioactive Waste Compact, Central Midwest Low-Level Radioactive Waste Compact, Midwest Interstate Low-Level Radioactive Waste Compact, Northwest Compact on Low-Level Radioactive Waste Management, Rhode Island-Massachusetts Low-Level Radioactive Waste, Rocky Mountain Low-Level Radioactive Waste Compact, Southeast Interstate Low-Level Radioactive Waste Compact, and Southwestern Low-Level Radioactive Waste Disposal Compact. *National Center for Interstate Compacts Database*, NAT'L CENTER FOR INTERSTATE COMPACTS, http://apps.csg.org/ncic/ (search keyword "radioactive waste" in advanced search) (last visited March 19, 2014).

11 There are twenty-six water compacts that apportion water, seven water compacts that manage water pollution, and seven compacts whose purpose is to control floods. *Id.* (search keyword "water" in advanced search). Conflicts over interstate waters can be resolved by: (a) original action to the Supreme Court of the United States; (b) interstate water compact; and (c) congressionally written federal legislation. Congress has only legislated interstate water resources allocation twice. First, Congress apportioned the Colorado River between Arizona, California, and Nevada under the Boulder Canyon Project Act of 1928. Boulder Canyon Project Act of 1928, 43 U.S.C. 617 (1928). Second, Congress apportioned the Truckee River, Carson River and Lake Tahoe between California and Nevada. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, §204, 104 Stat. 3289, 3295–3304 (1990).

12 U.S CONST. art. 1, §10, cl. 3.

13 Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (interpreting the Compact Clause in the dicta of the opinion). The Supreme Court later adopted this interpretation in *New Hamp-*

does not demand or authorize action beyond the constitutional authority of the states, then the compact is not considered to intrude upon federal interests and the compact does not need Congressional consent.[14] Therefore, if a compact affects federal interests but lacks such consent, the agreement is not enforceable.[15] However, if the compact manages areas of jurisdiction historically retained by the states, then consent is not required. The compact is enforceable and is interpreted pursuant to state law or the law selected by the compact, because the Constitution places no prohibition on states entering into agreements that touch upon *only* state interests.

Interstate waters are an article of commerce; therefore, any regulation of interstate waters touches upon a federal interest.[16] Consequently, Congress must approve any interstate compact that apportions and allocates navigable water resources when the compact imposes an unreasonable burden on commerce.[17] Congress may consent to the compact as negotiated and written by the states.[18] Alternatively, Congress may amend the language of the compact or attach conditions to its approval.[19] For instance, in the case of the Boulder Canyon Project Act of 1928, Congress granted its consent to the compact but conditioned its consent on the approval of the modified compact by at least

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shire v. Maine, 426 US. 363, 369–70 (1976) (holding that the consent decree simply adopted the accepted boundary line between Maine and Massachusetts; therefore, the compact did not interfere with the supremacy of the Federal government and require the consent of Congress).

14 U.S. Steel Corp. v. Multistate Tax. Comm'n, 434 U.S. 452, 473 (1978) (finding that the Multistate Tax Compact did not increase the political power of the States in a way that reduced the supremacy of the United States and stating that "the test is whether the Compact enhances state power quoad the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time.").

15 *See* U.S. CONST. art. 1, § 10, cl. 3. Consent can be manifested in three ways: (1) legislation providing for states to enter into compacts (*see* Federal Water Pollution Control Act of 1948, 62 Stat. 1155, Sec. 2(b) stating "The Surgeon General shall encourage. . .compacts between States for the prevention and abatement of water pollution."); (2) legislation expressly consenting to a compact negotiated by states (*e.g.*, H.R. REP. NO. 110-863 at 1 (2008)); and (3) implicit consent revealed through subsequent legislative acts (*see* Virginia v. Tennessee, 148 U.S. 503, 522 (1893) (holding that legislative acts adopted after the states entered into a compact, which adopted the same boundary between Tennessee and Virginia as recognized in the compact acted as a congressional sanction of the compact).

16 *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 959–60 (1982).

17 *Id.* Most jurisprudence and research regarding interstate water compacts focuses on "interstate" waters. Once the term "navigable waters" was coined under the Clean Water Act and designated as the waters into which dischargers were forbidden from polluting, it became necessary to better understand the reach the federal government has to regulate/manage water resources.

18 H.R. REP. NO. 110-863 (2008).

19 JOSEPH ZIMMERMAN, INTERSTATE WATER COMPACTS: INTERGOVERNMENTAL EFFORTS TO MANAGE AMERICA'S WATER RESOURCES 38, State University of New York Press (2012).

six of the seven states subject to the terms of the compact.[20] Furthermore, even once Congress has consented to the compact, the compact can be vetoed by the President.[21]

B. THE COMPACT IS FEDERAL LAW, YET IS INTERPRETED AS A CONTRACT

Once Congress and the President have approved an interstate compact, it becomes federal law.[22] As federal law, questions arising under federal law present a federal question.[23] Therefore, it should logically follow that compacts are interpreted using the same canon of construction used to interpret federal statutes.[24] However, the Supreme Court has determined that compacts should be interpreted "under the principles of contract law."[25] While the process of writing and negotiating an interstate compact is more anal-

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20 *Id.*

21 *Id.* President Franklin D. Roosevelt vetoed the Republic River Compact in 1941 for including language that withdrew United States' jurisdiction over a portion of the Republic Basin. *Id.* at 38.

22 Cuyler v. Adams, 449 U.S. 433, 438 (1981) (stating, "Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presented a federal question."). *See also* Carchman v. Nash, 473 U.S. 716, 719 (1985) (noting that the compact at issue was "a congressionally sanctioned interstate compact within the Compact Clause. . .and thus is a federal law subject to federal construction"). While congressional consent transforms the compact into federal law, the same compact is also adopted as state law. In fact, typically the compact requires the signatory states to adopt the compact as state law. The language of the compact may limit the ability of states to amend the compact, thereby eliminating states' ability to unilaterally change the terms of the compact. Jurisprudentially, it is strange that a law is both federal and state law. It is unclear whether there is any significance to this.

23 *Cuyler*, 449 U.S. at 438.

24 When interpreting federal statutes, courts should first identify the "plain meaning" of the statutory provisions:

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction . . . . Construction may not be substituted for legislation.

United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 277–78 (1929). However, when the "plain meaning" of the statute leads to an unreasonable result, the Court can look to the intent and purpose of the statute to derive meaning. United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543-544 (1940).

25 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2123 (2013) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)) (agreeing with Justice Frankfurter's dissenting opinion in Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959))). *See also* Fletcher v. Peck, 10 U.S. 87, 137 (1810) (holding that a "contract is a compact between two or more parties"); Virginia v. Tennessee, 148 U.S. 503, 520 (1893) (holding that there is no difference between a compact or agreement under Article 1, Section 10, Clause 3 of the U.S. Constitution because both "cover all stipulations affecting the conduct or claims of

ogous to the process of contract formation, compacts are agreements that are passed by both houses of Congress and signed into law by the President. Therefore, the character of a compact is much more similar to federal law. Given how interstate compacts come into being, compacts do not fit neatly into any category of law as we traditionally understand laws. However, because of the nature and purpose of interstate compacts, interstate water compacts are federal law and should be interpreted using the same canons of construction used when interpreting federal law.

II. *Tarrant Regional v. Herrmann*

A. Background

In 2007, the Tarrant Regional Water District ("Tarrant Regional")—a political subdivision of the State of Texas—sued the nine members of the Oklahoma Water Resources Board (OWRB) in their official capacity.[26] Tarrant Regional alleged that several provisions of the Oklahoma statutes had been preempted by the adoption of the Red River Compact in 1978 and that the statutes discriminated against out-of-state permit applicants in violation of the Commerce Clause.[27]

If water resources recognized and abided by the arbitrarily established state borders, states, judges and legislators would not be faced with interstate water controversies. Waters would fall completely within state boundaries and therefore more "clearly" be subject to only state regulation.[28] Instead, many navigable waters traverse state boundaries, particularly those that serve as lifelines to the northeastern, southern, midwestern and western regions of the United States, such as the Mississippi River, the Colorado River and the Red River.[29] While the beds and banks of these bodies of water are permanently

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the parties."); Kansas v. Colorado, 533 U.S. 1, 24–25 (1907) (stating, "[w]e are dealing with an interstate compact apportioning the flow of a river between two States. A compact is a contract. It represents a bargained-for exchange between its signatories . . . . It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made.").

26 The OWRB was created pursuant to 82 Okl. St. §1085.1 and is the Oklahoma agency authorized to enforce "Oklahoma laws which regulate the appropriation, sale and use of Oklahoma surface water and groundwater." Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007), Plaintiffs' Compl. at 2–3.

27 *Id.* at 10–12.

28 "Clearly" is in parentheses because there is a policy argument that, regardless of state boundaries, water is a resource of the United States to be regulated by or under the oversight of the federal government. According to this argument, state laws regarding water resource management would still be subject to oversight.

29 The three longest rivers in the United States are the Missouri, Mississippi, and Yukon Rivers. Kammerer, J.C., Largest Rivers in the United States, US Geological Survey Fact Sheet OFR 87-242 rev. 1990, *available at* http://pubs.usgs.gov/of/1987/ofr87-242/. The Mississippi River alone runs through or borders ten states— Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana— demonstrating the complexity in managing the interstate water resources. National Research Council of the National Academies, *Mississippi River Water Quality and the Clean Water Act: Progress,*

located within state borders, the water traveling through the channels is not a permanent fixture within the states. Consequently, it is hard to claim ownership over a natural resource that is there one day and many miles away the next.

The availability of water resources is not guaranteed and varies greatly between the regions of the United States. Therefore, states have had to develop different systems for allocating or authoring water use. These systems generally reflect the challenges states have faced regarding water availability and access. Eastern states that experience infrequent water shortages allocate water rights under the riparian doctrine whereby rights to water attached to the land ownership.[30] This means that a landowner has a right to reasonable use of the water located on or adjacent to his or her property.[31] Western states generally allocate waters according to the "first in time, first in right" rule of prior appropriation.[32] To obtain a right of appropriation, an individual must put water to beneficial use.[33] Users, according to their date of appropriation, can use up to their full allocation of water rights as long as the water supply is available.[34] These appropriative rights are recognized as real property that can be sold or transferred.[35] These systems of allocation resolved intrastate controversies over who could use what water where and

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Challenges and Opportunities 5 (2008), *available at* http://www.nap.edu/openbook.php?record_id=12051&page=1. These rivers contribute millions of dollars in annual economic activity from benefits associated with water quality, recreation, agriculture, and navigation, and are directly and indirectly responsible for thousands of jobs with millions in annual salaries. Along the Upper Mississippi River: (1) commercial navigation generates $1 billion in revenues per year and employs approximately 6,300 people; (2) commercial harvesting activities generate $3 million to $9 million annually; (3) 7.2 billion gallons of water are withdrawn for energy production, agriculture, mining, manufacturing and water supply sectors (including drinking water supply systems which employ about 1,000 people and generate $130 million in annual revenues); (4) recreation (e.g., fishing, boating, hiking or sightseeing) generates $200 million in revenue for local businesses; (5) tourism generates $6.6 billion per year and supports 140,000 jobs; (6) agriculture generates more than $5 billion annually and employs approximately 94,000 people; and (7) manufacturing generates $126 billion annually and employs over 600,000 people. Industrial Economics, Inc., *Economic Profile for the Upper Mississippi River Region*, iii (Mar. 1999), *available at* http://library.fws.gov/Pubs3/economicprofile_miss99.pdf.

30 Jeremy Nathan Jungreis, *"Permit" Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East*, 29 HARV. ENVTL. L. REV. 369, 373 (2005), *available at* http://www.law.harvard.edu/students/orgs/elr/vol29_2/jungreis.pdf.

31 *Id.* at 373–74. Riparianism was derived from English common law. Under the "natural flow theory," landowners could use an unlimited amount of the water. *Id.* Water was plentiful in the East; therefore, there was no need to prioritize uses. *Id.* It soon became clear that it was untenable to allow unlimited use of the water. *Id.* Courts tempered the riparianism doctrine by requiring that the use be reasonable. *Id.*

32 *Id.* at 375–76.

33 *Id.* at 376.

34 Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (Colo.1882). The Colorado Supreme Court's decision in *Coffin* became the basis for Western states adopting the doctrine of prior appropriation. The court discussed the inequity in allowing water to only be available to those who own land and how that system of appropriation would be a detriment to the economy given the dependence of agriculture on sufficient irrigation. *Id.*

35 Texas Water Rights Com. v. Wright, 464 S.W.2d 642, 647-648 (1971).

how much, but they were not designed to resolve interstate allocation. The states' resolution of intrastate issues of water allocation ignored the interstate nature of some of these waters. It took the diminishing availability in water resources—and downstream states being disadvantaged by upstream states' overuse of the shared resources—for states to acknowledge the interstate quality of the waters being regulated by states.

Where no compact exists and downstream states allege overuse of the interstate waters by an upstream state, federal courts develop a system of apportionment.[36] The Supreme Court devised a doctrine of equitable apportionment to fairly and equitably allocate interstate waters between the states; however, the doctrine has changed with each application.[37]

1. The Red River Compact

To analyze the *Tarrant Regional* decision and its implications, a brief overview of the Red River Compact ("Compact"), Oklahoma statutes, and relevant Constitutional clauses, and the District Court, Tenth Circuit and Supreme Court decisions is appropriate. The Red River Compact[38] attempts to achieve what neither Texas, Oklahoma, Arkansas, nor Louisiana could achieve alone: the equitable and fair apportionment of the water of the Red River and its tributaries.[39] Within their state borders, Texas and Oklahoma apportion water according to the doctrine of prior appropriation while Arkansas and Louisiana apply the riparian doctrine.[40] As written, the Compact does not supplant the states' internal system for managing water but restricts upstream states from disadvantaging downstream states.[41]

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36 Kansas v. Colorado, 206 U.S. 46, 95 (1907) ("Neither state can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states.").

37 Part III, *infra*, discusses this in greater detail.

38 After more than twenty years of negotiations, the states of Arkansas, Louisiana, Oklahoma, and Texas approved the language of the Compact on May 12, 1978. Joint Appendix, 2011 U.S Briefs 889, 2013 U.S. S. Ct. Briefs LEXIS 987 at 9. *See also* Red River Compact, Pub.L. No. 96-564, 94 Stat. 3305 (1980).

39 Joint Appendix, 2011 U.S Briefs 889, 2013 U.S. S. Ct. Briefs LEXIS 987 at 9.

40 *Id.* at 33.

41 Article 1, Section 1.01, of the Red River Compact states:

> The principal purposes of this compact are:
>
> (a) To promote interstate comity. . .;
>
> (b) To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;. . .
>
> (d) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof.

Pub.L. No. 96-564, 94 Stat. 3305 (1980).

The Compact divides the Red River and its tributaries into five "Reaches" that are further subdivided into subbasins.[42] The litigation in *Tarrant Regional* focused narrowly on the treatment of water specifically located within Reach II, located along the mainstem of the Red River. Reach II is defined as the "Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana state boundary and all tributaries that contribute to the flow of the River within this Reach."[43] Within Reach II Subbasin 5, the Compact's apportionment of water to the signatory states depends on the quantity of flow at the Arkansas-Louisiana border. Water in Subbasin 5 is allocated as follows:

> (1) The Signatory States shall have *equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5*, so long as the flow of the Red River at the Arkansas-Louisiana state border is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.
>
> (2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 cubic feet per second, but more than 1,000 cubic feet per second, the States of Arkansas, Oklahoma and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5. . .***
>
> (3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing into subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow.[44]

Section 5.05(b) is written to assure a reliable flow to the downstream states of Arkansas and Louisiana and to quantify the amount of excess runoff and undesignated water that belongs to each of the four signatory states.[45]

When interpreting the Compact, sections which allocate and apportion similarly-situated resources should be compared. Each Reach is purposively subdivided differently, taking into account the geography and the hydrology of the Red River and its tributaries. Certain sections may share similarities in language. However, when interpreting the Compact, it is important to read the text within the context of the geographical realities it is acting upon and to compare those sections which act upon similarly situated re-

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42 Reach I is located in Texas and Oklahoma and divided into four subbasins. *Id.* § 2.12. Reach II is located in Texas, Oklahoma, and Arkansas, and is divided into five subbasins. *Id.* Reach III is located in Texas, Arkansas, and Louisiana, and is divided into four subbasins. *Id.* Reach IV is only located in Arkansas, and is divided into two subbasins. *Id.* Reach V is only located in Louisiana and is not subdivided into subbasins. *Id.*

43 Red River Compact, § 2.12(b); *see also* Appendix A and Appendix B to Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011).

44 Red River Compact § 5.05, Pub.L. No. 96-564, 94 Stat. 3305 (1980) (emphasis added).

45 Joint Appendix, 2011 U.S. Briefs 889, 2013 U.S. S. Ct. Briefs LEXIS 987 at 29–30.

sources and not to compare sections simply because they use similar language.[46] For example, given that both Reach II Subbasin 5 and Reach I Subbasin 4 apportion the mainstem of the Red River rather than its tributaries, a comparison of the language used in these two sections is illustrative. That these two sections apportion the Red River similarly,[47] is important when analyzing the courts' method for deriving meaning from Section 5.05(b)(1) based on the inclusion of certain language found in other sections but not in Section 5.05(b)(1).

As clear as the allocations and apportionments seem to be, the Compact struggles to clearly carve out the states' and federal government's regulatory authority. Article II allows states to "freely administer water rights and uses in accordance with the laws of that state," but makes those uses subject "to the availability of water in accordance with the apportionments made by this Compact."[48] At the same time, the Compact provides that:

> Nothing in this Compact shall be deemed to: (a) Interfere with or impair with the right or power of any Signatory State to regulate within its boundaries the appropriation, use and control of water, or quality of water, *not inconsistent with its obligations under this Compact*.[49]

At best, this provision sets up an unclear, uneasy division of powers between the federal and state governments. While the Compact allocates interstate water resources at the federal level, the Compact tries to save room for state involvement in allocation. However, there is no room for states to allocate and apportion interstate waters even if these waters are located within the borders of a state.[50] On the other hand, with respect to the interaction between the Compact and other federal laws, the Compact clearly and without qualification asserts that nothing in the Compact "shall be deemed to impair or affects the powers, rights or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin."[51] The Compact, in no uncer-

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46 *See* Appendix A to *Tarrant Reg'l Water Dist.*, 656 F.3d 1222, 1251 (10th Cir. 2011) for a summary of how water within each subbasin was allocated between the affected states and the different language used.

47 Reach I Subbasin 4 is divided as follows: "(1) Oklahoma 200,000 acre-feet and Texas 200,000 acre-feet, which quantities shall include existing allocations and uses; and (2) Additional quantities in a ration of fifty (50) percent to Oklahoma and fifty (50) percent to Texas. Joint Appendix, 2011 U.S. Briefs 889, 2013 U.S. S. Ct. Briefs LEXIS 987 at 19.

48 Red River Compact § 2.01, Pub.L. No. 96-564, 94 Stat. 3305 (1980).

49 Joint Appendix, Vol. I at 12, 133 S. Ct. (No. 11–889) (emphasis added).

50 There is no doubt that the Compact is insufficient to completely allocate and apportion the waters in and between the signatory states. Ideally, the interstate water compact would be written to comprehensively manage the interstate water and, therefore, supplant the state systems of allocation and apportionment. However, the language of the Compact displays the uneasiness with which the states relinquished their control to federal oversight. With states negotiating the compacts and a lack of a leadership from the federal government in asserting its authority to regulate, interstate water compacts will remain partial solutions to water resource management.

51 Red River Compact § 2.07, Pub.L. No. 96-564, 94 Stat. 3305 (1980). Joint Appendix, Vol. I at 12, 133 S. Ct. (No. 11–889).

tain terms, states that the Compact cannot be interpreted to conflict with other federal laws.

The interpretive comments provide additional support for construing the relationship between the Compact and the federal laws differently than the relationship between the Compact and state law. The interpretive comment to Article I states that "Sections 2.01, 2.05, 2.10 and 2.14 each, *at least in part*, are intended to insure that the states' internal autonomy is not displaced by the Compact" while "Section 3.07 likewise insures that federal rights and obligations are *unaffected* by the Compact."[52] While there is no question that the interstate compact is not to conflict with other federal law, the interplay between state law and the interstate compact seems murky at best. In fact, the language of the Compact could be said to reflect the states' reluctance to relinquish their control over interstate waters.

2. RELEVANT OKLAHOMA STATUTES

Tarrant Regional alleged that certain Oklahoma statues were preempted by the Compact and discriminated against Texas because they prevent Texas from accessing its portion of the water allocated to the state under the Compact.[53] Texas challenged seven Oklahoma statutes that treat out-of-state users differently from in-state users of Oklahoma waters. Certain statutory provisions require the OWRB to consider additional factors before issuing a water use permit to an out-of-state user. For instance, if an out-of-state applicant applies for a long-term appropriation, the OWRB will only grant such a permit "upon a showing that the proposed use 'will promote the optimal beneficial use of water in [Oklahoma].'"[54] Other provisions of the Oklahoma statutes limit OWRB's and the Oklahoma Water Conservation Storage Commission's (OWCSC) authority to permit the use of Oklahoma water outside of Oklahoma.[55] Tarrant Regional claimed that Oklahoma's "Anti-Export" statutes prohibited Texas from accessing the 25% of runoff owed to Texas under Section 5.05(b)(1) of the Compact, in violation of the Compact's directive. Oklahoma successfully argued that, by ratifying the Compact, Congress authorized the limitations on water withdrawal by out-of-staters imposed by the Oklahoma legislature.[56]

3. RELEVANT CONSTITUTIONAL CLAUSES

Tarrant Regional alleged constitutional violations based on the Supremacy Clause and the Commerce Clause. Tarrant argued that the Compact, as federal law, preempted

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52 Joint Appendix, Vol. I at 14, 133 S. Ct. (No. 11–889) (emphasis added).

53 Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *2 (W.D. Okla. Nov. 18, 2009).

54 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 17–18 (2013) (petition for writ of certiorari).

55 First, 82 OKLA. STAT. §1085.2(2) prohibits the OWRB from issuing a permit to an out-of-state applicant without the approval of the Oklahoma Legislature. Additionally, 82 OKLA. STAT. §1085.22 prohibits the OWCSC from granting a permit for the sale or resale of water outside of Oklahoma. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 19 (2013) (petition for writ of certiorari).

56 *Tarrant Reg'l Water Dist.*, 2009 U.S. Dist. LEXIS 107520, at *13.

conflicting Oklahoma state laws. To understand the preemption doctrine we turn to the Supremacy Clause which states:

> Constitution, and the laws of the United States which shall be made in pursuance thereof. . .shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding.[57]

Accordingly, state laws that conflict with federal law, either expressly or implicitly, are "without effect."[58] There are three ways that a federal statute can conflict with state law. First, federal statutes can expressly state that Congress intends to regulate a field or part of a field.[59] Second, courts can also find that the states have implicitly been preempted by federal regulation—either the state cannot obey a state law without violating a federal law (conflict preemption) or Congress has so occupied the field that Congress must have intended to exclude states from regulating from within that same field (field preemption).[60]

Courts are reluctant to find that state laws have been preempted by federal law, especially when the state law in question controls an area "which the States have traditionally occupied."[61] This presumption does not apply in *Tarrant Regional*.[62] History shows that states developed principles by which to allocate water resources.[63] However, the states regulated these water resources as *intra*state water resources rather than as

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57 U.S. CONST. art. VI, cl. II.

58 Maryland v. Louisiana, 451 U.S. 725,746 (1981).

59 *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) ("First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one"). *See also* Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (stating that the "purpose of Congress is the ultimate touchstone in every preemption case" and that even if Congress has expressly preempted state regulation, the court will still look to the scope and purpose the statute).

60 *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S 132, 142–43 (1963) (reviewing a federal and state law regarding the importation of avocados and whether "compliance. . .is a physical impossibility"); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992) (holding that the Occupational Safety and Health Act of 1970 so occupied the field of legislating health and safety standards for the workplace so as to preempt any state law promulgating health and safety standards). *See also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

61 Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1242 (10th Cir. 2011). *See also Rice*, 311 U.S. at 230.

62 *See Tarrant Reg'l Water Dist.*, 656 F.3d at 1235 (arguing that the courts have traditionally deferred to state water law, and that the Compact's text reflects a general deference to state law).

63 The fact that the states own the beds of navigable waters should have no bearing on determining states' authority to apportion and allocate waters:

> It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States. . .and subject to the qualification that where the United States, after acquiring the territory and before

*inter*state water resources. In other words, the states established mechanisms by which to grant rights to intrastate water users; however, these rights were not necessarily developed within the context of their interstate consequences and with an eye to preserving future availability. Furthermore, there is little evidence to show that states have acted to comprehensively manage interstate water resources, especially independently from what is required by federal mandates. For example, states regulate water quality at the behest of Congress and the regulations issued by the Environmental Protection Agency pursuant to the Clean Water Act.[64] In fact, the reason that Congress became more active in the field of pollution control was because the states had *failed* to act in that area and the pollution had reached an intolerable level. States disregarded their responsibility to manage the use of natural resources, resulting in rampant pollution and overuse. The extent and severity of water pollution reached a breaking point in 1969 when the Cuyahoga River went up in flames and Congress was motivated to take action.[65] Therefore, history contradicts the proposition offered by the OWRB and adopted by the courts that states have traditionally regulated in the area of water resources management. States have traditionally regulated the *intra*state uses of *inter*state waters as if they are intrastate waters. Therefore, the presumption against preemption does not apply.

Tarrant also argued that the Oklahoma statutes burdened interstate commerce.[66] Congress, via the Commerce Clause, has the sole authority to regulate navigable waters and did not relinquish that power as a result of their failure to promulgate laws asserting jurisdiction over every aspect of water resources management. The Commerce Clause states, "Congress shall have power. . .to regulate commerce with foreign nations, and among the several states, and with the Indian tribe."[67] In conjunction with the explicit grant of power to Congress to regulate interstate commerce, the commerce clause implicitly prohibits states from passing laws that discriminate against other states or place an undue burden on interstate commerce.[68] States have a general police power to regulate

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> the creation of the State, has granted rights in such lands. . .such rights are not cut off by the subsequent creation of the State.

United States v. Holt State Bank, 270 U.S. 49, 54–55 (1926).

64 Section 402 of the Clean Water Act requires the EPA to develop and implement the National Pollutant Discharge Elimination System (NPDES) program whereby the EPA must set effluent limitations on a technology and water-quality basis. Clean Water Act of 1977, 33 U.S.C. §§ 1281(a), 1294–1297 (1977). The EPA is further authorized to allow the state governments to perform the NPDES permitting program. *Id*.

65 *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1948) ("Clean Water Act"); The Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1899); Clean Air Act, 77 Stat. 392 (1963) (current version at 42 U.S.C. §§ 7401–7642 (1977)).

66 *Tarrant Reg'l Water Dist.*, 656 F.3d at 1222.

67 U.S. CONST. art. I, § 8, cl. 3. *See also* Gibbons v. Ogden, 22 U.S. 1(1824) (holding that Congress' power to regulate interstate commerce–commerce that is not completely internal to the states—is plenary).

68 *Gibbons*, 22 U.S. 1 (Johnson, J., concurring) (introducing the concept of the Dormant Commerce Clause, noting that the Court has a Constitutional jurisdictional mandate to regulate commerce where Congress does not). Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (holding that the Oklahoma statute prohibiting the exportation of minnows out-of-state invalid on the basis that the statute was discriminatory in violation of the Commerce Clause). Pike v. Bruce Church, 397 U.S. 137, 142–43 (1970) (holding that an Arizona

commerce within their state boundaries; however, if the states' regulations impede the national marketplace to the detriment of interstate commerce, the states have acted beyond their police power. States have a general police power to regulate within their state boundaries.[69] For Oklahoma to have exceeded its police powers the courts would have to have found that Congress had regulated in the same area in which the Oklahoma statutes attempt to regulate and either the Compact explicitly states that the Compact fills the field or the court finds that one could not comply with both the federal and state requirements. Or, if Congress has not regulated in that area, the court must find that the Oklahoma statutes show a preference for certain states over other states or unduly burden the interstate exchange of goods.

Even if the courts were able to support their proposition that States have historically regulated in the area of interstate water management, state action does not eliminate Congress's authority to act. The Supreme Court has expressly designated water as an "article of commerce," thereby placing the authority to regulate water squarely within the purview of Congress pursuant to the Commerce Clause. The Commerce Clause, paired with the Necessary and Proper Clause, gives Congress broad authority to enact laws regulating interstate commerce.[70] The fact that states have legislated water allocation and apportionment within their state borders does not extinguish Congress's authority to apportion and allocate interstate waters.

The OWRB argued that Congress consented to the enforcement of the Oklahoma "Anti-Export" statutes by approving the Compact, which they interpret as protecting state management of interstate waters.[71] Preemption doctrine jurisprudence tells us that Congress can consent to discriminatory or burdensome state laws.[72] Congress can remove obstructions on states' ability to regulate in an otherwise restricted field or expressly endorse the state regulation.[73] To identify consent, courts are instructed to look for clear, affirmative language that unmistakably demonstrates Congress's intent and act to consent to state protectionism.[74] No language in the Compact expressly consents to state protectionism. However, because language in the Compact provides general deference to state law, the Tenth Circuit concluded that the Compact "contains the clear statement of congressional authorization of state regulation that *Sporhase* and *Wunnicke* require."[75] The Tenth Circuit identified four Compact provisions that it concluded evidenced Congress' intent. These provisions either authorize states to allocate water in the

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statute requiring certain packaging for cantaloupes unjustifiably burdened interstate commerce).

69 Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905) (holding that it is within a state's police power to enact a compulsory vaccination law).

70 McCulloch v. Maryland, 17 U.S. 316 (1819); Wickard v. Filburn, 317 U.S. 111 (1942).

71 Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1229 (10th Cir. 2011).

72 S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945) (stating "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.").

73 *Tarrant Reg'l Water Dist.*, 656 F.3d at 1234 (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946)).

74 *Id.* at 1235.

75 *Id.* at 1237.

way the states deem beneficial, provided that the Compact should not interfere with state regulation, or give designated states "free and unrestricted use" to water in certain geographical areas.[76] Neither authorization of power amounts to clear "congressional authorization" for states to manage interstate waters. Although this interpretation does not meet the standard, the Supreme Court did not address the issue of application of Congressional consent.

The proper effectuation of water allocation depends on the courts' correct application of constitutional law.

4. THE COURTS' OPINIONS: DIFFERENT REASONS FOR THE SAME RESULT — NO WATER FOR TEXAS

In 2007, Tarrant Regional sued the OWRB, alleging that the Compact preempted the moratorium on nonresident acquisition of water located within the state of Oklahoma and that several Oklahoma provisions discriminated against other states in violation of the Commerce Clause.[77] Tarrant Regional sought injunctive relief prohibiting the enforcement of Oklahoma's moratorium on the sale or export of water outside of Oklahoma.[78] The District Court denied the defendant's motion to dismiss.[79]

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76 *Id.* at 1237–38 (referring to Sections 2.01, 2.10, 4.02 and 5.05 of the Compact).

77 The moratorium on out-of-state exports of water is set forth in 82 OKLA. STAT. §1B (2013):

> §1B. Moratorium on sale or exportation of surface water and/or groundwater
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> A. In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section. . ..
>
> B. Subject to the moratorium set by subsection A of this section, no state agency, authority, board, commission, committee, department, trust or other instrumentality of this state. . .shall contract for the sale or exportation of surface water or groundwater outside the state, or sell or export surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water.

Other statutory provisions prevent the out-of-state sale of water: (a) 82 OKLA. STAT. § 105.16 allows permits to be issued only when the whole amount of water will be put to a beneficial use within seven years; (b) 82 OKLA. STAT. § 1085.2(2) requires any contract for the sale or use of water outside of Oklahoma to be approved by the Oklahoma Legislature; and (c) 82 OKLA. STAT. § 1085.22 prohibits the OWCSC from issuing a permit for the sale or resale of water out of state. Furthermore, the Oklahoma Attorney General issued an opinion proffering that "an out-of-state user of water is not a proper permit applicant before the OWRB." Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2007 U.S. Dist. LEXIS 79973, at *3–5.

78 *Id.* at *3–5.

79 The District Court made three findings. First, the case presented a "case or controversy" because there was nothing to stop Oklahoma from applying its discriminatory state laws against Tarrant Regional's permit applications. *Id.* at *3. Second, the defendants were not immune from suit pursuant to the Eleventh Amendment. *Id.* at *4. Third, Arkansas and Louisiana were not necessary and indispensable parties to a suit challenging the validity of the Oklahoma laws. *Id.* at *5. In an interlocutory appeal, the Tenth Circuit affirmed the

Two years later, the Oklahoma Legislature adopted H.R. 1483, amending one of the "Anti-Export Statutes" to include laws applicable only to out-of-state permit applicants.[80] Tarrant Regional was granted leave to submit a supplemental complaint, after which the defendants filed a new motion to dismiss and motion for summary judgment.[81] The District Court dismissed the motions, finding that the new law did not explicitly repeal the moratorium and that questions remained as to the constitutionality of the statute as applied to water allocated via the Red River Compact.[82]

The Supreme Court considered two questions. First, did Congress's approval of the Red River Compact manifest "unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water."[83] The Court did not answer this question, but instead summarily concluded that Oklahoma's laws do not violate the Commerce Clause.[84]

The second question before the Court was whether Section 5.05 of the Red River Compact preempts Oklahoma laws that impede Tarrant Regional's ability to secure water under the Compact.[85] The Court concluded that the Compact does not preempt the Oklahoma statutes.[86] The Court agreed with Oklahoma that the language "equal rights" did not explicitly grant cross-border transfers of water from Reach II Subbasin 5 and that the language was ambiguous.[87] The Court based its opinion on three findings: "the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing."[88] Although the Compact language explicitly states that the water in Reach II Subbasin 5 is to be divided equally among the four Signatories, the Court required even

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District Court's holding regarding sovereign immunity. Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F. 3d 906 (10th Cir. Okla. 2008).

80 Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *3 (W.D. Okla. Nov. 18, 2009). 2009 OK. ALS 403 amending 82 Okl. St. § 105.12 (2013).

81 *Id.* at *3.

82 *Id.* at *7–8. The District Court made three important conclusions. First, the Doctrine of Primary Jurisdiction did not apply because Tarrant Regional did not assert rights under the Compact, and the Compact explicitly stated that findings by the Commission were not a condition precedent to the assertion of claims in the District Court. *Id.* at *12–13 (referring to §10.01(g) of the Compact). Second, the Oklahoma statutes were "not inconsistent with the Red River Compact insofar as they relate to the water allocated and apportioned to Oklahoma under the Compact." *Id.* at *24. Given that the laws do not necessarily conflict with federal law or excessively interstate commerce, no Supremacy Clause or Commerce Clause claims were presented.

83 *11-889 Tarrant Regional Water District v. Herrmann: Question Presented*, SUPREME COURT OF THE UNITED STATES, *available at* http://www.supremecourt.gov/qp/11-00889qp.pdf.

84 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2137 (2013).

85 *Id.*

86 *Id.* at 2137.

87 *Id.* at 2123.

88 *Id.* at 2132. The jurisprudential basis upon which the Supreme Court found that the courts have always deferred to state sovereignty over waters within their state borders is flawed. The Court cites *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842), which states,

more explicit language allow cross-border transfers.[89] By contrast, the Tenth Circuit was willing to find explicit language in general references to state deference.[90]

B. THE COURTS PROTECT THE FICTION OF STATE SOVEREIGNTY OVER INTERSTATE WATER

The courts' opinions suggest they are uncomfortable with legislating equitable water resources management and instead mistakenly protect states' sovereignty over interstate waters. To find that Congress consented to otherwise unconstitutionally discriminatory state laws, courts must find that Congress expressly intended to allow states to write and enforce discriminatory laws. While no such express consent exists, the courts have nevertheless found such consent in general references to state law.

The District Court liberally interpreted several provisions of the Compact to represent congressional consent to any state statutes that regulate the use and allocation of water within the state borders.[91] Because the Compact: (1) permitted states to use the water allocated to it by the Compact in any way deemed beneficial by that state; (2) granted states free and unrestricted use to its allocated water; and (3) required that the Compact not be read to interfere or impair the right or power of any Signatory State, the District Court held that Congress authorized the signatory states to regulate the use and allocation of water within their states.[92] For the OWRB, this meant that Congress' approval of the Compact was an endorsement of Oklahoma's statutes allocating water

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> when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, *subject only to the rights since surrendered by the Constitution to the general government*.'

Id. at 410 (emphasis added). The italicized portion of the quote was omitted from the Court's quotation of *Martin*, yet it is indispensable to the meaning of this sentence— states' rights to navigable waters can be modified by federal laws. Furthermore, the Court in *Martin* was asked to determine whether or not the ownership rights to the land under the navigable waters transferred from the King to the Duke. *Martin*, 41 U.S. at 411. This case is not authority for the principle that states retain sovereign rights over the waters, nor are the other cases cited by the Court. The Court cites to *United States v. Alaska*, 521 U.S. 1, 5 (1997) and *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). In *Alaska*, the parties were disputing the ownership of submerged lands along Alaska's Arctic Coast. These lands were rich with oil and the parties wanted to establish who had the right to issue permits to exploit these resources. *Alaska*, 521 U.S. 1. In *Utah Div. of State Lands*, the court again determined ownership rights to the land underlying water. *Utah Div. of State Lands*, 482 U.S. 193. "Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of the land was considered an essential attribute of sovereignty." *Id.* at 195. None of these cases provide a basis for the Supreme Court to draw the conclusion that states have sovereign rights over the water within their state borders.

89 *Id* at 2133.

90 *Id* at 2134.

91 Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *24 (W.D. Okla. Nov. 18, 2009).

92 *Id.*

within Oklahoma's borders. These provisions can hardly be seen as a clear expression of congressional consent to discriminatory state laws.

The Red River Compact is insufficient to singularly regulate the use of the water within each state. The Compact does not set forth a clear doctrine for allocation, nor does it provide for a permitting scheme for users within the state to apply for and be granted permits to use the allocated water. It is almost as if the Compact is trying to regulate the interstate water as a different entity than the intrastate waters. Therefore, in writing the interstate water compact, the states are trying to write a general allocation scheme to be superimposed upon the states' existing allocation schemes. The negotiating states, in a position to limit the effect of the Compact on their rights, retained this distinction between the interstate and intrastate quality of the resource. Neither the insufficiency of the Compact to holistically regulate use of the interstate waters nor the fact that the Compact authorizes the States to act where it has not acted (and arguably should have acted) means that the States' regulations can conflict with the allocations set forth in the Compact. The Compact must be interpreted to preempt conflicting state statutes; otherwise, the state statutes could override twenty years of negotiation and the resulting federal statute.

The Supreme Court seemed confounded by Tarrant Regional's suggestion that the signatory states have "dispensed with [their] core state prerogative to control water within their own boundaries."[93] But there is no reason to conclude that states had this power to lose in the first place or that Congress, in consenting to interstate water compacts, ever desired to completely devolve their regulatory authority to the states.[94] First, states are not authorized to negotiate and enter into interstate compacts that touch upon federal interests without the consent of Congress.[95] The states cannot act independently when regulating interstate waters, which means that states never held complete authority over interstate waters. Second, while Congress has typically been hands-off with respect to most water resource management, Congress has promulgated and applied its own apportionment scheme upon the states.[96] Third, the signatory states freely consented to an agreement (i.e. the interstate compact) that, by its very nature, reduces the

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93 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2132-33 (2013).

94 Congress has used federal legislation to encourage states to enter into interstate compacts that would control the effects of flooding and abate flooding. *See* Omnibus Flood Control Act of 1936, 33 USC §701(a) (1982); Clean Water Act, 33 U.S.C. §§ 1251–1376. While Congress encouraged states to manage regional waters, this does not mean that Congress intended to devolve its authority of navigable waters to the states.

95 U.S. CONST. art. I, § 10, cl. 3.

96 The states entered into the first interstate compact relating to the apportionment of waters in the Colorado River Compact of 1922. After signing the Colorado River Compact, the state of Arizona later refused to ratify the compact because it believed California could preempt the Compact-determined allocations pursuant to *Wyoming v. Colorado*, 259 U.S. 419 (1922). Congress stepped in and forced the apportionment upon California, Arizona, and Nevada by approving the Boulder Canyon Project Act, 45 Stat. 1057 (1928). This apportionment was upheld by the Supreme Court in *Arizona v. California*, 373 U.S. 546 (1964). The court wrote:

> In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional

control they have over the water within their state boundaries by restricting the amount of water they can use unless certain flows are met at designated state boundaries.[97] Thus, the states do not exercise complete control over interstate waters within their borders.

Neither the Tenth Circuit nor the Supreme Court discussed the meaning and purpose of interstate water compacts. The whole reason for an interstate water compact is that state regulation of interstate waters has interstate consequences. The very nature of interstate waters is that they travel through more than one state. Therefore, inherent to an interstate compact is the ceding of states' sovereign rights between the signatories as consented to by Congress. An interstate compact allocates waters between upstream and downstream states because upstream states can deplete the water resources before they naturally reach the downstream states. Texas, Oklahoma, and Arkansas, as upstream states, gave up complete control of the waters within their boundaries. To meet certain required flows required by the Compact, these states have to limit water use within their boundaries. Consequently, inherent to the negotiation and agreement to interstate compacts is the relinquishment of certain sovereign rights.

The Red River Compact is no different. Certain subbasins are composed entirely of tributaries located only in one state, and the Compact grants that state "free and unrestricted use" to the water of that subbasin, which means that the respective state can use one-hundred percent of that water.[98] Other subbasins restrict states' use by apportioning a specific flow to each state or requiring a state to allow a percentage of runoff to flow to a designated location.[99] The best explanation for the difference in regulation goes beyond the location of the waterway and more to the degree of interstate effect the use of a waterbody will have on the availability of other water resources. Therefore, to effectuate equitable access to an interstate resource, certain waters are treated more like intrastate waters while others must be treated more like interstate waters. Without these restrictions, the upstream states would be free to use as much as water from the waterbodies located within their state boundaries regardless of the interstate consequences. Therefore, the Compact inherently restricts each of the signatory states' sovereignty.

Congress has neither legislated a national plan for water resources management nor promulgated general policies for water management. By not acting, Congress has not lost its authority to regulate these resources or permanently deferred to state management of these interstate resources. In fact, it may even be accurate that given the location of water resources, and the direct consequences of their exploitation, regional management would be the most logical. What is most important is that the interstate character of water be accounted for by the water management scheme and that the applicable law be clearly identified. The problem with the Compact is that it needed to be comprehensive

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> power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.

Arizona, 373 U.S. at 565. *See also* Marguerite Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 OKLA. L. REV. 1 (1985).

97 Between 1789 and 1900, only twenty-one compacts had been entered into and most were related to jurisdictional disputes. Chapman, *supra* note 96, at 13.

98 Red River Compact §§ 4.02, 4.03, 5.03, 5.04, 6.04, 7.02, 8.01, Pub.L. No. 96-564, 94 Stat. 3305 (1980).

99 Red River Compact, Pub.L. No. 96-564, 94 Stat. 3305 (1980).

enough to replace state law or it needed to directly incorporate the state law and policy regarding use and allocation of the portion of an interstate waterbody located within each individual state. The Compact does not show deference to the states; it shows a partial commitment on the part of the signatory states to interstate management of interstate resources.

C. Hydrologic & Geographic Realities

Any effort to legislate water resources management must recognize the hydrologic and geographic realities that affect the appropriate apportionment and allocation of water. While portions of interstate waters are located within states' boundaries, these waters are and remain interstate waters, regardless of the location of one portion of it. Interstate waters either flow through more than one state or feed a larger body that travels interstate. Therefore, the effects of water use and pollution control decisions are felt beyond the state making the decisions.

First, interstate water compacts are tools to combat protectionist behavior; they are not intended to be drafted or interpreted for the purpose of "secur[ing] an economic or other advantage for [one] state or its citizens."[100] The District Court's conclusion that the "purpose and effect of the RRC. . .through its provisions for allocation and apportionment of the Red River's waters between the various states" is to give a "preferred right of access" to in-state users over out-of-state users, demonstrates a fundamental misunderstanding of the interstate availability of water resources and interstate effects of use of such water resources.[101] Water resources are not equitably divided between states by nature. More accurately, our state borders were not drawn to equitably divide natural resources between the states. Furthermore, states' use and management of water within their state affects the availability and quality of water in other states. Interstate water compacts are used to fairly apportion and allocate water resources between states so that one state cannot use their water to the disadvantage of another state. Compacts are written to eliminate the injustice dealt purely as a matter of geography and ensure that regardless of the location of a state, each state will have fair access to a geographically shared water resource. Therefore, the allocation of resources by interstate compact is not protectionist.

Second, the courts go out of their way to find that the Compact calls for deference to state water law and in so doing fail to interpret the Compact in light of the geographic realities the Compact aims to control. When the Circuit Court interprets the meaning of "equal rights" in Section 5.05(b), the court acts as if the states did not intentionally treat water within Reach II Subbasin 5 differently than water located in the other subbasins of Reach II or differently than the water located in other Reaches.[102] In concluding that the omitted reference to state boundaries was not purposefully done by the Compact's writers, the Circuit Court fails to consider how states would be able to access the excess runoff they are entitled to in the case of a flow greater than 3,000 cubic feet per second (cfs). Subsection 5.05 serves two purposes. First, it protects the downstream states by

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100 Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 U.S. Dist. LEXIS 107520, at *22 (W.D. Okla. Nov. 18, 2009).

101 *Id.*

102 Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1243 (10th Cir. 2011). Red River Compact § 5.05(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980).

ensuring that a certain flow (i.e. availability of water) is maintained at the Arkansas-Louisiana border.[103] Second, it allocates the water among the four signatory states once the minimum flow is achieved.[104] Given the location of the mainstem of the Red River, and the location of Reach II Subbasin 5, one or more of the signatory states may not be able to access its allocated percentage without crossing into a different state. For instance, the boundary between Texas and Oklahoma is set at the southern vegetation line of the Red River.[105] If the Compact was read as consenting to prohibitions on cross-border access to interstate waters, then Texas would not be able to access water from the mainstem of the Red River.

The disregard for the geographic realities is most blatant when the courts ignore the fact that Subsection 5.05 is only located in three of the four signatory states, but allocates each of the four signatories 25% of the excess runoff to Louisiana when there is a flow of 3,000 cubic feet per second into the Red River.[106] The courts presume the drafters did not purposefully write the provision. The same drafters who defined the boundaries of the different Reaches also wrote the provisions allocating and apportioning the interstate waters. Therefore, it is error to presume that the drafters did not intend to give states the right to access the water to which they were allocated, when the allocated water was not located within the respective states' boundaries. Also, while there are similarities in the language used to allocate and apportion water, when language is omitted from one provision and is used in other provisions, the omitted language should not be read into the provision. If "within state boundaries" were incorporated into Section 5.05(b)(1), as the courts suggest, it would read: "The Signatory States shall have equal rights to the use of runoff originating in Subbasin 5 and undesignated water flowing into Subbasin 5, *within their states' boundaries*." This subsection becomes nonsensical, because the four signatory states cannot each have an equal portion of the runoff in Subbasin 5 within their state boundaries because Louisiana is not located within Subbasin 5. Consequently, the courts' construction of Section 5.05(b)(1) is illogical.

The Tenth Circuit focused on the fact that Section 5.05's purpose is to protect a flow at the Arkansas-Louisiana border, and that other sections setting flow requirements also apportion waters according to state borders.[107] Both Sections 5.03(b) and 7.02(b) impose a flow requirement on the upstream state, and apportion the water between the states.[108] Section 5.03(b) authorizes Oklahoma and Arkansas to freely use the water within their state boundaries; however, Oklahoma must allow 40% of the total runoff originating below the last downstream major damsites in Oklahoma to flow into Arkansas.[109] Section 7.02(b) authorizes Arkansas to freely use the water within its state boundaries (given that Reach IV is exclusively located within Arkansas), but requires Arkansas to allow 40% of the total runoff originating below the last downstream major damsites in Arkansas to flow into Louisiana.[110] Different sections of the Compact were written dif-

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103 *Id.* at 1244. Red River Compact § 5.05(b)(1), Pub.L. No. 96-564, 94 Stat. 3305 (1980).
104 *Id.*
105 H.R. REP. NO. 106-770, pt. 1, at 1 (2000).
106 Red River Compact § 5.05(b)(1), Pub.L. No. 96-564, 94 Stat. 3305 (1980).
107 Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1243 (10th Cir. 2011).
108 Red River Compact § 5.05(b)(1) and § 7.02(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980).
109 Red River Compact § 5.03(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980).
110 Red River Compact § 7.02(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980).

ferently to reflect the geographic nature of the water supply they were apportioning. Sections 5.03(b) and 7.02(b) protect the downstream states from the greediness of upstream states, and allow the states to use a percentage of the water available to them within their state. These provisions ensure that each state is allocated a fair and equitable portion of water.

While in Sections 5.03(b) and 7.02(b), water apportionment could be best accomplished by reference to state borders, the same could obviously not be achieved in Section 5.05(b)(1), because the water was apportioned to each of the four states without reference to state borders. Furthermore, given that no territory of Louisiana is physically located within Reach II Subbasin 5, an allocation based on a reference to state borders would have kept Louisiana from receiving what the drafters must have thought was an amount of runoff equitably due Louisiana. The Tenth Circuit was so willing to protect state sovereignty that it ignored the geography of the region.

Third, in interpreting a provision apportioning natural resources, the court should compare provisions which apportion similarly-situated resources. Not all rivers, lakes and tributaries are the same. Section 5.05 and Section 4.04 are the only two sections that apportion the lifeline of the system (i.e., the mainstem of the Red River). Given the similarity of the water the two sections act upon, they should be analyzed together.[111] Section 4.04 apportions water above the Denison Dam, while Section 5.05 apportions the water below the Denison Dam. Neither section references state borders nor grants any of the affected signatory states the "free and unrestricted use of water," While only Section 5.05 uses the phase "equal rights," both sections apportion the water equally between Texas and Oklahoma. From the Denison Dam and above, Texas and Oklahoma are each apportioned 200,000 acre-feet of the storage of Lake Texoma and flow from the Red River's mainstem.[112] Additional quantities are divided 50-50.[113]

Below the Denison Dam, if the Red River's flow at the Arkansas-Louisiana state boundary is 3,000 cfs, then the signatory states have "equal rights" to the runoff.[114] The Compact further clarifies that "equal rights" means each of the signatory states *to the Compact*—not just the signatory states in which Reach II is located (only three states: Texas, Oklahoma, and Arkansas)—is entitled to 25% of the runoff.[115] Given the geographic and hydrologic similarities of the waters regulated under Section 5.05 and Section 4.02, these two sections should be compared. The actual hydrology must have been a consideration when equitably allocating the waters and therefore must be considered when interpreting the language of the Compact provisions.[116]

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111 Section 4.04 apportions water located in Reach I, Subbasin 4, which straddles the border of Texas and Oklahoma. Section 5.05 apportions water located in Reach II, Subbasin 5, which also straddles the border of Texas and Oklahoma. Red River Compact § 4.04(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980).

112 *Id.*

113 *Id.*

114 *Id.* § 5.05(b)(1).

115 *Id.*

116 Even so, while the analysis disproves the existence of a resounding support for state deference, it does not necessarily answer the question of whether the Compact authorized Texas to access water located in Oklahoma. This is exactly the reason it would be have been beneficial if the Commission was required to make a finding before suit was brought in

One purpose of Section 5.05 is to protect water flow to the downstream states.[117] However, the Section also exists to allocate equitable quantities of water to the signatory states. While there is no explicit language in the Compact authorizing Texas to cross into Oklahoma to obtain its twenty-five percent, the Compact includes no provision forbidding cross-border access to water or specifically forbidding preemption of applicable state laws. Courts actively avoid interfering with state sovereignty; therefore they are uncomfortable concluding that one state can access water resources within a different state. However, in light of the geography of Reach II Subbasin 5, the drafters must have thought Louisiana could access its twenty-five percent of Reach II Subbasin 5 from one of the other three states because there is no Reach II Subbasin 5 water within Louisiana's state borders.

The Supreme Court fell into the same trap as the Tenth Circuit by ignoring the differences in language used in different provisions of the Compact and reading language into provisions that was intentionally omitted.[118] The Court relied on three provisions requiring states to allow a certain percentage of runoff to flow from "within their respective states" into another state. For example, Section 5.03(b) states:

> The States of Oklahoma and Arkansas shall have *free and unrestricted use of the water* of this subbasin within their respective states, subject, however, to the limitation that Oklahoma shall allow a quantity of water equal to 40 percent of the total runoff originating below the following existing, authorized or proposed last downstream major damsites in Oklahoma to flow into Arkansas (emphasis added).[119]

This section suggests that Oklahoma can freely use the water within its borders, but requires Oklahoma to let 40% of the runoff to flow to Arkansas. The Court also refers to Section 5.05(b)(3), Section 5.05(b)(2), and Section 6.01(b), all of which require the States to allow a certain percentage of water or a certain amount of water (measured in cfs) to flow through a specific downstream state border. The problem with the courts' interpretation is that they ignore that these Sections were written to achieve different ends. Section 5.05(b)(1) grants each of the four signatory states a percentage of water they can use when a minimum flow is achieved at the Arkansas-Louisiana state border. Sections 5.05(b)(2) and 5.05(b)(3) limit the upstream states' use by requiring a certain flow be achieved at the Arkansas-Louisiana border. Therefore, Section 5.05(b)(1) sets forth the quantity of water, specifically runoff, that is owed to each of the states while Sections 5.05(b)(2)-(3) identify the strength of the flow at the state line. By comparing two sections with different purposes, and reading language from one section into a section from which that language was omitted, the court leaves Section 5.05(b)(1) without the effect and meaning the drafters intended.

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court. The Commission is better qualified to answer these legal and interpretive questions in light of the topographical realities of the area.

117 Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1245 (10th Cir. 2011). (stating that protection of the flow to downstream states was the "raise d'être of §5.05, including §5.05(b)(1)").

118 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013).

119 Red River Compact § 5.03(b), Pub.L. No. 96-564, 94 Stat. 3305 (1980). Reach II, Subbasin 3 is located solely in Oklahoma and Arkansas, with the majority of the area located in Oklahoma. *Id.*

Furthermore, the Court does not acknowledge the inherent geographic differences between Section 5.05(b)(1) and Section 6.01(b). While both sections apportion water by percentages, there is a fundamental difference in the geography of the area being apportioned. Reach III, Subbasin 1 is fully located in both Arkansas and Texas; therefore, both states are able to access their apportioned percentage within their state boundaries. The same does not apply for Section 5.05(b)(1); Reach II, Subbasin 5 is geographically located *only* within Oklahoma, Texas and Arkansas. No portion of Reach II, Subbasin 5 is located within Louisiana's borders. By failing to recognize important geographic and hydrologic differences between sections, the Court compared sections they should not have and therefore drew conclusions that ignored the interstate quality and purpose of the Compact.

The Court also ignored the geographic differences between the areas legislated by compacts by comparing and contrasting the Red River Compact to other compacts.[120] Other interstate water compacts reference and explicitly authorize "cross-border diversions."[121] However, little value is added by making this comparison. Interstate compacts are not congressionally-generated legislation where it might be reasonable to expect some consistency in terminology. Instead, different compacts are generated by different states and are interpreted as contracts rather than as Congressional legislation.[122] The parties negotiating and writing the compacts change, which means that while previously written compacts may inform future negotiators, these compacts should not form a jurisprudential basis from which to interpret other compacts. No state is required to use the same model of interstate allocation as another state.[123] While there are similarities between interstate water compacts, there are also many differences. For example, only the Red River Compact uses the language "equal rights," which means that the courts should pay particular attention to this language given its specific selection by the drafters. Furthermore, the apportionment determinations in each are informed by different geographic and hydrologic realities. Not every state is carved in the same way, and the rivers and tributaries allocated under different compacts do not flow similarly. Because of these differences, different considerations would affect negotiations. In comparing different compacts, the courts must remember the geographical realities the compact's legal terms are acting upon, or each compact's independent meaning will be lost.

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120 *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133-2134 (analyzing the customary practices employed in other compacts).

121 *Id.* at 2134.

122 Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2130 (2013) (referencing the holding in *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) that interstate compacts are to be construed as contracts).

123 In fact, because of how the compacts are negotiated, compacts are more like contracts with respect to their uniqueness. A lawyer may compare contracts' usage of terms of art, but they would not compare the contract provisions of different contracts acting upon different things.

III. MOVING FORWARD

States resist interference with their ability to control water within their borders. Courts are desperate to protect the status quo and lack the expertise to serve as the proper forum to develop principles of water resource management. Disputes over interstate waters are not going away any time soon, particularly as the availability of water resources declines.[124] Congress must develop a national water resource management plan, setting forth a clear doctrine of equitable apportionment that requires states to address water resource management issues and taking to account local, state, and regional needs.

A. THE CONUNDRUM: MANY QUESTIONS AND ONLY JUDICIAL ACTION

To deal with the matters before the Supreme Court on the basis of original jurisdiction, the Court developed the doctrine of equitable apportionment, which in its original form, empowers the Court to legislate in the area of interstate water management.[125] *Kansas v. Colorado* was the first case to address states' use of interstate waters.[126] Kansas alleged that Colorado had no authority to reduce the flow of the Arkansas River by any amount,[127] and Colorado claimed that it could use every last drop of the Arkansas River because the water within Colorado's borders belonged to Colorado.[128] The Court disagrees with both positions and instead conducts its own analysis on the basis of equity and fairness:

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124 Justin Gillis, *A Jolt to Complacency on Food Supply*, N.Y. TIMES, Nov. 11, 2013 (discussing the effect of climate change and water stress on crops and food supply); Damien Ma & William Adams, *If You Think China's Air is Bad. . .*, N.Y. TIMES, Nov. 7, 2013 (discussing the extensive water pollution and water scarcity in China).

125 Josh Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1 (2014).

126 Kansas v. Colorado, 206 U.S. 46 (1907).

127 Counsel for Kansas argued, "Each State has certain rights to the waters of an interstate stream. The right of either cannot be destroyed by the other. Manifestly the law of neither State extends beyond its boundaries." Kansas v. Colorado, 51 L. Ed. 956, 51 (1907).

128 Colorado made the argument that there were "really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and. . .onward through Kansas and Oklahoma towards the Gulf of Mexico." *Id.* at 115. The Court recognizes that the strength of the flow changes depending on the season of the year; however the Court will not accept the premise that each section of the river inside state borders is a different river even though they are each a section of the same river:

> From time immemorial the existence of a single continuous river has been recognized by geographers, explorers and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows.

Id.

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.[129]

The Court found that Colorado had the right to use water from the Arkansas River for irrigation because the detriment to Kansas (i.e., the diminution of flow) was outweighed by the benefit to Colorado (i.e., irrigated land for crops).[130] The Court acted in the absence of a compact or Congressional action by ruling that irrigation was an acceptable use of a shared water resource.

The Court changed its approach when two states, Wyoming and Colorado, sought an equitable apportionment of the Laramie River after applying the doctrine of prior appropriation to their intrastate waters.[131] First, the Court saw no reason to apply a different doctrine of apportionment from the doctrine applied to intrastate waters when both states applied the doctrine of prior appropriation to their intrastate waters.[132] Because the two states applied the same doctrine, there was not the same sense that one state was imposing its laws onto the other state.[133] Second, the Court drew no distinction between intrastate apportionment and interstate apportionment.[134] Therefore, there was no reason to apply a different doctrine of apportionment.[135] Determining that Wyoming was owed a supply of water greater than the lowest natural yearly flow, the Court calculated the amount of water available to Wyoming to appropriate, which then informed the quantity of water remaining for junior appropriations in Colorado.[136]

The Court rejected its own application of the doctrine of prior appropriation in *Nebraska v. Wyoming* and applied a nuanced factor test:

> That does not mean that there must be a literal application of the priority rule. . ..But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the

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129 *Id.* at 97.

130 *Id.* at 113.

131 *Compare* Wyoming v. Colorado, 259 U.S. 419, 465 (1922), *and* Kansas v. Colorado, 206 U.S. 46 (1907) (involving two states that domestically applied different doctrines of apportionment—Kansas was a common law riparian rights state whereas Colorado was a prior appropriation state).

132 Wyoming v. Colorado, 259 U.S. 419, 458–59.

133 *Id.*

134 *Id.*

135 *Id.* at 470–71 (ruling that "[e]ach of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others.").

136 *Id.* at 496.

> character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.[137]

The factor test outlined by the Court above is more than "not a literal application" of the doctrine of prior appropriation. This test represents a fundamental shift in the court's understanding of "equitable apportionment." For the first time in its interstate water jurisprudence, the Court recognized the interstate nature and character to the waters being apportioned by holding that the senior appropriations of one state should not limit the junior appropriations of another state. The Court finally acknowledged that intrastate use has interstate consequences—one state's intrastate prioritization of uses can be detrimental to downstream states' economic vibrancy. Intrastate apportionment and use is permissible when that apportionment or use do not prevent another state from accessing its fair and equitable supply of the interstate water resource. If the Court subjected one state to another state's senior appropriation, interstate apportionment would merely become a court grant of approval to intrastate methods of appropriation and allocation, completely contrary to the principles of fairness and equity.

It makes sense why the Court has shifted its approach to interstate water apportionment with each examination. The Court has essentially been asked to act as a legislator with its hands tied behind its back. Legislatures have the luxury of having the time to examine different approaches to regulation and consider the larger policy questions at stake. The Court looks at water resource management on a case-by-case basis, trying its best to effectuate fairness and equity between states in different circumstances, with different needs and guided by different legal doctrines.[138] The Court tries to resist acting where states have typically acted by attempting to fit a round peg into a square hole, or to make intrastate appropriations and allocations work in the interstate context. The *Nebraska* decision shows that the apportionment of an interstate resource requires the evaluation of different considerations than when managing intrastate resources.

B. INTERSTATE COMPACTS ARE AN IMPERFECT SOLUTION

Given that interstate compacts are negotiated compromises in areas where there is no agreement, one would assume that fewer conflicts regarding these shared resources would arise following the compact's implementation. One might also think that there would be less need for courts to serve in the role of a legislator since the compact apportions the water. In fact, states may have negotiated these compacts to have some control in determining their interstate obligations. Having seen the variability in the methods employed by the courts to interpret interstate obligations without a compact in place, states might have thought that they would have a better chance of maintaining control over their own water use if they wrote the controlling agreement.

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137 Nebraska v. Wyoming, 325 US 589, 618 (1945) (emphasis added).

138 *Id.* at 627 (stating, "The standard of an equitable apportionment requires an adaptation of the formula to the necessities of the particular situation.").

Even so, many compacts reflect a tension between the need to apportion water as an interstate resource and the desire to preserve the status quo of states' authority to allocate the water of an interstate resource located within a state. When states voluntarily and successfully negotiate a compact, they automatically relinquish some of their sovereignty. Yet, most compacts largely try to safeguard the states' sovereignty. For instance, the Red River Compact states that "[n]othing in this Compact shall be deemed to: (a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact."[139] But the Compact inherently interferes with the State's ability to apportion and use water within its borders. An interstate apportionment changes how a state can manage water use within its own borders.[140] All of the water within the state is no longer available for use by that state. Each state is apportioned a percentage of the available water physically located within their borders rather than being left to freely and indiscriminately access all of the water, and in several instances, the percentage of water use is available only after flow requirements are met at state borders.

Furthermore, many of the interstate water compacts create interstate administrative agencies, but the states do not adequately empower them to interpret the terms of the compact, resolve disputes or enforce compliance.[141] Establishing an interstate agency subject to the guidelines of the federal Administrative Procedure Act (APA) and authorized to implement the interstate compact would reduce disputes between the member states and better protect the interstate waters.[142] To determine the applicability of the APA, courts will "examine the structure, function and mandate" of the alleged agency.[143] Therefore, when states design the interstate agency, the agency should possess sufficiently "broad power" to act[144] and should operate separately from the Govern-

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139 Red River Compact, Section 2.10, Pub.L. No. 96-564, 94 Stat. 3305 (1980).

140 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938) (stating, "Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. . ..[T]he private rights of grantees of a State are determined by the adjustment by compact of a disputed boundary was settled a century ago in Poole v. Fleeger. . ."); Nebraska v. Wyoming, 325 U.S. 589, 627 (1945) (stating, "The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State").

141 Interstate water compacts have called the bodies overseeing the compacts' implementation interstate administrative agencies, interstate agencies and commissions. For the sake of simplicity, such bodies will be referred to as interstate agencies.

142 Under the Administrative Procedure Act, 5 U.S.C. § 551(1), an agency is an "authority of the Government of the United States," with enumerated exceptions that include Congress, the courts, and six more limited exceptions.

143 Kinney v. Caldera, 141 F. Supp. 2d 25 (2001).

144 Conservation Law Found. of New England, Inc. v. Harper, 587 F. Supp. 357, 364 (1984) (finding that the Property Review Board, created by Executive Order, possessed sufficient "broad power, whether formal or informal, to control the sale or other disposition of public

ment.[145] The interstate compact should explicitly require the states to submit their claim to the interstate agency, thereby having to exhaust their administrative remedies before allowing a court appeal. Interstate agencies would be better equipped to interpret the language of the compact in the context of the geographic realities in which the compact was written. On appeal, the courts would then have a solid factual basis upon which to interpret the compact and resolve the dispute. States must start negotiating these interstate compacts with the goal of planning for future needs, predicted climactic changes, growing population, and scarcer water resources.

C. CONGRESS SHOULD ENACT A NATIONAL WATER RESOURCE MANAGEMENT PLAN AND POLICY

Neither the courts nor the states are well-positioned to formulate law and policy on water resource management. Therefore, the United States needs a national water resource management plan and a set of consistent policies to apply to states' water resource management plans. Courts do not have the expertise to understand the hydrologic realities being acted upon, and seeing individual fact patterns does not afford them the proper opportunity to generate the best doctrine. States are self-interested parties and may struggle to construct a management scheme that is truly interstate in nature. Congress can no longer abdicate its responsibility to regulate an article of commerce so vital to life and industry. At the same time, there are benefits to managing regionally located water at the regional level. The question is, how does Congress establish a system by which water resources are managed consistently but respond to regional needs?

Congress must enact a national water resources management plan. First, the plan must set forth a doctrine for equitably apportioning interstate water resources. Congress must clearly define the waters over which it exercises jurisdiction. It should consult experts to determine what factors must be considered when allocating and apportioning interstate waters between states in light of municipal, industrial, agricultural, and future needs. Congress can then adopt a doctrine that will inform states' efforts to apportion and allocate water resources through an interstate water compact or will inform courts' interpretation of water rights in the absence of an interstate compact. This doctrine would help to bring consistency to the area of regional water resources management.

Second, Congress should require states to establish apportionment and allocation schemes for interstate waters or to amend existing interstate compacts to reflect the new legal requirements. These interstate compacts should be comprehensive. Specifically,

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property" to qualify the Review Board as an "agency" under the National Environmental Protection Act). *But see* Dong v. Smithsonian Inst., 125 F.3d 877, 882–83 (holding that because the Smithsonian does "not make binding rules of general application or determine rights and duties through adjudication. . . and performs no regulatory functions," the Smithsonian does not exercise sufficient "independent authority" to be designated an agency under §551(1).).

145 *See also* Washington Research Project, Inc. v. Dep't. of Health, Educ. and Welfare, 504 F.2d 238, 246–47 (1974) (identifying, in analyzing *Soucie v. David*, several factors that must be considered in determining whether the entity in question is an agency, including whether the creation of the entity was "explicitly considered" by Congress, whether some of Congress's power was delegated to the entity, and whether it was considered that the entity would operate separately from the Government).

rather than provisions deferring to state regulation of intrastate regions of interstate waters, the interstate compacts should be comprehensive and regulate interstate resources completely, regardless of the intrastate portions. Further, states should be required to act by a deadline. If the states do not comply with this deadline, Congress would be authorized to write the scheme themselves.

Conflicts over transboundary water resources are far from being a thing of the past. In 2012, Kansas alleged that Nebraska had used more water than the amount designated to it in the 1943 Republican River Compact. In November 2013, the Special Master concluded that Nebraska did exceed its apportionment as well as recommended that the accounting procedures be revised.[146] Over the same period of time, Georgia and Florida have been disputing how much water Georgia is denying Florida (the downstream state), culminating in a lawsuit being filed by Georgia in the Supreme Court on October 1, 2013.[147] Unfortunately, these are not the last of the conflicts that states will have over the availability and management of water resources. It is imperative that comprehensive water resource management be effectuated in the United States.

This article aims to demonstrate the need for congressional action in water resources management and looks ahead to future articles and discussions of what the United States needs to move forward with comprehensive management of water resources, looking beyond the arbitrary boundaries of state lines to the hydrologic realities of the water resource.

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146 Lars-Eric Hedberg, "Kansas Urges Supreme Court to Reject Special Master's Water Accounting Recommendations," Bloomberg Law (March 12, 2014).

147 Arian Campo-Flores, "Florida Sues Georgia Over Water Use: State Takes Long-Running Dispute to the U.S. Supreme Court", The Wall Street Journal (October 1, 2013).

DECKER V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER, 133 S. CT. 1326 (2013)

On March 20, 2013, the U.S. Supreme Court held that a group of companies and governmental entities did not violate the Clean Water Act (CWA) because the stormwater flows that were impacted by their activities and then were discharged into waters of the United States were not flows that required a permit under Sections 1311(a) and 1362(12) of the CWA.[1] The Court held that the Defendants' activities were not "industrial activity" under the exemptions from the Silvicultural Rule from the CWA, and, therefore, did not need National Pollutant Discharge Elimination System (NPDES) permits before channeled stormwater from the roads used by the Defendants could be discharged into the navigable waters of the United States.[2] The Justices used the *Auer* deference to determine the intended scope of "industrial activity."[3]

CASE BACKGROUND AND PROCEDURAL HISTORY

The central issue in *Decker* was whether stormwater that runs off logging roads into ditches, culverts, and channels and then discharges into rivers and streams is considered a by-product of an industrial activity requiring an NPDES permit under Sections 1311(a) and 1362(12) of the CWA.[4] In September 2006, the Northwest Environmental Defense Center (Plaintiff) filed suit under the citizen-suit provision of the CWA and named logging operators, paper-products operators, and state and local governments as defendants (collectively, the Defendants).[5] The Plaintiff's petition claimed that the Defendants' activities were the cause of the discharges that had come from the logging roads and flowed into two Oregon rivers, and because they had not obtained the required NPDES permits for these discharges, the Defendants had violated the CWA.[6] The federal district court dismissed the action for failure to state a claim, determining that NPDES permits were not necessary because ditches, culverts, and channels were not considered "point sources" under the CWA and the Silvicultural Rule.[7] The Court of Appeals for the Ninth Circuit reversed the district court's decision, and subsequently, the Supreme Court granted certiorari.[8]

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1 Decker v. Nw. Envtl. Defense Center, 133 S. Ct. 1326, 1328 (2013).
2 *Id.* at 1329.
3 *Id.* at 1329-30 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to an agency's interpretations of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation")).
4 *Id.* at 1328-29.
5 *Id.*
6 *Id.*
7 *Id.* at 1329; *see also* 40 C.F.R. § 122.27(b)(1) (2014).
8 *Decker*, 133 S. Ct at 1329.

THE CWA AND RELEVANT CHANGES, INTERPRETATIONS, AND DEFINITIONS

Congress voted for the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] The Environmental Protection Agency (EPA) is responsible for administering the CWA.[10] Sections 1311(a) and 1362(12) of the CWA require that "individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States."[11] The CWA describes a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[12] The statute specifies that the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture."[13]

Relevant to this case, the EPA has adopted the Silvicultural Rule, which defines a point source as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[14] Therefore, a discharge from a point source under the Silvicultural Rule requires an NPDES permit unless the stormwater flow is exempted by another statute.

Congress exempted most "discharges composed entirely of stormwater" from needing NPDES permits.[15] However, a stormwater discharge "associated with industrial activity" still requires an NPDES permit.[16] Congress did not define what constituted "industrial activity" in the statute itself, but the EPA defined it as:

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant . . . For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.[17]

"The Standard Industrial Classifications are a system used by federal agencies to categorize firms engaged in different types of business activity."[18] Congress' definition of

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9 *Id.* at 1331 (citing 33 U.S.C. § 1251(a) (2014)).
10 *Id.* at 1330.
11 33 U.S.C. §§ 1311(a), 1362(12); *Decker*, 133 S. Ct at 1331.
12 33 U.S.C. § 1362(14).
13 *Id.*
14 *Decker*, 133 S. Ct. at 1331 (citing 40 C.F.R. § 122.27(b)(1) (2014)).
15 33 U.S.C. § 1342(p)(1).
16 *Id.* § 1342(p)(2)(B).
17 40 C.F.R. § 122.26(b)(14) (2006).
18 *Decker*, 133 S. Ct. at 1332.

an "industrial activity" in the Standard Industrial Classifications classifies the "logging" industry as "industrial activity."[19]

Supreme Court's Opinion

In the majority opinion, Justice Kennedy determined that the main substantive issue was whether the logging road stormwater discharges were "associated with industrial activity," because if not, then the Defendants were exempt from getting NPDES permits.[20] The statute is ambiguous because it does not give its intended scope of the term "industrial activity."[21]

The Supreme Court found two reasons to defer to the EPA's interpretation of its intended scope of "industrial activity."[22] First, the Court noted that it "is well established that an agency's interpretation need not be the only possible reading of a regulation" to succeed.[23] The Court reconfirmed the *Auer* deference standard by stating that it would defer to an agency's interpretation of their own regulation unless it is "plainly erroneous or inconsistent with the regulation."[24] The Court found the EPA's interpretation was reasonable.[25] The Court reasoned that "taken together, the regulation's references to 'facilities,' 'establishments,' 'manufacturing,' 'processing,' and an 'industrial plant' leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities."[26] Second, the Court found no evidence that this is a change from prior practice or a post hoc rationalization built in response to litigation.[27] Therefore, the Defendants were exempt from the permitting scheme.[28]

Looking to the Future

The Court's Opinion in *Decker* will undoubtedly impact future CWA interpretations in Texas. As Chief Justice Roberts said in his concurring opinion, these kinds of cases of agency deference arise on a regular basis.[29] *Decker* reconfirms that the *Auer* deference

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19 *Id.* (citing Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72974 (Dec. 7, 2012) (to be codified at 40 C.F.R. pt. 122)).

20 *Id.* at 1336.

21 *Id.*

22 *Id.* at 1337.

23 *Id.*

24 *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997).

25 *Id.* at 1337.

26 *Id.*

27 *Id.*

28 *Id.* at 1338.

29 *Id.* at 1339. The Fifth Circuit has since cited *Decker* for the deference owed agency interpretations. *See Mangwiro v. Johnson*, 554 Fed. Apx 255, 262 (5th Cir Feb. 4, 2014) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that

should apply to all future interpretations of administrative agency regulations. Further, the holding in *Decker* provides that stormwater discharges from logging roads are exempt from NPDES permits even though there is evidence that this kind of discharge has a large amount of sediments that could harm aquatic organisms.[30] This is especially important considering that the mining and logging industry was Texas's fastest growing industry in 2013.[31]

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interpretation is plainly erroneous or inconsistent with the regulation." quoting *Decker*, 133 S. Ct. at 1337); and *Elgin Nursing and Rehabilitation Center v. U.S. Dept. of Health and Human Servs.*, 718 F.3d 488, 493 (5th Cir. May 17, 2013) (noting that an agency has "[an] incentive [] to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect.").

30 *Decker*, 133 S. Ct. at 1333, 1338.

31 Susan Combs, 2013 Annual Cash Report, STATE OF TEXAS COMPTROLLER OF PUBLIC ACCOUNTS 1, 3 (2013), available at http://www.texastransparency.org/State_Finance/Budget_Finance/Reports/Cash_Report/13/texas_annual_cash_report_2013.pdf.

MORE AUTONOMY IN FRACKING TO ENCOURAGE WATER CONSERVATION

In April 2013, the Texas Railroad Commission (RRC) adopted new recycling rules aimed at encouraging water conservation by oil and gas operators.[1] Before the proposed and adopted amendments, the existing rules only provided for two categories of commercial recycling facilities: mobile facilities and stationary facilities.[2] As operators began recycling more and more, the RRC received an increasing number of applications for permits, and the need for facilities that fit neither category became apparent.[3] In response, the RRC created a third category: a semi-mobile commercial recycling facility.[4] Other changes and amendments to the rules relate to adopting the semi-mobile commercial recycling facility, as well as clarifying and updating requirements for water recycling. The RRC hopes these new rules will make it easier for Texas operators to continue their efforts in conserving water used in the hydraulic fracturing process for oil and gas wells.[5]

The RRC acknowledges that the rules were enacted despite the fact that less than one percent of statewide water use is employed in hydraulic fracturing and total mining.[6] In fact, the three top water consumers user categories statewide are irrigation, municipalities, and manufacturing.[7] Although use of water in hydraulic fracturing appears relatively minimal at this point in time, the RRC's push to actively encourage water recycling through these new rules may indicate an anticipation of increasing use of hydraulic fracturing and recycling fluid from those types of operations in the future.

CLARIFICATION OF PERMIT REQUIREMENTS

The new rules more clearly define the existing recycling permit application requirements and reflect the current standard field conditions for recycling permits.[8] Significantly, the RRC noted that a permit is not required for an operator to conduct recycling of produced water on its own lease.[9] Further, the rules have made it generally easier to get a permit for water recycling and even eliminated the need for an RRC-granted permit in some cases.[10] They also clarify that treated fluids reused in the wellbore of an oil, gas, geothermal, or service well are authorized by the RRC "and no further individual permit is needed."[11] This should encourage more self-sufficient recycling of fluids by

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1 38 Tex. Reg. 2318 (2013) (codified as an amendment to 16 TEX. ADMIN. CODE § 3.8).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 2319.
10 *Id.*
11 *Id.*

operators and potentially reduce the need to transfer the fluid off-site to be recycled or disposed of.[12]

Nonetheless, when operators do choose to transport their fluid off-site, the RRC has maintained its strict level of regulation of transportation vehicles.[13] The RRC also included requirements that vehicles used to haul non-solid oil and gas waste be designed to transport such wastes.[14] These particular changes implement RRC's own policy "based on this history and the importance of proper containment of oil and gas waste during transportation."[15] Although the RRC has loosened the reins for operators by not requiring permits for some water recycling, it still requires permits for other recycling methods besides those listed in the new, tiered approach.

Further, the new rules amend the definition of "recycle" to mean "[t]o process and/or use or re-use oil and gas wastes as a product for which there is a legitimate commercial use and the actual use of the recyclable product."[16] The rules also establish five categories of commercial recycling permits that more accurately reflect current industry practices in the field: (1) On-lease Commercial Solid Oil and Gas Waste Recycling, (2) Off-lease or Centralized Commercial Soil Oil and Gas Water Recycling, (3) Stationary Commercial Solid Oil and Gas Waste Recycling, (4), Off-lease Commercial Recycling of Fluid, and (5) Stationary Commercial Recycling of Fluid.[17] By reflecting current industry practices in the field, it appears that the RRC is clarifying previous confusion and making the permit categories more accessible to those who engage in hydraulic fracturing.

RRC's Priorities & Concerns with Water Recycling

The RRC appears to be actively encouraging operators to use technology to reduce fresh water use.[18] In keeping with this aim of efficiency, the RRC has clarified that an operator that recycles its own waste would be classified as "non-commercial fluid recycling" and no additional authority is necessary to haul oil and gas wastes for non-commercial recycling.[19] Furthermore, there is no additional authority required for non-commercial fluid recycling whether an operator is recycling on- or off-lease so long as uses and storage of produced water or flowback fluid are non-commercial.[20]

Commentary in the proposal drafts highlighted the significance of these changes from the RCC's and stakeholders' perspectives. The Joint Commenters, which include Environmental Texas, Earthworks, Public Citizen, and Sustainable Energy and Economic Development Coalition recommended that the RRC mandate recycling of produced water or hydraulic fracturing fluid, but the RRC ultimately declined to make this

12 *Id.*
13 *Id.*
14 *Id.* at 2321.
15 *Id.*
16 *Id.* at 2320.
17 *Id.* at 2321.
18 *Id.*
19 *Id.*
20 *Id.*

change in the adopted amendments.[21] It emphasized that, by adopting the new rules, it has effectively provided a regulatory framework in which "recycling is a viable alternative to disposal."[22] This is consistent with the RRC's recognition that hydraulic fracturing takes up less than one percent of all water use in the state.[23] The RRC appears to be advocating for the gradual adoption of recycling and does not view eliminating disposal in favor of recycling as a viable option at this time.

Drinking water standards were also a concern during the comment period. TPWD commented that the treatment levels to protect humans are not necessarily the same as those needed to protect terrestrial or aquatic habitat and it may be necessary to consider additional provisions beyond drinking water standards.[24] The RRC agreed and clarified that "if the treatment of the fluids results in distilled water, the [RRC] authorizes any reuse other than discharge to waters of the state" and noted its adoption of a tiered approach to the reuse of recycled fluids.[25]

Further, changes in the proposed and adopted rules shed light on the RRC's ultimate goal of encouraging water conservation. One change from the proposed to adopted rules is that the RRC also chose to use the more inclusive term "fluids" as it relates to recycling instead of the narrower proposed term "produced water and/or hydraulic fracturing flowback fluid."[26] Incorporating the broader term of "fluids" in the recycling context enables operators more freedom and flexibility in their recycling operations and reflects the new rules' overall goal of encouraging more water recycling. Additionally, under the proposed rules, non-commercial on-lease produced water and/or hydraulic fracturing flowback fluid recycling was permissible without a permit if the fluids were either: (1) recycled for use as hydraulic fracturing fluid or other oilfield fluid to be used in the wellbore of an oil, has, geothermal or service well; or (2) treated to national drinking water standards under the federal Safe Drinking Water Act.[27] The RRC revised these provisions and adopted a "tiered approach" to reuse of treated fluids instead because the federal drinking water standards alone do not "fully address all the potential risks from treated fluids."[28] Under the new, tiered approach, no other permit is required from the RRC if: (1) treated fluid is recycled for use as makeup water for a hydraulic fracturing fluid treatment or another type of oilfield fluid; (2) treated fluid is reused in any manner other than discharge to waters of the state and another state or federal agency has permitted such reuse; or (3) treatment of the fluid results in distilled water.[29]

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21 *Id.*
22 *Id.*
23 *Id.*at 2318.
24 *Id.* at 2319.
25 *Id.*
26 *Id.* at 2319-20.
27 37 Tex. Reg. 7555 (2012) (to be codified at 16 Tex. Admin. Code § 3.8) (proposed Sept. 28, 2012) (Railroad Comm'n of Tex.).
28 38 Tex. Reg. at 2319.
29 16 Tex. Admin. Code § 3.8.

CONCLUSION

While it remains to be seen what effects will result from the amendments and additions to Section 3.8, the RRC ultimately hopes to "continue in its efforts to deal proactively with the challenges arising from evolving oil and gas technology and practices" going forward.[30] Adopting these new rules is a good step toward reusing water in hydraulic fracturing and protecting fresh water in Texas.

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30 *Id.*

JONATHAN H. ADLER, *CONSERVATIVE PRINCIPLES FOR ENVIRONMENTAL REFORM*, 23 DUKE ENVTL. L. & POL'Y F. 253 (2013)

In *Conservative Principles for Environmental Reform*, Jonathan H. Adler offers some theoretical underpinnings for a solution to the problems of U.S. environmental policy.[1] Adler describes an ineffective system of environmental regulation that has been in place since the passage of the Clean Air Act, U.S.C. §7401 *et seq*. (1970), and the Clean Water Act, 33 U.S.C. §1251 *et seq*. (1972), and largely unimproved by subsequent legislative action.[2] He proposes five principles of environmental reform that could form the basis of a conservative alternative to the "conventional environmental paradigm": (1) Do No Harm; (2) Green through Growth; (3) Promote and Protect Private Property; (4) Make the Polluter Pay; and (5) Decentralize Decision-Making.[3]

Adler has written on the history and problems of the environmental regulatory system for over ten years with a conservative perspective.[4] For Adler, "conservative" is defined to include both libertarian and traditionalist views.[5] In this article, he targets members of the political right, whose current attitudes he describes as "moderate 'me-too'-ism" and "reflexive opposition."[6] Moderate "me-too"-ism is Adler's phrase for the behavior of those conservatives who uncritically support environmental regulation but ask for the price tag to be reduced.[7] "Reflexive opposition" is Adler's phrase for the reactionary behavior of other conservatives who fiercely oppose environmental regulation and sometimes deny environmental problems.[8]

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1 Jonathan H. Adler, *Conservative Principles for Environmental Reform* 23 DUKE ENVTL. L. & POL'Y F. 253, 253-80 (2013).

2 *Id*. at 253-54.

3 *Id*. at 266-79.

4 *See generally Is the Common Law a Free-Market Solution to Pollution?*, 24 CRITICAL REV. 61 (2012), *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011), *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 B.C. L. Rev. 301 (2008), *Reforming Our Wasteful Hazardous Waste Policies*, 17 N.Y.U. ENVTL. L. J. 724 (2008), *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007), *Jurisdictional Mismatch in Environnmental Federalism*, 14 N.Y.U. Envtl. L. J. 130 (2005), *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93 (2004), *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. J. 89 (2002), *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J. L. & PUB. POL'Y 653 (2001), *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001), *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999).

5 Adler, *supra* note 1 at 254, n.9.

6 *Id*. at 255.

7 *See id*.

8 *See id*. at 256-58.

According to Adler, neither moderate "me-too"-ism nor reflexive opposition are satisfactory conservative responses to environmental policymaking. Adler criticizes the former as too compromising and the latter as too dogmatic.[9] Moreover, both of these camps within the political right accept prescriptive regulation as the "necessary response" to environmental problems even as they resist its implementation and implications.[10] To challenge this premise, Adler re-examines the familiar logic of the tragedy of the commons and reveals the failings of current environmental regulation.

CHALLENGING THE DOMINANT ENVIRONMENTAL PARADIGM

Adler criticizes the solution of "mutual coercion, mutually agreed upon" from Garrett Hardin's seminal essay on the use of natural resources and champions the alternative solution of greater reliance on property rights.[11] Federal environmental laws and regulations tend to replace the environmental costs of human activity with the public costs of special interests.[12] He argues that property-based management regimes deserve more consideration because of their efficiency.[13]

Even when government intervention is needed, Adler advocates for local and state regulation over federal regimes. Adler argues that federal environmental regulation is supported by a "false narrative" of state and local inadequacies in the face of environmental problems.[14] Using the popular account of the 1969 Cuyahoga River fire as an example, Adler gives an alternative account in which the fire was "far smaller and less significant" than publicized.[15] Adler contends that the Cuyahoga and other known environmental problems were already improving before the federal government stepped in.[16]

Adler provides other examples of effective state and local action against environmental problems, including pre-Clean Water Act declines in waterborne organic wastes and bacteria, pre-Clean Air Act declines in airborne sulfur dioxide, and non-federal wetland protection programs.[17] However, Adler admits that state, local, and private entities are more effective at improving the "most obvious" and "understandable" environmental problems than they are at addressing "emerging or less understood problems."[18] His aim is to challenge the notion that federal intervention is always necessary for effective and good environmental protection.[19]

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9 *See id.* at 255-58.
10 *Id.* at 258.
11 *See id.* at 259-63.
12 *See id.* at 261-62.
13 *Id.* at 263.
14 *Id.*
15 *Id.* at 265.
16 *Id.*
17 *See id.* at 265-66 (citing others).
18 *Id.* at 266.
19 *See id.*

Principles of Environmental Reform

Adler presents five principles to guide conservative environmental regulatory policy: (1) Do No Harm; (2) Green through Growth; (3) Promote and Protect Private Property; (4) Make the Polluter Pay; and (5) Decentralize Decision-Making.[20]

"Do No Harm" emphasizes that, all things being equal, environmental policies should not cause additional environmental problems. Adler claims that "[n]umerous government policies and programs cause, subsidize, or encourage the very environmental harms that environmental programs are designed to address."[21] His evidence includes destruction of forested wetlands by federal flood control projects, environmental degradation facilitated by federal agricultural subsidies, poor stewardship of federal lands, and renewable fuel standards that actually encourage air pollution.[22]

"Green through Growth" urges conservatives to align economic interest with environmental concern. Market competition and economic growth can stimulate advancements in technology and resource use that benefit the environment.[23] Adler notes that societal wealth is positively correlated with public demand for environmental quality and funding for environmental protection.[24]

"Promote and Protect Private Property" reflects conservative values that were present in the early American conservation movement.[25] Adler gives examples of early conservationists using private property rights to protect natural resources and undeveloped lands.[26] As for the potential of modern property-based environmental protection, Adler presents the success of "catch-shares" in preventing fishery collapse.[27]

Adler has one caveat to this particular pillar of his platform—property rights must be secure in order for owners to be good stewards of their land and natural resources.[28] When property rights are threatened by the demands of environmental protection, owners will secure the incidents of ownership over promoting environmental quality.[29] For example, owners with land inhabited by endangered or threatened species are restricted in their use of private property by the Endangered Species Act.[30] Therefore, owners are deterred from managing their lands to benefit such species and have decreased the number of habitats for endangered species on private land.[31] If not for such regulation forcing owners to choose between the use of their lands and their commitments to environmental stewardship, protection of private property leads to protection of the environment.[32]

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20 *Id.* at 266-79.
21 *Id.* at 266.
22 *Id.* at 267-69 (citing others).
23 *See id.* at 270.
24 *See id.* at 269, n.82 (collecting sources).
25 *Id.* at 271.
26 *Id.*
27 *See id.* at 273-74 (citing studies).
28 *Id.* at 274.
29 *Id.*
30 *See id.* at 274-75.
31 *Id.*
32 *Id.*

"Make the Polluter Pay" stems from a traditional emphasis on personal responsibility.[33] This principle arises in the context of common-law nuisance.[34] When a small number of sources are responsible for a disproportionate share of pollution, a regulatory scheme of "[b]road drift-net-style regulatory edicts" is neither efficient nor equitable.[35] For a problem like climate change, the polluter-pays principle should support a tax on carbon that would be fully rebated to taxpayers on a per capita basis.[36] Adler argues that a carbon tax would incentivize lower carbon emissions while being less vulnerable to "special-interest manipulation and capture" than cap-and-trade programs.[37] At the same time, a full rebate to taxpayers would ensure polluters pay their fellow citizens instead of the government.[38]

"Decentralize Decision-Making" takes into account physical realities and institutional competencies. First, most environmental problems are local or regional; however, it is the federal government that sets most environmental policies.[39] Second, localities should be able to determine their environmental policies according to their local values and particular environmental conditions.[40] Third, giving states control over their environmental decisions allows for experimentation and adoption of innovative best practices from other states.[41] Fourth, decentralizing environmental policy allows the federal government to focus on its areas of strength—supporting scientific research and handling interstate spillovers—while allowing local and state governments to use local knowledge on local environmental problems.[42]

Adler concludes this essay by lamenting the lack of care for the environment by contemporary conservatives.[43] He urges conservatives to recognize the compatibility of environmental protection and conservative principles lest the political right have no say in the making of environmental policy.[44]

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33 *Id.* at 275.
34 *See id.* at 276.
35 *See id.* at 275-76.
36 *Id.* at 277.
37 *Id.* at 277-78.
38 *See id.* at 277.
39 *See id.* at 278.
40 *Id.* at 278-79 (citing Henry N. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 27 (1996)).
41 *See id.* at 279 n.133 (collecting sources).
42 *Id.* at 280.
43 *Id.*
44 *Id.*

CITY OF HOUSTON V. BCCA APPEAL GROUP, INC., NO. 01-11-00332-CV, 2013 WL 4680224 (TEX. APP.––HOUSTON [1ST DIST.] AUG. 29, 2013, PET. FILED) (MEM. OP.)

In *City of Houston v. BCCA Appeal Group, Inc.*, the BCCA Appeal Group, Inc. (BCCA) challenged the City of Houston ("City") Ordinance Nos. 2007-208 and 2008-414 (collectively, "Ordinance"), which regulates air emissions, claiming the Ordinance is preempted by state law.[1] BCCA asserted a preemption claim based on the allegation that the Texas Legislature exclusively delegated regulatory authority over the sources in question to the Texas Commission on Environmental Quality (TCEQ).[2] In support of that claim, BCCA relied upon the Texas Clean Air Act (TCAA) and the Texas Water Code.[3] The court held that the Ordinance was not preempted by state law and did not constitute an impermissible delegation of the City's authority.[4]

THE ORDINANCE

A 1992 version of the Ordinance regulated air pollution from facilities not already subject to TCEQ regulation and licensure.[5] The City contracted and cooperated with the TCEQ to ensure sources of emissions located within the City's borders complied with state law.[6] The challenged Ordinance incorporated by reference state statutory requirements and regulations implemented by the TCEQ "as if written word for word in this section including appendices and other matters promulgated as part of the state rules . . . as they are currently written and as they may be changed from time to time."[7] Furthermore, City health officers were empowered to "carry out a regulatory compliance program to determine whether registered facilities are in compliance with all applicable state and federal air pollution control laws and regulations."[8] The Ordinance was further amended in 2008 to provide an affirmative defense to prosecution if an activity was permitted under the TCAA or a permit, rule or order of the TCEQ.[9]

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1 No. 01-11-00332-CV, 2013 WL 4680224, at *1 (Tex. App.––Houston [1st Dist.] Aug. 29, 2013, pet. filed) (mem. op.).
2 *Id.*
3 *Id.*
4 *Id.* at *13-14.
5 *Id.* at *3.
6 *Id.*
7 *Id.* at *4.
8 *Id.*
9 *Id.*

THE COURT OF APPEALS' OPINION

BCCA's preemption argument focused on three aspects of the Ordinance: (1) registration, (2) fees and enforcement, and (3) enforcement and incorporation of state law.[10] The court held BCCA failed to show that the Ordinance was preempted in any of these areas.[11] Additionally, the court held that BCCA failed to show that the Ordinance impermissibly delegated authority to the TCEQ.[12]

REGISTRATION

First, BCCA argued that, if a facility failed to register with the City pursuant to the Ordinance requirements, the facility's operation would be unlawful even if it was complying with TCEQ's rules and orders.[13] Thus, BCCA argued the entire registration program was preempted.[14] Noting that this reasoning would invalidate any concurrent municipality regulatory scheme or permitting process, the court concluded that the case law did not support such a claim.[15]

Relying on *Unger v. State*, 629 S.W.2d 811, 812-813 (Tex. App.—Fort Worth 1982, writ ref'd), the court reasoned that a municipal ordinance establishing a parallel registration, licensing, or permitting program is not necessarily preempted.[16] BCCA cited pre-*Unger* authority to support the claim that field-preemption is one way for the Legislature to express an intent to preempt local regulation with "unmistakable clarity."[17] *Unger* involved an ordinance paralleling state oil and gas drilling regulations.[18] The court determined that, if the heavily-regulated oil and gas field was not preempted in *Unger*, then the Ordinance here was certainly not preempted with "unmistakable clarity."[19]

Additionally, the court distinguished *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 679 (Tex. 2013), which held that another City ordinance requiring concrete-crushing facility operators to seek a municipal permit for operation within the city was preempted.[20] The court noted that the municipal ordinance in that case imposed more restrictive requirements than those imposed under the TCAA and TCEQ regulations and rules; in this case, the Ordinance only sought to create a concurrent regulatory scheme or permitting process to enforce the state's existing rules and regulations.[21]

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10 *Id.* at *8-12.
11 *Id.*
12 *Id.* at *14.
13 *Id.* at *8.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at *9.
18 629 S.W.2d at 812.
19 City of Houston v. BCCA Appeal Group, Inc., No. 01-11-00332-CV, 2013 WL 4680224, at *9 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, pet. filed) (mem. op.).
20 *Id.*
21 *Id.*

Fees and Enforcement

Second, BCCA argued that, because the Ordinance's duplicative registration program was preempted, the fees associated with it were also duplicative and invalid.[22] The court noted that, although the TCAA required TCEQ to collect fees associated with its regulations, the statute did not prohibit municipalities from also charging and collecting fees to fund the program.[23] Furthermore, the home-rule city's authority under its police power to enact ordinances carries a corresponding right to impose fees for funding and implementing such ordinances.[24] If those fees were reasonably associated with the cost of administering the ordinance, they were presumed valid.[25] BCCA presented no arguments to show that the Ordinance's fees were not reasonably associated with the cost of administration.[26]

Enforcement and Incorporation of State Law

BCCA pointed to § 21-164(c) of the Ordinance, which prohibited the operation of a facility not in compliance with the incorporated TCEQ rules, claiming that the enforcement of this provision duplicates TCEQ's enforcement of identical provisions.[27] The court observed that state law expressly allows cumulative remedies and does not prohibit cities from enforcing their ordinances in municipal court.[28]

BCCA also claimed the Ordinance impermissibly empowered the City to criminally prosecute cases that would normally have been civil actions requiring TCEQ's joinder as a necessary party.[29] The court also rejected this claim, noting that the TCAA expressly provided that municipalities retain the authority to enact and enforce ordinances to abate and control air pollution.[30] Furthermore, the Texas Water Code's remedies were cumulative of all other remedies and the Texas Water Code did not exempt a person from being subject to other law.[31] Thus, the City was not prohibited by the TCAA or the Texas Water Code from enforcing its own regulations.[32]

Impermissible Delegation of Authority

BCCA's alternative argument was that the Ordinance's incorporation by reference of "specific rules promulgated by TCEQ and codified in the Administrative Code that

22 *Id.* at *10.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at *11.
28 *Id.* at *12.
29 *Id.* at *11.
30 *Id.* at *12.
31 *Id.*
32 *Id.*

implement the TWA and TCAA" violated the Texas Constitution's separation of powers provision by delegating to the TCEQ the authority to make unilateral changes to the City's Code of Ordinances without any action from City Council.[33] Looking to *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1997), the court observed that the non-delegation doctrine should be used sparingly and was unwilling to find the doctrine applicable to BCCA's challenge.[34] The court determined that incorporation by reference is permissible as a mechanism to ensure that the Ordinance will remain consistent with state law on an ongoing basis without requiring amendment every time the Administrative Code changes.[35]

CONCLUSION

The court's decision in *City of Houston* upheld a city ordinance paralleling TCEQ rules, regulations, and orders.[36] The court denied BCCA's claims that the Ordinance's registration requirements, duplicative fees, and state law incorporation by reference were grounds for preemption.[37] This ruling permitted the City to more easily enforce ordinance violations by bringing suit in municipal criminal court instead of having to file a civil suit with the TCEQ joined as a necessary party.[38]

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33 *Id.* at *13 (citing TEX. CONST. art II, § 1).
34 *Id.*
35 *Id.* at *13-14.
36 *Id.* at *14.
37 *Id.* at *8-12.
38 *Id.* at *11.

EDWARDS AQUIFER AUTHORITY V. BRAGG: GROUNDWATER TAKINGS IN TEXAS

Since the Texas Supreme Court recognized that landowners own the groundwater in place beneath their property, it opened the way for Texas landowners to seek compensation for regulatory takings.[1] In the recent case, *Edwards Aquifer Authority v. Bragg*, the San Antonio Court of Appeals took the next step in recognizing regulatory takings of groundwater when it held that the Edwards Aquifer Authority's (EAA) issuance of a limited groundwater use permit and denial of another permit constituted a regulatory taking of the Braggs' property.[2]

BACKGROUND

The Braggs own two properties located over the Edwards Aquifer.[3] On one property, the "Home Place," is a commercial pecan orchard, and an Edwards Aquifer well connected to an irrigation system.[4] The other property, "the D'Hanis Orchard," was acquired years later and also used as a commercial pecan orchard.[5] At first, the D'Hanis Orchard was sustained by shallow local wells, but in 1995, the water source became inadequate and the Braggs drilled an Edwards Aquifer well to supply irrigation.[6]

The Edwards Aquifer Authority Act ("Act") was enacted in 1993, giving the EAA the authority to regulate use of the Edwards Aquifer.[7] Part of the Act's regulatory scheme

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1 Edwards Aquifer Authority v. Day & McDaniel, 369 S.W.3d 814 (Tex. 2012).

2 No. 04-11-00018-CV, 2013 WL 5989430 (Tex. App.—San Antonio Nov. 13, 2013, pet. filed).

3 *Id.* at *1.

4 *Id.*

5 *Id.*

6 *Id.*

7 Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–.62 and 6.01–.05, 2001 Tex. Gen. Laws 1991, 2021–2022, 2075–2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S ., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen. Laws 4612, 4627–4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901–5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "the Act"]. §§ 1.11, 1.14. Citations are to the Act's current sections, without separate references to amending enactments. The Act remains uncodified, but an unofficial compilation can be found on the EAA's website, at http://www.edwardsaquifer.org/files/EAAact.pdf.

included a permitting system for aquifer withdrawals.[8] The permit system gives preferential treatment to "existing users," those who withdrew and used Edwards Aquifer water on or before June 1, 1993.[9] Existing users are allowed to apply for a permit under the Act by filing a declaration of their Aquifer use before 1993, and permits for Aquifer withdrawal are based on this accounting of their historical use.[10]

The Braggs found that this permitting system did not accurately account for the groundwater needs of their commercial pecan orchards.[11] For the Home Place, the Braggs claimed 228.85 acre-feet/year of water and noted that this amount supplied house use as well as the commercial pecan orchard and that "historical use should not be applicable because trees require more water each year as they reach maturity."[12] For the D'Hanis Orchard, they claimed 193.12 acre-feet/year of water, despite having no historical use prior to 1993.[13] As a result of their past groundwater use, the EAA granted the Home Place permit for 120.2 acre-feet/year of Edwards Aquifer water and denied the D'Hanis Orchard permit.[14] Subsequently, the Braggs sued the EAA for a regulatory taking of their property without compensation.[15]

THE HOLDING OF THE COURT OF APPEALS

In considering whether the limitations on groundwater use put in place by the Act are restrictive enough to amount to a taking, the Court of Appeals based its decision on the standards articulated by the U.S. Supreme Court in *Penn Central*: the economic impact on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action.[16] Finding that those factors indicated that the Act had affected a regulatory taking of the Braggs' property, the court remanded the case to determine appropriate compensation.[17]

ECONOMIC IMPACT

In its economic impact analysis, the Court of Appeals agreed with the trial court's finding that the "highest and best use" of both the Home Place and the D'Hanis Orchard was for pecan orchards and that the cost of converting the orchards to farmland would be prohibitively expensive.[18] Additionally, the court found that, if the Braggs main-

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8 *Id.* § 1.15.
9 *Id.* § 1.03(10).
10 *See id.* § 1.16(a).
11 *Bragg*, 2013 WL 5989430, at *3.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at *16 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).
17 *Id.* at *21.
18 *Id.* at *17.

tained the orchards under the regulation, they would be forced to buy or lease what they already had before the regulation—unrestricted right to use the water under their land.[19]

The court considered that, in the time since the limited permit for Home Place was granted and the permit for D'Hanis was denied, the Braggs reduced the number of pecan trees by between 30 and 50 percent and reduced watering of remaining trees, resulting in smaller pecans and a smaller overall crop.[20] Without purchasing or leasing water under the permitting system, the Braggs were unable to produce any commercially viable crop.[21] Despite constituting only a 10% increase in irrigation expenses, the court found that economic impact was more than just an "incidental diminution in value" and concluded that this *Penn Central* factor heavily favored finding a compensable taking of the Braggs' property.[22]

Investment-Backed Expectations

The second *Penn Central* factor looks at the investment-backed expectations of the claimant and considers the reasonableness of those expectations.[23] As for the Home Place Orchard, the court recognized that the Braggs purchased that property with the intention of living there and using the land for a commercial pecan orchard, relying on the property's location over the Edwards Aquifer for unlimited groundwater, and invested much time, money, and energy into the orchard.[24] The Braggs knew the trees would require more water as they grew, and they planned accordingly by ensuring that the Home Place's Edwards Aquifer well could supply as much as needed to irrigate the mature trees.[25] The court found that the Braggs had similar expectations for the D'Hanis Orchard property. The availability of Edwards Aquifer water for irrigation was an important consideration in their purchase of that property, and Mr. Bragg stated that they "would not have purchased the property if they had known they would not be able to drill and use an Edwards Aquifer well."[26] The court pointed out that, though the Braggs had no expectation that a regulatory scheme limiting their use of the groundwater beneath either of their properties would never exist, the lack of any regulations at the time of their purchases of the properties reasonably influenced their expectation that they would have unrestricted access to the Edwards Aquifer groundwater for use in irrigation.[27]

In determining the reasonableness of the Braggs' investment-backed expectations, the court looked at the expertise of Mr. Bragg and his experience with pecan crops and water rights.[28] Concerning the Home Place property, the court found that, because "Mr.

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19 *Id.* at *18.
20 *Id.*
21 *Id.*
22 *Id.*
23 *See Penn Central*, 438 U.S. at 124.
24 *Bragg*, 2013 WL 5989430, at *19.
25 *Id.*
26 *Id.* at *20.
27 *Id.*
28 *See id.* at *20-21.

Bragg had an extensive understanding of pecan crops, no permit was required when [the Braggs] drilled their well, [the Braggs] correctly understood that they owned the water under the land, and no regulatory entity existed that governed the use of their water," the Braggs' investment-backed expectations were reasonable.[29] As for the D'Hanis Orchard, the court noted that, when the Braggs purchased the orchard, they intended to drill a well in the future, and although the Act was enacted before they completed drilling the D'Hanis well, the property was an existing pecan orchard when purchased, so the land was already committed to that purpose 10 years before the enactment of the Act.[30] Because of these circumstances, the court found the Braggs' investment-backed expectations as to the D'Hanis Orchard to be reasonable as well.[31] The court's findings that the Braggs' investment-backed expectations as to both properties were reasonable weighed heavily in favor of compensable takings.[32]

Character of Governmental Action

The court began its analysis by noting that the third *Penn Central* factor, the character of the governmental action, looks less to the factual circumstances of the claimant and more to the purpose and necessity of the regulation.[33] Quoting the Act and precedent, the court held in a relatively brief discussion that "given the importance of "protect[ing] terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state," this factor weighs heavily against a finding of a compensable taking.[34]

Other Considerations

The court further noted that, when courts apply the *Penn Central* factors, they "are to consider 'surrounding circumstances' and other 'relevant circumstances,' but little light is cast on what these circumstances may be."[35] In this case, the court found it appropriate to consider the nature of the Braggs' business outside of financial considerations.[36] Because the nature of the Braggs' business is agriculture, which is heavily dependent on water for irrigation, the court weighed this consideration in favor of a compensable taking.[37]

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29 *Id.* at *20.
30 *Id.* at *21.
31 *Id.*
32 *Id.*
33 *Id.* (citing Edwards Aquifer Authority v. Day & McDaniel, 369 S.W.3d 814, 840 (Tex. 2012)).
34 *Id.* (quoting City of Houston v. Trail Enters., Inc., 377 S.W.3d 873, 880 (Tex.App.—Houston [14th Dist.] Aug. 9, 2012, pet. denied)).
35 *Id.* at *22.
36 *Id.*
37 *Id.*

Conclusion

Though the protective purpose of the Act was important, it did not outweigh the findings of the other *Penn Central* factors and the agricultural nature of the Braggs' business. Because the *Penn Central* considerations of the economic impact and investment-backed expectations of the claimant both weighed heavily in favor of finding that Act's restrictions on the Braggs' groundwater use was a taking, the court held that the permitting system imposed under the Act resulted in a compensable regulatory taking of both the Home Place Orchard and the D'Hanis Orchard.[38] In determining appropriate compensation, the court held that just compensation is to be decided "by reference to the highest and best use of the property" and found that the property taken was the Braggs' unlimited use of Edwards Aquifer water for irrigation.[39] The court directed that compensation be valued "with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the Act were implemented or applied to the Home Place Orchard in 2005 and to the D'Hanis Orchard in 2004."[40] Accordingly, the court remanded the case for the trial court to calculate compensation owed.[41]

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38 *Id.* at *22.
39 *Id.* at *28.
40 *Id.* at *29.
41 *Id.*

What Tautology?: How the Whole Act Rule Could Inform CERCLA's Ownership Definition and Limit Lessees' Liability

By John Morris

In December 2012, the EPA issued revised enforcement guidance regarding the treatment of tenants under the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA) Bona Fide Prospective Purchaser (BFPP) defense.[1] Generally speaking, CERCLA Sections 101(40)(A)–(H) classify a BFPP as a "person (*or a tenant of a person*) that acquires ownership of a facility after January 11, 2002," who can prove it conducted all appropriate inquiry (AAI) prior to purchase, that has no affiliation with a potentially responsible party (PRP), and has satisfied certain continuing obligations.[2] The EPA's enforcement guidance makes it abundantly clear that tenants may, under certain circumstances, avail themselves of the BFPP defense.[3] Indeed, the EPA indicated that tenants might deserve BFPP protection irrespective of whether the owner

1 Cynthia Giles & Mathy Stanislaus, Envtl. Prot. Agency, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision 1–5 (2012) [hereinafter December 2012 Guidance].

2 Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601(40)(A)–(H), 9607(r) (2012) (emphasis added) (providing complete BFPP criteria).

3 *See* December 2012 Guidance, *supra* note 1, at 1, 3–5 (stating first that "[l]easehold interests play an important role in facilitating the cleanup and reuse of contaminated properties"

of the facility in question is itself a BFPP.[4] While this guidance is certainly useful, one wonders whether the EPA might have done better to issue revised guidance on tenant liability in the first instance. Such advice would be particularly useful given that some courts have found that tenants are *themselves* "owners" for the purpose of CERCLA liability.[5] Therefore, this Note considers the scope of lessee liability as CERCLA "owners."

This Note concludes that the courts' current approaches to lessee ownership under CERCLA are flawed, and that the "whole act" rule[6] of interpretation could categorically absolve lessees of ownership liability. Part I places CERCLA's ownership definition in context, considering both its sociopolitical background and ordinary methods for its interpretation. Part II describes the federal courts' three current approaches to the problem of lessee ownership. Part III alleges that each of these approaches is flawed, not just for reasons peculiar to each solution, but also because each solution fails to consider CERCLA's ownership definition in context of the whole act. Part IV concludes that until the Supreme Court resolves CERCLA's ownership definition, the EPA should consider issuing guidance regarding lessee ownership, and practitioners representing leaseholders should consider making the whole act argument.

I. UNDERSTANDING AND APPLYING CERCLA GENERALLY

CERCLA today is a combination of three pieces of legislation: the original Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980,[7] the Superfund Amendments and Reauthorization Act (SARA) of 1986,[8] and the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Act") of 2002.[9] The statute serves three main goals: (1) "the identification. . .and remediation of contaminated sites"; (2) "the allocation of financial responsibility for clean-up activities"; and (3) "the support of voluntary clean-up and redevelopment of contaminated sites."[10] To those ends, CERCLA is, in part, a liability statute. Although CERCLA itself does not express the standard of liability to be applied, courts have uniformly held that it is strict, generally joint and several, and retroactive.[11] It is therefore a common com-

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and advising that "the EPA intends to treat tenants as BFPPs if their lease agreement was executed after January 11, 2002 and they meet the other BFPP provisions").

4 *Id.* at 3-5.

5 *See infra* Part II (discussing cases in which courts have found that leasehold interests rise to the level of ownership interests within the scope of CERCLA ownership liability); *see also* December 2012 Guidance, *supra* note 1, at 4 (noting no change with respect to the EPA's position that "tenants with sufficient indicia of ownership" may count as "owner[s] for purposes of liability under CERCLA").

6 *See generally infra* Section III.B.1 & United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

7 CERCLA, Pub. L. No. 96–510, 94 Stat. 2767.

8 SARA, Pub. L. No. 99–499, 100 Stat. 1613.

9 Brownfields Act, Pub. L. No. 107-118, 115 Stat. 2356.

10 JOHN S. APPLEGATE ET AL., THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES 459 (2d ed. 2011).

11 *See, e.g.*, U.S. v. Monsanto, 858 F.2d 160, 171–72 (4th Cir. 1988) (finding that CERCLA liability inherited the principle of joint and several liability from common law rules); U.S.

plaint that CERCLA's liability framework is unusually exacting.[12] Commentators frequently attribute CERCLA's severity to its sociopolitical context, crediting the Love Canal disaster with generating widespread public support for new hazardous waste regulation, and thanking then-President Carter and lame duck democratic Senate for passing CERCLA sweepingly and urgently.[13] As one observer has noted, CERCLA was "hurriedly put together . . . considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments."[14] While SARA and the Brownfields Act may have assuaged some of the problems with the original act, courts have been left with the difficult task of applying CERCLA.

Applying CERCLA requires methods for statutory interpretation. Indeed, recognizing that environmental law is overwhelmingly statute-based, many environmental lawyers spend much of their time interpreting statutes.[15] Yet there is no consensus among lawyers as to the goals, methods, or sources of interpretation.[16] A leader in the field of statutory interpretation, Professor Eskridge, has cogently summarized three categories of interpretive objectives that judges seek to vindicate:

> *[T]he rule of law idea* that statutory meaning should be relatively predictable and accessible to the citizenry and should be neutrally applied to everyone; *the democratic legitimacy idea* that interpreters ought to defer to decisions made by the popularly elected legislators who enact statutes; and *the pragmatic idea* that interpreters have an obligation to contribute productively to the statutory scheme and, perhaps ultimately, to the common good.[17]

These goals are not necessarily mutually exclusive.[18] However, the goals one accepts for statutory interpretation influence the interpreter's methods. An interpreter who values the rule of law is likely to endorse a "textualist" interpretation, which generally means that "'judges must seek and abide by the public meaning of the enacted text,

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v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) (establishing as a matter of first impression the elements of strict, joint and several, and retrospective liability).

12 *See* Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 837 (1989) (concluding that CERCLA's liability scheme is "expansive").

13 APPLEGATE ET AL., *supra* note 10, at 471. *See also* John Copeland Nagle, *CERCLA's Mistakes*, 38 WILLIAM & MARY L. REV. 1405, 1407–08 (1997). *See generally* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (attributing CERCLA to the last legs of the environmental movement and a supportive lame duck Congress).

14 Grad, *supra* note 13, at 1.

15 *See* WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 2 (2d ed. 2006) (noting that statutory interpretation is most of what all lawyers do); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (observing the "statutorification" of American law); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997) ("We live in an age of legislation, and most new law is statutory law.").

16 *See infra* text accompanying note 17.

17 ESKRIDGE ET AL., *supra* note 15, at 220.

18 *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 11 (2009) (explaining that some adherents believe that "rule of law" is "the best means of being a faithful agent of Congress").

understood in context.'"[19] An interpreter who values democratic legitimacy might rather endorse "intentionalism" or "purposivism," which means that the court's objective should be to ascertain the legislature's intent or purpose in passing the statute, and apply that intent or purpose to the case at hand.[20] Finally, a pragmatist is most likely to endorse "dynamic" interpretation, wherein an interpreter should apply a statute in light of "present societal, political, and legal context."[21]

Furthermore, an interpreter's methodology will influence what sources of law she treats as authoritative, such as text, precedent, legislative history, canons of construction, history, public values, and others.[22] For present purposes, the most significant point is that all of these methods of interpretation—that is, textualism, intentionalism, and dynamism—have garnered support in Supreme Court precedent.[23] An honest look at CERCLA liability must therefore recognize not only that CERCLA may be substantively unclear, but also that the method for its application in litigation is similarly unsettled.[24]

II. CERCLA'S LESSEE OWNERSHIP PROBLEM

A. THE PROBLEM

One of CERCLA's guiding principles is that clean-up costs should be borne by responsible parties.[25] To that end, CERCLA identifies four categories of Potentially Responsible Parties (PRPs)—owners, operators, arrangers, and transporters.[26] In pertinent part, CERCLA specifically confers PRP status on "the owner and operator of a vessel or a facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."[27] Thus, in common parlance, CERCLA may impose liability on present owners and operators, as well as certain past owners and operators.

The definitional boundaries of the PRP categories have been particularly litigious.[28] So, it is not surprising that so-called "hard cases" have arisen with regard to the scope of

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19 *Id.* at 11–12, 24 (*quoting* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005)).

20 *See id.* at 59–64 (explaining intentionalism); ESKRIDGE ET AL, *supra* note 15, at 228–30 (explaining purposivism).

21 William N. Eskridge, *Dynamic Statutory Interpretation* 135 U. PA. L. REV. 1479, 1479 (1987).

22 *See* ESKRIDGE ET AL., *supra* note 15, at 257–387 (discussing the respective roles of text, precedent, extrinsic sources, and canons in statutory interpretation).

23 *See generally*, ESKRIDGE ET AL., *supra* note 15.

24 *See* Nagle, *supra* note 13, at 1410 (looking to lower federal court precedents interpreting CERCLA and concluding that it "confounds every theory of statutory interpretation").

25 U.S. ENVTL. PROT. AGENCY, *CERCLA/SUPERFUND Orientation Manuel* I-1, I-4 (1992), *available at* http://www.epa.gov/superfund/policy/remedy/pdfs/542r-92005-s.pdf.

26 CERCLA, 42 U.S.C. § 9607(a) (2006).

27 *Id.*

28 *See, e.g.* Burlington N. and Santa Fe Ry. Co. v. U.S., 556 U.S. 559, 612 (2009) ("In order to qualify as an arranger, [a seller] must have entered into the sale . . . with the intention that at least a portion of the product be disposed of during the transfer process."); U.S. v.

liability in disputes involving less than fee simple interests in land.[29] Such hard cases arise even though CERCLA expressly defines ownership. In fact, CERCLA's definition of "owner or operator" is so expansive that it spans five subsections.[30] It is thousands of words long.[31] It would be too cumbersome to quote here the full definition, but the text of Section 101(20)(A) illustrates the point:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.[32]

The fact that the Supreme Court has not addressed CERCLA's ownership definition in the way that it has specified its operator definition makes the lessee ownership problem distinctively troublesome. In *U.S. v. Bestfoods*, the Court unanimously held that an "operator" within CERCLA's meaning "is simply someone who directs the workings of, manages, or conducts the affairs of a facility."[33] To "sharpen" the definition, the Court continued, an operator "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[34] The Court added that CERCLA "obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."[35] Before *Bestfoods*, one court held that a tenant could be liable as an operator even without showing that it had the "ability to control the facility" at the time of the hazardous release.[36] However, courts have since

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Bestfoods, 524 U.S. 51, 66 (1998) ("To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution."); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1343 (9th Cir. 1992) ("We conclude that liability may be imposed under section 9607(a)(4) for transporting hazardous material to an uncontaminated area of property, regardless of whether the material was conveyed to a separate parcel of land.").

29 *See* ESKRIDGE ET AL., *supra* note 15, at 251.

30 CERCLA, 42 U.S.C. § 9601(20)(A)–(G).

31 *Id.*

32 *Id.* § 9601(20)(A).

33 *Bestfoods*, 524 U.S. at 66.

34 *Id.* at 66–67.

35 *Id.* at 71.

36 Clear Lake Props. v. Rockwell Int'l Corp., 959 F. Supp. 763, 768 (S.D. Tex. 1997).

understood that operator liability after *Bestfoods* requires "a level of control over the hazardous substances at issue" to impose lessee liability.[37]

Thus, where the Court has at least adopted a test for operator liability, lessees have had no such luck with respect to CERCLA's ownership definition. Writing for the Court in *Bestfoods*, Justice Souter posited "'owner or operator' is defined only by tautology."[38] While there can be no plausible argument that CERCLA's ownership definition is clear, Section 101(20)(A)'s sheer length evinces that it would at least be an exceedingly comprehensive tautology. Whether or not Justice Souter's characterization is accurate, the circuits and lower courts prior to and since *Bestfoods* have gripped the idea that CERCLA's ownership definition is essentially circular.[39] Finding little guidance in the statute itself, courts have come up with disparate answers to the question of whether, and under what circumstances, the rights possessed by a lessee are sufficient to rise to the level of ownership.

B. SOLUTION 1 — SITE CONTROL

One possible answer to the lessee ownership question is that a lessee may be held liable as an owner if it exercised sufficient control over the contaminated site. Several district courts have adopted this approach. Consider in this respect *U.S. v. South Carolina Recycling and Disposal, Inc.* ("*SCRDI*").[40] From 1972 to 1978, the Columbia Organic Chemical Company (COCC), a chemicals manufacturer, continuously leased the "Bluff Road" site, a portion of which it subleased to the South Carolina Recycling and Disposal, Inc. (SCRD) beginning in 1976.[41] During its leasehold, COCC operated the Bluff Road site as a hazardous waste disposal facility to which it transported chemical and industrial wastes for profit.[42] In fact, it was COCC's president and two of its vice-presidents who together founded SCRD and transferred all of the recycling, reclamation, and disposal functions performed by COCC to SCRD.[43] Finding it beyond question that hazardous substances were disposed of at the Bluff Road site during COCC's leasehold, the court determined that COCC, as lessee of the site, maintained control and responsibility such that it "stood in the shoes" of the property owners.[44]

The court reasoned that lessees in COCC's position "should, along with the property owners themselves, be considered 'owners' for purposes of imposing liability under section 107(a)."[45] In support of this conclusion, the court noted that "site control is an important consideration" in determining ownership, citing Section 101(20)(A).[46] Fur-

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37 *See, e.g.*, AMW Testing Materials v. Town of Babylon, 584 F.3d 436, 444 (2d Cir. 2009) (refusing to accord operator status as a matter of law to municipal fire company).

38 *See Bestfoods*, 524 U.S. at 56 (handling "operator" liability).

39 *See infra* note 128 and corresponding text.

40 653 F. Supp. 984 (D.S.C. 1986).

41 *Id.* at 1000, 1002.

42 *Id.* at 1000–01.

43 *Id.* at 1002.

44 *Id.* at 1003.

45 *Id.* at 1003 & n.2 (citing cases arising under state constitutional law and state condemnation statutes as examples from other legal contexts in which courts have construed ownership to cover leaseholders).

46 *Id.* at 1003 (D.S.C. 1986).

thermore, the court felt that neglecting to treat COCC as an owner "would frustrate Congress' intent" that the polluter should pay.[47] Of course, the polluter-pays objective was not violated because the court separately held that COCC met the statutory requirements to qualify as an operator, arranger, and transporter.[48] But neither this nor the fact that COCC sublet a portion of its site persuaded the court to let COCC off the ownership liability hook.[49]

Following *SCRDI*'s lead, the court in *U.S. v. A & N Cleaners and Launderers, Inc.* ("*A & N Cleaners*") held that a party can be liable as an owner either by virtue of holding title to property, or instead by exercising site control.[50] Three individuals held title as tenants in common to real property with a brick building similar to a shopping mall.[51] From 1970 to 1990, Marine Midland Bank ("Marine") continuously leased the entire property.[52] It operated a branch office out of part of the building, and beginning in 1982, subleased a different portion to A & N Cleaners and Launderers ("A&N") on the condition that A&N use the premises for a dry cleaning, rug cleaning, and laundry establishment.[53] Marine's lease conveyed to it substantial rights and responsibilities, including the right to sublet the property, discretion to control subtenants' use of the property, authority to collect rent from subtenants, authority to investigate and repair the interiors of sublet premises, and ultimate responsibility for maintenance and repair of the whole property.[54] The court therefore found that, except for the power to alienate, "Marine enjoyed the rights and bore the obligations of an 'owner' as the term is commonly understood."[55] Therefore, when A&N disposed hazardous wastewater into a drain at the site, contaminating local groundwater and precipitating approximately three million dollars in clean-up costs, the court held the titleholders liable as current owners, A&N liable as past operators, and Marine liable as a past owner.[56]

Delaney v. Town of Carmel[57] reaffirmed *A & N Cleaners* seven years later. From 1955 to 1970, Carmel entered into a renewable "lease" agreement with the owners of the DeLuca Farm property.[58] For an annual rental rate, Carmel obtained permission to dump sewage waste on a parcel of the DeLuca Farm property.[59] In accordance with the agreement, Carmel solicited septic waste haulers, charging them an annual dump fee, and Carmel employees occasionally maintained, improved, and plowed the access road to the dump site.[60] Unlike a normal leaseholder, Carmel retained no present possessory interest

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47 *Id.*
48 *Id.* at 1005–06.
49 *Id.* at 1003.
50 *See* 788 F. Supp. 1317, 1333–34 (S.D.N.Y. 1992) (approving of *SCRDI*).
51 *Id.* at 1319–20. These three "Berkman defendants" actually obtained title to the subject property in 1979 from the original titleholder, but this detail is impertinent.
52 *Id.*
53 *Id.*
54 *Id.* at 1333–34.
55 *Id.* at 1334.
56 *Id.* at 1326, 1334 (S.D.N.Y. 1992) (declining to answer whether Marine could also be held liable as an operator).
57 55 F. Supp. 2d 237 (S.D.N.Y. 1999).
58 *Id.* at 241–42.
59 *Id.* at 242.
60 *Id.*

in the site.[61] On these facts, the court distinguished *A & N Cleaners* and held that Carmel's involvement did not satisfy the site control test, because "in contrast to the *A & N Cleaners* leaseholder's active site control, Carmel had no involvement with the Site's day-to-day management."[62] Such active management, the court further stated, was "necessary to treat a leaseholder as a CERCLA owner."[63]

Many other district courts have found site control sufficient for CERCLA owner liability.[64] However, among courts accepting the site control test, dissension has arisen with respect to whether site control must be active, or whether instead it may be passive.[65] At least in the context of "operator" liability, *Bestfoods* answered that control must be active before CERCLA liability will attach.[66] Seemingly, the test for owner liability should complement rather than parallel such an active control test for operator liability, suggesting that a site control criterion based on active day-to-day management is implausible.[67] However, those courts accepting the site control test appear not to have fixated on this issue, and in some jurisdictions, site-control is still good law.[68]

C. SOLUTION 2 — DE FACTO OWNERSHIP

A second solution to the lessee ownership problem suggests that lessees should be held liable as owners if they satisfy a de facto ownership test. The foremost proponent of this solution is the Second Circuit's opinion in *Commander Oil Corp. v. Barlo Equipment Corp.* ("*Barlo*").[69] Following a 1963 merger, Commander Oil became the record owner of adjacent lots, 7A and 7B.[70] While lot 7A was used as office and warehouse space, lot 7B

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61 *See id.* at 259 & n. 24 (accepting plaintiff's contention that its agreements with Carmel gave the town a leasehold interest, but noting that some courts require a present possessory interest to qualify as a leaseholder for purposes of CERCLA owner liability).

62 *Id.* at 259.

63 Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 259 (S.D.N.Y. 1999).

64 *See, e.g.*, Castlerock Estates Inc. v. Estate of Markham, 871 F. Supp. 360, 367 (N.D. Cal. 1994) (finding site control to be the critical test for CERCLA ownership); Burlington N. R.R. Co. v. Woods Indus., Inc., 815 F. Supp. 1384, 1391–92 (E.D. Wash. 1993) (same); Pape v. Great Lakes Chem. Co., No. 93 C 1585, 1993 WL 424249, at *3 (N.D. Ill. 1993) (same).

65 *Compare Delaney*, 55 F. Supp. 2d at 259 (stating that active involvement in day-to-day site management is "necessary" to treat a leaseholder as a CERCLA owner), *with* U.S. v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1334, 1334 (S.D.N.Y. 1992) (attaching owner liability to enjoyment of the "rights" and "obligations" commonly possessed by true owners and not necessarily the exercise of those rights or obligations).

66 *See* U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) (finding that direct CERCLA liability for a parent corporation of a polluting subsidiary attaches when the parent "operates the facility," which is "evidenced by participation in the activities of the facility").

67 *See infra* Section III.A.i.

68 *E.g.* Lentz v. Mason, 961 F. Supp. 709, 715 (D. N. J. 1997) (*citing SCRDI*, 653 F. Supp. at 1003) ("CERCLA 'owner' liability may be extended to a lessee. . .when the lessee [actively] participates in the disposal of hazardous wastes."); Pape v. Great Lakes Chem. Co., No. 93 C 1585, 1993 WL 424249, at *3–4 (N. D. Ill. Oct. 19, 1993) (determining that plaintiff sufficiently stated a claim for CERCLA ownership liability where lessee had "active authority over hazardous waste disposal.").

69 215 F.3d 321, 331 (2d Cir. 2000).

70 *Id.* at 324.

contained twelve above-ground petroleum storage tanks that Commander Oil used as a throughput facility.[71] In 1964 and 1969, Commander Oil leased lots 7A and 7B to Barlo Equipment Company and Pasley Solvents & Chemicals Inc, respectively.[72] However, to transfer responsibility to Barlo for the maintenance and payment of taxes on both lots, in 1972, Commander Oil consolidated its leases and rented both lots to Barlo, at which point Barlo re-let lot 7B to Pasley.[73] Subsequently, local government investigators located contamination on lot 7B and sought reimbursement for its response costs from Commander Oil.[74] In turn, Commander Oil sued Barlo for contribution or indemnification of its costs.[75]

The Second Circuit unanimously held that Barlo was not an owner for the purpose of Section 107(a)(1) present owner liability.[76] "The critical question," the court found, "is whether the lessee's status is that of a *de facto* owner and not whether it exercises control over the facility."[77] That is, under some circumstances, lessees may possess sufficient "indicia of ownership vis-à-vis the record owner" to be strictly liable as de facto owners.[78] Although the court did not specifically name those factors that would result in lessee owner liability, it did note certain "important" non-exhaustive factors:

> (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs.[79]

While the court acknowledged that Barlo possessed certain ownership attributes with regard to lot 7B—including the obligations to insure the property, cover assessments and increased taxes, and perform nonstructural repairs—Commander Oil retained much of the rights and obligations of ownership.[80] Barlo therefore lacked most of the "bundle of rights" involved in ownership.[81]

In rejecting the site control test, the *Barlo* court invoked the rule against "surplusage," arguing that any test conditioning ownership liability on the basis of mere control threatened to conflate the owner and operator PRP categories.[82] The court further sup-

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71 *Id.*
72 *Id.*
73 *Id.* at 324–25.
74 *Id.* at 325.
75 *Id.* at 325.
76 *Id.* at 331.
77 *Id.*
78 *Id.* at 330.
79 *Id.* at 330–31.
80 *See id.* at 331–32 (listing certain rights and obligations retained by Commander Oil, including the rights to enter lot 7B, use oil storage tanks on 7B, use office space in lot 7A, maintain an aerial on the roof, and the responsibility to provide for structural repairs).
81 *Id.* at 332.
82 *See id.* ("It is settled in this circuit that owner and operator liability should be treated separately."); U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) (conditioning operator liability

ported its holding by reference to the legislative history and policy considerations.[83] However, these additional considerations merely showed why lessee owner liability should not "automatically apply" as a matter of course.[84] *Barlo*'s preference for the de facto ownership criterion should therefore be viewed as substantially reliant on the injunction against rendering statutory language superfluous.

Barlo has engendered some support in the district courts within the past few years. For instance, the District Court for the District of Connecticut applied *Barlo*'s de facto ownership test to reject the dismissal motion of a commercial vendor that assumed lessee status by conveying its fee interest as part of a "sale-leaseback" agreement.[85] Because the agreement reserved to the lessee the costs and obligations of ownership and restricted the buyer-lessor's right to terminate, the court declined to let the vendor escape liability.[86] Interestingly, the U.S. District Court for the District of South Carolina abandoned its site control test in recognition of *Barlo*'s reasoning, finding that treating lessees as owners would render operator liability "redundant," and "contrary to the intentions of the drafters of CERCLA."[87] Taking the argument one step further than *Barlo*, however, the court held summarily that lessees simply are not ever owners under CERCLA.[88]

D. SOLUTION 3 — STATE COMMON LAW

Still a third possible solution to the lessee ownership problem is that ownership liability should attach to lessees only if the relevant state common law would treat leaseholders as owners. The Ninth Circuit adopted this approach recently in *City of Los Angeles v. San Pedro Boat Works* ("*San Pedro*"), which held that owner liability under CERCLA does not extend to "holders of mere possessory interests in land."[89] *San Pedro* involved permitting for use of the City of Los Angeles' Berth 44, located in the Port of Los Angeles.[90] In 1965, the Board of Harbor Commissioners issued a revocable permit to the Los Angeles Harbor Marine Corporation ("Harbor Marine") for the "limited purpose" of operating a boatworks.[91] Later, in 1969, Harbor Marine sold the permit to Pacific American, which subsequently conveyed all of its interest in Harbor Marine's physical assets to Pacific American's wholly owned subsidiary, San Pedro Boat Works.[92]

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on control of the subject facility); *see also* ESKRIDGE ET AL., *supra* note 15, at 275–76 (explaining the rule against surplusage).

83 Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 329–30 (2d Cir. 2000) (suggesting that the rationales based on profit and notice for imposing owner liability do not necessarily hold as applied to lessees).

84 *Id.* at 330.

85 Pateley Assocs. I v. Pitney Bowes, Inc., 704 F. Supp. 2d 140, 145–46 (D. Conn. 2010).

86 *Id.*

87 *See* Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 477 (D.S.C. 2011) (concurring that ownership liability for lessees threatens to blend the owner and operator categories).

88 *Id.*

89 635 F.3d 440, 444 (9th Cir. 2011) ("We here hold that 'owner' liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees.").

90 *Id.*

91 *Id.*

92 *Id.* at 444–45.

When the permitted reissued in 1970, Pacific American conveyed it to San Pedro Boat Works as well; thus, Pacific American had remained as permittee for ten months.[93] Finally, in 1993, BCI Coca-Cola purchased Pacific American and all of its assets and liabilities.[94] As a successor-in-interest to Pacific American, BCI Coca-Cola would be liable if Pacific American were deemed an owner of the property at the time of disposal.[95]

The Ninth Circuit reasoned that its "narrow construction" of CERCLA ownership status "further[ed] Congress's intent" to hold liable both the "passive fee title owner" and "the active (or negligent) operator" of a contaminated facility.[96] The court found that its holding best effectuated CERCLA's "two primary goals" of ensuring prompt and effective clean-up and assuring that the parties responsible for the hazardous disposal bear the costs of remediation.[97] The court also relied heavily on its decision in *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust* ("*Long Beach*"), which exonerated certain oil companies from CERCLA ownership liability where they merely held an easement to a non-polluting pipeline running through the contaminated property.[98] Looking to cases in California state property law, *Long Beach* determined that ownership interests do not include easements.[99] As the *San Pedro* court interpreted it, *Long Beach* established the rule that CERCLA ownership should be construed by reference to state common law.[100]

San Pedro complained chiefly that the site control and de facto ownership standards are "nebulous and flexible," fail to "clearly call out what an investor in land can expect," and risk "endless manipulation" by litigants.[101] Indeed, *San Pedro* highlighted that California's test for ownership drew a much more predictable distinction: "'Notwithstanding the fact that a lease is a present possessory interest in land . . . [a] leasehold is not an *ownership* interest, unlike the possession of land in fee simple.'"[102] An ownership definition that included only freehold interests, the court further found, was particularly sensible as applied given the "narrow bundle of rights" Pacific American enjoyed during its mere ten month possession of the revocable permit.[103] The court also felt that narrowing CERCLA ownership to freehold estates complemented Ninth Circuit "operator" precedent, which treated operators as anyone with mere "'authority to control'" the locus of contamination.[104] Of course, *Bestfoods* had intermittently determined that a PRP must

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93 *Id.* at 445.
94 *Id.*
95 42 U.S.C. § 9607(a); *San Pedro*, 635 F.3d at 446–67.
96 *San Pedro*, 635 F.3d at 444.
97 *Id.* at 447 (quoting Carson Harbor Village v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001)).
98 32 F.3d 1364, 1370 (9th Cir. 1994); *San Pedro*, 635 F.3d at 447–48 (discussing *Long Beach*).
99 *Long Beach*, 32 F.3d at 1370; *San Pedro*, 635 F.3d at 448 (discussing *Long Beach*).
100 *See San Pedro*, 635 F.3d at 449 (electing to "follow our court's methodology in *Long Beach*" in the face of site control and de facto ownership precedents in other courts).
101 *Id.*
102 *See id.* at 450 (quoting Auerbach v. Assessment Appeals Bd. No. 1., 39 Cal. 4th 153 (2006)).
103 *Id.* at 451.
104 *See id.* at 451 n.9 (quoting Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992)).

actively operate a subject facility to suffer CERCLA operator liability.[105] Notwithstanding this apparent gaffe, *San Pedro* further reasoned that, had Congress really intended to impose ownership liability on holders of mere possessory interests, "the least it could do is speak clearly."[106]

III. RECONSIDERING LESSEE OWNERSHIP

Accepting that it is the judiciary's role to interpret CERCLA conclusively, it is troubling that the courts have not reached a consistent answer to the lessee ownership problem.[107] Nevertheless, courts have taken sides on the issue, splitting the Second and Ninth Circuits.[108] One of the courts' three solutions may be preferable to the other two. However, it is also possibile that none of the courts' three solutions are desirable.

A. CRITICISMS PECULIAR TO THE COURTS' THREE SOLUTIONS

1. SITE CONTROL IS AMBIGUOUS

Each of the courts' three solutions to the lessee ownership problem carries its own inherent problems, beginning with the site control test. Both *Barlo* and *San Pedro* levied the charge against site control that it threatens to conflate owners and operators, which are supposed to be two statutorily distinct types of PRPs.[109] Such conflation would violate the rule against "surplusage," which advises that interpreters should avoid reading statutes in a way that would render other provisions of the statute superfluous.[110] However, the site control test does not necessarily combine these two categories. Rather, the circuit courts' objections highlight the true problem with site control—ambiguity of the term "control." If site control refers to active control, as *SCRDI* and *Delaney* suggest, such that a tenant becomes an "owner" under CERCLA by actively managing the day-to-day operations of a contaminated site, then it confuses owners with the *Bestfoods* definition of operators.[111] However, if site control merely refers to passive authority to control, as *A & N Cleaners* suggests, then the tests for owners and operators remain separate.[112] Whatever the best conception of site control may be, its ambiguity serves

105 *See* U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) (holding that "an operator must manage, direct, or conduct operations specifically related to pollution").

106 *San Pedro*, 635 F.3d at 451.

107 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating famously that "it is emphatically the province and duty of the judicial department to say what the law is").

108 *See supra* Part II.C–D.

109 Commander Oil Corp. v. Barlo Equip. Corp., 212 F.3d 321, 328 (2d Cir. 2000); City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 451–52 (9th Cir. 2011).

110 *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 678, 698 (1995) ("A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."); *see also* Duncan v. Walker, 533 U.S. 167, 174 (2001) ("We are especially unwilling to [render terms superfluous] when the term occupies so pivotal a place in the statutory scheme.").

111 *See* U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) (holding that operators are those who manage, direct, or conduct operations at the subject facility).

112 U.S. v. A & N Cleaners and Launderers Inc., 788 F. Supp. 1317, 1332–33 (S.D.N.Y. 1992).

none of the goals of statutory interpretation.[113] It is especially bad from a rule of law perspective because it fails to resolve the standard to be applied with enough clarity. It is also bad from a pragmatic standpoint because it contributes *additional* uncertainty to the lessee ownership question by introducing a "control" test that itself is susceptible to multiple interpretations.

2. De Facto Ownership is Vague

Barlo's de facto ownership solution suffers from a related problem. As the Ninth Circuit in *San Pedro* correctly noted, the de facto ownership standard employs a "nebulous and flexible analytical framework" that evades clarity and can be manipulated.[114] The Ninth Circuit's objection therefore amounts to an allegation of vagueness, which at least is a lesser interpretive evil than ambiguity.[115] Yet the solution is perhaps even worse than site control for rule of law proponents. *Barlo*'s non-exclusive list of "important" considerations—including the lease term, the owner's right to terminate, the lessee's right to sublet, and the lessee's responsibility for costs and repairs—gives parties many more "attachment points" to litigate.[116] The test gives no guidance as to whether, in the ordinary lessee ownership case, these listed factors are entitled to the same weight, nor to the breadth of available unlisted factors deserving of attention. Thus, while the Second Circuit may be right that ownership is inherently difficult to define, it did little to advance the ball.[117] Furthermore, some experienced lawyers also worry that such vague legal standards give judges too much room to manipulate legal outcomes according to personal preferences.[118]

3. State Common Law Threatens Uniformity

Finally, interpreting CERCLA's express "owner and operator" definition to invite an ownership definition based in state common law fares no better. The Supreme Court held in *De Sylva v. Ballentine* that, while the "scope of a federal right is, of course, a federal question[,] . . . that does not mean that its content is not to be determined by state, rather than federal law."[119] *De Sylva* decided the meaning of the term "children" as used in Section 24 of the Copyright Act, which conferred a federal right of copyright renewal upon the author or "the widow, widower, or children of the author."[120] Signifi-

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113 *See supra* note 17 and accompanying text.

114 City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 449 (9th Cir. 2011).

115 *See* Black's Law Dictionary (9th ed. 2009). The conceptual difference between vagueness and ambiguity is that a vague test has indefinite application to particular cases, whereas an ambiguous test has two or more distinct meanings.

116 *See, e.g.*, Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 Tex. L. Rev. 1701, 1707 & n. 21 (2008) (explaining how opportunities for public input in the administrative rulemaking process create sticking points for rule makers).

117 *See* Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 329 (2d Cir. 2000) (observing that ownership is a "relational" concept that stands for a "priority of rights and claims and not a concrete status").

118 *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence*, 50 Stan. L. Rev. 1833, 1860 (1998).

119 De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

120 *Id.* at 571–72, 580.

cantly, the Copyright Act itself did not define the term "children," so noting both that domestic relations are "primarily a matter of state concern" and that the term "children" denoted not just a physical relationship but also a legal status, the court found it wise to defer to "the law of the State which created those legal relationships."[121] More recent cases following *De Sylva* have similarly interpreted federal rights by reference to state law when the statutory term in question involved both a legal relationship created by state or foreign law and the federal statute in which the term appeared did not itself define the relevant term.[122] These cases nevertheless concede uniformity is an important concern in federal statutory interpretation.[123] Federal legislation is enacted to achieve federal objectives that would be undermined if, under federally created rights and duties, identical behavior were subjected to the vagaries of the laws of the fifty states.[124]

Therefore, *San Pedro*'s state common law solution underwhelms because it undermines CERCLA's uniformity without good reason. CERCLA's ownership definition presents a federal question of federal statutory interpretation, but unlike in *De Sylva*, CERCLA actually defines the term in question.[125] The lessee ownership problem involves a federal duty created by federal law, that is, created by CERCLA itself. Thus, even acknowledging that property relations are ordinarily state law constructs, it does not follow that CERCLA's ownership definition should be construed according to state law.[126] After all, CERCLA's very title indicates that its liability scheme is "comprehensive."[127] The state common law solution to CERCLA's ownership problem is therefore a poor choice from both a rule of law perspective, which demands that a federal statute's command ought to be "neutrally applied" to everyone, as well as from a democratic legitimacy perspective, which demands that courts interpret federal statutes to carry out their drafters' intent.[128]

B. SNUBBING THE WHOLE ACT RULE

Beyond the peculiar problems of each of the courts' three alternative solutions to the lessee ownership problem, arguably all three solutions err by snubbing the whole act rule.

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121 *Id.* at 580–81.

122 *See, e.g.*, Minasyan v. Gonzales, 401 F.3d 1069, 1076–77 (9th Cir. 2005) (interpreting as a matter of "federal statutory interpretation" the meaning of " 'legal separation' as contained in former [Immigration and Nationality Act] § 321(a)(3)").

123 *Id.* at 1076.

124 *See De Sylva*, 351 U.S. at 583 (Douglas, J., concurring) ("[T]he statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty-eight States."); *Cf.* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (finding a uniform statutory term clearly desirable to the application of state law that would "mak[e] identical transactions subject to the vagaries of the laws of the several states").

125 42 U.S.C. § 9601 (2006).

126 *Accord* Timothy Holly, *Potential Responsibility Under CERCLA: Canadyne-George Corp. v. Nationsbank, N.A. (South)—An Illustration of Why We Need a Common Federal Rule Defining "Owned" and "Operated"*, 12 VILL. ENVTL. L.J. 119, 169 (advocating for a common federal law for determining ownership under CERCLA).

127 42 U.S.C. § 9610 (2006).

128 *See supra* note 17 and accompanying text.

CERCLA's history provides good reasons for judges to dislike its text.[129] One judge colorfully compared CERCLA's provisions to an optical illusion, leaving judges to the erroneous belief that "if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain."[130] Seemingly everywhere judges agree with the premise that Section 101(20)(A)'s "owner or operator" definition is circular or tautological.[131] The Ninth Circuit in *San Pedro* stated the supposed tautology in a typical way: "In short, an 'owner' is 'any person owning a facility.'"[132]

However, when courts say that the definition is circular, they elect to read only a part of it.[133] It would be better for the goal of democratic legitimacy if courts would focus on CERCLA's ownership definition not in short, but in full.

1. The Whole Act Rule

The whole act rule is a familiar canon of construction. The Supreme Court has articulated it as follows: "[s]tatutory construction . . . is a holistic endeavor," so that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."[134] Federal courts today frequently invoke the whole act rule in statutory interpretation, and it is as old as the courts themselves.[135] Moreover, the Supreme Court has previously invoked the whole act rule to interpret CERCLA.[136] Yet, federal courts have failed to apply the whole act rule to the lessee ownership problem, implicitly affirming that there is nothing in CERCLA's statutory scheme at all helpful to resolving the pivotal question of whether and under what circumstances lessees may be liable as owners. To my eyes, however, there exists such helpful context.

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129 *See supra* Part II.

130 CP Holdings, Inc. v. Goldberg-Zoino & Assocs., 769 F. Supp. 432, 435 & n. 3 (D.N.H. 1991).

131 *See* U.S. v. Bestfoods, 524 U.S. 51, 56 (1998) ("The phrase "owner or operator" is defined only by tautology, however, as 'any person owning or operating a facility.'"); City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 443 (9th Cir. 2011) ([T]he definitions Congress provides in CERCLA to 'owners' and 'operators' are mere tautologies."); Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 326–27 (2d Cir. 2000) ("We are thus required to give content to a statutory tautology."); Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, , 32 F.3d 1364, 1368 (9th Cir. 1994)("42 U.S.C. § 9601(20)(A) defines 'owner or operator' as 'any person owning or operating' a toxic waste facility, which is a bit like defining 'green' as 'green.'"); Delaney v. Town of Carmel, 55 F. Supp.2d 237, 258 (S.D.N.Y. 1999) ("CERCLA provides little guidance to the courts is assigning liability to owner/operators, defining this term in tautological fashion as '. . . any person owning or operating such facility.'"); U.S. v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1331 (S.D.N.Y. 1992) ("[T]he circularity of this definition necessarily precludes is use as an interpretive device.").

132 *San Pedro*, 635 F.3d at 447.

133 *See supra* note 32 and surrounding text.

134 United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

135 *See, e.g.*, Priestman v. U.S., 4 U.S. (4 Dall.) 28, 31–32 (1800) (applying the whole act rule to federal customs law); Cubb Custom Ins. Co. v. Space Sys./Loral, Inc., 2013 WL 1093071 at *5 (9th Cir. 2013) (applying the whole act rule to CERCLA in March of 2013).

136 *See, e.g.*, U.S. v. Atl. Research Corp., 551 U.S. 128, 135 (2007) (applying the whole act rule to CERCLA's language in 42. U.S.C. § 9607(a)(4)(B)).

2. APPLYING THE WHOLE ACT RULE TO CERCLA'S LESSEE OWNERSHIP PROBLEM

Consider in full Section 101(20)(A), quoted above.[137] Notably, the term "owner or operator" is defined by reference to the type of property being owned or operated.[138] For instance, it states that "the term 'owner or operator' means (i) in the case of a vessel, any person owning, operating, *or chartering by demise*, such vessel."[139] The statute further defines "person" broadly to include fictitious personhood, and it defines "vessel" in the nautical sense.[140] Unlike ownership, the demise charter is not an elusive concept. A charterer by demise is simply the tenant of a vessel pursuant to a charter agreement whereby the "shipowner surrenders possession and control" of the vessel to the charterer.[141] Put simply, a demise charterer is a lessee at sea.[142] Therefore, Section 101(20)(A)(i)'s demise charter provision may have an important implication for the lessee ownership problem, because the statute expressly distinguishes the verbs "owning," "operating," and "chartering by demise."[143] An interpreter who takes seriously the whole act rule and the rule against interpreting statutory provisions as mere surplusage must therefore admit that owning, operating, and leasing a vessel are three different actions under CERCLA. Thus, with respect to an ordinary demise charter, the plain language of Section 101(20)(A)(i) suggests categorically differentiating owners from tenants, such that the lessor ought to be considered the owner, and the lessee ought to be considered the demise charterer and operator. If this reading of Section 101(20)(A)(i) has merit, I can think of no principled reason—nor do I see any suggestion in CERCLA's text—for why the ownership definition should apply any differently to vessels at sea than to facilities on land. The locus of the contaminated property simply has no bearing on the nature of the lessor-lessee relationship. Thus, if to own a vessel is a different thing than to charter it by demise, at least by CERCLA's definition, it seems a lessee cannot be an owner.[144]

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137 *See supra* note 32 and surrounding text.

138 *See* 42 U.S.C. § 9601(20)(A) (subdividing the owner/operator definition as applied to vessels, facilities, and facilities taken by the government).

139 *Id.* (emphasis added).

140 *See id.* § 9601(21) ("The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."); *id.* § 9601(28) ("The term 'vessel' means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.").

141 A "bareboat charter" is a "charter under which the shipowner surrenders possession and control of the vessel to the charterer, who then succeeds to many of the shipowner's rights and obligations." BLACK'S LAW DICTIONARY, 213 (9th ed. 2009). A "demise charter" is a bareboat charter wherein the charterer provides its own "personnel, insurance, and other materials necessary to operate the vessel." *Id. Accord* U.S. v. Shea, 152 U.S. 178, 186 (1894) (defining a demise charter as an agreement in which the owner of the vessel completely relinquishes to the charterer the "possession, command, and navigation" of the vessel).

142 *See Shea*, 152 U.S. at 186–87.

143 42 U.S.C. § 9601(20)(A) (2013).

144 Importantly, this same logic would not save the demise charterer of a vessel from operator liability under *Bestfoods*. Because the demise charterer takes control of the vessel as part of

Second, CERCLA's exclusion of secured creditors from ownership liability could be instructive as well. Section 101(20)(A) expressly provides that the term "owner or operator . . . does not include a person, who, without participating in the management of a vessel or facility, holds *indicia of ownership* primarily to protect his security interest in the vessel or facility."[145] In 1992, the EPA issued an interpretive rule rejecting the idea that a lender's mere authority to influence waste disposal decisions was enough to impose owner liability absent the lender's active participation.[146] The courts struck this rule down as beyond the scope of the EPA's authority; however, Congress thereafter amended Section 101(20) to add that the lender must "actually participat[e] in the management or operational affairs" for the exclusion not to apply.[147] Furthermore, the amendment clarified that a lender who forecloses on a property in which it had a security interest and subsequently "sells [or] re-leases" it is not thereby a past owner of the property.[148] So-called "indicia" of ownership contemplate a type of property interest that is not active, but passive, and the fact that a person could hold indicia of ownership without participating in management seems at least to render site control implausible. Furthermore, the fact that a secured creditor who repossesses and sells or re-leases a foreclosure property may need a statutory exclusion to avoid ownership liability suggests that ownership liability ordinarily attaches to people in the position of such a seller or lessor. Thus, the lender exclusion is predicated on the notion that ownership lies with the party holding the right to convey property. If so, ordinary lessees would be excluded from its ambit, unless of course a lessee itself retained the right to re-convey the same subject property.

Third, there may also be relevant statutory context outside of CERCLA's ownership definition. For example, courts might look to CERCLA's Municipal Solid Waste (MSW) liability exemption for contextual clues addressing the lessee ownership problem. Section 107(p) conditionally exempts categories of MSW generators from liability for response costs under Section 107(a)(3).[149] Under Section 107(p)(1)(A), an "owner, operator, *or lessee* of residential property" from which all of the person's MSW was generated may be exempted from generator liability.[150] Although the exemption does not absolve lessees of owner or operator liability, the fact that the statute expressly places lessees in a category of their own, separate from owners, indicates again that CERCLA as a whole considers leasehold interests categorically distinct from ownership interests.

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its agreement, it could still be found liable by virtue of that control and independent of its charterer status. *See* U.S. v. Bestfoods, 524 U.S. 51, 66–67 (1998) (defining "operator" for CERCLA liability).

145 *See* 42 U.S.C. § 9601(20)(A) (2013) (emphasis added).

146 40 C.F.R. § 300.1100(c)–(d).

147 Kelley v. EPA, 15 F.3d 1100, 1106 (D.C. Cir. 1994). 42 U.S.C. § 9601(20)(F)(i)(I)–(II) (2013); *see also* APPLEGATE ET AL., *supra* note 10, at 555–56 (discussing the 1996 amendments to CERCLA's ownership lender exclusion).

148 42 U.S.C. § 9601(20)(E)(ii)(II) (2013).

149 *See id.* § 9607(p) (explaining that the exemption does not apply to parties liable as owners or operators).

150 *See id.* § 9607(p)(1)(A) (emphasis added); *accord* Susan E. Bromm & Bruce S. Gelber, ENVTL. PROT. AGENCY, Interim Guidance on the Municipal Solid Waste Exemption 1, 4 (2003), *available at* http://www2.epa.gov/sites/production/files/documents/interim-msw-exempt.pdf.

Other of CERCLA's many provisions may also be relevant to the issue of lessee ownership. Perhaps applying the whole act rule would add little value, or worse, maybe it would find statutory coherence where none exists.[151] But if one goal of statutory interpretation is to effectuate legislative intent and thereby vindicate our democratic legitimacy, then the full statutory scheme must at least be addressed. Judges and litigants' unexplained neglect of the whole act rule suggests CERCLA's interpreters have been just as hasty as its drafters.[152]

IV. CONCLUSION

CERCLA's lessee ownership problem defies easy solution. Frustrated with the statute's imprecision, courts have proven themselves inadequate to resolve the issue. The courts' site control, de facto ownership, and state common law solutions have seemingly intractable problems.[153] The resultant uncertainty serves neither regulated industry and small businesses, who have a reasonable expectation to know what is expected of them, nor the EPA and its personnel, who have limited resources to spend prosecuting doubtable violations. Furthermore, until the Supreme Court has the occasion to take up the issue—as it did with "operator" liability in *Bestfoods*—the problem is likely to remain unsolved.[154]

The EPA might be able to better explain the scope of CERCLA ownership liability. At the moment, one might surmise from EPA guidance documents discussing CERCLA defenses that the EPA prefers *Barlo*'s de facto ownership test, but the Agency could say so more explicitly. The courts seem to have foreclosed the possibility that the EPA could issue an interpretive rule applying CERCLA's ownership definition to less than fee interests.[155] However, issuing non-binding EPA guidance on the scope of lessee ownership liability could be a low-risk, high-reward undertaking that would support future prosecutorial discretion.[156]

In the meantime, practitioners representing leaseholders in CERCLA liability lawsuits should consider making the whole act argument. Based on textual and structural clues from CERCLA's statutory context, there is a viable argument that the term "owner" as defined in Section 107(20)(A) categorically excludes lessees.[157] Practitioners making this whole act argument should emphasize its advantages for rule of law and democratic legitimacy values. Moreover, this whole act solution suffers none of the

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151 CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 435 & n. 3 (D.N.H. 1991).

152 *See supra* notes 13-14 and surrounding text (recounting allegations that CERCLA was drafted hastily by a lame duck Congress).

153 *See supra* Part III.A.

154 U.S. v. Bestfoods, 524 U.S. 51, 66 (1998) (clarifying operator liability).

155 *See* Kelley v. EPA, 15 F.3d 1100, 1106 (D.C. Cir. 1994) (rejecting the EPA's 1992 interpretive rule construing CERLCA's secured lender safe harbor).

156 *See, e.g.*, December 2012 Guidance, *supra* note 1, at 2 (advising that "[t]his guidance is not a rule and it does not create new liabilities or limit or expand obligations under any federal, state, tribal, or local law").

157 *See supra* Part III.B.ii.

problems peculiar to the courts' three current solutions, in that it avoids ambiguity, vagueness, and threats to uniformity.[158] Of course, practitioners making the whole act argument should realize that, even if a leaseholder is not an "owner" within the meaning of CERCLA, it might still independently qualify as a PRP under the courts' various tests for operators, arrangers, and transporters. Instead, the whole act argument is most helpful to a leaseholder executing a sub-lease with another party who subsequently causes the sub-leased facility to become contaminated. Finally, even if practitioners only rarely encounter CERCLA's lessee ownership problem, due consideration of a whole act reading of CERCLA's ownership definition would engender the precision in statutory interpretation clients and the public at large ought to expect from lawyers.

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158 *See supra* Part III.A.

Oilfield Recycling in Texas: Why Command and Control Regulations are Stifling the End Goal

By Austin C. Whitmore

I. INTRODUCTION

Texas is producing oil and gas at a record pace.[1] Advanced drilling technologies such as hydraulic fracturing have operators drilling bigger and more productive wells, and there are no signs of stopping.[2] However, the boom in the oil patch has a downside. Waste generation is soaring in U.S. oil fields—to the annual tune of roughly 18 billion and 140 million barrels of fluid and solid wastes, respectively.[3] These wastes contain radioactive materials and other undesirable components that pose significant hazards to human health and the environment.[4] Although commonly managed by underground disposal,[5] oil and gas exploration (E&P) wastes can also be recycled into readily usable raw materials.[6] Not only does recycling serve to mitigate environmental concerns associated with permanent disposal, but it also promises economic benefits for operators and end product consumers in the market for recycled products.[7] To be sure, oilfield waste recycling is no longer purely an environmental concern, but rather a matter of strategic and economic importance.[8]

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1 *Monthly Oil and Gas Production by Year*, R.R. COMM'N OF TEX., *available at* http://www.rrc.state.tx.us/data/production/ogismcon.pdf (last updated Jan. 21, 2014).

2 Russell Gold, *U.S. Shale Producers Drilling Bigger, Faster Wells*, WALL ST. J., (Oct. 22, 2013), *available at* http://online.wsj.com/news/articles/SB10001424052702303672404579151874236726940.

3 *Oil and Gas Production Wastes*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/radiation/tenorm/oilandgas.html (last updated Aug. 30, 2012). *See also Solid Waste Management*, INTERMOUNTAIN OIL & GAS BMP PROJECT, http://www.oilandgasbmps.org/resources/solidwaste.php (last visited Feb. 3, 2014).

4 *Oil and Gas Production Wastes*, *supra* note 3.

5 U.S. DEP'T OF ENERGY, *Fact Sheet – Onsite Burial (Pits, Landfills)*, DRILLING WASTE MGMT. INFO. SYS., http://web.ead.anl.gov/dwm/techdesc/burial (last visited Mar. 17, 2014).

6 R.R. COMM'N OF TEX., WASTE MINIMIZATION IN THE OIL FIELD, 5-2 (July 2001), *available at* http://www.rrc.state.tx.us/forms/publications/wasteminmanual/AM-CH_4.pdf.

7 *See* David Wethe, *Fracking Bonanza Eludes Wastewater Recycling Investors*, BLOOMBERG (Nov. 25, 2013), *available at* http://www.bloomberg.com/news/2013-11-26/fracking-bonanza-eludes-wastewater-recycling-investors.html.

8 *See* Allison Sider et al., *Drillers Begin Reusing 'Frack Water'*, WALL ST. J. (Nov. 20, 2012), *available at* http://online.wsj.com/news/articles/SB10001424052970203937004578077183112409260.

Indeed, it makes sense to recycle oilfield wastes—both from an environmental and economic standpoint. Yet, despite growing water scarcity and contamination concerns, Texas is not making oilfield waste recycling a priority. The demand for recycling far exceeds the supply of facilities,[9] and recent amendments to outdated recycling regulations have only reinforced the command and control framework and further discouraged market development.[10] The effects are clear: needless disposal of beneficially usable materials, permanent consumption of scarce water resources, and negative externalities to communities and the environment.[11] This paper reviews these wastes, identifies potential beneficial uses, and offers a course of action to allow oilfield recycling to prevail in Texas.

II. Wastes Generated in the Oil Field

A. Introduction

Oil and gas drilling produces an incredible amount of solid and liquid waste. From construction to production, each stage of developing a well generates wastes that must be disposed of, recycled, or reused.[12] Rig construction generates "debris, lubricating oil[,] contaminated soil. . . [and] contaminated rainwater," while production generates a variety of fluids, fuel, "drill cuttings, drums and containers. . . paint wastes. . . and garbage."[13] The scope of this paper is limited to only those wastes uniquely associated with drilling and production, namely: drilling mud and associated cuttings, produced water, and wastewater from hydraulic fracturing.[14]

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9 Comments of Waste Facilities, Inc. on Proposed Amendments to Recycling Rules at 2, R.R. Comm'n of Tex. Oil & Gas Docket No. 20-0277739 (Oct. 29, 2012), *available at* http://www.rrc.state.tx.us/rules/comments-3-8andCh4-WasteFacilities.PDF.

10 *Railroad Commission Today Adopts New Recycling Rules to Help Enhance Water Conservation By Oil & Gas Operators*, R. R. Comm'n of Tex (Mar. 26, 2013), *available at* http://www.rrc.state.tx.us/pressreleases/2013/032613.php (recognizing the need to reduce regulatory burdens on fluid waste recycling facilities to keep pace with technology, but failing to address outdated regulations applicable to solid waste). *See also Waste Facilities, Inc.*, Proposed Revisions to Oil and Gas Waste Recycling Rules 1,2 (March 2012), *available at* http://www.rrc.state.tx.us/rules/comm-recycl-WFI-letter-and-redline-2012-March.PDF (suggesting that the current oilfield waste recycling rules are outdated).

11 Roger Real Drouin, *As Fracking Booms, Growing Concerns about Wastewater*, Yale Envt. 360 (Feb. 18, 2014), *available at* http://e360.yale.edu/feature/as_fracking_booms_growing_concerns_about_wastewater/2740/.

12 *Oil and Gas Production Wastes*, *supra* note 3.

13 R.R. Comm'n of Tex., Waste Minimization in the Oil Field, 4-2 (July 2001), *available at* http://www.rrc.state.tx.us/forms/publications/wasteminmanual/AM-CH_4.pdf.

14 *See id.* at 3-3, *available at* https://www.rrc.state.tx.us/forms/publications/wasteminmanual/AM-CH_3.pdf (explaining that "produced water and drilling fluids are unique," while "cleaning wastes, painting wastes, and waste lubricating oil are commonly generated in activities other than E&P activities.").

B. Solid Wastes Generated From Exploration and Production (E&P) Operations

Oil and gas operators in the U.S. generate roughly 1.21 barrels of drilling wastes with every foot of drilling.[15] This includes drilling mud and cuttings brought up through the wellbore.[16] Although these wastes must be carefully treated, they can be recycled and put to beneficial uses.[17]

1. Drill Cuttings and Mud

Drill cuttings are brought up from the underlying strata along with drilling mud circulating up from the drill bit as it cuts into the earth.[18] Although most laws and regulations do not list cuttings as "hazardous" wastes, cuttings often contain Naturally Occurring Radioactive Materials (NORM)—especially those cuttings extracted from the Marcellus Shale region and other gas-bearing shale formations in the eastern United States.[19] Cuttings can be separated from the drilling mud, which is generally disposed of when the drilling job is finished.[20]

2. Disposal Methods for Solid Oil and Gas Wastes

Nearly all drill cuttings in the U.S. are disposed of either on-site, in landfills, or in land farms or reclamation pits.[21] These permanent disposal methods raise a number of concerns regarding potential radioactivity. Heavy drill cuttings behave differently than other landfill solid wastes due to their shearing strength and potential to increase the toxicity of leachates and even clog leachate collection systems.[22] Inorganic cuttings also inhibit the collection of valuable landfill gas and may even migrate into the gas produced.[23] Moreover, permanent disposal methods result in economic waste, specifically through the costs of shipping heavy cuttings off-lease, burdensome regulations, and potential legal liability for waste haulers and operators.[24]

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15 *Overview of Exploration and Production Waste Volumes and Waste Management Practices in the United States*, AM. PETROLEUM INST. 22 (May 2000), *available at* http://www.api.org/environment-health-and-safety/environmental-performance/~/media/Files/EHS/Environmental_Performance/ICF-Waste-Survey-of-EandP-Wastes-2000.ashx.

16 *Id.* at 4.

17 *Id.* at 11.

18 *Fact Sheet: Drill Cuttings from Oil and Gas Exploration in the Marcellus and Utica Shale Regions of Ohio*, OHIO ENVTL. PROT. AGENCY (Feb. 2012), *available at* http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/Fact%20Sheet%20on%20Drilling%20Muds.pdf.

19 *See* Marie Cusick, *Gas Drilling Waste Triggers Radioactive Alarms At Landfills*, NPR (Aug. 22, 2013), http://stateimpact.npr.org/pennsylvania/2013/08/22/gas-drilling-waste-triggers-radioactive-alarms-at-landfills.

20 Savannah Cooper, *Recovering Drilling Muds and Drill Cuttings for Reuse*, ENVTL. PROT. ONLINE (Oct. 4, 2013), *available at* http://eponline.com/articles/2013/10/04/recovering-drilling-muds-and-drill-cuttings-for-reuse.aspx.

21 Comments of Waste Facilities, Inc., *supra* note 9, at 3.

22 John Campanelli, *Drilling Boom Means More Waste*, WASTE & RECYCLING NEWS (June 14, 2013), *available at* http://wsppn.org/drilling-boom-means-more-waste-and-more-concerns.

23 *Id.*

24 *Id.*

3. Beneficial Uses of Recycled Drill Cuttings

Recycled cuttings are readily usable inputs in manufacturing high-quality road base, asphalt, cement, brick, and landfill cover material.[25] These end products are highly marketable not only to states and municipalities, but also to private landowners.[26] Promising research also suggests new potentially beneficial uses. For example, U.S. Department of Energy studies on the feasibility of using cuttings to restore Louisiana's diminishing wetlands indicate that several plant species can thrive in treated cuttings, topsoil and dredged sediments.[27] Additionally, studies in the United Kingdom have tested the potential for oily cuttings to be blended into coal for power plant fuel.[28]

C. Fluid Wastes Generated From E&P Operations

The U.S. Environmental Protection Agency (EPA) estimates that over 18 billion barrels of fluid wastes are produced annually from E&P operations in the U.S.[29] This, however, is only part of the equation. In addition to water produced from oil and gas reservoirs, a tremendous amount of fluid waste is also generated as flowback water in hydraulic fracturing operations.[30]

1. Produced Water

Produced water is a brine water found naturally in oil and gas reservoirs that is produced from the well at an increasing rate as a reservoir is depleted over time.[31] An estimated 10 barrels of produced water are generated with every barrel of oil produced.[32] Although it occurs naturally, produced water contains radioactive decay products dissolved in the brine from reservoir minerals such as uranium and thorium.[33]

2. Wastewater from Hydraulic Fracturing

A second and very large component of fluid waste is wastewater from hydraulic fracturing. Hydraulic fracturing ("fracking") pumps water mixed with sand and other chemical additives into the ground at extreme pressures to create fractures that allow natural gas trapped in shale formations to flow through a wellbore to the surface.[34] Drilling a well can consume as much as 350,000 gallons of water, and fracking a horizontal well

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25 U.S. Dep't of Energy, *Fact Sheet – Beneficial Reuse of Drilling Wastes*, Drilling Waste Mgmt. Info. Sys., http://web.ead.anl.gov/dwm/techdesc/reuse (last visited Feb. 7, 2014).

26 *See id.*

27 *Id.*

28 *Id.*

29 *Oil and Gas Production Wastes*, *supra* note 3.

30 Rebecca Hammer & Jeanne VanBriesen, *In Fracking's Wake*, Natural Res. Def. Council 1 (May 2012), *available at* http://www.nrdc.org/energy/files/fracking-wastewater-fullreport.pdf.

31 *Oil and Gas Production Wastes*, *supra* note 3.

32 *Id.*

33 *Id.*

34 *Hydraulic Fracturing Background Information*, U.S. Envtl. Prot. Agency, http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last updated May 9, 2012).

can consume up to 5 million gallons.[35] The EPA estimates that between 15%–80% of that water is returned to the surface after production.[36]

Fracking wastewater contains many undesirable components that must be disposed of in compliance with federal, state, and local laws and regulations.[37] These include naturally-occurring contaminants and man-made additives containing known carcinogens.[38] Adding to the concern, operators often do not disclose the contents of their fracking fluids, which are exempted from federal disclosure laws.[39] Further, state laws have proven ineffective in terms of enforcement.[40]

3. Fluid Waste Disposal Methods

Disposal of fluid wastes varies greatly from state to state depending on the particular geological character of the region, flowback water quality, economic considerations, and regulations.[41] Since the geological character of the Marcellus Shale precludes underground injection wells, operators in the region recycle and reuse as much as 90% of wastewater.[42] In Texas, however, the numbers are not even close.[43] A 2011 study by the Texas Water Development Board estimated that only 3% of injected frac water is recycled in Texas.[44] The data also revealed great disparities among producing regions within the state, some in which recycling was entirely nonexistent.[45] The reasoning lies in the economics—operators find it more cost-effective to permanently dispose of the water in the ground rather than to treat and recycle it.[46]

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35 *Hydraulic Fracturing Research Study*, U.S. ENVTL. PROT. AGENCY (JUNE 2012), *available at* http://www.epa.gov/safewater/uic/pdfs/hfresearchstudyfs.pdf.

36 *Id.*

37 Inessa Abayev, *Hydraulic Fracturing Wastewater: Making the Case for Treating the Environmentally Condemned,* 24 FORDHAM ENVTL. L. REV. 275, 276–78 (2013).

38 *Id.* at 308.

39 *See* Energy Policy Act of 2005, ch. 322, Pub. L. No. 109–58, 119 Stat. 596 (codified as amended at 42 U.S.C. § 300h(d)(B)(ii) (2013)).

40 Matthew McFeeley, *State Hydraulic Fracturing Disclosure Rules and Enforcement*, NATURAL RES. DEF. COUNCIL 8 (July 2012), *available at* http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf.

41 *Frac Water Treatment: Where is the Market?*, AM. WATER INTELLIGENCE (July 2011), *available at* http://www.americanwaterintel.com/archive/2/7/opinion/frac-water-treatment-where-market.html.

42 Katie Galbraith, *In Texas, Recycling Oilfield Water Has Far to Go,* TEX. TRIB. (Mar. 19, 2013), *available at* http://www.texastribune.org/2013/03/19/texas-recycling-oilfield-water-has-far-go.

43 *See* Jean-Phillipe Nicot et al., *Current and Projected Water Use in the Texas Mining and Oil and Gas Industry*, TEX. WATER DEV. BD. 186 (June 2011), *available at* http://www.twdb.state.tx.us/publications/reports/contracted_reports/doc/0904830939_MiningWaterUse.pdf.

44 *Id.* at 186.

45 *Id.* at 186 (estimating that operators recycle as much as 5%–10% of frac water in the Barnett Shale, while operators in the Haynesville Shale did not recycle at all).

46 *See* Galbraith, *supra* note 42.

4. Beneficial Uses of Recycled Fluid Waste

Various technologies exist for treating and reusing flowback water in drilling operations, which could serve as a sharp cost-cutting mechanism for oil and gas companies.[47] Recycled produced water and fracking water can also be put to uses off-lease, such as using brine water to de-ice roadways and aid in dust control.[48] Produced water can be treated and recycled into irrigation and even drinking water.[49] Technology for recycling fracking water into drinking water does not yet exist but could be coming in the future.[50]

III. The Regulatory Framework for E&P Wastes

A. Federal Regulation of E&P Wastes

Oil and gas E&P wastes must be managed in compliance with complex federal and state rules and regulations. Although wastes uniquely associated with oil and gas drilling are governed primarily by state law, the general framework is largely set out by federal statutes and regulations.

1. The Resource Conservation and Recovery Act and the "E&P Exemption"

The Resource Conservation and Recovery Act (RCRA) is a comprehensive "cradle to grave" regime for regulating hazardous wastes.[51] RCRA Subtitle C regulates hazardous wastes with the principle objective of protecting human health and the environment, while promoting recycling and beneficial re-use of resources.[52] These goals often conflict, however, because recycled wastes can pose the same health risks as hazardous wastes if not properly managed.[53] The underlying tension is reflected by RCRA's complicated definitions of "solid waste" and "hazardous waste" and by the specific categorical exceptions under the act.[54]

Under RCRA, "hazardous waste" is defined as "solid waste" posing hazards to human health or the environment.[55] "Solid waste" is broadly defined to include "any garbage, refuse, sludge . . . and *other discarded material* . . . resulting from industrial, commercial, mining and agricultural operations."[56] Notably, E&P wastes are exempted from "hazard-

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47 Conway Irwin, *Wastewater Recycling Part I: Will Drilling and Environmental Goals Align as Cleanup Costs Fall?* Breaking Energy (May 14, 2013), *available at* http://breakingenergy.com/2013/05/14/wastewater-recycling-part-i-will-drilling-and-environmental-goals-align-as-cleanup-costs-fall.

48 *Id.*

49 Greg Kendall-Ball, *New Business Can Turn Oil Field Waste Into Drinking Water*, Abilene Rep.-News (April 23, 2012), *available at* http://www.reporternews.com/news/2012/apr/23/new-business-can-turn-oil-field-waste-into-water.

50 Sider et al., *supra* note 8.

51 *See* 42 U.S.C. §§ 6921–6939g (2013).

52 *Id.* § 6902(a).

53 46 Constance C. Westfall, *Texas Practice Series: Environmental Law* § 29.3 (2d ed. 2013).

54 *Id.*; *see also* 42 U.S.C. § 6903(5), (27) (2013).

55 42 U.S.C. § 6903(5) (2013).

56 *Id.* § 6903(27) (emphasis added).

ous waste" regulation under Subtitle C, which expressly excludes "[d]rilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil . . . [and] natural gas" from its purview.[57] The exemption applies to wastes "uniquely associated with primary field operations," including primary, secondary and tertiary production of oil and gas.[58] As a result, E&P drilling wastes are subject to the less-stringent Subtitle D, which provides a framework to guide state agencies in managing non-hazardous solid wastes.[59]

2. Exemption of Wastewater from the Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) mandates that the EPA establish regulations to prevent contamination of drinking water.[60] Wastewater from hydraulic fracturing fell within the SDWA for a brief period of time until exempted by the Energy Policy Act of 2005.[61] Though fracking wastewater remains unregulated by the SDWA, Congress could foreseeably bring it under federal regulation.[62]

B. Regulation of E&P Wastes in Texas

The Railroad Commission of Texas (RRC) regulates all oil and gas wastes produced in the state, both hazardous and nonhazardous.[63] Hazardous oil and gas wastes are governed by statewide Rule 98, which incorporates by reference the RCRA "E&P Exemption" for wastes unique to drilling and production.[64] As such, drill cuttings, mud, produced water, and wastewater from hydraulic fracturing are all subject to non-hazardous waste regulation under Rule 8, entitled "Water Protection."[65]

As a part of its program to reduce and minimize oil field waste, the RRC is required to "adopt and enforce rules and orders, and [is] authorized to issue permits relating to . . . the discharge, storage, handling transportation, reclamation, or disposal of oil and gas waste."[66] Rule 8 provides for a number of authorized disposal methods not requiring a permit, including on-site disposal of certain drilling fluids, cuttings, sands, silts, and other wastes that can be landfarmed without a permit.[67] Generators may also dispose of

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57 40 C.F.R. § 261.4(b)(5) (2013); *see also* 42 U.S.C. § 6921 (2013).

58 R.R. COMM'N OF TEX., WASTE MINIMIZATION IN THE OIL FIELD, *supra* note 14.

59 *See* 42 U.S.C. §§ 6941–6949a (2013).

60 *Id.* § 6902.

61 *See* Pub. L. 109–58, Title III, § 322; *see also* 42 U.S.C. § 300h(d)(1)(B)(ii).

62 *See* Fracturing Responsibility and Awareness of Chemicals Act of 2011, H.R. 1084, 112th Cong. (2011) (proposing to repeal the fracturing wastewater exemption from the SWDA and to require federal disclosure of fracturing fluids).

63 *See* 16 TEX. ADMIN. CODE § 3.30 (R.R. Comm'n of Tex., Memorandum of Understanding Between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ)); *see also* TEX. HEALTH & SAFETY CODE ANN. § 361.003(34) (West 2013); *see also* TEX. NAT. RES. CODE ANN. § 91.101 (West 2013).

64 16 TEX. ADMIN. CODE § 3.98(e)(1)(C) (2013) (R.R. Comm'n of Tex., Standards for Management of Hazardous Oil and Gas Waste).

65 16 TEX. ADMIN. CODE § 3.8 (2013) (R.R. Comm'n of Tex., Water Protection).

66 TEX. NAT. RES. CODE § 91.101 (2013); *see also id.* at § 91.101 (2013).

67 16 TEX. ADMIN. CODE § 3.8(d)(3) (2013) (R.R. Comm'n of Tex., Water Protection).

wastes in non-commercial fluid recycling pits subject to stringent regulation and inspection by the RRC.[68]

All other methods of oil and gas waste disposal require a RRC permit, and Rule 8 provides basic standards that an applicant must satisfy.[69] Permits establish requirements concerning the design and construction of pits and disposal facilities, as well as notice requirements triggered by certain occurrences.[70] Rule 8 also requires a waste hauler permit for persons transporting oil and gas wastes for hire.[71] Waste haulers must keep daily logs on the types of wastes carried, from whom they are received, and to where they are transported.[72] Violators are subject to fines, and waste generators are prohibited from knowingly using the services of a transporter who has not obtained a permit.[73]

IV. The Report Card: Texas's Failing Grade in E&P Waste Recycling

A. Recycling Solid Wastes from E&P Operations

Most drill cuttings in Texas are permanently disposed of rather than recycled.[74] Further complicating the situation is the fact that the demand for recycling services in Texas far exceeds the supply of those services in the market.[75] Thus, cuttings are needlessly being "disposed of in landfills or by underground injection rather than being put to valuable and productive use through recycling."[76] Additionally, the transportation of wastes off-lease only adds to the heavy truck traffic that the Texas Department of Transportation estimates has cost the state over $2 billion in road damage solely for the Eagle Ford Shale.[77]

Technology for recycling solid E&P wastes is not new. In fact, operators have had the ability to recycle wastes since the 1950's.[78] However, despite all of the issues associated with permanent disposal, oilfield solid waste recycling has not prevailed in Texas.[79] This failure can largely be attributed to prohibitive costs of transporting waste products to recycling facilities, a lack of standardized recycling rules in the industry, a lack of a regulatory definition for "recycled product," and liability concerns of generators and re-

68 *See id.* § 3.8(d)(4)(G).
69 *Id.* § 3.8(d)(6).
70 *Id.* § 3.8(d)(6)(C).
71 *Id.* § 3.8(f)(1).
72 *Id.* § 3.8(f)(2).
73 *Id.* § 3.8(d)(5)(A).
74 *Comments of Waste Facilities, Inc.*, *supra* note 9, at 2.
75 *Id.*
76 *Id.*
77 Terrence Henry, *What Texas Can Do About Roads Damaged by Drilling*, NPR (Aug. 23, 2013), *available at* http://stateimpact.npr.org/texas/2012/08/23/what-texas-can-do-about-roads-damaged-by-drilling.
78 Manny Gonzalez et al., Am. Ass'n of Drilling Eng'rs, New Reduce, Reuse, Recycle Drilling Waste Treatment Technologies and Programs, 2 (2006), *available at* http://ipec.utulsa.edu/Conf2006/Papers/Gonzalez_27.pdf.
79 *Id.* at 3.

cycling facility operators who are averse to being associated with the recycled product in subsequent uses.[80]

B. Wastewater from Hydraulic Fracturing

It is estimated that only 5–10% of water used in fracking operations in the Barnett Shale is recycled, less than 5% in the Eagle Ford Shale, and no fracking water is recycled in the Haynesville Shale.[81] The problem is that most of the water used in hydraulic fracturing is permanently consumed.[82] Unlike water used in irrigation or manufacturing processes that can return to the water cycle through evaporation, fracking water is mixed with toxic chemicals and generally injected deep beneath the surface.[83] But despite the growing scarcity of water in Texas, operators are not making the grade in wastewater recycling.

V. Recent Statutory and Administrative Developments in Texas

A. Regulations Amended to Encourage Fluid Waste Recycling

In March 2013, the RRC adopted significant amendments to oil and gas recycling regulations to encourage recycling of fracking fluids and produced water.[84] The RRC also clarified permitting requirements for commercial recycling facilities.[85] As amended, § 3.8 permits oil and gas operators to engage in "non-commercial fluid recycling" of wastewater without a permit.[86] Operators may do so on their own leased premises and may also transport fluid wastes to be recycled on other leases.[87] The amendments further provide for storage of fluids awaiting treatment in "non-commercial fluid recycling pits" subject to stringent guidelines on pit construction, use, and operation requirements.[88]

The revisions also establish a "tiered approach" to govern beneficial uses of recycled fluids.[89] Operators may reuse treated fluids in the wellbore without having to obtain a permit.[90] Non-wellbore uses of recycled fluids are also authorized if made pursuant to a

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80 *Id.* at 3–4.

81 Emily Pickrell, *Bills Would Require Recycling of Fracturing Water*, HOUS. CHRON. (Apr. 11, 2013), *available at* http://www.houstonchronicle.com/business/article/Bills-would-require-recycling-of-fracturing-water-4428341.php.

82 James Osborne, *State Rule Change Makes Recycling Fracking Wastewater Easier*, DALL. MORNING NEWS (Mar. 26, 2013), *available at* http://www.dallasnews.com/business/energy/20130326-state-rule-change-makes-recycling-fracking-wastewater-easier.ece.

83 *Id.*

84 *See* 37 Tex. Reg. 7555, 7562 (Sept. 28, 2012) (to be codified at 16 TEX. ADMIN. CODE § 3.8) (Tex. R.R. Comm'n, Water Protection).

85 16 TEX. ADMIN. CODE §§ 4.201–04 (2013) (Tex. R.R. Comm'n, General).

86 *Id.* § 3.8(d)(7)(b).

87 *Id.* § 3.8(a)(41).

88 *See id.* § 3.8(d)(4)(G).

89 Kristen Hulbert, *Texas Adopts New Hydraulic Fracturing Fluid Recycling Rules*, NORTON ROSE FULBRIGHT (April 3, 2013), http://fracking.nortonrosefulbright.com/2013/04/TexasAdopts NewFrackingFluidRecyclingRules.html.

90 *See* 16 TEX. ADMIN. CODE § 3.8(d)(7)(B) (2013) (Tex. R.R. Comm'n, Water Protection).

permit issued by another state or federal agency.[91] Other reuses will be considered and permitted on a case-by-case basis based on the volume and source of the fluids, anticipated concerns, and the proposed reuse.[92]

B. Statutes Enacted to Reduce Liability for Operators of Fluid Waste Recycling Facilities

Historically, waste generators in Texas have been reluctant to recycle E&P wastes because of potential tort liability for harms to the end user of the recycled product.[93] The Texas legislature addressed this in 2013 when it added provisions to the Natural Resources Code limiting potential liability of fluid waste recycling facility operators ("facility operators") for harms caused by the subsequent use of the end product.[94] The new provisions clarify that a facility operator who takes possession of waste for recycling ceases to have a property interest in the waste upon transfer to another person for disposal or beneficial use.[95] Likewise, the facility operator is immunized from tort liability resulting from a subsequent use of the recycled product by the transferee or other person.[96] In effect, facility operators are assured they will not be sued over incidental harms that occur for reasons unrelated to any negligence on their part. As a matter of policy, facility operators will still be liable for personal injury, death, or property damage actions arising from exposure to the waste or end product.[97] This type of action would, of course, stem from the facility operator's own negligence in producing a dangerous or defective product.

The legislature found the correct balance here. The new rules properly address the problem of the wrongdoing "sham recycler" by imposing liability on facility operators who stockpile wastes or produce dangerous products.[98] These tortfeasors will be deterred by liability rules subjecting them not only to suit by the initial transferee of the recycled product but also to suit by any future user. At the same time, the rules sufficiently protect good-faith operators from unforeseen harms that occur despite compliance with all applicable quality and safety standards.[99] As a result, operators can manage their risks with a greater deal of certainty. Policies like these encourage investment in recycling facilities and create incentives for compliance with regulations and safety standards.

Notably, these statutes have yet to be interpreted by courts; thus, questions exist about the impact on regulatory responsibilities of facility operators in the event that a recycled product reverts back to "waste" if not put to the permitted beneficial use.[100] However, the broad statutory language suggests that the release of ownership would survive the recycled product reverting back to "waste" characterization. Liability would

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91 *Id.*
92 *Id.* § 3.8(d)(7)(C).
93 Gonzalez et al., *supra* note 86, at 3.
94 *See* Act of May 9, 2013, 83rd Leg. R.S., H.B. 2767 (to be codified at Tex. Nat. Res. Code Ann. §122).
95 Tex. Nat. Res. Code Ann. § 122.002 (West 2013).
96 *Id.* § 122.003(a).
97 *Id.* § 122.003(b).
98 *See id* § 122.003.
99 *Id.*
100 46 David W. Cooney, Jr., *Texas Practice Series: Environmental Law* § 25.16 (2d ed. 2013).

then fall on the transferee responsible for stockpiling the recycled products. Either way, it seems clear that the legislature's intent is to encourage recycling and market development.

C. AMENDMENTS TO THE COMMERCIAL RECYCLING REGULATIONS

1. THE FIVE-DIVISION COMMERCIAL RECYCLING PERMITTING SYSTEMS

In 2006, the RRC adopted commercial recycling rules contemplating only two categories of commercial recycling facilities: mobile and stationary facilities.[101] Upon receiving numerous applications for facility permits fitting neither category, the RRC undertook to create a third "semi-mobile" category, but determined three categories were insufficient to cover all activity in the field.[102] Accordingly, the RRC attempted to clarify the permitting process and to generally update its rules by developing five separate categories of commercial recycling permits tailored to reflect practices in the field.[103] These are in addition to a sixth category dedicated to on-lease recycling of produced water and fracking fluids now authorized by Rule 8.[104]

2. MAKING SENSE OF THE CATEGORICAL PERMITTING SYSTEM FOR COMMERCIAL RECYCLING

The RRC defines a "commercial recycling facility" as "a facility whose owner or operator receives compensation from others for the storage, handling, treatment and recycling of oil and gas wastes."[105] These facilities are distinct from "non-commercial" recycling facilities, which treat wastes produced on-lease to be disposed into non-commercial injection or disposal wells.[106]

3. COMMERCIAL RECYCLING PERMITS FOR SOLID WASTES

E&P solid wastes may be recycled only pursuant to a permit.[107] Under the amended regulations, the RRC requires permits for on-lease, off-lease and stationary commercial recycling facilities.[108] On-lease commercial solid waste recycling facilities are movable from one location to another.[109] Therefore, these permits are flexible in the sense that the permittee can specify multiple leases on which it will conduct recycling operations without having to apply for multiple permits. Permitees are limited, however, to accepting only wastes generated on-lease; and the recycled product may only be put to limited beneficial uses such as on-lease roads, drilling pads, and county roads.[110] These permits are renewable after one year.[111]

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101 R.R. COMM'N OF TEX., MEM., O&G Docket No. 20-0277739, 1 (2012), *available at* http://www.rrc.state.tx.us/rules/prop-3-8-comm-recycling-Sept-2012.PDF.
102 *Id.*
103 *Id.*
104 *Id.*
105 16 TEX. ADMIN. CODE § 4.204(3) (2013) (Tex. R.R. Comm'n, Definitions).
106 *See generally id.* § 3.8(a)(41).
107 *See id.* § 4.201.
108 *See* id. §§ 4.212–261.
109 *Id.* § 4.204(9).
110 *Id.* § 4.221(f) (Tex. R.R. Comm'n, Minimum Permit Provisions for Operations).
111 *Id.* § 4.204(9)(A).

Off-lease or centralized commercial solid waste recycling facilities are also movable, but may operate in one location for a longer period of time (up to two years).[112] The permits include the same requirements applicable to on-lease facilities, but also require site-specific environmental and property information.[113] Operators can accept wastes generated off-lease, and there are no specific limitations on beneficial uses of the recycled products.[114]

Lastly, stationary commercial solid waste recycling facilities are immobile and fixed at a location for up to five years.[115] These facilities can accept wastes from multiple generators, and the beneficial uses of recycled products are limited only to the extent that they must be put to a "legitimate commercial use."[116] Permittees must also give certain notices to the RRC and to neighboring landowners.[117]

4. Commercial Recycling Permits for Fluid Wastes

The amendments to § 3.8 now authorize "non-commercial fluid recycling" of wastewater and produced water without a permit.[118] The RRC does, however, require a permit for commercial recycling of fluid wastes at off-lease and stationary recycling facilities.[119]

The regulatory framework is similar to that of off-lease or centralized solid waste facilities.[120] Off-lease commercial fluid waste recycling facilities may accept wastes from multiple locations and are permitted for up to two years.[121] Permits for stationary facilities have a five-year duration and are likewise renewable upon application.[122] As with commercial solid waste recycling, beneficial uses of recycled products from fluid wastes are not specifically limited except to the extent that they must be put to a "legitimate commercial use."[123]

VI. Reality Check: Unworkable Regulations Stifling Market Development

No matter how noble of a pursuit recycling E&P wastes may be, operators and investors in Texas will not pursue it unless there is a viable market for the end product.

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112 *Id.* § 4.204(14).

113 *Surface Waste Management Manual*, R.R. Comm'n of Tex., *available at* http://www.rrc.state.tx.us/forms/publications/SurfaceWasteManagementManual/recycling.php.

114 16 Tex. Admin. Code § 4.242 (2013) (Tex. R.R. Comm'n, Minimum Permit Provisions for Operations).

115 *Id.* § 4.255(a).

116 *Id.* § 4.258(c).

117 *Id.* § 4.254.

118 *See id.* § 3.8(a)(41).

119 *Id.* §§ 4.262–93 (Tex. R.R. Comm'n, Requirements for Off-Lease Commercial Recycling of Fluid & Requirements for Stationary Commercial Recycling of Fluid).

120 *See id.* § 4.204(14).

121 *Id.* § 4.271(a).

122 *Id.* § 4.287(a).

123 *Id.* § 4.274(c); *see also id.* § 4.290(c).

Much of the recycling debate is centered around environmental and water quality issues, but very little attention is given to the RRC's command and control regulatory regime that is stinting market development. Under the guise of simplifying the regulations, the RRC is only reinforcing its command and control approach. In doing so, the RRC has failed to address the key underlying issues.

A. Commercial vs. Non-Commercial Recycling: A Needless Distinction That is Reinforcing Command and Control Regulation

The RRC's justification for the commercial vs. non-commercial distinction is a reflection of its conflicting mandates. On the one hand, the RRC has a policy of promoting recycling.[124] This is reflected in the RRC's deregulation of certain types of non-commercial fluid recycling and its attempt to improve the permitting process.[125] At the same time, however, the RRC has a justified concern about risks associated with commercial facilities that will theoretically (though not positively) be housing and treating higher volumes of drilling wastes generated from a wider variety of sources. Therein lies the fundamental question of how to balance the need to promote commercial recycling, tempered by the need to protect the environment and water quality. But the amendments to the permitting regulations do not make any substantial changes to the overall command and control regime.[126] Rather, the amendments only reinforce this regime through an unnecessarily complicated permitting system.[127]

"Command and control" regulation refers to direct regulation of an activity through rules and regulations that state what is permitted and what is not.[128] The RRC's framework for commercial recycling is illustrative—providing complicated permitting rules for engineering, design, operations, siting, and extensive monitoring by the RRC. One appeal of command and control regulation, in theory, is a predictable outcome: standards will be set and violators will be fined.[129] But stringent rules, albeit predictable, severely limit the freedom of operators to determine how to meet standards, effectively stifling innovation and entrepreneurship in operating and minimizing risks.

A better framework would provide incentive-based rules to encourage recycling while incentivizing facility operators to reduce their stockpiled wastes and increase the rate at which recycled products can be put to beneficial uses. This would encourage market activity by reducing regulatory burdens, while also allowing the RRC to focus on the important issues: the volume of wastes accepted at commercial facilities and the

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124 *Railroad Commission Today Adopts New Recycling Rules to Help Enhance Water Conservation By Oil & Gas Operators*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/pressreleases/2013/032613.php (Mar. 26, 2013).

125 *Id.*

126 *See generally* 16 TEX. ADMIN. CODE §§ 4.201–293 (2013) (Tex. R.R. Comm'n, Commercial Recycling). *See also* Comments of Waste Facilities, Inc., *supra* note 9, at 2.

127 16 TEX. ADMIN. CODE §§ 4.201–293.

128 Winston Harrington & Richard D. Morgenstern, *Economic Incentives versus Command and Control*, RES. FOR THE FUTURE 13 (Fall/Winter 2004), *available at* http://www.rff.org/rff/Documents/RFF_Resources_152_ecoincentives.pdf.

129 Dawn Anderson, *Regulatory Policy vs. Economic Incentives*, LITERACY COUNCIL (2008), *available at* http://www.enviroliteracy.org/article.php/1329.html.

duration of operations at any one location.[130] These concerns could be adequately addressed by registration and licensing requirements for facility operators; testing and review of recycling operations to be performed by inspectors; and subsequent liability and enforcement actions taken against wrongdoing facility operators who recycle improperly.[131]

An instructive example for the RRC is the Texas Commission on Environmental Quality's (TCEQ) program for recycling scrap tires.[132] Like E&P solid wastes, discarded tires pose serious environmental and health hazards and must be managed to prevent fires and control disease vectors such as mosquitoes, rats, and snakes.[133] Instead of taking a command and control approach, the TCEQ has implemented an incentive-based program that allows registered commercial recycling facilities to process tire rubber into recycled road base.[134] No permit is required, and the program does not impose any formal testing or tracking requirements for recycled products.[135]

B. On-Lease vs. Off-Lease Distinction: A Burden to Small Operators

The amended regulations for "on-lease" commercial recycling restrict facility operators to accepting only wastes generated on-site.[136] It follows that these movable facility operators will only set up shop on large leases that generate enough waste to justify the investment. In effect, the rule will completely deter small lease operators from recycling. Small operators will have to transport their wastes (sometimes across long distances) to "off-lease" or "stationary facilities" even if there is an "on-lease" commercial facility operating on a neighboring tract.[137] Faced with these options, small oil companies will find it more economical to dispose of their wastes in the ground or in landfills, resulting in needless disposal of wastes that could have been put to beneficial uses.[138]

For oilfield waste recycling to take hold in Texas, oil companies must be able to transport their wastes to the nearest recycling facility—and whether a facility is stationary, on-lease or off-lease should not be decisive. That a facility can operate at multiple locations does not mean it should be limited to treating smaller amounts of wastes or limited to accepting wastes generated from a single lease.[139] Allowing on-lease commer-

130 *Waste Facilities, Inc.*, Proposed Revisions to Oil and Gas Waste Recycling Rules 1, 4 (March 2012), *available at* http://www.rrc.state.tx.us/rules/comm-recycl-WFI-letter-and-redline-2012-March.PDF (suggesting that if the RRC did not "split hairs on the type of facility," the Commission could focus on "volumes of materials to be stored and treated" and "the length of time a facility intends to operate at a given location").

131 *Comments of Waste Facilities, Inc.*, *supra* note 9, at 4.

132 *Id.*

133 *Scrap-Tire Recycling*, Tex. Comm'n on Envtl. Quality, http://www.tceq.texas.gov/tires/recycling.html (last visited Feb. 9, 2013).

134 *Id. See also* 30 Tex. Admin. Code §§ 328.51–54 (2013) (Tex. Comm'n on Envtl. Quality).

135 *Scrap-Tire Recycling*, *supra* note 133. *See also Comments of Waste Facilities, Inc.*, *supra* note 21, at 4.

136 16 Tex. Admin. Code § 4.221(a)(1) (2013) (R.R. Comm'n of Tex., Minimum Permit Provisions for Operations).

137 *Waste Facilities, Inc.*, *supra* note 140, at 5.

138 *Id.*

139 *Id.* at 3.

cial recycling facilities to accept wastes generated off-lease would reduce burdens on small operators and increase the profits of facility operators by increasing the demand for services and the supply of raw waste materials. This flexibility would also decrease negative externalities such as increased oil and gas traffic, pollution, destruction of roads, and noise.[140]

C. ANTI-COMPETITIVE RESTRICTIONS ON PRODUCTION AND BENEFICIAL USES

The RRC is preventing competitive markets from functioning by placing restrictions on beneficial uses and ceilings on the quantity of recycled products produced. For viable markets to form, the RRC should limit its interference with these types of business decisions.

1. RESTRICTIONS ON USE OF RECYCLED ROAD BASE PRODUCED AT ON-LEASE RECYCLING FACILITIES

Recycled road base produced at on-lease commercial solid waste recycling facilities can be used only for on-lease roads and county roads.[141] Though no court has ruled on the issue, it seems the effect is to restrict access to the market for off-lease private property and non-county roads.

For the market to properly function, treated road base material should be transferrable to any buyer who will put the material to a beneficial use, regardless of whether the recycling was done on-lease or off-lease. Any other rule will stifle innovation, diminish profits, and hurt small operators who would otherwise be able to turn a profit by selling road base recycled on their land.

2. RESTRICTIONS ON THE QUANTITY OF RECYCLED PRODUCT PRODUCED

All commercial recycling facilities are restricted in the quantity of recycled product they may produce.[142] Each of the five permit categories provides that the RRC *shall* include requirements reasonably necessary to ensure a facility operator "does not accumulate . . . recyclable product at the facility without . . . putting [it] to a *legitimate commercial use*."[143] The issue here is two-fold.

3. LIMITATIONS ON QUANTITY PRODUCED

First, placing limitations on the amount of recycled product produced is anti-competitive. Basic economic principles hold that the optimal outcome is found at the point where demand and supply intersect forming an equilibrium price and quantity.[144] Presumably, the RRC's rule will ensure that the quantity of recycled product will be limited to the quantity demanded, but the underlying premise is faulty. Rather than determin-

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140 *Id.* at 5–6.

141 16 TEX. ADMIN. CODE § 4.221(f) (2013) (R.R. Comm'n of Tex., Minimum Permit Provisions for Operations); *see also id.* § 4.221(d).

142 *See generally id.* §§ 4.201–293.

143 *Id.* § 4.221(c) (emphasis added). *See also id.* §§ 4.242(c), 4.258(c), 4.274(c), 4.290(c) (providing for speculative accumulation).

144 *See* ROBERT COOTER & THOMAS ULEN, LAW & ECON. 16–17, 33 (Denise Clinton, et al. eds., 5th ed. 2008).

ing the maximum quantity produced, the RRC should let operators make their own judgments and risk assessments. Facility operators may find it advantageous to stockpile recycled products in hopes of higher future market prices or to overproduce when raw materials are relatively cheap. The RRC should not interfere with these types of business decisions.

4. The "Legitimate Commercial Use" Limitation

The requirement that recycled products must be put to a "legitimate commercial use" is unnecessary.[145] Road base, concrete, and fill material for drilling platforms can undoubtedly be put to legitimate commercial uses, but what about other useful materials like potting soil or dredge material used to restore wetlands? There are certainly markets for recycled products that are not strictly "commercial" in nature, and regulations should allow these markets to flourish.

D. Problem of Characterization: A Recycled Product is Not a Waste

An intuitive distinction can be made between a recycled product and a waste. The term "waste" is pejorative, implying an unwanted, unusable material to be disposed of.[146] Quite the contrary, "recycled" materials are created for beneficial uses valuable to individuals and communities.[147] Curiously, the RRC's regulations stipulate that a recycled product will "revert" back to waste if not put to the beneficial use specified by permit.[148] In other words, even recycled products treated in compliance with all applicable quality and safety standards will be rendered unusable (and in violation of regulation) if not put to a legitimate commercial use.[149]

The fundamental issue is that the RRC now regulates oilfield recycling as a disposal process rather than a manufacturing process that results in a re-usable non-waste.[150] Admittedly, the "cradle-to-grave" framework for regulating radioactive and toxic wastes is justified in that wastes retain their harmful characteristics even after disposal. However, even conceding that E&P wastes should be regulated as wastes up to the point they are recycled, the finished recycled product deserves entirely different treatment.

Regulations that render beneficially usable raw materials unusable will stifle recycling in Texas. If safeguards exist to ensure that recycled products are safe and fit for

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145 16 Tex. Admin. Code § 4.221(c) (R.R. Comm'n of Tex., Minimum Permit Provisions for Operations); *see also id.*

146 *See* Merriam-Webster Online, *available at* http://www.merriam-webster.com/dictionary/waste (defining "waste" as "damaged, defective, or superfluous material produced by a manufacturing process. . .").

147 *See* Merriam-Webster Online, *available at* http://www.merriam-webster.com/dictionary/recycled (defining "recycle" as "to make something new from something that has been used before").

148 *See* 16 Tex. Admin. Code § 4.204(12) (2013) (R.R. Comm'n of Tex., Definitions) (providing that a recycled product may revert back to waste if not recycled as authorized by the permit). *See also* 16 Tex. Admin. Code § 3.8(c)(43) (2013) (R.R. Comm'n of Tex., Water Protection) (defining "recycle" to mean "process[ing] and . . . reus[ing] oil and gas wastes as a product for which there is a legitimate commercial use").

149 16 Tex. Admin. Code § 4.204(12) (2013) (R.R. Comm'n of Tex., Definitions).

150 Comments of Waste Facilities, Inc., *supra* note 9, at 5.

productive uses, the RRC's rules should work to encourage those materials to be brought to market. A better rule would be to allow recycled products to be stored or returned to the original generator to be sold or reused. Parties could even provide for this by contract.

E. Potential Tort Liability of Solid Waste Facility Operators Discourages Recycling

In 2013, the Texas legislature enacted statutes clarifying that facility operators are immune to tort liability for harm resulting from a subsequent use of a recycled product from *fluid* oil and gas drilling wastes.[151] The legislature has not, however, afforded this protection to solid waste facility operators. Potential investors may be dissuaded by concerns, for example, about liability for automobile accidents on roads built from recycled road base or for harms resulting from improper uses of the material by a transferee. Open-ended liability makes risk management difficult, especially considering inherent challenges in tracking every subsequent use of a recycled product.

F. Burdensome Financial Security Requirements for Commercial Permit Applicants

Applicants for off-lease and stationary commercial recycling permits must maintain financial security in the form of an individual performance bond, blanket performance bond, or a letter of credit or cash deposit in the same amount.[152] Financial assurance is necessary to ensure that the facility operator will operate and close the facility in accordance with state law, the RRC's rules, and permit requirements.[153] Generally, the amount is set according to an estimate of the *maximum* dollar amount necessary to close the facility.[154] These estimates can create arbitrarily large security requirements, especially when closing costs are difficult to accurately predict.[155]

Excessive bond requirements create a barrier to entry for potential facility operators and thus hurt market competition. Another unintended result could pass costs on to waste generators, resulting in less recycling at the cost of more disposal and negative externalities. Instead of using the *maximum* estimated dollar amount necessary for closure, the RRC could lessen its burden on the market by establishing more reasonable security requirements.[156] Specifically, in a comment to the RRC's proposed revisions to waste recycling rules, Waste Facilities, Inc. recommends setting security requirements at "110% of reasonably estimated closure costs."[157] This would sufficiently provide a margin of error for unanticipated costs without discouraging facility operators from entering the market.

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151 *See* TEX. NAT. RES. CODE ANN. § 122.003 (West 2014).

152 *See* 16 TEX. ADMIN CODE § 3.78(d) (2013) (R.R. Comm'n of Tex., Fees and Financial Security Requirements).

153 *See* TEX. NAT. RES. CODE ANN. § 91.109(a)–(b) (West 2013).

154 *See* 16 TEX. ADMIN. CODE § 3.78(l)(4) (2013) (R.R. Comm'n of Tex., Fees and Financial Security Requirements).

155 *Waste Facilities, Inc.*, *supra* note 140, at 7–8.

156 *Id.* at 8.

157 *Id.*

VII. Conclusion

Oilfield waste management is not just a preventative apparatus; it must be undertaken with an eye toward growth and sustainability. The policy implications are clear. Oilfield waste recycling stands to address key concerns related to drilling and production, and it has gained wide support from members of the industry and environmental communities alike. Not only can recycling alleviate environmental contamination issues by keeping wastes out of our waterways and landfills, it also cuts costs for operators, conserves scarce resources, and facilitates the development of markets for valuable end products.

Indeed, this is a good policy for Texas. But, it will not come to fruition without a fundamental regulatory departure from traditional command and control philosophy. The current regulations, though aimed at encouraging recycling, create unworkable rules that burden operators and lead to counter-intuitive results. To truly encourage recycling, the system must be amended with an aim to encourage market development. With sufficient inspection and liability rules in place, incentive-based regulations will compel market actors to recycle with greater efficiency and responsibility. Doing so would further both of the RRC's goals (encouraging recycling while protecting the environment) in a way that strict permitting and monitoring simply cannot. In sum, E&P waste recycling must be approached as a process of manufacturing a valuable commodity rather than a means of disposing of a non-usable waste.

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SUPREME COURT GRANTS LIMITED CERTIORARI TO CASES CHALLENGING THE EPA RULES FOR STATIONARY SOURCE GREENHOUSE GAS EMISSIONS

The U.S. Supreme Court recently decided several cases, on a consolidated basis, involving the U.S. Environmental Protection Agency (EPA) regulation of greenhouse gases (GHGs) emitted from stationary sources such as chemical plants and other industrial facilities.[1] The Court limited its consideration to a single question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."[2] The Court ruled that it did not.[3]

HISTORICAL CONTEXT

The historical context of this case extends back to *Massachusetts v. EPA*, when the Supreme Court held that GHGs may be regulated as an "air pollutant" under the Clean Air Act (CAA).[4] The Court held that because the CAA requires the EPA to establish motor-vehicle emission standards for "any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare," the EPA has a statutory obligation to regulate GHGs.[5] The Court thus instructed the EPA to study available scientific evidence to determine "whether sufficient information exists to make an endangerment finding" for GHGs.[6] Subsequently, the EPA arrived at an Endangerment Finding.[7] In the Finding, the EPA defined GHGs as a single "air pollutant" made up of an "aggregate group" of six well-mixed GHGs.[8] Further, it found that motor-vehicle emissions of these gases "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare."[9] The EPA, in conjunction with the National Highway Traffic Safety Administra-

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1 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 134 S. Ct. 418 (2013).

2 *Id.*

3 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).

4 549 U.S. 497, 500 (2007).

5 *Id.* at 534.

6 *Id.*

7 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

8 *Id.* at 66,536-37.

9 *Id.* at 66,499.

tion, then published the Tailpipe Rule, which set GHG emission standards and corporate average fuel economy standards for cars and light trucks.[10]

EPA's Timing Rule, Regulation of Stationary Source GHGs, and Tailoring Rule

Various non-GHG air pollutants from stationary sources were already regulated under the CAA through Title I, Part C, Prevention of Significant Deterioration of Air Quality (PSD), which required construction permits,[11] and through Title V, which required operating permits.[12] However, once regulations for motor vehicle GHGs were announced in the Tailpipe Rule, the EPA was faced with finding a rationale for regulating GHGs from stationary sources.

The EPA addressed this issue in its Timing Rule, where it relied on its long-standing interpretation that an air pollutant that is regulated under any part of the CAA should also be subject to the CAA PSD and Title V permitting requirements.[13] In short, the EPA determined that the Tailpipe Rule triggered PSD and Title V regulation of GHGs from stationary sources.[14] Whether this was permissibly determined is the central and single question the Court considered in *UAR Group v. EPA*.[15]

Next, the EPA adjusted the emission thresholds that would trigger PSD and Title V permitting requirements for stationary source GHGs through its Tailoring Rule, noting that the 100/250 tons per year CO_2-equivalent thresholds for non-GHG emissions would, if applied to GHGs, cause an absurdly large increase in the number of stationary sources subject to permitting requirements.[16] To limit the burden on industry and regulatory agencies, the EPA raised the thresholds to 75,000/100,000 tons per year CO_2-equivalent.[17]

The D.C. Circuit Decision in *Coalition for Responsible Regulation*

In 2012, various states and industry groups (collectively, Petitioners) challenged the EPA's Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule, as well

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10 *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

11 Clean Air Act, Title I, Part C, 42 U.S.C. § 7475 (2014).

12 Clean Air Act, Title V, 42 U.S.C. § 7661a (2014).

13 *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

14 *Id.*

15 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).

16 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,535-36 (June 3, 2010).

17 *Id.* at 31,516.

as the EPA interpretations of the CAA regarding PSD regulation of GHGs.[18] The D.C. Circuit found that the Endangerment Finding and the Tailpipe Rule were neither arbitrary nor capricious, as alleged by Petitioners.[19] Further, the court dismissed all challenges to the Timing and Tailoring Rules because Petitioners "failed to establish that the Timing and Tailoring Rules caused them 'injury in fact,' much less injury that could be redressed by the Rules' vacatur."[20] Significantly, the court upheld the EPA's interpretation that the CAA compels PSD regulation of GHGs from stationary sources,[21] emphasizing that the Supreme Court previously determined the term "any air pollutant" unambiguously includes GHGs.[22] The court also noted that the PSD program requires the use of "control technology for 'each pollutant' regulated under the CAA."[23] Finally the court concluded that Congress's PSD Declaration of Purpose expressly states that "the PSD program was meant, in part, to protect against adverse effects on 'weather' and 'climate,'—precisely the types of harm caused by greenhouse gases."[24]

The Supreme Court's Grant of Limited Certiorari

Several cases involving this issue, among others, were appealed to the Supreme Court, with petitioners seeking to overturn the D.C. Circuit's decision in *Coalition for Responsible Regulation*.[25] The Court granted limited certiorari.[26] Furthermore, the Court focused on the single issue of the EPA's interpretation that the CAA statutorily compels PSD regulation of GHGs from stationary sources.[27]

Petitioners in the consolidated case claimed that: (1) the D.C. Circuit erred in finding that regulation of stationary source GHG emissions under PSD and Title V is statutorily required by *Chevron* "step one;" (2) the D.C. Circuit and the EPA failed to examine whether certain statutory components of the PSD program were contradicted, nullified, or otherwise contravened by application to GHGs; and (3) that the D.C. Circuit and the EPA failed to examine whether alternative mechanisms exist for regulating stationary-source GHG emissions under the CAA.[28]

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18 Coalition for Responsible Regulation v. U.S. Envtl. Prot. Agency, 684 F.3d 102, 113 (D.C. Cir. 2012), cert. granted in part, 134 S. Ct. 418 (2013).

19 *Id.*

20 *Id.* at 148.

21 *Id.* at 135-36.

22 *Id.* at 136 (citing Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 529 (2007)).

23 *Id.* (citing 42 U.S.C. § 7475(a)(4)).

24 *Id.*; 42 U.S.C. § 7470(1).

25 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 134 S. Ct. 418 (2013).

26 *Id.*

27 *Id.*

28 *See, e.g.*, Petition for Writ of Certiori, Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. Envtl. Prot. Agency, No. 12-1254, pet. cert. granted, 134 S.Ct. 418 (April 17, 2013), 2013 U.S. S.Ct. Briefs LEXIS 2009, *1-3.

THE DECISION

In determining whether it was permissible to regulate GHGs from stationary sources under PSD and Title V, the Court addressed two distinct challenges: (1) whether the EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit GHGs, and (2) whether the EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants may be required to limit its GHG emissions by employing the "best available control technology" (BACT) for GHGs.[29]

On the first challenge, the Court held that the CAA neither compelled nor permitted the EPA to adopt an interpretation of the act that required a source to obtain a PSD or Title V permit solely on the basis of its potential emissions of GHGs.[30] Although *Massachusetts v. EPA* held that the definition of "air pollutant" in the CAA includes GHGs, the EPA has routinely given the "air pollutant" a narrower reading that is context-related in practice.[31] The Court reasoned that this practice recognizes that the definition of "air pollutant" in the CAA is merely a description of the entire universe of substances the EPA may consider regulating under the CAA's operative provisions, which includes Title V and PSD permitting.[32]

Furthermore, in resolving statutory ambiguities, the agency must "operate within the bounds of reasonable interpretation" even in the world of extensive *Chevron* deference to agencies.[33] Yet, the EPA has admitted time and again that requiring PSD and Title V permits for GHGs would be inconsistent with the CAA's structure and design if applied beyond more than a handful of large sources capable of complying with such regulations.[34] Any other interpretation would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[35] As such, the EPA lacked the "enforcement discretion," much less the authority, to "tailor" the explicit thresholds established by the CAA to accommodate a GHG-inclusive interpretation of permit thresholds.[36]

On the second challenge, the Court held that the EPA reasonably interpreted the CAA to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for GHGs. PSD permits require a source to comply with BACT for "each pollutant subject to regulation under [the CAA]."[37] First, in addressing petitioner's concerns that the EPA's interpretation unreasonably targeted energy efficiency measures through BACT, the Court reasoned that BACT analysis for

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29 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 389 (citing Arlington v. FCC, 569 U.S. __, __; 133 S.Ct. 1863, 185 L.Ed. 2d 941, 951 (2013)).
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* (citing Clean Air Act, 42 U.S.C. § 7475(a)(4)).

permitting purposes must consider options other than energy efficiency.[38] Likewise, BACT must only be considered to the extent of the *proposed facility*; BACT cannot be used to initiate a fundamental redesign.[39] Moreover, the EPA has a standing interpretation that BACT is required only for pollutants that the source actually emits.[40]

Second, the Court held that the EPA's decision to require BACT for GHGs emitted by sources that are otherwise subject to PSD review is generally permissible under *Chevron*.[41] The Court concluded that the exact language of the BACT provision is unambiguous and requires BACT "for each pollutant subject to regulation under this chapter."[42] Furthermore, the Court held that, even if the text of the BACT provision were not clear, applying BACT to GHGs would be nothing more than "moderately increasing the demands EPA . . . can make of entities already subject to litigation."[43]

Collectively, in answering these two challenges, the Court held that the EPA did, in fact, exceed its authority when it interpreted the CAA to require PSD and Title V permitting for stationary sources based solely on their emissions of GHGs.[44] As such, the EPA "may not treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' . . . in the PSD context or a 'major source' in the Title V context."[45] However, the EPA may consider GHGs in the BACT analysis for sources otherwise requiring PSD and Title V permitting.[46]

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38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*

Recent Developments

Air Quality

Removal of Port Arthur from the Air Pollutant Watch List

Introduction: The Air Pollutant Watch List

Port Arthur, Texas is a model of success for the Texas Commission on Environmental Quality's (TCEQ) efforts to reduce harmful air emissions in Texas through the Air Pollutant Watch List (APWL). TCEQ created the APWL to target emissions reductions in locations with a relatively high concentration of harmful air pollutants.[1] In an effort to protect the public, TCEQ uses the APWL to determine how to allocate its resources to best achieve the reduction of emissions that pose a serious risk of adverse health and environmental effects.[2] To determine whether a specific location should be placed on the APWL, TCEQ looks to monitoring data collected each year on the concentration of toxics in the ambient air for a given region.[3] TCEQ contrasts this monitoring data with air monitoring comparison values (AMCVs) established by TCEQ's Toxicology Division. AMCVs are conservative levels set far below the point at which adverse health effects likely would occur.[4] If TCEQ determines that the concentration of a given toxic exceeds the safe AMCV, the location will be added to the APWL until concentrations are lowered to levels below the AMCV.[5]

Why Was Port Arthur Placed on the APWL?

Port Arthur has six monitoring stations that take measurements of the toxic contaminant benzene in the ambient air.[6] Benzene is an industrial chemical originating from crude oil that is commonly used to manufacture certain prescription drugs, lubricants, and adhesives.[7] Benzene is also an integral component of gasoline.[8] Due to its composi-

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1 Tex. Health & Safety Code Ann. §382.0161 (West 2011).

2 Tex. Comm'n on Envtl. Quality, *Protocol for Notification and Work Group Functions for Evaluating Potential and Active Air Pollutant Watch List (APWL) Areas*, 4 (Feb. 2012), *available at* http://www.tceq.state.tx.us/assets/public/implementation/tox/apwl/protocol2012.pdf.

3 *Id.* at 13.

4 *Id.*

5 *Id.* at 14-18; *see also* Tex. Health & Safety Code Ann. § 382.0161(a)(2).

6 Tex. Comm'n on Envtl. Quality, Air Permits Div., *Air Pollutant Watch List (APWL) Proposed Change: Removal of Port Arthur from the APWL (Currently Listed for the Air Toxic Benzene)*, 7 (Aug. 2013), *available at* http://www.tceq.com/assets/public/implementation/tox/apwl/PABackgroundDocument.pdf.

7 Joseph T. Haney, Jr., Tex. Comm'n on Envtl. Quality, *Benzene CAS Registry Number 71-43-2*, 3 (Oct. 2007), *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/dsd/final/benzene_71-43-2_final_10-15-07.pdf.

8 *Id.*

tion, benzene readily evaporates into the air, and TCEQ considers it to be a human carcinogen.[9]

Port Arthur's APWL area includes "the geographical area north of Sabine Lake (on the Texas-Louisiana border), south of the Highway 73 Frontage Road, east of the J.D. Wildlife Management Are, and west of Savannah Avenue, extended to Sabine Lake."[10] Aside from the several industrial complexes located inside the APWL area, there are also some residences and heavily used roadways located either inside or in close proximity to the APWL region.[11]

Port Arthur was added to the APWL in 2001 due to the high levels of benzene measured at its City Service Center monitor, a canister sampler located northwest of the designated APWL region.[12] Canister samplers typically collect data for twenty-four hours every six or twelve days.[13] TCEQ takes the average of this data each year and compares it to the area's long-term AMCV, the level at which an individual could safely be exposed to benzene over his or her lifetime without suffering adverse health effects.[14] When TCEQ began monitoring for benzene at the City Service Center in 1997, the long-term AMCV for benzene was 1.0 parts per billion by volume (ppbv).[15] TCEQ Toxicology Division raised this value to 1.4 ppbv in 2007.[16]

TCEQ's decision to add Port Arthur to the APWL in 2001 was based on measured benzene levels at the City Service Center that consistently either equaled or exceeded the long-term AMCV of 1.0 ppbv between 1997 and 2001.[17] Although the long-term AMCV for benzene was raised to 1.4 ppbv in 2007, the fact that benzene levels consistently exceeded both the old and the new AMCVs from 1997 through 2001 (with 1998 concentrations equaling the new AMCV) evidences the magnitude of the problem.[18]

The Port Arthur City Service Center monitor did not see significant improvement in the years following Port Arthur's placement on the APWL.[19] Although the benzene concentrations at the City Service Center did experience a small decline from 2002 to 2005, benzene levels still continued to exceed the then-current AMCV of 1.0 ppbv.[20]

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9 *Id.* at 3-4.

10 TEX. COMM'N ON ENVTL. QUALITY, AIR PERMITS DIV., *supra* note 6, at 2-3.

11 *Id.* at 2.

12 *Id.* at 7.

13 *Id.*

14 TEX. COMM'N ON ENVTL. QUALITY, *supra* note 2, at 4.

15 TEX. COMM'N ON ENVTL. QUALITY, AIR PERMITS DIV., *supra* note 6, at 10.

16 Haney, TEX. COMM'N ON ENVTL. QUALITY, *supra* note 7, at 1.

17 TEX. COMM'N ON ENVTL. QUALITY, AIR PERMITS DIV., *supra* note 6, at 9.

18 *Id.*

19 *Id.*

20 *Id.*; *see also* Interoffice Memorandum from Darrell D. McCant, Toxicology Section, Tex. Comm'n on Envtl. Quality, to Georgie Volz, Dir., Stuart Mueller, Air Sect. Mngr., and TCEQ Region 10 – Beaumont, 2 (Sept. 24, 2004), *available at* https://www.tceq.texas.gov/toxicology/regmemo/2003/Reg10.html/at_download/file; Interoffice Memorandum from Darrell D. McCant, Toxicology Section, Tex. Comm'n on Envtl. Quality, to Georgie Volz, Dir., Stuart Mueller, Air Sect. Mngr., and TCEQ Region 10 – Beaumont, 4 (Dec. 22, 2005), *available at* https://www.tceq.texas.gov/toxicology/regmemo/2004/Reg10.html/at_download/file; Interoffice Memorandum from Darrell D. McCant, Toxicology Section, Tex. Comm'n on Envtl. Quality, to Georgie Volz, Dir., Stuart Mueller, Air Sect. Mngr.,

While the 2006 and 2007 benzene levels dropped below the AMCV, 2008 saw an all-time high spike in the concentration of benzene to 1.9 ppbv.[21] However, TCEQ performed a wind-directional analysis of the benzene data collected at the City Service Center and noted that concentrations tended to be higher when the wind was blowing from the southeast.[22] Since there were several industrial complexes to the southeast with significant benzene emissions, TCEQ determined that the higher benzene levels at the monitor were likely the result of emissions from those sources.[23]

Grounds for Removal: Improvements Leading to the Reduction of Benzene

Beginning in 2009, benzene levels at the City Service Center dropped below 1.4 ppbv.[24] They remained below the AMCV through 2012.[25] Average concentrations of benzene experienced a major decline to .08 ppbv in 2009 and dropped to an all-time recorded low of .05 ppbv in 2012.[26] This success was attributed in large part to the efforts of the industrial complexes located southeast of the monitor to reduce emissions of benzene.[27] For example, Flint Hills owns and operates a chemical plant that is the

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Heather Ross, Air Sect. Mngr., TCEQ Region 10 – Beaumont, and David Bower, Area Dir., 2 (Nov. 10, 2006), *available at* https://www.tceq.texas.gov/toxicology/regmemo/2005/Reg10.html/at_download/file.

21 Tex. Comm'n on Envtl. Quality, Air Permits Div., *supra* note 6, at 9; *see also* Interoffice Memorandum from Darrell D. McCant, Toxicology Section, Tex. Comm'n on Envtl. Quality, to Georgie Volz, Dir., 2 (July 27, 2007), *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/2006/reg_10_beaumont.pdf; Interoffice Memorandum from Vincent A. Leopold, Toxicology Section, Tex. Comm'n on Envtl. Quality, to Georgie Volz, Reg'l Dir., R10 Beaumont, 3 (Aug. 25, 2008), *available at* http://www.tceq.state.tx.us/assets/public/implementation/tox/monitoring/evaluation/2007/reg_10_beaumont.pdf; Interoffice Memorandum from Carla Kinslow, Toxicology Div., Tex. Comm'n on Envtl. Quality, to Heather Ross, Reg'l Dir., 3 (Dec. 17, 2009) *available at* http://www.tceq.state.tx.us/assets/public/implementation/tox/monitoring/evaluation/2008/reg_10_beaumont.pdf.

22 Tex. Comm'n on Envtl. Quality, Air Permits Div., *supra* note 6, at 10.

23 *Id.*

24 Interoffice Memorandum from Carla Kinslow, Toxicology Div., Tex. Comm'n on Envtl. Quality, to Heather Feldman, Reg'l Dir., 3 (Mar. 4, 2011) *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/2009/reg_10_beaumont.pdf.

25 Interoffice Memorandum from Carla Kinslow, Toxicology Div., Tex. Comm'n on Envtl. Quality, to Heather Feldman, Reg'l Dir., Region 10 Beaumont, 3 (June 21, 2011) *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/2010/reg_10_beaumont.pdf; Interoffice Memorandum from Ross Jones, Toxicology Div., Tex. Comm'n on Envtl. Quality, to Heather Feldman, Reg'l Dir., Region 10 Beaumont, 3 (Oct. 9, 2012) *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/2011/reg_10_beaumont.pdf; Interoffice Memorandum from Ross Jones, Toxicology Div., Tex. Comm'n on Envtl. Quality, to Heather Feldman, Reg'l Dir., Region 10 Beaumont, 3 (June 24, 2013) *available at* https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/2012/reg_10_beaumont.pdf.

26 Kinslow, *supra* note 24, at 3; Jones, *supra* note 25, at 3.

27 Tex. Comm'n on Envtl. Quality, Air Permits Div., *supra* note 6, at 11.

closest source of benzene emissions to the City Service Center monitor.[28] In 2008, a TCEQ investigation determined that a spill at the plant had largely contributed to benzene emissions exceeding the AMCV for that year.[29] Since the spill, Flint Hills has taken several steps to aid in the reduction of benzene emissions.[30] First, Flint Hills established strategies to better operate and assess the fence-line monitors installed at the plant by its previous owner.[31] Second, Flint Hills initiated enhanced leak detection and repair techniques to reduce "fugitive" emissions from valves, flanges, seals, and other components. Finally, it improved wastewater management and other industrial practices in order to reduce emissions from the plant.[32]

Similarly, two refineries in Port Arthur, Premcor and Motiva, also took steps to reduce benzene emissions.[33] Both refineries entered into a consent decree with the U.S. Environmental Protection Agency (EPA) to take part in its Petroleum Refinery Initiative, a program aimed at reducing emissions from refineries nationwide.[34] Through their respective consent decrees, both companies agreed to implement at their Port Arthur refineries better industrial practices, such as leak detection and repair, more efficient wastewater management to reduce the amount of benzene released, and improved emission controls monitoring.[35] In addition, in compliance with a TCEQ order, Motiva agreed to pay for the installation and maintenance of Port Arthur's Memorial School monitor.[36] Furthermore, Premcor made an agreement with the EPA to participate in extra environmental projects in support of the Port Arthur community.[37]

Chevron also made substantial efforts to reduce benzene emissions at both of its Port Arthur locations.[38] Chevron stopped producing benzene in 2003, ceased operation of its UDEX system and, in doing so, completely phased out the benzene sources associated with the system by 2005.[39] Chevron also replaced the UDEX system's cyclohexane unit with a new unit and reduced the storage of benzene along with loading ships and barges.[40] Chevron also sold its cumene unit and tanks to INEOS in 2005.[41]

Due to the success of these efforts and the TCEQ's projection that benzene levels are expected to remain below the AMCV in the future, the TCEQ proposed to remove Port Arthur from the APWL in August 2013.[42] Following a public comment period from August 28th to October 11th, 2013 and a public meeting held on October 8th to collect

28 *Id.* at 12.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 13-15.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 15.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.* at 18.

additional comments, the TCEQ finalized its removal of Port Arthur from the APWL this May.[43]

Conclusion

Due to the combined efforts of several industrial complexes located near Port Arthur's City Service Center monitor, the level of ambient benzene recorded at that monitor dropped below the AMCV for benzene in 2009.[44] In response to this success, and with the expectation that benzene levels will remain below the AMCV, the TCEQ decided to end the city's twelve-year stint on the APWL in May of this year.[45] The success in Port Arthur serves as a significant model for how the cooperation of toxic-producing businesses can yield lasting, positive results.

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Natural Resources

More Autonomy in Fracking to Encourage Water Conservation

In April 2013, the Texas Railroad Commission (RRC) adopted new recycling rules aimed at encouraging water conservation by oil and gas operators.[1] Before the proposed and adopted amendments, the existing rules only provided for two categories of commercial recycling facilities: mobile facilities and stationary facilities.[2] As operators began recycling more and more, the RRC received an increasing number of applications for permits, and the need for facilities that fit neither category became apparent.[3] In response, the RRC created a third category: a semi-mobile commercial recycling facility.[4] Other changes and amendments to the rules relate to adopting the semi-mobile commercial recycling facility, as well as clarifying and updating requirements for water recycling.

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43 *Id.*; *see also* News Release, Tex. Comm'n on Envtl. Quality, *TCEQ Removes Lynchburg Ferry and Port Arthur from Air Pollutant Watch List* (May 27, 2014), *available at* https://www.tceq.texas.gov/news/releases/tceq-removes-lynchburg-ferry-and-port-arthur-from-air-pollutant-watch-list.

44 Tex. Comm'n on Envtl. Quality, Air Permits Div., *supra* note 6, at 10; *see also* Kinslow, *supra* note 24, at 3.

45 Tex. Comm'n on Envtl. Quality, Air Permits Div., *supra* note 6, at 18.

1 38 Tex. Reg. 2318 (2013) (codified as an amendment to 16 Tex. Admin. Code § 3.8).

2 *Id.*

3 *Id.*

4 *Id.*

The RRC hopes these new rules will make it easier for Texas operators to continue their efforts in conserving water used in the hydraulic fracturing process for oil and gas wells.[5]

The RRC acknowledges that the rules were enacted despite the fact that less than one percent of statewide water use is employed in hydraulic fracturing and total mining.[6] In fact, the three top water consumers user categories statewide are irrigation, municipalities, and manufacturing.[7] Although use of water in hydraulic fracturing appears relatively minimal at this point in time, the RRC's push to actively encourage water recycling through these new rules may indicate an anticipation of increasing use of hydraulic fracturing and recycling fluid from those types of operations in the future.

CLARIFICATION OF PERMIT REQUIREMENTS

The new rules more clearly define the existing recycling permit application requirements and reflect the current standard field conditions for recycling permits.[8] Significantly, the RRC noted that a permit is not required for an operator to conduct recycling of produced water on its own lease.[9] Further, the rules have made it generally easier to get a permit for water recycling and even eliminated the need for an RRC-granted permit in some cases.[10] They also clarify that treated fluids reused in the wellbore of an oil, gas, geothermal, or service well are authorized by the RRC "and no further individual permit is needed."[11] This should encourage more self-sufficient recycling of fluids by operators and potentially reduce the need to transfer the fluid off-site to be recycled or disposed of.[12]

Nonetheless, when operators do choose to transport their fluid off-site, the RRC has maintained its strict level of regulation of transportation vehicles.[13] The RRC also included requirements that vehicles used to haul non-solid oil and gas waste be designed to transport such wastes.[14] These particular changes implement RRC's own policy "based on this history and the importance of proper containment of oil and gas waste during transportation."[15] Although the RRC has loosened the reins for operators by not requiring permits for some water recycling, it still requires permits for other recycling methods besides those listed in the new, tiered approach.

Further, the new rules amend the definition of "recycle" to mean "[t]o process and/or use or re-use oil and gas wastes as a product for which there is a legitimate commercial use and the actual use of the recyclable product."[16] The rules also establish five catego-

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5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 2319.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at 2321.
15 *Id.*
16 *Id.* at 2320.

ries of commercial recycling permits that more accurately reflect current industry practices in the field: (1) On-lease Commercial Solid Oil and Gas Waste Recycling, (2) Off-lease or Centralized Commercial Soil Oil and Gas Water Recycling, (3) Stationary Commercial Solid Oil and Gas Waste Recycling, (4), Off-lease Commercial Recycling of Fluid, and (5) Stationary Commercial Recycling of Fluid.[17] By reflecting current industry practices in the field, it appears that the RRC is clarifying previous confusion and making the permit categories more accessible to those who engage in hydraulic fracturing.

RRC's Priorities & Concerns with Water Recycling

The RRC appears to be actively encouraging operators to use technology to reduce fresh water use.[18] In keeping with this aim of efficiency, the RRC has clarified that an operator that recycles its own waste would be classified as "non-commercial fluid recycling" and no additional authority is necessary to haul oil and gas wastes for non-commercial recycling.[19] Furthermore, there is no additional authority required for non-commercial fluid recycling whether an operator is recycling on- or off-lease so long as uses and storage of produced water or flowback fluid are non-commercial.[20]

Commentary in the proposal drafts highlighted the significance of these changes from the RCC's and stakeholders' perspectives. The Joint Commenters, which include Environmental Texas, Earthworks, Public Citizen, and Sustainable Energy and Economic Development Coalition recommended that the RRC mandate recycling of produced water or hydraulic fracturing fluid, but the RRC ultimately declined to make this change in the adopted amendments.[21] It emphasized that, by adopting the new rules, it has effectively provided a regulatory framework in which "recycling is a viable alternative to disposal."[22] This is consistent with the RRC's recognition that hydraulic fracturing takes up less than one percent of all water use in the state.[23] The RRC appears to be advocating for the gradual adoption of recycling and does not view eliminating disposal in favor of recycling as a viable option at this time.

Drinking water standards were also a concern during the comment period. TPWD commented that the treatment levels to protect humans are not necessarily the same as those needed to protect terrestrial or aquatic habitat and it may be necessary to consider additional provisions beyond drinking water standards.[24] The RRC agreed and clarified that "if the treatment of the fluids results in distilled water, the [RRC] authorizes any reuse other than discharge to waters of the state" and noted its adoption of a tiered approach to the reuse of recycled fluids.[25]

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17 *Id.* at 2321.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*at 2318.
24 *Id.* at 2319.
25 *Id.*

Further, changes in the proposed and adopted rules shed light on the RRC's ultimate goal of encouraging water conservation. One change from the proposed to adopted rules is that the RRC also chose to use the more inclusive term "fluids" as it relates to recycling instead of the narrower proposed term "produced water and/or hydraulic fracturing flowback fluid."[26] Incorporating the broader term of "fluids" in the recycling context enables operators more freedom and flexibility in their recycling operations and reflects the new rules' overall goal of encouraging more water recycling. Additionally, under the proposed rules, non-commercial on-lease produced water and/or hydraulic fracturing flowback fluid recycling was permissible without a permit if the fluids were either: (1) recycled for use as hydraulic fracturing fluid or other oilfield fluid to be used in the wellbore of an oil, has, geothermal or service well; or (2) treated to national drinking water standards under the federal Safe Drinking Water Act.[27] The RRC revised these provisions and adopted a "tiered approach" to reuse of treated fluids instead because the federal drinking water standards alone do not "fully address all the potential risks from treated fluids."[28] Under the new, tiered approach, no other permit is required from the RRC if: (1) treated fluid is recycled for use as makeup water for a hydraulic fracturing fluid treatment or another type of oilfield fluid; (2) treated fluid is reused in any manner other than discharge to waters of the state and another state or federal agency has permitted such reuse; or (3) treatment of the fluid results in distilled water.[29]

CONCLUSION

While it remains to be seen what effects will result from the amendments and additions to Section 3.8, the RRC ultimately hopes to "continue in its efforts to deal proactively with the challenges arising from evolving oil and gas technology and practices" going forward.[30] Adopting these new rules is a good step toward reusing water in hydraulic fracturing and protecting fresh water in Texas.

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26 *Id.* at 2319-20.
27 37 Tex. Reg. 7555 (2012) (to be codified at 16 TEX. ADMIN. CODE § 3.8) (proposed Sept. 28, 2012) (Railroad Comm'n of Tex.).
28 38 Tex. Reg. at 2319.
29 16 TEX. ADMIN. CODE § 3.8.
30 *Id.*

PUBLICATIONS

JONATHAN H. ADLER, *CONSERVATIVE PRINCIPLES FOR ENVIRONMENTAL REFORM*, 23 DUKE ENVTL. L. & POL'Y F. 253 (2013)

In *Conservative Principles for Environmental Reform*, Jonathan H. Adler offers some theoretical underpinnings for a solution to the problems of U.S. environmental policy.[1] Adler describes an ineffective system of environmental regulation that has been in place since the passage of the Clean Air Act, U.S.C. §7401 *et seq*. (1970), and the Clean Water Act, 33 U.S.C. §1251 *et seq*. (1972), and largely unimproved by subsequent legislative action.[2] He proposes five principles of environmental reform that could form the basis of a conservative alternative to the "conventional environmental paradigm": (1) Do No Harm; (2) Green through Growth; (3) Promote and Protect Private Property; (4) Make the Polluter Pay; and (5) Decentralize Decision-Making.[3]

Adler has written on the history and problems of the environmental regulatory system for over ten years with a conservative perspective.[4] For Adler, "conservative" is defined to include both libertarian and traditionalist views.[5] In this article, he targets members of the political right, whose current attitudes he describes as "moderate 'me-too'-ism" and "reflexive opposition."[6] Moderate "me-too"-ism is Adler's phrase for the behavior of those conservatives who uncritically support environmental regulation but ask for the price tag to be reduced.[7] "Reflexive opposition" is Adler's phrase for the

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1 Jonathan H. Adler, *Conservative Principles for Environmental Reform* 23 DUKE ENVTL. L. & POL'Y F. 253, 253-80 (2013).

2 *Id*. at 253-54.

3 *Id*. at 266-79.

4 *See generally Is the Common Law a Free-Market Solution to Pollution?*, 24 CRITICAL REV. 61 (2012), *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011), *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 B.C. L. Rev. 301 (2008), *Reforming Our Wasteful Hazardous Waste Policies*, 17 N.Y.U. ENVTL. L. J. 724 (2008), *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007), *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L. J. 130 (2005), *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93 (2004), *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. J. 89 (2002), *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J. L. & PUB. POL'Y 653 (2001), *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001), *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999).

5 Adler, *supra* note 1 at 254, n.9.

6 *Id*. at 255.

7 *See id*.

reactionary behavior of other conservatives who fiercely oppose environmental regulation and sometimes deny environmental problems.[8]

According to Adler, neither moderate "me-too"-ism nor reflexive opposition are satisfactory conservative responses to environmental policymaking. Adler criticizes the former as too compromising and the latter as too dogmatic.[9] Moreover, both of these camps within the political right accept prescriptive regulation as the "necessary response" to environmental problems even as they resist its implementation and implications.[10] To challenge this premise, Adler re-examines the familiar logic of the tragedy of the commons and reveals the failings of current environmental regulation.

CHALLENGING THE DOMINANT ENVIRONMENTAL PARADIGM

Adler criticizes the solution of "mutual coercion, mutually agreed upon" from Garrett Hardin's seminal essay on the use of natural resources and champions the alternative solution of greater reliance on property rights.[11] Federal environmental laws and regulations tend to replace the environmental costs of human activity with the public costs of special interests.[12] He argues that property-based management regimes deserve more consideration because of their efficiency.[13]

Even when government intervention is needed, Adler advocates for local and state regulation over federal regimes. Adler argues that federal environmental regulation is supported by a "false narrative" of state and local inadequacies in the face of environmental problems.[14] Using the popular account of the 1969 Cuyahoga River fire as an example, Adler gives an alternative account in which the fire was "far smaller and less significant" than publicized.[15] Adler contends that the Cuyahoga and other known environmental problems were already improving before the federal government stepped in.[16]

Adler provides other examples of effective state and local action against environmental problems, including pre-Clean Water Act declines in waterborne organic wastes and bacteria, pre-Clean Air Act declines in airborne sulfur dioxide, and non-federal wetland protection programs.[17] However, Adler admits that state, local, and private entities are more effective at improving the "most obvious" and "understandable" environmental problems than they are at addressing "emerging or less understood problems."[18] His aim is to challenge the notion that federal intervention is always necessary for effective and good environmental protection.[19]

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8 *See id.* at 256-58.
9 *See id.* at 255-58.
10 *Id.* at 258.
11 *See id.* at 259-63.
12 *See id.* at 261-62.
13 *Id.* at 263.
14 *Id.*
15 *Id.* at 265.
16 *Id.*
17 *See id.* at 265-66 (citing others).
18 *Id.* at 266.
19 *See id.*

Principles of Environmental Reform

Adler presents five principles to guide conservative environmental regulatory policy: (1) Do No Harm; (2) Green through Growth; (3) Promote and Protect Private Property; (4) Make the Polluter Pay; and (5) Decentralize Decision-Making.[20]

"Do No Harm" emphasizes that, all things being equal, environmental policies should not cause additional environmental problems. Adler claims that "[n]umerous government policies and programs cause, subsidize, or encourage the very environmental harms that environmental programs are designed to address."[21] His evidence includes destruction of forested wetlands by federal flood control projects, environmental degradation facilitated by federal agricultural subsidies, poor stewardship of federal lands, and renewable fuel standards that actually encourage air pollution.[22]

"Green through Growth" urges conservatives to align economic interest with environmental concern. Market competition and economic growth can stimulate advancements in technology and resource use that benefit the environment.[23] Adler notes that societal wealth is positively correlated with public demand for environmental quality and funding for environmental protection.[24]

"Promote and Protect Private Property" reflects conservative values that were present in the early American conservation movement.[25] Adler gives examples of early conservationists using private property rights to protect natural resources and undeveloped lands.[26] As for the potential of modern property-based environmental protection, Adler presents the success of "catch-shares" in preventing fishery collapse.[27]

Adler has one caveat to this particular pillar of his platform—property rights must be secure in order for owners to be good stewards of their land and natural resources.[28] When property rights are threatened by the demands of environmental protection, owners will secure the incidents of ownership over promoting environmental quality.[29] For example, owners with land inhabited by endangered or threatened species are restricted in their use of private property by the Endangered Species Act.[30] Therefore, owners are deterred from managing their lands to benefit such species and have decreased the number of habitats for endangered species on private land.[31] If not for such regulation forcing owners to choose between the use of their lands and their commitments to environmental stewardship, protection of private property leads to protection of the environment.[32]

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20 *Id.* at 266-79.
21 *Id.* at 266.
22 *Id.* at 267-69 (citing others).
23 *See id.* at 270.
24 *See id.* at 269, n.82 (collecting sources).
25 *Id.* at 271.
26 *Id.*
27 *See id.* at 273-74 (citing studies).
28 *Id.* at 274.
29 *Id.*
30 *See id.* at 274-75.
31 *Id.*
32 *Id.*

"Make the Polluter Pay" stems from a traditional emphasis on personal responsibility.[33] This principle arises in the context of common-law nuisance.[34] When a small number of sources are responsible for a disproportionate share of pollution, a regulatory scheme of "[b]road drift-net-style regulatory edicts" is neither efficient nor equitable.[35] For a problem like climate change, the polluter-pays principle should support a tax on carbon that would be fully rebated to taxpayers on a per capita basis.[36] Adler argues that a carbon tax would incentivize lower carbon emissions while being less vulnerable to "special-interest manipulation and capture" than cap-and-trade programs.[37] At the same time, a full rebate to taxpayers would ensure polluters pay their fellow citizens instead of the government.[38]

"Decentralize Decision-Making" takes into account physical realities and institutional competencies. First, most environmental problems are local or regional; however, it is the federal government that sets most environmental policies.[39] Second, localities should be able to determine their environmental policies according to their local values and particular environmental conditions.[40] Third, giving states control over their environmental decisions allows for experimentation and adoption of innovative best practices from other states.[41] Fourth, decentralizing environmental policy allows the federal government to focus on its areas of strength—supporting scientific research and handling interstate spillovers—while allowing local and state governments to use local knowledge on local environmental problems.[42]

Adler concludes this essay by lamenting the lack of care for the environment by contemporary conservatives.[43] He urges conservatives to recognize the compatibility of environmental protection and conservative principles lest the political right have no say in the making of environmental policy.[44]

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33 *Id.* at 275.
34 *See id.* at 276.
35 *See id.* at 275-76.
36 *Id.* at 277.
37 *Id.* at 277-78.
38 *See id.* at 277.
39 *See id.* at 278.
40 *Id.* at 278-79 (citing Henry N. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 27 (1996)).
41 *See id.* at 279 n.133 (collecting sources).
42 *Id.* at 280.
43 *Id.*
44 *Id.*

WATER RIGHTS

EDWARDS AQUIFER AUTHORITY V. BRAGG: GROUNDWATER TAKINGS IN TEXAS

Since the Texas Supreme Court recognized that landowners own the groundwater in place beneath their property, it opened the way for Texas landowners to seek compensation for regulatory takings.[1] In the recent case, *Edwards Aquifer Authority v. Bragg,* the San Antonio Court of Appeals took the next step in recognizing regulatory takings of groundwater when it held that the Edwards Aquifer Authority's (EAA) issuance of a limited groundwater use permit and denial of another permit constituted a regulatory taking of the Braggs' property.[2]

BACKGROUND

The Braggs own two properties located over the Edwards Aquifer.[3] On one property, the "Home Place," is a commercial pecan orchard, and an Edwards Aquifer well connected to an irrigation system.[4] The other property, "the D'Hanis Orchard," was acquired years later and also used as a commercial pecan orchard.[5] At first, the D'Hanis Orchard was sustained by shallow local wells, but in 1995, the water source became inadequate and the Braggs drilled an Edwards Aquifer well to supply irrigation.[6]

The Edwards Aquifer Authority Act ("Act") was enacted in 1993, giving the EAA the authority to regulate use of the Edwards Aquifer.[7] Part of the Act's regulatory scheme

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1 Edwards Aquifer Authority v. Day & McDaniel, 369 S.W.3d 814 (Tex. 2012).

2 No. 04-11-00018-CV, 2013 WL 5989430 (Tex. App.—San Antonio Nov. 13, 2013, pet. filed).

3 *Id.* at *1.

4 *Id.*

5 *Id.*

6 *Id.*

7 Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–.62 and 6.01–.05, 2001 Tex. Gen. Laws 1991, 2021–2022, 2075–2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S ., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen. Laws 4612, 4627–4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901–5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "the Act"]. §§ 1.11, 1.14. Citations are to the Act's current sections, without separate references to amending enact-

included a permitting system for aquifer withdrawals.[8] The permit system gives preferential treatment to "existing users," those who withdrew and used Edwards Aquifer water on or before June 1, 1993.[9] Existing users are allowed to apply for a permit under the Act by filing a declaration of their Aquifer use before 1993, and permits for Aquifer withdrawal are based on this accounting of their historical use.[10]

The Braggs found that this permitting system did not accurately account for the groundwater needs of their commercial pecan orchards.[11] For the Home Place, the Braggs claimed 228.85 acre-feet/year of water and noted that this amount supplied house use as well as the commercial pecan orchard and that "historical use should not be applicable because trees require more water each year as they reach maturity."[12] For the D'Hanis Orchard, they claimed 193.12 acre-feet/year of water, despite having no historical use prior to 1993.[13] As a result of their past groundwater use, the EAA granted the Home Place permit for 120.2 acre-feet/year of Edwards Aquifer water and denied the D'Hanis Orchard permit.[14] Subsequently, the Braggs sued the EAA for a regulatory taking of their property without compensation.[15]

THE HOLDING OF THE COURT OF APPEALS

In considering whether the limitations on groundwater use put in place by the Act are restrictive enough to amount to a taking, the Court of Appeals based its decision on the standards articulated by the U.S. Supreme Court in *Penn Central*: the economic impact on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action.[16] Finding that those factors indicated that the Act had affected a regulatory taking of the Braggs' property, the court remanded the case to determine appropriate compensation.[17]

ECONOMIC IMPACT

In its economic impact analysis, the Court of Appeals agreed with the trial court's finding that the "highest and best use" of both the Home Place and the D'Hanis Orchard was for pecan orchards and that the cost of converting the orchards to farmland would

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ments. The Act remains uncodified, but an unofficial compilation can be found on the EAA's website, at http://www.edwardsaquifer.org/files/EAAact.pdf.

8 *Id.* § 1.15.

9 *Id.* § 1.03(10).

10 *See id.* § 1.16(a).

11 *Bragg*, 2013 WL 5989430, at *3.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at *16 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

17 *Id.* at *21.

be prohibitively expensive.[18] Additionally, the court found that, if the Braggs maintained the orchards under the regulation, they would be forced to buy or lease what they already had before the regulation—unrestricted right to use the water under their land.[19]

The court considered that, in the time since the limited permit for Home Place was granted and the permit for D'Hanis was denied, the Braggs reduced the number of pecan trees by between 30 and 50 percent and reduced watering of remaining trees, resulting in smaller pecans and a smaller overall crop.[20] Without purchasing or leasing water under the permitting system, the Braggs were unable to produce any commercially viable crop.[21] Despite constituting only a 10% increase in irrigation expenses, the court found that economic impact was more than just an "incidental diminution in value" and concluded that this *Penn Central* factor heavily favored finding a compensable taking of the Braggs' property.[22]

Investment-Backed Expectations

The second *Penn Central* factor looks at the investment-backed expectations of the claimant and considers the reasonableness of those expectations.[23] As for the Home Place Orchard, the court recognized that the Braggs purchased that property with the intention of living there and using the land for a commercial pecan orchard, relying on the property's location over the Edwards Aquifer for unlimited groundwater, and invested much time, money, and energy into the orchard.[24] The Braggs knew the trees would require more water as they grew, and they planned accordingly by ensuring that the Home Place's Edwards Aquifer well could supply as much as needed to irrigate the mature trees.[25] The court found that the Braggs had similar expectations for the D'Hanis Orchard property. The availability of Edwards Aquifer water for irrigation was an important consideration in their purchase of that property, and Mr. Bragg stated that they "would not have purchased the property if they had known they would not be able to drill and use an Edwards Aquifer well."[26] The court pointed out that, though the Braggs had no expectation that a regulatory scheme limiting their use of the groundwater beneath either of their properties would never exist, the lack of any regulations at the time of their purchases of the properties reasonably influenced their expectation that they would have unrestricted access to the Edwards Aquifer groundwater for use in irrigation.[27]

In determining the reasonableness of the Braggs' investment-backed expectations, the court looked at the expertise of Mr. Bragg and his experience with pecan crops and

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18 *Id.* at *17.
19 *Id.* at *18.
20 *Id.*
21 *Id.*
22 *Id.*
23 *See Penn Central*, 438 U.S. at 124.
24 *Bragg*, 2013 WL 5989430, at *19.
25 *Id.*
26 *Id.* at *20.
27 *Id.*

water rights.[28] Concerning the Home Place property, the court found that, because "Mr. Bragg had an extensive understanding of pecan crops, no permit was required when [the Braggs] drilled their well, [the Braggs] correctly understood that they owned the water under the land, and no regulatory entity existed that governed the use of their water," the Braggs' investment-backed expectations were reasonable.[29] As for the D'Hanis Orchard, the court noted that, when the Braggs purchased the orchard, they intended to drill a well in the future, and although the Act was enacted before they completed drilling the D'Hanis well, the property was an existing pecan orchard when purchased, so the land was already committed to that purpose 10 years before the enactment of the Act.[30] Because of these circumstances, the court found the Braggs' investment-backed expectations as to the D'Hanis Orchard to be reasonable as well.[31] The court's findings that the Braggs' investment-backed expectations as to both properties were reasonable weighed heavily in favor of compensable takings.[32]

Character of Governmental Action

The court began its analysis by noting that the third *Penn Central* factor, the character of the governmental action, looks less to the factual circumstances of the claimant and more to the purpose and necessity of the regulation.[33] Quoting the Act and precedent, the court held in a relatively brief discussion that "given the importance of "protect[ing] terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state," this factor weighs heavily against a finding of a compensable taking.[34]

Other Considerations

The court further noted that, when courts apply the *Penn Central* factors, they "are to consider 'surrounding circumstances' and other 'relevant circumstances,' but little light is cast on what these circumstances may be."[35] In this case, the court found it appropriate to consider the nature of the Braggs' business outside of financial considerations.[36] Because the nature of the Braggs' business is agriculture, which is heavily depen-

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28 *See id.* at *20-21.
29 *Id.* at *20.
30 *Id.* at *21.
31 *Id.*
32 *Id.*
33 *Id.* (citing Edwards Aquifer Authority v. Day & McDaniel, 369 S.W.3d 814, 840 (Tex. 2012)).
34 *Id.* (quoting City of Houston v. Trail Enters., Inc., 377 S.W.3d 873, 880 (Tex.App.—Houston [14th Dist.] Aug. 9, 2012, pet. denied)).
35 *Id.* at *22.
36 *Id.*

dent on water for irrigation, the court weighed this consideration in favor of a compensable taking.[37]

Conclusion

Though the protective purpose of the Act was important, it did not outweigh the findings of the other *Penn Central* factors and the agricultural nature of the Braggs' business. Because the *Penn Central* considerations of the economic impact and investment-backed expectations of the claimant both weighed heavily in favor of finding that Act's restrictions on the Braggs' groundwater use was a taking, the court held that the permitting system imposed under the Act resulted in a compensable regulatory taking of both the Home Place Orchard and the D'Hanis Orchard.[38] In determining appropriate compensation, the court held that just compensation is to be decided "by reference to the highest and best use of the property" and found that the property taken was the Braggs' unlimited use of Edwards Aquifer water for irrigation.[39] The court directed that compensation be valued "with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the Act were implemented or applied to the Home Place Orchard in 2005 and to the D'Hanis Orchard in 2004."[40] Accordingly, the court remanded the case for the trial court to calculate compensation owed.[41]

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Washington Update

Supreme Court Grants Limited Certiorari to Cases Challenging the EPA Rules for Stationary Source Greenhouse Gas Emissions

The U.S. Supreme Court recently decided several cases, on a consolidated basis, involving the U.S. Environmental Protection Agency (EPA) regulation of greenhouse

37 *Id.*
38 *Id.* at *22.
39 *Id.* at *28.
40 *Id.* at *29.
41 *Id.*

gases (GHGs) emitted from stationary sources such as chemical plants and other industrial facilities.[1] The Court limited its consideration to a single question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."[2] The Court ruled that it did not.[3]

HISTORICAL CONTEXT

The historical context of this case extends back to *Massachusetts v. EPA*, when the Supreme Court held that GHGs may be regulated as an "air pollutant" under the Clean Air Act (CAA).[4] The Court held that because the CAA requires the EPA to establish motor-vehicle emission standards for "any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare," the EPA has a statutory obligation to regulate GHGs.[5] The Court thus instructed the EPA to study available scientific evidence to determine "whether sufficient information exists to make an endangerment finding" for GHGs.[6] Subsequently, the EPA arrived at an Endangerment Finding.[7] In the Finding, the EPA defined GHGs as a single "air pollutant" made up of an "aggregate group" of six well-mixed GHGs.[8] Further, it found that motor-vehicle emissions of these gases "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare."[9] The EPA, in conjunction with the National Highway Traffic Safety Administration, then published the Tailpipe Rule, which set GHG emission standards and corporate average fuel economy standards for cars and light trucks.[10]

EPA'S TIMING RULE, REGULATION OF STATIONARY SOURCE GHGS, AND TAILORING RULE

Various non-GHG air pollutants from stationary sources were already regulated under the CAA through Title I, Part C, Prevention of Significant Deterioration of Air

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1 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 134 S. Ct. 418 (2013).
2 *Id.*
3 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).
4 549 U.S. 497, 500 (2007).
5 *Id.* at 534.
6 *Id.*
7 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).
8 *Id.* at 66,536-37.
9 *Id.* at 66,499.
10 *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

Quality (PSD), which required construction permits,[11] and through Title V, which required operating permits.[12] However, once regulations for motor vehicle GHGs were announced in the Tailpipe Rule, the EPA was faced with finding a rationale for regulating GHGs from stationary sources.

The EPA addressed this issue in its Timing Rule, where it relied on its long-standing interpretation that an air pollutant that is regulated under any part of the CAA should also be subject to the CAA PSD and Title V permitting requirements.[13] In short, the EPA determined that the Tailpipe Rule triggered PSD and Title V regulation of GHGs from stationary sources.[14] Whether this was permissibly determined is the central and single question the Court considered in *UAR Group v. EPA*.[15]

Next, the EPA adjusted the emission thresholds that would trigger PSD and Title V permitting requirements for stationary source GHGs through its Tailoring Rule, noting that the 100/250 tons per year CO_2-equivalent thresholds for non-GHG emissions would, if applied to GHGs, cause an absurdly large increase in the number of stationary sources subject to permitting requirements.[16] To limit the burden on industry and regulatory agencies, the EPA raised the thresholds to 75,000/100,000 tons per year CO_2-equivalent.[17]

The D.C. Circuit Decision in *Coalition for Responsible Regulation*

In 2012, various states and industry groups (collectively, Petitioners) challenged the EPA's Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule, as well as the EPA interpretations of the CAA regarding PSD regulation of GHGs.[18] The D.C. Circuit found that the Endangerment Finding and the Tailpipe Rule were neither arbitrary nor capricious, as alleged by Petitioners.[19] Further, the court dismissed all challenges to the Timing and Tailoring Rules because Petitioners "failed to establish that the Timing and Tailoring Rules caused them 'injury in fact,' much less injury that could be redressed by the Rules' vacatur."[20] Significantly, the court upheld the EPA's interpretation that the CAA compels PSD regulation of GHGs from stationary sources,[21] empha-

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11 Clean Air Act, Title I, Part C, 42 U.S.C. § 7475 (2014).
12 Clean Air Act, Title V, 42 U.S.C. § 7661a (2014).
13 *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).
14 *Id.*
15 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).
16 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,535-36 (June 3, 2010).
17 *Id.* at 31,516.
18 Coalition for Responsible Regulation v. U.S. Envtl. Prot. Agency, 684 F.3d 102, 113 (D.C. Cir. 2012), cert. granted in part, 134 S. Ct. 418 (2013).
19 *Id.*
20 *Id.* at 148.
21 *Id.* at 135-36.

sizing that the Supreme Court previously determined the term "any air pollutant" unambiguously includes GHGs.[22] The court also noted that the PSD program requires the use of "control technology for 'each pollutant' regulated under the CAA."[23] Finally the court concluded that Congress's PSD Declaration of Purpose expressly states that "the PSD program was meant, in part, to protect against adverse effects on 'weather' and 'climate,'—precisely the types of harm caused by greenhouse gases."[24]

THE SUPREME COURT'S GRANT OF LIMITED CERTIORARI

Several cases involving this issue, among others, were appealed to the Supreme Court, with petitioners seeking to overturn the D.C. Circuit's decision in *Coalition for Responsible Regulation*.[25] The Court granted limited certiorari.[26] Furthermore, the Court focused on the single issue of the EPA's interpretation that the CAA statutorily compels PSD regulation of GHGs from stationary sources.[27]

Petitioners in the consolidated case claimed that: (1) the D.C. Circuit erred in finding that regulation of stationary source GHG emissions under PSD and Title V is statutorily required by *Chevron* "step one;" (2) the D.C. Circuit and the EPA failed to examine whether certain statutory components of the PSD program were contradicted, nullified, or otherwise contravened by application to GHGs; and (3) that the D.C. Circuit and the EPA failed to examine whether alternative mechanisms exist for regulating stationary-source GHG emissions under the CAA.[28]

THE DECISION

In determining whether it was permissible to regulate GHGs from stationary sources under PSD and Title V, the Court addressed two distinct challenges: (1) whether the EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit GHGs, and (2) whether the EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants may be required to limit its GHG emissions by employing the "best available control technology" (BACT) for GHGs.[29]

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22 *Id.* at 136 (citing Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 529 (2007)).

23 *Id.* (citing 42 U.S.C. § 7475(a)(4)).

24 *Id.*; 42 U.S.C. § 7470(1).

25 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 134 S. Ct. 418 (2013).

26 *Id.*

27 *Id.*

28 *See, e.g.*, Petition for Writ of Certiori, Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. Envtl. Prot. Agency, No. 12-1254, pet. cert. granted, 134 S.Ct. 418 (April 17, 2013), 2013 U.S. S.Ct. Briefs LEXIS 2009, *1-3.

29 Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency, 573 U.S. ___, 189 L.Ed. 2d 372 (2014).

On the first challenge, the Court held that the CAA neither compelled nor permitted the EPA to adopt an interpretation of the act that required a source to obtain a PSD or Title V permit solely on the basis of its potential emissions of GHGs.[30] Although *Massachusetts v. EPA* held that the definition of "air pollutant" in the CAA includes GHGs, the EPA has routinely given the "air pollutant" a narrower reading that is context-related in practice.[31] The Court reasoned that this practice recognizes that the definition of "air pollutant" in the CAA is merely a description of the entire universe of substances the EPA may consider regulating under the CAA's operative provisions, which includes Title V and PSD permitting.[32]

Furthermore, in resolving statutory ambiguities, the agency must "operate within the bounds of reasonable interpretation" even in the world of extensive *Chevron* deference to agencies.[33] Yet, the EPA has admitted time and again that requiring PSD and Title V permits for GHGs would be inconsistent with the CAA's structure and design if applied beyond more than a handful of large sources capable of complying with such regulations.[34] Any other interpretation would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[35] As such, the EPA lacked the "enforcement discretion," much less the authority, to "tailor" the explicit thresholds established by the CAA to accommodate a GHG-inclusive interpretation of permit thresholds.[36]

On the second challenge, the Court held that the EPA reasonably interpreted the CAA to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for GHGs. PSD permits require a source to comply with BACT for "each pollutant subject to regulation under [the CAA]."[37] First, in addressing petitioner's concerns that the EPA's interpretation unreasonably targeted energy efficiency measures through BACT, the Court reasoned that BACT analysis for permitting purposes must consider options other than energy efficiency.[38] Likewise, BACT must only be considered to the extent of the *proposed facility*; BACT cannot be used to initiate a fundamental redesign.[39] Moreover, the EPA has a standing interpretation that BACT is required only for pollutants that the source actually emits.[40]

Second, the Court held that the EPA's decision to require BACT for GHGs emitted by sources that are otherwise subject to PSD review is generally permissible under *Chevron*.[41] The Court concluded that the exact language of the BACT provision is unambiguous and requires BACT "for each pollutant subject to regulation under this chapter."[42]

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30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 389 (citing Arlington v. FCC, 569 U.S. __, __; 133 S.Ct. 1863, 185 L.Ed. 2d 941, 951 (2013)).
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* (citing Clean Air Act, 42 U.S.C. § 7475(a)(4)).
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*

Furthermore, the Court held that, even if the text of the BACT provision were not clear, applying BACT to GHGs would be nothing more than "moderately increasing the demands EPA . . . can make of entities already subject to litigation."[43]

Collectively, in answering these two challenges, the Court held that the EPA did, in fact, exceed its authority when it interpreted the CAA to require PSD and Title V permitting for stationary sources based solely on their emissions of GHGs.[44] As such, the EPA "may not treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' . . . in the PSD context or a 'major source' in the Title V context."[45] However, the EPA may consider GHGs in the BACT analysis for sources otherwise requiring PSD and Title V permitting.[46]

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FEDERAL CASENOTES

DECKER V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER, 133 S. CT. 1326 (2013)

On March 20, 2013, the U.S. Supreme Court held that a group of companies and governmental entities did not violate the Clean Water Act (CWA) because the stormwater flows that were impacted by their activities and then were discharged into waters of the United States were not flows that required a permit under Sections 1311(a) and 1362(12) of the CWA.[1] The Court held that the Defendants' activities were not "industrial activity" under the exemptions from the Silvicultural Rule from the CWA, and, therefore, did not need National Pollutant Discharge Elimination System (NPDES) permits before channeled stormwater from the roads used by the Defendants could be discharged into the navigable waters of the United States.[2] The Justices used the *Auer* deference to determine the intended scope of "industrial activity."[3]

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43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
1 Decker v. Nw. Envtl. Defense Center, 133 S. Ct. 1326, 1328 (2013).
2 *Id.* at 1329.
3 *Id.* at 1329-30 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to an agency's interpretations of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation")).

Case Background and Procedural History

The central issue in *Decker* was whether stormwater that runs off logging roads into ditches, culverts, and channels and then discharges into rivers and streams is considered a by-product of an industrial activity requiring an NPDES permit under Sections 1311(a) and 1362(12) of the CWA.[4] In September 2006, the Northwest Environmental Defense Center (Plaintiff) filed suit under the citizen-suit provision of the CWA and named logging operators, paper-products operators, and state and local governments as defendants (collectively, the Defendants).[5] The Plaintiff's petition claimed that the Defendants' activities were the cause of the discharges that had come from the logging roads and flowed into two Oregon rivers, and because they had not obtained the required NPDES permits for these discharges, the Defendants had violated the CWA.[6] The federal district court dismissed the action for failure to state a claim, determining that NPDES permits were not necessary because ditches, culverts, and channels were not considered "point sources" under the CWA and the Silvicultural Rule.[7] The Court of Appeals for the Ninth Circuit reversed the district court's decision, and subsequently, the Supreme Court granted certiorari.[8]

The CWA and Relevant Changes, Interpretations, and Definitions

Congress voted for the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] The Environmental Protection Agency (EPA) is responsible for administering the CWA.[10] Sections 1311(a) and 1362(12) of the CWA require that "individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States."[11] The CWA describes a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[12] The statute specifies that the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture."[13]

Relevant to this case, the EPA has adopted the Silvicultural Rule, which defines a point source as "any discernible, confined and discrete conveyance related to rock crush-

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4 *Id.* at 1328-29.
5 *Id.*
6 *Id.*
7 *Id.* at 1329; *see also* 40 C.F.R. § 122.27(b)(1) (2014).
8 *Decker*, 133 S. Ct at 1329.
9 *Id.* at 1331 (citing 33 U.S.C. § 1251(a) (2014)).
10 *Id.* at 1330.
11 33 U.S.C. §§ 1311(a), 1362(12); *Decker*, 133 S. Ct at 1331.
12 33 U.S.C. § 1362(14).
13 *Id.*

ing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[14] Therefore, a discharge from a point source under the Silvicultural Rule requires an NPDES permit unless the stormwater flow is exempted by another statute.

Congress exempted most "discharges composed entirely of stormwater" from needing NPDES permits.[15] However, a stormwater discharge "associated with industrial activity" still requires an NPDES permit.[16] Congress did not define what constituted "industrial activity" in the statute itself, but the EPA defined it as:

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant . . . For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.[17]

"The Standard Industrial Classifications are a system used by federal agencies to categorize firms engaged in different types of business activity."[18] Congress' definition of an "industrial activity" in the Standard Industrial Classifications classifies the "logging" industry as "industrial activity."[19]

SUPREME COURT'S OPINION

In the majority opinion, Justice Kennedy determined that the main substantive issue was whether the logging road stormwater discharges were "associated with industrial activity," because if not, then the Defendants were exempt from getting NPDES permits.[20] The statute is ambiguous because it does not give its intended scope of the term "industrial activity."[21]

The Supreme Court found two reasons to defer to the EPA's interpretation of its intended scope of "industrial activity."[22] First, the Court noted that it "is well established that an agency's interpretation need not be the only possible reading of a regulation" to succeed.[23] The Court reconfirmed the *Auer* deference standard by stating that it would defer to an agency's interpretation of their own regulation unless it is "plainly

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14 *Decker*, 133 S. Ct. at 1331 (citing 40 C.F.R. § 122.27(b)(1) (2014)).
15 33 U.S.C. § 1342(p)(1).
16 *Id.* § 1342(p)(2)(B).
17 40 C.F.R. § 122.26(b)(14) (2006).
18 *Decker*, 133 S. Ct. at 1332.
19 *Id.* (citing Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72974 (Dec. 7, 2012) (to be codified at 40 C.F.R. pt. 122)).
20 *Id.* at 1336.
21 *Id.*
22 *Id.* at 1337.
23 *Id.*

erroneous or inconsistent with the regulation."[24] The Court found the EPA's interpretation was reasonable.[25] The Court reasoned that "taken together, the regulation's references to 'facilities,' 'establishments,' 'manufacturing,' 'processing,' and an 'industrial plant' leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities."[26] Second, the Court found no evidence that this is a change from prior practice or a post hoc rationalization built in response to litigation.[27] Therefore, the Defendants were exempt from the permitting scheme.[28]

Looking to the Future

The Court's Opinion in *Decker* will undoubtedly impact future CWA interpretations in Texas. As Chief Justice Roberts said in his concurring opinion, these kinds of cases of agency deference arise on a regular basis.[29] *Decker* reconfirms that the *Auer* deference should apply to all future interpretations of administrative agency regulations. Further, the holding in *Decker* provides that stormwater discharges from logging roads are exempt from NPDES permits even though there is evidence that this kind of discharge has a large amount of sediments that could harm aquatic organisms.[30] This is especially important considering that the mining and logging industry was Texas's fastest growing industry in 2013.[31]

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24 *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997).

25 *Id.* at 1337.

26 *Id.*

27 *Id.*

28 *Id.* at 1338.

29 *Id.* at 1339. The Fifth Circuit has since cited *Decker* for the deference owed agency interpretations. *See Mangwiro v. Johnson*, 554 Fed. Apx 255, 262 (5th Cir Feb. 4, 2014) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." quoting *Decker*, 133 S. Ct. at 1337); and *Elgin Nursing and Rehabilitation Center v. U.S. Dept. of Health and Human Servs.*, 718 F.3d 488, 493 (5th Cir. May 17, 2013) (noting that an agency has "[an] incentive [] to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect.").

30 *Decker*, 133 S. Ct. at 1333, 1338.

31 Susan Combs, 2013 Annual Cash Report, State of Texas Comptroller of Public Accounts 1, 3 (2013), available at http://www.texastransparency.org/State_Finance/Budget_Finance/Reports/Cash_Report/13/texas_annual_cash_report_2013.pdf.

STATE CASENOTES

CITY OF HOUSTON V. BCCA APPEAL GROUP, INC., NO. 01-11-00332-CV, 2013 WL 4680224 (TEX. APP.––HOUSTON [1ST DIST.] AUG. 29, 2013, PET. FILED) (MEM. OP.)

In *City of Houston v. BCCA Appeal Group, Inc.*, the BCCA Appeal Group, Inc. (BCCA) challenged the City of Houston ("City") Ordinance Nos. 2007-208 and 2008-414 (collectively, "Ordinance"), which regulates air emissions, claiming the Ordinance is preempted by state law.[1] BCCA asserted a preemption claim based on the allegation that the Texas Legislature exclusively delegated regulatory authority over the sources in question to the Texas Commission on Environmental Quality (TCEQ).[2] In support of that claim, BCCA relied upon the Texas Clean Air Act (TCAA) and the Texas Water Code.[3] The court held that the Ordinance was not preempted by state law and did not constitute an impermissible delegation of the City's authority.[4]

THE ORDINANCE

A 1992 version of the Ordinance regulated air pollution from facilities not already subject to TCEQ regulation and licensure.[5] The City contracted and cooperated with the TCEQ to ensure sources of emissions located within the City's borders complied with state law.[6] The challenged Ordinance incorporated by reference state statutory requirements and regulations implemented by the TCEQ "as if written word for word in this section including appendices and other matters promulgated as part of the state rules . . . as they are currently written and as they may be changed from time to time."[7] Furthermore, City health officers were empowered to "carry out a regulatory compliance program to determine whether registered facilities are in compliance with all applicable state and federal air pollution control laws and regulations."[8] The Ordinance was further amended in 2008 to provide an affirmative defense to prosecution if an activity was permitted under the TCAA or a permit, rule or order of the TCEQ.[9]

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1 No. 01-11-00332-CV, 2013 WL 4680224, at *1 (Tex. App.––Houston [1st Dist.] Aug. 29, 2013, pet. filed) (mem. op.).
2 *Id.*
3 *Id.*
4 *Id.* at *13-14.
5 *Id.* at *3.
6 *Id.*
7 *Id.* at *4.
8 *Id.*
9 *Id.*

The Court of Appeals' Opinion

BCCA's preemption argument focused on three aspects of the Ordinance: (1) registration, (2) fees and enforcement, and (3) enforcement and incorporation of state law.[10] The court held BCCA failed to show that the Ordinance was preempted in any of these areas.[11] Additionally, the court held that BCCA failed to show that the Ordinance impermissibly delegated authority to the TCEQ.[12]

Registration

First, BCCA argued that, if a facility failed to register with the City pursuant to the Ordinance requirements, the facility's operation would be unlawful even if it was complying with TCEQ's rules and orders.[13] Thus, BCCA argued the entire registration program was preempted.[14] Noting that this reasoning would invalidate any concurrent municipality regulatory scheme or permitting process, the court concluded that the case law did not support such a claim.[15]

Relying on *Unger v. State*, 629 S.W.2d 811, 812-813 (Tex. App.—Fort Worth 1982, writ ref'd), the court reasoned that a municipal ordinance establishing a parallel registration, licensing, or permitting program is not necessarily preempted.[16] BCCA cited pre-*Unger* authority to support the claim that field-preemption is one way for the Legislature to express an intent to preempt local regulation with "unmistakable clarity."[17] *Unger* involved an ordinance paralleling state oil and gas drilling regulations.[18] The court determined that, if the heavily-regulated oil and gas field was not preempted in *Unger*, then the Ordinance here was certainly not preempted with "unmistakable clarity."[19]

Additionally, the court distinguished *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 679 (Tex. 2013), which held that another City ordinance requiring concrete-crushing facility operators to seek a municipal permit for operation within the city was preempted.[20] The court noted that the municipal ordinance in that case imposed more restrictive requirements than those imposed under the TCAA and TCEQ regulations and rules; in this case, the Ordinance only sought to create a concurrent regulatory scheme or permitting process to enforce the state's existing rules and regulations.[21]

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10 *Id.* at *8-12.
11 *Id.*
12 *Id.* at *14.
13 *Id.* at *8.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at *9.
18 629 S.W.2d at 812.
19 City of Houston v. BCCA Appeal Group, Inc., No. 01-11-00332-CV, 2013 WL 4680224, at *9 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, pet. filed) (mem. op.).
20 *Id.*
21 *Id.*

FEES AND ENFORCEMENT

Second, BCCA argued that, because the Ordinance's duplicative registration program was preempted, the fees associated with it were also duplicative and invalid.[22] The court noted that, although the TCAA required TCEQ to collect fees associated with its regulations, the statute did not prohibit municipalities from also charging and collecting fees to fund the program.[23] Furthermore, the home-rule city's authority under its police power to enact ordinances carries a corresponding right to impose fees for funding and implementing such ordinances.[24] If those fees were reasonably associated with the cost of administering the ordinance, they were presumed valid.[25] BCCA presented no arguments to show that the Ordinance's fees were not reasonably associated with the cost of administration.[26]

ENFORCEMENT AND INCORPORATION OF STATE LAW

BCCA pointed to § 21-164(c) of the Ordinance, which prohibited the operation of a facility not in compliance with the incorporated TCEQ rules, claiming that the enforcement of this provision duplicates TCEQ's enforcement of identical provisions.[27] The court observed that state law expressly allows cumulative remedies and does not prohibit cities from enforcing their ordinances in municipal court.[28]

BCCA also claimed the Ordinance impermissibly empowered the City to criminally prosecute cases that would normally have been civil actions requiring TCEQ's joinder as a necessary party.[29] The court also rejected this claim, noting that the TCAA expressly provided that municipalities retain the authority to enact and enforce ordinances to abate and control air pollution.[30] Furthermore, the Texas Water Code's remedies were cumulative of all other remedies and the Texas Water Code did not exempt a person from being subject to other law.[31] Thus, the City was not prohibited by the TCAA or the Texas Water Code from enforcing its own regulations.[32]

IMPERMISSIBLE DELEGATION OF AUTHORITY

BCCA's alternative argument was that the Ordinance's incorporation by reference of "specific rules promulgated by TCEQ and codified in the Administrative Code that

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22 *Id.* at *10.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at *11.
28 *Id.* at *12.
29 *Id.* at *11.
30 *Id.* at *12.
31 *Id.*
32 *Id.*

implement the TWA and TCAA" violated the Texas Constitution's separation of powers provision by delegating to the TCEQ the authority to make unilateral changes to the City's Code of Ordinances without any action from City Council.[33] Looking to *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1997), the court observed that the non-delegation doctrine should be used sparingly and was unwilling to find the doctrine applicable to BCCA's challenge.[34] The court determined that incorporation by reference is permissible as a mechanism to ensure that the Ordinance will remain consistent with state law on an ongoing basis without requiring amendment every time the Administrative Code changes.[35]

Conclusion

The court's decision in *City of Houston* upheld a city ordinance paralleling TCEQ rules, regulations, and orders.[36] The court denied BCCA's claims that the Ordinance's registration requirements, duplicative fees, and state law incorporation by reference were grounds for preemption.[37] This ruling permitted the City to more easily enforce ordinance violations by bringing suit in municipal criminal court instead of having to file a civil suit with the TCEQ joined as a necessary party.[38]

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33 *Id.* at *13 (citing Tex. Const. art II, § 1).
34 *Id.*
35 *Id.* at *13-14.
36 *Id.* at *14.
37 *Id.* at *8-12.
38 *Id.* at *11.