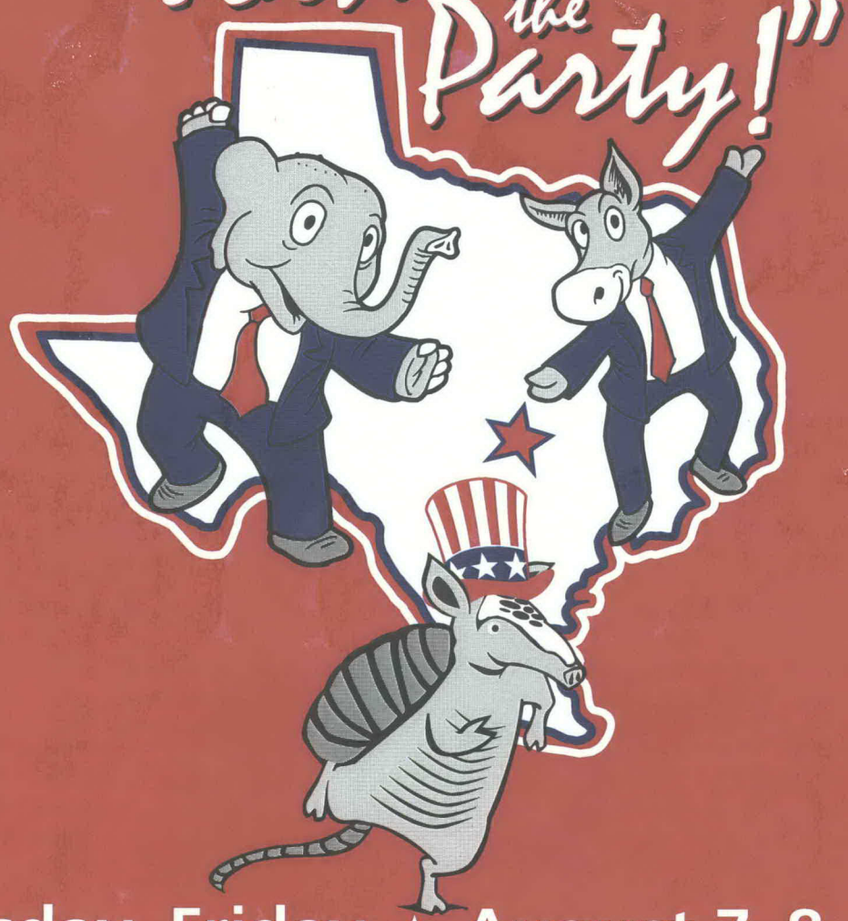
20th Annual

TEXAS ENVIRONMENTAL SUPERCONFERENCE

"Join the Party!"



Thursday–Friday ★ August 7–8, 2008

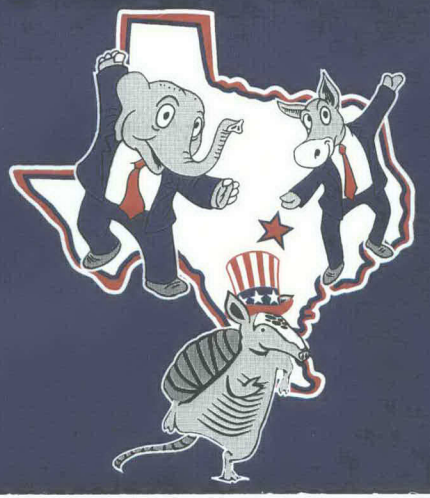
Four Seasons Hotel ★ Austin, Texas

20th Annual

TEXAS ENVIRONMENTAL SUPERCONFERENCE

"Join the Party!"

August 7–8, 2008



The Twentieth Annual Texas Environmental Superconference
"Join the Party"



TO: Attendees

FROM: Planning Committee

DATE: August 7, 2008

On behalf of the Environmental and Natural Resources Law Section of the State Bar of Texas, the Air and Waste Management Association-Southwest Section, the Water Environment Association of Texas, the Texas Association of Environmental Professionals, the Auditing Roundtable, and the American Bar Association Section of Environment, Energy & Resources, welcome to the politically-themed Twentieth Annual Texas Environmental Superconference -- "Join the Party."

As always, there are evaluation forms for the program. We appreciate your taking the time to complete them. The organizers of this program take these forms into account in planning next year's conference. In addition, if you have an interest in having a particular topic presented or in speaking on a particular topic, the evaluation form is the appropriate place to provide that information. Suggestions for themes for next year also are being solicited. Next year's conference is scheduled for August 6-7, 2009. Please mark your calendars.

For the fourth year, we had a Wednesday evening session. Instead of a nuts-and-bolts program, we focused this year on a specific aspect of environmental law -- Brownfields Development. Please let us know what you think about the concept of a Wednesday evening program. Should we do it again? What topics should we cover?

For the first time, we will be placing course materials, both papers and powerpoints, online where they will be accessible to conference registrants for one year following the conference. The website for these materials can be found at www.texenrls.org. We will provide you the user name and passcode.

If you have any questions or comments, please do not hesitate to contact any member of the Planning Committee at the conference, or, thereafter, Jeff Civins at (512) 867-8477 or Jeff.Civins@haynesboone.com.

TWENTIETH ANNUAL
TEXAS ENVIRONMENTAL SUPERCONFERENCE
"Join the Party"
Thursday-Friday, August 7-8, 2008

THURSDAY, AUGUST 7, 2008

8:00 – 8:45 **Registration/Continental Breakfast**
"The stakes are too high for you to stay at home"

8:45 – 9:00 **Opening Remarks –** *"Happy days are here again"*

Jeff Civins, Texas Environmental Superconference
Kerry Halliburton, Environmental and Natural Resources Law Section, State Bar of Texas (SBOT ENRLS)
Joe Hossley, Air & Waste Management Association, Southwest Section
Brad Castleberry, Water Environment Association of Texas
Ed Fiesinger, Texas Association of Environmental Professionals
Michael Byington, Auditing Roundtable
Danny Worrell, ABA Section of Environment, Energy & Resources

* * * *

Moderator: Cindy Bishop, Gardere, Wynne, Sewell LLP

TAB 1 **9:00 – 9:25** **Environmental Case Law Update**
"Are you better off than you were one year ago?"

Brenda Clayton, Kelly Hart & Hallman

TAB 2 **9:25–9:50** **Administrative Case Law Update**
"Things have never been more like the way they are today in history"

Peter Gregg, Beveridge & Diamond

TAB 3 **9:50 – 10:10** **Views of a New Commissioner**
"In your heart you know he's right"

Commissioner Bryan W. Shaw, TCEQ

10:10 – 10:30 Break

[First Skit]

* * * *

Moderator: David Cabe, Zephyr Environmental Corporation

TAB 4 **10:30 – 11:30** **Air Quality Panel – What's up?**
"California here we come"

Carl Edlund, Director, Multimedia Planning & Permitting, EPA Region 6
Booker Harrison, Sr. Air Quality Attorney, TCEQ
Matt Kuryla, Baker Botts

TAB 5 **11:30 – 12:00** **Lobbying Ethics*** – *"The buck stops here"*

Gardner Pate, Locke Lord Bissell & Liddell LLP

[Second Skit]

12:00 – 1:15 **Lunch** – *"Not just peanuts"*

[Turn in Presidential Slogans Quiz]
[Third Skit]

* * * *

Moderator: Janet McQuaid, El Paso Corporation

TAB 6 **1:15 – 1:35** **Providing Water for the Environment**
"Tippecanoe and Tyler too"
Tom Mason, General Manager, Lower Colorado River Authority

TAB 7 **1:35 – 2:25** **Water Quality Panel – Current Issues**
"Don't change horses in the middle of a stream"

Kerrie Qualtrough, Senior Water Quality Attorney, TCEQ
Peggy Glass, Vice President and Principal, Alan Plummer Associates, Inc.
Willie Lane, Chief, NPDES Permits and Technical Section EPA Region 6
Patrick Rankin, Practice Group Leader, Office of Regional Counsel, EPA Region 6

TAB 8 **2:25 – 3:15** **Energy Planning** – *"Don't stop thinking about tomorrow"*
Coal, Nuclear, Biomass, Biodiesel

Moderator: Mike Nasi, Jackson Walker L.L.P.

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* Indicates Ethics Credit.

Chairman Michael Williams, Railroad Commission of Texas

Carl Bauer, Director, National Energy Technology Laboratory

3:15 – 3:35 **Break**

[Announce Presidential Slogan Quiz Winners]
[Fourth Skit]

* * * *

Moderator: Debra Tsuchiyama Baker, Connelly Baker Wotring

TAB 9 **3:35 –4:45** **Climate Change –** *" Change we can believe in"*

Legislation: John Howard, Vinson & Elkins
Marketing: Jennifer Clymer, Austin Energy
Permitting: Eddie Lewis, Fulbright & Jaworski
The Region's Position: Joe Kordzi, Environmental Engineer, EPA Region 6

TAB 10 **4:45 – 5:10** **Municipal Sustainability Initiatives**
"Compassionate Conservatism"

Laura Fiffick, Director, Environmental Quality, City of Dallas

[Pop Quiz]

5:10 – 6:00 **Reception** – *"Cox and Cocktails"*

FRIDAY, AUGUST 8, 2008

8:00 – 8:30 **Continental Breakfast** – *"It's morning in America again"*

8:30 – 8:40 **Opening Remarks –** *"Read my lips"*

[Announce Pop Quiz Winners]
[Fifth Skit]

* * * *

Moderator: Carrick Brooke-Davidson, Guida Slavich & Flores

TAB 11 **8:40 – 9:20** **Solid Waste –** *"Don't let 'em take it away"*

Matt Hale, Director, Office of Solid Waste, EPA DC
Mary Reagan, McGinnis, Lochridge & Kilgore, LLP

TAB 12 **9:20 – 10:10** **Internal Investigations** – *"You ain't seen nothing yet"*

Roberta Lewis, Shell Oil Company
Barry McNeil, Haynes and Boone, LLP

10:10 – 10:30 **Break**

[Sixth Skit]

* * * *

Moderator: Carolyn Ahrens, Booth, Ahrens & Werkenthin

TAB 13 **10:30 – 11:30** **Policy Pairs Point-Counterpoint**[**]
"Truth between candid minds never does harm"

- Endangered Species v. Other Environmental Programs
- Biofuels v. Food
- Wind Energy v. Birds and Bats
- Nuclear v. Carbon-based Power
- Innovation v. Reliability
- Chemical Security v. Confidentiality & Public Information

Tom McGarity, University of Texas School of Law
Victor Flatt, University of Houston School of Law

TAB 14 **11:30 – 12:00** **Federal Enforcement – EPA Headquarters' Perspective***
"Give 'Em Hell, Harry"

Granta Nakayama, Asst. Administrator for Enforcement & Compliance, EPA DC

[turn in Skit Quiz]

12:00 – 1:15 **Lunch** –*"Full-dinner pail"*

[Announce Skit Quiz Winners]

* * * *

Moderator: Lisa Roberts, Valero Energy Corporation

TAB 15 **1:15 – 1:55** **State and Federal Enforcement***
"Speak softly and carry a big stick"

[**] Thanks for preparing resource materials go to Mike Nasi (Biofuels v. Food and Nuclear v. Carbon-based Power) and to Guillermo Wiener, an SMU Law student, for the other topics.

		Stephen Gilrein, Deputy Director, Enforcement & Compliance Assistance, EPA Region 6 Matt Baker, Director, Enforcement Division, TCEQ
TAB 16	**1:55 – 2:50**	**Natural Resource Damages** *"A chicken in every pot"* Legal Issues: Craig Pritzlaff, Andrews & Kurth State Perspective: Richard Seiler, Head of NRD, TCEQ Quantifying Damages: Greg Reub, ENVIRON
TAB 17	**2:50 – 3:30**	**EPA in the Next Administration** *"We stand today on the edge of a New Frontier"* Eric Schaeffer, Environmental Integrity Project Jeff Holmstead, Bracewell & Giuliani
	3:30	**Adjourn** – *"Leave no child behind"* **Ice Cream Sundae Reception** – *"Keep cool with Coolidge"*

[Turn in Comment Cards/Drawing for Prizes at 3:45] ***

*** You must be present to win.

2008 Planning Committee

Jeff Civins, Chair
Haynes and Boone, LLP

Carolyn Ahrens
Booth, Ahrens & Werkenthin

Debra Baker
Connelly Baker Wotring LLP

Carol Batterton
Water Environment Association of Texas

Stephanie Bergeron Perdue
TCEQ

Cindy Bishop
Gardere Wynne Sewell, LLP

Patricia Finn Braddock
Fulbright & Jaworski, LLP

Carrick Brooke-Davidson
Guida Slavich & Flores, PC

David Cabe
Zephyr Environmental Corporation

Mike Gershon
Lloyd Gosselink Rochelle & Townsend, P.C.

Pam Giblin
Baker Botts, LLP

John Howard
Vinson & Elkins

Elizabeth Hurst
Gardere Wynne Sewell LLP

Lynde Jones
EPA Region 6

Janet McQuaid
El Paso Corporation

Arnoldo Medina
Shell Oil Company

Michael Nasi
Jackson Walker LLP

Bane Phillippi
Haynes and Boone, LLP

Lisa Roberts
Valero Energy Corporation

Jeffrey A. Saitas
Saitas and Seales

Cindy Smiley
Kelly Hart & Hallman LLP

Caroline Sweeney
TCEQ

Sarah Walls
Cantey Hanger, LLP

Constance Westfahl
Strasburger & Price

Timothy Wilkins
Bracewell & Giuliani, LLP

Betty Williamson
EPA Region 6

Danny Worrell
Brown McCarroll, LLP

PRACTICE EMPHASIS

Cindy Bishop provides services in a variety of environmental areas including federal and state litigation, regulatory counseling, and due diligence. She has defended clients in lawsuits involving groundwater, soil contamination and vapor intrusion, has negotiated settlements with government agencies regarding enforcement actions and assisted clients in obtaining environmental permits.

Before becoming an attorney, Ms. Bishop worked for seven years as an engineer for a national environmental consulting firm and is a licensed professional engineer in Texas (inactive status). She managed complex environmental projects for industrial clients, including underground storage tank compliance and removal, asbestos inspection and abatement, air permitting, and toxic chemical release inventories.

CLIENT MATTERS

Ms. Bishop has a broad range of litigation experience and has litigated federal CERCLA contribution and cost recovery actions as well as state statutory and common law claims involving property damage and personal injury allegedly caused by contamination. Ms. Bishop has resolved a variety of issues involving leaking underground storage tanks at former service stations located in many states, including Texas, Arkansas, Tennessee, Iowa, Pennsylvania, Arizona, and Massachusetts.

Ms. Bishop's work has included negotiating with the United States Environmental Protection Agency, The Texas Commission on Environmental Quality, and other agencies to reduce penalties assessed against industrial clients. She has assisted clients with obtaining closure approval from regulatory agencies for impacted property, including using municipal setting designations (MSD) to facilitate closure. Ms. Bishop has reviewed environmental conditions and analyzed the viability of claims under environmental insurance policies. She has also reviewed numerous environmental reports and records for properties to determine potential environmental liabilities for lenders and real estate developers, and has defended potentially responsible parties in litigation with state and federal agencies to minimize the clients' liability at contaminated properties.

EDUCATION

J.D., Southern Methodist University Dedman School of Law (1994)
B.S.Ch.E., The Ohio State University (1986)

BRENDA L. CLAYTON
KELLY, HART & HALLMAN, LLP
301 Congress Avenue, Suite 2000
Austin, Texas 78701
(512) 495-6409
brenda.clayton@khh.com

Ms. Clayton's practice centers on environmental and administrative law, oil, gas, and mineral law, and appellate law.

Education:

J.D. with honors, University of Texas Law School, May 1992
B.A. in Economics with honors, University of Texas at Austin, 1980

Current Practice:

Environmental and administrative law. Ms. Clayton's environmental and administrative law practice includes regulatory matters involving waste and water, such as those arising under the Resource Conservation and Recovery Act, the Clean Water Act, the Texas Water Code, the Texas Solid Waste Disposal Act, the Texas Asbestos Health Protection Act, and water rate, water utility, and water district matters. She is also experienced in private environmental litigation under the Comprehensive Environmental Response, Compensation and Liability Act, the Texas Solid Waste Disposal Act, various citizens' suits, and common law tort actions.

Ms. Clayton represents private third parties before the Attorney General in Public Information Act proceedings in which the third party seeks to protect trade secret or other confidential information from disclosure by a governmental entity.

Oil, gas, and mineral law. Ms. Clayton's oil, gas, and mineral law practice includes regulatory matters and litigation arising from the exploration and production of oil, gas, and other minerals.

Appellate law. Ms. Clayton's appellate practice includes both suits for judicial review of agency decisions and appeals from trial court decisions. She served as co-counsel in cases such as *In re Bass*, 113 S.W.3d 735 (Tex. 2003) (orig. proceeding), a mandamus action holding that seismic data may be entitled to trade secret protection, and *Ridge Oil Co. v. Guinn Investment, Inc.*, 148 S.W.3d 143 (Tex. 2004), which held that a partial assignee could release its interest in an oil and gas lease and take another because he owed no duty to another partial assignee to continue to operate the original lease.

Professional Organizations and Activities:

State Bar of Texas
Administrative Law Section Member
Appellate Law Section Member
Oil, Gas and Mineral Law Section Member
Austin Bar Association, Environmental, Natural Resources, and Water Law Section, Member
Austin Bar Association Civil Appellate Section
Chair, 2007-2008
Austin Bar Association Oil, Gas and Mineral Law Section
Chair, 2006-2007

Pro Bono Activities

Ms. Clayton periodically handles appeals from domestic violence cases. She is also the Chair of the Screening Committee for the Third Court of Appeals' Pro Bono Pilot Program.

ENVIRONMENTAL CASE LAW UPDATE

"ARE YOU BETTER OFF THAN YOU WERE ONE YEAR AGO?"

by

Brenda L. Clayton
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Twentieth Annual Texas Environmental Law Superconference
Austin, Texas
August 7-8, 2008

CASE LAW UPDATE

"Are you better off than you were one year ago?"

Brenda L. Clayton
Kelly Hart & Hallman LLP

Texas Environmental Superconference
Austin, Texas
August 7-8, 2008

Table of Contents

Page

I. WASTE 1

A. CERCLA 1

1. *Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255 (3rd Cir. 2008) (post-Aviall, post-Atlantic Research) 1

2. *ITT Industries, Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007) (post-Aviall, post-Atlantic Research) 1

3. *U.S. v. Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir.), petition for cert. filed, 77 U.S.L.W. 3009 (U.S. June 23, 2008) (No. 07-1601) (orphan shares, arranger liability) 2

B. RCRA 3

1. *Consolidated Companies, Inc. v. Union Pacific R.R. Co.*, 499 F.3d 382 (5th Cir. 2007) (standing and definition of "facility" for purposes of RCRA citizens' suit) 3

2. *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007) (meaning of "imminent and substantial" in citizens' suit provision) 5

3. *OSI, Inc. v. U.S.*, 525 F.3d 1294 (11th Cir. 2008) (CERCLA remedial action bars RCRA citizens' suit) 5

4. *K-7 Enterprises, L.P. v. Jester*, No. 4:06-CV-57, 2007 WL 1795694 (E.D. Tex. 2007) (RCRA and the Burford abstention doctrine) 6

C. Texas Solid Waste Disposal Act 7

1. *Celanese Corp. v. Coastal Water Authority*, No. CIV.A. H-06-2265, 2008 WL 2697321 (S.D. Tex. July 2, 2008) (operator and arranger liability under TSWDA) 7

2. *First Edwards, L.P. v. Union Pacific R.R. Co.*, No. CIV.A. H-08-1573, 2008 WL 2674859 (S.D. Tex. July 7, 2008) (attorneys' fees under the UDJA or TSWDA) 9

II. WATER QUALITY 9

A. *Exxon Shipping Co. v. Baker*, No. 07-219, 2008 WL 2511219 (U.S. June 25, 2008) (CWA does not pre-exempt punitive damages) 9

B. *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2nd Cir. 2007), cert. granted in part, 76 U.S.L.W. 3255, 76 U.S.L.W. 3548, 76 U.S.L.W. 3554 (U.S. Apr. 14, 2008) (Nos. 07-588, 07-589 and 07-597) (proper role of costs in determining best technology available under § 316 of the CWA) 10

C. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007), cert. granted, 76 U.S.L.W. 3411, 76 U.S.L.W. 3681 (U.S. June 27, 2008) (Nos. 07-984 and 07-990) (interaction of § 402 and § 404 of the CWA) 12

D. *U.S. v. Lucas*, 516 F.3d 316 (5th Cir. 2008), petition for cert. filed, 76 U.S.L.W. 3655 (U.S. June 2, 2008) (No. 07-1512) (post-Rapanos decision interpreting waters of the United States) 14

E. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007) (post-Rapanos decision interpreting waters of the United States) 16

F. *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007) (post-Rapanos decision interpreting waters of the United States) 17

G. *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008) (attorneys' fees for citizens' suits) 18

H. *American Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008) (definition of navigable waters for SPCC) 18

III. WATER RIGHTS 20

A. *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, No. 06-0904, 2008 WL 2223209 (Tex. May 30, 2008) (transfers of water out of a groundwater district) 20

B. *Canyon Regional Water Auth. v. Guadalupe-Blanco River Auth.*, No. 06-0873, 2008 WL 2069836 (Tex. May 16, 2008) (condemnation of one public use for another public use) 22

C. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 04-06-00782-CV, 2008 WL 508682 (Tex. App.—San Antonio Feb. 27, 2008, no pet.) (ownership of groundwater) 23

D. *Engelman Irrigation Dist. v. Texas Comm'n on Environmental Quality*, 251 S.W.3d 184 (Tex. App.–Austin 2008, no pet.) (irrigation district's ability to declare bankruptcy) 24

E. *City of Dallas v. Hall*, 2008 WL 2622809 (N.D. Tex. June 30, 2008) (challenging the creation of a wildlife refuge at the site of a proposed reservoir) 25

IV. AIR QUALITY 26

A. *North Carolina v. E.P.A.*, No. 05-1244, 2008 WL 2698180 (D.C. Cir. July 11, 2008) (striking down the Clean Air Interstate Rule regulating SO2 and NOx) 26

B. *Pacific Merchant Shipping Ass'n v. Goldstene,* 517 F.3d 1108 (9th Cir. 2008) (CAA preemption) 27

C. *New Jersey v. E.P.A.*, 517 F.3d 574 (D.C. Cir. 2008) (delisting a Hazardous Air Pollutant). 28

D. *Environmental Defense, Inc. v. E.P.A.*, 509 F.3d 553 (D.C. Cir. 2007)(rules regulating "hot spot" analyses) 28

E. *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007) (environmental impact statement for impact of CO2 under the Energy Policy and Conservation Act) 29

F. *Sierra Club v. U.S. E.P.A.*, 499 F.3d 653 (7th Cir. 2007) (best available control technology and the 8-hour standard) 30

G. *Blue Skies Alliance v. Texas Comm'n on Environmental Quality*, 265 Fed.Appx. 203 (5th Cir. 2008) (attorneys' fees in citizens' suit) 30

H. *U.S. v. Citgo Petroleum Corp.*, No. C-06-563 (criminal prosecution of refinery for violating the CAA) 31

V. Natural Resources Development: Oil and Gas, Mining 31

A. *Strata Resources v. State*, No. 03-06-00393-CV, 2008 WL 2736904 (Tex. App.—Austin July 11, 2008, no pet. h.) (penalties for plugging wells under the Texas Natural Resources Code) 31

B. *Valence Operating Co. v. Texas Genco, LP*, No. 10-06-00252-CV, 2008 WL 553220 (Tex. App.—Waco Feb. 27, 2008, no pet.) (not yet released for publication) (drilling gas well in the footprint of a landfill) 32

C. *Texas Citizens for a Safe Future and Clean Water v. Railroad Comm'n of Texas*, 254 S.W.3d 492 (Tex. App.–Austin 2007, no pet. h.) ("public interest" standard under § 27.051 of the Texas Water Code) 33

VI. PROTECTING ANIMAL SPECIES 36

A. *Natural Resources Defense Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir. 2008), cert. granted, 76 U.S.L.W. 3539, 76 U.S.L.W. 3666, 76 U.S.L.W. 3672 (U.S. June 23, 2008) (No. 07-1239) (must the Navy complete an EIS before conducting training activities involving sonar) 36

B. *Aquifer Guardians in Urban Areas v. U.S. Fish and Wildlife Service*, 2008 WL 972661 (W.D.Tex. 2008) (timing of ESA and APA challenge). 39

CASE LAW UPDATE
"Are you better off than you were one year ago?"

Brenda L. Clayton
Kelly Hart & Hallman LLP

I sought to make this paper fairly inclusive but do not claim it is exhaustive. The cases that I selected are cases I believe are important, based on my practice and interest. I also included most Texas and Fifth Circuit cases, presuming that they are at least interesting, if not important, because they are local. And, while some of the cases had numerous holdings, I focused only on the holdings that seemed most relevant. Finally, I am indebted to Bob Stewart and Monica Jacobs for their comments on this paper, particularly with regard to air quality and water rights, respectively.

I. WASTE

A. CERCLA

1. *Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255 (3rd Cir. 2008) (post-*Aviall*, post-*Atlantic Research*)

This case involved a CERCLA contribution claim under § 9613(f)(1), which provides that "any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) . . . ***during or following any civil action under section 9606 . . . or 9607(a)***." The court held that the requirement that a § 9613(f)(1) plaintiff must have been sued under § 9606 or § 9607(a) before filing suit is an element of the claim rather than a jurisdictional prerequisite. Therefore, a court has jurisdiction over a petition that does not allege that the plaintiff had been subject to a § 9606 or 9607 action. More importantly – because it is not a jurisdictional prerequisite – a defendant **waives** the plaintiff's failure to allege the predicate action if it does not timely object. In this case, the Third Circuit held that the defendant had waived that statutory requirement because it did not raise the objection during its second appeal of a denial of its motion for summary judgment.

2. *ITT Industries, Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007) (post-*Aviall*, post-*Atlantic Research*)

This case involved a CERCLA § 9607 cost recovery claim and a CERCLA § 9613(f)(3)(B) contribution claim. The issue was whether an administrative order by consent ("AOC") was a basis for a contribution action under § 9613(f)(3)(B) of CERCLA, which provides that a person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such an action "in an administrative or judicially approved settlement" can seek contribution from any person.

The Sixth Circuit first looked at the language of the particular AOC, and, based on that language, held that the plaintiff had not resolved **any** of its liability to the United States. The court reached that conclusion on two grounds. First, in the AOC, EPA had expressly reserved its right to bring a legal action to adjudicate the plaintiff's liability for failure to comply with the AOC, for costs of response, for costs of injunctive relief or enforcement, criminal liability, and other matters. Second, the plaintiff had not conceded the question of liability as part of its settlement with the EPA. The court held that in view of those reservations, it was clear that the AOC did not resolve the question of the plaintiff's liability with respect to contamination at the site.

The court also held more broadly that an AOC is simply not an "administrative or judicially approved settlement" under § 9613(f)(3)(B). The court considered language in the Supreme Court's decision in *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004) that directed the court to read the phrase "administrative or judicially approved settlement" together with § 9613(g), which establishes limitations applicable to contribution actions. Those limitation periods start only after the dates of settlement under CERCLA §§ 9622(g) and 9622(h), which are de minimus and cost recovery settlements, respectively.

3. ***U.S. v. Burlington Northern & Santa Fe Ry. Co.***, 520 F.3d 918 (9th Cir.), *petition for cert. filed*, 77 U.S.L.W. 3009 (U.S. June 23, 2008) (No. 07-1601) (orphan shares, arranger liability)

A now-defunct company, Brown & Bryant, Inc. ("B & B"), owned and operated a facility at which toxic chemicals were stored and distributed. Two railroad companies (the "Railroads") owned part of the land on which the chemical operation was located, and Shell Oil Company ("Shell") supplied and delivered some of the chemicals B & B used. EPA and the State of California's Department of Toxic Substances Control ("DTSC") had spent a considerable amount of money to clean up the site, and faced the possibility of spending more in the future. The two agencies sought to recover these response costs from the Railroads and Shell under CERCLA. The district court held the Railroads and Shell liable for only a minor portion of the total cleanup costs – the Railroads for 9%, and Shell for 6%. The agencies (and ultimately the taxpayers) were left responsible for roughly 85% of the remediation cost because B & B was defunct.

Apportionment. EPA and DTSC appealed the district court's conclusion that the Railroads and Shell were liable for only a small portion of the remediation costs. The Ninth Circuit, following decisions handed down by other courts of appeals, including the Fifth Circuit's decision in *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 897 (5th Cir. 1993), held that apportionment was available at the liability stage of a CERCLA action, if the defendant can prove any reasonable basis for apportionment.

Apportionment as to the Railroads. However, the Ninth Circuit held that the Railroads failed to prove any reasonable basis for apportioning liability. The district court had relied on the percentage of land area, length of time of ownership, and types of hazardous products, to apportion liability. But there was no evidence, the court said, indicating what part of the contaminants at B&B's property was attributable to the presence of toxic substances, or to activities, on the Railroad parcel. The percentage of land ownership was an inappropriate measure when all activities did not occur on all portions of the facility. The period of ownership

was an inappropriate measure because the fraction assumed constant leakage on the facility for each time period, and no evidence suggested that to be the case. And the district court was simply wrong to assign a simple ⅔ percentage to apportion the Railroads liability – i.e., finding that 2 of 3 chemicals were on the Railroads' property – when there was evidence that all 3 were on the Railroads' property.

Apportionment as to Shell. Further, although the Ninth Circuit believed that Shell's harm was capable of apportionment, evidence concerning leakage of chemicals was insufficient for that purpose because Shell had produced only evidence of leakage. The relevant inquiry, the Court held, was contamination, not leakage. Generally, where multiple contaminants have been disposed of, courts require a showing of the relationship between waste volume, the release of hazardous substances, and the harm at the site. Alternatively, volumetric calculation of contaminating chemicals – those remaining in the environment – could be sufficiently specific for apportionment. But Shell failed to prove whether its leaked chemicals contaminated the soil in any specific proportion as compared to other chemicals spilled at the site.

The Ninth Circuit held that apportionment was not appropriate because neither the Railroads nor Shell had proven a basis for apportionment. As a result, the Railroads and Shell, rather than paying only 9% and 6%, respectively, were jointly and severally liable for 100% of the cost.

Arranger liability. Shell cross-appealed the district court's determination that it should bear any CERCLA liability because it was an "arranger." Shell sold a soil fumigant called D-D to B & B. Shell had encouraged its customers, including B & B, to purchase D-D in bulk, a practice requiring large storage tanks. The contents of the trucks carrying D-D were transferred to the tanks by hoses. The process was messy, with frequent spills. The Ninth Circuit held that Shell had sufficient ownership and control over, and knowledge of, the transfer process to be liable as an "arranger" under CERCLA. Although Shell had sold B & B a useful product, leakage of some of that product was both inherent in, and contemporaneous with, the transfer process arranged by Shell. Shell arranged for its subcontractors to deliver the substances to the site, and was aware of, and to some degree dictated, the transfer arrangements. Accordingly, the Ninth Circuit upheld the trial court's determination that Shell was a person who "arranged for" the disposal of a hazardous substance because disposal was a necessary part of the sale and delivery process.

B. RCRA

1. *Consolidated Companies, Inc. v. Union Pacific R.R. Co.*, 499 F.3d 382 (5th Cir. 2007) (standing and definition of "facility" for purposes of RCRA citizens' suit)

Consolidated Companies, Inc. ("Conco") purchased property from Southern Pacific, the predecessor-in-interest of Union Pacific. The property, along with several other contiguous parcels of property, composed Southern Pacific's railroad yard. Southern Pacific had conducted railroad activities on the site for approximately thirty years, ceasing in the mid-1960s.

When contamination was discovered, Conco sought monetary damages and a mandatory injunction directing Union Pacific to clean up the contamination. Initially, Conco asked only that Union Pacific remediate its tract; Conco later amended its complaint to request relief over the entire site of the former railway yard.

Union Pacific challenged Conco's standing to require Union Pacific to remediate all the tracts, including those Conco did not own. The Fifth Circuit held that Conco had demonstrated an injury-in-fact sufficient for constitutional standing. Conco had shown that the contaminants were present in the soil throughout the entire former railroad site, and that the contaminants on the tracts Conco did not own may have already migrated to the Conco tract, or may do so in the future. Additionally, Conco's employees drank the water from the City of Lafayette's water supply, the Chicot aquifer, which lay beneath the land surface at issue. There was at least a possibility that pollutants on the property had contaminated the aquifer.

Union Pacific also argued that the district court erred in holding that the entire former railroad site was a single "facility" for purposes of Conco's RCRA claims. The Fifth Circuit noted that the term "facility" is not specifically defined in the definition section of RCRA. However, the court said, the term "facility" is defined in § 6991b(h)(6)(D), the RCRA section that addresses claims relating to underground storage tanks:

> For purposes of this paragraph, the term 'facility' means, with respect to any owner or operator, all underground storage tanks used for the storage of petroleum which are owned or operated by such owner or operator and located on a single parcel of property (*or on any contiguous or adjacent property*).

42 U.S.C. § 6991b(h)(6)(D) (emphasis added).

The Fifth Circuit did not discuss the initial words to the definition, "For purposes of this paragraph . . . ." Instead, the court cited to cases holding that identical words used in different parts of the same act are intended to have the same meaning. The court considered the definition of facility in § 6991b(h)(6)(D) particularly instructive because the contexts in which the words were used are "quite similar:" in § 6991b(h)(6)(D) "facility" is defined in relation to property upon which underground storage tanks are present, and in this case, facility would mean the property upon which above ground storage tanks were located.

The court also noted that CERCLA § 9601(a) defines the term "facility" as:

> any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

Because of that, the Fifth Circuit stated, it had defined an entire neighborhood – rather than the property owned by individual residents – as a facility in *Tanglewood East Homeowners v. Charles Thomas, Inc.*, 849 F.2d 1568, 1572-74 (5th Cir. 1988).

Finally, the Fifth Circuit looked at the legislative purpose behind RCRA's citizens' suit provisions. The citizens' suit provisions, the court said, had been promulgated to given citizens the power to enforce RCRA provisions in order to speed compliance with environmental laws and put pressure upon a government that was unable or unwilling to enforce such laws itself.

Requiring each owner of each property to bring suit to effectuate the remediation of one large, discrete pollution source would slow, rather than speed, compliance with environmental laws. It also defied common sense to require piecemeal rather than comprehensive remediation. Ultimately, the Fifth Circuit concluded that the district court correctly determined that the term "facility" could encompass the entire former railroad site.

2. ***Burlington Northern and Santa Fe Ry. Co. v. Grant***, 505 F.3d 1013 (10th Cir. 2007) (meaning of "imminent and substantial" in citizens' suit provision)

Burlington Northern and Santa Fe Railway ("BNSF") brought suit against a neighboring landowner, Grant, claiming that tar-like material ("TLM") had moved onto its property from Grant's for decades. BNSF brought several causes of action, including a RCRA citizen suit under § 6972(a)(1)(B), alleging that the TLM's migration presented an "imminent and substantial endangerment to health or to the environment."

The trial court granted the defendant's summary judgment on the ground that BNSF had not proven an imminent and substantial endangerment. The trial court held that BNSF had not proven that harm was imminent because BNSF failed to establish that the TLM had injured any person, or that any study showed that the TLM threatened to "immediately" cause harm to a person or the environment. Further, the trial court noted, neither the Oklahoma Department of Environmental Quality ("ODEQ") nor the EPA had ever ordered the TLM removed. And finally, BNSF had monitored the migration of the TLM onto its property for years without acting.

The Tenth Circuit reversed. The court of appeals held that, in determining whether harm was "imminent," it was irrelevant when the TLM was deposited on the property and "equally irrelevant" how long BNSF had monitored the TLM before acting. Further, the district court erred by considering only harm to persons, rather than also considering harm to the environment. Also, a finding of "imminent" endangerment does not require a showing that the actual harm will occur immediately, as long as the risk of threatened harm exists. Finally, the court of appeals held that administrative action on the part of the ODEQ or the EPA is not a prerequisite to a citizen suit – in fact, such a suit would bar the citizens' suit.

3. ***OSI, Inc. v. U.S.*** 525 F.3d 1294 (11th Cir. 2008) (CERCLA remedial action bars RCRA citizens' suit)

OSI, Inc. brought a § 6972(a)(1)(B) suit alleging that an "imminent and substantial endangerment" existed on property it owned, and that the Air Force had leased for use as a landfill in the 1960s and early 1970s. At the time OSI brought suit, the Air Force, which had been investigating the contamination, had released its final Summary of Remedy Selection.

The Eleventh Circuit held that the Air Force's ongoing remedial activity on private land that had been leased to Air Force and used by it as a landfill had been "selected under" § 9604, the CERCLA section conferring general response authority upon the President. As a result, § 9613(h), CERCLA's jurisdictional bar against "challenges" to such remediation, precluded the landowner's RCRA suit seeking an injunction requiring removal of all contaminants from the

site. The court rejected the argument that the Air Force's actions were undertaken pursuant to § 9620, a CERCLA section governing "federal facilities" – and that is not subject to the jurisdictional bar – since § 9620 concerns only government actions related to National Priorities List ("NPL") facilities.

4. ***K-7 Enterprises, L.P. v. Jester***, No. 4:06-CV-57, 2007 WL 1795694 (E.D. Tex. 2007) (RCRA and the Burford abstention doctrine)

The *Burford* abstention doctrine bars federal judicial interference with complex state regulatory schemes where "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy in respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The doctrine was first announced in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

K-7 Enterprises involved a property owner, K-7 Enterprises ("K-7"), who brought suit to require a neighboring landowner to remediate contamination that had migrated to K-7's property from leaking underground storage tanks located on the neighboring property. The *K-7* Court used the factors from the Fifth Circuit's decision in *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993), to determine whether *Burford* abstention was appropriate:

(1) *Whether the claims arise under federal or state law.* The district court noted that the case was brought pursuant to RCRA. The district court further noted that Texas had a delegated RCRA program. Regardless, the district court found that the RCRA claim was not "entangled in an area of state law that must be untangled before this federal case can proceed." Further, the district court stated, federal courts have exclusive jurisdiction over RCRA citizen suits. In sum, the district court held that this factor weighed against abstention.

(2) *Whether the case requires inquiry into unsettled issues of state law.* The district court noted that the plaintiff had not asked the court to evaluate or interfere with the TCEQ's actions but simply asked the court to order the defendants to commence and complete all necessary removal and remediation actions to restore their property. That factor weighed against abstention.

(3) *The importance of the state interest involved.* The district court found that water was a matter of great state concern, so that factor weighed in favor of abstention.

(4) *The state's need for a coherent policy.* The district court noted that in *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), the United States Supreme Court had held that when the plaintiff did not bring a lawsuit challenging the state scheme or challenging the order entered by a state agency, this factor weighs against *Burford* abstention. The district court noted that the request that the defendant implement a corrective action plan did not affect overall state policy and did not challenge the existing state policy, so held that this factor weighed against abstention.

(5) *The presence of a special state forum for judicial review.* The district court noted that the federal courts have exclusive original jurisdiction over RCRA citizen suits, so that factor weighed against abstention.

The district court finally held that, on balance, the five factors looked at to decide whether to abstain indicated that *Burford* abstention was inappropriate in that RCRA citizens' suit case.

C. Texas Solid Waste Disposal Act

1. *Celanese Corp. v. Coastal Water Authority*, No. CIV.A. H-06-2265, 2008 WL 2697321 (S.D. Tex. July 2, 2008) (operator and arranger liability under TSWDA)

In this litigation, Celanese Corp. sought recovery of costs it has incurred (and will incur) due to a methanol leak from a damaged pipeline. Celanese installed the methanol line in 1971. In the late 70s, Coastal Water Authority ("Coastal") contracted with Kellogg, Brown & Root, Inc. ("KBR") to design and supervise the installation of a 30" water pipeline. The Coastal water line runs 5'-6' below the Celanese line through an easement granted to CWA from Exxon. However, the Coastal water line crosses the Celanese methanol line at one point. Eby Construction Co., Inc. ("Eby") is the contractor that excavated for installation of Coastal's water pipeline.

Celanese alleges that an Eby employee operated a backhoe during the excavation that hit and damaged its methanol pipe, eventually causing the leak. The methanol pipe was damaged in an area approximately 10 feet from the point where the two lines intersect. Celanese alleged that Coastal, KBR, and Eby knew about the damage to the pipe at the time it occurred, but hid it by backfilling over the damaged portion of the pipeline without informing Celanese.

Coastal, KBR and Eby moved for summary judgment on Celanese's Texas Solid Waste Disposal Act ("TSWDA") claims.

Coastal's liability. The TSWDA creates liability for a person who:

(1) is the owner or operator of a solid waste facility;

(2) owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste;

(3) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at:

(A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or

(B) the site to which the solid waste was transported that contains the solid waste; or

(4) accepts or accepted any solid waste for transport to a solid waste facility or site selected by the person.

Id. § 361.271(a).

Celanese first argued that Coastal was liable as an operator of a solid waste facility. The district court held that it would look to federal CERCLA cases for guidance on determining "operator" status under the TSWDA. The district court quoted *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 928 (5th Cir. 2000) for the proposition that, "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 . . . . For one to be considered an operator, then, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility."

The district court noted that Coastal's pipeline did not leak, and that Coastal did not play an active role in operating the pipeline that did leak. And while Coastal held an easement for its pipeline, it did not hold the easement for the purpose of operating a hazardous waste facility. The district court also rejected Celanese's characterization of Coastal as the "operator" of the excavation project, because the definition of "facility" makes it clear that a facility is comprised of land or improvements. A "solid waste facility" is defined as "all continuous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of solid waste." TEX. HEALTH & SAFETY CODE ANN. § 361.003(36) (Vernon 2001).

Section 361.271(a)(3) creates liability for an entity that arranges "by contract, agreement, or otherwise," to process, store or dispose of solid waste. The issue was whether Coastal "otherwise arranged" to dispose of solid waste by failing to tell Celanese about the damage to the methanol pipe, when it knew that the damage would eventually lead to a leak. The district court stated that there must be a "nexus between the party's conduct and the disposal of the hazardous substance." That nexus has been found based on the party's authority, involvement, or obligation in regard to the disposal. *Id.* "[T]he court['s] inquiry should focus on the degree of the defendant's actual control over the decision regarding the specific method or manner of disposal." *Id.* at *4 (*quoting R.R. Street & Co., Inc., v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 243 (Tex. 2005).

Coastal would not be liable merely by contracting for the installation of a water line, because by so doing it did not contract for or take an affirmative or intentional action to cause the leak of a hazardous substance. The district court noted, however, that Celanese had alleged the Coastal concealed the damage to the pipe – an allegation that, if true, meant that Coastal arguably took some affirmative and intentional action. However, the district court held that Celanese had not presented more than scintilla of evidence that Coastal knew of the damage and did not inform Celanese. Rather, the evidence showed the opposite: Coastal representatives were not on-site every day, and there was no evidence that any Coastal employee ever saw the exposed pipe, or any evidence that KBR reported the damage to Coastal. Therefore, the district court granted Coastal's motion for summary judgment on the TSWDA claims.

KBR's and Eby's liability. The district court first held that Celanese had proven sufficient facts to show that KBR and Eby knew of the damage and concealed it. The next question was whether that action made them an "arranger" under the TSWDA and CERCLA.

The *Geraghty* opinion explained that "just as a nexus must exist for operator liability to attach, there must also be a nexus that allows one to be labeled an arranger." That nexus has been described as "the obligation to exercise control over hazardous waste disposal, and not merely the ability or opportunity to control the disposal." *Id.* The district court concluded that if the fact-finder accepted Celanese's version of events, then KBR and Eby may be held liable as arrangers for the disposal of hazardous substances, and it will be necessary to allocate responsibility for clean up costs.

Finally, the district court rejected KBR's and Eby's argument that § 16.009 of the Texas Civil Practice and Remedies Code, the 10-year Texas statute of repose, barred a suit for damages. Section 16.009 provides that a claimant must bring a suit for damages "against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in any action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement." TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 2002) (emphasis added). The district court noted that § 16.009 appears to target defective performance in the construction or repair of the real property improvement itself, rather than targeting hazardous waste spills. Further, the district court noted, the improvement KBR and Eby undertook was the construction of the water line, not a repair to Celanese's methanol line. The district court held § 16.009 was not applicable because the case did not arise out of a defect in the water line.

2. ***First Edwards, L.P. v. Union Pacific R.R. Co.,*** No. CIV.A. H-08-1573, 2008 WL 2674859 (S.D. Tex. July 7, 2008) (attorneys' fees under the UDJA or TSWDA)

Union Pacific Railroad Co. ("UPRC") filed a motion to dismiss First Edwards attorneys' fee claims. First Edwards had brought a cost-recovery suit under the Texas Solid Waste Disposal Act ("TSWDA"). It also sought a declaratory judgment that UPRC was the party responsible for solid waste on the property and an award of attorneys' fees pursuant to the act.

The district court held that under the *Erie* doctrine, a party may not rely on the Texas Uniform Declaratory Judgment Act to authorize attorneys' fees in a diversity case because the Declaratory Judgment Act is not substantive law. The district court further held that attorneys fees were not recoverable under the TSWDA, even though § 361.344(a) of the TSWDA provides that "other costs" may be recoverable, in addition to the reasonable and necessary costs of a removal or remedial action.

II. WATER QUALITY

A. ***Exxon Shipping Co. v. Baker***, No. 07-219, 2008 WL 2511219 (U.S. June 25, 2008) (CWA does not pre-exempt punitive damages)

This tort suit was brought after the *Exxon Valdez* grounded on a reef off Alaska, spilling millions of gallons of crude oil into Price William Sound. Evidence showed that the *Valdez's* captain, Captain Hazelwood, had repeated problems with alcohol abuse, and Exxon knew of those problems. Hazelwood consumed 5 double vodkas before leaving shore the night of the

accident. He inexplicably abandoned the helm at some point, leaving an untrained officer to steer the *Valdez* through a perilous portion of the Prince William Sound.

The jury found Exxon and Captain Hazelwood reckless and awarded $287 million in compensatory damages to some of the plaintiffs. The jury also awarded $5 thousand in punitive damages against the Captain Hazelwood and $5 billion in punitive damages against Exxon. The district court rendered judgment on the verdict.

The Ninth Circuit upheld that liability instruction and remitted the punitive damages award against Exxon to $2.5 billion.

The Supreme Court first rejected Exxon's argument that the Clean Water Act's (CWA's) pollution penalties preempted punitive damage awards in maritime spill cases. Exxon conceded the CWA did not preempt compensatory damages but argued it somehow preempted punitive damages. The Supreme Court disagreed, stating it had rejected similar attempts to sever remedies from their causes of action. Further, the Court said, there was no indication of Congressional intent to occupy the entire field of pollution remedies. *Id.* at *10-11. Finally, the Court did not see how punitive damages would frustrate the remedial scheme of the CWA, a circumstance that would suggest preemption.

The Court further held, however, that the punitive damages were excessive as a matter of maritime common law. Under the circumstances of this case, the Court held, the award should be limited to an amount equal to compensatory damages.

The circumstances the Court identified as deserving a lesser award were the relative lack of "blameworthiness" of the defendants:

> The data put the median ratio for the entire gamut of circumstances at less than 1:1, see supra, at 25-26, and n. 14, meaning that the compensatory award exceeds the punitive award in most cases. **In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties** ***in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards.***

Id. at *20.

B. ***Riverkeeper, Inc. v. U.S. EPA***, 475 F.3d 83 (2nd Cir. 2007), *cert. granted in part*, 76 U.S.L.W. 3255, 76 U.S.L.W. 3548, 76 U.S.L.W. 3554 (U.S. Apr. 14, 2008) (Nos. 07-588, 07-589 and 07-597) (proper role of costs in determining best technology available under § 316 of the CWA)

This case, handed down in January of 2007, involved several petitions for review of a rule regulating cooling-water intake structures at power plants. Although the Second Circuit addressed a number of issues, the issue on review in the Supreme Court is whether the Clean

Water Act ("CWA") authorizes the Environmental Protection Agency to compare costs with benefits in determining the best technology available ("BTA") for minimizing adverse environmental impact" at cooling water intake structures?

The petitions for review challenged EPA's final rule regarding the water that large, existing power plants withdraw from rivers, lakes, and other waterways of the United States to cool their facilities. *See* 40 C.F.R. § 125.91(a). This cooling process requires power plants to extract billions of gallons of water per day from the nation's waters, thereby impinging and entraining a huge number of aquatic organisms. A single power plant can kill or injure billions of aquatic organisms in a single year. *Riverkeeper*, 475 F.3d at 90.

Congress added § 316 of the CWA to address the problem. Section 316 provides that any standard established under 301 or 306 of the CWA "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." CWA § 316(b), 33 U.S.C. § 1326(b).

The environmental petitioners contended that closed-cycle cooling is the appropriate BTA and that the EPA exceeded its authority by promulgating a rule that does not require closed-cycle cooling, or the use of technologies producing a commensurate reduction of water usage for existing facilities. They also argued that the EPA improperly rejected closed-cycle cooling as BTA at the direction of the Office of Management and Budget because EPA sought to maximize net economic benefits rather than to minimize adverse environmental impact. Finally, they contended that EPA erred by comparing costs to the benefits in determining BTA, rather than selecting a standard that required a commitment of the maximum resources economically feasible.

The Second Circuit contrasted the standard in § 316 for BTA with the standard in § 301(b)(1)(A) for "best practicable technology." Section 304 of the CWA provides that, in determining BPT, EPA could consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." CWA § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B). However, that CWA's standards were to become increasingly stringent over time. So, in 1989, the more lenient BPT standard for existing sources was replaced by the "best available technology" ("BAT") standard of section 301(b)(2)(A). Section 304 provides that the EPA, in determining BAT, could consider only "the cost of achieving such effluent reduction." CWA § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B). The list of permissible factors the EPA could consider in determining BAT did not include the cost of technology in relation to the benefits that technology could achieve. The Second Circuit had already held that EPA could not use a cost benefit analysis in determining BAT. Because § 316's BTA standard was similar to § 301's BAT standard, the court of appeals held that EPA could not use a cost benefit analysis to determine the appropriate technology under § 316, either.

However, the Second Circuit held that EPA could consider costs in determining (1) benchmark technology, i.e., what technology can be reasonably borne by industry – since it is otherwise not "available" technology, and (2) to engage in cost-effectiveness analysis as to other technologies with the same performance, in determining BTA.

C. ***Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers***, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3411, 76 U.S.L.W. 3681 (U.S. June 27, 2008) (Nos. 07-984 and 07-990) (interaction of § 402 and § 404 of the CWA).

Coeur Alaska, Inc. applied for and received a § 404 permit from the Army Corps of Engineers. The permit authorizes Coeur Alaska to discharge process wastewater containing tailings from its gold mine into a lake that is a navigable water of the United States. Under the permit, Coeur Alaska will discharge daily 210,000 gallons of process wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge will raise the bottom elevation of the lake by 50 feet, and the area of the lake will increase three-fold. To accommodate the expanded area, Coeur Alaska will build a 90-foot high, 500-foot long dam to contain the discharge. Coeur Alaska and the Corps admit that the discharge and settling of the tailings into the lake would kill all of the fish and nearly all of the aquatic life in the lake. The effluent would have a pH factor of over 10, which is considerably higher than the lake's current pH factor, and would contain concentrations of several potentially hazardous materials, including aluminum, copper, lead, and mercury. The toxicity of the discharge may have lasting effects on the lake and may negatively affect its ability to sustain aquatic life in the future. The Corps intends that aquatic life will be reintroduced into the lake, but the extent to which aquatic life could eventually be restored is unclear.

The Corps claimed it had the jurisdiction to issue the § 404 permit – without regard to a § 402 discharge permit – because the tailings from Coeur Alaska's froth-flotation mill operation facially meet the Corps' current regulatory definition of "fill material": the tailings would have the effect of raising the bottom elevation of the lake. *See* 33 C.F.R. § 323.2(e). Under this interpretation, the discharge would be subject to the permit process governed by § 404 of the Clean Water Act ("CWA"). However, EPA previously promulgated a performance standard, pursuant to § 301 and § 306 of the CWA, that prohibited discharges from froth-flotation mills into waters of the United States. *See* 40 C.F.R. § 440.104(b)(1).

Statutory authority: The Ninth Circuit examined the history and purpose of the CWA. Historically, the court stated, one of the principal purposes of the Act was to end the use of water for waste disposal. Towards the end, Congress promulgated § 301, which prohibits all discharges of any pollutant except in compliance with the statute. *See* 33 U.S.C. § 1311. Section 301 requires EPA to adopt increasingly stringent, technology-based effluent limitations for point sources. Once an effluent limitation is promulgated, § 301 requires that it be applied to all point sources of discharge of pollutants. Section 306 requires EPA to implement even more stringent standards of performance for new sources such as Coeur Alaska's new facility. *See* 33 U.S.C. 1316.

To ensure compliance with effluent limitation and performance standards established under §§ 301 and 306, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program under § 402 of the Act. 33 U.S.C. § 1342. A permit cannot be granted under § 402 unless the discharge complies with §§ 301 and 306.

In addition to the NPDES permit program, the Clean Water Act established a secondary permit program for the discharge of "dredge or fill material" under § 404. 33 U.S.C. § 1344.

The court found a simple explanation for the relationship between §§ 402 and 404: if EPA had adopted an effluent limitation or performance standard applicable to a relevant source of pollution, §§ 301 and 306 preclude the use of a § 404 permit for that discharge. Further, § 404 does not contain an explicit exception to effluent limitations or standards of performance, although it does contain exceptions to other provisions of the CWA. The clear reading of § 404 is that discharges under that section must comply with § 301 and 306, unless specifically exempted – and mining is not.

Regulatory authority: The Corps and EPA had historically promulgated different definitions of fill material and discharge of fill material. However, the Corps had consistently deferred to EPA on the regulation of mining tailings.

Then, in 2002, the Corps and EPA promulgated a joint regulation defining the terms "fill material" and "discharge of fill material." 67 Fed. Reg. at 31,130. The current regulatory definition of "fill material" provides:

> (1) Except as specified in paragraph (e)(3) of this section, the term "fill material" means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

A single sentence in the preamble to the proposed joint definition stated that "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" The Corps had relied on this sentence in issuing the permit, and the district court relied on this sentence in upholding the permit. However, the Ninth Circuit recognized that the preamble also painstakingly explained that the new definition would not change the treatment of discharges subject to effluent limitations and standards of performance. Therefore, the Court concluded, the fill rule applied only to tailings and other mining-related materials that are **not** subject to effluent limitations or standards of performance.

Finally, the Ninth Circuit held that the performance standard should control because it is more specific. Unlike the fill rule, which pertained to fill material generally, the performance standard covers froth-flotation mills specifically.

Accordingly, the Ninth Circuit held that the discharge of fill from Coeur Alaska's facility must comply with the NPDES program because it is subject to an effluent limitation or performance standard.

The United States Supreme Court granted Coeur Alaska's petition for certiorari on June 27, 2008.

D. ***U.S. v. Lucas***, 516 F.3d 316 (5th Cir. 2008), *petition for cert. filed*, 76 U.S.L.W. 3655 (U.S. June 2, 2008) (No. 07-1512) (post-*Rapanos* decision interpreting waters of the United States)

The Fifth Circuit, in *In re Needham*, 354 F.3d 340 (5th Cir. 2003), criticized the Corps' definition of "navigable waters," and proclaimed that jurisdictional waters must be either themselves navigable or "adjacent to" navigable waters. This year, in *U.S. v. Lucas*, 516 F.3d 316 (5th Cir. 2008), the court reprised its definition of "adjacent to" to comport with *Rapanos*.

Prelude to *U.S. v. Lucas*: *In re Needham*. *In re Needham*, 354 F.3d 340 (5th Cir. 2003) was a CWA and Oil Pollution Act ("OPA" case) that arose after an employee of a oil and gas operator pumped oil from a containment basin into an adjacent drainage ditch. The parties stipulated that the oil that was discharged into the ditch spilled into Bayou Cutoff and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico. In an opinion by Judge Edith Jones, the Fifth Circuit harshly criticized the Corps of Engineers for its definition of navigable waters as including all tributaries of navigable water, stating:

> Nevertheless, the United States urges this court to approve its regulatory definition of "navigable waters." *See* 40 C.F.R. § 300.5 (2003). This definition includes as "navigable waters" all "tributaries" of navigable-in-fact waters. *See id.* at § 300.5(d). **According to the government, the definition covers all waters, excluding groundwater, that have any hydrological connection with "navigable water."** At least two courts appear to have agreed with this expansive interpretation. *See United States v. Deaton,* 332 F.3d 698, 702 (4th Cir.2003) (asserting authority, under the CWA, over wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay"); *United States v. Rapanos,* 339 F.3d 447, 449 (6th Cir.2003) (asserting authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river).
>
> In our view, this definition is unsustainable under *SWANCC.* **The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice,* 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice,* 250 F.3d at 269.**[1]

Even so, the Court concluded that the defendant was liable under the CWA and the OPA because the oil had drained into Bayou Folse, which was "adjacent" to an open body of navigable water.

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[1] *In re Needham,* 354 F.3d at 345-346.

In *In re Needham*, the Fifth Circuit used the "adjacency" test from *SWANCC*, even though *In re Needham* involved a tributary that flowed into waters of the U.S., while *SWANCC* involved an isolated pond.

U.S. v. Lucas. *U.S. v. Lucas* involved criminal convictions for developing wetlands eight miles from the coast. Lucas and his co-defendants were developers who sold house lots and designed and certified septic systems on wetlands, but represented the lots as dry. Ultimately, the septic systems failed, and the government prosecuted the developers.

In *Lucas*, the Fifth Circuit approved a jury instruction that incorporated *Rapanos*. Rather than overrule *In re Needham*, the court approved an instruction that defined "adjacent to" as having a "significant nexus" between the wetlands and the navigable-in-fact waterway. The jury instruction read:

> **The term wetlands means those areas that are inundated or saturated by surface or groundwater** at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . . Not all wetlands fall under the protection of the Clean Water Act. However, wetlands that are waters of the United States are protected by the Clean Water Act. Wetlands are considered waters of the United States if they are adjacent to a navigable body of open water. **Wetlands are adjacent to a navigable body of water if there is a significant nexus between the wetlands in question and a navigable-in-fact waterway. Some of the factors which you may wish to consider in determining whether there is a significant nexus include, but are not limited to: . . . flow rate of surface waters from the wetlands into a navigable body of water . . . evidence of any past or present contamination of a navigable body of water attributable to the discharge of pollutants on the wetlands . . . when, or to what extent, contaminants from the wetlands have or will affect a navigable body of water . . . .**

The defendant's rejected jury instruction had defined "adjacent to" as "lying near, close, continuous, or adjoining a navigable waterway."

The Fifth Circuit also held that evidence was sufficient to support the jury's verdict – based on all three *Rapanos* opinions.

***Rapanos's* plurality decision**. The court first evaluated the question under the *Rapanos* plurality decision. The four-justice plurality defined waters of the United States, as "relatively permanent, standing or flowing bodies of water," concluding that establishing that wetlands ... are covered by the Act requires two findings: First, that the adjacent channel contains a "water of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

In *Lucas*, the government's maps presented at trial showed a number of bayous and tributaries connected to the developed property, all of which eventually flowed into the navigable Tchoutachabouffa River, the Pascagoula River, and the Mississippi Sound. Further, the

government's expert testified that "there is a continuous band of wetlands and streams and creeks that lead from the site to the waters," and showed aerial photographs of "drainage and wetlands patterns on the site" as well as drainage and wetlands patterns that "branch up towards the site" and that lead "up on to the property itself." The Fifth Circuit concluded that the government's evidence was sufficient under the plurality decision.

***Rapanos's* concurring decision**. The Fifth Circuit also evaluated the evidence under the concurring *Rapanos* opinion. The concurring opinion concluded that the applicable standard should be the "significant nexus." Under that opinion, the question is whether "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." In *Lucas*, the government presented evidence that the developed wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence the Fifth Circuit held was consistent with the "significant nexus" standard of the *Rapanos* concurrence.

***Rapanos's* dissenting opinion**. Finally, the Fifth Circuit reviewed the evidence under the dissenting opinion in *Rapanos*. That dissent, the Fifth Circuit stated, held that *United States v. Riverside Bayview Homes, Inc.* controls the definition of waters of the United States, and the Supreme Court should defer to "the Corps' judgment that treating adjacent wetlands as 'waters' would advance the 'congressional concern for protection of water quality and aquatic ecosystems.'" The Fifth Circuit held that the evidence of flood and pollution control provided by the developed wetlands was sufficient to establish jurisdiction by this measure, as well.

In sum, the Fifth Circuit concluded that the evidence at trial supported all three of the *Rapanos* standards, without addressing which opinion was controlling.

E. ***Northern California River Watch v. City of Healdsburg***, 496 F.3d 993, 995 (9th Cir. 2007) (post-*Rapanos* decision interpreting waters of the United States)

The Northern California River Watch ("River Watch") sued the City of Healdsburg ("Healdsburg") under the Clean Water Act ("CWA"). River Watch alleged that Healdsburg violated the CWA by discharging sewage from its waste treatment plant into waters of the United States, without a National Pollutant Discharge Elimination System ("NPDES") permit. Healdsburg had discharged the sewage into a body of water known as "Basalt Pond," a rock quarry pit that had filled with water from the surrounding aquifer, and that is located next to the Russian River.

The issue was whether Basalt Pond was subject to the CWA because the Pond, containing wetlands, bordered additional wetlands that were adjacent to a navigable water of the United States – the Russian River. The district court held that discharges into the Pond are discharges into the Russian River, a navigable water of the United States protected by the CWA. The district court had followed the United States Supreme Court's decision in *United States v. Riverside Bay View Homes, Inc.,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

As the Ninth Circuit noted, the Supreme Court has narrowed the scope of *Riverside* by its decision in *Rapanos v. United States,* 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). The court held that the controlling opinion was that of Justice Kennedy, who stated that to

qualify as regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a "significant nexus" to a waterway that is in fact navigable.

The Ninth Circuit concluded that Basalt Pond possessed a "significant nexus" to waters that are navigable in fact, for two reasons. First, the Pond waters ultimately seeped into the navigable Russian River, both through the surface wetlands and the underground aquifer. Second, the Pond waters "significantly affect[ed] the physical, biological, and chemical integrity" of the river. The following facts, the court held, showed that that significant effect:

Physical effects. An actual surface connection exists between Basalt Pond and the Russian River when the River overflows the levee and the two bodies of water commingle. There is also an underground hydraulic connection between the two bodies, so that a change in the water level in one immediately affects the water level in the other. Basalt Pond drains into the aquifer, and at least 26 percent of the Pond's volume annually reaches the River itself. The court concluded that the several hydrological connections between Basalt Pond's wetlands and the Russian River affected the physical integrity of the River.

Biological effects. Basalt Pond and its wetlands support substantial bird, mammal and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem. Many of the bird populations at the pond are familiar along the river, including cormorants, great egrets, mallards, sparrows, and fish-eaters. Fish indigenous to the river also live in the pond due to the recurring breaches of the levee. These facts made Basalt Pond indistinguishable from any of the natural wetlands alongside the Russian River that have extensive biological effects on the River itself.

Chemical effects. Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels. The chloride from Basalt Pond reaches the River in higher concentrations as a direct result of Healdsburg's discharge of sewage into the pond. Testimony at trial showed that the average concentration of chloride appearing upstream in the river was only 5.9 parts per million. However, the average concentration of chloride seeping from Basalt Pond into the River was 36 parts per million, and the chloride concentration on the west side of the River adjacent to the Pond was 18 parts per million.

F. ***U.S. v. Moses,*** 496 F.3d 984 (9th Cir. 2007) (post-*Rapanos* decision interpreting waters of the United States)

Despite numerous warnings over twenty years, Charles Moses continued to work in the channel of the Teton Creek in Idaho for the purpose of rerouting, reshaping and otherwise controlling the flow of the waters of the Creek. Water runs in the portion of the creek in which he worked for only two months of the year. Teton Creek is a tributary of the Teton River, which flows into the Snake River.

After the numerous warnings failed, Moses was prosecuted for violating the CWA. The Ninth Circuit examined the plurality opinion in *Rapanos*, the dissent, and Justice Kennedy's concurring opinion, and concluded that intermittent streams – at least seasonal intermittent streams – can be waters of the United States. The Court also found that the evidence supported the conviction, and affirmed it.

G. ***Environmental Conservation Org. v. City of Dallas***, 529 F.3d 519 (5th Cir. 2008) (attorneys' fees for citizens' suits)

In September 2003, due to problems with the City's operation of its storm sewer system and the polluted appearance of some Dallas-area water bodies, the Environmental Conservation Organization ("ECO") notified the City, EPA and the TCEQ that it would file a CWA citizens' suit.

In December 2003, more than 60 days after it had given the required notice, ECO filed suit alleging that the City had discharged pollutants without a permit, and had violated the terms of the permit it did have.

In February 2004, EPA issued an administrative compliance order that identified various violations of the City's MS4 Permit and the CWA. The City and EPA entered into settlement discussions, which ECO declined to participate in. Ultimately, the City and EPA reached a settlement.

In May 2006, the EPA and the State of Texas filed a CWA enforcement action against the City, and simultaneously filed a proposed consent decree. ECO commented on the consent decree but did not oppose the entry of the order.

The City then moved for summary judgment in ECO's claim, on the ground that the suit was barred by res judicata because the final judgment in the EPA enforcement action precluded re-litigation of the same claims in a citizens' suit. Alternatively, the City argued the suit was moot. The district court determined that the suit was barred by res judicata. ECO appealed.

The Fifth Circuit considered mootness first, because that doctrine is jurisdictional: the court has no jurisdiction over a moot controversy. Because the City had changed its conduct only in response to EPA's consent decree, the court held that the strict test for "voluntary" mootness under *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061-65 (5th Cir. 1991), was inappropriate. Under that standard, the party asserting mootness bears the "formidable burden" of showing that its alleged violations cannot reasonably be expected to recur. Adhering to the stringent test for voluntary mootness when the defendant changed its conduct under compulsion, the court stated, would shift enforcement from the agencies to the general public and to courts. Instead, the Court borrowed the test used by the Second and Eighth Circuits, under which ECO's claims for relief were moot unless ECO proved that there was a "realistic prospect that the violations alleged in its complaint would continue notwithstanding the consent decree." *Id.* at *6-7. The Fifth Circuit court held that the citizens' suit became moot before the district court's entry of final judgment, and vacated the judgment because it was rendered without jurisdiction. The Fifth Circuit's opinion expressly did not address whether ECO might be entitled to attorneys' fees, the subject of a separate appeal.

H. ***American Petroleum Inst. v. Johnson***, 541 F. Supp. 2d 165, 183-184 (D.D.C. 2008) (definition of navigable waters for SPCC)

Section 1321(j)(1)(C) of the Clean Water Act authorizes EPA, to "issue regulations . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore

facilities [into navigable waters of the United States], and to contain such discharges." *See* 33 U.S.C. § 1321(j)(1)(C). In 1973, EPA promulgated a regulation pursuant to its § 1321(j) authority which, among other things, required oil-producing facilities that could reasonably be expected to discharge oil into navigable waters to develop spill prevention, control, and counter-measure ("SPCC") plans. EPA's 1973 SPCC Rule contained a definition of "navigable waters."

EPA adopted revisions to the SPCC rules in 2002 ("2002 SPCC Rule"). Like the 1973 SPCC Rule, the 2002 SPCC Rule included a regulatory definition of the statutory term "navigable waters." That definition provided:

> Navigable waters means the waters of the United States, including the territorial seas. The term includes:
>
> (i) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
>
> (ii) All interstate waters, including interstate wetlands;
>
> (iii) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (A) That are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,
>
> (C) That are or could be used for industrial purposes by industries in interstate commerce;
>
> (iv) All impoundments of waters otherwise defined as waters of the United States under this section;
>
> (v) Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;
>
> (vi) The territorial sea; and
>
> (vii) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition.

2002 SPCC Rule, 40 C.F.R. § 112.2(1).

Plaintiffs brought suit challenging the 2002 SPCC Rule. The district court abated the suit while the Supreme Court considered *Rapanos v. United States*. After *Rapanos* was handed down, the district court reinstated the suit to consider the cause.

Plaintiffs' argument was based largely on the decision and the reasoning of the Supreme Court in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*"), a case decided over a year before EPA promulgated its new regulatory definition of "navigable waters." In *SWANCC*, the Supreme Court reaffirmed its view that the Clean Water Act was intended to regulate both (1) traditional navigable waters and (2) "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 167. This distinction was important because, the Supreme Court reasoned, Congress did not intend to assert regulatory jurisdiction to the full extent of its Commerce Clause power when it enacted the Clean Water Act. Instead, it intended to exert nothing more "than its commerce power over navigation"– that is, its authority to regulate commerce by regulating the nation's "navigable waters." *Id.* at 168 n. 3, 121 S.Ct. 675.

Plaintiffs contended that EPA was obligated to address the tension between its new definition and the decision and reasoning of the Supreme Court in *SWANCC* because EPA's new regulatory definition of "navigable waters" appeared to extend EPA's regulatory authority to the outer limits of the Commerce Clause. Plaintiffs argued that EPA's failure to address this tension meant that EPA either ignored or failed to appreciate *SWANCC*'s holding. Plaintiffs maintained that EPA's explanation was either "not based on a consideration of the relevant factors" or indicated "a clear error of judgment." Therefore, in their view, the new regulatory definition of "navigable waters" could not be regarded as a product of reasoned decisionmaking and must be set aside under the Administrative Procedure Act. The Court agreed, setting aside the 2002 SPCC Rule.

III. WATER RIGHTS

A. *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, No. 06-0904, 2008 WL 2223209, 6 (Tex. May 30, 2008) (transfers of water out of a groundwater district)

Chapter 36 of the Texas Water Code authorizes underground water districts to restrict groundwater production. When promulgating rules that limit groundwater production, § 36.116 provides that a district may preserve historic or existing uses of groundwater in the district to the maximum extent practicable consistent with its comprehensive management plan. § 36.116(b). Section 36.122(c) provides that, "Except as provided in Section 36.113(e), a district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users." Section 36.113(e) provides that the district may impose more restrictive permit conditions on new permit applications, and applications to increase use by historic users, if the limitations applied to all applications by those groups of users, bear a reasonable relationship to the district management plan, and are reasonably necessary to protect existing uses.

In 2002, the Hudspeth County Underground Water Conservation District ("the District") promulgated new rules regulating the withdrawal of groundwater. The rules set a historical

period from January 1992 to May 2002 to determine rights to withdraw water. The rules divided groundwater production among three core classes of users:

(1) statutorily exempt users,
(2) existing and historic users, and
(3) new users, which also might include historic users seeking to increase consumption.

The rules link the right to produce groundwater from completed, non-exempt wells directly to the aquifer's level, although groundwater production limitations were to operate differently depending on the type of permit held by the well owner.

The rules also recognized three types of permits:

(1) validation permits,
(2) operating permits, and
(3) transfer permits.

Wells operating before the adoption of the District's new rules were generally entitled to validation permits. If a well was not eligible for a validation permit, the landowner could apply for an operating permit. Finally, transfer permits must be obtained to transfer water out of the district. A validation or an operating permit is required in order to obtain a transfer permit.

Validation permit holders, particularly those held by landowners who irrigated during the historic use period, receive substantially greater transfer rights under the rules than other landowners because they receive substantially greater guaranteed allocations of groundwater than other landowners. By contrast, landowners who hold operating permits receive no guaranteed allocation and so may not have any right to transfer water when the aquifer fails to reach the designated elevation.

Guitar Holding Co., LP ("Guitar"), one of the largest landowners in the District, irrigated only s small portion of its land during the historical period used to determine historical usage. So, it received relatively few validation permits, despite its large holdings. Guitar filed suit challenging the rules, which the district court affirmed and the court of appeals reversed only in part. Guitar appealed again to the Texas Supreme Court.

The two questions before the Texas Supreme Court were first, whether the District's statutory authority to protect "historic or existing uses of groundwater" meant that it only had to protect the *amount* of use, or also the *purpose* of the use, and second, whether a request for a transfer permit was a new permit.

Meaning of "use." The Water Code does not define historical "use." The court looked to the ordinary meaning of "use," and found that it also contemplated the purposes of an action. The court also considered several definitions in § 36.001 of the Texas Water Code, "use for a beneficial purpose," "agricultural use," and "conjunctive use," all of which considered the purpose of the use. TEX. WATER CODE § 36.001(9), (20), (21). Similarly, § 36.001(29) of the Texas Water Code defines "evidence of historic or existing use" with a list of purposes. The court concluded that a district's discretion to preserve historic or existing use is tied to both the amount and the purpose of that prior use.

Status of transfer permit. Section 36.122(c) provides that a "district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users." However, the court stated, §§ 36.122(c) and 36.113(e) further provides that a district may include additional limitations on new permit applications if the restrictions are uniformly applied and necessary to protect existing use. Guitar argued that by tying the transfer permit to the existing permit, the District had granted persons with validation permits a preferential right to convert their existing irrigation wells to an entirely new use without satisfying more restrictive conditions applied to other landowners.

The Court held that the transfer rules did not protect the existing irrigation use. Instead, the court said, the transfer rules permit in-district irrigators to convert their protected existing use to an entirely new use: to transfer it out of the District for municipal and industrial purposes. But, the Court held, once the groundwater allocated for existing irrigation use is transferred outside the District, the protected existing use ends, as does the justification for protecting that use. Rather than protecting historic or existing use, the District's transfer rules essentially grant franchises to some landowners to export water while denying that right to others. The Court held that the District's transfer rules were invalid under § 36.113 because the limitations were not uniformly applied to these new applications, and were not necessary to protect existing use.

B. ***Canyon Regional Water Auth. v. Guadalupe-Blanco River Auth.***, No. 06-0873, 2008 WL 2069836 (Tex. May 16, 2008) (condemnation of one public use for another public use)

The Guadalupe-Blanco River Authority ("GBRA") brought suit for declaratory and injunctive relief to prohibit Canyon Regional Water Authority ("Canyon Regional") from constructing a new intake structure on Lake Dunlap at any location not authorized by its existing easement. Canyon Regional relied on its existing easement to construct the new intake structure but also counterclaimed for condemnation of the property necessary to complete the project.

The issues on appeal were (1) whether Canyon Regional properly relied on its existing easement as authority to construct a second water intake and pipeline to draw water from Lake Dunlap, and (2) if not, whether Canyon Regional can condemn an easement for the construction and operation of the second intake and pipeline.

Existing easement. The easement described two parcels, the second of which contained a metes-and-bounds description that corresponded with the location of the first water intake and pipeline, and a restricted zone easement on the lake's surface. The easement was "for the purpose of allowing the construction, operation, and maintenance of the intake diversion piping and to restrict further use of the area within the 200' radius on the surface of Lake Dunlap. . . . " Because the easement could not be read any broader, the Court held that it did not authorize construction of a second intake.

Condemnation. The court of appeals had held that Canyon Regional could not condemn GBRA's property. Under *Sabine & E.T. Ry. Co. v. Gulf & I. Ry. Co. of Tex.*, 92 Tex. 162, 46 S.W. 784, 786 (1898), the test to use when a condemnee seeks to prevent a condemnation, and the property is already devoted to another public use, is whether the new condemnation "would practically destroy the use to which it has been devoted." Then, if the condemnee has shown

that, the condemnor must show that the necessity is so great that the new enterprise is of "paramount importance to the public, and it cannot be practically accomplished in any other way."

In deciding that the condemnation could not proceed, the court of appeals relied on the affidavit of Fred Blumberg, the River Authority's Deputy General Manager and Chief Operations Officer, who stated:

> One result of this proposed construction would be, to the extent that the restricted zones do not overlap, a second 200-foot restricted area that would materially impact the recreational use of Lake Dunlap, and potentially create a safety hazard, because boats and other watercraft would find it more difficult to make turns safely in the middle of the Lake.

The court of appeals held that that evidence supported a conclusion that Canyon Regional's new intake destroys a portion of Lake Dunlap's recreational use. The Texas Supreme Court, however, held that a court "must look to the entire use of the affected property, and not a portion of its use, when considering practical destruction or material interference." *Id.* at *3. If the test applied only to a part of the affected property, a condemnee could shift the burden to the condemnor. "Every utility pole, railroad, highway, or storm drain practically destroys the existing public use of a small portion of the right-of-way upon which it is built." *Id.* Applying the test to only a portion of the property, the Texas Supreme Court held, would render the practical destruction inquiry superfluous.

In this case, the court held, because the restricted zone would affect less than two acres of 410-acre lake, it would have no impact on the recreational use of more than 400 remaining acres of the lake, so could not be said to "practically destroy" the lake's existing recreational use. Further, the court held, the new restricted zone did not "materially interfere" with the lake's recreational use. The court reversed and remanded the condemnation cause to the trial court for further proceedings.

C. ***City of Del Rio v. Clayton Sam Colt Hamilton Trust***, No. 04-06-00782-CV, 2008 WL 508682 (Tex. App.—San Antonio Feb. 27, 2008, no pet.) (ownership of groundwater)

The Clayton Sam Colt Hamilton Trust (the "Trust") owns 3,200 acres of land in Val Verde County (the "Ranch"). The Ranch is in the City of Del Rio's extraterritorial jurisdiction but not in the boundaries of any groundwater conservation district. The Trust sold 15 acres of the 3200-acre ranch to the City of Del Rio by warranty deed, but, in that deed, reserved "all water rights" on those 15 acres. The City later drilled water wells on the 15-acre tract and began pumping approximately 500 gallons of water per minute.

The City claimed that the Trust's reservation was invalid because water could not be owned until it was reduced to possession. Further, the City claimed that it could drain the water from the Ranch without consequences under the rule of capture.

The court of appeals noted that water is "exclusive property" of the surface owner and "subject to barter and sale as any other species of property." *Id.* at * 4 (*quoting Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927). Therefore, the court held, the Trust was entitled

to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio.

The rule of capture, the court of appeals explained, is a corollary to the absolute ownership theory. Under the rule of capture a person owns all of the water, oil or gas produced by a well bottomed on his own land, even though the well may be draining the substance from beneath other's property. Further, the rule of capture eliminates any judicial remedy for the landowner whose property is being drained: he can neither enjoin production nor obtain an accounting. In this case, the court held, if the City had owned the groundwater beneath the 15-acre tract and began pumping water from beneath the surface, the Trust would have no judicial remedy for any drainage of groundwater from its 3200-acre tract. However, because the City did not own the water beneath the 15-acre tract, it could not rely on the rule of capture to protect it.

D. ***Engelman Irrigation Dist. v. Texas Comm'n on Environmental Quality***, 251 S.W.3d 184 (Tex. App.–Austin 2008, no pet.) (irrigation district's ability to declare bankruptcy)

The Engelman Irrigation District applied for permission from the TCEQ to file for bankruptcy after a farm obtained a judgment against it in a breach of contract action. The TCEQ denied the District's application on the ground that the District had a number of options available to it by which to pay its debt. According to the TCEQ, the District could:

- sell some of its water rights,
- sell all of its mineral rights
- sell some of its water allocations;
- increase its assessments to irrigators, and
- with Commission approval, obtain a long-term revenue note.

Engleman challenged the order on a number of grounds.

Forced sale. Engleman claimed that the order was invalid because it was an unconstitutional forced sale of Engelman's asserts. Article XI, § 9 of the Texas Constitution provides that "all property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation." The court held the Commission's order did not violate the Constitution because the Commission had not ordered a sale. Instead, the order provided that the District is entitled to take certain acts, including the sale of water rights, to meet its debt obligations.

Bankruptcy rule. Engleman argued that, under § 293.88(a) of Title 30 of the Texas Administrative Code, the Commission could only consider the District's ability to raise money from taxes and fees, not from funds generated by selling its property. The court held that § 293.88 only listed information that the District must provide when it applies for permission to declare bankruptcy, and does not limit what the Commission may consider in deciding whether bankruptcy is appropriate. Engleman also complained that, under § 293.88(d), the Commission was required to order Engleman to take "specific measures" rather than identify different options

from which the District could choose. The court, giving deference to the Commission's interpretation of its own rule, found no inconsistency between § 293.88 and the ordering provisions at issue.

Borrowing money. Engleman claimed that the Commission wrongly concluded that Engelman could borrow money to satisfy the judgment because no provision allowed a district to borrow money to satisfy a private judgment creditor. The court held that § 58.391 of the Water Code, which provides that a district could borrow money "to pay obligations," was sufficient to authorize such debt. The statute did not need to specifically list each purpose for which the District may borrow.

Substantial evidence. Engleman also challenged the evidentiary basis of the conclusion that it could increase its water assessments in an amount necessary to satisfy the judgment, and that it can reasonably meet its debt obligations as they mature. Although the region had been experiencing a drought, the leader of Commission's utility and oversight team testified that the District could sell the water rights associated with about 500 acres that had been excluded from the District without impairing its obligations because, although the total number of irrigable acres within its boundaries had declined, there had been no corresponding decrease in the amount of water rights it owned. Further, there was evidence that the District was not required to provide irrigation water to all of the irrigable acres within its boundaries. Finally, the existence of the drought meant the District could obtain advantageous terms if it sold water rights.

The Austin Court of Appeals held there was sufficient evidence to support the TCEQ's order, and affirmed its issuance.

E. ***City of Dallas v. Hall***, 2008 WL 2622809 (N.D. Tex. June 30, 2008) (challenging the creation of a wildlife refuge at the site of a proposed reservoir)

On June 11, 2006, the Fish and Wildlife Service ("FWS") designated a 25,218-acre site as the Neches River National Wildlife Refuge (the "Refuge"). The City of Dallas and the Texas Water Development Board had wanted to use the same land on the Upper Neches River to develop a reservoir to serve the future water needs of Dallas residents and other customers. The City and the Board filed suit against officials of the FWS and the United States Department of the Interior, alleging that the officials' decision to establish the Refuge was procedurally and substantively flawed. In this opinion, the Court evaluated cross-motions for summary judgment on the issue of whether the FWS violated NEPA by failing to prepare an environmental impact statement ("EIS") before establishing the Refuge. The City and the Board had the burden to show that the defendants had no evidence to support the decision not to produce an EIS, or that defendants disregarded or ignored a factor required in conducting their environmental assessment ("EA").

The court evaluated the complaint under the Fifth Circuit's decision in *Sabine River Authority v. United States Department of the Interior*, 951 F.2d 669 (5th Cir. 1992). In that decision, the Fifth Circuit had held that the FWS was not required to prepare an EIS with regard to its decision to accept a conservation easement on 3800 acres of land in East Texas, even though acquisition of the easement prevented the plaintiff from constructing a water reservoir on the same land.

The court rejected the plaintiffs' arguments that the establishment of the Refuge alters the status quo. The status quo, the court stated, is the condition of the land as it is now. The Refuge will preserve – not alter – that status quo.

The court also rejected arguments that the FWS violated NEPA by failing to address the Refuge's indirect effects on Dallas's water supply, the Dallas economy, and Dallas and Texas' future water planning. The court held that the establishment of the Refuge was not the proximate cause of Dallas' future water problems, even though the proposed reservoir was listed as a planned reservoir in two regional water plans, a potential construction date had been set, facility and unit costs calculated, and the economic consequences of not adopting the proposed water management strategies estimated. The adequacy of the City's future water supply turned on too many factors, most of which were under the City's control – not the FWS's.

The court rejected as well arguments that the FWS's EA was inadequate, holding that the EA had included consideration of a reasonable range of alternatives, that the dated information the FWS used did not harm the FWS's ability to assess its environmental impact, that the FWS did not err by concluding that establishing the Refuge's boundaries would not have a directly ascertainable economic impact on the City, and that the FWS adequately coordinated with state and local agencies before deciding to establish the Refuge.

The district court according rendered judgment against the City and the Board on their NEPA claims.

IV. AIR QUALITY

A. *North Carolina v. E.P.A.*, No. 05-1244, 2008 WL 2698180 (D.C. Cir. July 11, 2008) (striking down the Clean Air Interstate Rule regulating SO2 and NOx)

EPA sought to implement § 7410(a)(2)(D) of the Clean Air Act ("CAA") with its Clean Air Interstate Rule ("CAIR") regulating SO2 and NOx. Under § 7410(a)(2)(D)(i)(I), EPA had to determine what amount of emissions "contribute[s] significantly" to another state's nonattainment problem. EPA used several factors to define "contribute significantly," including one state's impact on another's air quality, the cost of "highly cost effective" emissions controls, and fairness and equity in the balance between regional and local controls.

CAIR sets each state's NOx emission budget by allocating the regionwide NOx budget among CAIR states according to each state's proportion of oil-,gas-, and coal-fired facilities. CAIR sets each state's SO2 budget using a process similar to the one used for the NOx budgets: it allocates the regionwide SO2 budget among upwind states.

The D.C. Circuit Court of Appeals overturned several significant portions of the CAIR. Then, holding that the invalid portion was not severable from the remaining portion, the court vacated the CAIR in its entirety. The court held that the CAIR suffered from the following deficiencies:

- EPA's pollution trading program was invalid because it did not require sources that contribute significantly to nonattainment in any other State to reduce their emissions.
- EPA did not include in its CAIR upwind states that send pollution into downwind areas that are projected to marginally meet attainment levels of NAAQS in 2010.
- EPA did not harmonize CAIR's deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas.
- EPA chose the SO2 and NOx budgets on an improper basis:
    - SO2 – EPA based the budget on allowances the states' electric generating units ("EGUs") receive under Title IV. The court held that EPA did not adequately explain how reducing Title IV allowances would adequately prohibit states from contributing significantly to downwind nonattainment of the PM2.5 NAAQS.
    - NOx – EPA determined the regional cap by multiplying NOx emissions rates by the heat input of states in the CAIR region. Then, EPA distributed to each state, as its budget of NOx emissions allowances, its proportionate share of the regional cap. But in determining the shares, EPA adjusted each state's heat input for the mix of fuels its power plants used: a coal fired EGU contributed its full heat input to the state total, an oil-fired EGU counted for only 60% of its heat input and a gas-fired EGU only 40%. This adjustment was based on EPA concept that this created a "fair" allocation – a factor that the court held EPA could not permissibly consider.
- EPA did not have the statutory authority to terminate or limit Title IV allowances, either through a trading program under § 7410(a)(2)(D), or by requiring that SIPs have allowance retirement provisions.

B. ***Pacific Merchant Shipping Ass'n v. Goldstene***, 517 F.3d 1108 (9th Cir. 2008) (CAA preemption)

Section 209(e)(2)(A) of the Clean Air Act ("CAA") requires states to obtain EPA authorization in order to adopt "standards and other requirements relating to the control of emissions from [ ] vehicles or engines." 42 U.S.C. § 7543(e)(2)(A). The issue in this case was whether the Marine Vessel Rules (the "Rules") constituted standards relating to the control of emissions from vehicles or engines, and thus are preempted under the CAA, or whether the Rules are mere "in-use requirements" under § 209(d) that are not preempted. For the following reasons, the Ninth Circuit held that the Rules are standards, and so preempted.

First, by their very terms, the Rules explicitly prohibited the operation of auxiliary diesel engines "which emit[ ] levels of diesel PM, NOx, or SOx in exceedance of the emission rates" that would result from the use of certain fuels. CAL.CODE REGS. tit. 13, § 2299.1(e)(1) (2008). Those rates are susceptible to precise quantification. The Ninth Circuit recognized that under the Supreme Court's decision in *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) ("*SCAQMD*"), this sort of regulation is a "standard." In *SCAQMD,* the Supreme Court considered whether regulations that prohibited the purchase or lease of motor vehicles that do not comply with certain emissions requirements were preempted standards under § 209(a) of the Clean Air Act. 541 U.S. at 248-49, 124 S.Ct. 1756.

Although it defined "standard" under § 209(a), the Supreme Court indicated that its definition of "standard" is applicable throughout Title II of the Clean Air Act, which includes § 209(e). *Id.* at 254, 124 S.Ct. 1756. Further, said the Ninth Circuit, § 209(e) contains the phrase "standard or requirement relating to the control of emissions," which is essentially identical to § 209(a)'s "standard relating to the control of emissions."

The Ninth Circuit held that the CAA preempted the Rules.

C. ***New Jersey v. E.P.A.***, 517 F.3d 574 (D.C. Cir. 2008) (delisting a Hazardous Air Pollutant).

Several public entities petitioned for review of Environmental Protection Agency ("EPA") rules regarding the emission of hazardous air pollutants ("HAPs") from coal and oil fired electric utility steam generating units ("EGUs"). The first set of rules removed coal- and oil-fired EGUs from the list of sources whose emissions are regulated under § 112 of the Clean Air Act. The second set of rules established, under § 111 of the CAA, performance standards for new coal-fired EGUs, and total mercury emissions limits for States, along with the voluntary cap-and-trade program for new and existing coal-fired EGUs.

The D.C. Circuit held that once EPA had determined the EGUs should be regulated under § 112 and listed them under § 112(c)(1), EPA had no authority to delist them without following the procedure in § 112(c)(9). And, because the performance standards under § 111 were based on EPA's decision to delist under § 112, those rules were also invalid. Accordingly, the court of appeals vacated both sets of rules.

D. ***Environmental Defense, Inc. v. E.P.A.***, 509 F.3d 553 (D.C. Cir. 2007)(rules regulating "hot spot" analyses)

Environmental organizations brought a petition for review of a final rule promulgated by EPA to regulate "hot spot" analyses undertaken as part of transportation conformity determinations required by Clean Air Act ("CAA").

Petitioners sought a remand of §§ 93.116 and 123(b) of the Final Rule on the ground that they failed to implement the conformity conditions in CAA §§ 176(c)(1)(A) and (B)(iii). They also sought a vacatur of EPA's decision to withdraw a previously announced emissions model from use in "hot spot" analyses on the ground that EPA failed to give prior adequate notice of opportunity for comment.

The court held that petitioners did not prove that EPA's interpretation of CAA 176(c)(1)(A) is unreasonable or that EPA failed to give adequate notice and opportunity for comment prior to withdrawing the model, so denied the petition as to those allegations.

However, the court held that it was arbitrary and capricious for EPA not to define the term "any area" under § 176(c)(1)(B)(iii) in the same way as in 176(c)(1)(B)(i) and (B)(ii), or to explain why the term means something different in (B)(iii). The court therefore remanded the final rule for EPA to either interpret (B)(iii) in harmony with (B)(i) and (B)(ii) or explain why it need not do so.

E. ***Center for Biological Diversity v. National Highway Traffic Safety Admin.***, 508 F.3d 508 (9th Cir. 2007) (environmental impact statement for impact of CO2 under the Energy Policy and Conservation Act)

Various states and public interest organizations petitioned for review of the National Highway Traffic Safety Administration ("NHTSFA") rule setting corporate average fuel economy ("CAFE") standards for light trucks. The governing statute is the Energy Policy and Conservation Act ("EPCA"), which was enacted after the 1973 Mideast oil embargo. *See* 42 U.S.C. 32901, et. seq. The Ninth Circuit struck the rule, holding that it suffered from a number of infirmities.

No monitization of CO2 emissions. The court held that NHTSA may use a cost-benefit analysis to determine the "maximum feasible" fuel economy, but could not "put a thumb on the scale" by undervaluing the benefits and overvaluing the costs of more stringent standards. NHTSA acknowledged that the scientific literature contained estimates of the value of reducing CO2 and other greenhouse emissions, but concluded that that value was too uncertain to support their explicit valuation and inclusion among the savings in environmental externalities. But – because it had shown that there was a range of values, not beginning at zero, the court held that the agency erred by not including *some* value for the benefit of reducing CO2 and other greenhouse gases. Further, NHTSA had monetized other uncertain benefits, such as the reduction of criteria pollutants, crash, noise, congestion costs, and the value of increased energy security, which suggested that NHTSA could monetize the uncertain benefits of the value of reducing CO2, as well.

No backstop. A backstop is a required economy level applicable to a manufacturer if its required level under the Reformed CAFE (model year 2011 and beyond) fell below a certain minimum. NHTSA argued that a backstop would limit the ability of manufacturers to respond to market shifts arising from changes in consumer demand. The court concluded there was a chance that a floating fleet-mix-based standard would continue to permit upsizing – not as a function of consumer demand, but also as a function of the manufacturer's own design and marketing decisions. Therefore, the Ninth Circuit held that NHTSA should have included a backstop.

Failure to close SUV loophole. NHTSA sets CAFE standards lower for "light trucks" than for passenger automobiles. "Light trucks" includes many SUVs, vans, and pickup trucks. The Ninth Circuit held that the NHTSA's failure to tighten the definition of "light truck" was arbitrary, given that most trucks are used primarily for passengers. The court remanded that issue to the agency to either change the definition or provide a valid reason why it should not.

Standards for 8,500 to 10,000 GVWR. The Court held that NHTSA's decision not to regulate the fuel economy of all vehicles between 8,500 and 10,000 lbs. Gross Vehicle Weight Rating ("GVWR"), is arbitrary because fuel economy standards for those vehicles are feasible and would result in significant energy conservation. 49 U.S.C. § 32901(a)(3). The only vehicles in that weight class that NHTSA had set standards for were those designed primarily for the transportation of persons.

No EIS. The Ninth Circuit further held that NHTSA was required to prepare an environmental impact statement ("EIS") because there was a substantial question as to whether

NHTSA's CAFE standards for light trucks might have significant impact on environment. NHTSA had concluded that the new standards would result in 0.2% decrease in carbon dioxide emissions – but that was only in comparison to no change in the standards at all. So, while greenhouse gases would increase overall, the increase was a tiny bit smaller with the CAFE rules. The court noted that the record contained evidence showing that a continued increase in greenhouse gas emissions might change the climate in a sudden and non-linear way. Despite that evidence, NHTSA failed to provide convincing statement of reasons for why a small decrease – as opposed to a larger decrease – in growth of emissions would not have a significant impact on environment. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.27(b).

F. ***Sierra Club v. U.S. E.P.A.***, 499 F.3d 653 (7th Cir. 2007) (best available control technology and the 8-hour standard)

Section 7475(a)(4) of the Clean Air Act ("CAA") requires that new major air pollution sources and major modifications be designed to have the best available control technology ("BACT") for minimizing pollution. The Sierra Club and other environmental organizations challenged the EPA's issuance of a permit to Prairie States General Co. ("Prairie States") to build a "mine mouth" coal-fired generating plant on the ground that the permit did not require BACT. The plant would be located at the mouth of the mine, which would allow coal to be brought by a conveyer belt to the plant. But the coal mined at that site had a high sulfur content. To burn low-sulfur coal Prairie States would have to arrange to transport the coal from more than a thousand miles away, and would have to change the design of the plant – i.e., that portion of the plant that received the coal. The petitioners argued that EPA must decide whether hauling low-sulfur coal from afar would be the best available means of controlling air pollution from the plant. EPA argued that that consideration was inappropriate because determination of the BACT does not include redesigning the plant proposed by the applicant.

Justice Posner's opinion noted that, taken to an extreme, the EPA could order Prairie States to redesign its plant as a nuclear plant rather than a coal-fired one, or to replace coal-fired boilers with wind turbines. But that would turn an evaluation of BACT into an evaluation of alternatives – a different statutory requirement. Because the difference in determining BACT and requiring alternatives was a difference of degree, the Court deferred to EPA's judgment to uphold the permit as requiring BACT.

The Sierra Club also challenged the permit on the ground that EPA could not rely on the older 1-hour standard to determine whether the plant's emissions would exceed the new 8-hour standard imposed by the CAA's national ambient air quality standards under § 7475(a)(3). The court held that the agency was entitled to use the measure used for the older 1-hour standard as a stopgap pending adoption of a measure tailored to the new 8-hour standard.

G. ***Blue Skies Alliance v. Texas Comm'n on Environmental Quality***, 265 Fed.Appx. 203 (5th Cir. 2008) (attorneys' fees in citizens' suit)

Blue Skies Alliance and other environmental organizations sued the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA") for failing to take several non-

discretionary actions with respect to the air quality in the Dallas-Fort Worth area ("DFW"). The Texas Commission on Environmental Quality ("TCEQ") and other parties intervened. After multi-lateral discussions, plaintiffs and the EPA agreed to a consent decree that included attorneys' fees for plaintiffs; there were also agreements with several of the intervenors, including the TCEQ. Plaintiffs moved for attorneys' fees of $56,276.10 from the TCEQ, which the district court awarded. The TCEQ appealed the award of fees. The Fifth Circuit held that attorneys' fees are not justified because plaintiffs did not succeed against the TCEQ on the merits, so reversed the fee award.

H. ***U.S. v. Citgo Petroleum Corp.***, No. C-06-563 (criminal prosecution of refinery for violating the CAA)

The United States' successful prosecution of Citgo Refining and Chemical Co., and Citgo Petroleum Corp. (collectively, but referred to singularly, as "Citgo") for violations of the Clean Air Act marks the first time a refinery has been convicted under the Act. Citgo was indicted after the Environmental Crimes Task Force – including the EPA, US. Fish and Wildlife Service, the FBI, Texas Parks and Wildlife, and the TCEQ – investigated benzene emissions from Citgo's Corpus Christi Plant.

The emissions were identified as emanating from two open-top aboveground storage tanks, Tank 116 and Tank 117. The tanks had been installed in December 1993. The indictment alleged that the defendants knew as early as December 1995 that a significant volume of oil was entering tanks 116 and 117, that that volume of oil was environmentally unacceptable, and that environmental regulations required roofs on the tanks. At an unannounced inspection, the TCEQ found approximately 4.5 million gallons of oil in the tanks.

The jury found Citgo guilty of knowingly operating Tank 116 and Tank 117 as oil/water separators without installing pollution control devices (such as floating or fixed roofs) to prevent benzene emissions into the environment. *See, e.g.,* 40 C.F.R. §§ 60.690-.691.

The Corpus Christi Division of the United States District Court, Southern District of Texas, will soon assess punishment.

V. Natural Resources Development: Oil and Gas, Mining

A. ***Strata Resources v. State***, No. 03-06-00393-CV, 2008 WL 2736904 (Tex. App.—Austin July 11, 2008, no pet. h.) (penalties for plugging wells under the Texas Natural Resources Code)

Strata Resources and its one-time general partners, Stephen Epps and Charles Brandes, appealed from a judgment imposing administrative and civil penalties and requiring reimbursement for funds expended to plug certain wells formerly operated by Strata.

The RRC had issued an administrative order with respect to four sets of wells, giving the defendants 30 days to plug the well and assessing an administrative penalty. When they failed to do so, the RRC, at the request of the landowner, converted two of the wells to water wells. The State then brought suit against Strata, Epps and Brandes, seeking a mandatory injunction requiring them to plug the remaining wells, reimbursement for well-plugging costs, and penalties for failure to comply with the orders to plug abandoned wells. Epps filed for personal

bankruptcy while the suit was pending. Following Epp's bankruptcy, the trial court heard evidence and argument. The court rendered judgment imposing administrative penalties, civil penalties, and reasonable plugging expenses.

Effect of bankruptcy. On appeal, Epps claimed he was not liable for his share of plugging expenses because that debt had been discharged in his bankruptcy. The State argued that the judgment could not have been discharged in bankruptcy because the debt did not arise until after the bankruptcy proceeding, when the trial court rendered judgment. The court of appeals held, by reference to federal environmental laws, that the claim arose before the petition was filed, because the State had a right to payment 30 days after Epps failed to comply with Commission orders. The court therefore held that Epps had discharged his share of plugging expenses in bankruptcy, even though the debt at that time was unmatured, unliquidated, and disputed.

Conversion to water well. Strata, Epps and Brandes also challenged the RRC's decision to convert two of the wells to water wells rather than plug them. The court upheld the RRC's decision to do so. Not only does § 3.14 of the RRC's rules anticipate that a well might be converted to a water well, but, by so doing, the RRC spent less money than it would have spent to completely plug the wells. *See, e.g.,* 16. Tex. Admin. Code § 3.14.

Disposing of abandoned property. Strata, Epps, and Brandes also claimed that the RRC did not prove its plugging costs, because it had disposed of items from the wellsite at a price below market. Section 389.085 of the Texas Natural Resources Code allows the RRC to treat the property as abandoned but requires that it dispose of it "at a price or value that reflects the generally recognized market value of the equipment of hydrocarbons, with allowances for physical condition." The State argued that this fact, even if true, did not affect the State's ability to recover its plugging costs. Instead, their remedy was through a suit against the oil-field cleanup fund, under § 89.086 of the Texas Natural Resources Code. The court agreed.

Amount of civil penalties. Strata, Eppas and Brandes also challenged the amount of the civil penalties, claiming that they were invalid because the trial court did not explicitly find the number of days that they were in violation. The court of appeals noted that it was undisputed that the appellants did not comply with any of the orders before trial. Based on that, the trial court could have fined Strata and Epps as much as $202,100,000, and Brandes as much as $165,880,000. Therefore, the evidence was sufficient to support the district court's assessment of $20,000 for Strata and Epps and $10,000 for Brandes.

Attorneys' fees. Finally, Strata, Epps, and Brandes challenged the award of attorney's fees, which were awarded jointly and severally against all three defendants. The court of appeals held that the State had not segregated its attorney's fees incurred in prosecuting claims for which fees were recoverable from those in which fees were not recoverable. Further, the State did not segregate its fees as to each defendant, although Brandes was liable for only two groups of wells, but Epps was liable for all four groups of wells. Finally, the State should not have obtained well-plugging expenses against Epps, since his liability had been discharged, so it could not recover attorneys fees as to him on that claim. The court therefore remanded that portion of the case to the trial court for further proceedings.

B. ***Valence Operating Co. v. Texas Genco, LP,*** No. 10-06-00252-CV, 2008 WL 553220 (Tex. App.—Waco Feb. 27, 2008, no pet.) (not yet released for publication) (drilling gas well in the footprint of a landfill)

Texas Genco, LP ("Genco") sought a permanent injunction to prevent Valence Operating Co. ("Valence") from drilling a gas well within two cells of Genco's ash-disposal landfill. Genco burns lignite coal to produce electricity. The coal burning process produces coal combustion products, such as fly ash and bottom ash, that Genco disposes of in its Class II industrial waste landfill.

In 1985, Genco deed-recorded 45 acres of land for its landfill. At that time, there was one preexisting gas well within the landfill's footprint. Genco redesigned the landfill in 1994 to include an approximately 91-acre tract. Genco deed-recorded this 91-acre tract as part of its industrial landfill and registered the landfill expansion with the TCEQ.

Valence eventually drilled additional wells, gradually surrounding Genco's landfill. Genco objected to Valence's proposals to drill Wells 8 and 9 within the landfill's footprint because the wells eliminated possible options for expanding the landfill. Genco attempted to persuade Valence to directionally drill the wells. When that failed, Genco filed suit, seeking to enjoin the wells on the basis of the accommodation doctrine.

Even though the mineral estate is dominant, and has the right to the reasonable use of the surface estate to produce minerals, this right must exercised with due regard for the rights of the surface estate's owner. The Texas Supreme Court, in *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971), described the accommodation doctrine as follows:

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the [mineral owner] whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the [mineral owner].

A jury found for Genco on all issues, the trial court rendered judgment on that verdict, and Valance appealed.

On-lease drilling site. The court of appeals first found that Genco had identified on-lease drilling sites, so overruled Valance's complaints that it was being forced to find an off-lease site from which to drill.

"Existing" use. The court of appeals also overruled Valence's complaint that it was being force to accommodate a use that did not yet exist. The court found sufficient evidence that the use of cells 8 and 12, which were within the landfill's footprint, would be interfered with even though ash had not yet been deposited: (i) half of cell 8 had been prepared with a clay liner, (ii) topsoil and clay had been mined from cell 12 for use in other cells, and (iii) the changes would cut 2.2 years from the estimated 11-year remaining life of the landfill.

The court of appeals affirmed the trial court judgment in Genco's favor.

C. ***Texas Citizens for a Safe Future and Clean Water v. Railroad Comm'n of Texas***, 254 S.W.3d 492 (Tex. App.–Austin 2007, no pet. h.) ("public interest" standard under § 27.051 of the Texas Water Code)

Pioneer Exploration ("Pioneer") applied to the Railroad Commission ("RRC") for a permit to operate a commercial injection well for the disposal of oil and gas waste. The Texas Citizens for a Safe Future and Clean Water and James Popp (the "Citizens") challenged the permit application on water quality and public safety grounds. Testimony at the hearing indicated that Pioneer had failed to identify all wells within ¼ mile of the location of the proposed injection well. When the Commission's Underground Injection Control staff expressed concern, the Hearings Examiners recessed the hearing on the application so information on the "mystery well" could be gathered.

During the recess, Pioneer located the "mystery well," which was in fact within ¼ mile of the proposed injection well, and performed a remedial cement squeeze job on that well. This action satisfied the staff's concern that the well could become a conduit for migration of the injected waste. The hearing was reconvened, and the RRC ultimately granted the permit.

The Citizens appealed, claiming that RRC denied the Citizens due process and failed to adequately consider the public interest.

Due process. The Court of Appeals rejected the Citizens' argument that the RRC should have simply denied the permit application rather than recessing the hearing and allowing Pioneer to supplement its application. The Citizens were given adequate notice and an opportunity to respond, and actually benefited from the continued hearing because they did not have to prepare for an entirely new hearing.

Public interest. Section 27.051(b) of the Water Code requires that RRC find "that the use or installation of the injection well is in the public interest" before issuing an injection well permit. The Citizens had presented evidence of a public-safety issue because trucks hauling waste to the well would be using narrow, unpaved roads that contained blind curves, and that were frequently used by children and pedestrians. Pioneer's own expert testified that the proposed well could operate 24 hours a day, 7 days a week and that between 20 to 50 trucks could travel the roads to and from the well each day. The RRC heard this evidence but granted the permit application based solely on the public interest in increasing oil and gas production in the state.

Pioneer and the RRC claimed that the traffic-related concerns are not within RRC's jurisdiction and could not be considered. In making this claim, Pioneer and RRC cited to a memorandum opinion, *Grimes v. State*, 2005 WL 2043842 (Tex. App.–Austin 2005, no pet.), which states that RRC may take into consideration the increased production of oil and gas as a factor in determining whether the proposed well is in the public interest. The *Texas Citizens* court distinguished *Grimes*, stating that although *Grimes* allows the RRC to consider increased production, that should not be the *only* factor considered.

The RRC also argued that the legislature intended to preclude the RRC from considering the effects of proposed wells on public roadways. The RRC pointed out that that § 27.051(a)(6) specifically requires the TCEQ to take public roadways (and other factors) into consideration in evaluating a hazardous waste injection well permit "not located in an area of industrial land use," while § 27.051(b) does not require the RRC to take those factors into consideration in any instance. The Austin Court of Appeals, however, noted that the requirement that the TCEQ

consider public roadways – along with other resources such as local law enforcement, emergency medical or fire-fighting personnel – is limited to very narrow circumstances: the permitting of hazardous waste wells that are "not located in an area of industrial land use." The court reasoned that the legislature could have added this requirement because it believed that "hazardous waste injection wells in non-industrial areas require more careful oversight and explicit statutory requirements" regarding the issuance of permits. The court held that, "The specific mandate founding § 27.051(a)(6), which affects only very limited types of permit applications evaluated by the TCEQ, does not necessarily imply that the legislature intended to foreclose consideration of public interest concerns related to public roadways in all other situations" – by either the TCEQ or the RRC.

The RRC also claimed that the consideration of traffic issues was not within its jurisdiction because other agencies are responsible for regulating traffic. The *Texas Citizens* court rejected that argument, stating that almost every aspect of public safety is regulated by some agency. So, if the RRC were foreclosed from considering factors that were regulated by another agency, the Commission would only be able to consider the effect on oil and gas production, an implausible conclusion given the broad mandate to consider the "public interest."

The court further noted that the permit that had been granted included several "special conditions" and "standard conditions" that related to public safety, such as requiring security to prevent unauthorized access. The court stated that the RRC could similarly include "special conditions" that address the traffic issues, such as limiting the number of trucks accessing the well or requiring the use of alternative routes to access the well.

The court ultimately reversed the district court's decision and remanded the permit application to RRC for a broader consideration of the public interest consistent with the court's opinion. The court's original decision, drafted by Justice Henson, and participated in by Justices Law and Waldrop, was handed down on December 6, 2007. On May 23, 2008, Justices Pemberton and Waldrop each handed down a concurring opinion.

Justice Pemberton agreed that the term "public interest" cannot be viewed in isolation, but must be construed in its statutory context. To that extent, "it is not an unqualified delegation of policymaking power," nor it is "wholly without objective meaning." He ultimately concluded that there was nothing in the statutory scheme related to the RRC or its injection-well program "evidencing legislative intent to limit the Commission's *statutory authority* or *jurisdiction* in a manner that would preclude it from considering the public-safety factors." *Texas Citizens,* 254 S.W.3d at 504. (emphasis original).

Justice Waldrop, joined by Justices Puryear and Pemberton, stated that the legislative instruction to consider the "public interest" could have been intended to allow the RRC to address the "myriad possible circumstances that might be presented in an injection well permit application." He stated that the RRC should not refuse to entertain particular aspects of the public interest on the theory that it does not have the power or jurisdiction to do so. He stated that the fundamental problem is that even if one supposed that "public interest" in § 27.051(b) is tied to the RRC's charge to conserve oil and gas, this does not necessarily imply that the RRC must carry out its charge without considering the impact of its actions on issues of public interest that are affected by, but are not themselves, related to the conservation or production of oil and gas.

VI. PROTECTING ANIMAL SPECIES

A. ***Natural Resources Defense Council, Inc. v. Winter,*** 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 76 U.S.L.W. 3539, 76 U.S.L.W. 3666, 76 U.S.L.W. 3672 (U.S. June 23, 2008) (No. 07-1239) (must the Navy complete an EIS before conducting training activities involving sonar)

Environmental organizations (collectively, but referred to singularly, as the "NRDC") brought suit to enjoin the Navy's use of high-intensity, mid-frequency active ("MFA") sonar in training exercises because that use would cause serious harm to various species of marine mammals present in southern California waters. At least thirty-seven species of marine mammals are found in those waters, nine of which are listed as threatened or endangered under the Endangered Species Act ("ESA"): the blue whale, fin whale, humpback whale, Northern Pacific right whale, sei whale, sperm whale, sea otter, Stellar sea lion, and Guadalupe fur seal.

The Navy acknowledged in its Environmental Assessment ("EA") that MFA sonar may affect both the physiology and behavior of marine mammals. Exposure to "very high" acoustic energy levels may impair the function of marine mammals' visual system, vestibular system and internal organs, and may cause injury to their lungs and intestines. *NRDC*, 518 F.3d at 665. The primary physiological effects of MFA sonar are on the mammal's auditory system: very high sounds levels may rupture the eardrum or damage small bones in the middle ear, but even lower levels may cause permanent or temporary hearing loss. *Id.*

The Navy also acknowledged that the use of MFA sonar can result in profound behavior alterations, including changes in feeding, diving, and social behavior. The National Marine Fisheries Service ("NMFS") found that acoustic exposure can impair marine mammals' foraging ability and their ability to detect predators or communicate. The NMFS also cited studies finding that noise has caused whales to move away from their feeding and mating grounds and migration routes, and to change their calls. *Id.* at 660.

Beaked whales were particularly vulnerable to MFA sonar. It is clear that the use of sonar can lead to the stranding of beaked whales. Several strandings coincided with the Navy's sonar training exercises. Necropsies of the dead whales in several of the strandings revealed hemorrhages in and around the ears, in the cranial spaces, and in other parts of the body such as the jaw fat, lungs and kidneys. In a joint report, the Navy and NOAA concluded that the injuries to the whales that stranded in the Bahamas constituted "some sort of acoustic or impulse trauma," and that the Navy's use of MFA sonar was the "most plausible" source of that trauma. *Id.* at 667. The International Whaling Commission agreed that the hemorrhages in the inner ears and cranial spaces were consistent with "direct acoustic effects." *Id.*

Despite the possibility that beaked whales are more likely to be injured – it is also more likely that those injuries would go undetected – the NMFS concluded that "injuries or mortalities . . . would rarely be documented, due to the remote nature of many [naval activities] and the low probability that an injured or dead beaked whale would strand." *Id.* at 670. NMFS researchers suggest that the likelihood of detecting dead beaked whales is low, as it concluded that in 90% of beaked whale stocks, a decline in population of 50% over a 15-year period would go undetected

as a decline at all. Non-fatal injuries not leading to stranding would be even more difficult to detect because no beaked whale carcass would surface.

The trial court granted the writ of injunction, finding that NRDC had demonstrated probable success on the merits of its claim that the Navy violated the National Environmental Policy Act ("NEPA") by failing to prepare an Environmental Impact Statement ("EIA"). The district court also found that the NRDC had demonstrated probable success on the merits of its claim that the Navy violated the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, by submitting a consistency determination that did not take into account the planned use of MFA sonar and failing to adopt the mitigation measures the California Coastal Commission ("CCC") determined were necessary for the exercises to be consistent with the California Coastal Management Program. The preliminary injunction imposed conditions on the completion of the remaining eight of fourteen scheduled training exercises.

On January 15, 2008 the White House's Council on Environmental Quality purported to approve "alternative arrangements," pursuant to 40 C.F.R. § 1506.11 that would permit the Navy to continue its exercise without first completing an EIS. On the same day, President George W. Bush, pursuant to 16 USC § 1456(c)(1)(B), exempted the Navy's use of MFA sonar from the requirements of the CZMA.

On February 4, 2008, the district court refused to withdraw its injunction, concluding that the CEQ's action was invalid and therefore not entitled to deference. The district court also expressed concerns about the constitutionality of the President's CZMA exemption on the ground that it appeared to amount to an executive revision of a judicial decision and thus violated the principle, recognized in *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L.Ed. 436 (1792), that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. However, the district court declined to decide the constitutionality of the CZMA exemption because it concluded the preliminary injunction was firmly supported on NEPA grounds. The district court also found that plaintiffs had demonstrated a possibility of irreparable harm and that the balance of hardships tipped in plaintiffs' favor.

The Navy appealed the trial court's preliminary injunction, and the Ninth Circuit reviewed the case on an expedited schedule. The court of appeals heard oral argument on February 27, 2008, and handed down its decision on February 29, 2008.

A court of appeals evaluating a preliminary injunction considers whether the plaintiff met one of two sets of criteria. Under the traditional criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

On appeal, the Navy raised two threshold issues. First, the Navy argued that the district court lacked subject matter jurisdiction to review the CEQ's approval of alternative arrangements because such approval constitutes a superseding agency action that renders moot any basis for an injunction predicated on the plaintiffs' original claims concerning the Navy's EA. The Ninth

Circuit rejected that argument, holding that the district court took its action based on the "firmly grounded . . . principle that only a *valid* subsequent action can render a legal claim moot." *Id.* at 679 (emphasis original).

Second, the Navy argued that, even if the district court could review the CEQ's action, the court erred by not deferring to the CEQ's and the Navy's assessment that "emergency circumstances" existed within the meaning of 40 C.F. R. 1506.11. The court of appeals held that the district court's conclusion that the Navy's current "emergency" was a creature of its own making – its failure to prepare adequate environmental documentation in a timely fashion, via the traditional EIS process or otherwise. That failure justified the district court's conclusion that no "emergency" existed. The appeals court distinguished the CEQ's current proclamation from its proclamation following Hurricane Katrina, when the CEQ explained that "emergency circumstances" exist when there is not sufficient time to follow the regular EIS process. By contrast, the Navy's routine training exercises were planned well in advance and with sufficient time to following the process. The court of appeals also noted that Congress has from time to time specifically exempted some Defense Department activities from NEPA, but did not exempt these training exercises.

Likelihood of success on the merits. The Ninth Circuit then considered the merits: i.e., whether the district court should have issued the injunction. The Navy's EA had estimated that its use of MFA sonar in the SOCAL exercises will expose marine mammals to 564 instances of Level A harassment and nearly 170,000 instances of Level B harassment. Level A harassment is an act that physically injures the marine mammal. Level B harassment is an act that disrupts the behavior of a marine mammal. The court of appeals stated that this clearly indicates that at least some substantial harm will likely occur in the Southern California Operating Area. *Id.* at 671-672.

The court rejected the Navy's statement that it had overestimated the 564 instances of Level A harassment only to allow it to analyze the potential impacts of MFA sonar on each beaked whale species in greater detail than it would otherwise. There was no support for that assertion in the record, and the Navy's counsel was unable to explain how overestimating the instances of Level A harassment would help the Navy more closely analyze those impacts on the beaked whale.

Moreover, the court said, to the extent a lack of scientific data prevents the Navy from establishing meaningful impact thresholds for beaked whales, that is all the more reason to conduct further research and prepare an EIS – not a reason to ignore the data that does exist and proceed with the exercises without mitigation measures.

The Navy also complained that the district court misunderstood the significance of the nearly 170,000 predicted Level B harassments. It argued first that that number was an overestimate resulting from conservative assumptions and did not take into consideration mitigation measures. The court of appeals also rejected that argument, noting that the Navy's EA had said its estimate was "consistent with the best available science."

The Navy also claimed it only had to prove that the exercise would not jeopardize the continued existence of a species. The court of appeals held that was the wrong standard. The

issue, the court said, is whether the act have a "significant effect" on the environment – even if it does not threaten a species with extinction.

Possibility of irreparable harm. The court of appeals held that the Navy's estimates in the EA regarding the Level A and B harassments were sufficient to show irreparable harm.

Balance of hardships. The Navy challenged certain of the mitigation measures, alleging they created an unreasonable hardship. The court of appeals concluded that there was no clear error in the district court's decision that requiring the Navy to shut down its use of MFA sonar when a marine mammal is detected within 2,200 yards of a sonar-emitting source would not jeopardize the Navy's ability to train and certify its forces. The broader safety zone would likely not cause significantly more shutdowns.

The Navy also protested the requirement that it power-down in significant surface ducting conditions. The Navy stressed the importance of training in surface ducting conditions but admitted that they rarely occurred in southern California, and had certified troops before even though they had not trained in such conditions.

The district court had concluded that although the Navy would have to alter the way it conducted anti-submarine warfare training, the mitigation measures would not preclude the Navy from effectively training and certifying forces for deployment to combat zones in the Western Pacific and Middle East. The court held that the district court's conclusion that the balance of hardships tipped in NRDC's favor was reasonable.

Advancement of the public interest. The Ninth Circuit recognized that the public has an interest both in national security and in protection of the marine environment. Because the court had concluded that that Navy had not shown that it would be unduly burdened by mitigation measures, and because the court had concluded that NRDC showed likely irreparable harm to the environment, the public interest was advanced by the injunction.

On June 23, 2008, the United States Supreme Court granted the Navy's petition for certiorari on the following issue: Can the Navy be enjoined from using sonar testing during training exercises without filing environmental impact statements as required by the Council on Environmental Quality?

B. ***Aquifer Guardians in Urban Areas v. U.S. Fish and Wildlife Service***, 2008 WL 972661 (W.D.Tex. 2008) (timing of ESA and APA challenge).

Environmental advocacy organizations brought actions against United States Fish and Wildlife Service and Army Corps of Engineers, alleging that the agencies violated the Endangered Species Act ("ESA") and the Administrative Procedure Act ("APA") by concluding that an approved transmission line project was not likely to have jeopardized the continued existence of the golden-cheeked warbler. The court held that the action was moot after construction of transmission line project was substantially complete, notwithstanding the organizations' concern about the ongoing effects of project.

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Mr. Gregg is a Principal in the Austin, Texas office of Beveridge & Diamond, P.C. and Co-Chair of the Firm's Oil and Gas section. His legal career has been devoted to the practice of environmental law. Over the course of his 15-year career, he has worked with most of the significant federal and Texas environmental programs. Most recently, his practice has focused on environmental issues involving contaminated properties, including the management of state and federal CERCLA matters, RCRA compliance counseling, transactions involving contaminated properties, counseling on state and federal regulatory cleanup programs, and state and federal natural resource damage claims. Mr. Gregg has also counseled clients on all manner of air, water and waste management regulatory issues (permitting, enforcement, and general compliance matters). He has represented national and international clients within the chemical, petroleum refining, and natural gas production, processing and transportation industries, among others, as well as various local and regional manufacturing interests.

Mr. Gregg began his career at the Texas Commission on Environmental Quality (TCEQ), where he provided program development and legal/litigation support for various air, water quality, and industrial and hazardous waste programs. From the TCEQ, he moved into private practice, focusing on environmental regulatory counseling and environmental litigation, until his move in-house to an international energy company in 2001. Mr. Gregg managed that company's nationwide MTBE MDL groundwater contamination and products liability lawsuits and provided legal defense on CERCLA cost-recovery and contribution matters across the country. He also managed the legal issues associated with the company's remediation portfolio, coordinated the company's environmental due diligence activities, and structured, drafted and negotiated the environmental components of the company's acquisitions, divestitures, and other transactions.

PROFESSIONAL HIGHLIGHTS

Mr. Gregg is a former Chair of the Houston Bar Association's Environmental Law Section and a current officer of the Texas Bar's Environmental and Natural Resources Law Section. He was distinguished in 2007 as a "Super Lawyer" in Environmental/Land Use law by Texas Monthly and Law & Politics Magazine (having been recognized in previous years as one of Texas' "Rising Stars"). He is AV Peer Review Rated.

ADMINISTRATIVE CASE LAW UPDATE

by

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20th Annual Texas Environmental Superconference
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LIST OF CASES

TEXAS STATE COURT CASES

Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1, 51 Tex. Sup. J. 971, 2008 Tex. LEXIS 513 (Tex. May 30, 2008)

Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality, No. 07-07-0183-CV, 2008 Tex. App. LEXIS 4943, (Tex. App.--Amarillo, Jul. 2, 2008)

West v. Texas Commission on Environmental Quality, No. 03-07-00455-CV, 2008 Tex. App. LEXIS 3967 (Tex. App.--Austin May 29, 2008)

Engelman Irrigation District v. Texas Commission on Environmental Quality and Shields Brothers, Inc., 251 S.W.3d 184 (Tex. App.--Austin April 10, 2008)

State v. Rhine, No. 2-07-319-CR, 2008 Tex. App. LEXIS 3221 (Tex. App.--Fort Worth May 1, 2008)

City of Celina v. Dynavest Joint Venture, 253 S.W.3d 399 (Tex. App.-- Austin Apr. 24, 2008)

Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas, No. 03-07-00025-CV (Tex. App.--Austin Dec. 6, 2007 (motion for rehearing denied (Tex. App. LEXIS 4040 (Tex. App.--Austin May 23, 2008))

Hillin v. Texas Commission on Environmental Quality, No. 03-07-00122-CV, 2008 Tex. App. LEXIS 2808 (Tex. App.--Austin Apr. 16, 2008)

Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Med. Exam'rs, Co. 03-05-00620-CV (Tex. App.--Austin May 23, 2008)

City Of Aspermont V. Rolling Plains Groundwater Conservation Dist., No. 11-07-00009-CV (Tex. App.-- Eastland May 8, 2008)

State v. Hale, No. 07-07-00343-CV, 2008 Tex. App. LEXIS 487 (Tex.App.--Amarillo January 23, 2008)

FEDERAL COURT CASES

City of Bangor v. Citizens Communications Co., 2008 U.S. App. LEXIS 14533 (1st Cir. July 9, 2008)

Benzman v. Whitman, 523 F.3d 119 (2nd Cir. April 22, 2008)

National Association of Home Builders v. U.S. Army Corps of Engineers, 264 Fed. Appx. 10 (D.C. Cir. February 5, 2008)

Sierra Club v. Hamilton County Bd. of County Comm'rs, 504 F.3d 634 (6th Cir. 2007)

U.S. v. FMC Corp., 2008 U.S. App. LEXIS 13556 (9th Cir. June 27, 2008)

U.S. v. Alcoa, Inc., 2008 U.S. App. LEXIS 13358 (5th Cir. June 24, 2008)

San Francisco Chapter of A. Philip Randolph Institute v. EPA, 2008 U.S. Dist. LEXIS 27794 (N.D. Cal. Mar. 28, 2008)

City of Dallas v. Hall, 2008 U.S. Dist. LEXIS 49944 (N.D. Tex. June 30, 2008)

North Carolina v. EPA, 2008 U.S. App. LEXIS 14733 (D.C. Cir. July 11, 2008)

API v. Johnson, 541 F. Supp. 2d 165 (D.D.C. March 31, 2008)

Riverkeeper, Inc. v. EPA, 514 F. Supp. 2d 565 (S.D.N.Y 2007)

The following is a discussion of several state and federal cases issued within the past year addressing administrative law issues potentially important to environmental law practitioners. The cases do not reflect a comprehensive survey of all administrative law opinions issued in that timeframe. Instead, the author selected a limited number of cases based on their perceived relevance to the practice of environmental law in Texas.[1]

TEXAS STATE COURT CASES

Rulemaking - Standard of Review

Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1, 51 Tex. Sup. J. 971, 2008 Tex. LEXIS 513 (Tex. May 30, 2008)

Guitar Holding Company ("Guitar") challenged the validity of Hudspeth County Underground Water Conservation District's ("District") rules adopted May 31, 2002 regarding groundwater production and transfer permits. Guitar argued the District misapplied its authority under Chapter 36 of the Texas Water Code to preserve existing or historical groundwater use within the district and in effect granted certain irrigators a perpetual franchise to transfer and sell Hudspeth county groundwater. Guitar argued the Water Code only authorizes a district to preserve historic or existing use of the same type or purpose. The District said that the statute addressed the quantity and not the purpose to which the production of groundwater is applied. The trial court upheld the validity of the District's rules and the permits that had been issued under the rules. The court of appeals affirmed those rulings.

The Texas Supreme Court reversed the court of appeals and rendered judgment declaring the transfer rules and the permits invalid. Acknowledging that a groundwater district's rules and decisions will generally be reviewed under the substantial evidence rule, the court found Guitar's action to be a challenge on the ground that the District had acted beyond its statutory authority. The court thus conducted a de novo review. After parsing the statutory language, the court found that while Chapter 36 permits a district to grandfather historic or existing uses of groundwater resources, the statute also requires that the district consider the quantity and purpose of the use when assessing whether or not it qualifies as historic and existing. Because transferring water to an entity outside the district is not the same purpose as irrigation within the district, the court found the District's decision to grandfather that use exceeded the District's authority provided in the Water Code.

Standing

Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality, No. 07-07-0183-CV, 2008 Tex. App. LEXIS 4943, (Tex. App.--Amarillo, Jul. 2, 2008)

"If pigs had wings they would fly." That is how judge Brian Quinn chose to begin his opinion in this case - usually not a good sign for one of the parties. IESI Texas Landfill, L.P. (IESI) purchased a landfill from the City of Weatherford and sought a permit modification from the

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[1] Special thanks to Geoffrey Goode and Graham Zorn for their assistance in identifying and summarizing many of the cases discussed in this paper.

TCEQ. The Executive Director granted the modification on October 27, 2004. Texas Disposal Systems Landfill, Inc. (Texas Disposal), a company that owns a landfill in Austin - 200 miles from the Weatherford landfill - challenged the decision. Following a public hearing, the Commission issued an order upholding the Executive Director's decision. Texas Disposal sought judicial review. The Commission and IESI filed pleas to the jurisdiction of the trial court, asserting that Texas Disposal lacked standing to complain since it was not a direct competitor of IESI's Weatherford landfill. The trial court agreed and dismissed the case.

Texas Disposal argued on appeal that it did have standing because, in the skeptical paraphrasing of the appellate court, "the manner in which the [IESI] permit was modified "potentially" jeopardizes the trust relationship that exists between [Texas Disposal] and its neighbors in Austin, and that, in turn, "potentially" interferes with the normal operation of [Texas Disposal's] landfill." The appellate court found that Texas Disposal failed to meet the standing requirements necessary to sustain its challenge to the Commission's decision. The court explained that a complainant must show a justiciable interest in the outcome by being "personally aggrieved or affected." Because Texas Disposal's landfill does not directly compete with IESI's (an undisputed fact), the appellate court determined Texas Disposal failed to establish that the Commission's decision would do anything more than give rise to *potential* impacts with their business. The Court concluded that, "like the chance of a pig growing wings, the purported injury that may befall Texas Disposal is mere speculation...fall[ing] short of establishing a justiciable interest and standing."

Judicial Review of Administrative Decision

West v. Texas Commission on Environmental Quality, No. 03-07-00455-CV, 2008 Tex. App. LEXIS 3967 (Tex. App.--Austin May 29, 2008)

In 2000, Abitibi, the owner of a paper mill in Lufkin, Texas filed an application with the Commission to renew and amend its TPDES permit. The Commission granted Jo Ellen Atkinson's hearing request on the application. The Commission denied other hearing requests, including those by Walter West and the Sierra Club. Subsequent to the Commission's referral of Abitibi's application to the State Office of Administrative Hearings (SOAH), Ms. Atkinson withdrew her hearing request. The administrative law judge granted Abitibi's ensuing motion for remand. On remand, the Executive Director granted the permit application pursuant to Tex. Water Code §5.122 (delegating uncontested matters to the Executive Director). Walter West and the Sierra Club filed petitions for judicial review more than thirty days after the Executive Director's issuance of the permit. The Commission filed a plea to the jurisdiction, arguing the deadline to file the petition had lapsed pursuant to Tex. Water Code Ann. §5.351 (requiring that a person file a petition for judicial review of a Commission's decision within thirty days after the effective date of the decision). The trial court granted the plea and dismissed the case. West and the Sierra Club appealed.

On appeal, West and the Sierra Club argued that review of the Commission's decision was governed by the Texas Administrative Procedure Act (APA) and not the Texas Water Code because the matter entailed the judicial review of a contested case decision. The appeals court disagreed. It first dismissed the appellant's argument relying on *Texas Department of Protective and Regulatory Services v. Mega Child Care, Inc.* (145 S.W. 3d 170 (Tex. 2004)) that the APA provides an independent right to judicial review. The appeals court found that case instead held that Section 2001.171 of the APA only provides an independent right to judicial review when the

agency's enabling act is silent. Because the Water Code expressly provides a right to judicial review, the appeals court found the Texas Supreme Court's holding in *Mega Child Care* inapposite. Turning to appellants' argument that the APA applies because the Abitibi application was a contested case, the appeals court concluded the Commission's approval of the Abitibi application was not a final decision in a contested case within the meaning of the APA. It dismissed appellants' argument that the judicial review provisions in the APA attached once the Commission granted Ms. Atkinson's request for a hearing, finding that the application became "uncontested" pursuant to 30 Tex. Admin. Code §80.101 when the application was remanded to the Commission.

Rule Interpretation

Engelman Irrigation District v. Texas Commission on Environmental Quality and Shields Brothers, Inc., 251 S.W.3d 184 (Tex. App.--Austin April 10, 2008)

The Engelman Irrigation District ("Engelman") initiated the bankruptcy-authorization process pursuant to Section 49.456 (a) - (d) of the Texas Water Code after Shields Brothers, Inc. obtained a jury verdict against Engleman for failing to deliver irrigation water. The bankruptcy-authorization provision provides that no district may proceed in bankruptcy until authorized to do so by written order of the Commission. After conducting an investigation into Engelman's financial condition and a three-day SOAH hearing on the matter, the Commission denied Engelman's application. In its order denying the request, the Commission adopted proposals put forth by the ALJ that described different ways Engelman could raise the necessary funds to pay off its debt. A district court affirmed the Commission's decision and Engelman appealed.

On appeal, Engelman argued the Commission violated its own bankruptcy-authorization rule because it based its denial, in part, on Engelman's ability to sell water rights and other non-surplus property. Engelman first argued that was an abuse of discretion because the rule only permits the Commission to consider revenue from taxes and fees, not from funds generated by selling property. The court of appeals disagreed. Stating that the Commission is entitled to deference in interpreting its own rule, the court found the Commission was free to consider any measure that a district could implement to generate revenue. Engelman next argued that the Commission's order was procedurally flawed because it did not tell Engelman which "specific measures" to adopt in order to generate revenue. The court, deferring to the Commission's interpretation of the relevant rule, found that the order was sufficient because it required Engelman to adopt "specific measures" and then suggested different revenue-generating techniques. The court found that the Commission has the discretion to place the responsibility of choosing the appropriate measures on Engelman as opposed to prescribing them itself.

Delegation Doctrine

State v. Rhine, No. 2-07-319-CR, 2008 Tex. App. LEXIS 3221 (Tex. App.--Fort Worth May 1, 2008)

Rhine was charged under Tex. Water Code § 7.177(a)(5) for violating the TCEQ's outdoor burning rules. The trial court granted Rhine's motion to quash the information on the basis that the TCEQ rules violated the "nondelgation doctrine" prohibiting the delegation of authority by the legislature to the Commission in violation of Tex. Const. art. II, § 1. The State appealed.

The court of appeals determined the appropriate standard of review to be de novo, citing *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004) ("when the resolution of a question of law does not turn on an evaluation of the credibility and demeanor of a witness, then the trial court is not in a better position to make the determination, so appellate courts should conduct a *de novo* review of the issue"). The court of appeals began its analysis by reiterating the principles of non-delegation presented in a Texas Supreme Court decision in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). Principally, "it is not possible for the Legislature to shoulder the burden of drafting the infinite minutiae required to implement every single law necessary to adequately govern the State of Texas." In applying this understanding to the statute in question, the court said that as long as the Legislature conferred definite guidelines and sufficient standards to guide the Commission's discretion, delegation would be supportable. Disagreeing with Rhine's first complaint - that there was no evidence that the nature of the subject of the legislation could not have been practically and efficiently exercised by the Texas Legislature - the court found that it would neither be efficient nor practical for the Legislature "which meets every other year for a few months" to determine exactly what materials should be banned from outdoor burning, and under what circumstances, including the wind speed, time of day, and other minutiae related to curbing the legislatively-defined 'air pollution.'" In response to Rhine's second complaint - that the statute did not contain sufficient guidance concerning prohibited conduct - the court again disagreed and said that the section in question, along with other sections containing key definitions and instructions, provide adequate limitations to guide the Commission's promulgation of related rules and regulations. The court of appeals therefore held that the trial court erred in granting the defendant's motion to quash.

Jurisdiction Over Actions

City of Celina v. Dynavest Joint Venture, 253 S.W.3d 399 (Tex. App.-- Austin April 24, 2008)

In 2003, the Commission approved the City of Celina's ("City") application to amend the City's certificate of convenience and necessity ("CCN") to expand the area to which the City could supply water. The expanded area included property outside of the City's jurisdiction and included property owned by Dynavest. Dynavest did not file a challenge with the Commission. In 2006 Dynavest filed suit seeking declaratory judgment under the Uniform Declaratory Judgment Act ("UDJA"), claiming that the amended CCN is void because it extended beyond the City's jurisdiction. The City and Commission argued that the trial court lacked jurisdiction because the UDJA does not confer jurisdiction to consider a challenge to the Commission's ruling when another statute authorizes review of that ruling. They contended that Dynavest should have brought a timely challenge under the relevant section of the Texas Water Code instead of bringing a collateral attack under the UDJA. The trial court ruled that it had jurisdiction over the UDJA claim and the City and Commission appealed.

The appeals court agreed that courts generally do not have jurisdiction to consider a collateral attack on agency decisions. However, relying on *Chocolate Bayou Water Co. & Sand Supply v. Texas Natural Res. Conservation Comm'n*, 124 S.W.3d 844, 853 (Tex. App.--Austin 2003, pet. denied), the court found a collateral attack may be maintained successfully if the agency order is void, instead of voidable or erroneous. Dynavest sought an order that the extra-jurisdictional portion of the amended certificate was void under the statute, not voidable or erroneous, due to noncompliance with the relevant provision of the Texas Water Code. The court determined the

remedy Dynavest sought was not "impermissibly redundant of the remedy available pursuant to direct judicial review," and affirmed the trial court's decision.

Due Process and Rule Interpretation

Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas, No. 03-07-00025-CV (Tex. App.--Austin Dec. 6, 2007 (motion for rehearing denied (Tex. App. LEXIS 4040 (Tex. App.--Austin May 23, 2008))

Pioneer Exploration, Ltd. ("Pioneer") applied for a permit from the Railroad Commission of Texas ("TRC") to convert an old gas well into a commercial injection well for the disposal of oil and gas waste. Following a hearing on the application, the TRC issued the permit. After exhausting its administrative remedies, Texas Citizens for a Safe Future and Clean Water ("Citizens"), one of the parties to the administrative hearing, sought judicial review. The district court affirmed the TRC's decision. Citizens appealed.

On appeal, Citizens argued the TRC denied its members due process and failed to adequately consider the public interest when it approved Pioneer's permit. Citizens argued that it was denied the opportunity for a fair hearing on the matter when the TRC halted and then reconvened the public hearing after allowing Pioneer to amend its incomplete application. Citizens argued the TRC should have terminated the hearing altogether and starting over once the application was complete. The appeals court disagreed, stating that due process requires a hearing and the opportunity to respond and present evidence, but that this is also a flexible standard that depends on the practical requirements of the circumstances. In this case, the court said that the Commission's decision to delay completion of the hearing until Pioneer amended its application did not violate the due process requirement because Citizens had the opportunity to attend and present evidence at both sessions. Further, the Commission's decision to recess the hearing and reconvene at a later date saved both time and resources. As the court stated, "What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances" (quoting *University of Texas Med. Sch. v. Than*, 910 S.W.2d 926, 930 (Tex. 1995))

The court then addressed the adequacy of the TRC's consideration of the public interest in approving the application. Section 27.051(b)(1) of the Texas Water Code requires that before approving the installation of an injection well, the TRC must make a finding "that the use or installation of the injection well is in the public interest." In this case, the only factor that the TRC considered in its public interest analysis was that the new well would increase capacity for oil and gas production. While the court found an agency has discretion with regard to the factors it considers in a public interest analysis, the court concluded that the TRC abused this discretion by limiting its analysis to one factor, especially after Citizens presented evidence at one of the hearings related to issues of public safety and transportation. The court remanded the issue back to the TRC to conduct a broader public interest analysis.

Dismissal for Want of Prosecution

Hillin v. Texas Commission on Environmental Quality, No. 03-07-00122-CV, 2008 Tex. App. LEXIS 2808 (Tex. App.--Austin Apr. 16, 2008)

In August 2004, the Commission issued a final administrative order requiring Hillin to complete remediation at a site pursuant to the Solid Waste Disposal Act. In October 2004, Hillin filed a petition in the trial court seeking judicial review of the Commission order. After the Commission filed its answer in November 2004, Hillin made no other filings with the district court or the district clerk's office until July 2005, when he sent a letter to the Commission and the district clerk stating that he would be vacationing outside the United States for approximately five weeks. Approximately one year later, July 2006, Hillin sent a letter to the TCEQ notifying it that he had contacted the county court administrator's office and had obtained a jury trial setting for November 2006. In August 2006, the Commission filed a motion to dismiss for want of prosecution pursuant to Texas Health & Safety Code § 361.322 (b), which provides that in an appeal of an administrative order issued under Section 361.272, "the court shall presume that the action has been abandoned if the plaintiff does not prosecute the action within one year after it is filed and shall dismiss the suit . . . unless the plaintiff . . . can show good and sufficient cause for the delay." The trial court held a hearing on the Commission's motion to dismiss. After hearing various explanations from Mr. Hillin for the delay, including health problems, involvement in other litigation, and inability to locate a witness who could "substantiate some of [his] allegations," the trial court granted the Commission's order dismissing Hillin's claims. Hillin appealed.

The appellate court noted that the statute expressly states that a failure to prosecute the action within a year after filing will give rise to a presumption that the lawsuit has been abandoned. The appellate court found that on this record, and in light of the mandate of section 361.322, the trial court was required to presume that Hillin's lawsuit had been abandoned due to his failure to prosecute the action in a timely manner. The court noted that although Hillin argued at the hearing on the motion to dismiss that his health problems, involvement in other civil litigation, and inability to locate a witness caused the delay, he did not put on any evidence to support these allegations. On that record, the court could not conclude that the trial court acted arbitrarily or unreasonably when it found that Hillin failed to show good cause for the delay.

Rule Interpretation

Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Med. Exam'rs, Co. 03-05-00620-CV (Tex. App.--Austin May 23, 2008)

The Texas Orthopaedic Association and others ("TOA") filed a declaratory action challenging a rule promulgated by the Texas State Board of Podiatric Medical Examiners ("State Board") defining the word "foot." TOA asserted the definition impermissibly expanded the scope of podiatric medicine beyond what was permitted in the relevant statutes. The rule authorized podiatrists to treat the foot and ankle, but contained no additional language to limit the definition of "foot" to those portions of the body. The trial court declared that the rule was valid and did not exceed the State Board's statutory authority. The TOA appealed.

The State Board argued that TOA's appeal should fail because TOA conceded that the Board's rule was reasonable, and reasonableness is the test for upholding administrative rules. The court

dismissed that argument, stating that the reasonableness standard is predicated upon a finding that the rule is consistent with the relevant statutes. The State Board also asserted that the trial court should be affirmed because TOA failed to meet their burden of proof in contesting the rule's validity. The appellees argued that a rule is presumed to be valid (and therefore must be proven otherwise) if the agency provides a reasoned justification for the rule. Further, they argued that the presumption of validity extends to an agency's factual findings associated with promulgating the rule. The court said that because the appellants filed an action for declaratory judgment alleging that the rule interfered with their legal rights, the appellants did not have to contest the factual basis for the rule. More important, the court found, determining whether or not the factual basis is proper does not necessarily show that the rule is consistent with the underlying statutes. Lastly, the appellees argued that the legislature had implicitly agreed with the Board's rule by failing to adopt legislation to the contrary. The court said that successfully applying the legislative ratification doctrine requires an affirmative action on the part of the legislature, and since the legislature has not reenacted the relevant statutes since the Board promulgated the rule, that argument was invalid.

Sovereign Immunity (Code Construction Act § 311.034)

City Of Aspermont V. Rolling Plains Groundwater Conservation Dist., No. 11-07-00009-CV (Tex. App.-- Eastland May 8, 2008)

The Rolling Plains Groundwater Conservation District (District) sued the City of Aspermont ("City"), citing the City's failure to file monthly reports and refusal to pay export fees for water transported out of the District. The District sought money damages from the City and a declaratory order stating that the City was required to file the reports and pay fees, and the City argued in a plea to the jurisdiction that it was immune from suit and that immunity had not been waived. The trial court granted the plea with respect to the District's request for damages and denied the plea with respect to declaratory relief for future activities.

The appeals court premised its discussion on the principle sovereign immunity. The court noted that Texas law prohibits a court from construing a statute as constituting a waiver of immunity "unless the waiver is effected by clear and unambiguous language." TEX. GOV'T CODE ANN. § 311.034 (2007). The court began it analysis by examining the statutes that created the District and govern its activities. Chapter 36 of the Texas Water Code granted the District all its duties and powers. The District argued that references to municipalities within this chapter implicitly waived immunity with regards to actions governed by the chapter. The court disagreed, stating that regardless of the references to municipalities, the relevant issue is whether the statute clearly and unambiguously waived immunity, and the court said it did not.

The District also argued that in addition to money damages, it sought declaratory and regulatory relief, against which the principle of sovereign immunity does not apply. The District requested a declaratory order that would force the City to comply with the water conservation rules and regulations that the District alleged it was ignoring. The court also disagreed with this theory, stating that when the purpose for a declaratory judgment is to obtain a money judgment, immunity is not waived. More specifically, when injuries have already occurred and the only plausible remedy for a claim is money damages, a request for declaratory judgment to address those injuries will not serve to waive immunity. However, the District's request for declaratory relief was also concerned with present and future harm related to the City's refusal to file reports and pay fees. Regarding this issue, the court said that the district court was correct to deny the

City's plea to the jurisdiction even though it may subject the City to future fees or monetary liabilities.

Jurisdiction

State v. Hale, No. 07-07-00343-CV, 2008 Tex. App. LEXIS 487 (Tex.App.--Amarillo January 23, 2008)

Hale owns an 8,000 acre ranch in Roberts County. Kim Flowers owns a ranch directly south of the Hale ranch. The TRC planned to perform an environmental remediation project to clean up a saltwater disposal pit at an abandoned gas well site on Flowers' property. The project would involve the removal and replacement of approximately three thousand eight hundred cubic yards of contaminated soil. Soil removal would require heavy-duty dump trucks to make over six hundred trips across a road on Hale's property. Relying on § 91.113(c) of the Texas Natural Resources Code, the TRC informed Hale that the Commission's employees or agents were authorized to enter Hale's property for that purpose. Section 91.113(c) states: "The commission or its employees or agents, on proper identification, may enter the land of another for the purpose of conducting a site investigation or environmental assessment or controlling or cleaning up oil and gas wastes or other substances or materials under this section." Hale filed a declaratory judgment action contending the TRC was improperly applying § 91.113(c) to gain entry onto his property, or, alternatively, the statutory provision is unconstitutional because it violates Due Process. The Roberts County trial court issued a temporary injunction enjoining the TRC from utilizing the road on Hale's ranch for the remediation project. It denied the TRC's motion to transfer venue and its plea to the jurisdiction. The TRC appealed.

The Amarillo appeals court reversed, relying on § 85.241 of the Health & Safety Code, which states:

> Any interested person who is affected by the conservation laws of this state or orders of the commission relating to oil and gas and the waste of oil or gas, and who is dissatisfied with any of these laws or orders, may file suit against the commission or its members in a court of competent jurisdiction in Travis County to test the validity of the law or order.

The court noted the statute is jurisdictional, and not a venue statute, and that the jurisdiction of a competent court in Travis County is exclusive. Reviewing Hale's petition, the appellate court noted Hale is, or will be, "affected" by the Commission's proposed action and conservation laws related to the cleanup on the Flowers' ranch. He is "dissatisfied" with the applicable conservation laws and Commission orders, and by his suit seeks to "test the validity of the law(s) or order(s)." As such, the appeals court found Hale's action subject to the jurisdictional strictures of § 85.241.

FEDERAL COURT CASES

Validity of Consent Decree

City of Bangor v. Citizens Communications Co., 2008 U.S. App. LEXIS 14533 (1st Cir. July 9, 2008).

The City of Bangor ("Bangor") sued Citizens Communications Co. ("Citizens"), the owner of the site of a former manufactured gas plant, for CERCLA cleanup costs associated with a polluted section of the Penobscot River. Citizens filed third-party complaints against several other parties with alleged responsibility for a portion of the contamination. The parties agreed that the trial would proceed in three phases: (1) a trial between Bangor and Citizens on Bangor's claims and Citizens' counterclaims and defenses; (2) a determination of the remedy; and (3) if necessary, a trial to determine the third parties' liability to Citizens. At the conclusion of the first phase, the court apportioned 40 percent liability for past and future cleanup costs to Bangor and 60 percent to Citizens. The district court did not enter a final judgment, and instead "instructed the parties to determine the best way to move forward while the action was stayed." Bangor, Citizens, and the State of Maine (as intervenor) subsequently filed a proposed consent decree. Finding that it was fair (procedurally and substantively), reasonable, and consistent with the purpose of CERCLA, the trial court entered the consent decree. Several third and fourth-party defendants appealed.

Noting that the U.S. government was not a party to the consent decree, the appellate court considered what deference to afford the State of Maine in determining whether entry of the consent decree was proper. The court had not previously considered a consent decree involving a state rather than the federal government. The court noted other courts had applied to state consent decrees the standard in suits involving the United States: is the decree "reasonable, faithful to the statute's objectives, and fair (both procedurally and substantively)." The First Circuit disagreed with those prior holdings. It determined that states should not be afforded the same deference, finding that states are entitled to deference when interpreting state statutes, but not to its interpretation of federal statutes it is not charged with enforcing (like CERCLA). The First Circuit did recognize that the state has some expertise, and concluded that it would "accord some deference to Maine's decision to sign onto the consent decree, but not the same amount of deference we would accord the EPA in a consent decree involving the United States."

APA Section 706(1) and 706(2) Challenges

Benzman v. Whitman, 523 F.3d 119 (2nd Cir. April 22, 2008).

Plaintiffs, a putative class of people who resided, attended school, or worked near the World Trade Center ("WTC") towers, sued EPA and current or former EPA representatives for claims arising out of their alleged false and misleading claims that the air in lower Manhattan and Brooklyn was safe to breathe after the collapse of the towers on September 11, 2001. Plaintiffs' action included claims under the APA pursuant to section 706(1) (a district court may "compel agency action unlawfully withheld or unreasonably delayed") and 706(2) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion . . . otherwise not in accordance with law . . . [or] contrary to constitutional right"). EPA argued to the trial court that the agency decisions on which the APA count was based were discretionary. EPA further argued the agency decisions

forming the basis of the APA count did not constitute the sort of agency actions for which judicial review is available under the APA. The trial court dismissed, pursuant to the Stafford Act (40 U.S.C. § 5148) ("The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this Act"), those aspects of the APA count based on alleged violations of National Contingency Plan ("NCP") regulations, finding the underlying agency decisions were discretionary because the relevant NCP regulations established non-mandatory duties. However, the trial court also ruled the Stafford Act did not preclude judicial review of the entirety of the APA count because that count included a constitutional (substantive due process) claim against EPA. The trial court also concluded that the agency action Plaintiffs identified in response to EPA's motion to dismiss--a voluntary clean-up program undertaken by EPA in the WTC area and completed before the litigation--constituted final "agency action" within the meaning of the APA, rendering the challenged agency decisions culminating in that action subject to judicial review. The parties appealed.

The Second Circuit quickly dismissed the substantive due process claims couched in the APA, relying, in part, on *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 202, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."), and its progeny, *see, e.g., Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005) ("A failure to interfere when misconduct takes place, and no more, is not sufficient to amount to a state *created* danger.") (emphasis in original). The Second Circuit parsed each of the NCP regulations in addressing the 706(1) claims. The court concluded none of the regulations sets forth a discrete agency action that EPA was required to take. The court then addressed the 706(2) challenge - the plaintiffs' contention that the now-complete post-9/11 cleanup program was "final agency action" eligible for review under the APA. EPA argued that a cleanup program is not like "an agency order or rule"-classic examples of final action; a completed program cannot be "set aside," which is what section 706(2) directs courts to do in response to valid claims; and, in any event, the only specific relief the Plaintiffs sought was an order directing EPA prospectively to conduct monitoring, testing, and arrange a professional cleanup. The Second Circuit agreed with EPA. It found that even if a cleanup program could be considered "final agency action," Plaintiffs' challenge to the clean-up program is rendered moot by the completion of that program. A completed cleanup program cannot be effectively remedied under section 706(2) because a court cannot undo a completed program. Second, the specific relief sought here is not available under section 706(2), which empowers a court to "hold unlawful and set aside" an agency action.

Mootness Challenge

National Association of Home Builders v. U.S. Army Corps of Engineers, 264 Fed. Appx. 10 (D.C. Cir. February 5, 2008).

The United States Army Corps of Engineers (Corps) issued five-year nationwide pollutant discharge permits in 2002 (2002 NWPs) pursuant to section 404(e) of the Clean Water Act (CWA). The National Association of Home Builders (NAHB) challenged the 2002 permits in district court, arguing that the Corps failed to consider whether the selected acreage limitations would cause only "minimal adverse environmental effects" as required by 33 U.S.C. §

1344(e)(1). On November 24, 2003, the district court granted summary judgment to the Corps, concluding that issuance of the 2002 permits did not constitute "final agency action." The D.C. Circuit reversed in part, holding that the Corps' issuance of NWPs constituted final agency action subject to judicial review. On remand, the district court again granted summary judgment to the Corps, concluding that the inclusion of various acreage limitations in the 2002 NWPs was neither arbitrary nor capricious. NAHB timely appealed on November 22, 2006. The 2002 NWPs subsequently expired on March 18, 2007.

In response to the Corps resulting mootness challenge, NAHB asserted the "capable of repetition, yet evading review" exception to the mootness doctrine. That exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wis. Right to Life, Inc.,* 127 S.Ct. 2652, 2662, 168 L. Ed. 2d 329 (2007) (quoting *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)). NAHB first argued that the 2002 NWPs' expiration before the court could render judgment is evidence that the 2007 NWPs are likely to evade review. The Second Circuit disagreed, noting that now that it had resolved threshold jurisdictional issues regarding challenges to NWPs, NAHB's challenge to the 2007 NWPs would most likely proceed expeditiously. The Second Circuit also found that NAHB had not shown that its challenge to the 2002 NWPs is capable of repetition. It noted the application of the 33 U.S.C. § 1344(e)(1) environmental effects test necessarily varies from one permit period to the next, depending upon the circumstances the Corps considers. NAHB's challenge would require review of a different record from the one on which the 2002 NWPs were issued, a record containing new explanations, analyses and assessments. The Second Circuit therefore dismissed the NAHB's petition as moot.

Award of Attorneys' Fees under the Clean Water Act

Sierra Club v. Hamilton County Bd. of County Comm'rs, 504 F.3d 634 (6th Cir. 2007).

The Sierra Club, a citizen intervenor in a Clean Water Act enforcement action relating to sewage discharge into Cincinnati area rivers and tributaries, sought attorneys fees under the Clean Water Act following the entry of the resulting consent decree. The defendants argued the citizens' group was not a signatory to the final consent decree and therefore was not a prevailing party. The trial court disagreed, applying the "catalyst theory," under which parties are entitled to fees if their litigation was the catalyst for the eventual result, and finding they were prevailing or substantially prevailing parties under 33 U.S.C.S. § 1365(d) ("the court, in issuing any final order in any action brought pursuant to [the citizen suits provision of the CWA], may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate").

On appeal, the defendants argued the "catalyst theory" was debunked by the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), and that the trial court was therefore precluded the application of the catalyst theory to CWA actions, as well as any determination that Sierra Club was a prevailing party in the case. In its decision upholding the trial court, the Sixth Circuit effectively side-stepped the "catalyst theory," instead finding the Sierra Club to be a prevailing party because it was "abundantly clear on the record that without the Sierra Club's active intervention in the litigation, the less-than-adequate interim consent decree would not have been

withdrawn and a fully adequate consent decree would not have been entered in its place." Dissenting Judge Reeves would not have awarded Sierra Club attorneys' fees. Reeves argued *Buckhannon* and its progeny require that "the term 'prevailing party'. . . does not include a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Further, although the majority did not directly address the issue, Judge Reeves argued *Buckhannon* rejected the catalyst theory explaining that only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees."

Standing to Enforce Consent Decree

U.S. v. FMC Corp., 2008 U.S. App. LEXIS 13556 (9th Cir. June 27, 2008).

FMC owns and operated mining facilities on its fee-simple land within the boundaries of the Shoshone-Bannock Tribes' ("Tribes") reservation. EPA filed suit, and the Tribes intervened, regarding potential violations of tribal and environmental laws at the mine. The Tribes and EPA entered into separate agreements with FMC to settle the suit. FMC agreed to pay the Tribes $1.5 million per year in lieu of applying for certain tribal permits. EPA and FMC entered into a consent decree addressing the violations of federal laws. The Tribes were not signatories to the consent decree. FMC subsequently stopped some of its mining operations at the site, stopped making payments to the tribes, and refused to apply for tribal permits. The tribes sought enforcement of the EPA-FMC consent decree. The trial court found the Tribes could enforce the consent decree, finding that even though the tribes were clearly not parties to the agreement, "[b]y conferring numerous benefits on the Tribes, the parties to the [consent decree] make it clear that the Tribes are an intended—and not merely an incidental—beneficiary of the decree. Under Supreme Court and 9th Circuit precedent, intended third party beneficiaries of a consent decree have standing to enforce the decree while incidental beneficiaries do not."

Applying a de novo review standard ("Whether a party has standing to enforce a consent decree under the third-party beneficiary doctrine . . . is an 'issue of law that must be reviewed de novo'" (quoting *Hook v. Ariz., Dep't of Corr.*, 972 F.2d 1012, 1014 (9th Cir. 1992)), the Ninth Circuit disagreed. The court concluded the Tribes were incidental beneficiaries of the consent decree with no standing to enforce the decree. The court conceded that the decree referred to the tribes explicitly several times. However, the court found that paragraph 77 of the decree expressly disclaimed any intent to grant rights to all third parties. Paragraph 77 states:

> Nothing in this Consent Decree is intended either to create any rights in or grant any cause of action to any person not a party to this Consent Decree, or to release or waive any claim, cause of action, demand, or defense in law or equity that any party to this Consent Decree may have against any person(s) or entity not a party to this Consent Decree.

Interestingly, the court noted that, during the pendency of the appeal, FMC began the process of applying for tribal permits. At oral argument, the Tribes expressed their concern that, if the Ninth Circuit were to hold that the Tribes lack standing to enforce the Consent Decree, FMC would withdraw its permit applications. In response to questioning from the Ninth Circuit panel, FMC's lawyer represented that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion. The court accepted that

statement from counsel as binding on FMC, effectively providing the Tribes with what the sought at the outset of the litigation.

Challenge to Modification of Consent Decree

U.S. v. Alcoa, Inc., 2008 U.S. App. LEXIS 13358 (5th Cir. June 24, 2008)

Three citizens' groups and the federal government sued Alcoa for alleged Clean Air Act violations at an electric generation plant in Texas. All parties agreed to a consent decree, which the district court entered. Alcoa chose an option under the decree which required it to build a new power plant subject to certain requirements. Alcoa subsequently failed to meet the decree's deadline for completing construction. It negotiated a stipulated order with the government to extend the deadline. The citizens' groups objected to this new order, arguing it constituted an improper modification to the consent decree since the citizens' groups, as parties to the original consent decree, did not agree to the new terms. The district court disagreed, holding that it was implementing a remedy, not modifying the decree. The citizens' groups appealed.

The Fifth Circuit upheld the lower court's ruling and reasoning. The court started by noting that because it is judicially enforceable, a consent decree is more than just a contract between the parties. The district court has inherent power to enforce the decree. Further, the consent decree itself afforded the district court with wide discretion to "take any action necessary or appropriate" to carry out the decree. The circuit court cited the contracts principle of substantial performance, which allowed the district court to craft a remedy, short of rescission, for failing to meet the construction deadline. The Fifth Circuit found the extended deadline and new requirements to be a permissible means of enforcing the existing agreement and not an impermissible modification of the decree.

APA 706(1) Challenge

San Francisco Chapter of A. Philip Randolph Institute v. EPA, 2008 U.S. Dist. LEXIS 27794 (N.D. Cal. Mar. 28, 2008).

A Citizens' group sought a writ of mandamus to compel EPA to comply with Massachusetts v. EPA, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), by immediately determining whether carbon dioxide "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," (quoting 42 U.S.C. § 7521(a)(1)). The district court declined to issue such a writ because "the EPA has violated no duty that is so plain as to be free from doubt simply because it has not yet responded to the Supreme Court's directive." The court reasoned the Supreme Court was careful to structure its decision to not put a time limit on EPA. The Administrative Procedure Act § 706(1) allows judicial intervention only when agency action has been unreasonably withheld or delayed. The court noted that cases in which courts have afforded relief pursuant to § 706(1) "have involved delays of years, not months." (quoting In re Cal. Power Exchange Corp., 245 F.3d 1110, 1125 (9th Cir. 2001)). Here, the matter was remanded to the EPA in September of 2007, just ten days before Plaintiffs filed their complaint. Accordingly, the court found "[t]he EPA's delay does not qualify, as a matter of law, as unreasonable under the rule of reason."

Application of APA §706(2) to Nepa Challenge

City of Dallas v. Hall, 2008 U.S. Dist. LEXIS 49944 (N.D. Tex. June 30, 2008)

The City of Dallas ("City") and the Texas Water Development Board ("TWDB") sought reversal of the United States Fish and Wildlife Service's ("FWS") decision to establish the Neches River National Wildlife Refuge ("Refuge") without preparing an Environmental Impact Statement or an adequate Environmental Assessment as required by NEPA. On June 11, 2006, FWS designated a 25,281-acre site within Anderson and Cherokee Counties, Texas as the Neches River National Wildlife Refuge. Plaintiffs wanted to use the same land on the Upper Neches River for development of a reservoir to serve the future water needs of Dallas residents and other customers. Plaintiffs alleged that FWS's administrative decision to establish the Refuge was plagued with procedural flaws and statutory violations. Plaintiffs contended that FWS violated its NEPA obligation by failing to prepare an EIS or an adequate EA with respect to its decision to establish the Refuge. First, Plaintiffs contended that Defendants were required to prepare an EIS because the Refuge decision was a "major federal action . . . significantly affecting the quality of the human environment." Second, Plaintiffs contended the EA was inadequate because FWS failed to provide adequate evidence and analysis of the indirect impacts of the Refuge designation and failed to consider alternative refuge sites. Third, Plaintiffs alleged that FWS failed to take a "hard look" at the environmental consequences of its decision, as illustrated by its decisions to rely on an obsolete study and ignore current data. Fourth, Plaintiffs accused FWS of violating NEPA by failing to cooperate with state and local officials.

The court conducted its review under the APA's § 706(2)(A) "arbitrary and capricious" standard. The Court noted that under this standard it cannot reconsider anew the facts leading to the establishment of the Refuge or weigh the evidence supporting or contradicting FWS's decision. It may only evaluate whether FWS's decision had evidentiary support based on the administrative record at the time it was made. Whether or not the Court would have decided similarly is immaterial, so long as the agency considered all relevant factors and had evidence supporting its decision. Thus, the court found that Plaintiffs' burden in this case was to show that Defendants had no evidence to support the decision not to produce an EIS or Defendants disregarded or ignored a factor required in conducting the EA. The court noted it "must look at the decision not as a chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." (quoting *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006) (internal quotation marks omitted)). Applying that standard, the court denied the City's and TWDB's motions for summary judgment and granted the federal defendants' cross-motions for partial summary judgment on the NEPA claims.

CAA "Arbitrary and Capricious" Review

North Carolina v. EPA, 2008 U.S. App. LEXIS 14733 (D.C. Cir. July 11, 2008)

EPA promulgated the Clean Air Interstate Rule ("CAIR") in 2005 to address the interstate transport of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions, and the impact of such transport on the ability of "downwind" states to attain ambient air quality standards for ozone and fine particulate matter. Several parties filed petitions for review challenging different aspects of the rule. The Circuit Court reviewed the petitions pursuant to the review standard in

42 U.S.C. § 7607(d) (providing for reversal of an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." The court further explained its standard of review as follows:

> The petitions under review involve EPA's construction of the CAA, a statute it administers. Where the statute speaks to the direct question at issue, we afford no deference to the agency's interpretation of it and "must give effect to the unambiguously expressed intent of Congress." (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). But where the statute does "not directly address[] the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," and we only reverse that determination if it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. An action is "arbitrary and capricious" if it
>
> > has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
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> (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *see Motor Vehicle Mfrs. Ass'n. v. EPA*, 247 U.S. App. D.C. 268, 768 F.2d 385, 389 n.6 (D.C. Cir. 1985) (noting that "the standard we apply (i.e., whether the EPA's actions were in excess of statutory authority or arbitrary and capricious) is the same under" the CAA and the APA)).

Applying that standard, the court found numerous deficiencies in EPA's promulgation of the rule, including:

- failure to explain how CAIR's trading program would ensure that the emissions from each covered state remain below the level necessary to avoid "significant contribution" to nonattainment in downwind states;
- failure to give independent effect to the requirement that states avoid "interfering with the maintenance" of air quality standards in other states;
- establishment of state SO_2 and NO_x budgets based on factors other than each state's "significant contribution";
- establishing a compliance deadline that failed to ensure that covered states would reduce their emissions in sufficient time to allow the downwind states to attain the relevant air quality standards; and

- exceeding its statutory authority in terminating Title IV allowances by forcing submission of such allowances under the CAIR.

Having determined CAIR was flawed, the court considered the proper remedy. The petitioners proposed a range of remedies focused on individual deficiencies. The court determined it could not "pick and choose portions of CAIR to preserve." (quoting *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA,* 323 U.S. App. D.C. 425, 108 F.3d 1454, 1459 (D.C. Cir. 1997) ("Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own.") and *North Carolina v. FERC,* 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (Whether a regulation is severable "depends on the issuing agency's intent.")), the court determined the proper remedy required that the entire CAIR rule be vacated. The court noted that "CAIR is a single, regional program, as EPA has always maintained, and all its components must stand or fall together.' The court determined "no amount of tinkering . . . will transform CAIR, as written, into an acceptable rule."

CWA APA 706(2) Rulemaking Challenge

API v. Johnson, 541 F. Supp. 2d 165 (D.D.C. March 31, 2008)

EPA adopted a broad definition of "navigable waters" in a 2002 Spill Prevention, Control, and Countermeasure ("SPCC") Rule. The American Petroleum Institute ("API") and Marathon Oil Company ("Marathon") challenged EPA's definition as impermissibly broad under the Clean Water Act and the Commerce Clause and arbitrary and capricious because EPA failed to offer a rational explanation for its new definition. In developing the rule, EPA responded to comment that the definition was too broad by stating the following:

> Navigable waters are not only waters on which a craft may be sailed. Navigable waters include all waters with a past, present, or possible future use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide. Navigable waters also include intrastate waters which could affect interstate or foreign commerce. The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact.

API and Marathon argued EPA failed to take into account relevant recent decisions of the Supreme Court and the lower federal courts bearing on the meaning of "navigable waters" and reached a conclusion at odds with those decisions. In its analysis, the court focused on the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("SWANCC").* The court found the EPA contention that the case law supported the definition was conclusory at best in light of *SWANCC. SWANCC* dealt with a definition of waters similar to the one at issue in the SPCC rule and the court found EPA did not provide enough explanation to show how this definition fit under *SWANCC.* The court found that even if EPA had expressed its reasoning more clearly, it was not clear to the court how the EPA could have concluded EPA's definition was "supported" by *SWANCC.* It may have been true that the case law "permitted" the definition, but *SWANCC* did not "support" it.

CWA Jurisdiction

Riverkeeper, Inc. v. EPA, 514 F. Supp. 2d 565 (S.D.N.Y 2007).

In the underlying suit, Plaintiffs challenged EPA's failure to promulgate regulations to protect aquatic species from harm from certain cooling water intake structures. EPA argued that, under the Clean Water Act, the court of appeals and not the district court had subject matter jurisdiction over such challenges. The court disagreed. CWA section 509(b)(1)(E) confers jurisdiction on the court of appeals to review "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation." The court found this action did not challenge a limitation, but rather the lack of a limitation. It therefore fell outside section 509(b)(1)(E) and the district court retained subject matter jurisdiction under the APA and citizen suit provisions of the CWA.

Bryan W. Shaw, Ph.D.

Dr. Bryan W. Shaw of Bryan was appointed to the Texas Commission on Environmental Quality by Gov. Rick Perry on Nov. 1, 2007. His term will expire on Aug. 31, 2013.

Shaw was an associate professor in the Biological and Agricultural Engineering Department of Texas A&M University (TAMU) with many of his courses focused on air pollution engineering. The majority of his research at TAMU concentrated on air pollution, air pollution abatement, dispersion model development and emission factor development. Shaw was associate director of the Center for Agricultural Air Quality Engineering and Science, and formerly served as Acting Lead Scientist for Air Quality and Special Assistant to the Chief of the U.S. Department of Agriculture Natural Resources Conservation Service.

In addition to his duties as TCEQ Commissioner, Shaw continues to serve as a member of several committees for the U.S. Environmental Protection Agency (EPA) Science Advisory Board, including the Environmental Engineering Committee, Committee on Integrated Nitrogen, and Ad Hoc Panel for review of EPA's Risk and Technology Review Assessment Plan. Additionally, he is a member of the U.S. Department of Agriculture - Agricultural Air Quality Task Force and was appointed by Governor Rick Perry to the Environmental Flows Advisory Group.

Shaw received a bachelor's and master's degree in agricultural engineering from TAMU and a doctorate degree in agricultural engineering from the University of Illinois at Urbana-Champaign.

David Cabe

David Cabe is a professional engineer, a qualified environmental professional, and a founding partner of Zephyr Environmental Corporation. Mr. Cabe holds a Bachelor's Degree in Engineering Science and a Master of Science Degree in Environmental Health Engineering from the University of Texas. Since 1971, he has practiced continuously in the air quality field and has been an air quality consultant in since 1974.

Carl E. Edlund, P.E.
Director, Multimedia Planning and Permitting Division

Carl Edlund, a charter member of the United States Environmental Protection Agency (EPA), is the Director of the Multimedia Planning and Permitting Division with the EPA, Region 6 in Dallas, Texas. He directs the EPA Region 6 programs for air pollution, hazardous waste, underground storage tank, solid waste, pesticides, and toxic pollutants including developing air quality improvement plans, issuing and overseeing air and waste permits. His program area includes cleaning up underground storage tank pollution, overseeing pesticide use, developing U.S.-Mexico border environmental initiatives and developing toxic contaminant strategies targeted to help sensitive groups of people.

Before this assignment, Mr. Edlund managed a variety of programs in the EPA Regional Office including the Superfund, Air Enforcement, and Resources Management Offices. Prior to joining the Dallas Regional Office in 1977, he worked at EPA Headquarters in Washington, D.C. where he chaired national task forces to abate air pollution at iron and steel mills and other problem industries.

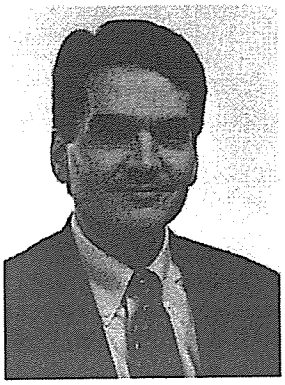
Mr. Edlund belongs to the federal Senior Executive Service. He is an adjunct professor and a member of the Civil and Environmental Engineering Advisory Board at Southern Methodist University. He received his B.S. in mechanical engineering from the University of Maryland and is a registered professional engineer in Texas.

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Booker Harrison

Booker Harrison is the Senior Attorney for Air with the Environmental Law Division of the TCEQ. The Air Section provides counsel for permitting, rule-making, policy, and SIP development. Prior to becoming the senior attorney for air, Booker was a senior attorney and staff attorney with the Litigation Division of the TCEQ. Booker graduated with a BA in Economics from UT Austin and he received his JD and MBA from Texas Tech University.

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Recognized as a Leading Lawyer by Chambers USA, *America's Leading Business Lawyers* every year since 2005

Named by *Law & Politics* as a "Texas Rising Star," 2004

Admissions and Affiliations

State Bar of Texas

United States Courts of Appeals for the Fifth and Sixth Circuits

United States District Courts for the Northern District of Ohio and the Northern and Southern Districts of Texas

United States Supreme Court

Houston Bar Association, Environmental Section, Governing Council Member

Houston Bar Foundation, Fellow

Houston/Galveston Area Emissions

Concentration

Environmental compliance, enforcement, and litigation

Summary

Matt Kuryla's broad-based environmental practice encompasses regulatory counseling, transactional advice, litigation, and alternative dispute resolution.

Mr. Kuryla represents clients before state and federal courts in a variety of environmental actions. He has coordinated multiclient litigation and regulatory negotiation and rulemaking as counsel to several Texas industry coalitions formed to respond to emerging air quality requirements, including revisions to the Houston/Galveston ozone plan, the Beaumont/Port Arthur ozone plan, and the Texas Title V operating permits program. He has counseled and represented clients in environmental criminal investigations, explosions, releases, and other corporate crises.

Mr. Kuryla's practice also encompasses environmental review, and permitting of energy infrastructure projects. He currently serves as environmental counsel for three separate onshore liquefied natural gas (LNG) terminal projects and one offshore Gulf of Mexico LNG project, and has advised on permitting of several wind power and landfill-gas-to-energy development projects.

Mr. Kuryla has handled federal and state agency proceedings under the National Environmental Policy Act (NEPA), the Clean Air Act, the Toxic Substances Control Act (TSCA), the Clean Water Act, and the Emergency Planning and Community Right-to-Know Act (EPCRA or SARA), among other environmental laws.

Publications, Speeches, and Presentations

Reduction Credit Organization, Board Member

Houston/Galveston Regional Air Quality Planning Committee, Board Member

- "Seeking Certainty in the Wake of *Massachusetts v. EPA*: Federal and State Options for Addressing Stationary Source Greenhouse Gas Emissions," *Bloomberg Corporate Law Journal*, Winter 2008 (Steve McMillen and Matt Paulson, co-authors)
- "Houston Businesses Preparing to Live in 'Carbon-Capped' World," *Houston Business Journal*, April 20-26, 2007 (Steve McMillen, co-author)
- "Managing Facility Startup, Shutdown, Maintenance, Malfunction, and Upset (SSMMU) Activities Under the Clean Air Act," 2006 Environmental Conference, National Petrochemical and Refiners Association, San Antonio, September 2006
- "Challenges in Texas Air Quality Planning: Integrating Law, Policy, and Science in the Crucible of Litigation," State Bar of Texas *Environmental Law Journal*, Summer 2005
- "Title V Compliance Certification: Legal Principles and Key Issues," Air and Waste Management Association, Annual Meeting, Minneapolis, June 2005
- "Environmental Financial Disclosure and the Sarbanes-Oxley Act," Annual Environmental Update, Texas Association of Business, Houston, September 2003
- "Release Reporting in the Era of Criminal Enforcement," Conference on Environmental Law, American Bar Association, Environment, Energy and Resources Section, Keystone, Colorado, March 2001
- "Criminal Environmental Enforcement Trends," Baker Botts Annual Environmental Law Seminar, Houston, January 2000

July 18, 2008

CHANGE YOU CAN RELY ON: BRIDGING THE SIP GAP IN TEXAS AIR QUALITY PERMITTING

By Matthew L. Kuryla and James P. Rizk

Abstract

On September 25, 2007, the Environmental Protection Agency sent a letter to all 120 flexible permit holders in Texas. In the letter, EPA gave "fair notice" to the regulated community that EPA had not yet approved the Texas flexible permit rules and explained that it considered the terms of prior permits to remain federally enforceable.[1] In March of 2008, EPA sent enforcement information requests to eight flexible permit holders, requesting data on their compliance with these older, in many cases expired, "legacy permits." Is this initiative aimed at major projects built without a federal new source review ("NSR") permit? Not this time. Here, the focus is on actions in compliance with the current rules of the Texas Commission on Environmental Quality ("TCEQ"). Over 30 rule revisions await EPA's approval as part of Texas' Clean Air Act State Implementation Plan ("SIP"). As a result, the Texas air quality permit program has a substantial "SIP gap." By its recent letter initiative, EPA is re-asserting and broadening the principle that state rules, once embedded in an EPA-approved SIP, require a SIP revision before the regulated community can rely on a change.

The Texas air quality permit program predates the federal Clean Air Act ("CAA"). Texas applicants must undergo a more rigorous technology and impacts review than that required under any similar program, federal or state. Much of the Texas program need never have been submitted to EPA. Now, each of the rule revisions in the current "SIP gap" must either be SIP-approved or formally withdrawn from EPA's purview. Pulling these programs apart would not add clarity for industry, nor enhance public confidence in the system. EPA should promptly approve the pending rule revisions, so that Texans can rely on one of the nation's most comprehensive and protective air quality permitting programs.

I. The Texas NSR SIP Gap: An Overview

As suggested by their name, *state* implementation plans consist of state regulations. Once promulgated, the state regulations that constitute the proposed SIP are submitted to EPA for approval, at which time the SIPs become federally enforceable.[2] Because state promulgation and federal approval do not occur simultaneously, the currently-applicable state regulations often differ from the SIP-approved regulations. This difference, commonly

[1] Letter from John Blevins, Director, Compliance and Enforcement Division, EPA Region 6 to Flexible Permit Holders (Sept. 25, 2007).
[2] 42 U.S.C. §7410.

referred to as the "SIP gap," generally becomes larger and more significant the longer it takes EPA to act on state SIP submittals.[3]

A. SIP Approval Chronology

The gap between state rules and federally-approved rules is particularly wide in Texas. The following timeline lists some of the key actions that have led to the "SIP gap" that currently faces Texas air permitting programs:

1993: TCEQ Recodification of 30 Texas Administrative Code ("TAC"), Chapter 116 submitted for EPA approval.

1994: TCEQ Flexible Permit Rules submitted for EPA approval.

1995: EPA approves rules from prior TCEQ submittals including the approval of portions of the 1993 Recodification of 30 TAC Chapter 116. Approved rules include NSR definitions and provisions for permitting in nonattainment areas.

1996: SB 1126 Qualified Facility Flexibility Rules submitted for EPA approval.

1999: HB 801 Public Participation Rules submitted for EPA approval.

2002: EPA approves portion of 1993 Recodification of 30 TAC Chapter 116 submittal including provisions governing permit alterations and major NSR rules.

2002: NSR Reform "SIP call" promulgated by EPA.

2003: EPA approves Texas Permit by Rule ("PBR") and Standard Permit regulations.

2006: EPA approves portion of 30 TAC Chapter 116 Recodification submittal dealing with alternative language public notice requirements.

2006: TCEQ NSR Reform Rule submitted for EPA approval.

2007: EPA "Fair Notice" Letter issued to Flexible Permit Holders.

[3] The CAA requires EPA to determine within a six-month period whether state plan submittals meet minimum criteria, and to approve or disapprove such submittals within 12 months of the initial determination of completeness. 42 U.S.C. §7410(k)(1)(B) and (k)(2).

B. SIP-Approval Status of Key Texas NSR Rules

1. Approved Programs

Key Texas air permitting rules that have received EPA approval in largely their present form include:

(a) Permit by Rule Program

PBRs are minor source permits adopted under 30 TAC Chapter 106 of TCEQ's rules, which authorize the construction of new and modified facilities or changes within facilities that TCEQ has determined will not result in a significant contribution of air contaminants.[4]

(b) Standard Permits

Standard Permits are minor source permits adopted under 30 TAC Chapter 116, Subchapter F of TCEQ's rules, which authorize the construction of certain other categories of sources and changes.[5]

2. SIP Gap Programs

Key Texas air permit rules for which approval remains pending include:

(a) Flexible Permit Program

Submitted on November 29, 1994 and codified in 30 TAC Chapter 116, Subchapter G, the flexible permitting program is the basis for authorization of emissions at 120 industrial sites.

(b) Public Participation Program

Enacted by the Texas Legislature in 1999, HB 801 provided for enhanced public participation in Texas air quality permit proceedings. Implementing rules at 30 TAC Chapter 39 were submitted on October 25, 1999, and remain pending.

(c) Qualified Facility Flexibility

Enacted by the Texas Legislature in 1995, SB 1126 revised the Texas Clean Air Act ("Texas CAA") definition of "modification" to exclude changes below current allowable levels at "qualified facilities" that employ up-to-date control technology. Implementing rules at 30 TAC § 116.116(e) were submitted on March 13, 1996, and remain pending.

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[4] *See* 68 *Fed. Reg.* 64,546 (Nov. 14, 2003).
[5] *Id.*

(d) NSR Reform Rules

In 2006, TCEQ adopted and submitted to EPA a rule package modeled on EPA's 2002 NSR Reform Rule. TCEQ's rules, housed mainly at 30 TAC §§ 116.12 and 116.150 - 161, await SIP-approval. The prior versions of these sections were approved by EPA in 2002.

EPA maintains the current text of the last SIP-approved versions of TCEQ's air permit regulations on its website. See EPA webpage, http://www.epa.gov/earth1r6/6pd/air/sip/sip.htm.

II. Approval of NSR Programs Under the CAA and EPA Regulations

A. Introduction to SIP Approval of NSR Programs

In response to increasing concerns about air quality, Congress enacted the CAA amendments of 1970, which restructured the CAA and established National Ambient Air Quality Standards ("NAAQS") in order to protect air quality. The 1970 amendments provided for the application of these NAAQS to individual sources of air pollution through SIPs that were to be approved and made federally enforceable by EPA.

In the context of NSR, the original requirements for an approvable SIP were very general, and provided broad discretion for states to identify the types and sizes of facilities subject to NSR. In 1977, Congress added the requirement for EPA to specify more stringent and prescriptive NSR provisions for major sources. Neither the CAA nor EPA regulations have ever specified similarly prescriptive requirements for minor sources and modifications.

The general requirements for the adoption and approval of SIPs for national primary and secondary ambient air quality standards are established in Section 110 of the CAA. Section 110(a)(2)(A)-(M) provides the elements of an initial SIP. Sections 110(k) and (l) detail EPA's procedures and standards for evaluating initial SIP submittals and revisions, respectively. The provisions for SIPs in section 110 are general in nature, and reflective of the overall policy behind the SIP approach—that EPA sets the standards, but leaves states with the discretion to determine their own individual path for attaining those standards. In fact, as the Fifth Circuit U.S. Court of Appeals recently phrased it, "the EPA has no authority to question the wisdom of a State's choices of emissions limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)"[6]

B. Federal NSR Program Review

In addition to the general SIP approvability standard outlined above, section 110(a)(2)(C) of the CAA requires SIPs to:

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[6] *CleanCoalition v. TXU Power*, No. 07-50685 slip op. at 5 (5th Cir. July 21, 2008); *See also Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (holding that section 110 of the CAA does not give EPA the authority to condition approval of a state's plan on the state's adoption of control measures chosen by EPA).

> include a program to provide for the enforcement of the measures described in subparagraph (A) [regarding control techniques], and regulation of the modification and construction of any stationary source within the areas covered by the plans as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C [regarding PSD] and D [regarding nonattainment NSR] of this subchapter.[7]

Section 110(a)(2)(C) gives states broad discretion to develop "*a program*" to regulate the modification and construction of sources "*as necessary*" to assure compliance with the NAAQS.[8] However, section 161 of the CAA (added as part of the 1977 CAA amendments) adds the more specific requirement that implementation plans:

> . . . contain emission limitations and such other measures as may be necessary, ***as determined under regulations promulgated under this part*** to prevent significant deterioration of air quality . . . .[9]

In accordance with this provision, EPA promulgated Title 40, section 51.166 of the Code of Federal Regulations ("CFR"), which contains the elements of an approvable prevention of significant deterioration ("PSD") permitting program.[10] However, while the language in 40 CFR § 51.166 is detailed and prescriptive, EPA has indicated that certain deviations from its model program are approvable if the state demonstrates that the submitted provisions are at least as stringent as the EPA rule language.[11]

EPA elaborated on the scope of state discretion in implementing its own PSD program in the preamble to EPA's initial PSD rules. That preamble explains that:

> States will be permitted to meet the following requirements of 40 CFR 51.24 with different but equivalent regulations, or implement the federal regulations with considerable discretion:
>
> a. Baseline area.
> b. Type and amount of data needed for monitoring purposes.
> c. Temporary exclusions from increment consumption.
> d. Defining "contemporaneous" as a reasonable period that may be greater or shorter than 5 years.
> e. Banking of emissions reductions for future offsets.
> f. Source information and analysis required of the applicant.
> g. Public participation after providing the opportunity for public hearing.
> h. Alternatives to first-come-first-served permit processing.

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[7] 42 U.S.C. § 7410(a)(2)(C).

[8] Parts C and D of the CAA were added as part of the 1977 amendments to the CAA. Prior to that time, the CAA contained only general requirements for NSR.

[9] 42 U.S.C. § 7471 (emphasis added).

[10] Technical and procedural requirements for a SIP submittal are contained in 40 CFR Part 51, Appendix V.

[11] *See e.g.* 40 CFR §§ 51.166(a)(7)(iv) and 51.166(b).

State PSD must follow the federal regulations in other matters. This includes but is not limited to the following:

a. Maximum allowable increments.
b. Modeling techniques.
c. Class I area protection.
d. Notice to the Administrator or the applicable Federal Land Manager for prospective permit actions.
e. New (grass roots) major stationary source applicability.
f. NSPS, NESHAP minimum requirements for BACT determinations.
g. Definitions generally as contained in 40 CFR 52.24(b).[12]

EPA recently re-affirmed this approach in its 2002 NSR reform rules. In that rulemaking, EPA decided against a "menu approach" for the reform mechanisms where states would have been able to choose which elements of the reform rules they wanted to incorporate. Instead, EPA incorporated the new provisions into the base NSR program requirements, but indicated that states could elect not to implement the new applicability provisions in the reform rules if they could show that the state program was as stringent as the revised base program. In making this decision, EPA emphasized that "even without the menu approach, State and local jurisdictions have significant freedom to customize their NSR programs."[13]

C. Minor NSR Program Review

Section 110(a)(2)(C) of the CAA also serves as a basis for most states' decisions to include minor NSR programs in their implementation plans. That section requires that implementation plans include a program addressing "regulation of the modification and construction of ***any*** stationary source within the areas covered by the plans ***as necessary*** to assure that national ambient air quality standards are achieved."[14] Unlike the PSD program, the statute does not require EPA to promulgate rules prescribing requirements for minor NSR, and EPA has not done so.

In 1973, EPA promulgated rules to implement NSR requirements in general. These rules were intended to address NSR requirements before there was a PSD program.[15] Despite their broad original purpose, these rules (currently located at 40 CFR §§ 51.160 - .164) have been cited to apply to minor NSR permitting programs.[16]

The requirements in these sections are significantly less detailed than the PSD requirements in 40 CFR § 51.166, and simply require that plans include enforceable procedures

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[12] 45 *Fed. Reg.* 52,676, 52,726 (Aug. 7, 1980).
[13] 67 *Fed. Reg.* 80,186, 80,241 (Dec. 31, 2002).
[14] 42 U.S.C. § 7410(a)(2)(C) (emphasis added).
[15] 38 *Fed. Reg.* 15,834 (June 18, 1973).
[16] *See e.g.*, 63 *Fed. Reg.* 16,751, 16,752 (April 6, 1998) (proposing limited approval of Delaware SIP submittal); *see also*, 71 *Fed. Reg.* 48,695, 48,700 (Aug. 21, 2006) (proposing regulations for new source review in Indian Country).

to enable states to determine whether projects will result in a violation of the control strategy or will interfere with attainment of the NAAQS. Moreover, section 51.160(e) provides:

> The procedures must identify the types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.[17]

This provision provides states with considerable discretion to determine which, if any, sources are subject to minor NSR.[18]

D. Recent EPA Considerations in Minor NSR Program Review

While section 51.160(e) provide states with broad discretion to determine which sources are subject to minor NSR programs, in the mid-1990s EPA began to enumerate criteria that would appear to limit states' discretion. These principles were never codified in rule, and are not expressed in the CAA. The following sections discuss these concepts in more detail.

1. *De Minimis* Limitations as Set Forth in *Alabama Power Co. v. Costle*

In several SIP approval actions, EPA has suggested that a state's ability to exempt sources from minor NSR requirements is limited by *de minimis* principles outlined in *Alabama Power Co. v. Costle*, 636 F.3d 323 (D.C. Cir. 1979). In that decision, the D.C. Circuit interpreted the scope and validity of PSD regulations promulgated under the 1977 amendments to the CAA, which established the PSD program. In the case, EPA sought to justify: 1) its interpretation that the proper test to determine which sources were subject to PSD review was based on potential emissions without consideration of reductions from control devices; and 2) its 50-ton threshold for exempting certain sources from certain PSD requirements. In its ruling, the court determined that: 1) the proper test for determining major source status should be based on post-control emissions; and 2) EPA's regulation exempting facilities emitting less than 50 tons per year of a pollutant was inconsistent with the CAA. In remanding the issue to EPA, the court included *dicta* outlining a general *de minimis* principle under which agencies could create limited PSD exemptions despite the absence of express statutory authority.

While the decision does not specify what constitutes a *de minimis* matter, it indicates that there is typically an implied authority to provide exemptions "when the burdens of regulation yield a gain of trivial or no value."[19] The decision also notes that the assessment depends on the particular circumstances and that the agency bears the burden for supporting such a determination. In the context of "modifications," the opinion notes that exceptions to what constitutes a modification subject to PSD review include situations "when the emissions are *de minimis*, and when the increases are offset by contemporaneous decreases of pollutants."[20]

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[17] 40 CFR § 51.160(e).
[18] The preambles to the rules containing this requirement do not elaborate on the scope of this provision.
[19] *Alabama Power Co. v. Costle*, 636 F.3d 323, 360 (D.C. Cir. 1979).
[20] *Id.* at 400.

Importantly, the discussion of *de minimis* authority in *Alabama Power* is in the context of exemptions from ***PSD review***. However, it appears that EPA has taken the position that the *de minimis* principles in *Alabama Power* limit the scope of what states can exempt from their minor NSR programs under 40 CFR § 51.160(e).[21] This approach applies the principle where it is not strictly needed. Unlike the PSD program at issue in *Alabama Power*, under which EPA has no express statutory authority to exempt sources, both CAA Section 110 and 40 CFR § 51.160(e) expressly provide states with broad authority to define the scope of their minor NSR programs.

2. Environmental Significance

In 1995, EPA issued a proposed rulemaking that sought to define the approval criteria for state minor NSR programs.[22] That proposal recognized the authority of states to determine the scope of their minor NSR programs as follows:

> Under the applicable Federal regulations, States have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards. Indeed, States may exempt categories of changes from minor NSR altogether on de minimis grounds (i.e., the change is trivial in size and of no importance in safeguarding ambient standards). States have exercised this discretion to subject some or many, but generally not all, minor source changes to their minor NSR programs. * * * The EPA recognizes that States may also structure their minor NSR program to limit the public process afforded during preconstruction review consistent with the environmental significance of the change.[23]

The rulemaking proposal would have revised 40 CFR § 51.161 to clarify the scope of state discretion in determining the scope of public participation requirements. The proposal relied on the concept of "environmental significance" and proposed to divide changes potentially subject to review into two categories: 1) those that are more environmentally significant; and 2) those that are less environmentally significant. Under the proposal, changes that were more environmentally significant could not be exempted from the public participation requirements in 51.161(e). With respect to the former, EPA identified the following four categories considered to be "more significant" changes:

- Any change subject to major NSR;
- Any physical change or change in the method of operation of a part 70 source associated with a project where the prospective emissions increases from such changes, considered by themselves,

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[21] It is worth noting that the requirement in 40 CFR § 51.160(e) was originally codified in 1973--six years before the court's decision in *Alabama Power* and well before the 1977 amendments to the CAA at issue in that case. *See* 38 *Fed. Reg.* 15,834 (June 18, 1973) (language contained in then existing 40 CFR § 51.18(f)).

[22] 60 *Fed. Reg.* 45,530 (Aug. 31, 1995). Notably, the proposed changes to 40 CFR Part 51 were not adopted.

[23] *Id.* at 45,536.

would be a significant emissions increase of any pollutant subject to regulation under part C or D of the Act;

- Any change subject to review as a modification under the regulations implementing section 112(g) of the Act; and
- Any other change determined by the permitting authority to have a similarly significant environmental impact.[24]

This proposal was never adopted.

The "environmental significance" concept re-emerged in subsequent SIP-approval actions. The concept was used as a basis for granting less than full approval in SIP submittals by West Virginia and Delaware. EPA granted limited approval to Delaware's SIP submittal, which contained a 15-day comment period for minor NSR applications. EPA stated that the approval would convert to a full approval if the procedures were determined to be consistent with the final rule revisions in 40 CFR § 51.161.[25] With regard to West Virginia, EPA partially disapproved the SIP because limited public participation procedures for temporary permits were insufficient and were not properly tied to the environmental significance of the matter.[26]

However, EPA did not apply the "environmental significance" concept in other actions. For example, in EPA's 2006 proposal for the review of new sources and modifications in Indian Country, the agency proposed minor NSR thresholds without discussion of environmental significance.[27] Notably, the proposed Indian Country program was designed to serve as a model that was representative of other approvable state minor NSR programs. EPA explained:

> [W]e seek to establish a flexible preconstruction permitting program for minor stationary sources in Indian country that is comparable to that which applies outside of Indian country, in order to create a more level regulatory playing field . . . . [T]his can serve as one example of a program that meets the objectives and requirements of the Act.[28]

The Indian country proposal would establish numeric review thresholds that "represent a reasonable balance between environmental protection and economic growth."[29]

EPA has also proposed approval of other minor NSR programs as consistent with 40 CFR Part 51 without discussion of whether the exemptions satisfied the "environmental significance" concept. For example, EPA recently proposed to approve Alaska's minor NSR

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[24] *Id.* In support of its decision to include "net outs" in the more significant category, EPA explained that netting transactions are complicated and are among the most important minor NSR decisions that permitting authorities make. However, EPA also expressed concern over the burden of public comment requirements to this large category of permitting actions and requested further information and comment regarding this issue.
[25] *See* 63 *Fed. Reg.* 16,751, 16,753 (April 6, 1998).
[26] *See* 63 *Fed. Reg.* 5484, 5486 (Feb. 3, 1998).
[27] 71 *Fed. Reg.* 48,696 (Aug. 21, 2006).
[28] *Id.* at 48,700.
[29] *Id.* at 48,701.

program which requires a permit prior to a modification if "(1) the stationary source already has the potential to emit more than the emission thresholds for construction of new minor sources requiring permits, and (2) the modification would cause an increase greater than 10 tpy of PM-10, 10 tpy of NO_x, 10 tpy of SO_x, or 100 tpy of CO."[30]

III. Approvability of the Texas Minor NSR Program

A. Applicable Standard

As discussed in Section II.C., the fundamental legal standard for approving an NSR program simply requires that implementation plan include a program that addresses "regulation of the modification and construction of ***any*** stationary source within the areas covered by the plans ***as necessary*** to assure that national ambient air quality standards are achieved."[31] This general standard supports a holistic review of the program to evaluate the stringency of the program and its ability to help ensure compliance with NAAQS.[32]

B. Overview of the Texas Air Permitting Program

TCEQ has a complex and comprehensive air permitting program that provides a number of mechanisms for the preconstruction authorization of new sources. These mechanisms include both federal NSR permits[33] for sources and modifications that are considered "major" under the federal CAA as well as an array of permitting options for sources and modifications that are "minor." These minor source permitting options include PBR authorizations, standard permits, and minor NSR permits (which include flexible permits). In fact, these mechanisms cover virtually all new sources and modifications resulting in an emissions increase.

In its comprehensive scope, the Texas permitting program differs from a number of other minor source air permitting programs across the country, which provide broader exclusions from permitting. However, because Texas has such a comprehensive permitting system for minor sources, it has necessarily recognized that certain minor modifications are entitled to graduated review procedures that are commensurate with the significance of the proposed source or modification.

Accounting for the future growth of point source emissions authorized within the Texas permitting program is a central element of the state's NAAQS attainment demonstration process. For example, as part of any ozone attainment demonstration, the state accounts for both future permitted point source growth and future offsetting emissions reductions to be achieved

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[30] *See* 72 *Fed. Reg.* 5232, 5235 (Feb. 5, 2007).

[31] 42 U.S.C. § 7410(a)(2)(C) (emphasis added).

[32] As discussed above, EPA takes the position that its regulations at 40 CFR §§ 51.160 - .164 contain additional requirements for the approval of minor NSR programs. This applicability, however, is unclear because the rules were promulgated to address NSR requirements *before* there was a PSD program. Nonetheless, the requirements are generally non-prescriptive and provide discretion for states to determine which minor sources are subject to review. Accordingly, the regulations are not necessarily inconsistent with a holistic approach to review and approval of minor NSR program submittals.

[33] This consists of Nonattainment NSR permits for major sources or major modifications that are not in attainment with the National Ambient Air Quality Standards and Prevention of Significant permit for major sources or major modifications located in attainment areas.

through on-the-books control measures.[34] The process begins with "base case" modeling of a representative high ozone episode using historical meteorological, air quality and emissions data.[35] The state then projects future emissions growth using growth models based on projected increases in population, traffic, and industrial activity.[36] The emissions growth forecast is then adjusted downward to reflect emissions reductions expected from on-the-books federal and state regulations to arrive at a "future base inventory" for the attainment year.[37] If ozone concentrations modeled from the future base inventory do not demonstrate attainment, then the state must develop additional control measures to supplement the control measures that are reflected in the future base inventory.[38] DFW has now seen the process reach completion for the 1-hour standard, as EPA recently determined that the area has attained that standard.[39] The state applied a similar technique when developing a 1-hour attainment demonstration for the Beaumont-Port Arthur area.[40] Current monitoring data indicate that Beaumont has attained both the 1-hour and 8-hour ozone standards, and TCEQ has proposed to issue a request to EPA for redesignation of that area to attainment.[41]

C. Texas Public Notice Requirements

1. Overview of TCEQ Public Notice Requirements

Section 382.056 of the Texas Clean Air Act ("TCAA") provides the statutory requirements for public notice for air permit applications. These statutory provisions, strengthened by the Texas legislature in House Bill 801 in 1999, are implemented by TCEQ rules located in 30 TAC Chapter 39.

The Texas rules require applicants to comply with notice requirements that vary depending on the significance of the project. Conceptually, the levels of review can be divided into three categories:

1) Projects that trigger major NSR;

2) Projects that trigger minor NSR public notice requirements; and

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[34] *See* TNRCC., Rule Log No. 98046-SIP-AI, Revisions to the State Implementation Plan for the Control of Ozone Air Pollution, Attainment Demonstration for the Dallas-Fort Worth Ozone Nonattainment Area 3-3 - 3-4 (Feb. 1999) *available at* http://www.tceq.state.tx.us/implementation/air/sip/feb1999dfw.html.

[35] *Id.* at 3-3.

[36] *Id.*

[37] *Id.* at 3-3 - 3-4.

[38] *Id.* at 3-4.

[39] Approval and Promulgation of Air Quality Implementation Plans; Texas; Dallas/Fort Worth 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard, 73 *Fed. Reg.* 39,897 (July 11, 2008).

[40] *See* TNRCC., Rule Log No. 1999-055-SIP-AI, Beaumont/Port Arthur Attainment Demonstration 3-1 - 3-2 (Apr. 2000) *available at* http://www.tceq.state.tx.us/implementation/air/sip/apr2000bpa.html

[41] *See* Tex. Comm. on Envtl. Quality, Project No. 2008-006-SIP-NR, Revisions to the State Implementation Plan for the Control of Ozone Air Pollution, Eight-Hour Ozone Designation Request and Maintenance Plan for the Beaumont-Port Arthur Ozone Nonattainment Area 2-1 (Proposed July 9,. 2008) *available at* http://www.tceq.state.tx.us/implementation/air/sip/bpa.html#ed_request (The proposal does not include a request for EPA action related to the 1-hour standard, but Figure 2-3 in the request shows only one monitored exceedance of the 1-hour standard in BPA since 2005.)

3) Projects for which public notice is not required.

Projects that trigger major NSR are subject to the most comprehensive notice requirements, which are part of the SIP-approved Texas major NSR program. Projects in the third category, including projects with increases below *de minimis* levels, permit alterations, and projects authorized by PBR, are typically not subject to case-by-case public notice.[42,43] These aspects of the Texas program are, in large part, already SIP-approved.[44] Because there is relative consensus regarding the first and third categories, this paper focuses primarily on the sufficiency of notice procedures for projects in the middle category.

A unique aspect of the Texas public notice process is that the initial notice mechanism is the notice of intent to obtain an individual permit. This notice, often referred to as "first notice," is designed to involve interested parties early in the process in order to address their concerns before the TCEQ takes action on the application. In several circumstances, sources are also to provide a "second" notice, known as "notice of application and preliminary decision." This dual-notice system is unique to Texas. In other states, where public notice is required, only a single notice is given.[45] *See e.g.*, 35 ILLINOIS ADMIN. CODE § 252.201; *see also* 7 NEW JERSEY ADMIN. CODE 27-8.10.

a. Notice of Receipt of Application and Intent to Obtain a Permit (First Notice)

TCEQ requires applicants to publish first notice for nearly all applications for a new individual permit or permit amendment.[46] For example, the requirement to publish first notice, applies to:

- Construction of any new facility;
- Modifications to existing facilities that change the character of emissions or release a new air contaminant not previously authorized under the permit;
- Permit amendments involving a total emissions increase exceeding the following *de minimis* levels:
  - 0.6 tons per year ("tpy") lead;

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[42] Note, however that PBRs are subject to the notice-and-comment rulemaking requirements under the Administrative Procedures Act. Moreover, Texas regulations also allow for public notice in certain case-specific situations when the TCEQ Executive Director deems that notice is warranted. *See* 30 TAC § 39.403(b)(8).

[43] EPA recognizes the ability of states to exclude insignificant sources from public notice requirements. For example, in 2007 EPA approved the Arkansas minor NSR program which does not require public notice on changes resulting in an increase in potential emissions less than: (1) 5 TPY carbon monoxide, nitrogen dioxide, PM-10, and sulfur dioxide; (2) 20 TPY of volatile organic compounds; and (3) .5 TPY of lead. *See* 72 *Fed. Reg.* 18,394 (April 12, 2007) (EPA Final Rule approving Arkansas SIP submittal, including 014-01-04 Ark. Code R. § 19.407(C)).

[44] *See e.g.*, 67 *Fed. Reg.* 58,697 (Sept. 18, 2002); 71 *Fed. Reg.* 12,285 (March 10, 2006).

[45] *See e.g.*, 35 ILLINOIS ADMIN. CODE § 252.201; *see also* 7 NEW JERSEY ADMIN. CODE 27-8.10.

[46] *See* 30 TAC §§ 39.402 and .403 (setting forth when public notice requirements are applicable).

- 5 tpy NO_x, VOC, PM, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;
- 10 tpy SO_2;
- 50 tpy CO.

- Other changes when the Executive Director determines there is a reasonable likelihood of nuisance conditions, impacts to sensitive receptors, or significant public interest, or if there are compliance history concerns; and

- Applications subject to federal requirements for major sources of hazardous air pollutants.[47]

Applicants that are required to publish first notice must comply with the content provisions in 30 TAC § 39.411(b). This section includes a number of requirements to help ensure that interested parties know how to remain involved in the permitting process. In particular, the section requires:

- A brief description of procedures by which the public may participate in the *final* permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, or a notice and comment hearing;

- A description of the procedure for a person to be placed on a mailing list for additional information about the application;

- The public location for viewing or copying the permit application; and

- A listing of criteria pollutants for which authorization is sought.[48]

b. Notice of Application and Preliminary Decision (Second Notice)

In addition to notice of a permit application, TCEQ rules also require applicants to publish notice of the agency's preliminary decision and draft permit. This "second notice" is required for all of the situations for which first notice is required, but can be avoided, in certain instances, if public response to the first notice suggests either that there is little public interest or that public concerns have already been addressed. Specifically, TCEQ rules provide that the second notice is not required if:

- No interested member of the public responds to the first notice by requesting a hearing;

- All hearing requests have been withdrawn prior to the date the preliminary decision is issued; or

[47] *Id.*
[48] 30 TAC § 39.411(b).

- The application is for an amendment, modification, or renewal application that would not result in an increase in the allowable emissions and would not result in the emission of a new air contaminant.[49]

TCEQ rules, however, provide that these exemptions from second notice are inapplicable for certain permit actions deemed to be significant enough to warrant second notice despite an apparent lack of public interest. Specifically, second notice is always required for applications involving nonattainment NSR, PSD, or federal requirements for major sources of hazardous air pollutants.[50]

Applicants that are required to publish second notice must comply with the content requirements in 30 TAC § 39.411(c). These requirements incorporate the content requirements of § 39.411(b) and provide additional requirements, including a summary of the Executive Director's preliminary decision and whether the Executive Director has prepared a draft permit.

2. Comparison of Public Notice Requirements to EPA Benchmarks

The TCEQ public notice provisions satisfy 40 CFR § 51.161. That section generally describes the minimum public participation requirements for state air quality permitting. Its three main public participation requirements are:

- Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;
- A 30-day period for submittal of public comment; and
- A notice by prominent advertisement in the area affected of the location of the source information and analysis specified [above].[51]

EPA's regulations also state that the agency must provide "opportunity for public comment on information submitted by owners and operators," and that "public information must include" the agency analysis and the agency's proposed approval or disapproval of the action.[52] Notably, EPA's rules include flexibility to approve other approaches, where the 30-day comment requirements "would conflict with existing requirements for acting on requests for permission to construct or modify."[53]

TCEQ's public notice provisions meet the first element of federal approvability by making the information and analysis available to any member of the public that requests it.[54] In

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[49] *Id.* § 39.419(e). Note that this third exclusion is inapplicable in cases where the TCEQ determines that there are compliance history concerns associated with the applicant. *Id.*
[50] *Id.* § 39.419(e)(3).
[51] 40 CFR § 51.161(b).
[52] *Id.* § 51.161(a).
[53] *Id.* § 51.161(c).
[54] 30 TAC §§ 39.418, 39.419.

fact, an interested person may request that TCEQ place him on a mailing list to receive additional information as it comes available.[55]

The regulations meet the second element of federal approvability by providing for a 30-day public comment period after both a Notice of Receipt of Application and Intent to Obtain Permit, and a Notice of Application and Preliminary Decision.[56] And the regulations meet the third element of federal approvability by requiring prominent, detailed advertisements in newspapers of general circulation in the location of or nearest to the location or proposed location of the facility.[57] In fact, Texas's regulations go beyond these minimum requirements by providing for sign-posting, mailed notice, bilingual notice, and in certain cases responses to comments and an opportunity for a contested case hearings.[58] Finally, the Texas program provides ample opportunity for public comment on all relevant submittals, and TCEQ maintains as "public information" all relevant documentation of its analysis and decision.[59]

In addition, these regulations are considerably more stringent than the earlier public notice requirements under Chapter 116, Division 3 of the Texas Administrative Code, which EPA previously approved.[60] The existing, SIP-approved public notice requirements only require a non-major source to give the public notice of proposed construction.[61] Under the post-HB 801 rules, TCEQ rules require non-major applicants to publish notice of proposed construction and, if a hearing request is received, publish a subsequent notice of preliminary decision. Because the post-HB 801 regime contains a second opportunity for public notice, the rules represent a strengthening of the public participation requirements for non-major applications. Accordingly, a SIP disapproval of the change would leave a potential commenter with less opportunity for public notice than exists under the currently-approved SIP rules.

Not only do TCEQ regulations meet regulatory requirements, they also meet or exceed benchmarks set by other recent EPA SIP approvals. Notably, EPA recently approved the Alaska Department of Environmental Conservation ("ADEC") regulations pertaining to public participation requirements for minor sources.[62] ADEC's regulations allow minor sources to utilize a "fast-track" procedure, which only requires a 15-day notice period to request a 30-day public comment period.[63] The "fast-track" procedure is available for all but four specific classes of minor sources in Alaska. *Id.* § 50.542(a)(1). The four classes of sources that do not qualify for the "fast-track" procedure are stationary sources that are: "(1) classified under [§50.502(c)] for carbon monoxide emissions; (2) in a sulfur dioxide special protection area established under [§50.025(c)]; (3) in the Nikiski Industrial Area; or (4) on an offshore platform."[64]

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[55] *Id.* § 39.411(b)(9).
[56] *Id.* § 55.152.
[57] *Id.* §§ 39.603, 39.411.
[58] *Id.* §§ 39.418; 55.152, -.156, -.209.
[59] Information on agency analysis and decision is available in a variety of ways, most notably by filing a hearing request triggering second notice under the HB 801 rules outlined above.
[60] *See* 40 CFR § 52.2270(c); 60 *Fed. Reg.* 49,781, 49,785 (Sept. 27, 1995); (as initially codified at 30 TAC § 116.10(a)(1)); 67 *Fed. Reg.* 58,597 (Sept. 18, 2002) (as recodified at 30 TAC §§ 116.130-137).
[61] 30 TAC § 116.131.
[62] 72 *Fed. Reg.* 45,378 (Aug. 14, 2007).
[63] ALASKA ADMIN. CODE tit. 18, 50.542 (2008).
[64] *Id.* 50.542(a)(1).

For those eligible minor sources, most are required to submit a "screening ambient air quality analysis" that predicts an ambient air concentration of less than one of the three available measuring criteria.[65] Further, some construction and modification projects do not require a minor source permit at all, provided they do not exceed the potential to emit thresholds listed in § 50.502(c). For construction of new stationary sources, the potential to emit threshold is:

- 15 tpy of PM-10;
- 40 tpy of NO_x;
- 40 tpy of SO_2;
- 0.6 tpy of lead; or
- 100 tpy of CO within 10 kilometers of a non-attainment area.[66]

For modifications, the increase in potential to emit or increase in actual emissions threshold is:

- 10 tpy of PM-10;
- 10 tpy of sulfur dioxide;
- 10 tpy of nitrogen oxides; or
- 100 tpy of CO within 10 kilometers of a non-attainment area.[67]

In stark contrast with Texas, EPA allowed Alaska to exempt from permitting an entire class of new sources and modifications adding appreciable levels of new emissions.

EPA's approval of ADEC public participation requirements under the "fast-track" procedure shows that 40 CFR § 51.161 does not require a 30-day comment period on a state agency's analysis of a minor source permit application when the public does not express an interest. TCEQ's proposed SIP revisions require a 30-day initial notice period for the public to express an interest in commenting on the agency's decision, rather than 15 days under Alaska's "fast-track" procedure. Also, minor sources in Texas must allow the public an opportunity to express an interest on reviewing the agency's analysis of the source's application materials.

EPA recently recognized the benefits of early public notice in its proposed flexible permit rule.[68] In exploring possibilities for enhanced public notice for flexible permits, EPA explained:

> During the permitting process, permitting authorities could consider making the permit application available to the public soon after receipt. We found for these pilot permits that early outreach to the community,

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[65] *Id.* § 50.542(b)–(c). The three measuring criteria for predicted ambient air concentrations are: (1) for new stationary sources or modifications, equal to or less than two-thirds of each ambient standard for PM-10, or 80 percent of each ambient standard for sulfur dioxide or nitrogen oxides; (2) for modifications, increases less than the significant impact levels described in Table 5 of §50.215(d); or (3) for modifications, if the sum of an increase from the highest previous prediction and the highest current prediction is less than the concentrations described in (1). *Id.* § 50.542(c)(2).

[66] *Id.* § 50.502(c)(1).

[67] *Id.* § 50.502(c)(3). Notably, with respect to both new sources and modifications, Alaska's thresholds for an exemption from permitting are greater than Texas's thresholds for an exemption from public notice.

[68] 72 *Fed. Reg.* 52,206 (Sept. 12, 2007).

> rather than waiting until the draft permit was prepared, was an effective public participation strategy."[69]

The fact that TCEQ regulations already provide for this early notice, in addition to an opportunity for a second notice of the draft permit, further demonstrates that public notice requirements in Texas exceed the requirements for SIP-approval.

In another recent significant action, EPA disapproved the public notice element of Nevada's minor NSR submittal.[70] However, that action is clearly distinguishable from the Texas program and serves to highlight the comprehensive nature of public notice in Texas. Under Nevada's program, the Director of the Nevada Department of Environmental Protection has the discretion to completely forego public notice for sources up to 100 tons per year--a threshold for major NSR.[71] This essentially collapses Texas' middle and lower categories for public notice into a single category for which notice is not mandatory. EPA objected to this approach, explaining that Nevada's threshold was not approvable given that the state "provided no demonstration that 100 tons per year represents an acceptable *de minimis* level below which the burden of public notice on sources yields a gain of trivial or no value."[72] By contrast, Texas requires varying levels of public notice for new facilities and changes that, as outlined above, is commensurate with environmental impact. This approach implicitly addresses the EPA requirement that states identify the basis for determining whether--and in Texas' case how--facilities will be subject to review.

The Texas public notice provisions provide ample opportunity for public participation. Moreover, Texas' public notice requirements are proportional to both the expected environmental impact and the degree to which the public expresses interest in a project. In light of these features, approval of Texas public notice provisions would be consistent with other EPA actions, which include disapproval of state submittals with no public notice for significant minor sources and modifications and approval for submittals with various public notice procedures for significant minor sources. The Texas notice regime meets the requirements in 40 CFR Section 51.161, represents a strengthening of existing requirements, and should be fully and finally approved.

D. Texas Flexible Permitting Program

1. Overview of Texas Flexible Permit Program

The TCEQ's flexible permit regulations in 30 TAC Chapter 116, Subchapter G were promulgated in 1994 as a flexible mechanism to comply with State minor NSR permitting requirements. This alternative to a traditional permit was established as a way to encourage facilities to install controls that would not otherwise be required in exchange for operational flexibility associated with emission caps. Under the flexible permit program, a permittee can seek pollutant-specific caps that cover certain facilities at the site. These caps act like a bubble

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[69] *Id.* at 52,214.
[70] *See* 73 *Fed. Reg.* 20536 (April 16, 2008).
[71] *Id.* at 20,546.
[72] *Id.* Notably, EPA continues to use the phrase "*de minimis*" as a surrogate for the requirement in 40 CFR § 51.160(e) to discuss the basis for determining which facilities will be subject to review.

and are established based on the application of BACT to all of the facilities contributing to the emissions cap.[73] In exchange for this higher level of control, sites are provided with an alternative to individual facility emission limits (for the covered facilities) as long as the site complies with the emission limits set by the cap.

The flexible permit also allows for the use of individual emission limitations in certain situations.[74] Individual limits are used when it is necessary to control off-property impacts, such as impacts from air toxics or to meet the NAAQS. Specific emission limits that an individual facility cannot exceed may also be established to ensure that federal permitting requirements are not circumvented.[75]

The flexible permit program has been quite successful in achieving emission reductions. For example, flexible permitting has resulted in more than a 25,000 tons per ytpyear (tpy) reduction in SO_2 and more than a 10,000 tpy reduction in NO_x at a coal and petroleum coke fired power plant and a reduction of more than 4,800 tpy of SO_2 and CO from a petroleum refinery.[76] In addition, the flexible permit program has served as a successful precursor to other emission cap permitting programs, such as the federal Plantwide Applicability Limit ("PAL") established as part of federal NSR reform.[77] However, unlike PALs, which are a *major* NSR tool, flexible permitting is an alternative to *minor* NSR permitting. Issuance of a flexible permit has no impact on the permit holder's obligation to comply with federal PSD or nonattainment NSR requirements. In fact, for projects that constitute major sources or modifications, TCEQ issues a major source permit (PSD or NNSR) in addition to the state flexible permit.

The distinction between flexible permit and federal NSR requirements, and a flexible permit holder's obligation to comply with those federal NSR requirements, is made explicit throughout the flexible permit rules:

- § 116.711(1) states that a flexible permit application must demonstrate that "[t]he emissions from the proposed facility, group of facilities, or account . . . will comply with all rules and regulations of the commission," which includes Division 5 (nonattainment NSR) and Division 6 (PSD) of Subchapter B.[78]

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[73] 30 TAC § 116.716(a). Note, however, that a site may have an implementation period to install the new control devices. Under this period, an initial cap will be higher than the final cap, which is based on BACT.
[74] 30 TAC § 116.715(b) and 116.716(b).
[75] 30 TAC § 116.715(d).
[76] Letter from Richard Hyde, Director, Air Permits Division, TCEQ to Jeff Robinson, Chief, Air Permits Section, EPA Region 6 (August 30, 2007).
[77] In response to the federal NSR reform rules, TCEQ promulgated its own PAL program in 2006. This program codified at 30 TAC Chapter 116, Subchapter C, is based on the federal model and applies to major NSR. The Texas flexible permit program is not intended to be, and need not be, equivalent to the PAL permit program. The flexible permit program is a state permitting program that establishes a flexible mechanism to comply with State minor NSR permitting requirements. Moreover, the flexible permit rules were adopted in 1994, long before EPA codified PAL requirements.
[78] 30 TAC § 116.711(l).

- § 116.711(8): "Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review of this chapter."[79]

- § 116.711(9): "Prevention of Significant Deterioration (PSD) Review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review."[80]

- § 116.718 states that the emissions increase at a facility covered by a flexible permit that does not exceed the emission cap is insignificant *"for the purposes of state new source review under this subchapter."* The flexibility provided flexible permit holders to make physical or operational changes under the cap is limited to minor NSR.[81]

When an application for a new or amended flexible permit is reviewed, all facilities in the flexible permit are considered to be modified, and the federal applicability requirements are applied to all emission caps contained within the permit.

2. Comparison of Texas Flexible Permitting to EPA Benchmarks

The flexible permit program was intended, and has served, as a useful tool to help Texas assure compliance with the NAAQS. By encouraging the voluntarily installation of modern emission controls in exchange for operational flexibility, flexible permits have resulted in significant emission reductions that would not have otherwise been required under traditional permitting programs. Moreover, neither the CAA nor EPA regulations at 40 CFR §§ 51.160 - .164 prohibit such operational flexibility in minor NSR permits. To the contrary, as outlined above, 40 CFR § 51.160(e) expressly provides states with broad authority to define the scope of their minor NSR programs.

EPA has recently recognized and encouraged state authority to issue minor NSR permits that accommodate operational flexibility. For example, in its Indian Country proposal, EPA proposed a minor source PAL program that shares some similarities with--but is less stringent than--the Texas program.[82] The Indian Country minor PAL program requires control technology and emission limitations that are determined on a case-by-case basis. Under this determination, control technology can range from "technology that is less stringent than reasonably available control technology (RACT) . . . to technology that is the BACT level of control."[83] However, in Texas, BACT is required for all preconstruction permits.[84] Applicants

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[79] *Id.* § 116.711(8).
[80] *Id.* § 116.711(9).
[81] *Id.* § 116.718.
[82] *See* 71 *Fed. Reg.* 48,696 (Aug. 21, 2006).
[83] *Id.* at 48,704.
[84] TEX. HEALTH & SAFETY CODE § 382.0518(b)(1).

must also demonstrate that the proposed project will be protective of both public health and property.[85]

Similarly, EPA's recently proposed flexible permitting rule recognizes and encourages state authority to issue minor NSR permits that allow for operational flexibility.[86] Moreover, EPA intentionally decided against any changes to its rules governing minor NSR programs in order to leave application of existing flexible state programs undisturbed. The preamble provides:

> Because of the diversity of existing State minor NSR programs . . . we are not proposing any revisions to the rules governing State minor NSR programs at 40 CFR 51.160 through 51.164.[87]

Application of the Texas flexible permitting program does not interfere with compliance with NNSR and PSD review requirements for major sources. In fact, the application requirements for a flexible permit explicitly require compliance with applicable requirements for NNSR and PSD review.[88] And for projects that constitute major sources or modifications, TCEQ issues a major source permit (PSD or NNSR) that is separate from the state flexible permit. Accordingly, all new major sources and major modifications in Texas must have a PSD or NNSR permit.

Because Texas' flexible permitting program meets the requirements in 40 CFR §§ 51.160 - .164 and does not preclude applicable major NSR compliance obligations, the program meets the standard for federal approval.

E. Qualified Facility Regulations

1. Overview of Qualified Facility Regulations

The "qualified facility" rules are a state minor NSR mechanism that allows permit holders to make certain changes to well-controlled facilities without that change being considered a "modification" that requires a permit amendment. These rules were promulgated to implement Senate Bill 1126 (SB 1126), which revised the TCAA statutory definition of "modification of an existing facility" by adding three types of physical and operational changes that are not considered to be modifications (for purposes of minor NSR), even if the change results in an increase in emissions.

Under the qualified facility rules, a facility is a "qualified facility" if it: 1) was issued a permit or permit amendment or was exempted from pre-construction permit requirements within the last 10 years or 2) uses air pollution control methods that are at least as effective as the BACT that was required or would have been required for the same class or type

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[85] *Id.* § 382.0518(b)(2).

[86] *See* 72 *Fed. Reg.* 52,206 (Sept. 12, 2007) ("We recognize that many States' minor NSR and part 70 programs may already provide for the flexible permitting approaches proposed and that such States are currently able to implement these approaches.")

[87] *Id.*

[88] *See* 30 TAC § 116.711(8) and (9).

of facility by a permit issued within the last 10 years. Facilities that meet either of these criteria may make physical or operational changes without obtaining a permit or other approval from the TCEQ if the change will not result in a net increase in allowable emissions of any air contaminant or the emission of any air contaminant not previously emitted. Under the rules, qualified facilities can meet the no net increase requirement by installing air pollution control equipment on the qualified facility and by emission decreases from other qualified facilities at the same commission air quality account number.[89] These emission decreases act like intra-plant trades and can be reductions in either allowable emissions or actual emissions depending on whether the facility is a qualified facility due to permit, exemption, or the use of BACT.[90]

Importantly, the qualified facility rules have no effect on a permit holder's compliance obligations under the federal PSD or nonattainment NSR programs. The overriding obligation to comply with federal NSR requirements is made explicit in TCEQ's SB 1126 guidance:

> SB 1126 only revised the Texas "minor new source review" program to allow some changes to be made without a requirement to obtain a permit or other "approval" from the TCEQ. SB 1126 does not supersede federal requirements such as Nonattainment (NA) review and Prevention of Significant Deterioration (PSD) review of major new sources and major modifications to existing sources, which are incorporated into Chapter 116. . . . In making changes under SB 1126, owners and operators must consider the potential for these other federal and state requirements to limit their ability to make a desired change. The owner/operator is responsible for ensuring that any change to a facility complies with all applicable regulations.[91]

2. Comparison of Qualified Facility Rules to EPA Benchmarks

The qualified facility rules are an important statutory tool to promote flexibility at well-controlled facilities. Because these rules ensure offsetting reductions within the facility, they provide flexibility without compromising the state's ability to assure that the NAAQS are achieved.

Under the FCAA and 40 CFR Part 51, States define the scope of their minor NSR programs. This discretion is not limited by whether minor modifications at a major source require netting in order to avoid permitting requirements or to avoid being major. EPA recently expressed this very point in its recent Indian Country proposal, in which the agency proposed a definition of "modification" as part of a minor source NSR program that differs from major NSR definitions. In that proposal, EPA proposed a definition of modification which provides a methodology for determining the increase in allowable emissions from a physical or operational

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[89] *Id.* §116.116(2)(2).
[90] *Id.*
[91] TCEQ Guidance Document No. RG-223, *Guidance for Air Quality: Qualified Changes under Senate Bill 1126* at p.3 (Dec. 2000 Draft).

change based on net increases in *allowable* emissions.[92] EPA explained, "because the statutory basis for the minor NSR program is section 110(a)(2)(C) of the Act, which does not define or refer to a definition of 'modification,' we believe that we have discretion in defining the term as we think it best for the minor NSR program . . . ."[93] Under the Indian Country proposal, a project is evaluated based on its allowable, not actual, increases. In this sense, it is analogous to the Texas qualified facility flexibility (but without the current technology requirement). In fact, under the proposal, a project would be major without consideration of corresponding decreases might qualify for an administrative revision under this methodology.

EPA's approach in distinguishing minor from major "modification" definitions has found support in its administrative enforcement process. In 2000, EPA's Environmental Appeals Board found that there is no "legally prescribed methodology" for the emissions test used for minor NSR applicability determinations, and rejected the argument made by enforcement personnel that, in the absence of an explicit minor NSR methodology in state rules, the minor NSR applicability test must be consistent with that used for federal PSD purposes.[94]

Because the qualified facility rules meet requirements in 40 CFR §§ 51.160 - .164, are limited in application to minor NSR, and because neither the FCAA nor the EPA rules limit state discretion to define "modification" for purposes of minor NSR, the qualified facility rules are approvable as part of the Texas SIP.

IV. Conclusion

Over the past 40 years, environmental law has developed from a handful of statutes into a complex field comprised of 31 volumes of federal regulations. This has particularly been the case with the regulation of air quality, which now comprise 20 of EPA's 31 volumes of regulation. Despite this explosion of complexity, remarkably little has changed regarding requirements for state minor NSR programs. In fact, the statutory provision requiring states to have NSR programs was added by the Clean Air Act amendments of 1970, and has not changed since 1977, when Congress added more prescriptive NSR provisions for major sources. To this day, EPA's 1973 regulation relevant to state NSR programs comprises less than two pages of the CFR. Thus, the legal standards for state minor NSR programs have remained unchanged for more than 30 years.

EPA's review of minor NSR program submittals has seen substantial variation over the years and across EPA regions. This variability has resulted in confusion as to the fundamental requirement, or "bar," for SIP-approval. Consequently, state rule approvals have seen significant delays, broadening the SIP gap.

Nowhere has this been more evident than in Texas, where numerous minor NSR submittals, dating back to 1993, still await EPA approval. The Texas "SIP gap" has created growing uncertainty and tension between EPA, the State of Texas, and individuals holding valid state permits that rely on a SIP gap provision. In response to the EPA's threat of enforcement

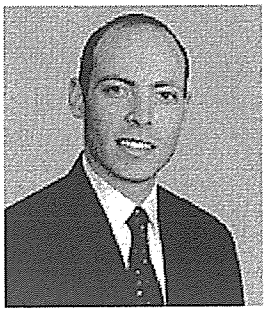
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[92] 71 *Fed. Reg.* 48,696, 48,701 (Aug. 21, 2006).
[93] *Id.*
[94] *In re Tennessee Valley Authority*, 9 EAD 357, 461 (EAB Sept. 15, 2000).

and the associated uncertainty surrounding the SIP gap, on May 27, 2008, the BCCA Appeal Group, the Texas Association of Business, and the Texas Oil and Gas Association, filed 60-day notice of intent to sue EPA to address the agency's failure to perform the non-discretionary duty of acting on the Texas SIP submittals relating to air quality permitting.[95] Texas source owners have relied on their permit program for many years. If there are real obstacles to their approval, it is fair to raise them within a reasonable time after submittal. The statute requires no less.

Here, an analysis of the legal standards and benchmarks shows that Texas "meets the bar." The Texas air quality permitting program is among the most stringent in the nation. Current and future permitted emissions are explicitly integrated into the Texas ozone NAAQS attainment demonstrations. Each of the pending rules should promptly be approved, before the widening dispute further erodes the reliability of this effective and protective system.

[95] Letter from Matthew Kuryla, Baker Botts to Stephen L. Johnson, Administrator, EPA (May 27, 2008).



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Texas Lobbyist Regulations

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Texas Lobbyist Regulations
Brief Summary

What is lobbying?
As defined in Texas law, lobbying is directly communicating with a member of the legislative or executive branch to influence legislation or administrative action. In other words, any direct communication (think telephone call, face to face meeting, or letter) with a member of the legislative or executive branch (any person appointed, elected, or employed by the State of Texas, not including those in the judicial branch) intended to influence legislation or administrative action is lobbying.

Who is required to register?
As a threshold matter, if you don't "lobby" (see above), then you won't have to register as a lobbyist. If you do, in fact, lobby, then you may have to register if you meet certain requirements, based on compensation received or expenditures made. Finally, even if you are not required to register, you may still choose to do so voluntarily.

Compensation Requirement
If you receive $1,000 or more in a calendar quarter as compensation for lobbying (think someone paying you to lobby for them), then you have to register as a lobbyist. However, if lobbying (including the time it takes to prepare to actually lobby) takes up less than 5% of your total compensated time in a calendar quarter, then you do not have to register as a lobbyist, regardless of how much money you receive for lobbying activities.

If you are paid by someone to perform both lobbying and non-lobbying services, you must apportion the compensation in a reasonable manner between what is paid for lobbying activities (including time for preparation) and what is paid for non-lobbying activities. When adding up compensation received, do not include reimbursement paid to you for your own expenses (such as travel expenses or membership dues). You may also exclude compensation paid for the following activities:

- Requesting an advisory opinion from the state;
- Preparing a document providing information only, as required by law, rule, regulation, or order;
- Communicating to show compliance with existing laws;
- Communicating to achieve compliance with existing laws;
- Communicating as part of an advisory committee or task force;
- Responding to a specific request for information from the legislative or executive branch;
- Communicating in the context of a litigation or adjudicative proceeding where the state is a party;
- Communicating in an adjudicative proceeding authorized by or subject to the Texas Administrative Procedures Act;
- Providing clerical assistance to a lobbyist; and
- Communicating regarding purchasing decision of a state agency.

Expenditures
If you make more than $500 in lobby expenditures in a calendar quarter, then you must register as a lobbyist. A lobby expenditure is one made to lobby, or to generate goodwill for later use in lobbying (think meals or event tickets for members). Payments made for the lobbyist's own expenses (think office rent, telephones, or travel) are not included in this calculation. Tax and tip is not included in the amount of a lobby expenditure.

What does lobby registration entail?
If you meet the registration requirements, or if you don't meet them but you voluntarily choose to register, you must file a registration statement with the Texas Ethics Commission. While the annual fee is $500 for most lobbyists, there is a $100 fee for non-profit groups. The registration papers require you to report your client(s), your compensation for each client (either compensation you've already received or compensation you're contracted to receive), and the subject matters on which you'll lobby for each client.

A registered lobbyist must also report his lobby expenditures. This is usually done monthly, though at the time of registration, a lobbyist may elect to report the expenditures annually if he expects to spend $1,000 or less in a calendar year. The expenditures must be reported by category of expense (transportation and lodging, food and beverages, entertainment, gifts other than awards and mementos, and awards and mementos). They also must be allocated according to the beneficiary of the expenditure, such as elected officials, legislative branch employees, etc. If you spend more than a certain amount in any category of expenditure on a single individual on any one day, you must file a detailed report. The most common example is the food and beverage and the entertainment categories: spending more than $90.60 in any day on any single individual in either of those categories requires a detailed report. A detailed report requires you to specifically state what you spent money on and who the beneficiary was.

What restrictions on expenditures are placed on lobbyist?
Transportation and lodging
A lobbyist may not make a lobby expenditure for transportation and lodging except under very narrow circumstances, such as official fact-finding trips. If you register as a lobbyist, you should only make such expenditures after consulting with your attorney.

Food and beverage
A lobbyist may only make these expenditures if he is present.

Entertainment
A lobbyist may only make these expenditures if he is present. The total amount of expenditures for entertainment may not exceed $500 per beneficiary in a calendar year.

Gifts other than awards or mementos
The total amount of expenditures for gifts other than awards or mementos may not exceed $500 per beneficiary in a calendar year.

Awards or mementos
Any single award or memento may not exceed $500.

Would entities ever be required to register?

Yes. The lobby law is written to require entity registration if the entity exceeds either the compensation or expenditure threshold. However, the Texas Ethics Commission has, by rule, allowed an entity otherwise required to register to avoid registration so long as all of the compensation paid to the entity, and all of the expenditures made by the entity, are reported by one or more lobbyists. An expenditure made directly by an entity (including an expenditure made with a credit card for which the entity itself is liable) is an expenditure by the entity; an expenditure made by an individual, even if reimbursed by the entity, is an expenditure by the individual.

Texas Lobbyist Regulations

When dealing with the Texas state government, it is important to be aware of the state's lobby laws. These laws are designed to regulate certain conduct by persons interacting with state government. The laws operate, generally, by encompassing a broad array of activities, then provide exceptions to registration in certain circumstances. This paper explains, in relatively basic terms, how to navigate your way through this area of the law, which contains many nuances.

What is lobbying?

As a threshold matter, the first question when discussing lobbying regulations is determining what is and is not "lobbying". As defined in Texas law, lobbying is directly communicating with a member of the legislative or executive branch to influence legislation or administrative action.[1] Therefore, to be "lobbying", you must be doing three things: (1) communicating directly (2) with a member of the legislative or executive branch (3) with the intent to influence legislation or administrative action. Examining each of those factors, we are able to construct what activities are and are not "lobbying".

Communicating Directly

As defined in the statute, this phrase means contact in person, by telephone, by telegraph, by letter, by fax, by email, or by other means of communication.[2]

Member of the Legislative or Executive Branch

As defined, a member of the legislative branch means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, or an employee of the legislature.[3] Similarly, a member of the executive branch means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government.[4] In other words, a member of the legislative or executive branch means anyone either employed by, appointed to, elected to, or a candidate for either the legislative or executive branch. Notably, this excludes both judicial branch employees and local governmental employees, though some local governments have enacted their own lobbyist regulations for local governmental lobbying.[5]

Intent to Influence Legislation or Administrative Action

The terms legislation and administrative action are both defined broadly to encompass virtually any administrative or legislative activity (including appointments and gubernatorial vetoes).[6] The Texas Ethics Commission broadened these definitions by including activities aimed at gaining goodwill for influencing later legislation or administrative action.[7]

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[1] *See* Tex. Gov't Code § 305.003(a).
[2] *See id.* § 305.002(2).
[3] *See id.* § 305.002(7).
[4] *See id.* § 305.002(4).
[5] Contacts with judicial branch employees are generally governed by the cannons of ethics. Contacts with local governmental employees are generally governed by local governmental ordinances and codes.
[6] *See* Tex. Gov't Code §§ 305.002(1), (6).
[7] *See* Op. Tex. Ethics Comm'n No. 4 (1992).

I've engaged in lobbying activities. Now what?

As defined above, "lobbying" encompasses many activities that non-lobbyists engage in regularly. The next step in understanding the lobbyist regulations is examining the exemptions and carve-outs to determine whether a particular activity requires registration as a lobbyist.

Generally, registration as a lobbyist is only required if the person engaging in "lobbying" exceeds a compensation or expenditure threshold. In each case, both with the compensation and the expenditure thresholds, there are exceptions to what does and does not count towards that amount. The two registration thresholds operate independently of each other; if a person is required to register under one of the thresholds, but not under the other threshold, he must still register. What follows is a discussion of those regulations, and the exceptions.

Compensation and Reimbursement

A person must register as a lobbyist if he receives, or if he is entitled to receive, more than $1,000 in compensation or reimbursement in a calendar quarter for lobbying activities.[8] If the person is compensated for both lobbying and non-lobbying activities, he must make a "reasonable allocation" of compensation between those two activities.[9] The compensation a person receives for preparing to lobby is included in calculating whether the $1,000 threshold has been crossed.[10] Reimbursement received for the person's own travel, food, lodging, membership dues, or general overhead is not included in calculating the threshold amount.[11]

The most commonly used exception to the compensation threshold is the so-called "five percent rule". If lobbying, including the time it takes to prepare to lobby, takes up less than five percent of the person's total compensated time in a calendar quarter, the person is not required to register as a lobbyist. This is true even if the person is paid millions of dollars for that five percent of their time.[12] This single rule helps to keep many individuals, such as business executives, from ever having to register as a lobbyist, even though they are paid to advocate for their causes.

The second most prominent exception is the laundry list of exempt activities. The Texas Ethics Commission's rules specifically exempt compensation received for certain activities from the $1,000 registration threshold. Thus, any compensation received for the following activities is not included in determining whether the person has exceeded the $1,000 compensation in a calendar quarter threshold:[13]

1. Requesting a written opinion that interprets a law, regulation, rule, policy, practice, or procedure administered by a state office or agency;
2. Preparation or submission of an application or other written document that merely provides information required by law, statute, rule, regulation, order, or subpoena, or that responds to a document prepared by a state agency;

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[8] *See* Tex. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 34.43(a).
[9] *See* 1 Tex. Admin. Code § 34.43(c).
[10] *See id.* § 34.3.
[11] *See id.* §§34.7, 34.43(a).
[12] *See id.* § 34.43(b).
[13] *See id.* § 34.5.

3. Communicating merely for the purpose of demonstrating compliance with an audit, inspection, examination of a financial institution, or government investigation to interpret and determine compliance with existing laws, rules, policies, and procedures;
4. Communicating for the purpose of achieving compliance with existing laws, rules, policies, and procedures, including communications to show qualification for an exception of general applicability that is available under existing laws, rules, policies, and procedures;
5. Communicating in the capacity of one's service on an advisory committee or task force appointed by a member;
6. Responding to a specific request for information from a member of the legislative or executive branch, when the request was not solicited by or on behalf of the person providing the information;
7. Communicating to an agency's legal counsel, an administrative law judge, or a hearings examiner concerning litigation or adjudicative proceedings to which the agency is a party, or concerning adjudicative proceedings of that agency;
8. Providing testimony, making an appearance, or any other type of communication documented as part of a public record in a proceeding of an adjudicative nature of the type authorized by or subject to the Administrative Procedure Act, Government Code, Chapter 2001, whether or not that proceeding is subject to the Open Meetings Law;
9. Providing oral or written comments, making an appearance, or any other type of communication, if documented as part of a public record in an agency's rule-making proceeding under the Administrative Procedure Act, Government Code, Chapter 2001, or in public records kept in connection with a legislative hearing;
10. Providing only clerical assistance to another in connection with the other person's lobbying (for example, a person who merely types or delivers another person's letter to a member); or
11. Communicating to a member of the executive branch concerning purchasing decisions of a state agency, or negotiations regarding such decisions.[14]

Both the five percent rule and the specifically excluded activities are large exceptions to the compensation and reimbursement threshold. However, should neither the five percent rule nor the excluded activities apply, if the person receives more than $1,000 in a calendar quarter for lobbying, then the person must register as a lobbyist.

Expenditure Requirement

A person must register as a lobbyist if he spends more than $500 in a calendar quarter to lobby.[15] The most common example of these expenditures are lobbyists spending money on meals or drinks with members or employees of the legislative or executive branch, either to push an agenda or build goodwill.

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[14] The Ethics Commission has been discussing new rules that could either broaden or limit the scope of this exception. As of July 18, 2008, no new rule had been adopted. One is expected this year.

[15] *See* Tex. Gov't Code § 305.003(a)(1); 1 Tex. Admin. Code § 34.41(a).

When calculating the amount of expenditures, it is important to remember several key exclusions. First and foremost, the person should not include any expenditures made for his own travel, food, lodging, or membership dues.[16] In addition, taxes and tips are not included in determining the amount of an expenditure.[17]

I meet the compensation and/or expenditure requirement. What now?
If you meet the compensation and/or the expenditure requirement, then, generally, you must register as a lobbyist with the Texas Ethics Commission. However, once again, there are certain exceptions that will allow a person to avoid registering as a lobbyist. If a person meets any of the exceptions listed below, he is exempt from registering. Otherwise, he must register as a lobbyist. Those exceptions are:[18]

1. A person who owns, publishes, or is employed by a newspaper, any other regularly published periodical, a radio station, a television station, a wire service, or any other bona fide news medium that in the ordinary course of business disseminates news, letters to the editors, editorial or other comment, or paid advertisements that directly or indirectly oppose or promote legislation or administrative action, if the person does not engage in further or other activities that require registration under this chapter and does not represent another person in connection with influencing legislation or administrative action;
2. A person whose only direct communication with a member of the legislative or executive branch to influence legislation or administrative action is an appearance before or testimony to one or more members of the legislative or executive branch in a hearing conducted by or on behalf of either the legislative or the executive branch and who does not receive special or extra compensation for the appearance other than actual expenses incurred in attending the hearing;
3. A person whose only activity is to encourage or solicit members, employees, or stockholders of an entity by whom the person is reimbursed, employed, or retained to communicate directly with members of the legislative or executive branch to influence legislation or administrative action;
4. A person whose only activity to influence legislation or administrative action is to compensate or reimburse an individual registrant to act in the person's behalf to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action;
5. A person whose only activity to influence legislation or administrative action is attendance at a meeting or entertainment event attended by a member of the legislative or executive branch if the total cost of the meeting or entertainment event is paid by a business entity, union, or association;
6. A person whose only compensation subject to Section 305.003(a)(2) consists of reimbursement for any wages not earned due to attendance at a meeting or entertainment

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[16] *See* 1 Tex. Admin. Code § 34.41(a).
[17] *See id.* § 34.9.
[18] *See* Tex. Gov't Code § 305.004.

event, travel to and from the meeting or entertainment event, admission to the meeting or entertainment event, and any food and beverage consumed at the meeting or entertainment event if the meeting or entertainment event is attended by a member of the legislative or executive branch and if the total cost of the meeting or entertainment event is paid by a business entity, union, or association; and

7. A person who communicates directly with a member of the legislative or executive branch on behalf of a political party concerning legislation or administrative action, and whose expenditures and compensation, as described in Section 305.003, combined do not exceed $5,000 a calendar year.

I'm required to register. What does lobby registration entail?
Those persons required to register as a lobbyist must file a registration statement with the Texas Ethics Commission.[19] While the annual fee is currently $500 for most filers, there is a $100 fee for non-profit groups.[20] The registration papers require you to report your client(s), your compensation for each client, and the subject matters on which you'll lobby for each client.[21] Compensation is reported in compensation brackets, unless the lobbyist makes more than $500,000 a year (in which case he must report the exact compensation amount).[22] The form also requires some detailed information about the client, such as who is in charge of making lobbying decisions, but those requirements vary with entity type.[23]

Lobbyist registrations last only until December 31 of the year they are filed. For this reason, lobbyists must re-register every year.[24]

I registered as a lobbyist. Are there any more reporting requirements?
All registered lobbyists must report their lobby expenditures on "activity reports". Most lobbyists file these reports monthly. However, if, at the time of registration, the lobbyist states he does not expect to spend more than $1,000 on lobby expenditures in the calendar year, the lobbyist may then choose to file only a single activity report at the end of the year.[25] However, if the lobbyist exceeds the $1,000 in lobby expenditures during the calendar year, he must begin filing monthly reports starting the next monthly reporting period.[26]

Content of Activity Reports
The activity reports are due by the tenth of each month, and cover the previous month's lobby expenditures.[27] The lobbyist must break down the lobby expenditures on the activity report in two separate ways. First, the lobbyist must divide the expenditures into groups according to the category of expenditure. The available categories are: (1) transportation and lodging; (2) food and beverages; (3) entertainment; (4) gifts, other than awards and mementos; (5) awards and mementos; and (6) expenditures made for the attendance of members of the legislative or

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[19] *See id.* § 305.005(a).
[20] *See id.* § 305.005(c).
[21] *See id.* § 305.005(f).
[22] *See id.* § 305.005(g).
[23] For more information about those requirements, *see id.* § 305.005(h)-(i).
[24] *See id.* § 305.005(b).
[25] *See id.* § 305.0063(a).
[26] *See id.* § 305.0063(d).
[27] *See id.* § 305.007(a).

executive branch at political fundraisers or charity events.[28] Second, the lobbyist must separate the expenditures according to who benefited from them. The available categories are: (1) state senators; (2) state representatives; (3) other elected or appointed state officers; (4) legislative branch employees; (5) executive agency employees; (6) immediate family members of a legislative or executive branch member; (7) events to which all legislators are invited; and (8) guests.[29]

What expenditures must be reported?
The lobbyist must report all the lobby expenditures he incurred, as well as those incurred on his behalf and with his consent and ratification.[30] As a reminder, expenditures for the lobbyist's own expenses are not considered lobby expenditures, and need not be reported.[31] In addition, taxes and tips are also not included in lobby expenditures.[32] A lobbyist may make a joint expenditure with another lobbyist, and thereby reduce the amount of the expenditure attributable to each lobbyist.[33] However, if a lobbyist splits an expenditure with a non-lobbyist, special rules and provisions will apply.[34] Finally, if a lobbyist makes an expenditure of up to $200 that is fully reimbursed by the beneficiary before the activity report is due, the lobbyist does not report that expenditure.[35]

Detailed Reports
Under certain circumstances, a lobbyist must provide more detailed information about his lobby expenditures on a "detailed report", which is filed with the lobbyist's activity report. The requirements for detailed reporting vary based on the expenditure type category. Each detailed reporting requirement is listed below.

> **Transportation and lodging**. If a lobbyist spends more than $90.60 for transportation and lodging (this number will adjust upward in 2009) in a single day for a member of the legislative or executive branch, he must report the member's name, the place and date of the transportation and lodging, and the purpose of the transportation and lodging.[36] As discussed below, except for limited circumstances, a lobbyist may not provide transportation or lodging to a state official or employee.
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> **Food and beverage**. If a lobbyist spends more than $90.60 for food and beverages (this number will adjust upward in 2009) in a single day for a member of the legislative or executive branch, he must report the member's name, the place and date of the expenditure, and the specific amount of the expenditure.[37]

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[28] *See* Tex. Gov't Code § 305.006(b).
[29] *See id.* § 305.0062(a).
[30] *See id.* § 305.006(b).
[31] *See* 1 Tex. Admin. Code § 34.41(a).
[32] *See id.* § 34.9.
[33] *See* Tex. Gov't Code § 305.0021.
[34] *See id.*
[35] *See* 1 Tex. Admin Code § 34.1(2).
[36] *See* Tex. Gov't Code § 305.0061(a).
[37] *See id.* § 305.0061(b).

Entertainment. If a lobbyist spends more than $90.60 for entertainment (this number will adjust upward in 2009) in a single day for a member of the legislative or executive branch, or for an immediate family member of a member of the legislative or executive branch, he must report the member's name, the place and date of the expenditure, and the specific amount of the expenditure.[38]

Gifts, other than awards and mementos. If a lobbyist spends more than $50.00 on a gift given to a member of the legislative or executive branch, he must report the member's name, a general description of the gift, and the amount of the expenditure.[39]

Awards and mementos. If a lobbyist spends more than $50.00 on an award or memento given to a member of the legislative or executive branch, he must report the member's name, a general description of the award or memento, and the amount of the expenditure.[40]

Expenditures for a member's attendance at political fundraisers or charity events. For any expenditure a lobbyist makes in this category, he must report the member's name, the name of the charity or the political fundraiser's beneficiary, and the date of the event.[41]

I'm a registered lobbyist. What restrictions are placed on my activities?
Texas law restricts certain activities lobbyists may engage in. They are described in detail below.

Restrictions on Expenditures
Lobbyists are restricted in their ability to make certain types of expenditures. Those restrictions apply based on the category of expenditure type. Follows are the limitations.

Transportation and lodging. A lobbyist may not make a lobby expenditure for transportation and lodging except under very narrow circumstances, such as official fact-finding trips. If you register as a lobbyist, you should only make such expenditures after consulting with your attorney.[42]

Food and beverage. A lobbyist may only make these expenditures if he is present.[43] However, if the expenditure is for a gift of food or beverages valued at less than $50 and delivered by mail or common carrier outside the Capitol Complex, the expenditure is considered a gift (see below).[44]

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[38] *See id.*
[39] *See id.* § 305.0061 (c).
[40] *See id.*
[41] *See id.* § 305.0061(d).
[42] *See id.* § 305.024(a)(2)(A).
[43] *See id.* § 305.024(a)(2)(E)(i).
[44] *See id.* § 305.0061(e-1)

Entertainment. A lobbyist may only make these expenditures if he is present.[45] The total amount of expenditures for entertainment may not exceed $500 per beneficiary in a calendar year.[46]

Gifts, other than awards or mementos. The total amount of expenditures for gifts, other than awards or mementos, may not exceed $500 per beneficiary in a calendar year.[47]

Awards or mementos. The amount of any single award or memento may not exceed $500.[48]

Expenditures for a member's attendance at political fundraisers or charity events. A lobbyist may only make these expenditures if he is present.[49]

Restrictions on Monetary Transactions
A lobbyist may not loan money, endorse a loan for money, or give a gift of cash or other negotiable instrument to a member.[50]

Restriction on Contingent Fees
A lobbyist may not be paid with a fee contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.[51] There are some exceptions to this blanket prohibition. First, it does not prohibit accepting a contingent fee that is expressly authorized by another law.[52] Second, it does not prohibit receiving a contingent fee for legal representation before a state administrative agency in a contested hearing or similar adversarial proceeding prescribed by law or administrative rule.[53] In addition to those two exceptions, the prohibition does not apply to a sales commission payable to an employee of a vendor of a product.[54]

The sales commission exception has been the subject of much debate recently. While the text of the statute only applies to sales commissions paid to a vendor of a product, a 1996 ethics advisory opinion held the exception also applies to "all fees for efforts to influence agency purchasing decisions, regardless of whether the person attempting to influence an agency purchasing decision is working as an employee of a vendor or as an independent contractor."[55] This flows, generally, from a 1993 rule that specifically exempted efforts to influence an agency's "purchasing decision" from being an "administrative action".[56] However, the Ethics

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[45] *See id.* § 305.024(a)(2)(E)(i).
[46] *See id.* § 305.024(a)(2)(B).
[47] *See id.* § 305.024(a)(2)(C).
[48] *See id.* § 305.024(a)(2)(D).
[49] *See id.* § 305.024(a)(2)(E)(i).
[50] *See id.* § 305.024(a)(1).
[51] *See id.* § 305.022(b).
[52] *See id.* § 305.022(d)(1).
[53] *See id.* § 305.022(d)(2).
[54] *See id.* § 305.022(c).
[55] *See* Op. Tex. Ethics Comm'n No. 341 (1996).
[56] *See* 1 Tex. Admin. Code § 34.5(11).

Commission has been discussing rules that could either broaden or limit the scope of this exclusion. As of July 18, 2008, no rule had been adopted, but one is expected this year.

Restriction on Admission to Chamber Floors
Lobbyists may not go on the floor of either the House of Representatives or the Texas Senate while that house is in session unless he is invited by the house.[57]

Restrictions on Conflicts of Interest
Lobbyists face restrictions on conflicts of interest with regard to their representation of clients on different sides of an issue. Should this happen, lobbyists must notify the clients impacted as well as the Ethics Commission. In certain circumstances, the lobbyist must discontinue representation of one or both clients in order to resolve the conflict. However, if the lobbyist receives consent from both sides, and appropriately notifies the Ethics Commission, he may continue to represent one side on the issue.[58] It should be noted that, in addition to the conflicts of interest rules found in the lobbyist regulations, the State Bar Rules of Professional Conduct dealing with legal conflicts apply to lobbyists who are also lawyers.

Restrictions on False Communications
Lobbyists are prohibited from making false statements or misrepresentations to members of the legislative or executive branch. Should this happen, the lobbyist must notify the member of the false statement and provide the correct information.[59]

I'm registered. What benefits do I gain from registering?
As a registered lobbyist, the law does confer some benefits on the registration. For one, any expenditures made for lobbying is exempted from the Penal Code's prohibition on offering gifts to a public servant, as well as bribery.[60] Nevertheless, the Penal Code exception on bribery does not allow any type of quid pro quo in exchange for a lobby expenditure.[61]

You used the term "persons" frequently, instead of individual. Are entities ever required to register?
This is a commonly asked question. Under Texas lobby laws, entities may be required to register if they either make expenditures or accept compensation or reimbursement that exceed the appropriate thresholds. As with most other items discussed in this paper, there are exceptions to entity registration.

The first exception is found in statute, which exempts an entity whose only activity to influence legislation or administrative action is to compensate or reimburse an individual registrant to act in the person's behalf to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.[62] On first reading, this exception would appear to allow those entities who pay someone else to lobby on their behalf to avoid registration

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[57] *See* Tex. Gov't Code § 305.023.
[58] *See id.* § 305.028.
[59] *See id.* § 305.021.
[60] *See* Tex. Penal Code §§ 36.02(d); 36.10(a)(5).
[61] *See id.* § 36.02(d).
[62] *See* Tex. Gov't Code § 305.004(4).

as a lobbyist. However, in order for this exception to apply, the entity may not perform any other lobby activity besides compensating or reimbursing a lobbyist. This includes making a lobby expenditure directly (as opposed to reimbursing a lobbyist for his expenses).[63]

The second exception is more commonly used. By rule, the Ethics Commission has allowed entities to avoid registration as lobbyists so long as all activity otherwise reportable by the entity is reported by one or more registered lobbyists.[64] This exception, therefore, allows a lobby entity, such as a lobby firm or a law firm that employs lobbyists, to avoid registration even if it pays directly for lobby expenditures. However, the individuals registered as lobbyists must report all of those expenditures required to be reported by the entity. The compensation the entity earns would also be apportioned to the lobbyists for reporting purposes. This exception for entity registration has also come under fire with the Ethics Commission. They have discussed eliminating this exemption, but have not done so as of July 18, 2008. The most likely scenario is that this exception will remain, but in a different form. In the rule proposed by the Ethics Commission, the individual reporting the entity's expenditure must have some nexus to the entity, such as being employed by the entity for lobbying purposes.

What does all of this mean?

When dealing with the government, it is important to ensure that you are in compliance with all laws. Failure to comply with these laws carries criminal, civil, and administrative penalties. In addition to those potential problems, there is a media angle to non-compliance. In this day and age, with so much focus placed on government and its interactions with private industry, there is a heightened expectation for lobbyists to know and comply with the law.

Several Austin attorneys specialize in handling this type of law, including this author. In addition, an industry trade group, the Professional Advocacy Association of Texas (www.PAAT.org), lobbies and monitors these laws on behalf of lobbyists and trade groups in Texas. The Texas Ethics Commission (www.ethics.state.tx.us) is also a good source of information. They have staff attorneys who are both knowledgeable and courteous in responding to questions from the public.

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[63] *See* Op. Tex. Ethics Comm'n No. 89 (1992).

[64] *See* 1 Tex. Admin. Code § 34.45(a).

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Trading Spaces: Allocating Environmental Risk in Commercial Transactions, Texas Envt'l L. Journal (Nov. 2004 (originally published in conference proceedings of the Texas Environmental Superconference August 2004)

Co-Chair and Speaker, Various Topics, Texas Water Law Conference (CLE International 1998-2007)

Background Information on
Water Quality New Developments

By Janet McQuaid, Moderator
Water Quality Panel
2008 Texas Environmental Superconference

TABLE OF CONTENTS

I. Texas Surface Water Quality Standards 1
A. Regulatory Framework 1
1. Designated Uses 2
2. Water Quality Criteria 4
3. Anti-Degradation Policy 4
B. Standards Update 5
1. Recreational Uses and Criteria 5
2. Aquatic Uses and Nutrient Criteria 8
3. Toxicity Criteria 9
4. Whole-Effluent Toxicity Testing 10
II. Implications of Rapanos 11
A. Case Law 12
1. Rapanos Split Opinion (2006) 12
2. Legal Effect 13
B. EPA's Rapanos Guidance (2007) 14
C. Clean Water Restoration Act of 2007 15
III. Water Transfers 15

ATTACHMENTS

Attachment 1.—Whole Effluent Toxicity (WET) Testing—Current TCEQ Policy (TCEQ Staff Draft 6/26/2007), *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/stakeholders/a0607tceqpolicy.doc

Attachment 2.—EPA Permitting Strategy for WET: Summarized from the Draft December 2004 Guidance Document (TCEQ Staff Draft 6/26/2007), *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/stakeholders/b0607permitstrategy.doc

Attachment 3.—Comparison of *Rapanos* Standards: Fifth Circuit to Supreme Court

Attachment 4.—Excerpt from Joint Memorandum on Clean Water Act Jurisdiction in Rapanos v. United States and Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

Background Information on
Water Quality New Developments

By Janet McQuaid,* Moderator
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This paper summarizes the legal framework behind the new developments in water quality to be discussed by the water quality panel at the 2008 Texas Environmental Superconference. Topics covered include ongoing revisions to the Texas Surface Water Quality Standards, including recreation, nutrient, and toxicity criteria; changes under consideration to TCEQ's Standards Implementation Procedures relating to whole-effluent toxicity testing; the legal framework underlying discussion of the water-quality implications of the Supreme Court's 2006 decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006); and a summary of EPA's recent rule relating to water transfers.

I. TEXAS SURFACE WATER QUALITY STANDARDS

This section summarizes the regulatory framework of the Texas Surface Water Quality Standards ("TSWQS" or "Standards") in general and specifically as they relate to recreation uses, nutrient criteria, and toxicity criteria.

A. Regulatory Framework

Section 303(a) of the Federal Clean Water Act ("CWA") requires each state to develop water quality standards for each body of water in the state. *See* 33 U.S.C. § 1313(a). The Texas Commission on Environmental Quality implements Section 303(a) of the CWA through Texas Pollutant Discharge Elimination System ("TPDES") permits issued in accordance with the Federal Clean Water Act pursuant to a Memorandum of Agreement ("MOA") with the U.S. Environmental Protection Agency ("EPA"). *See* MEMORANDUM OF AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 6 AND THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION CONCERNING THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (Sept. 14, 1998), *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/municipal/c1.pdf.

Water quality standards consist of three components: (1) the designated uses of a water body; (2) the water quality criteria needed to protect the designated uses; and (3) an anti-degradation policy, which requires that discharges not interfere with the attainment or maintenance of water quality standards. *See* 33 U.S.C. §§ 1313(a), (c)(2)(A),

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(d)(4)(B), 1342(o); Tex. Water Code § 26.003; 40 C.F.R. § 131.12; 30 Tex. Admin. Code § 307.5.

1. Designated Uses

Under the CWA and its implementing regulations, each state must identify the existing uses of its water bodies, defined as the uses actually in existence on or before November 28, 1975. *See* 33 U.S.C. § 1313(a); 40 C.F.R. § 131.3(e). The water quality necessary to support the existing uses as of 1975 must, at a minimum, be maintained, subject to narrow exceptions. *See* 40 C.F.R. § 131.10(h). These existing uses are considered "designated uses" for purposes of regulation. In addition, all designated uses should allow for the protection and propagation of aquatic life and recreation in and on the water, commonly referred to as the "fishable/swimmable" standard. *See* 40 C.F.R. § 131.2. If the fishable/swimmable standard is attainable, it applies regardless of the 1975 existing use, unless the state demonstrates to the Environmental Protection Agency ("EPA") that attainment of such use is not feasible. *See* C.F.R. §§ 131.2, 131.10(g).

The Texas Water Quality Standards (the "Standards") define the following use categories:

- Recreation—contact ("CR") or noncontact ("NCR"), *See* 30 Tex. Admin. Code §§ 307.3(a)(12), (35), 307.7(b)(1);
- Domestic water supply—public water supply ("PS") or aquifer protection ("AP") (*i.e.*, capable of recharging the Edwards Aquifer), *See* Tex. Admin. Code § 307.7(b)(2);
- Aquatic life—exceptional, high, intermediate, and limited, *id.* § 307.7(b)(3); and
- Additional uses—such as navigation ("N"), agricultural water supply, industrial water supply ("IS"), wetland water quality functions, and seagrass propagation, Tex. Admin. Code § 307.7(b)(5).

The criteria that apply to each of these use categories is discussed below, in subpart I.A.2 of this chapter.

The surface water bodies (731 of them) in the state fall into one of three general categories: (1) classified segments listed in Appendix A of the Texas Water Quality Standards (374 water bodies); (2) unclassified segments for which site-specific uses and criteria have been set, listed in Appendix D of the Standards (240 water bodies); and (3) other unclassified segments to which the State's general criteria apply (117 water bodies).

The first category of "classified" water bodies consists of the major surface waters of the state, which are classified in Appendix A of the Standards by segment (374 of them) for the purpose of water quality management and designation of site-specific standards. *See* 30 Tex. Admin. Code §§ 307.2(c), 307.10 app. A. The geographic extent

of each classified segment is described by metes and bounds in Appendix B of the Standards. *See* 30 Tex. Admin. Code § 307.10 app. B. For example, Grapevine Lake in the Trinity River Basin, the Houston Ship Channel in the San Jacinto River Basin, and the Upper San Marcos River in the Guadalupe River Basin are listed in Appendix A as classified segments with the following designated uses:

		Uses			
Segment No.	Segment Name	Recreation	Aquatic Life	Domestic Water Supply	Other
0826	Grapevine Lake	CR	H	PS	
1006	Houston Ship Channel Tidal				N/IS
1007	Houston Ship Channel/ Buffalo Bayou Tidal				N/IS
1814	Upper San Marcos River	CR	E	AP	

30 Tex. Admin. Code § 307.10 app. A.

The second category consists of certain unclassified segments for which site-specific receiving water assessments have been done, allowing an aquatic-life use ("ALU") designation to be made. These site-specific, aquatic-life use designations (see below) are listed in Appendix D of the Texas Water Quality Standards. *See* 30 Tex. Admin. Code § 307.10 app. D. All unclassified segments are designated for contact recreation, including the segments listed in Appendix D. Other criteria are the same as for the water body in which each segment listed in Appendix D is located. Here are a few examples of the site-specific, designated uses for Appendix D unclassified segments:

Segment	County	Water Body	ALU	D.O.	Description
0826	Denton	Trail Creek	H	5.0	Perennial stream from the confluence with Denton Creek up to 2.1 km upstream of SH 156 in Justin
1006	Harris	Halls Bayou	I	4.0	Perennial stream from the confluence of Greens Bayou up to US 59
1007	Harris	Brays Bayou above Tidal	L	3.0	Perennial stream from 11.5 km upstream from the confluence of the Houston Ship Channel up to SH 6

30 Tex. Admin. Code § 307.10 app. D.

The third category consists of the rest of the surface water bodies in the state (*i.e.*, those not listed in Appendices A or D). These other water bodies are unclassified and no

site-specific receiving water assessment has been made. For unclassified segments, the general water quality criteria discussed below generally apply, subject to certain exceptions discussed later in this chapter. *See* 30 Tex. Admin. Code § 307.10.

2. Water Quality Criteria

The second component of a water quality standard is the water quality criteria. Water quality criteria are descriptions of the quality necessary to support existing or designated uses in waters of the state. Water quality criteria may be numeric (e.g., milligrams per liter ("mg/L")) or narrative (e.g., "free of floating debris and suspended solids"). See, e.g., 30 Tex. Admin. Code § 307.4(b) (providing narrative criteria for aesthetic parameters); Tex. Admin. Code § 307.6 (providing concentrations for toxic materials). Water quality criteria may be general or site-specific. 30 Tex. Admin. Code § 307.4 (general); Tex. Admin. Code § 307.10 (site-specific).

The Texas Commission on Environmental Quality ("TCEQ") does a review of the water quality standards every three years. Every three years, therefore, the standards are subject to modification—including (and especially) the site-specific criteria—subject to the anti-degradation component of the water quality standards.

3. Anti-Degradation Policy

The third component of a water quality standard is an anti-degradation policy. The EPA's regulations implementing section 303(a) of the CWA require each state to establish an antidegradation policy as part of its water quality standards. *See* 40 C.F.R. § 131.12; *see also* 33 U.S.C. § 1313(a). The Texas Water Quality Standards achieve this federal requirement by establishing three antidegradation evaluation tiers.

For Tier 1 waters, which are fishable/swimmable waters, existing uses are maintained by ensuring that TPDES permits for discharges to water bodies listed pursuant to CWA section 303(d) (*i.e.*, water bodies that do not attain the water quality standard) will not allow an increase in the loading of a listed pollutant that will cause or contribute to the violation of water quality standards. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PROCEDURES TO IMPLEMENT THE TEXAS SURFACE WATER QUALITY STANDARDS (RG-194) (Jan. 2003), at 16, *available at* www.tceq.state.tx.us/files/rg-194.pdf_4005964.pdf [hereinafter cited as "RG-194"].

For Tier 2 waters, which are waters that meet or exceed the fishable/swimmable standard, TPDES permits subject to anti-degradation reviews must be conditioned to ensure that such water quality will be maintained unless lowering it is necessary for important economic or social development. RG-194, at 30. When degradation is anticipated, the TCEQ reviews the preliminary determination of potential degradation, the evaluation of alternatives, and economic and social justification. The TCEQ then determines whether a lowering of water quality is expected from the proposed discharge. If it is, the TCEQ then determines whether the lowering of water quality is necessary for important economic or social development and whether reasonable alternatives to the lowering of water quality are unavailable. The TCEQ may also refer questions

concerning an anti-degradation review to the State Office of Administrative Hearings for an administrative hearing. Any proposed TPDES permit that allows degradation is subject to EPA review and approval. RG-194, at 35.

For Tier 3 waters, which are outstanding natural resource waters, TPDES permits must ensure that no increase in pollution that could cause degradation of water quality is allowed in these waters. Outstanding natural resource waters must be specifically designated under section 307.5 of the Texas Water Quality Standards. Currently there are no designated outstanding national resource waters in Texas. *See* 30 Tex. Admin. Code § 307.4; RG-194, at 35.

B. Standards Update

As noted above, TCEQ reviews the TSWQS every three years. TCEQ is currently considering making significant changes to the current standards. Changes being considered include:

- Revising the criteria for recreation.
- Establishing numerical nutrient criteria for up to 107 large water supply reservoirs. The TCEQ currently has narrative criteria for nutrients.
- Recalculating human-health toxic criteria to incorporate updated procedures to address child exposure, estimated amounts of fish consumed, and bioaccumulation rates – in coordination with toxicologists in the TCEQ Chief Engineer's Office.
- Adding 23 new human-health toxic criteria, two new aquatic-life criteria, and revising numerous existing toxic criteria; including consideration of 2001 EPA guidelines for Mercury in fish-tissue:
    - EPA guidance criterion is 0.3 ppm. The target used for the TCEQ standards was 1.0 ppm;
    - TDSHS alert level for fishing advisories is 0.7 ppm. TCEQ staff is proposing 0.7 ppm.
- Incorporating new site-specific studies to:
    - Revise uses or criteria for about 40 larger water bodies;
    - Add aquatic-life uses for about 43 new small streams in Appendix D; and
    - Add toxic criteria for 16 additional water bodies in Appendix E.

The balance of this part discusses changes to the recreation criteria, nutrient criteria, and toxic criteria.

1. Recreational Uses and Criteria

As discussed in Part I.A, above, designated uses should allow for the protection and propagation of aquatic life and recreation in and on the water. *See* 40 C.F.R. § 131.2. Since the TSWQSs were first promulgated in 1973, one of the designated uses defined in the TSWQS has been contact recreation. *See* 30 Tex. Admin. Code §§ 307.3(a)(12), (35), 307.7(b)(1). Contact recreation is defined as "recreational activities involving a

significant risk of ingestion of water, including wading by children, swimming, water skiing, diving, and surfing." 30 Tex. Admin. Code § 307.3(a)(12). Another use defined in the TSWQS is for noncontact recreation. Noncontact recreation is defined as "aquatic recreational pursuits not involving a significant risk of water ingestion: including fishing, commercial and recreational boating, and limited body contact incidental to shoreline activity." *See* 30 Tex. Admin. Code § 307.3(a)(35).

In 1983, EPA revised the federal regulations to provide that, if the fishable/swimmable standard is attainable, it applies regardless of the 1975 existing use, unless the state demonstrates to the Environmental Protection Agency ("EPA") that attainment of such use is not feasible. *See* C.F.R. §§ 131.2, 131.10(g). The analysis supporting a demonstration that attainment of a use is or is not feasible is called a "use-attainability analysis." Since 1983, therefore, EPA has required a use-attainability analyses for all water bodies that were designated for less than primary contact recreation.

Under the TSWQSs, contact recreation is the presumed use for all Texas waterbodies unless a use attainability analysis demonstrates otherwise. Texas has numerical criteria for recreational uses, as shown in Table 1, below. The contact recreation criteria are not, however, attained in numerous Texas water bodies. In Texas's 2006 list of impaired water bodies prepared by TCEQ in accordance with Section 303(d) of the CWA (known as the "303(d) list"), 36% of assessed stream and river miles did not meet recreation criteria. These impairments are often due to non-anthropogenic causes, such as vegetation decomposition, wildlife waste, and slow-moving water.

As mentioned above, as part of the ongoing triennial Standards review, TCEQ is considering expanding the existing categories of recreational uses and associated criteria, as shown in Table 1, below.

Table 1
Summary of Recreational Uses and Selected Criteria

Uses	Criteria and Estimated Risk					
	E. coli (FW)		Enterococci (SW)		Fecal coli (FW& SW)	
Existing Uses						
Contact recreation	126	8	35	19	200	--
Noncontact rec.	605	~14	168	~27	2000	--
Proposed Uses						
Primary CR 1	126	8	35	19	--	--
Primary CR 2	206	10	--	--	--	--
Secondary CR	630	14-15	175	27-28	--	--
Noncontact Rec.	1260	17-18	350	31-32	--	--

G. mean = Geometric mean of bacteria per 100 ml
Risk = Risk of illness (gastroenteritis) per 1000 swimmers (from EPA 1986 guidance criteria)

See Water Quality Standards Revision: Options for Recreation—Summary (Staff Draft May 5, 2008), *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/stakeholders/Recreational_stds_proposed_summary_05-2-08.pdf [hereinafter cited as "Staff Draft Summary"]. Currently there is only one category of contact recreation" defined broadly as:

> Contact recreation—recreational activities involving a significant risk of ingestion of water, including wading by children, swimming, water skiing, diving, and surfing."

30 Tex. Admin. Code § 307.3(a)(12). Under TCEQ's staff's draft concept rules, what was previously known as "contact recreation" would be known as "primary contact recreation." This new term would be defined similarly to "contact recreation" in terms of a significant risk of ingestion, as follows:

> Primary contact recreation—Water recreation activities, such as wading by children, swimming, water skiing, diving, tubing, and surfing, involving a significant risk of ingestion of water.

Chapter 307 Draft Rule Language: TCEQ Standards Workgroup (Staff Draft May 5, 2008) § 307.3, at p. 10-11 [hereinafter "Draft Standards Rule"], *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/stakeholders/307-7,8,9fromMNGTdirectory.pdf. "Primary Contact Recreation" would be further divided into "Primary Contact Recreation 1" ("CR1") and Primary Contact Recreation 2 ("CR2"), which differ based on differing probability of exposure in the waterbodies to which they would apply. CR1 would apply to waterbodies in which people more likely to swim (i.e., all classified segments, lakes, reservoirs, and perennial streams or perennial pools located in or adjacent to state or national parks). CR2 would apply to waterbodies in which people are less likely to swim (i.e. unclassified freshwater streams and rivers that have perennial flow or pools but are not in or adjacent to state or national parks). Draft Standards Rule § 307.7(b)(1)(A)(i)-(ii).

In addition, to help address the problem of non-human sources, a new category, called "secondary contact recreation" would be created, defined as activities not having a significant risk of ingestion, as follows:

> Secondary contact recreation—Water recreation activities, such as fishing, commercial and recreational boating, and limited body contact incidental to shoreline activity, not involving a significant risk of water ingestion.

Draft Standards Rule §307.3, at p. 10-11. Intermittent streams without perennial pools and nontidal wetlands would be automatically designated for secondary contact recreation. See Draft Standards Rule § 307.7(b)(1)(A)(iii). Texas waterbodies may also be designated in the Standards for "secondary contact recreation use as a site-specific use. This site-specific use designation is intended to be used in limited areas for individual water bodies in situations where studies demonstrate that wildlife sources of bacteria are

unavoidably high, such as in wildlife preserves with very large waterfowl populations and limited aquatic recreational potential. See Staff Draft Summary.

In summary, the staff draft Standards rule considers creating the following presumptive uses for Texas waterbodies:

- Contact 1: Classified segments
- Contact 1: Unclassified reservoirs, tidal rivers, bays and unclassified freshwater streams & rivers that are located in national and state parks
- Contact 2: Unclassified perennial streams or pools
- Secondary: Unclassified intermittent streams and nontidal wetlands Noncontact: Segments now designated noncontact

Additional uses being evaluated are:

- Contact 2: Also apply to classified streams and rivers
- Secondary: Also apply to unclassified streams < 18" deep

See Staff Draft Summary.

2. Aquatic Uses and Nutrient Criteria

Nutrient enrichment from nitrogen and phosphorus can cause excessive growth of aquatic plants. The major sources of nutrients in Texas are agricultural runoff, municipal discharges, and storm water runoff.

As promulgated in the 1970s and currently in effect, the TSWQS have narrative criteria for nutrients. The narrative criterion for nutrients in the TSWQS requires:

> Nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use. Sitespecific nutrient criteria, nutrient permit limitations, and/or separate rules to control nutrients in individual watersheds will be established where appropriate after notice and opportunity for public participation and proper hearing.

30 Tex. Admin. Code § 307.4(e). As a result of this narrative criterion, about 30 municipal wastewater permits now have effluent limits for phosphorus. Eight water bodies have "watershed rules" with nutrient controls for wastewater discharges. In the 2004 Water Quality Inventory, many water bodies have nutrient-related concerns. However, the North Bosque River is the only listing for nutrient impairment on the 303(d) list.

In 2001, EPA published guidance in the Federal Register requiring States to adopt numeric nutrient criteria or procedures to translate a narrative nutrient criteria into a quantified endpoints. Nutrient Criteria Development: Notice of Ecoregional Nutrient Criteria, 66 Fed. Reg. 1671, 1673 (Jan. 9, 2001). EPA initially required states to adopt

numerical nutrient criteria into their state standards by December 31, 2004, but has allowed flexibility in this schedule if states were showing substantial progress in complying. EPA's 2001 guidance required the states either to adopt EPA's recommended, but non-binding, ecoregional nutrient criteria or to revise the default criteria based on facts and circumstances specific to the state. 66 Fed. Reg. at 1671.

EPA's ecoregional criteria for nutrients are very stringent. Up to half of Texas waterbodies do not meet the default criteria. If the TCEQ were to adopt EPA's criteria, this would result in these water bodies being added to the 303(d) list.

TCEQ has taken steps to develop nutrient criteria. The USGS has conducted database development and evaluations. TCEQ convened an advisory workgroup in 2002 that has held six meetings in this effort. This workgroup has been rolled into the Surface Water Quality Standards Advisory Workgroup. More information on the approaches being considered for numerical nutrient criteria isvailable on TCEQ's web site for the Nutrient Criteria Workgroup at—

www.tceq.state.tx.us/permitting/water_quality/stakeholders/nutrient_criteria_group_summaries.html

and on the Surface Water Quality Standards Advisory Workgroup web site at—

www.tceq.state.tx.us/permitting/water_quality/stakeholders/swqsawg.html

3. Toxicity Criteria

The TSWQSs contain both narrative and numeric criteria for toxicity. The narrative criteria provides that "Surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life." 30 Tex. Admin. Code § 307.4(d) (General Criteria). The narrative criteria further provide that surface waters shall not be acutely or chronically toxic to human health or aquatic or terrestrial organisms or livestock. 30 Tex. Admin. Code § 307.6(b). For a number of toxic substances, the TSWQSs provide specific numeric criteria for surface water. *See* Tex. Admin. Code § 307.6(c)-(d). These criteria are achieved by controlling the total, whole-effluent toxicity ("WET") in effluent discharged to water in the state. *See* 30 Tex. Admin. Code § 307.6(e). WET testing is discussed in more detail below, in Part 4 of this paper.

As part of the TSWQS revisions, TCEQ staff is pursuing the recalculation of the human-health toxic criteria in order to incorporate updated procedures to address child exposure, estimated amounts of fish consumed, and bioaccumulation rates. EPA has published new guidance on calculating toxic criteria to protect human health. The intent of the new guidance is to ensure that a child's small body size is protected from the exposure to non-carcinogens. This guidance yields more stringent criteria. In addition, the amount of fish consumed is considered at 17.5 g/day rather than 10 or 15 g/day. Again, this exposure assumption yields more stringent criteria. For more information on

TCEQ's work on toxic criteria, go to the Surface Water Quality Standards we site at the URL address cited above.

4. Whole-Effluent Toxicity Testing

EPA's and TCEQ's rules require that the water quality standards for toxicity be achieved in the receiving waterbody. As noted above, effluent discharged to water in the state must be controlled to achieve the applicable water quality criteria for toxicity. TCEQ's rules require "dischargers whose effluent has a significant potential for exerting toxicity in receiving waters will be required to conduct whole effluent toxicity biomonitoring." Under TCEQ's current policies, this biomonitoring is conducted after the permit is issued. 30 Tex. Admin Code § 307.6(e)(2)(A).

If post-permit-issuance biomonitoring results indicate that a discharge is exceeding the restrictions on total toxicity set out in the TSWQS, then the permittee is required to conduct a toxicity identification evaluation ("TIE") and toxicity reduction evaluation ("TRE") in accordance with TCEQ's Water Quality Standards Implementation Procedures. Possible outcomes to a TIE/TRE include permit modification to impose total toxicity limits, chemical specific limits, and/or best management practices designed to reduce or eliminate toxicity. Where conditions may be necessary to prevent or reduce effluent toxicity, modified permits include a schedule for achieving compliance with such additional conditions. *See* 30 Tex. Admin. Code § 307.6(e)(2)(D).

A summary of TCEQ's current approach to evaluating biomonitoring results is provided as Attachment 1 to this paper. More details can be found in TCEQ's Standards Implementation Procedures. *See* RG-194, at 101-125. In general, WET testing assesses the cumulative toxic effect that a wastewater discharge may have on the aquatic organisms in the receiving waters, by exposing selected aquatic species to the effluent. WET tests are generally conducted for major dischargers using an invertebrate (such as a water flea or small shrimp), and a small fish for each test. The effluent is diluted by the receiving water to mimic instream conditions. Several dilutions are used for each test to establish a pattern for any toxicity. Tests are generally conducted quarterly during the initial permit period. Testing can include: (1) 24-hour exposure to undiluted effluent; (2) 48-hour exposure for "acute" effects; or (3) 7-day exposure for "chronic" effects. Under TCEQ's current policy, if sublethal or lethal toxicity is noted, retests are required. If lethal failures occur in a retest, then the permittee is required to conduct a toxicity reduction evaluation (TRE) to identify the source of the lethal toxicity. As a result of the TRE, the permit is amended to include: (1) an enforceable limit for an identified toxicant: (2) an enforceable limit for WET lethality if a toxicant is not identified; or (3) a BMP to control toxicity. Currently, 784 permits include reporting requirements for WET; 65 of those 784 permits include effluent limitations for WET – for lethal effects. *See* RG-194, at 101-125.

TCEQ's procedures for WET testing were intended to implement EPA's regulations requiring WET limits in permits if TCEQ determines that a discharge causes, or has the reasonable potential to cause or contribute to an in-stream excursion above the numeric criterion for whole effluent toxicity or above the narrative criterion for toxicity.

See 40 C.F.R. § 122.44(d)(iv). EPA's regulations do not require WET limits when the permitting authority justifies that they are not needed, as follows:

> . . . . Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

40 C.F.R. § 122.44(d)(v).

In 1998, EPA approved TCEQ's approach to setting WET limits based on post-permit-issuance biomonitoring when EPA approved TCEQ's application to implement the NPDES permit, the documentation for which included the WET procedures in RG-194. In 2004, however, EPA made available draft guidance for WET testing in NPDES permits that the states were required to implement by June 2008. A summary of the 2004 guidance is provided as Attachment 2 to this paper. The new draft guidance requires a "predictive" rather than a "reactive" approach. Memorandum From J. Hanlon, EPA Office of Wastewater Management, to M. Flores, Water Quality Protection Division, EPA Region VI (Apr. 3, 2007) at 1 (using the terms "predictive" and "reactive") [hereinafter Hanlon Memo], *available at* www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/stakeholders/g0607memo0407.pdf . The new guidance also requires consideration of sublethal as well as lethal effects. Specifically:

- WET limits are required when permits are issued if there is "reasonable potential" for toxicity based on past test results, rather than allowing a TRE.

- Sublethal toxicity effects on growth and reproduction are added as a basis of requiring TREs and WET limits, rather than basing TREs and WET limits on lethality as TCEQ does currently.

TCEQ is considering EPA's policy in ongoing revisions to the TCEQ Standards Implementation Procedures as part of the triennial Standards review. TCEQ evaluations indicate that as many as 50 percent of applicable permits might end up with enforceable WET limits, many for sublethal effects. EPA has recently denied federal approval of draft TPDES permits where it considers there to be a "reasonable potential" for sublethal toxicity.

II. IMPLICATIONS OF RAPANOS

The impact of the U.S. Supreme Court's decision in *Rapanos* for Clean Water Act Section 404 permitting of wetlands activity has been extensively debated. But the implications for water-quality regulation and permitting have been relatively unexplored.

The panel will discuss some of the implications of *Rapanos* for water quality regulation and permitting. This section summarizes the legal framework underlying that discussion.

The EPA and the Corps interpret the term "navigable water" in section 404 to include "waters of the United States." The jurisdictional inquiry, therefore, becomes whether the discharge site qualifies as "waters of the United States."

The Corps' regulatory definition of waters of the United States is set forth at 33 C.F.R. § 328.3(a). It includes in part, "interstate wetlands," and "wetlands adjacent to waters...identified in [this regulation]." The regulations further provide that in the case of adjacent wetlands "jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetland" and that when "the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland." *See* 33 CFR § 328.4(c)(2), (3).

A. Case Law

1. Rapanos *Split Opinion (2006)*

In a pair of related cases, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, the U.S. Supreme Court attempted to define "waters of the United States" under the CWA. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006). The definition determines the scope of the federal government's jurisdictional power to require a permit for activities involving the discharge of dredged or fill materials into waters of the United States (including wetlands) under section 404 of the CWA. *See* 33 U.S.C. § 1344.

The EPA and the Corps have interpreted the term "waters of the United States" by regulation to include not only waters susceptible to use in interstate commerce—the traditional understanding of the phrase "navigable waters of the United States"—but also tributaries of those waters, including intermittent and ephemeral streams, and, of particular relevance in *Rapanos* and *Carabell*, wetlands adjacent to those waters or their tributaries. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. §§ 110.1, 122.2. This expansive regulatory definition has been the subject of almost continuous litigation since its promulgation in 1980. *See, e.g., Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001) ("SWANCC"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *see also* 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (defining "waters of the United States").

In *Rapanos* and *Carabell*, the Sixth Circuit, consistent with the Fourth, Seventh, and Ninth Circuits, upheld the government's assertion of jurisdiction based on a "hydrological connection" to traditionally navigable waters through intermittent, natural, and man-made channels. *United States v. Rapanos*, 376 F.3d 629, 638 (6th cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006); *Carabell v. United States Army Corp of Engineers*, 376 F.3d 704, 710 (6th Cir. 2004), *vacated and remanded* sub nom. *Rapanos v. United States*, 126 S. Ct. 2208 (2006). In contrast, the Fifth Circuit (which includes Texas, Louisiana, and Mississippi) took a much narrower view of CWA jurisdiction,

requiring that, to be jurisdictional, the waters in question must be "truly adjacent to navigable waters," or at least have a "significant measure of proximity." *Rapanos*, 391 F.3d at 638 (citing *In re Needham*, 354 F.3d 340, 345-46 & 347 n.12 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)).

When the Supreme Court granted review in *Rapanos* and *Carabell*, observers anticipated that the Court's decision would resolve the split among the circuits and reduce the uncertainty over the scope of CWA jurisdiction. The Court's opinion, however, did not give clear guidance on the limits of federal jurisdiction under the CWA. There was no majority opinion. Four justices led by Justice Scalia (plurality opinion) would sharply limit federal jurisdiction; four justices led by Justice Stevens (dissenting opinion) would uphold the Corps' expansive interpretation of its jurisdiction; and Justice Kennedy (concurring opinion), who stood alone in the middle, would require a showing of a "significant nexus" of the wetland in question to navigable waters. The table provided in Attachment 3 to this paper summarizes the plurality, concurring, and dissenting opinions and compares them to Fifth Circuit precedent.

2. Legal Effect

As a practical matter, it appears likely that five of the nine Justices of the current Supreme Court would find jurisdiction if either the plurality's "two-element" test or Justice Kennedy's "significant nexus" test is met in a particular fact situation. As a matter of legal theory, however, commentators and the courts are struggling with the issue of whether the split decision in Rapanos establishes any legal standard that binds the lower courts, as it is difficult to discern common elements on which the plurality and the concurring opinions in Rapanos agree. In the months since Rapanos, two district courts and three circuit courts have attempted to apply its tests, and a trend appears to be emerging, in the absence of clear, binding precedent, to interpret Rapanos so as to effect minimal change to the existing standard in any given circuit. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th cir. 2007) (concluding without analysis that Justice Kennedy's concurrence provides the controlling test); *United States v. Gerke Excavating*, 464 F.3d 723, 725 (7th Cir. 2006), cert. denied, ___ U.S. ___, 128 S. Ct. 45 (2007) (finding without significant analysis that Justice Kennedy's test provides the controlling standard); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (determining that the lower court should uphold jurisdiction if "either the plurality's or Justice Kennedy's standard" is met), cert. denied, ___ U.S. ___, 128 S. Ct. 375 (2007); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 614-25 (N.D. Tex. 2006) (holding consistent with existing Fifth Circuit precedent in *Harken Exploration*, 250 F.3d at 269, and *In re Needham*, 354 F.3d at 345-47, that the government did not have jurisdiction over an oil spill to an intermittent tributary); *United States v. Evans*, 2006 U.S. Dist. LEXIS 94369 (M.D. Fla. July 14, 2006) (determining that it would uphold jurisdiction if either the plurality's or Justice Kennedy's test were met).

This binding effect or lack thereof is of particular interest in the Fifth Circuit, where the U.S. Court of Appeals had, before *Rapanos*, generally followed a standard analogous to the *Rapanos* plurality opinion written by Justice Scalia. Notably, in a case decided since *Rapanos*, a Texas district court continued to follow prior Fifth Circuit

precedent. In *United States v. Chevron Pipe Line Co.*, 437 F. Supp. at 614-25, the Northern District of Texas district court reasoned that *Rapanos* did not establish binding legal precedent. The district court therefore followed existing Fifth Circuit precedent in *Harken Exploration*, *Harken*, 250 F.3d at 269, and *In re Needham*, 354 F.3d at 345-47, to hold that the government did not have jurisdiction over an oil spill to an intermittent tributary.

B. EPA's Rapanos Guidance (2007)

On June 5, 2007, the Corps and the EPA issued joint guidance on the jurisdictional issue. The summary of key points from the joint memorandum is included as Attachment 4 to this paper. The entire joint memorandum is available at www.epa.gov/owow/wetlands/guidance/CWAwaters.html The joint memorandum supplements the joint memorandum interpreting *SWANCC* issued by the Corps and EPA in January 2003, which remains in effect. The Corps and EPA intend to either reissue, revise, or suspend the *Rapanos* guidance after considering field experience and comments received on the guidance. *See* 72 Fed. Reg. 67,304 (Nov. 28, 2007). The extended comment period closed in January 2008.

The 2007 memorandum instructed officials to assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The EPA and Corps officials are instructed not to assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

Furthermore, the guidance instructs agents to decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Under the guidance, the significant nexus standard should be applied by assessing the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. The significant nexus includes consideration of hydrologic and ecologic factors.

C. Clean Water Restoration Act of 2007

In response to *Rapanos* and *SWANCC*, H. R. 2421 was introduced in the United States House of Representatives in May of 2007. The bill would enact the "Clean Water Restoration of 2007." The bill would amend the CWA by:

- Striking paragraph (7) from 33 USC § 1362. This would strike the term "navigable waters" from the CWA Definitions section.

- Striking the term "navigable waters" from the CWA and inserting the term "waters of the United States."

- Adding the following language at the end of 33 USC § 1362:

  > Waters of the United States.—The term "waters of the United States" means all waters subject to the ebb and flow of the tide, the territorial seas, and all *interstate and intrastate waters and their tributaries*, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*

(Emphasis added).

This proposed definition is similar to EPA's and Corps' current definitions for "waters of the United States." Where the agencies' definition provides jurisdiction over those waters with a connection to interstate or foreign commerce, however, the Clean Water Restoration Act would extend jurisdiction to the fullest extent of Congressional power under the Constitution.

III. WATER TRANSFERS

On June 13, 2008, the Environmental Protection Agency (EPA) published a final rule that excludes most "water transfers" from the permitting requirements of the

National Pollutant Discharge Elimination System (NPDES) permit program of the Clean Water Act (CWA). See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). Under the CWA, a discharger who adds pollutants into waters of the United States from a point source must obtain an NPDES permit under Section 402 of the Clean Water Act (in Texas, referred to as a TPDES permit). 33 U.S.C. § 1342. The water-transfer rule amends EPA's regulations by specifically listing "water transfers" as a category of discharge that does not require an NPDES permit. 73 Fed. Reg. at 33,708 (to be codified at 40 C.F.R. § 122.3(i)). The new rule defines the term "water transfers" as "activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The rule incorporates the substance of an Interpretive Statement that was published by EPA on August 5, 2005, and is materially the same as the proposed rule published in June 2006. *See* 73 Fed. Reg. at 33,699; *see also* National Pollutant Discharge Elimination System (NPDES) Proposed Water Transfer Rule, 71 Fed. Reg. 32887 (June 7, 2006); Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," *available at* www.epa.gov/npdes/pubs/water_transfers.pdf. .

In order to be exempt from NPDES permit requirements, the water being conveyed must meet the jurisdictional test of being a "water of the United States" prior to its release into the receiving water body, which also must be a separate "water of the United States." 73 Fed. Reg. 33,699. Conveyances of water that remain within the same water of the United States, however, also do not require NPDES permits, because they do not technically constitute water transfers. 73 Fed. Reg. 33,699 n.3.

In addition, the water in question must be conveyed without being subject to an intervening industrial, municipal, or commercial use. The fact that water is conveyed through pumping stations, pipes, canals, or other structures used solely to transport water from one water of the United States to another water of the United States does not constitute an intervening industrial, municipal, or commercial use. 33 Fed. Reg. at 33,704. Such an intervening use would exist, however, if the water is withdrawn during the transfer and then held and used for "cooling water, drinking water, irrigation," or similar purposes prior to its return into a water of the United States. 73 Fed. Reg. at 33,704. The natural confluence or convergence of two water bodies is not subject to the NPDES program.

The final rule does, however, require NPDES permits for pollutants actually introduced by the water transfer activity. An example of such an introduced pollutant would be the addition of grease into waters of the United States as water passes through the turbines of a large dam. 73 Fed. Reg. 33,699 n.3, 33,705. According to EPA, the scope of the required NPDES permit in such instances would be limited to the introduced pollutants, such as the turbine grease, and would not extend to any pollutants already contained in the water prior to its transfer. 73 Fed. Reg. 33,705.

The water-transfer rule is the result of several rounds of federal litigation over the movement of water within the Florida Everglades. In 2004, the U.S. Supreme Court decide *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541

U.S. 95, 104-05 (2004) [hereinafter "*Miccosukee*"]. In *Miccosukee*, the Miccosukee Tribe and various environmental groups sued the South Florida Water Management District (SFWMD), alleging that the pumping of water from a drainage canal into an undeveloped wetland required an NPDES permit. The rule is likely to be challenged in *Miccosukee*, which is pending on remand, or another case. *See, e.g.*, Comments of EarthJustice (Aug. 7, 2006) (opposing the EPA's proposed rule), available at www.regulations.gov as Doc. No. OW-2006-0141-1296.1; see also EarthJustice, Lake Okeechobee Backpumping Fact Sheet (Aug. 21, 2006) (stating intent to sue), available at http://www.earthjustice.org/library (doc type: fact sheets; issue: water). In the meantime, the water-transfer rule maintains the status quo in Texas, where projects that convey or connect water of the U.S. generally do not require a TPDES permit.

[END OF PAPER]

ATTACHMENT 1

Whole Effluent Toxicity (WET) Basics - Current TCEQ Policy

WET testing: The purpose of WET testing is to assess the effect that a permitted wastewater discharge may have on the aquatic organisms in the receiving waters. This is accomplished by exposing aquatic organisms to the discharge in a controlled test. The test simulates and measures the interaction of constituents in the discharge at a given distance from the point of discharge, typically at the edge of the mixing zone.

Regulatory Authority:

40 Code of Federal Regulations §122.44(d)(1)
30 Texas Administrative Code §307.6(e)

WET testing is applicable in the following situations

Domestic wastewater dischargers with:
- Permitted wastewater flow of 1 MGD or greater
- EPA-approved pretreatment program
- Potential to effect toxicity in receiving waters

Industrial wastewater dischargers with:
- EPA-classified majors
- Continuously-discharged process wastewater
- Potential to effect toxicity in receiving waters

Three Types of WET testing

24-hour acute: measures lethality to specified invertebrate/vertebrate species
48-hour acute: measures lethality to specified invertebrate/vertebrate species
7-day chronic: measures lethality and sublethality (growth/reproduction) to specified invertebrate/vertebrate species

Test Organisms Used

Freshwater:

Chronic:	*Ceriodaphnia dubia*	(water flea)
	Pimephales promelas	(fathead minnow)
Acute:	*Daphnia pulex*	(water flea)
	Pimephales promelas	(fathead minnow)

Saltwater:

Chronic and Acute:	*Mysidopsis bahia*	(mysid shrimp)
	Menidia beryllina	(inland silverside)

Passing vs. Failing WET

Passing: When the difference between the critical dilution (% effluent at the mixing zone) and the control is not statistically significant, the test is considered to have passed.

Failing: When the difference between the critical dilution (% effluent at the mixing zone) and the control is statistically significant, the test is considered to be a failure.

After a failure, TCEQ policy requires the permittee to conduct 2 additional consecutive monthly tests for LETHALITY ONLY to determine persistent toxicity.

A Toxicity Reduction Evaluation (TRE) is required when persistent toxicity is demonstrated after the initial failure and when both subsequent retests fail.

Toxicity Reduction Evaluation (TRE): A test method to try to determine the source of the lethal toxicity. There are three possible outcomes to a TRE:

Chemical specific limit: If an actual toxicant was identified as causing the test failure, then a limit is placed in the permit for that particular toxicant. This limit is enforceable.

Whole Effluent Toxicity limit (WET limit): If no single toxicant was identified, then a limit is placed in the permit for the toxicity of the entire effluent. This limit is enforceable.

Best Management Practice (BMP): Very rarely used; assessed in situations were a BMP will clearly prevent the toxicant from ever entering the wastewater treatment system.

The current Implementation Procedures also indicate that persistent sublethal effects may have to be addressed by a TRE to attempt to determine a source of sublethal toxicity. Currently, there are no stipulations indicating this may lead to a sublethal WET limit.

EPA PERMITTING STRATEGY FOR WET:
Summarized from the Draft December 2004 Guidance Document

- **EPA proposes the following strategy to further:**
  - < Regulatory policy and requirements established in 1989 and
  - < Guidance developed since that time as outlined in the EPA draft guidance document National Whole Effluent Toxicity (WET) Implementation Guidance Under The NPDES Program (EPA-832-B-04-003), released December 2004, which reiterates information found in the Technical Support Document for Water-Quality Based Toxics Control (EPA-505-2-90-001, 1991).

- **WET testing applies to:**
  - < All majors, minors with known or suspected toxic potential, and
  - < POTW minors ≥ 0.5 MGD with permitted chlorine residual limits > 0.1 mg/L (typically 1.0 - 4.0 mg/L).

$ **Reasonable Potential (RP)**

- < Regulatory basis - 40 CFR 122.44(d)(1)(i)
  - requires limitations on any parameter that has a "reasonable potential to cause, or contributes to an in-stream excursion ... above any state water quality standard, including state narrative criteria ..."
- < EPA uses a statistical analysis described in Technical Support Document (EPA 1991) to determine reasonable potential.
- < Historical data is used to determine if a WET effluent limit is appropriate.
  - Assessed WET limit would simply be for "toxicity", which includes lethal and sublethal effects.
- < Reasonable Potential Calculation as outlined in 2004 draft guidance document:

$$RIWC = \frac{QeCe}{Qe + (pmf)Qs}$$

where:

RIWC = Receiving water concentration, the resultant magnitude of toxicity in the receiving water after effluent discharge in TUs (also known as the in-stream waste concentration)

Qe = Effluent flow in MGD or cfs

Ce = Effluent concentration; magnitude of WET expressed in TUs (e.g., highest TU value observed in the effluent) (Note: When toxicity test results are expressed as NOEC % effluent, *Ce* = 100/NOEC, where NOEC is the lowest NOEC result observed in units of % effluent.)

pmf = Partial mix factor, percent of *Qs* allowed for mixing by State authority

Qs = Receiving water flow in MGD or cfs (the 1Q10 for acute and the 7Q10 for chronic should be used when using hydrologically based flow and the 1B3 and the 4B3 when using biologically based flow.[8] (See text box for EPA's recommendation for determining biologically based flow.)

- **Results of RP Calculation**
  - < If the calculation resulted in a number greater than or equal to 1 the reasonable potential is said to exist and a WET limit is assessed.

- **Toxicity Units (TUs)**
  - < Reporting NOECs as TUs to simplify the RP determinations.
  - < TUs = 100/NOEC.

$ **WET Limits**
- < Included in the newly-issued permit when RP is determined.
- < Issued for lethal and sublethal effects ("toxicity").
- < The guidance document, however, does not specifically address sublethal toxicity.

$ **Monitoring Frequencies**
- < Permits with WET limits: once per quarter for five years.
- < Majors: once per quarter for the first year, after which the frequency may be reduced.
- < Minors: case-by-case.
- < All dischargers: once per month for the next three months after a test failure.

$ **Region 6 WET Permitting Strategies**

< **Reasonable Potential**
- During the permitting process, determine if reasonable potential (RP) exists.
- "Toxicity" equals both lethal and sublethal effects.
- If RP exists, WET limits must be included in the permit.
- A chemical specific (CS) limit may be substituted for a WET limit if the permitting authority demonstrates that the CS limit will preclude toxicity.
- For 7-day chronic tests, RP analysis will be performed for both lethal and sublethal effects.
- During the permitting process, if it is determined that the permittee will not alter the effluent quality or quantity during the permit term and has conducted quarterly testing with no significant toxicity demonstrated for the previous five years, and has a critical dilution equal to or greater than 90% then a finding of no RP may be made.

< **WET Limits**
- WET limits may be removed from a permit after the first five years in effect as long as there has been no demonstration of significant toxicity.
- All data will be evaluated to ensure that the data is valid and mitigating circumstances (such as if there are failures but they were reported more than 2-3 years prior with several passing tests since) will be considered before automatically issuing a WET limit.
- Sublethal WET limits will only be implemented at the 80% effluent level at this time.

< **Toxicity Reduction Evaluations (TREs)**
- Trigger language is only included in permits where an RP is not determined.
- For lethal effects, TREs are implemented. This has been done historically.
- For sublethal effects, a graduated approach - after initial failure, 2 of 3 additional sublethal test failures trigger TRE requirements.
- Sublethal TREs are implemented only when failures have NOECs (No Observable Effect Concentration) below 75%.

DRAFT

ATTACHMENT 3

Comparison of *Rapanos* Standards
Fifth Circuit[1] to Supreme Court[2]

Fifth Circuit	Plurality (Scalia, J.)	Concurrence (Kennedy, J.)	Dissent (Stevens, J.)
Adjacent to navigable waters	Adjacent to a relatively permanent body of water connect to a traditional interstate navigable water	Adjacent to navigable water; or Adjacent to tributary and "significant nexus" to navigable water	Adjacent to navigable water or adjacent to tributary to navigable water.
"Close, direct, proximate link" to traditionally navigable waters"	Continuous surface connection to traditionally navigable water	"Significant nexus" based on physical, chemical, or biological impact, but not speculative or insubstantial impact. Mere hydrological connection not enough.	Hydrological connection enough; not clear would be required
Not intermittent or ephemeral	Not intermittent or ephemeral	Intermittent or ephemeral if significant nexus.	Intermittent or ephemeral enough.

[1] *In re Needham*, 354 F.3d 340, 345-46 & 347 n.12 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 614-25 (N.D. Tex. 2006).

[2] *United States v. Rapanos*, 376 F.3d 629, 638 (6th cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006); *Carabell v. United States Army Corp of Engineers*, 376 F.3d 704, 710 (6th Cir. 2004), *vacated and remanded* sub nom. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States

This memorandum provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States[1] (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.[2] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- **Traditional navigable waters**
- **Wetlands adjacent to traditional navigable waters**
- **Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)**
- **Wetlands that directly abut such tributaries**

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- **Non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary**

The agencies generally will not assert jurisdiction over the following features:

- **Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)**
- **Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will apply the significant nexus standard as follows:

- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters**
- **Significant nexus includes consideration of hydrologic and ecologic factors**

[1] 126 S. Ct. 2208 (2006).
[2] 33 U.S.C. §1251 et seq.

Thomas G. Mason
General Manager, Lower Colorado River Authority

Thomas G. Mason is general manager of the Lower Colorado River Authority, a public agency that provides energy, water and community services for much of Central Texas. Prior to being named general manager in November 2007, Mason served as LCRA's general counsel. As the agency's chief legal and policy adviser, he provided strategic guidance as well as ethics training and counseling to senior management and the agency's 15-member Board of Directors. Mason previously served as assistant general counsel for the Texas Department of Water Resources and director of the Water Quality Division of the Texas Water Commission. He was also a partner in a law firm with a statewide practice in environmental and administrative law. He holds a bachelor of arts in Plan II and a doctorate in jurisprudence from The University of Texas at Austin.

PAT RANKIN

Pat Rankin is the Cross-cutting Legal Issues Practice Group Leader in the Office of Regional Counsel for EPA Region 6. Since gaining employment with EPA in 1979, he has worked extensively on matters involving the Clean Water Act, Safe Drinking Water Act, Marine Protection, Research, and Sanctuaries Act, National Environmental Policy Act, Endangered Species Act, and National Historic Preservation Act. From 1974 to 1979, he was associated with the firm of Dufour, Levy, Marx, Lucas & Osborne in New Orleans, Louisiana representing, *inter alia*, national and local public interest environmental groups.

Mr. Rankin earned his J.D. in 1974, a B.A. in English in 1970, and a B.F.A. in Studio Art in 1970, all from Tulane University. He is a member of the Louisiana State Bar Association.

Willie Lane holds a BS degree in Biology/Chemistry from the University of Houston and a MS degree in Land and Water Resource Management from the University of North Texas. Willie joined EPA in 1988 and has broad experience in EPA's water quality programs having worked in the agency's ambient monitoring, NPDES inspection, and TMDL programs. His experience includes separate long-term detail assignments to the Galveston Bay National Estuary Program where he developed the programs monitoring program and the New Mexico Environment Department to facilitate creation of their TMDL program. Willie is currently Chief of the NPDES Permits and Technical Section in EPA Region 6.

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APAI specializes in engineering and scientific projects related to water (water quality, water supply, and wastewater management). Dr. Glass directs studies and assists clients to meet regulatory requirements related to water with an emphasis on those related to water quality.

PREVIOUS POSITIONS

Dr. Glass' previous positions include several years at predecessor agencies to the Texas Commission on Environmental Quality. During this time she directed a number of state programs, including water quality standards, wasteload allocations, special water quality studies and regional water quality management plans.

AFFILIATIONS

Water Environment Federation
Water Environment Association of Texas
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Texas Association of Clean Water Agencies
National Association of Clean Water Agencies
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Western Coalition of Arid States – Member of Board
Society of Environmental Toxicology and Chemistry

2008 TEXAS ENVIRONMENTAL SUPERCONFERENCE

THE GAP BETWEEN PERMITTEES AND EPA ON THE IMPLEMENTATION OF WHOLE EFFLUENT TOXICITY

Peggy W. Glass, Ph.D.
Alan Plummer Associates, Inc.

It is not possible to test a water sample for all potential toxic effects on aquatic life in receiving streams by using only chemical tests. Therefore, the U.S. Environmental Protection Agency (EPA) has developed the Whole Effluent Toxicity (WET) test. This test is a valuable tool in protecting water resources, but the specific regulatory structure in which it is applied has been a source of contention between permittees and EPA since the introduction of the test in the 1990s. Following is an overview of characteristics of the test, EPA's current proposed approach to WET regulations, the permittees' concerns, and the current status of the regulatory program.

DESCRIPTION OF TEST

A WET test measures the biological response of living aquatic organisms to a specific solution: wastewater effluent, surface water, or a laboratory-prepared standard solution, for example. If the liquid being tested is freshwater, as compared to marine water, the test organisms typically are water fleas, which are invertebrates, and minnows, which are vertebrates. In the interest of simplicity, this paper will focus on the freshwater organisms.

The organisms are exposed to several different concentrations of the test solution. If there is a toxic response, the extent of the response should be different in the different concentrations and should be proportional to the concentration. This is known as a dose response. If there is no dose response, the validity of the test is questionable.

The response can be a lethal response (organisms die) or a sublethal response. Sublethal responses are decreased growth for minnows and decreased reproduction (number of babies) for the water flea.

Tests can be relatively short (1-2 days), in which case they are described as "acute." Only lethality can be measured in an acute test. A chronic test typically lasts seven days; both lethal and sublethal responses can be measured in a chronic test.

What differentiates WET tests from chemical analyses is that the test result is dependent on the responses of living organisms. For chemical analyses, the test result is dependent on the movement of electrons in an electrode, the development of molecules with discrete color

(colorimetric test), etc. These responses are consistent with the same set of conditions. Living organisms exhibit variable responses to the same environmental conditions. Just like some people are allergic to peanuts and others are not, different water fleas respond differently to the same solution, especially for sublethal responses.

This variability is demonstrated on the reference toxicant charts developed by the laboratories that do perform WET tests. Each month, the organisms from the culture stock used by the laboratory are exposed to a solution of known, consistent quality to determine the level of response of the organisms in that culture and to verify that the organisms are responding within an acceptable range.

Reference toxicant charts for water fleas (Ceriodaphnia dubia) from two laboratories are presented in Figures I and II. These laboratories use sodium chloride as the substance that induces the toxic effect and measure the sublethal response (number of babies produced). The result reported is the IC_{25}, which is the concentration of sodium chloride that produced a 25% reduction in reproduction. The results of the reference toxicant tests for 24 consecutive months for each laboratory are presented on the charts.

The reference toxicant solutions are prepared the same way and have the same composition each month. As can be seen from these charts, while the 2-year median IC_{25} for both laboratories was approximately 600 milligrams per liter (mg/L), in any given month the IC_{25} varied from approximately 250 mg/L to approximately 900 mg/L.

The other unique feature of the WET test is that the test result does not indicate what substance produced the lethal or sublethal response. Therefore, if there is a lethal or sublethal response, a study must be conducted to identify the cause of the response and/or determine how to eliminate test failures. This study is called a Toxicity Reduction Evaluation (TRE). These studies typically take 1-to-2 years and can cost $100,000 - $200,000. In addition they are not always successful. Studies are most likely to be successful if an acute (lethal) response is consistently present. As responses move from acute lethal, to chronic lethal, to chronic sublethal, the success rate of TRE studies decreases. If the test failures are not consistently present, it becomes even more difficult to complete the TRE successfully and eliminate the test failures. One study determined that, when test effects were chronic (the study did not differentiate between lethal and sublethal) and infrequent, a TRE study was successful only 40% of the time.[1]

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[1] Toxicity Reduction and Toxicity Identification Evaluation for Effluents, Ambient Waters, and Other Aqueous Media, Proceedings from SETAC Workshop, June 23-28, 2001, Pensacola Beach, Florida. SETAC Press, Raleigh, North Carolina. 2005. p. 343.

Figure I
Reference Toxicant Data
Ceriodaphnia dubia
Reproduction IC_{25}

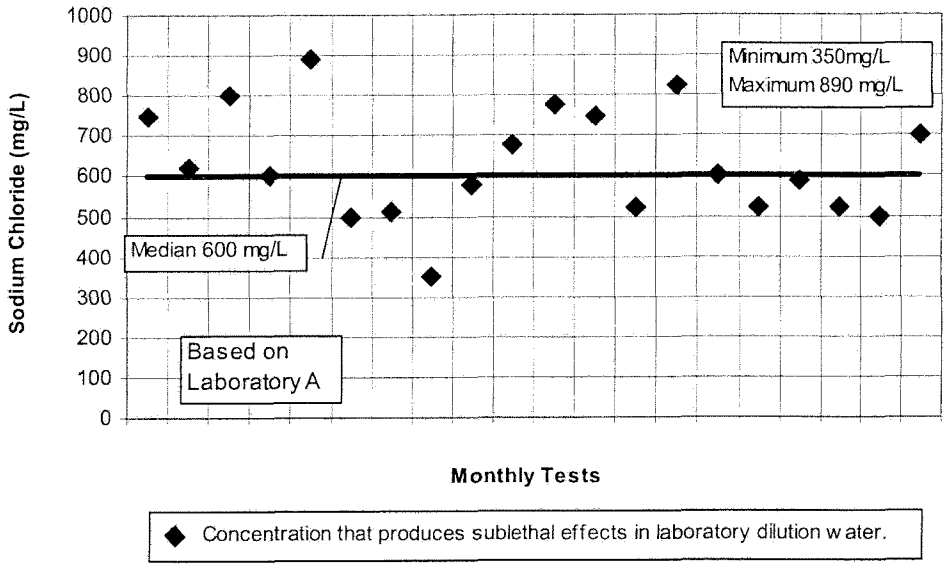
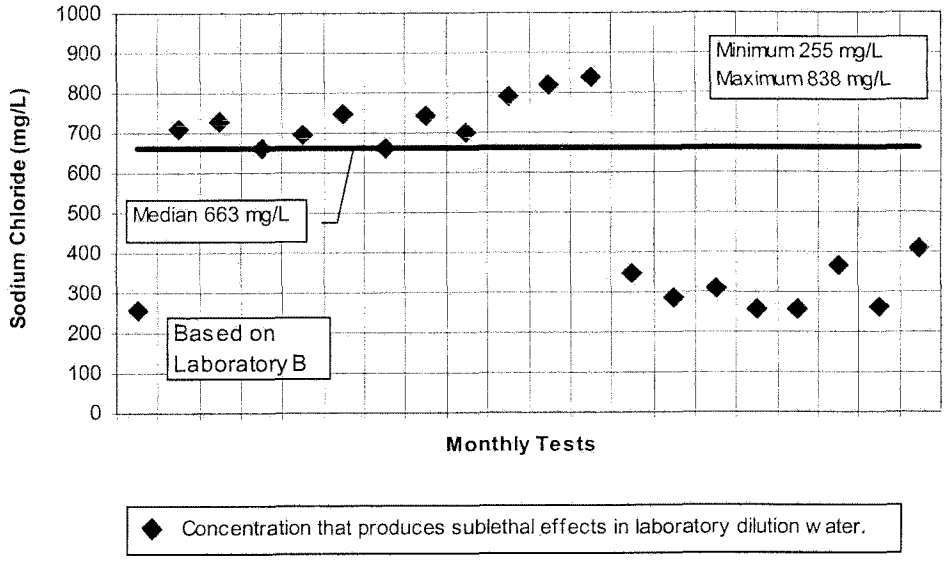


Figure II
Reference Toxicant Data
Ceriodaphnia dubia
Reproduction IC_{25}



U.S. ENVIRONMENTAL PROTECTION AGENCY POSITION

EPA Region VI is strongly urging TCEQ to revise the WET provisions in Procedures to Implement the Texas Surface Water Quality Standards, [RG-194 (revised)] in three key respects:

- Require TREs for sublethal, as well as lethal, failures. At the present time, TCEQ only requires a TRE when there are lethal failures.
- Determine whether to include WET limits in a permit based on the last five years of test results and the calculation procedure in the Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001 (TSD). If there is one test failure during the last five years, the TSD calculation results would require a permit limit. Sometimes, the TSD calculation results would require a limit even if there are no test failures. TCEQ has estimated that up to 50% of the Texas permittees that currently conduct WET testing may have limits imposed if this approach were adopted.
- Establish WET limits for sublethal test failures, as well as lethal test failures.

In 1994 EPA Headquarters issued draft guidance on the implementation of WET, which proposes a program very similar to the program EPA Region VI is urging on Texas. Because of the extent of the comments received on the national guidance, EPA Headquarters is reviewing it further and has not proceeded with issuance.

PERMITTEE POSITION

The WET implementation procedures being proposed by EPA are a concern to permittees in Texas and nationwide. Permittees are concerned about the following:

- The way in which the test is being used for regulatory purposes is inconsistent with the variability of the test.
- Permittees will have permit violations due to conditions over which they have no control.

Furthermore, permittees believe these burdensome requirements are unnecessary. The EPA approach would require WET limits in cases where there is no expectation that a test failure is indicative of an adverse impact in the receiving stream. There are no studies that indicate that a single sublethal WET test failure in a five-year period can be linked to instream impacts.

In Texas, a coalition of water organizations has joined together to present their common concerns related to proposed revisions, or needed revisions, to the water quality standards and implementation procedures for WET, bacteria, and nutrients. These organizations [Texas Water Conservation Association (TWCA), Water Environment Association of Texas (WEAT), Texas Municipal League (TML), and Texas Association of Clean Water Agencies (TACWA)] represent the agencies that provide wastewater management services to a large majority of Texas residents. The coalition has adopted a joint resolution setting forth these common concerns. The concerns set forth with respect to WET focus in the proposed use of sublethal tests as a trigger for a TRE and as a permit limit. A copy of the resolution is presented as Attachment 1.

At the national level, the National Association of Clean Water Agencies, Federal Water Quality Coalition, and Western Coalition of Arid States have repeatedly expressed concern regarding the WET implementation procedures proposed by EPA. These groups have submitted comments on the draft national WET guidance. Some have been meeting with EPA Headquarters in the past couple of months to discuss their concerns.

Representatives of the coalition of Texas organizations that signed the joint resolution have met with both TCEQ and EPA Region VI to discuss their concerns regarding WET. Both agencies have agreed to review permitting and implementation concepts proposed by the coalition. Accordingly, the coalition has put together a series of recommendations. Initially, the recommendations have been submitted to TCEQ for consideration. The principles on which the coalition recommendations are based are as follows:

- Permit limits should not be imposed in situations where the permittee cannot reasonably be expected to be able to eliminate WET test failures.
- Permittees should not incur penalties for circumstances over which they have no control.
- Regulatory programs need to take into account that, even when WET test failures are a concern and can be addressed, it will still take a significant amount of time to identify a solution.

Each of these principles is discussed in more detail below.

Ability to Respond to WET Test Failures

In order to identify the appropriate measures to eliminate WET test failures, a TRE must be conducted. TRE activities can only be conducted when a toxic response is present. In addition, the TRE assessment steps must be repeated several times to avoid confusing an artifact of the testing method with an appropriate conclusion regarding the characteristics of the effluent. This

means that test failures must occur with sufficient frequency to allow for the effective progression and duplication of the results of the TRE study.

In addition, the magnitude of the toxic response must be large enough to allow for a differentiation between a response of the sample and the random perturbations produced by the TRE manipulations. TRE manipulations change the characteristics of the test solution. Therefore, these manipulations produce changes in the responses of the test organisms that are not dependent on the characteristics of the effluent being tested.

Different criteria are needed for when a TRE is required depending on whether there is a lethal or a sublethal response. It is much more difficult to conduct a sublethal TRE. Therefore, the toxic response must be more frequent and larger in magnitude before a TRE is required for a sublethal response, compared to when a TRE is required for a lethal response.

Uncontrollable Test Failures

There will be circumstances that cause isolated, infrequent test failures that are beyond the ability of the permittee to control. Three examples are as follows:

- A spill in the collection system.
- An atypical organism response.
- A magnitude of response (particularly a sublethal response), that is not sufficient to support conducting a TRE.

Since it is neither possible to prevent these occurrences nor possible to do a TRE in these instances, (as discussed above), isolated, infrequent test failures should not be treated as permit violations.

Time to Resolve Problem

If there is a recurring incidence of test failures of an appropriate magnitude, a TRE is needed. Since conducting a TRE can take 1-to-2 years (or more depending on the frequency, magnitude, and complexity of the test failures) the permittee would, of necessity, violate a WET limit several times during the study. Regulatory protection is needed so that a permittee does not incur penalties while diligently performing a TRE.

CONCLUSIONS

WET testing plays an important role in protecting the nation's aquatic resources. However, when applied as a regulatory tool, the regulatory requirements must be consistent with the nature and variability of the test. To be effective and appropriate, an integrated regulatory

protocol is needed that addresses when permit limits are established, how permit limits are written, and what test failure conditions trigger enforcement. Therefore, the coalition is recommending that WET implementation procedures be based on the following concepts:

- Permit limits should not be imposed based on a single test failure,
- Permit violations should not be based on a single test failure, and
- Requirements for permit limits, triggers for TREs, and enforcement criteria should be different for lethal and sublethal WET, because of the greater variability exhibited by sublethal tests.

The coalition believes these recommendations are consistent with the Clean Water Act. There is no evidence that the incidence and types of test failures that would be allowed pursuant to these recommendations are sufficient to produce adverse impacts on aquatic life in receiving streams.

ATTACHMENT 1

JOINT RESOLUTION REGARDING THE TRIENNIAL REVIEW OF THE TEXAS SURFACE WATER QUALITY STANDARDS

WHEREAS, the Water Environment Association of Texas ("WEAT"), a member association of the Water Environment Federation ("WEF"), is a nonprofit organization made up of individual members interested in advancing the science of water quality management; and

WHEREAS, the Texas Association of Clean Water Agencies ("TACWA"), a member association of the National Association of Clean Water Agencies ("NACWA"), is a nonprofit organization made up of wastewater utilities across the State of Texas likewise interested in advancing the science of water quality management and wastewater collection and treatment; and

WHEREAS, the Texas Water Conservation Association ("TWCA") is a statewide nonprofit organization made up of individuals, firms, corporations, cities, water districts and authorities, public and private agencies, and groups dedicated to the task of conserving, developing, protecting, and utilizing the water resources of Texas for beneficial purposes; and

WHEREAS, the Texas Municipal League ("TML") is a nonprofit organization representing the interests of cities across the State of Texas as those interests relate to a host of matters, including but not limited to water quality management; and

WHEREAS, WEAT, TACWA, TWCA and TML (collectively the "Parties") share a common goal of promoting environmental stewardship, sound science, and efficient government in developing regulations related to water quality management; and

WHEREAS, representatives of the Parties have been participating in stakeholder meetings and discussions with the Texas Commission on Environmental Quality ("TCEQ") regarding the TCEQ's triennial review and revision of the Texas Surface Water Quality Standards (Title 30, Texas Administrative Code, Chapter 307) (the "TSWQS") and Procedures to Implement the Texas Surface Water Quality Standards (the "IPs"); and

WHEREAS, the Parties desire to work with the TCEQ to the fullest extent to provide information and assistance in the adoption of appropriate and relevant TSWQS and IPs; and

WHEREAS, in the interest of providing a common position on certain matters related to surface water quality management, and to provide recommendations to the TCEQ as it proceeds with its review and revision of the TSWQS and IPs, the Parties desire to enter into this resolution (the "Resolution") regarding common principles and recommendations related to the adoption and implementation of appropriate TSWQS and IPs.

NOW THEREFORE, the Parties are hereby resolved and do adopt the following principles related to establishing and implementing surface water quality standards relating to bacteria and nutrients, and for the implementation of Whole Effluent Toxicity ("WET") limits in TSWQS and Texas Pollutant Discharge Elimination System ("TPDES") permits:

1. Surface Water Quality Standards for Water-Based Recreation (Bacteria)

Surface water quality standards to protect recreational uses should be revised to embody the following principles:

- A tiered set of recreational uses should be defined and incorporated into the TSWQS that recognizes the true range of variation in recreational activities. The tiers should be created considering the relative amount of water exposure (contact and ingestion) so that uses (activities) with a relatively low potential for water exposure, such as bank fishing and boating, are distinct and separate from those uses (activities) with a higher potential for water exposure, such as full head-immersion swimming. Possible uses (activities) could include swimming, wading, fishing, and boating;

- Criteria to protect the tiered set of uses should be based on an appropriate exposure assessment wherein numeric criteria are inversely proportional to the amount of exposure to water;

- Criteria appropriate for the type of waterbody should be developed to protect each use (activity). Criteria applied to a large fresh water lake should not be applied to a shallow stream with substantially different physical conditions and uses;

- The TCEQ should identify specific waterbodies that should be designated as noncontact recreation uses (e.g., designated wildlife areas, navigation, drainage or irrigation channels, etc.);

- The TCEQ should develop and adopt recreational use attainability analysis ("UAA") procedures along with review and acceptance procedures to allow stakeholders to more accurately identify applicable waterbody uses under the new tiered system;

- The TCEQ should also conduct research to advance our knowledge of waterborne illnesses, the occurrence of pathogens in surface waters, and the human health risks present in Texas waterbodies with indicator organisms present. This effort could build on the epidemiology work performed by the Water Environment Research Foundation and others and would help with future triennial review changes; and

- The TCEQ should fully implement existing provisions of the TSWQS (307.7(a)) that allow the agency to refrain from listing waterbodies as impaired if the exceedance of a criterion is based on naturally occurring conditions.

2. Surface Water Quality Standards in Relation to Eutrophication (Nutrient) Criteria

The parties recognize that some waters exhibit undesirably elevated levels of algae and/or aquatic plant growth, characterized as eutrophication, and that addressing this concern is an important water quality management function. In addition, the parties recognize that current TCEQ efforts related to eutrophication (nutrient) criteria have focused on reservoirs. Consequently, our recommendations also focus on these criteria as they relate to reservoirs. The parties recognize additional work will be performed to develop criteria for other types of waterbodies (e.g., rivers, streams, estuaries, etc.) and may amend these recommendations to reflect this additional work in the future. Accordingly, the parties recommend the following:

- The TCEQ should use chlorophyll *a* measurements to assess waterbodies (in this case, reservoirs) and should develop numerical criteria based on chlorophyll *a;*

- When assessing waters with respect to chlorophyll *a*, the TCEQ should assess the water quality using the median value of the data collected over at least a five-year period. The data set should contain at least ten samples taken over at least two different years. In reservoirs, the TCEQ should base the assessment on samples collected from the station on which the original criterion was based. This station should be located in the main pool of the reservoir nearest the downstream dam;

- Because of significant changes in the analytical methods that were implemented in the early 1990's, only data collected from 1995 forward should be used for the establishment of criteria, except in those cases where the validity of the older data is verified;

- The TCEQ should ensure that the TSWQS clearly state that eutrophication-related criteria, when applied to reservoirs, should only apply to the main body of the reservoir, near the dam, in the vicinity of the station used to develop the criteria. This is important because many reservoirs exhibit a strong concentration difference between the main body and upper reaches, and not considering these differences could result in costly errors;

- With regard to implementation of eutrophication-related criteria, the TCEQ should ensure that permit evaluations, related modeling, and permitting decisions are based on the response variable, which is chlorophyll *a* in the case of reservoirs, and not try to limit the absolute concentrations of nutrients within the waterbody. For example, TCEQ's analysis of the nutrient criteria for permitting should model the response of the waterbody's chlorophyll *a* concentrations to varying phosphorus inputs. This recommended approach is different than trying to control the phosphorus levels within the receiving waterbody to certain, absolute levels; and

- If water quality criteria are adopted for phosphorus in addition to chlorophyll *a*, the TCEQ should ensure that phosphorus is not the sole reason for determining that a reservoir is non-compliant with the TSWQS, for 303(d) listings.

3. Surface Water Quality Standards and Implementation for Whole Effluent Toxicity

The TCEQ is urged to continue the current approach included in the TSWQS and IPs for Whole Effluent Toxicity ("WET") given that there has been no evidence that the current program is not protective of waters of the state. The Environmental Protection Agency (EPA) has consistently approved the TCEQ WET program since 1995. There has been no change in the WET requirements in either the Clean Water Act or EPA regulations since 1995. The current approach is appropriate because it takes into account the variability of a test that relies on the responses of living organisms. There is significant test variability that is solely attributable to the variation in sensitivity among individual organisms. This is especially true of sublethal tests.

The key features of the current approach are as follows:

- The standard practice, as set forth in the IPs, is to base the requirement for a permittee to conduct a Toxicity Reduction Evaluation (TRE) on lethal, not sublethal, test responses. However, the TSWQS and IPs provide TCEQ with the ability to require a permittee to perform a TRE for sublethal test responses, if the agency determines such action is warranted;

- Permit limits are not established for WET unless there is a reasonable potential for instream impacts as evidenced by consistent lethal test responses and an inability to conduct a successful TRE that identifies a means to eliminate the cause of the lethal test responses; and

- On the occasions when a permit limit for WET is justified, permit limits are established based on the occurrence of lethal test responses and not sublethal test responses.

The Parties appreciate the hard work of the TCEQ's staff on these important revisions to the TSWQS and look forward to working with the agency in the near future.

WATER ENVIRONMENT ASSOCIATION OF TEXAS

Carol Batterton

Carol Batterton

Executive Director

12-6-07

Date

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Willie R. Horton

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President

10 Dec 07

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TEXAS WATER CONSERVATION ASSOCIATION

John Burke

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President

Dec 12, 2007

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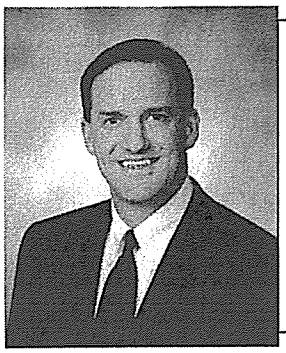
Harris County Attorney's Office – Federal Trial Division – Assistant County Attorney

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Mike attended the University of New Mexico and the University of Texas School of Law. He received his undergraduate degree from The University of Texas at Austin and his J.D. from the University of Houston. Mike serves Chairman of the Education Committee in the State Bar of Texas Environmental and Natural Resources Law Section (ENRLS). Mike is a Board member and Treasurer of the Sustainable Biodiesel Alliance and is a Board member at the Salvation Army, where he Co-Chairs the Development Committee. Mr. Nasi has been honored as one of *The Best Lawyers in America* under Environmental Law, as a "Rising Star" by *Texas Monthly Magazine*, and as an "Up and Coming" leader by Chambers U.S.A. in the area of Environmental Law. Mike is married with 3 children and lives in Central Austin.

ENERGY PLANNING - TEXAS STYLE – "WE NEED IT ALL"

By Mike Nasi, Jackson Walker L.L.P.[1]

I. Introduction

Worldwide demand for energy is forecast to nearly double by 2030, with much of that growth in developing nations such as China and India."[2] In the United States alone, energy consumption is projected to rise between 20-25% above present levels over the next two decades.[3] And then, there is the issue of climate change. The greatest challenge of this generation and, perhaps, any generation, will be meeting the World's and our Nation's ever-increasing demand for energy amidst an increased awareness of climate change and the long-term effects of relying exclusively upon non-renewable sources for that energy.

Because the demand for energy will continue to grow dramatically for the foreseeable future, a diverse array of existing and new energy resources and technologies will be essential, combined with dramatically improved energy efficiency.[4] Myopic energy policy positions that favor a single or limited group of energy resources could prove catastrophic. There is simply no ability to write off fossil fuel and meet the energy needs of this Nation or the World. By the same token, continued heavy reliance on oil and gas as the controlling sources of energy in this country could prove fatal for our environment, our economy, and our national security.

This paper is not intended to provide an exhaustive analysis of the issues associated with energy planning or climate change. Nor will it suggest what our Nation's energy policy should look like, in terms of the exact mix of renewable and non-renewable energy sources. We will, however, summarize several key realities that have been documented by state and federal energy planners of late in hopes of putting the issue of energy planning in its correct, global, context. This paper will also highlight several ongoing energy planning efforts in Texas that are likely to lead to formal "Energy Plans" and legislative/policy initiatives in the very near term.

II. Oil: U.S. Addiction and Global Thirst

Albert Einstein said that the definition of "insanity" is "doing the same thing over and over again and expecting different results." It could be contended that the United States has engaged in an insane energy policy over the past 35 years based on Einstein's definition, at least as it relates to our dependence upon foreign oil. After the energy crisis in the early 1970s, several initiatives were commenced by the United States government to improve our Nation's energy independence and security.[5] Yet, after the price of oil stabilized and eventually dropped in the early 1980s, most of the federal programs lost their funding and their momentum and we continued on a path toward increased, rather than decreased, dependence on foreign oil.[6]

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[1] Special thanks to Holly Hawkins, an associate in the Dallas office of Jackson Walker L.L.P., for her assistance in compiling much of the information contained and referenced in this article.

[2] *Id.* at 5.

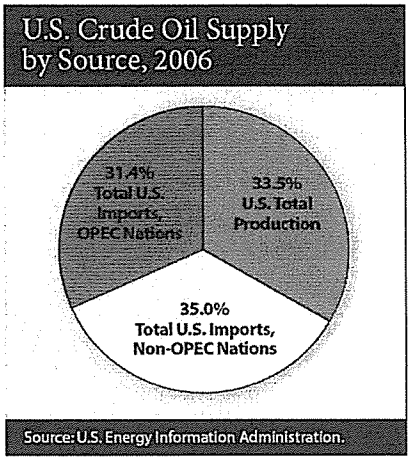
[3] "What You Need to Know About Energy", The National Academies, p. 5.

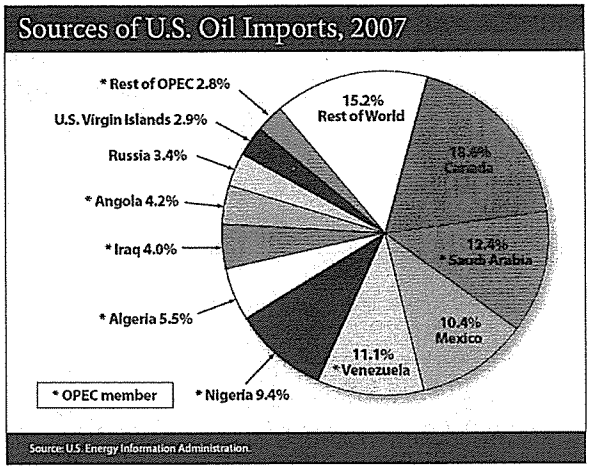
[4] *The Energy* Report (ER), Texas Comptroller of Public Accounts (May 2008), p. 21.

[5] Southern States Energy Board presentation (July 18, 2008).

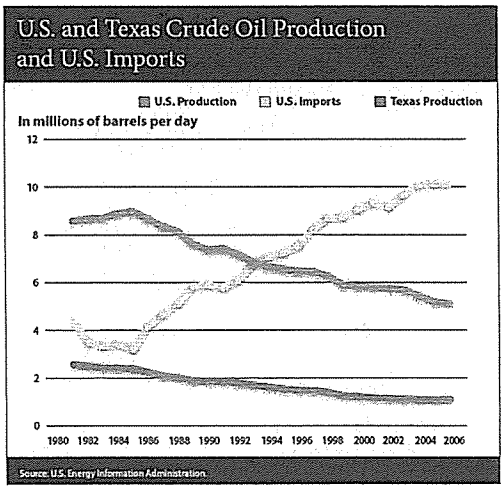
[6] Id.

In 1993, we began to import more oil and refined product than we produced for the first time in our Nation's history.[7] We currently import approximately 60-66% of the crude oil we consume.[8] As the following figures from the Texas Comptroller's 2008 Energy Report demonstrate, the amount of our imports and the nature of the exporting nations is cause for concern. With historic high oil prices, this results in hundreds of billions of dollars being sent every year out of our country and into the hands of nations that consider us their enemy.





Although alternative fuel programs have made some progress, they have not been prioritized sufficiently to stay ahead of increasing demand for transportation fuel. Nor has domestic production of non-renewable sources expanded sufficiently to slow our growing dependence on imports. As a result, and as documented by the following figures from the Comptroller's Report, the United States trade deficit regarding oil continues to grow, while, at the same time, we continue to consume more crude oil than any other nation by a dramatic margin. Note the dramatic increase in consumption of crude oil by China and India. This trend is discussed further below in terms of how increased global competition for oil and gas must be factored into the electric power fuel choices we need to make in the United States and Texas.



Top Petroleum-Consuming Countries, 2006
(Thousand Barrels per Day)

Rank	Country	Consumption	2005 Rank	2004 Rank	2000 Rank	Net Change in Consumption 2000-2006
1	United States	20,687	1	1	1	5.0%
2	China	7,273	2	2	3	51.7
3	Japan	5,159	3	3	2	-6.1
4	Russia	2,861	4	4	5	10.9
5	Germany	2,665	5	5	4	-3.9
6	India	2,587	6	6	8	21.6
7	Canada	2,264	7	7	10	11.7
8	Brazil	2,217	9	9	6	2.3
9	Korea, South	2,174	8	8	7	1.8
10	Saudi Arabia	2,139	11	12	14	39.2
11	Mexico	1,997	10	11	9	-1.9
12	France	1,961	12	10	11	-2.0
13	United Kingdom	1,830	13	13	13	4.0
14	Italy	1,732	14	14	12	-6.6
15	Iran	1,686	16	16	16	35.0

Sources: U.S. Energy Information Administration and Texas Comptroller of Public Accounts.

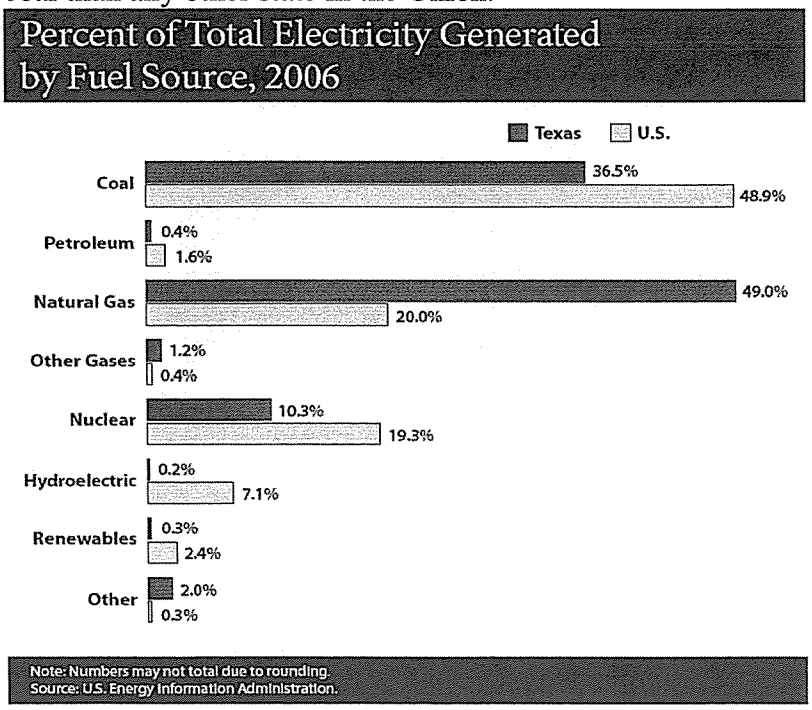
[7] Id.
[8] U.S. Energy Information Administration, Annual Energy Outlook 2008 (Early Release), http://www.eia.doe.gov/oiaf

III. An Even Bigger Dilemma: Global and Local Demand for Electric Power

Just as the global thirst for oil is dramatically increasing, the appetite for electric power in Texas and the rest of the World is boundless. According to the EIA and other global sources, the World's population will increase from 6.8 billion in 2010 to 8.2 billion in 2030. An even more dramatic increase in World GDP is expected as the 2010 level of $88 trillion is expected to almost double in 20 years. This surge in global population and GDP is expected to carry with it an increased demand for electricity that is breathtaking – a three and a half-fold increase in 20 years (from 9 trillion kilowatt hours (KWH) in 2010 to 31 trillion KWH in 2030).

Another factor that could dramatically increase the global and local demand for electric power is the likely electrification of a substantial component of our transportation fleet. The World-wide number of motor vehicles alone is predicted to nearly triple in 30 years (from 812 million in 2002 to 2.1 billion in 2030). Although sustainable biofuels production will put a dent in this demand, electric vehicles and electrified mass-transit will no doubt play a major role in meeting this unbelievable proliferation of human population in need of affordable transportation options. While energy efficiency and renewable sources (e.g. wind mills running at night while vehicles are plugged in) will help address some of this demand, the simple fact is that the already strained power grids of the world will need to be vastly expanded with a diverse mix of generation sources. All of this, mind you, while we are in the process of aggressively reducing greenhouse gasses for the first time in World history.

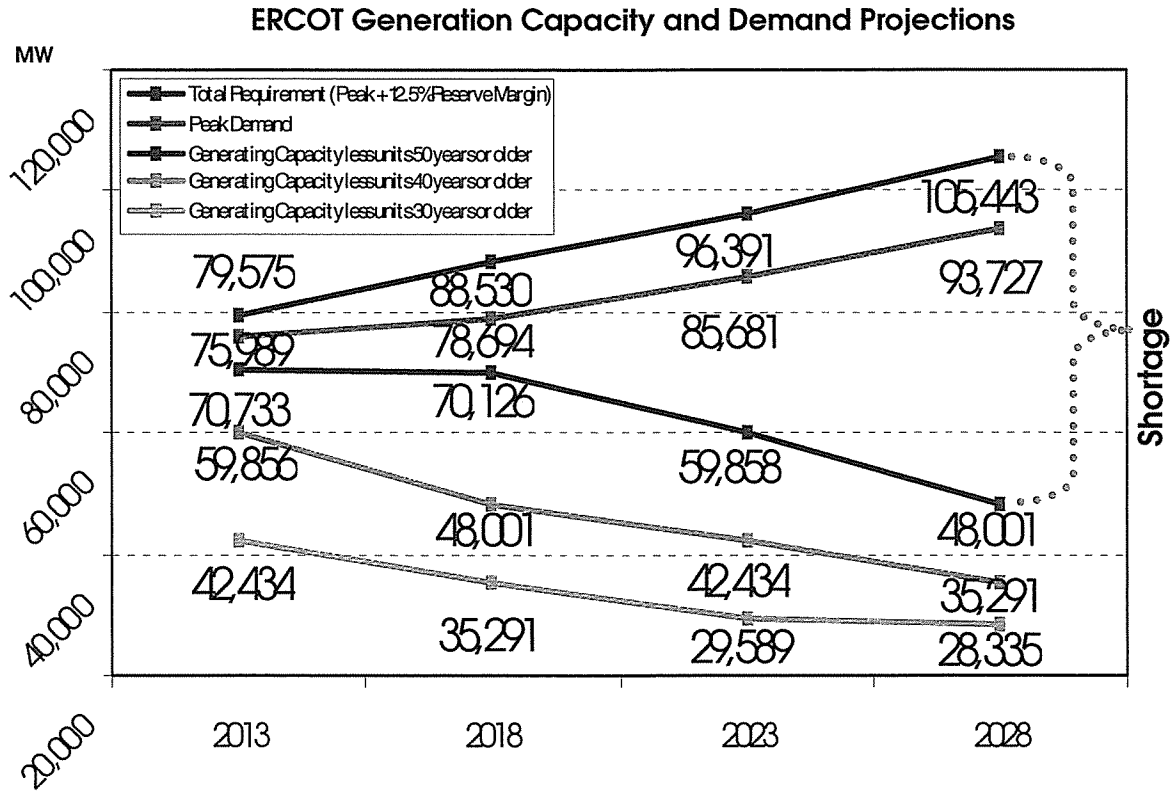
Texas is the largest consumer and producer of electricity in the United States.[9] As the figure below demonstrates, relative to the national average, the Texas electric power fuel mix is heavy on natural gas, although, due to the size of the Texas electricity market, Texas uses more coal than any other state in the Union.



[9] U.S. Energy Information Administration, "Texas Quick Facts," http://tonto.eia.doe.gov/state/state energy_profi les.cfm?sid=TX. (Last visited April 15, 2008.)

Like the global population, the Texas population is growing at a dramatic rate. At the current rate of migration, the state population will increase from 24 million to 41 million by 2030.[10] Population growth and continued industrial development, coupled with the need to replace older generation units, has led the Electric Reliability Council of Texas (ERCOT) to predict that Texas may need as much as 57,000 megawatts (MW) of new generating capacity by the year 2030.[11] That is the equivalent of 25 new nuclear facilities, 75 coal-fired units, 250 gas-fired units, or between 19,000-60,000 wind turbines.

The following chart reflects this critical need for new electric power generation capacity in Texas in the 10-20 year window without factoring in the balancing power challenges that we will face to support our impressive accomplishments in wind generation in Texas (discussed further below).



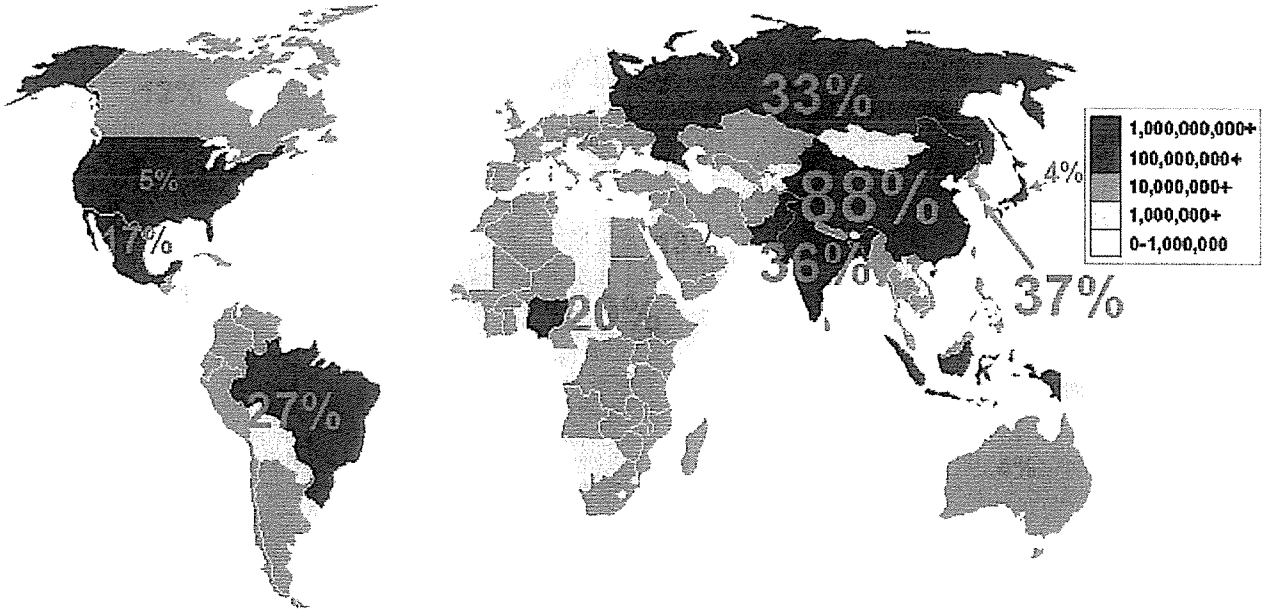
[10]Texas State Data Center and Office of the State Demographer. 2006. *Texas Population Estimates and Projections Program.*
[11]Electric Reliability Council of Texas. 2005. *Transmission Issues Associated with Renewable Energy in Texas.*

V. Predicting the Future

Although Danish Physicist Niels Bohr was a Nobel Prize winner, he probably did not need to make the statement for which he is often quoted– "Prediction is very difficult, especially about the future." Not to be outdone in stating the obvious, Yogi Berra added that "The future ain't what it used to be."

Dr. Bohr's and Yogi's sentiments ring true when contemplating how the current energy crisis compares to the situation we faced 30 years ago. The timing and extent of anticipated growth in demand for oil, gas, and electric power cannot be known with certainty, but there is no doubt that the world is a different place than it was when oil and electric power prices normalized after the energy crises of the 1970s. As the chart below demonstrates,[12] the dilemma we face now, which we did not face in the 1970s, is the explosive growth in population, GDP, and energy demand across the globe, especially in countries such as India and China.

Population vs. Projected 10-Yr. Growth in Total Energy Demand per Capita

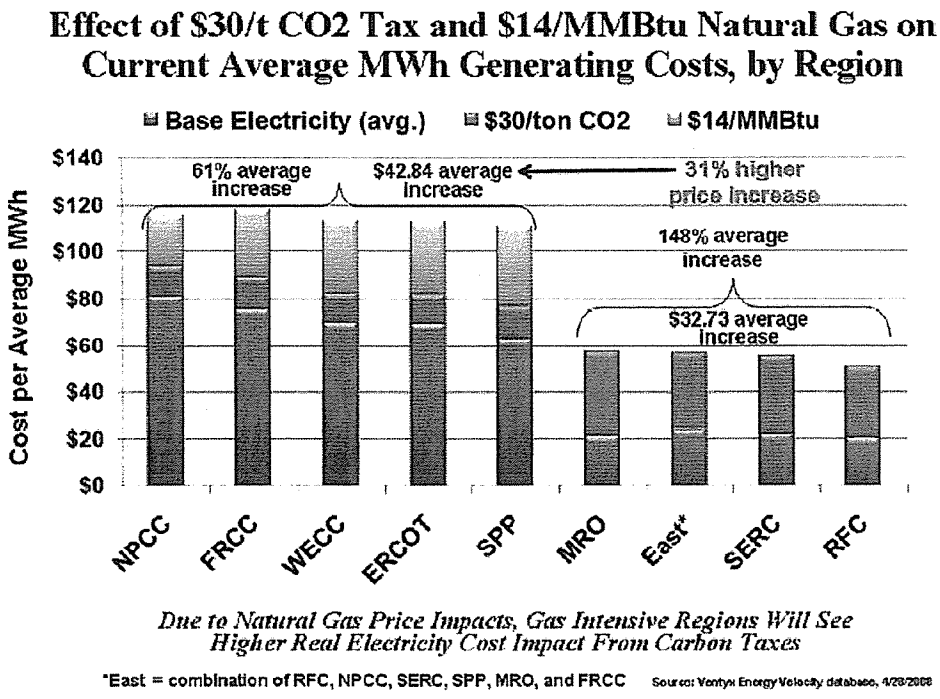


Industrial superpowers will compete with developing nations for access to energy resources

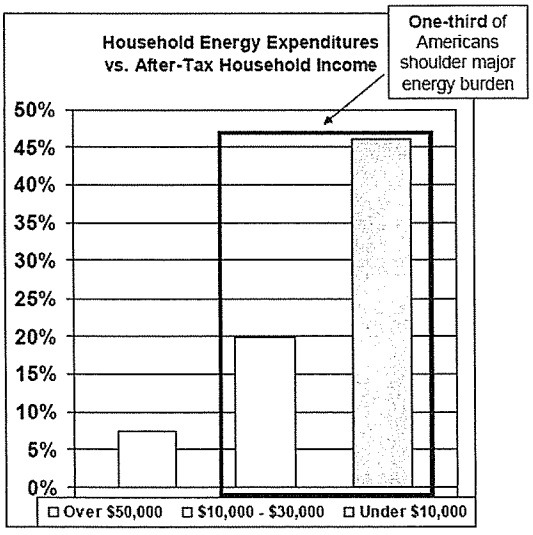
The skyrocketing global demand for agricultural products, oil, gas, and electric power make it very hard to predict that the price food, fuel, and electric power will return to historic levels anytime in the near future. Moreover, as our State and our Nation develop energy and environmental policies that drive our fuel choices for electric power, we need to keep in mind the impact on the price of natural gas that is a likely result from this global phenomenon. As fully documented in a recent report from the Department of Energy, (and as set demonstrated in the

[12] Source: U.S. Census Bureau, International Data Base; U.S. Energy Information Administration, International Energy Outlook 2006

chart set out below), reliance on natural gas as a result of overly aggressive greenhouse gas reduction programs will dramatically increase the price of electric power across the country and particularly in states like Texas that already pay dearly when natural gas prices spike.[13]



The impact of high electricity prices can be significant, especially on the poorest members of our society, as the chart[14] below clearly demonstrates.



[13] "Natural Gas and Electricity Costs and Impacts on Industry - White Paper on Expected Near-Term", DOE's National Energy Technology Laboratory (NETL) (April 28, 2008).

[14] Sources: Redefining Progress; U.S. Census Bureau, (2006) Annual Social and Economic Supplement.

With this historic perspective and a daunting future in mind, we turn to an overview of the current major sources of Texas energy and then move to a discussion of emerging renewable and non-renewable energy sources in Texas. We conclude with a survey of the state energy planning activities that have been initiated in the recent past and are currently in-process and likely to result in "Energy Plans" for Texas that will impact the future of our State and help shape the debate on the national level as we head toward a year that will see a new President and a new Congress in Washington. When you factor in the ongoing debate regarding climate change and greenhouse gas legislation, 2009 could stack up to be the most important year in our Nation's history on the issues of energy and the environment.

VI. A Tour of Texas Energy Sources

Texas leads the U.S. in the production and consumption of both renewable and non-renewable fuels and the electricity generated from them. That fact, along with the unique geographic, geologic, and economic situation that Texas enjoys, will ensure that our State is at the forefront of energy and carbon management research and development. What follows is a brief overview of the main sources of energy used in Texas, a brief explanation of environmental concerns related to each, and their prospects for growth in Texas, as well as a look at as-yet-undeveloped energy resources that could play a key role in meeting the energy and environmental needs of this great State.

a. Crude Oil

Texas has been a major producer and consumer of petroleum products and will continue to be for the foreseeable future.[15] With an ever-increasing demand for oil, both nationally and internationally, companies throughout the industry are pushing technological limits to develop oil and gas fields across the state and off-shore in ever-deeper waters.[16] For example, in 2006, Chevron and its partners set a drilling depth record in the Gulf of Mexico, reaching strata 34,189 feet or 6.5 miles deep in 3,500 feet of water.[17] Furthermore, the Federal Minerals Management Service reported in August 2007 that a record number of drilling ships — 15 — were working in Gulf of Mexico waters deeper than 5,000 feet.[18]

As of 2005, Texas was the top oil producing state in the U.S.[19] Additionally, Texas was the leading state in the U.S. for refining capacity.[20] Although Texas has been a major producer and consumer of petroleum products, the outlook for Texas' oil industry is inextricably linked to national and global supply and demand for oil.[21] Although Texas' oil and natural gas production has been expected to decline, the industry still remains a major factor in the state's economy and will remain a force for the foreseeable future.[22] The production, refining, transportation, storage

[15] *Id* at 56.
[16] *Id* at 56.
[17] *Id.* at 56.
[18] *Id.* at 56.
[19] *Id.* at 41.
[20] *Id.* at 46.
[21] *Id.* at 56.
[22] *Id.* at 57.

and consumption of petroleum and its byproducts, carry significant environmental risks.[23] New technologies can reduce but have not eliminated these environmental risks.[24] The challenge facing the oil industry is how to meet the dramatic increase in demand while addressing concerns about cost and the environmental impact of exploration, refining and the end-use of petroleum products.

b. Natural Gas

Natural gas is a proven, reliable and clean fuel that has provided Texas not only with abundant energy supplies for more than a half-century, but also has provided the Texas economy with a reliable income.[25] In a world where other energy supplies have uncertain futures, natural gas remains a popular, dependable and, importantly, domestically produced fuel.[26]

U.S. demand for natural gas is projected to grow by 0.5 percent annually through 2030.[27] However, the biggest issue involving natural gas is supply. Although Texas is a major producer and consumer of natural gas, without continued strong gas prices and continuing advancements in technology, natural gas producers may find it more difficult to keep producing adequate supplies.[28] As a result, this declining domestic production of natural gas in the U.S. could prevent U.S. natural gas producers from meeting demand.

A DOE/NETL Whitepaper on "Natural Gas and Electricity Costs and Impacts on Industry" notes that "high natural gas prices hurt all natural gas consumers, especially households and natural gas-intensive industry, with recent prices three to four times higher than a decade ago."[29] Additionally, the DOE notes that "should climate change legislation pass, the "dash to gas" will be exacerbated, doubling natural gas consumption for power generation, increasing dependence on foreign energy sources, and sending natural gas and power prices skyward across the country."[30]

Natural gas, although a non-renewable fuel source, is still a relatively clean fuel, leaving no ash residue and producing lower emissions of nitrous oxides, sulfur oxides, and carbon dioxide than coal.[31] In Texas in 2006, natural gas-burning electric, commercial and industrial plants emitted 42.1 percent of the state's total nitrous oxide gases, 0.1 percent of its sulfur oxide gases and 40.4 percent of the state's carbon dioxide emissions.[32] While natural gas units, especially high efficiency combined cycle units, are cleaner-burning than coal, molecule for molecule in its unburned state it is also the most potent greenhouse gas, due to its high capacity for trapping heat radiating outward from the Earth.[33]

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[23] *Id.* at 49.
[24] *Id.* at 52.
[25] *Id.* at 64.
[26] *Id.* at 64.
[27] *Id.* at 77.
[28] *Id.* at 77.
[29] "Natural Gas and Electricity Costs and Impacts on Industry", DOE/NETL-2008/1320.
[30] *Id.* at 1.
[31] ER at 73.
[32] *Id.* at 74.
[33] *Id.* at 73.

In view of declining domestic production, imports of natural gas will become increasingly important.[34] LNG imports are expected to account for about 25 percent of the nation's supply of natural gas by 2030.[35] In the meantime, new technology will allow us to produce from ever-deeper and more unconventional reserves.[36] LNG imports are all but certain to become more important to the national energy portfolio, and new terminals under construction in Texas will increase employment and pipeline usage.[37] DOE anticipates that global demand for LNG will significantly increase its price, however, so our ability to rely upon LNG as an affordable source of fuel is severely limited.[38] For the foreseeable future, natural gas will continue to serve Texas well both as fuel and as an important industry.[39]

c. Liquefied Petroleum Gas ("LPG")

Texas is the largest producer and consumer of Liquefied Petroleum Gas ("LPG"). Chemical feedstock uses account for 90 percent of the state's LPG use with nearly all of the remaining 10 percent used to produce energy.[40] However, LPG for transportation has seen its market share fall in recent years.[41] While a number of state and federal incentives encourage the use of LPG, Texas and the U.S. as a whole seem to be moving toward other alternative fuels. Falling sales of LPG vehicles have prompted manufacturers to curtail their production. LPG as a source of heating and cooking fuel will continue to be common in Texas because LPG is accessible and affordable.[42]

LPG, a non-renewable fuel source, is a cleaner alternative to many fuels, but its combustion produces pollutants, including particulate matter, sulfur dioxide, nitrogen oxides, nitrous oxide, carbon monoxide, carbon dioxide, methane and non-methane total organic carbon.[43] LPG vehicles emit around a third less reactive organic gas, which reacts with other pollutants in sunlight to create ozone, and about 50 percent less of the vapors that create smog, than do gasoline vehicles.[44] LPG vehicles also release 20 percent less nitrogen oxide and 60 percent less carbon monoxide than gasoline vehicles.[45] Finally, LPG contributes very little to acid rain because of its low sulfur content.[46]

d. Coal

Mines in the U.S. produced 1.2 billion tons of coal in 2006, of which nearly all was destined for electricity generation.[47] Known, recoverable U.S. coal reserves are estimated at

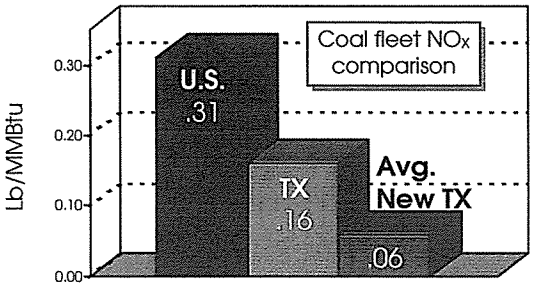
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[34] *Id.* at 77.
[35] *Id.* at 77.
[36] *Id.* at 78.
[37] *Id.* at 78.
[38] "Natural Gas and Electricity Costs and Impacts on Industry", DOE/NETL-2008/1320.
[39] *Id.* at 78.
[40] *Id.* at 81.
[41] *Id.* at 87.
[42] *Id.* at 87.
[43] *Id.* at 86.
[44] *Id.* at 86.
[45] *Id.* at 86.
[46] *Id.* at 86.
[47] "What You Need to Know About Energy," The National Academies, p. 16.

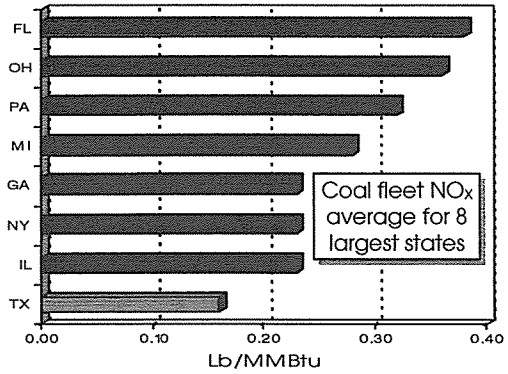
about 270 billion tons, which is more than one-fourth of the total known world coal reserves.[48] This supply is sufficient for hundreds of years at current consumption rates.[49] Additionally, coal is the least expensive for its energy content of all the fossil-fuel sources.[50] In 2006, coal-based power plants generated 146.4 million MWh of electricity, which was 36.5 percent of the state's total.[51]

In 2006, Texas had 13 operating surface mines, producing 45.5 million tons of coal, making Texas the 5th largest producer of coal in the U.S.[52] Coal is readily available in both Texas and from other parts of the U.S., and it can be shipped domestically.[53]

When burned, coal releases carbon dioxide, sulfur oxides, nitrous oxides and mercury compounds into the air.[54] For this reason, the federal Environmental Protection Agency (EPA) requires coal-fired boilers to be equipped with emission control devices.[55] Emissions data indicates that the Texas fleet of coal units (36 in all)[56] is far cleaner than the national average. In fact, data shows the Texas coal fleet is cleaner than almost every other state. [57] The Environmental Protection Agency (EPA) measures pollutants such as nitrogen oxides (NO_X) in terms of the pounds produced per million BTU of energy (Lb/MMBtu). According to the latest EPA data, the Texas coal fleet has a NO_X emission rate (.16 Lb/MMBtu) that is half the national average. In addition, a new fleet of coal units being built in Texas will have an average emission rate of 0.06, meaning the state's coal fleet is getting even cleaner.[58] (See chart to left)

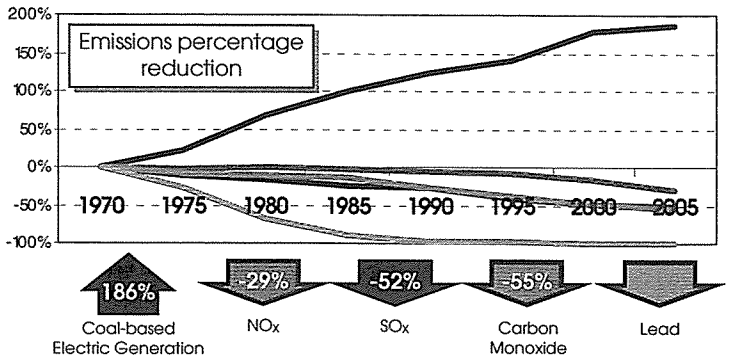


As you can see in the chart to the right, the Texas coal fleet is dramatically cleaner for NO_X than the coal fleets in the next 7 most populous states. In fact, Texas has one of the cleanest coal fleet emission rates for NO_X in the nation. The only coal fleets with cleaner NO_X rates are Massachusetts and Connecticut, which are only slightly cleaner (.13 Lb/MMBtu) and have only a



[48] *Id.* at 16.
[49] *Id.* at 16.
[50] *Id.* at 16.
[51] *Id.* at 90.
[52] *Id.* at 94.
[53] *Id.* at 99-101.
[54] *Id.* at 97.
[55] *Id.* at 97.
[56] Energy Information Administration. 2006. *Form EIA-860 Database; Annual Electric Generator Report.* http://www.eia.doe.gov.
[57] U.S. Environmental Protection Agency. 2007. *Continuous Emissions Monitoring Systems (CEMS) Database.* http://www.epa.gov.
[58] Average of NO_X emission rates recently permitted by TCEQ for CPS (Spruce 2)(Permit Nos. 70492 & 103042)(.05 lb/MMBtu); Oak Grove Mgmt. Co. LP (Luminant)(Permit Nos. 76474 & P1056)(.08 lb/MMBtu); and Sandy Creek Energy Associates, LP (Permit Nos. 70861 & P1039)(.05 lb/MMBtu).

fraction of Texas' generation capacity (TX: 21,018 MW; MA: 1,776 MW; CT: 614 MW).[59]



Today's coal plants also have many advanced scrubber technologies that they did not have just a few years ago. In fact, today environmental controls make up about 40% of a coal plant's cost. National EPA data also indicates that national air emissions have been getting cleaner for decades. The graph to the left shows the percentage change in a few of the most critical air emissions since 1970.[60] At the same time, the amount of coal-based generation has nearly doubled.[61] According to an analysis contracted for and presented to the TCEQ, combined emissions from all power plants in Texas will contribute less than 2.5% of the ozone expected to trigger non-attainment in the Dallas-Fort Worth area in 2009.[62]

The continued use of coal is critical to affordable and reliable electric power and, in the future, transportation fuels. As carbon dioxide emissions become subject to regulation, carbon capture and sequestration (CCS) projects will continue to grow, especially when coupled with enhanced oil recovery operations that utilize captured CO2 in carbon floods. Due to its geographic and geologic setting, as well as the already established experience with CO2 floods, Texas is uniquely situated to lead the nation and the world in the development of CO2 transportation, utilization, and permanent storage.

e. Nuclear

In 2006, Texas had two nuclear power plants, Luminant's Comanche Peak near Glen Rose and the South Texas Project in Matagorda County.[63] Together these nuclear plants produced 10.3 percent of the state's electricity.[64]

At least eight new nuclear reactors are planned to be built in Texas in the future. Owners of the South Texas Project have submitted an application to the U.S. Nuclear Regulatory Commission (NRC) to expand their facility.[65] Over the next two years, the NRC expects to receive applications for six more new nuclear reactors in Texas, including two more at Comanche Peak, an Exelon power project near Victoria, and another two units in west Texas.[66]

Because of the lack of greenhouse gas emissions associated with nuclear power, it is projected to be the preferred method of electric power generation in a carbon-constrained world.

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[59] U.S. Environmental Protection Agency. 2007. *Continuous Emissions Monitoring Systems (CEMS) Database*. http://www.epa.gov.

[60] U.S. Environmental Protection Agency. 2008. *Air Trends*. http://www.epa.gov.

[61] Energy Information Administration. 2006. Consumption for Electricity Generation by Energy Source: Electric Power Sector, 1949-2006. http://www.eia.doe.gov.

[62] Environ. 2006. *DFW 2009 Baseline APCA Results*. http://www.environcorp.com.

[63] *Id.* at 106.

[64] *Id.* at 106.

[65] *Id.* at 105.

[66] *Id.* at 105.

Although historic concerns about waste disposal and meltdowns slowed the growth of nuclear development, it is expected to grow to be a major component of the base load capacity of the domestic and international power market for decades to come.

f. Wind

Texas and several other states in the U.S. have implemented Renewable Portfolio Standards ("RPS"), which require a certain amount of energy to come from renewable sources. This has driven Texas to develop more wind energy within the state in order to meet its RPS goals. The PUCT established the REC trading program as part of its RPS program to encourage an additional 2,000 MW of new renewable energy capacity to be built in Texas by 2009. The REC program awards one REC for each MWh of renewable power produced.

As of January 16, 2008, Texas had 4,356 MW of installed capacity from renewable sources, 14% more than California, the state with the next highest level of installed capacity from renewable sources.[67] Texas is also the leader in projects that are currently under construction, with approximately 1,200 MW under development.[68] Additionally, T. Boone Pickens' company, Mesa Power, is expected to begin securing land and wind turbines for its proposed 4,000 MW wind farm, which will be the largest wind farm world-wide.[69]

While wind power represents only a small portion of Texas' overall electricity production (about three percent), the state's wind capacity is growing rapidly.[70] The Texas wind energy industry is ever-increasing due to high wind speeds, improved wind technology, and government subsidies and tax incentives.[71] Furthermore, with higher fossil fuel prices and more efficient wind turbines, wind power has become more competitive with conventional power sources than ever before.[72]

The state's wind industry is prospering, but it faces several potential hurdles.[73] Currently, the federal Production Tax Credit ("PTC") provides a ten (10) year corporate income tax credit of 2.0 cents per kWh, effectively reducing the cost of wind power.[74] However, the PTC is scheduled to expire on December 31, 2008.[75] Without an extension in the PTC, the industry's growth could slow resulting in less wind energy being generated in Texas.[76] Additionally, a continuing shortage of wind turbines that has driven up prices and caused lengthy delays in wind projects, could affect the growth of wind power in Texas.[77]

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[67] "United States Renewable Energy Attractiveness Indices" Ernst and Young, Q1, 2008, page 9.
[68] *Id.* at 9.
[69] *Id.* at 9.
[70] *Id.* at 161.
[71] *Id.* at 161.
[72] *Id.* at 177.
[73] *Id.* at 177.
[74] *Id.* at 163.
[75] *Id.* at 162.
[76] *Id.* at 177.
[77] *Id.* at 177.

From an environmental perspective, wind power does not produce waste products that require disposal or gas emissions that contribute to air pollution and global climate change.[78] Additionally, wind turbines do not consume or pollute water.[79] However, some local opposition to wind power is encountered and it usually centers on the danger posed to birds and bats, noise, aesthetics, land values, and the economic impact on tourism and landowners' property rights.[80]

Transmission continues to be perhaps the most significant barrier to wind energy development in parts of West Texas, including the Panhandle.[81] The Public Utility Commission of Texas is designating Competitive Renewable Energy Zones ("CREZs") that will develop additional transmission infrastructure.[82] On July 17, 2008, the PUCT adopted a plan for "Competitive Renewable Energy Zones (CREZ) that will result in $5 billion worth of transmission lines running out of West Texas and the Panhandle drawing, ultimately, 18.5 megawatts of clean new wind- and solar-generated electricity. Scenario 2 was selected from the following choices that were heavily debated throughout the docket:

- Scenario 1, Plan A, 12,053 MW, $2.95 billion
- Scenario 1, Plan B, 12,053 MW, $3.78 billion
- Scenario 2, 18,456 MW, $4.93 billion
- Scenario 3, 24,859 MW, $6.38 billion

  Scenario 4, 24,419 MW, $5.75 billion.

Texas has abundant wind resources. Its Renewable Portfolio Standard goals and the selection of CREZs to expedite transmission improvements should continue to drive the growth of wind energy in the state.[83] Balancing power for the rapidly expanding wind industry will likely be the focus of legislative and regulatory initiatives in the coming years to ensure that the emergence of this important energy source does not cause disruption in the electrical grid.

g. Solar Energy

Although Texas currently does not generate very much solar energy, Texas has excellent solar resources. Currently, all of the solar energy generated in Texas accounts for a minute portion of the state's electricity production and comes from distributed PV solar systems on homes and businesses.[84]

In the U.S., the extension of the federal income tax credit spurred rapid growth in the solar energy market.[85] While Texas has implemented some incentives to spur solar energy development — RPS, franchise tax incentives and some net metering guidelines — several other

[78] *Id.* at 172.
[79] *Id.* at 172.
[80] *Id.* at 172-173.
[81] *Id.* at 178.
[82] *Id.* at 178.
[83] *Id.* at 178.
[84] *Id.* at 138-139.
[85] *Id.* at 153.

states have implemented far more generous programs.[86] A recent Texas study also recommended the implementation of additional state level incentives to spur non-wind renewables.[87]

Solar energy technologies generate electricity without producing air or water pollution.[88] Solar thermal energy technologies may require cooling water, but most of this water can be recycled.[89] The manufacture of solar cells produces little to no hazardous materials.[90]

The IC2 Institute at the University of Texas at Austin concluded that Texas has the solar resources and the research institutions needed to achieve significant market share in the global solar energy market, but lacks a cohesive strategy to achieve success.[91] However, the IC2 Institute noted that ... for Texas to acquire and maintain a competitive advantage, it must create opportunities to align research, development, commercialization, and alliance building strategies necessary to gain a substantial and sustainable foothold in the global marketplace.[92]

The City of Austin maintains one of the most aggressive and attractive residential and commercial solar rebate programs in the country. Depending upon the size of the system involved, the City's rebate program can cover up to 80% of the cost of a solar system that includes net-metering capabilities that allow the customer to be credited for the solar power generated and netted back onto the grid.

g. Biodiesel

Biodiesel is an ester-based fuel that has been produced since Rudolf Diesel developed the first diesel engine that ran on biodiesel made from peanut oil. Virgin vegetable oils, animal fats and lard, as well as, waste cooking oils have been used as feedstocks in the production of biodiesel. Biodiesel is made through a process called transesterification whereby glycerin is separated from the fat or oil rendering a methyl ester called "Biodiesel." Blends of biodiesel with petroleum diesel are referred to by the percentage of biodiesel in the fuel (e.g., B20 = 20% biodiesel). Biodiesel is compatible with existing diesel engines and often used to enhance lubricity of "ULSD" petroleum diesel in place of sulfur. Biodiesel is also biodegradable, non-flammable, and non-toxic when spilled on water or land.

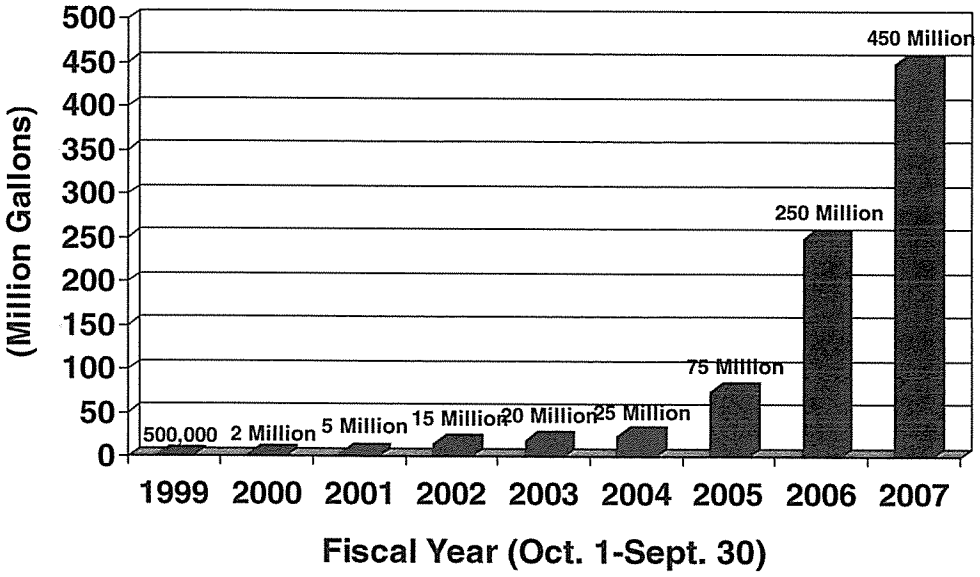
According to the U.S. Department of Energy, Biodiesel generates 3.2 units of fuel energy from biodiesel for every unit of fossil energy used to produce the fuel. That estimate includes the energy used in diesel farm equipment and transportation equipment, fossil fuels used to produce fertilizers and pesticides, fossil fuels used to produce steam and electricity and methanol used in the manufacturing process.[93] This very favorable "energy balance" makes Biodiesel a key player in meeting greenhouse gas reduction goals as it reduces lifecycle carbon dioxide emissions by 78-80% compared to petroleum diesel.

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[86] *Id.* at 153.
[87] *Id.* at 153.
[88] *Id.* at 150.
[89] *Id.* at 150.
[90] *Id.* at 150.
[91] *Id.* at 154.
[92] *Id.* at 154.
[93] *Id.* at 218.

Both the U.S. Environmental Protection Agency (EPA) and the National Renewable Energy Laboratory (NREL) have also concluded that Biodiesel reduces a host of conventional pollutants traditionally associated with petroleum diesel (particulate matter (PM), Carbon Monoxide (CO), Carbon Dioxide (CO2), Volatile Organic Compounds (VOCs), Sulfur Dioxide (SO2) & Hydrocarbons (HC)). Like all fuels used in motor vehicles, Biodiesel still produces nitrous oxides[94] although there is a significant ongoing debate whether Biodiesel needs to be additized like petroleum diesel in order to meet low emission diesel regulations developed by the Texas Commission on Environmental Quality (TCEQ) for 110 counties facing the most severe challenges from air pollution (primarily in the eastern half of Texas, including Austin, San Antonio, Houston and Dallas).[95]

The U.S. biodiesel industry has experienced tremendous growth over the past eight years, increasing from 2 million gallons of production in 2000 to 450 million gallons in 2007, as seen in the following chart from the National Biodiesel Board.



Texas has an installed Biodiesel production capacity of nearly 600 million gallons per year, which is more than twice the next biggest state and far exceeds the Nation's actual 2007 production. Texas A&M (TAMU) economists have estimated that Biodiesel has already returned an economic benefit of 2.234 billion and is responsible for the creation of 8,800 jobs.[96] TAMU estimates that the ongoing economic benefit of the industry producing at full installed capacity would be $3.7 billion per year and the addition of 9,977 permanent jobs.[97] This already impressive economic impact will explode if Texas feedstocks are developed & crushed to supply just the currently installed capacity. TAMU projects the economic benefit of such a scenario to exceed $23.7 billion, along with the creation of 147,675 jobs. TAMU projects that a

[94] *Id.* at 217-218.
[95] *Id.* at 218.
[96] *Economic Impact of the Current and Potential Biodiesel Industry in Texas*, Joe L. Outlaw & James W. Richardson, Texas A&M University (June 2, 2008) at 8.
[97] *Id.*

continuation of such an industry will return an ongoing economic benefit of $ 6.36 billion and the addition of 73,293 permanent jobs.[98]

Biodiesel is sometimes confused by the general public with ethanol, despite the fact that it is a completely different fuel (it displaces diesel, not gasoline), derived from different feedstocks (oils, not grains), and is produced through a different technology (transesterification rather than fermentation/distillation). Biodiesel is not produced from corn and does not impact the price of food or feed because, even food-grade oils, such as soybean oil, constitute one fifth of the crop, while the remaining four fifths is meal that flows into the market. In fact, by increasing soy meal production, biodiesel actually increases the amount of available feed/food for animal and human consumption.

Nevertheless, the commodity price escalation of soybeans and soybean oil has adversely impacted soy-based Biodiesel, so there is a global search underway to identify new biodiesel feedstocks. Several promising candidates, such as castor seed, mustard seed, jatropha, and oil-producing algae, are presently undergoing field trials. In the economic study cited above, Jatropha was evaluated to estimate the impact on the state from establishing 2.65 million acres of oilseed production. Jatropha has a number of advantages in that it has high oil content, does not require significant water, can be grown on marginal lands, and is not a food crop. As the chart below shows, TAMU estimates that enough marginal land well suited for jatropha production is available for use without disrupting normal food and fiber crops.[99]

Table 2. Estimated Acreage Available in Pasture, Rangeland, CRP, and Center Pivot Corners in Texas.

	Acres Available
CRP	3,063,771
Pasture[1]	16,045,000
Rangeland[2]	95,745,000
Center Pivot Corners[3]	914,754
Total	115,768,525

[1] CRP summary of acres expiring from 9/30/08 - 9/30/2012 from USDA-FSA, as of 1/04/08.
[2] Pasture and Rangeland summary of acres based on 1997 National Resources Inventory from USDA-NCRS.
[3] AFPC estimate based on 2003 Irrigation survey from USDA-NASS, released 11/15/2004.

As of 2006, 528,705 diesel vehicles were registered in Texas, and many farm and industrial vehicles run on diesel as well.[100] This provides a significant potential market for the Biodiesel industry in Texas, once developed. Federal policy changes to renewable fuel standards, combined with growing concerns about energy security and environmental change, may improve the outlook for biodiesel because it is domestically produced, renewable and has an excellent environmental profile.[101]

[98] *Id.* at 14.
[99] *Id.* at 13.
[100] *Id.* at 222.
[101] *Id.* at 222.

h. Ethanol

Texas has two operational ethanol plants, and two more under construction with others planned.[102] However, Texas only has a limited number of ethanol fueling stations for E85 (a blend of 85 percent ethanol and 15 percent gasoline which burns cleaner than other motor vehicle fuel).[103] Therefore, ethanol currently has a limited impact on Texas with much of the ethanol produced being consumed in other states. The current controversy surrounding corn-based ethanol and its impact on feed prices may slow, if not stop, the growth of the corn ethanol industry in Texas.

Heavy federal subsidies have resulted in a rapid and large expansion of ethanol production throughout the U.S.[104] As a result, an increasing percentage of the U.S. corn crop is being devoted to ethanol production.[105] From an environmental perspective, controversy has arisen regarding the amount of energy needed to produce ethanol compared to gasoline.[106] A 2005 study by Dr. David Pimentel of Cornell University and Dr. Tad Patzek of U.C. Berkeley concluded that producing ethanol from corn requires 29 percent more fossil energy than is contained in the resulting product.[107] However, a 2004 study by Dr. Hosein Shapouri of the USDA concluded that producing ethanol with corn creates a 67 percent net energy gain.[108]

Supporters of the ethanol industry say that its use helps the environment by reducing air pollutants.[109] No conclusive studies have shown this to be the case, however, and while alternative fuels such as ethanol can reduce America's dependence on foreign oil, the U.S. simply does not have enough acres of farmland to replace most of its gasoline with corn ethanol.[110] Even if the entire U.S. corn harvest in 2007, 13.1 billion bushels, were turned into ethanol, it would have produced only 36.6 billion gallons of ethanol, enough to replace about 30.2 percent of U.S. gasoline consumption in 2007.[111] It is, of course, not feasible to devote the entire U.S. corn harvest to producing ethanol and the Texas Governor has already requested EPA to waive 50% of the existing RFS standard for corn-based ethanol as a result of the projected impact of corn prices on the animal feeding industry.

Alternative technologies and feedstocks for producing ethanol hold promise for the industry. Current hurdles associated with corn ethanol should be overcome once cellulosic ethanol technology is cost-competitive and a bigger player in ethanol production.

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[102] *Id.* at 190.
[103] *Id.* at 189-190.
[104] *Id.* at 205.
[105] *Id.* at 205.
[106] *Id.* at 205.
[107] *Id.* at 205.
[108] *Id.* at 205.
[109] *Id.* at 201.
[110] *Id.* at 201.
[111] *Id.* at 206.

i. Biomass

There are two main types of biomass produced in Texas – wood biomass and feedlot biomass. Texas produces an estimated 20 million tons per year of biomass from wood that can be used as fuel.[112] Additionally, although Texas is the nation's leading cattle state and has significant potential resources for manure to create energy (i.e. "feedlot biomass"), thus far using manure to create energy is relatively rare in Texas.[113]

With respect to environmental concerns, wood-fired biomass power plants produce some air and water pollution.[114] The grinding or chipping of wood creates dust, although wetting the wood before chipping can reduce dust levels.[115] Furthermore, burning wood releases volatile organic compounds, or VOCs, which pose a health risk.[116]

Environmental concerns with respect to feedlot biomass include the production of very localized unpleasant odors, and lagoon-based projects carry the potential for wastewater releases during flooding if they are not engineered properly.[117] Additionally, concentrated animal feeding operations produce residual solids and flush water.[118] For these reasons, both the TCEQ and the U.S. EPA regulate their operations.[119]

Wood-fired biomass has some potential for Texas, particularly East Texas, which has enough potential capacity to produce the majority of the state's suggested goal of 500 MW of non-wind renewable energy capacity.[120] The main obstacle to wood-fired biomass power plants is economic.[121] Without incentives and subsidies, the cost of the fuel is too high to make such plants profitable.[122]

With respect to feedlot biomass, no significant public controversy has arisen over the use of manure as a fuel in Texas.[123] Instead, using manure as a fuel is seen as a way to mitigate potential environmental problems associated with feedlots and dairy operations.[124] Furthermore, agricultural wastes, including manure, have significant potential for power use.[125] Livestock manure and other forms of agricultural waste including poultry litter, rice straw, peanut shells, cotton gin trash and corn stover have the potential to produce 418.9 MW of electricity (enough to power over 250,000 homes in Texas, based on average electric use in 2006) according to a recent report from the Houston Advanced Research Center.[126]

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[112] *Id.* at 227.
[113] *Id.* at 238.
[114] *Id.* at 232.
[115] *Id.* at 232.
[116] *Id.* at 232.
[117] *Id.* at 243.
[118] *Id.* at 243.
[119] *Id.* at 243.
[120] *Id.* at 233.
[121] *Id.* at 233.
[122] *Id.* at 233.
[123] *Id.* at 244.
[124] *Id.* at 244.
[125] *Id.* at 245.
[126] *Id.* at 245.

j. Hydrogen

Texas is a major producer and user of hydrogen, but most of it is used for fertilizer manufacture and in petrochemical processes.[127] Its use for power purposes is limited mostly to research and demonstration projects, as is the case around the world.[128]

The environmental benefits of hydrogen are very positive.[129] When used in a fuel cell to power an electric vehicle, the emissions include only water and heat.[130] However, hydrogen is produced using energy from natural gas, coal, solar, wind or nuclear power, each of which has its own environmental effects.[131] The tradeoffs are much like those related to fuels used for electricity production.[132]

The first hydrogen station in Austin is using the wide availability of natural gas and its distribution pipelines to create hydrogen for on-site fueling.[133] Similarly, hydrogen can be produced from the nation's abundant coal reserves.[134] Most analyses show that the higher efficiency of hydrogen applications can result in lower greenhouse gas emissions, even when the hydrogen is produced from coal.[135] Observers say transitional approaches relying on natural gas could facilitate the use of hydrogen technologies until production methods using other, more environmentally friendly resources become available.[136]

VII. Conclusion & Path Forward for Texas Energy Planning

There is no question that meeting the ever-increasing demand for energy in Texas and the rest of the nation will require a diverse array of current and emerging energy resources. Concerns about the reliability and price of electricity will continue to drive the need for fossil fuels, including coal. Still, an increased awareness of climate change issues will also drive an expanded focus on renewable energy, energy efficiency, the capture and sequestration of carbon from fossil fuel energy sources.

Although energy from wind, solar, and other renewable sources is expected to nearly triple in the next two decades, the net effect of this increase will probably only raise the total contribution of renewables from 7% of total consumption now to about 8% in 2030.[137] As a result, Texas cannot meet current and future demand for energy from renewable sources alone. David McSweeny of Banc of America Securities, a commentator from the Ernst and Young Cleantech Symposium, noted that "Without nuclear, without new coal, we could see a 50%

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[127] *Id.* at 291.
[128] *Id.* at 291.
[129] *Id.* at 298.
[130] *Id.* at 298.
[131] *Id.* at 298.
[132] *Id.* at 298.
[133] *Id.* at 298.
[134] *Id.* at 298.
[135] *Id.* at 298.
[136] *Id.* at 298.
[137] "What You Need to Know About Energy," The National Academies, p. 17.

increase in real power prices in ten years.[138] Wind and solar alone, as great as they are, will not take care of the needs we will have in the next decade."[139]

Furthermore, reductions in coal-fired energy generation could result in a significant depletion of natural gas reserves. A back-down on coal power due to its effects on climate change will not only result in a shortage of energy for Texas, but will result in prohibitive increases in the cost of natural gas as well. This, added to the fact that there has been a significant depletion of natural gas reserves in the United States, could result in a dangerous dependence on natural gas from suppliers outside of the United States. As the DOE analyzed, "policies that encourage the use of natural gas to substitute for coal in power generation could very well lead to spectacular price increases for households and industry. As prices are pushed higher, the need for more LNG will create closer links to the world oil price, setting the stage for the marginal price of U.S. electricity to be set by the whims of foreign oil/LNG suppliers for the first time in U.S. history."[140]

With a proven history in energy production, innovation, and leadership in the areas of renewable energy and cleaner fossil-fuel production, Texas will be at the forefront of energy and carbon management research and development. Texas policymakers will be faced with the need to develop a multi-faceted and balanced approach to energy planning. For certain, there is no "Silver Bullet" – only "Silver Buckshot."

Several Texas policymakers have already embarked on the energy planning process. The Governor was first out of the gates as he has created the Clean Coal Technology Council, the Energy Planning Council, and, more recently, the Governor's Competitiveness Council, which is in the process of finalizing a "2008 Texas Energy Plan."[141] That Plan will contain recommendations for policy changes and research priorities designed to better position Texas for the challenges it will face on the energy front.

The Speaker of the House issued a series of energy planning-related interim charges[142] and appointed a "Select Committee on Electric Generation Capacity and Environmental Effects."[143] All three of the House Committee Chairman involved with Energy-related issues are on the Select Committee (Environmental Regulation Committee Chairman, Dennis Bonnen, Energy Resources Chairman Rick Hardcastle, and Regulated Industries Chairman Phil King), with Chairman Bonnen appointed as Chairman of the Select Committee.

In the Senate, the Lieutenant Governor issued several interim charges that related to energy and energy planning[144] and two key Committee Chairman have embarked on an informal process of developing energy planning policy and research recommendations (Natural Resources Chairman Kip Averitt and Business and Commerce Chairman Troy Fraser).

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[138] "United States Renewable Energy Attractiveness Indices", Ernst and Young, Q1, 2008, p. 13.
[139] *Id.* at 13.
[140] "Natural Gas and Electricity Costs and Impacts on Industry" DOE/NETL 2008/1320, p. 10-11.
[141] http://www.governor.state.tx.us/gcc
[142] http://www.house.state.tx.us/committees/charges/80interim/wholeInterimCharges.pdf
[143] http://www.house.state.tx.us/committees/proclamations/ProclamationElectric.pdf
[144] http://www.senate.state.tx.us/assets/pdf/InterimCharges2008.pdf

Both Texas Comptroller Susan Combs and Agriculture Commissioner Todd Staples have been involved in energy-related programs, have conducted energy-related studies and are likely to figure prominently in key aspects of the energy policy proposals pursued next session and beyond. 2009 should be a big year for energy policy developments in Texas. Stay tuned . . .

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Michael L. Williams is the Chairman of the Railroad Commission of Texas, the state's oldest regulatory commission. In November 2000, the people of Texas elected him to complete an unexpired term. In November 2002, they re-elected him to a full six-year term expiring in 2008. He was initially appointed to the Commission by then-Governor George W. Bush in December 1998 to fill a vacant seat. Williams served as Chairman of the Commission from September 1999 to September 2003. He is the first African American in Texas history to hold an executive statewide elected post.

Williams chairs the Governor's Clean Coal Technology Council and represents the Governor on the Southern States Energy Board and the Interstate Mining Compact Commission. He also is an appointee on the National Coal Council, an advisory board to the U.S. Secretary of Energy. Williams chaired FutureGen Texas and currently chairs the Governor's Competitiveness Council, a select group of public and private sector leaders working to identify the issues affecting Texas' competitiveness in the global marketplace.

An advocate of alternative energy, Williams is championing the conversion of Texas public and private fleets, especially school buses from diesel and gasoline to environmentally cleaner, cheaper and domestically produced natural gas and propane through his "Breathe Easy" initiative.

Michael is the immediate past Honorary State Chairman of Big Brothers Big Sisters of Texas. He initiated the Texas response against the tragedy in Darfur.

Previously, Williams served as general counsel to a Texas high-tech corporation and was "of Counsel" with the law firm of Haynes and Boone, L.L.P. He also has served in a volunteer capacity as the General Counsel of the Republican Party of Texas, the chairman of the Texas Juvenile Probation Commission, on the Board of Directors of the Arlington Chamber of Commerce, the Texas Public Policy Foundation and Our Mother of Mercy Catholic School.

He was an adjunct professor at Texas Southern University in the School of Public Affairs and Texas Wesleyan School of Law.

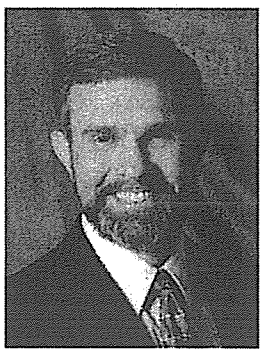
In 1990, President George H. W. Bush appointed Williams to be Assistant Secretary of Education for Civil Rights at the U.S. Department of Education, a position previously held by U.S. Supreme Court Justice Clarence Thomas. Former President Bush previously appointed Williams as Deputy Assistant Secretary for Law Enforcement at the U.S. Department of the Treasury. He had policy oversight responsibility for the Federal Law Enforcement Training Center, the U.S. Secret Service, the U.S. Customs Service, the Bureau of Alcohol, Tobacco and Firearms and the Financial Crimes Enforcement Network. Williams also served in the Department of Justice as Special Assistant to Attorney General Richard Thornburgh.

Williams served as a prosecutor in the Reagan Justice department. In 1988, he was awarded the Attorney General's "Special Achievement Award" for the conviction of six Ku Klux Klan members. Previously, he was an assistant district attorney in his hometown of Midland, Texas.

The son of public school teachers, Williams holds a bachelor's, a master's and a law degree from the University of Southern California. He is a member of Most Blessed Sacrament Catholic Church in Arlington, Texas. He is married to his best friend, Donna, for 23 years.

BIOGRAPHY

Carl O. Bauer



Carl Bauer is Director of the National Energy Technology Laboratory (NETL), a national laboratory, owned and operated by the U.S. Department of Energy, that serves as the lead field laboratory for the Department's Office of Fossil Energy. Mr. Bauer oversees the implementation of major science and technology development programs to resolve the environmental, supply, and reliability constraints of producing and using fossil resources. This includes technologies for—

- Advanced coal-fueled power generation and hydrogen production.
- Carbon sequestration.
- Environmental control for the existing fleet of coal-fired power plants.
- Improving the efficiency and environmental quality of domestic oil and natural gas exploration, production, and processing.

Mr. Bauer was appointed NETL Director in August 2005, following 6 months as Acting Director. From October 2003 to February 2005, he served as NETL Deputy Director. In this capacity, Mr. Bauer was responsible for NETL's energy assurance and infrastructure protection activities, and he provided oversight for the Office of Institutional and Business Operations; the Office of Science, Technology, and Analysis; and the Office of Technology Impacts and International Coordination.

Prior to serving as Deputy Director, Mr. Bauer was the Director of NETL's Office of Coal and Environmental Systems, with responsibility for all of NETL's activities related to coal and environmental research. He was also Director of NETL's Office of Product Management for Environmental Management, with responsibility for the development and demonstration of hazardous- and radioactive-waste cleanup technologies.

Mr. Bauer has more than 30 years of experience in technical and business management in both the public and private sectors. His positions at Department of Energy Headquarters have included Director of the Division of Work for Other Agencies, Director of the Idaho and Chicago Environmental Restoration Operations Division, Acting Director for the Environmental Management Office of Acquisition Management, and Director of the Office of Technology Systems. He has also served as Director of Engineering Support and Logistics, Naval Sea Systems Command for the U.S. Department of Defense; Vice President and General Manager of Technology Application, Inc.; and Vice President, Ship Systems and Logistics Group, Atlantic Research Corporation.

Mr. Bauer received an M.S. in nuclear power engineering from the Naval Nuclear Power Postgraduate Program in 1972 and a B.S. in marine engineering/oceanography from the U.S. Naval Academy in 1971. He has taken additional postgraduate courses at the Wharton School of Business and George Washington University in business administration, finance, and management, and has received additional executive management training at Harvard University's John F. Kennedy School of Government. He was recently recognized as a 2006 Director of the Year by the Federal Laboratory Consortium for Technology Transfer.

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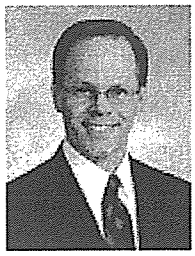
Ms. Baker is a founding partner of the Houston litigation and environmental regulatory law firm of Connelly · Baker · Wotring LLP, where she serves on the Firm's Management Committee. Ms. Baker has practiced environmental law for more than 24 years and obtained her law degree from the Georgetown University Law Center in 1984 where she received the Magoichi Kato Scholarship Award for Academic Excellence for Japanese American students. She obtained a Bachelor of Science degree, Summa Cum Laude, from the University of Maryland in 1981.

Ms. Baker's practice encompasses the full spectrum of environmental issues, with an emphasis on the handling of difficult and complex multi-party environmental cases, Superfund, environmental regulatory counseling and representation in enforcement, permitting, catastrophic release response, compliance and environmental support in corporate/real estate due diligence and transactional matters. She is an author and editor of the First and Second Editions of the *Texas Environmental Law Handbook*, published in January 1989 and October 1990 and is a co-author of two other books on environmental law. Ms. Baker has also authored and published more than 50 articles on environmental law, has lectured extensively on environmental legal issues, and has testified in a variety of cases as an expert witness on environmental law in the United States and Canada.

She is active in bar, law school and community activities promoting issues concerning the environment, minority advancement and gender equality issues, among others. Ms. Baker was recently featured on the cover of *Diversity & The Bar* magazine, a publication of the Minority Corporate Counsel Association, in connection with her work in the area of diversity. She is the 2008 recipient of the Ma'at Justice Award, awarded annually by the State Bar of Texas Women and the Law Section to an individual who has actively addressed the needs and issues of women in the legal profession and the community. Ms. Baker was also the 2006 award winner of the Texas Bar Foundation's Dan Rugeley Price Award presented to an outstanding practitioner dedicated to the bar and public. She has served as an Adjunct Professor of Environmental Law at both the University of Houston Law Center and the South Texas College of Law, and was co-founder and past Chair of the Houston Bar Association's Environmental Law Section. She was also a founder and Chair of the American Bar Association's national Environmental Law Group, supervising 10 environmental committees integrating issues of environmental law with real estate, landlord and tenant issues, due diligence, and merger and acquisition transactions. Ms. Baker was recently elected to Chair the Houston Bar Foundation, the HBA's 501(c)(3) charitable foundation, and other bar appointments include serving on the Board of Directors of the Asian American Bar Association, as Vice Chair of the State Bar of Texas Standing Committee on Women in the Profession, and Co-Chair of the Houston Bar Association's Gender Fairness Committee, among others. Prior to forming the Connelly · Baker Firm, Ms. Baker headed the Environmental Law Practice group for the 120-lawyer firm of Mayor, Day, Caldwell & Keeton, L.L.P. for over a decade and also practiced environmental law in the D.C. and Houston offices of Fulbright & Jaworski, L.L.P. She is admitted to practice in both the District of Columbia and Texas.

John L. Howard, Jr.

Vinson&Elkins LLP



John is a partner with V&E's Environmental, Public Policy, and Climate Change practice groups. John's public and private sector experience gives him a unique and comprehensive perspective in helping clients understand, navigate, develop, and implement state and federal environmental, natural resource, and energy policy.

He has represented the United States and Texas, led interagency councils, and assisted a diverse set of clients on such wide-ranging policy issues as climate change, sustainable buildings, biofuels, energy efficiency, environmental technology, recycling, water supply and infrastructure, vehicle fuel efficiency, environmental indicators, environmental management systems, recycling, stewardship, and sustainability.

In addition to his current representation of clients in Austin and D.C., John has chaired the Environmental Protection Agency's National Advisory Council for Environmental Policy and Technology for three years.

Previously, he served in federal and state government as the Federal Environmental Executive (2002-2004), Senior Associate Director with the White House Council on Environmental Quality (2001-2002), Environment and Natural Resources Policy Director in the Texas Governor's Policy Office (1996-2000), and an associate at law firms in Austin and Washington, D.C.

He has been recognized for his expertise by *The Best Lawyers in America* for environmental law and government relations law (2007), and by *Chambers USA: America's Leading Lawyers for Business* in environmental law (2005-2006). In 2003, he was named an Outstanding Young Alumnus of Baylor University. He is Vice President of Keep Texas Beautiful and Chairman of the Texas Water Foundation.

John received his law degree from The University of Texas at Austin (*Texas Law Review* administrative editor) and his bachelor of arts from Baylor University (Phi Beta Kappa).

The Campaign for Climate Change Legislation

John Howard, Vinson & Elkins, LLP*

There is a campaign underway across the United States to adopt laws and policies to reduce emissions of greenhouse gases (GHGs), a set of policies described by some as "easily the largest income redistribution scheme since the income tax"[1] and (together with other countries' efforts) "the process to organize the second industrial revolution."[2]

Climate change has moved to the forefront of political discussion in the U.S. in the last two years because of a confluence of several factors: the Supreme Court's decision in *Massachusetts v. EPA* and the "glorious mess" of potential ensuing rulemaking, scientific studies from the Nobel Prize-winning United Nations' Intergovernmental Panel on Climate Change, Al Gore's Oscar-winning movie, *An Inconvenient Truth*, Hurricanes Katrina and Rita and several tornadoes, significant media attention to climate change and melting ice caps, multi-million-dollar ad buys from environmental groups urging action, a change in power in Congress, other countries pushing for a post-Kyoto agreement by December 2009 in Copenhagen, and the support of both parties' presidential presumptive nominees.

Although comprehensive federal climate change legislation will not pass in 2008, supporters believe passage is quite possible in 2009 or 2010. Not wanting to wait, several regions, states, and cities already have begun taking their own actions. And the Texas Legislature has begun considering various aspects of this issue.

This paper outlines the major federal legislation that Congress is considering and briefly notes the regional, state, city, and Texas climate policy efforts under way.

Table of Contents:

I.	Federal Legislation		2
	A.	The Senate	2
	B.	The House	5
	C.	Presidential Candidates	8
II.	State Legislation and Regional Efforts		9
	A.	California	9
	B.	Regional: Northeast, West, Midwest	10
III.	Cities		11
IV.	Texas		12

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* I have relied heavily on the writing and research of – and thank profusely – my V&E Climate Change Practice Group colleagues, particularly Chris Carr, Eric Groten, Greg Staple, Mara Zimmerman, Greg Wall, and summer associates Jenny Sutter and Taylor Holcomb.

[1] "Cap and Spend," op-ed, Wall Street Journal, June 2, 2008, http://online.wsj.com/article/SB121236237789236363.html.

[2] Phil Woolas, United Kingdom Minister for the Environment, Greenwire, Feb. 2, 2008, http://www.eenews.net/Greenwire/2008/02/01/archive/3?terms=woolas.

I. Federal Legislation

As predicted by most political observers, federal climate change legislation is very unlikely to pass in 2008 (because it's a complex, costly issue in a presidential campaign year). Congress nevertheless continues to consider GHG emissions reduction schemes, and momentum continues to build for some form of comprehensive GHG legislation.[3] The leading Senate bill, Sen. Boxer's substitute to the Lieberman-Warner Climate Security Act, made it all the way to the Senate floor, where it was debated for nearly a week before being pulled down. In the House, the Energy and Commerce Committee continues to hold hearings and issue white papers to develop their own framework, and individual Congressmen have filed separate bills. Below is a summary of several significant federal bills and their contents.

A. The Senate. The leading[4] bill is S.3036, the Lieberman-Warner Climate Security Act of 2008,[5] offered by Senator Barbara Boxer (D-CA), Chair of the Environment and Public Works Committee, as a full substitute to the Lieberman-Warner Climate Security Act of 2007, S.2191.[6] The bill would establish a nationwide cap on GHG emissions, requiring reductions of about 65% from 2005 levels by 2050 through the issuance and trading of allowances beginning in 2012. The bill relies heavily on auctions of allowances, which would then provide funding for a plethora of programs (including deficit reduction). Below is a summary of S.3036's key provisions:

Topic	Explanation	Bill Reference
Covered Entities	Any entity that: (1) Uses more than 5,000 metric tons of coal in the U.S. in a year; (2) Is (a) a natural gas processing plant (outside Alaska); (b) that produces natural gas in Alaska; or (c) holds title to natural gas, including liquefied natural gas, when imported into the U.S.; (3) Manufactures in the U.S. or holds title, on importation, to petroleum-based liquid or gaseous fuel,	§ 4(16)

[3] The idea of a multi-pollutant bill (covering emissions of not just CO_2 but also SO_2, NO_x, and mercury, from power plants) has been dead for several years, with the primary legislative focus moving to GHGs. But with the D.C. Circuit recently vacating EPA's Clean Air Interstate Rule, in *North Carolina v. EPA*, the potential for multi-pollutant legislation, at least for power plants, may now be greater. Even the presidential candidates' teams have suggested that "a rethinking of the whole strategy" might be needed for tackling air quality and global warming. http://www.eenews.net/Greenwire/2008/07/15/3.

[2] Several other Senate bills have been introduced in the last two years, including S.1766, the Low Carbon Economy Act of 2007 (Bingaman-Specter); S.280, the Climate Stewardship and Innovation Act of 2007 (McCain-Lieberman); and S.485, the Global Warming Reduction Act of 2007 (Kerry-Snowe). None appears likely to gain traction, however, given the Environment and Public Works Committee's vote for and the Senate's initial consideration of S.3036. The opportunity for those and other bills lies in future negotiations and as floor amendments whenever legislation is considered again.

[3] http://lieberman.senate.gov/documents/amendment.pdf.

[6] http://www.govtrack.us/congress/billtext.xpd?bill=s110-2191.

	petroleum coke, or coal-based liquid or gaseous fuel; (4) Manufactures or holds title, on importation, to more than 10,000 CO_2 equivalents of non-HFC greenhouse gas in the U.S. in a year; or (5) Manufactures any HFC in the U.S.	
Emission Reporting	EPA shall establish a Federal Greenhouse Gas Registry to implement the cap-and-trade program within 2 years.	§§ 101-102
Annual Cap	Establishes two separate caps: (1) On covered entities that emit non-HFC gases. It starts in 2012 at approximately 4% below 2005 levels and declines by 2020 to reach approximately 18% below 2005 levels and by 2050, 71% below 2005 levels (2) On covered entities that emit HFCs. It starts at 289 million tons of carbon dioxide equivalents in 2012, declining to 15% below 2012 levels in 2020, 45%below 2012 levels in 2030, and 70% below 2012 levels in 2040 and 2050.[7]	§ 201 & § 1501
Covered Entities' Obligations	(1) Covered entities shall submit to EPA an emission allowance, an offset allowance, or an international allowance for each CO_2 equivalent emitted, assuming no sequestration, destruction or retention (2012-2050). (2) EPA is to issue credits against compliance obligations within 90 days after a compliance year for: destruction of greenhouse gases, sequestration through geologic capture, use of GHGs as a product feedstock and not resulting in emissions, export of regulated fuels or GHGs, and international flights which emissions are subject to a foreign country's cap-and-trade system.	§ 202
Use of Offset Allowances	EPA may distribute allowances as follows: Domestic: Up to 15% of the total quantity of annual emissions allowances as domestic offset allowances. International: Up to a total of another 15%: 5% as non-U.S. offset allowances, plus another 10% as international forest offset allowances.	§§ 301, 302 & 1314
Controlling Costs	(1) A covered entity may borrow with interest up to 15% of its required emission allowances from EPA from a future "source year" no more than 5 years in the future. (2) The Carbon Market Efficiency Board monitors the market and can implement cost-relief measures if the price of allowances threatens to hurt the economy. The Board may: (a) increase the amount of emission allowances that covered entities may borrow from future years, (b) expand the period during which a covered entity may repay EPA for an emission allowance, (c) increase the quantity of foreign offset allowances permitted, and (d) increase the quantity of offset allowances permitted.	§§ 521, 522 - 523, 421- 423, & 511-513

[7] World Resources Institute, Summary of S. 2191: Lieberman-Warner Climate Security Act of 2008 Manager's Substitute Amendment (May 23, 2008), http://climateprogress.org/wp-content/uploads/2008/05/wri-summary-of-s-2191-substitute-5-23-08-final.pdf.

	(3) In December of each year (2012-2027), EPA shall auction off emission allowances at a "Cost-Containment Auction." The President is to set the initial price in 2012 at no lower than $22 and no higher than $30 and increase it yearly (sum of the annual rate of inflation and 1.05).	
Distribution of Other Allowances	• 11% to carbon-intensive manufacturing facilities (declining, phased out in 2030) • 18% to fossil fuel-fired electricity generators (declining, phased out in 2030) • 2% (until 2017, then 1% until 2030) to U.S. petroleum-based liquid or gaseous fuel manufacturing • 0.75% to covered natural gas processors (until 2030). • 4% (increasing until to 10% through 2050) to states that have demonstrated leadership in GHG emission reductions and energy efficiency • 5% (declining, phased out in 2025) to covered entities and other parties for early actions (since Jan. 1, 1994 to reduce GHG emissions	§§ 541, 551, 561, 571, 614 & 701-705
Auction Revenue Uses	Auction revenue will be used in part to: (1) achieve additional GHG emission reductions from entities that are not "covered entities;" and (2) fund the following: • Climate Change Consumer Assistance Fund; • Climate Change Worker Training and Assistance Fund and assist low- and middle-income residential consumers and small business commercial consumers; • Transportation Sector Emission Reduction Fund; • Energy Efficiency and Conservation Block Grant Program; • Tribal Climate Change Assistance Fund; • State Wildlife Adaptation Fund; • Low-and-Zero-Carbon Electricity; • Carbon Capture and Sequestration Technology Fund; • Climate Change Transportation Technology Fund; • Director of DOE's Advanced Research Projects Agency Fund; • BLM and USFS Emergency Fire Fighting Funds; • Federal Wildlife Adaptation Fund; • State Wildlife Adaptation Fund; and • Deficit Reduction Fund.	§§ 527, 532, 583, 611,613,625, 631, 902, 1003, 1113, 1211-1212, 1231, 1331, & 1403
International Competitiveness	(1) President to enter into international negotiations to encourage foreign countries to enter into binding international agreements limiting GHG emissions. (2) Creates a bipartisan International Climate Change Commission to determine whether a foreign country is taking comparable actions to reduce GHG emissions. Importers must submit allowances for foreign goods from countries without comparable emissions limits.	§§ 1303-1307

Senate legislation still faces many hurdles. On June 6, 2008, a group of 10 moderate Democratic Senators sent Senate Majority Leader Reid a letter highlighting several issues they believe S.3036 does not yet resolve adequately, such as cost containment, R&D investment, protection for working families from rising energy prices, international competitiveness, the role of agriculture and forestry in sequestration, and the role of state regulations and federal preemption.[8] For example, the group of 10 believes the bill must explicitly preempt all state programs, but S.3036 allows existing state GHG programs to continue (unless less stringent) and would offer such states more than $560 million in free carbon allowances to transition into the federal program.

The White House issued a Statement of Administration Position describing S.3036 as "the wrong way" to address climate change and cited numerous problems, particularly the higher costs that consumers would have to pay.[9] Sen. Jon Kyl (R-AZ) described the bill as a "regressive stealth tax" because businesses would pass most of the $900 billion in costs to low and middle-income working families.[10] Sen. James Inhofe (R-OK) described the bill's June failure with a play on Al Gore's movie title: "When faced with the inconvenient truth of the bill's impact on skyrocketing gas prices, very few Senators were willing to even debate this bill."[11]

Industry groups were split on the bill. The U.S. Chamber of Commerce, the National Association of Manufacturers, the Farm Bureau, and the United Auto Workers, among others, opposed S.3036. Supporting the bill were other business and trade union groups, including many of the corporate members of the U.S. Climate Action Partnership (US CAP), as well as the Natural Resources Defense Council and Environmental Defense.

B. The House. The House continues to debate climate change issues and discuss potential legislation but has not yet coalesced around a particular approach or bill. House Energy and Commerce Committee Chairman John Dingell (D-MI) and Subcommittee Chair Rick Boucher (D-VA) succeeded in retaining primary jurisdiction over the issue after an early tussle with Speaker Pelosi. In addition to holding hearings (and initially suggesting that a carbon tax might be preferable to cap-and-trade), they have issued several white papers exploring a range of legislative options on:

> the basic design and key principles of a regulatory program, [including] different potential mechanisms for limiting the cost and maximizing the efficiency of a mandatory, comprehensive climate change program to reduce greenhouse gas emissions by 60 to 80 percent by 2050, ... key factors that should be considered in determining what roles are appropriate for each level of government, ... potential domestic legislative provisions that could encourage developing countries to curb their emissions of greenhouse gases, ... and the economic sectors and activities that are

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[8] http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b3685513-6c10-4ad7-b3ba-da04fe48e52e.

[9] http://www.whitehouse.gov/omb/legislative/sap/110-2/saps3036-s.pdf.

[10] http://www.wmicentral.com/site/news.cfm?BRD=2264&dept_id=581907&newsid=19777106&PAG=461&rfi=9.

[11] http://www.washingtonpost.com/wp-dyn/content/article/2008/06/06/AR2008060600333.html.

directly emitting greenhouse gases (GHGs) and how those emissions could be included in a cap-and-trade program.[12]

In addition, Speaker Pelosi has created a Select Committee on Energy Independence and Global Warming, which Rep. Ed Markey (D-MA) chairs. Although Markey's committee has no official jurisdiction on climate bills, he nevertheless introduced on June 4, 2008, a broad cap-and trade bill, the Investing in Climate Action and Protection Act, H.R. 6186.[13] The iCAP bill takes a different approach than S.3036 on several key issues. For example, it would require emission cuts of 85% by 2050, instead of 65%. It would auction almost all GHG emission allowances from the outset, instead of dividing a portion of them among major emitters and fossil fuel consumers, and the vast majority of auction revenues would be distributed to low- and middle-income American taxpayers. All new coal-fired power plants starting construction after January 2009 would need to capture and store 85% of their GHG emissions. And, developing countries that make comparable emission reductions to the U.S. would become eligible for significant new technology and deforestation funding. Below is a summary of H.R. 6186's key provisions:

Topic	Explanation	Bill Reference[14]
Covered Entities	(1) Any power generation or industrial facility that emits more than 10,000 tons of CO_2 or its GHG equivalent in a year. (2) Any facility that produces or imports petroleum or coal-based liquid or gaseous fuel whose combustion will annually emit more than 10,000 tons of CO_2 or its equivalent per year. (3) Any local distribution company delivering natural gas that when combusted will annually emit more than 10,000 tons of CO_2 or its equivalent. (4) A facility that annually produces for sale or imports more than 10,000 tons of CO_2 or the equivalent of hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, nitrogen trifluoride, or any other fluorinated gas the EPA designates as a GHG. (S.3036 does not include nitrogen trifluoride or allow the Administrator to list additional GHGs.) (5) A site at which CO_2 is sequestered on a commercial scale.	§ 700
Emission Reporting	All "affected facilities" (covered entities, other entities designated by the EPA, and any motor vehicle fleet emitting more than 10,000 tons of CO_2 or its equivalent) must submit annual and quarterly emissions data compliant with EPA reporting requirements for inclusion in the Federal Greenhouse Gas Registry.	§§ 701-707
Annual Cap on Emission Allowances	Covered entities must obtain emissions allowances from a pool that is capped in 2012 at 2005 levels (6,098 metric tons of CO_2 equivalents, higher than the S.3036 cap). The	§§ 711-712

[12] http://energycommerce.house.gov/Climate_Change/index.shtml.
[13] http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6186:.
[14] Note that all of these topics are covered in section 101 of iCAP. The bill references in this column refer to where iCAP proposes to codify these topics in the Clean Air Act.

	allowance pool decreases each year, resulting in a 20% reduction below 2005 levels by 2020 and an 85% reduction by 2050.	
Allowance Obligations	Beginning in 2012, covered entities must submit sufficient emission allowances, offsets, or GHG destruction credits no later than 90 days after the end of the calendar year.	§ 712
Allocation Scheme/ Auctions	(1) 94% of allowances will be auctioned and 6% will be distributed as transitional assistance (2012-2019). By 2020, all allowances will be auctioned. (2) 6% of allowances (2012-2019) for transitional assistance to manufacturers of "trade-exposed primary goods" (manufactured products sold in bulk for further processing that are likely to be significantly disadvantaged in internationally competitive markets by bearing allowance costs).	§§ 721, 723
Use of Auction Revenue	Nearly half of auction funds are to be distributed as tax credits to low- and middle-income energy consumers. The remainder of the auction proceeds go the following funds: 1) Investing in Climate Action and Protection Act Management Fund, 2) Climate Change Education and Outreach Fund, 3) Climate Trust Rebate Fund, 4) Low-Carbon Technology Fund, 5) National Energy Efficiency Fund, 6) Agriculture and Forestry Carbon Fund, 7) Climate Change Worker Transition Fund, 8) National Climate Change Adaptation Fund, 9) Natural Resource Conservation Fund, 10) International Forest Protection Fund, 11) International Clean Technology Fund, and 12) International Climate Change Adaptation Fund.	§ 722
Offset Allowances	Domestic: Up to 15% of a covered entity's compliance obligation may be satisfied with offset credits. International: Up to another 15% of allowances submitted may be international allowances or international offset credits.	§ 712(c)
Controlling Costs	Covered entity may borrow emissions allowances for up to 15% of its obligation; must be repaid in 5 years with interest.	§ 733
Early Action Recognition	None	
International Competitiveness	Covered list countries (those that do not regulate GHGs and are not among the least developed countries or low emitters) must submit international reserve allowances to cover trade-exposed primary goods exported to the U.S.	§ 765

Another legislative contender is the recently introduced Climate Market Auction Trust and Trade Emissions Reduction System, H.R. 6316, filed by Reps. Doggett (D-TX), Blumenauer (D-OR), and Van Hollen (D-MD).[15] The Climate MATTERS bill would set a 2050 emissions limit of 80% below 1990 levels and implement a cap-and-trade system. Interestingly, the bill would give the Treasury Department primary authority, instead of the Environmental Protection Agency, for implementing key program elements. That means that the House Ways and Means Committee, rather than the Energy and

[15] http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6316:.

Commerce Committee, would have jurisdiction over the bill, which could "dramatically alter expectations for how the climate issue will wind its way through Congress."[16]

C. Presidential Candidates. Presumptive presidential nominees Senators John McCain and Barack Obama both have proposed cap-and-trade plans to curb GHG gas emissions.[17] Rep. Boucher recently stated that regardless of who wins the presidential election, "either one will send to the U.S. Congress an aggressive cap-and-trade-bill within the first months of their administration."[18]

Sen. McCain broke with most Republican leaders several years ago by stating that he believes climate change is real and that the U.S. must address it. He joined Sen. Lieberman in sponsoring the Climate Stewardship Act of 2003.[19] Sen. McCain believes it was correct for the U.S. not to agree to the Kyoto Treaty but that a global agreement and effort is needed to reduce emissions. He has long supported using advanced technologies, such as nuclear energy, and reducing dependence on foreign suppliers of energy.

In a speech this spring, Sen. McCain proposed a cap-and-trade system that would gradually cut GHG emissions 66% by 2050 from 2005 levels, or 60% below 1990 levels.[20] McCain's plan would encompass electric power, transportation fuels, commercial business, and industrial business – sectors responsible for almost 90% of all U.S. man-made GHG emissions. Emission allowances would initially be given away for free but eventually would be auctioned to support the development of advanced technologies. A portion of the auction proceeds would support research and commercialization challenges, including carbon capture, sequestration, nuclear power, and battery development.

Sen. Obama supports a similar but more stringent approach. He co-sponsored Sen. Sanders' (D-VT) Global Warming Pollution Reduction Act of 2007,[21] which would require the U.S. to reduce its emissions by 80% below 1990 levels by 2050. In his campaign platform, Sen. Obama proposes to require that all pollution credits be auctioned. Some of the revenue generated by auctioning allowances would support the development of clean energy, energy efficiency improvements, and transition costs for consumers and workers.[22]

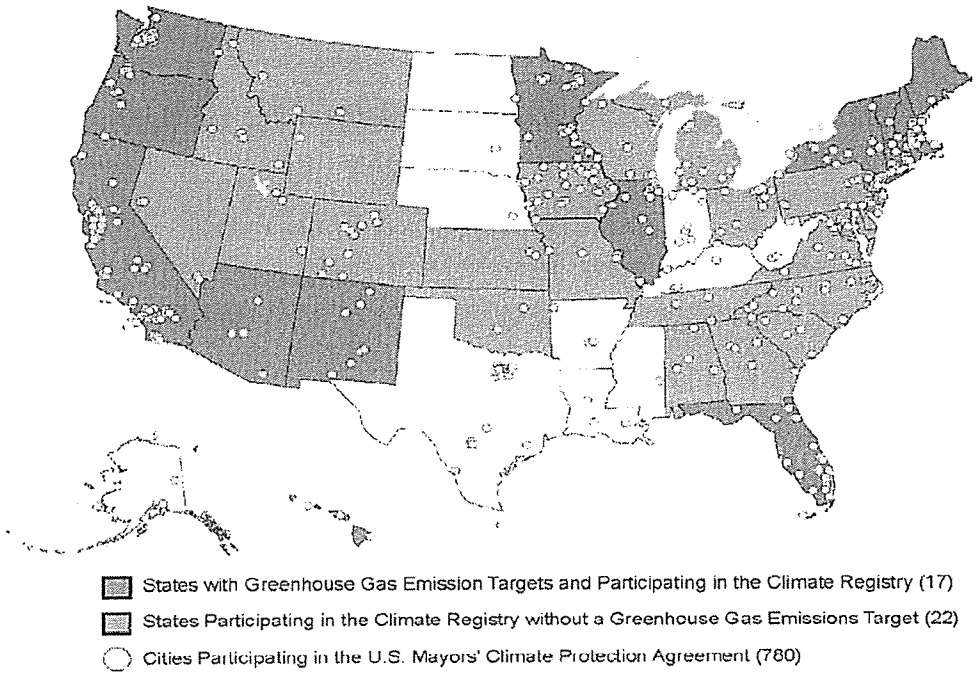
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[16] http://www.eenews.net/EEDaily/climate_change/2008/06/17/3.
[17] Both campaigns responded to the Bush Administration's July 11, 2008, issuance of the climate change Advanced Notice of Proposed Rulemaking (http://epa.gov/climatechange/anpr.html) with comments about how Congress is better suited for tackling climate change than EPA under the existing Clean Air Act. http://www.eenews.net/Greenwire/2008/07/15/3.
[18] http://www.eenews.net/EEDaily/climate_change/2008/06/16/7.
[19] http://thomas.loc.gov/cgi-bin/query/D?c108:1:./temp/~c108RD4zXG::.
[20] http://www.johnmccain.com/Informing/Issues/da151a1c-733a-4dc1-9cd3-f9ca5caba1de.htm.
[21] http://thomas.loc.gov/cgi-bin/query/z?c110:S.309:.
[22] http://www.barackobama.com/issues/energy/.

II. State Legislation and Regional Efforts

One of the key drivers for the recent momentum for a federal climate bill has been the passage by several states of their own legislation and policies limiting GHG emissions. Several governors also have issued executive orders creating climate change study task forces and developing action plans.[23] And three regions have formed state partnerships to work together on limiting greenhouse gas emissions. The chart below illustrates some of the state work underway, as of February 2008.[24] The paper outlines the major initiatives.

State and Local Participation in Selected Climate Change Initiatives



A. California. California has taken the lead by passing A.B. 32, the California Global Warming Solutions Act of 2006.[25] Under the bill, the California Air Resources Board (CARB) has established a statewide GHG emissions cap that would cut emissions to 1990 levels by 2020.[26] In December 2007, CARB approved the 2020 cap and the declining limits necessary to meet that target. On June 26, 2008, CARB issued its draft scoping plan outlining how it will make the reductions across approximately 85% of the state's man-made GHG emissions, including through increasing vehicle and fuel efficiencies, increasing appliance and building efficiencies, requiring that one-third of the state's power come from renewable sources, and developing a California cap-and-trade program that links with other western states to create a regional market system (see

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[23] See http://www.pewclimate.org/what_s_being_done/in_the_states/action_plan_map.cfm.
[24] House Energy and Commerce Committee, White Paper: Appropriate Roles for Different Levels of Government, Feb. 25, 2008, http://energycommerce.house.gov/Climate_Change/white%20paper%20st-lcl%20roles%20final%202-22.pdf.
[25] http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.html.
[26] In addition, Executive Order S-3-05 requires an 80% reduction from 1990 levels by 2050. http://gov.ca.gov/executive-order/1861/.

the Western Climate Initiative discussion below).[27] CARB is to issue the final implementing rules for its cap-and-trade program by January 2011.

B. Regional Groups. Three groups of states also have formed regional climate change partnerships.

1. Northeast. The first region was the Northeastern states, which formed the Regional Greenhouse Gas Initiative (RGGI).[28] Their focus is on creating a cap-and-trade program to reduce CO_2 emissions from power plants. Under RGGI, the 10 participating states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) have set the goal of capping CO_2 emissions from power plants at approximately 2005 levels through 2014. Thereafter, RGGI states agree to reduce emissions incrementally over a four-year period so that emissions will be 10 % below the initial cap by the end of 2018. The first regional emissions quarterly auction is scheduled for September 25, 2008. RGGI's regional emissions cap then will take effect on January 1, 2009. Participating states are to regulate GHG emissions from affected power plants under each state's emissions budget.[29]

RGGI stipulates that any fossil fuel-fired unit serving an electric generator with a nameplate capacity of 25 megawatts or greater will be subject to the cap-and-trade emissions program. If a source is subject to RGGI requirements, it must have enough allowances to cover its emissions at the end of each three-year compliance period. If a source does not have enough allowances to cover its emissions, it can reduce its emissions, buy CO_2 allowances on the market, or generate credits through an emissions offset project.[30]

Currently, states participating in RGGI are drafting, debating, and enacting legislation and regulations that will implement RGGI next year. For example, on June 30, 2008, Delaware enacted SB 263, which authorizes its state environmental agency to adopt the regulations needed to participate in RGGI and directs where the revenue from auction allowances is to be distributed.[31] Massachusetts Governor Patrick signed into law on July 2, 2008, the Green Communities Act, a broad energy bill that authorizes the auction of all allowances issued under RGGI.[32] The other RGGI states have proposed or adopted legislation or regulations to begin implementing the RGGI initiatives.[33]

2. West. The second regional effort is the Western Climate Initiative (WCI), which includes 7 states and 2 Canadian provinces: Arizona, California, Montana, New Mexico, Oregon, Utah, Washington, British Columbia, and Manitoba.[34] Collectively, they have agreed to cut GHG emissions to 15% below 2005 levels by 2020.

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[27] http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm.
[28] http://www.rggi.org/.
[29] http://www.rggi.org/docs/program_summary_10_07.pdf.
[30] Id.
[31] http://legis.delaware.gov/LIS/lis144.nsf/vwLegislation/SB+263/$file/legis.html?open
[32] http://www.mass.gov/legis/bills/senate/185/st02/st02768.htm.
[33] http://www.pewclimate.org/what_s_being_done/in_the_states/rggi.
[34] http://www.westernclimateinitiative.org/.

By September 2008, the WCI hopes to complete the design of its market-based mechanism, which may include provisions for offset projects. In addition to California's actions, Washington recently has passed legislation[35] and New Mexico has issued a rule for reporting GHG emissions.[36]

3. Midwest. The third regional effort, the Midwestern Greenhouse Gas Reduction Accord, was announced in November 2007.[37] Governors of 9 Midwestern states (Wisconsin, Minnesota, Illinois, Indiana (as an observer), Iowa, Michigan, Kansas, Ohio (as an observer), South Dakota (as an observer)) and the Premier of Manitoba[38] signed an agreement to establish GHG reduction targets, develop a cap-and-trade mechanism, and establish a system for tracking and crediting entities that reduce GHG emissions. These states are in the early stages of developing the needed implementing legislation and programs.

III. Cities

Interestingly, cities (not traditionally viewed as national policymakers) also are playing a critical role in developing climate change policy and creating momentum for national legislation. The driving force has been the U.S. Mayors Climate Protection Agreement, a resolution proposed in 2005 by Seattle's Mayor Greg Nickels and several other mayors to start taking action. As of June 5, 2008, more than 850 mayors had signed the U.S. Mayors Climate Protection Agreement, including more than 20 Texas cities.[39]

Under the Agreement, participating cities commit to take three actions:

- Strive to meet or beat the Kyoto Protocol targets in their own communities, through actions such as anti-sprawl land-use policies, urban forest restoration projects, and public information campaigns;
- Urge state governments and the federal government to enact policies and programs to meet or beat the GHG emission reduction target suggested for the U.S. in the Kyoto Protocol (7% reduction from 1990 levels by 2012); and
- Urge the U.S. Congress to pass GHG reduction legislation that would establish a national cap-and-trade system.

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[35] SB 6001 calls for reducing GHG emission levels to 1990 levels by 2020, 25% below 1990 levels by 2035, and 50% below 1990 levels by 2050. http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Passed%20Legislature/6001-S.PL.pdf (note: Governor Gregoire vetoed section 6 of the bill).

[36] http://www.nmenv.state.nm.us/aqb/GHG/ghgrr_index.html.

[37] http://www.midwesternaccord.org/.

[38] Yes, Manitoba is a member of both the western and the midwestern groups.

[39] http://www.usmayors.org/climateprotection/.

This group of mayors supported the Lieberman-Warner substitute, S.3036. The mayors are particularly supportive of the bill's Energy Efficiency and Conservation Block Grant program for funding energy efficiency and renewable energy development programs.[40]

IV. Texas

Although the Texas Legislature has not passed (and is very unlikely to any time soon) its own GHG cap-and-trade program, it has recently become more active on the issue of climate change. The number of bills on the topic that the Legislature considered jumped significantly from the 2005 session to the 2007 session, with bills on cap-and-trade and vehicle fuel economy receiving a hearing. And several carbon-related bills actually passed, including:

- SB 1461 strengthens Texas' bid for the Department of Energy's FutureGen, a low-carbon power plant and sequestration project (Texas did not win, but the bill's incentives could be used for FutureGen-like projects);[41]
- HB 3732 offers incentives for "advanced clean energy projects" that render CO_2 capable of capture, sequestration, or abatement, and offers production tax breaks for sequestering CO_2 for enhanced oil recovery (if TCEQ or the Railroad Commission approve);[42]
- HB 1967 promotes carbon gasification by regulating as a common carrier Texas pipelines that transport feedstock for and products of carbon gasification (the benefit is the authority to use eminent domain);[43]
- HB 3693 and SB 12 promote increased energy efficiency and renewable energy generation;[44] and
- SB 1762 requires the Water Development Board to study the impact of climate change on surface water supplies from the Rio Grande.45

In addition, in preparation for the upcoming 2009 Texas legislative session, House Speaker Craddick created a Select Committee on Electric Generation Capacity and Environmental Effects and gave it the following charge: "The environmental effects of the existing electric generating facilities also will be examined, as well as the effects on global warming and climate change."46

Conclusion: The climate change campaign is in full swing. The U.S. Congress, many states, and hundreds of cities are actively developing GHG emission reduction policies and laws. And their impact is already being felt in Texas.

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[40] United States Conference of Mayors press release, "Mayors Urge Senate to Pass Climate Security Act," May 22, 2008; see S.3036, §613, http://lieberman.senate.gov/documents/amendment.pdf.
[41] http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/SB01461F.pdf.
[42] http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03732F.pdf.
[43] http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB01967F.pdf.
[44] http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03693F.pdf.
[45] http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/SB01762F.pdf.
[46] http://www.house.state.tx.us/committees/proclamations/ProclamationElectric.pdf.

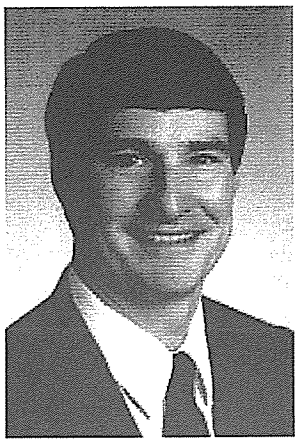
Biography – Jennifer Clymer

Jennifer Clymer is a Climate Change Program Specialist with the City of Austin's Climate Protection Program. Mrs. Clymer is helping to move the City of Austin toward its goal of carbon neutrality by 2020 and developing a plan to engage the Austin community to reduce its collective carbon footprint. In addition to building voluntary climate protection initiatives, Mrs. Clymer monitors federal climate change legislation for future compliance requirements and local government climate protection funding mechanisms. Her primary responsibility is to ensure Austin Energy and all City departments consider the current and future carbon impact of their operations.

Prior to joining Austin Energy, Mrs. Clymer was an air quality consultant with ICF International in Washington, DC and San Francisco. She received a B.A. in Environmental Sciences and Environmental Management from The University of Virginia and anticipates completion of her M.P.Aff. from the LBJ School of Public Affairs at The University of Texas in May 2009.

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Partner

EXPERIENCE

Eddie Lewis, who joined the firm in 1993, is a partner in Fulbright & Jaworski L.L.P.'s Houston office and Co-Chair of the Climate Change Practice Group. He focuses his practice in the environmental law area, including environmental litigation, enforcement, compliance counseling, remediation, permitting, auditing, and transactional matters. Prior to joining the firm, Eddie worked as a chemical engineer. His practice frequently involves legal issues in which complex technical issues are at the forefront.

PROFESSIONAL HONORS

- Selected by *Chambers & Partners* as one of the leading environmental attorneys in Texas
- Named one of Houston's top environmental attorneys by *H Texas* magazine
- Named one of *The Best Lawyers in America* for environmental law
- *Who's Who in America*
- *Who's Who in American Law*
- "Rising Star," *Texas Monthly* magazine

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

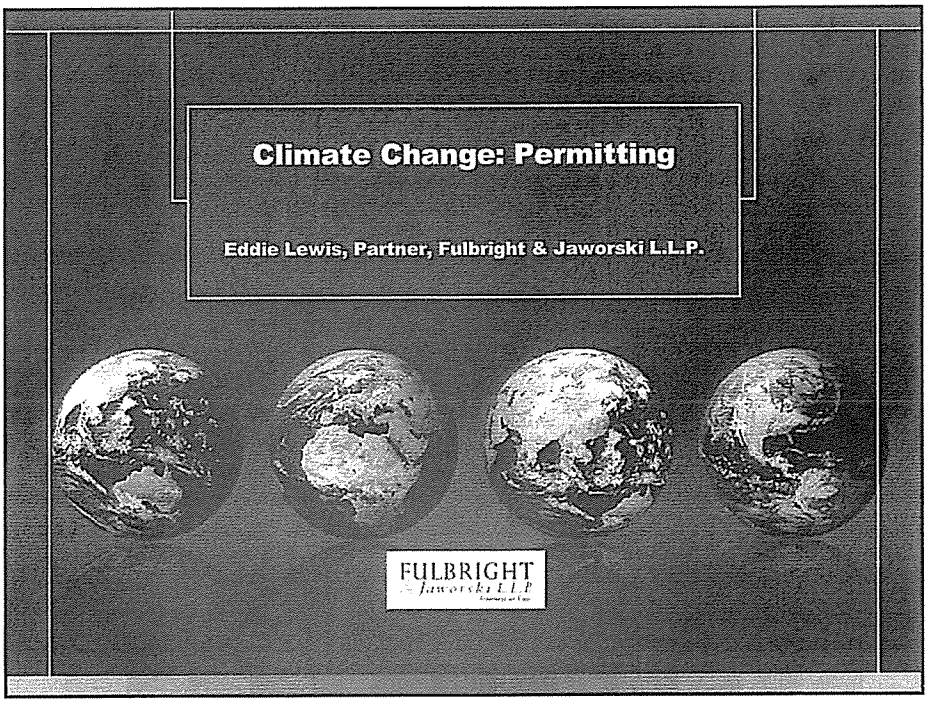
- Houston-Galveston Area Emission Reduction Credit Organization, Director
- Houston Bar Association - Environmental Law Section, former Director
- American Bar Association - Environmental, Energy and Resources Section
- State Bar of Texas - Environmental Law Section

PUBLICATIONS

- Contributing author, Texas Environmental Law Handbook, 3rd, 4th, and 5th editions
- "Supreme Court Issues Decision on Climate Change: Its Legal Bases and Implications," EnergyLaw 360, April 2007
- "The Evolution of Climate Change Litigation," CLE International (Sept. 2007)

EDUCATIONAL BACKGROUND

1992 -J.D., with honors, The University of Texas School of Law
1988 -B.S., Chemical Engineering, Texas A&M University



Introduction

- Climate Change Issues Affecting Permitting
  - Massachusetts v. EPA – the Supreme Court Weighs In
  - EPA Advance Notice of Proposed Rulemaking – EPA's Response
  - Challenges to EPA rulemaking
  - Challenges to permitting
  - Challenges to other government actions

Massachusetts v. EPA

Massachusetts v. EPA

- Petition for rulemaking filed in 1999 asking EPA to regulate greenhouse gasses (GHGs) from new motor vehicles under the Clean Air Act (CAA).
- EPA denied in 2003 claiming:
  - no authority to regulate GHG emissions;
  - GHGs are not pollutants within the meaning of the CAA;
  - Even if CAA provided authority to regulate, EPA would not because would be neither effective nor appropriate
- Denial appealed to the D.C. Circuit Court of Appeals and then the Supreme Court

Massachusetts v. EPA

- Supreme Court held:
  - Massachusetts had standing to bring the action;
  - GHGs are air pollutants; and
  - EPA has authority to regulate emissions of GHGs from new motor vehicles under Section 202 of the CAA and can avoid regulation only if:
    - EPA determines GHGs do not contribute to climate change
    - EPA provides "some reasonable explanation as to why it cannot or will not exercise its discretion"
- Implications of the Decision

EPA Advanced Notice of Proposed Rulemaking – GHG Regulation

ANPR

- July 11, 2008 – EPA Administrator Signs ANPR re Regulating GHGs under the Clean Air Act
- Invites public comments
- Preface: EPA Administrator Johnson calls the Clean Air Act "ill-suited" for responding to the complexities of climate change issues
- July 11 press call – Johnson asks Congress to develop comprehensive climate change legislation, but EPA would not offer a legislative proposal.

ANPR

- Key Issues for Discussion and Comment
  - Provisions and programs in the CAA and advantages and disadvantages of regulating GHGs under those programs
  - How a decision to regulate GHGs under one section of the CAA could or would lead to regulation under others
  - Issues for Congress to consider
  - Scientific information relevant to an endangerment analysis
  - Potential regulatory approaches and technologies for reducing GHG emissions
- Federal Agency Critiques of the Proposed Rulemaking.
- 120 day comment period

Challenges to EPA Rulemaking

Challenges to EPA Rulemaking

- New Source Performance Standards (NSPS) – Petroleum Refineries
  - May 14, 2007 - EPA issued a proposed rule revising the NSPS for petroleum refineries (Part 60, Subpart J).
    - No performance standards for GHGs included.
  - August 27, 2007 - Environmental groups submit comments challenging the rulemaking on the basis that rule lacks emission limits for CO_2 and CH_4 emissions.
  - April 30, 2008 - EPA finalized the proposed rule without including GHG emission limits
  - June 24, 2008 – EPA publishes final amended rule.

Challenges to EPA Rulemaking

- NSPS – Petroleum Refineries
  - EPA's reasons for not covering GHGs:
    - EPA only required to address air pollutants already regulated under the previous NSPS;
    - Promulgating NSPS for GHGS would potentially mandate regulation for numerous other source categories; and
    - More appropriate to consider GHGs in the ANPR.
  - Expect court challenge from both industry (for lack of comment period for substantive amendments) and environmental groups (re GHG issues).

Challenges to EPA Rulemaking

- NSPS - Electric Utility and Industrial Steam Generating Units
  - EPA published revised rules (Part 60 Subparts Da, Db, and Dc) that did not include GHG emissions standards for regulated sources.
  - Lawsuit filed challenging the lack of GHG emission standards (New York v. EPA, No. 06-1322 (D.C. Circuit)).
  - Following Mass. v. EPA decision, matter remanded to EPA for further proceedings.
  - Action pending.

Challenges to EPA Rulemaking

- NSPS – Portland Cement Plants
  - June 16, 2008 - EPA proposed amendments to the current NSPS for Portland Cement Plants revising emission limits affected facilities and including additional testing and monitoring requirements.
  - Comments due August 15, 2008.
  - NSPS does not include GHG emission regulations because EPA decided to consider GHG regulation under the Clean Air Act through the ANPR.

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Challenges to EPA Rulemaking

- Other Challenges
  - Nonroad vehicles
  - Ships
  - Aircraft

Permit Challenges

Permit Challenges – Christian County

- Christian County Generation, LLC, Taylorville Energy Center
  - Facility granted PSD permit for integrated gasification combined cycle coal-fired power plant in June 2007.
  - July 9, 2007 – Sierra Club appealed to the Environmental Appeals Board (EAB) to cancel the permit because permit review did not include the Best Available Control Technology (BACT) analysis for GHG emissions.
  - January 28, 2008 – EAB dismisses the appeal on procedural grounds, holding that Sierra Club should have raised the issue during the original permit comment period.

Permit Challenges – Chattahoochee

- *Friends of the Chattahoochee, Inc. et al v. EPA & Georgia Department of Natural Resources*, No. 2008CV156398, in the Superior Court of Fulton County.
  - Georgia approved a permit for a new 1200-MW power plant on the banks of the Chattahoochee river.
  - Plaintiffs challenged the permit on a number of grounds, claiming that the plant was not the most technologically-advanced and clean-burning that could have been built.

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Permit Challenges – Chattahoochee

- The Administrative Law Judge (ALJ) upheld the permit on Jan. 11, 2008, and plaintiffs filed a petition for review in Fulton County Superior Court on Feb. 11, 2008.
- Plaintiffs primary complaint relates to the 9 million tons of CO_2 allegedly emitted annually by the proposed plant.
- June 30, 2008 – Georgia Superior Court reversed the decision of the ALJ, vacated the decision, and remanded for further proceedings.

Permit Challenges – Chattahoochee

- Basis for Superior Court Decision
  - CO_2 is a pollutant based on the Mass. v. EPA decision
  - CO_2 is subject to regulation under the Clean Air Act due to regulations which impose certain monitoring requirements on CO_2 emissions.
  - Therefore, CO_2 emissions must be considered as part of a PSD review.
  - Also, determined that BACT required consideration of an integrated gasification combined cycle technology that would have allowed the power plant to capture its CO_2.
- First time a U.S. court held CO_2 emissions part of the CAA permitting process.
- Expect an appeal.

Permit Challenges – Deseret Power

- Deseret Power Electric Cooperative: EAB granted review of an air permit for expansion of coal-fired power plant on the basis that no BACT required for CO2 emissions limit.
- Timeline
  - August 30, 2007 – permit issued for construction of new waste-coal-fired electric generating unit.
  - October 1, 2007 – Sierra Club files a petition requesting the EAB review the permit issuance b/c does not include BACT for CO_2.
  - November 2, 2007 – Region filed a response to Sierra Club's petition for review.
  - November 16, 2007 – Deseret filed a motion requesting authorization to file a brief in response to Sierra Club's petition.
  - November 21, 2007 – request granted, briefs filed.
  - May 29, 2008 – oral arguments held.

Permit Challenges – Deseret Power

- EAB Ordered further briefing (June 16, 2008):
  - 1 – CO2 monitoring requirement enforceability under the Clean Air Act or any other law
  - 2 – whether a facility with the potential to emit threshold quantities of carbon dioxide is a major facility that requires a PSD permit
- EPA's brief is due August 8, 2008.
- Any responsive briefs are due September 12, 2008.
- The Final Order in *Friends of the Chattahoochee, Inc. v. Georgia Dep't of Environment* was filed with the court.

Permit Challenges – Sunflower Electric

- Sunflower Electric Power
  - In October 2007, Kansas Department of Health and the Environment (KDHE) denied Sunflower Electric Power a permit to expand an existing plant with two new coal-fired power plants.
  - KDHE denied the permit on the basis that it could not ignore the potential impact of the carbon dioxide emissions of the proposed plants.
  - Sunflower filed an administrative appeal with KDHE, filed a number of lawsuits, and appealed to the Kansas legislature to pass bills preventing denial of the permit.

Permit Challenges – Sunflower Electric

- Sunflower Electric Power
  - Despite clear backing from the state legislature, the governor vetoed legislation allowing the project to go forward twice.
  - The legislative session ended before another veto override could be attempted.
  - Kansas judge in Finney County dismissed lawsuits based on lack of jurisdiction and sent them to the Supreme Court.

Other Permit Challenges

- Many challenges (just to name a few):
  - Duke Energy / Cliffside Steam Station expansion
  - Interstate Power & Light / Marshalltown
  - Big Stone II power plant / Minnesota
- Creative Solutions
  - NuCoastal Power Corp / Texas
    - Agreed to offset carbon emissions by funding energy efficiency programs and installation of carbon sequestration technology as it becomes available.
- Abandoned Projects

Other Agency Action Challenges

BLM Oil and Gas Lease Protests

- Environmental groups have challenged lease sales in Colorado, Montana, New Mexico, North Dakota and Wyoming over greenhouse gas emissions
- Legal bases
  - NEPA
  - DOI 2001 Order

BLM Oil and Gas Lease Protests

- Requested relief – EA would include:
  - Quantify past, present, and reasonably foreseeable GHG emissions as a result of the E&P activities
  - Identify, consider and adopt a GHG emissions limit or reduction objective for BLM-authorized E&P activities
  - Identify, consider, and adopt management measures to reduce GHG emissions
  - Track and monitor GHG emissions from BLM leases.
  - Consider how global warming and climate change impacts the environment, and whether such impacts warrant additional protection.

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BLM Oil and Gas Lease Protests

- New Mexico BLM office was the first to respond.
  - Challenge Denied
  - But BLM will craft EA to analyze potential emissions from development on the leases, after they are issued.
- Decisions on similar protests filed by environmental groups over lease sales in Colorado, Montana and Wyoming in recent months are still pending.

Conclusion

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Joe Kordzi

Joe Kordzi holds science and engineering degrees and is a registered professional engineer in the State of Texas. He has worked at the EPA for over 19 years in various capacities in the water and air programs. He currently works in the air planning program as the particulate matter coordinator, the regional haze coordinator, and more recently on climate change issues."

LAURA W. FIFFICK

Ms. Fiffick is the Director of the Office of Environmental Quality for the City of Dallas. The Office of Environmental Quality provides environmental stewardship and sustainability assistance to the City of Dallas and participates in a variety of business and community environmental events. Under the direction of Ms. Fiffick, the City of Dallas achieved ISO 14001 certification across its major operations, an international recognition for environmental management. Ms. Fiffick also works collaboratively with federal and state agencies on air quality issues facing the North Texas region. Prior to the City of Dallas, Ms. Fiffick was the Environmental Affairs Manager for the Port of Houston Authority, where she was responsible for environmental and industrial hygiene compliance. Ms. Fiffick led the Port Authority through ISO 14001 certification and was extensively involved with maritime air quality issues.

Ms Fiffick received a Bachelor of Science degree in Geology from Texas A&M University and a Masters of Science in Industrial Hygiene from the University of Houston at Clear Lake. She attended law school at South Texas College of Law. She is also a Certified Safety Professional and a Registered Environmental Professional.

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Mr. Brooke-Davidson is a shareholder in the firm's Austin, Texas office. He has practiced environmental law since 1985, when he received his law degree from The University of Texas School of Law. His practice has included all facets of environmental law: he has experience with all the significant federal environmental laws and their Texas counterparts; his practice has involved litigation, arbitration, enforcement, permitting, transactions, and counseling; he has worked with various industries including chemicals, energy, agriculture, manufacturing, and real estate; and he has practiced in government as well as in private firms. He was named as one of The Best Lawyers in America for 2008 in the field of environmental law.

Mr. Brooke-Davidson received his bachelor's and master's degrees from the Massachusetts Institute of Technology, where his graduate work focused on environmental technology and policy issues. Prior to attending law school, he worked as an environmental consultant, focusing on air quality matters. He graduated from The University of Texas School of Law with honors; he was also a member of the Order of the Coif and served as Editor-in-Chief of *The Review of Litigation*. He was selected into the Honors Attorney Program of the United States Department of Justice, where he served in the Environmental Enforcement Section for twelve years, first as trial attorney and then as a supervising attorney, receiving three Special Achievement Awards and a Special Commendation. He has been in private practice in Austin since 1997.

Mr. Brooke-Davidson is a member of the State Bar of Texas and is also admitted to practice in the United States District Courts for the Western, Northern, Southern, and Eastern Districts of Texas, the United States Courts of Appeal for the Fifth, Seventh, and Tenth Circuits, and the United States Patent and Trademark Office. He is a Vice Chair of the Environmental Enforcement and Crimes Committee of the American Bar Association Section of Environment, Energy, and Resources and is a member of the Litigation Section and the Administrative Law and Regulatory Practice Section of the American Bar Association. He is a member of the Environmental Law Institute, the Air and Waste Management Association, the State Bar of Texas Environmental Section, the Austin Bar Association Environmental Section, and the Houston Bar Association Environmental Section. He also serves on the Planning Committee for the Annual Texas Environmental Law Superconference.

Mr. Brooke-Davidson has given numerous presentations on a variety of environmental law topics and has authored several articles. His recent articles includes: "The Continuation Of The Continuing Violation Fight: Supreme Court Asked To Decide Split Among Circuits On Continuing Violation Controversy," American Bar Association, Section of Environment, Energy and Resources, Environmental Enforcement and Crimes Committee Newsletter (April 2008); "The Continuing Fight Over the Continuing Violation: Another Battle at Bull Run," American Bar Association, Section of Environment, Energy and Resources, Environmental Enforcement and Crimes Committee Newsletter (November 2007); "Working With Expert Witnesses," Seventeenth Annual Texas Environmental Superconference (August 5, 2005).

Matthew (Matt) Hale
Director, Office of Solid Waste (OSW)
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Mr. Hale is responsible for managing EPA's programs governing hazardous and solid waste under the Resource Conservation and Recovery Act (RCRA). Before becoming Office Director, Mr. Hale served as Deputy Office Director. Prior to being elevated to the front office, Mr. Hale served as the Director of the Permits and State Programs Division (PSPD) within OSW. There, he was responsible for implementing the RCRA program throughout the country. Before joining OSW, Mr. Hale was with EPA's Office of Toxic Substances, assigned to the new chemicals program. Mr. Hale holds an undergraduate degree from Harvard College and PhD in history from the University of Maryland.

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BIOGRAPHICAL INFORMATION

MARY REAGAN leads the firm's Environmental and Water Practice Group and is certified by the Texas Board of Legal Specialization in Administrative Law. She is experienced in virtually every aspect of environmental regulation, including solid and hazardous waste, air, and water quality. She routinely represents clients on permitting, enforcement and rule-making matters before the Texas Commission on Environmental Quality (TCEQ). Her practice also extends to other regulatory agencies, including the U.S. Environmental Protection Agency (EPA). Previously, she was principal legal counsel to the TCEQ predecessor agency on hazardous waste, injection wells, and Superfund. She also was an assistant attorney general in the Texas Attorney General's Office prior to entering private practice. Mary is listed in *The Best Lawyers in America* in the area of Environmental Law. She is a frequent speaker on environmental and administrative law.

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TABLE OF CONTENTS

I. Introduction.....1

II. Rule-making.....1

A. 2006 Revisions.....1

1. Surface Water Drainage.....3

2. Groundwater.....4

3. Laboratory QA/QC.....4

B. MSW Amendments and Modifications.....4

C. Computer Recycling.....6

III. Judicial Decisions.....7

Municipal Solid Waste

I. Introduction.

The handling, storage, processing, and disposal of municipal solid waste ("MSW")[1] is regulated in Texas by the Texas Commission on Environmental Quality ("TCEQ"). *See* TEX. HEALTH & SAFETY CODE CHAPTER 361 (WEST 2008). This article will discuss the most recent developments in MSW regulation in the areas of rule-making, contested case decisions, and judicial decisions.

II. Rule-making.

A. 2006 Revisions.

The TCEQ's substantive rules governing the design and operation of MSW facilities are contained in 30 TEX. ADMIN. CODE Chapter 330. In 2006, Chapter 330 underwent an extensive revision which established significant new design and operational requirements, effective March 27, 2006. *See* 31 *Tex. Reg.* 2502 (March 24, 2006). ("2006 Revisions"). Key changes made by the 2006 Revisions are summarized in the following Table 1:

TABLE I
CHAPTER 330 RULE SUMMARY

1. Applicability.	• Effective 20 days after filing with Secretary of State with consistent implementation dates of 180 days to submit permit modifications except for groundwater monitoring (2 years), which allows for more efficient application preparation and review. § 330.1(a). • Pending applications declared administratively complete prior to effective date have one year to submit modification requests except for two years for groundwater monitoring. §330.1(a)(2). • Pending applications not involving capacity increases filed by effective date or within 180 days thereof are subject to former rules § 330.1(a)(5).
2. Definition of Contaminated Water.	Defined as leachate, gas condensate, or water that has contacted waste. §330.3(36).
3. Web Posting.	Owner/operator required to provide copies of applications on the internet with link provided to the TCEQ. Internet posting limited to applications requiring public notice and is for informational purposes only. § 330.57(i).

[1] The term "municipal solid waste" is defined as solid waste resulting from or incidental to municipal, community, commercial, institutional, or recreational activities and includes garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and other solid waste other than industrial solid waste. TEX. HEALTH & SAFETY CODE § 361.603(20)(West 2008).

4. Mineral Interest Notice.	Notice to owners of mineral interests under the facility required based on appraisal district records as of the date application filed. § 330.59(c)(3).
5. FEMA Maps.	FEMA maps are prima facie evidence of floodplain location. § 330.63(c)(2)(B).
6. Recirculation of Leachate.	Leachate and gas condensate derived from a landfill unit may be recirculated into a unit at the same facility with a composite liner and leachate collection system or an alternative liner with leachate collection system. § 330.177.
7. Alternative Daily Cover (ADC)	Contaminated soils used for ADC may not exceed 1500 ppm total petroleum hydrocarbons (TPH) and greater concentration allowed if demonstration approved by agency. § 330.165(d).
8. Recycling Storage Requirements.	Waste and recycled materials shall be stored in an enclosed building, vessel, or container. § 330.209(c).
9. Quality Assurance/Quality Control (QA/QC).	Owners and operators must ensure that laboratories comply with minimum QA/QC standards for sampling and analysis. QA/QC standards adopted with sunset provision of January 1, 2009. § 330.261.
10. Surface Drainage.	• Final cover design shall provide for long-term erosional stability during **all phases** of landfill operation, closure, and post-closure care. • Erosional stability analysis limited to external embankment slopes, clarifying and limiting scope of stability analysis. § 330.305(d).
11. Expansion over Non-Subtitle D Cells.	Vertical expansion over pre-Subtitle D cells must include composite liner and leachate collection system or alternative liner. § 330.331.
12. Groundwater Monitoring.	• Monitoring well spacing shall not exceed 600 feet without site specific demonstration. § 330.403(a)(2). • Field filtering of samples prohibited; unfiltered samples required with 2-yr phase-in period. § 330.405(c). • Closed sites which stopped receiving waste prior to October 1993 are exempted from groundwater monitoring except as specified by permit. § 330.401(a).
13. Closure Cost Estimates.	Closure and post closure cost estimates based on the largest area requiring closure in the following year. § 330.503.
14. Buffer Zones.	Buffer zones for new landfills and expansions increased from 50 feet to 125-feet, which is measured from new waste placement, including vertical expansions. § 330.543(b).
15. Standard Air Permit	Effective September 1, 2006, new standard air permit created to authorize air emissions from MSW landfills and transfer stations meeting conditions listed in the rule. §§ 330.981-330.995.

16. Medical Waste	Compliance with revised medical waste rules required with 120 days of the effective date of the 2006 Revisions, including revised definition of "special waste" (§ 330.3(148) which excludes treated medical waste; expanded 75-mile definition of "on-site" for medical waste generators (§ 330.1205)); and revised disposal requirements applicable to treated sharps (§ 330.1219(b)(4)).

To effectuate compliance with certain new requirements, the 2006 Revisions require existing permittees or registrants to file applications for permit modifications demonstrating compliance. Owners and operators were required to apply for a permit modification to comply with new requirements for analytical quality assurance and quality control and to remove any inconsistent provisions within 180 days of the effective date of the 2006 Revisions. 30 TEX. ADMIN. CODE § 330.261(a). Permittees or registrants were also required to apply for a permit modification to comply with new surface water drainage requirements within 180 days. *Id.* § 330.301. Landfill owners and operators were given two years to demonstrate compliance with the new groundwater monitoring requirements. *Id.* § 330.401(b). This influx of permit modification applications has generated numerous questions concerning the regulatory interpretation of these new requirements.

1. Surface Water Drainage.

Among the reforms enacted by the 2006 Revision is a new requirement for landfills to control erosion during all phases of development, including interim conditions. Specifically, 30 TEX. ADMIN. CODE § 330.305(d) provides that "landfill design must provide effective erosional stability to top dome surfaces and external embankment side slopes during *all phases* of landfill operation, closure, and post closure care (emphasis added)." Heretofore, although MSW facilities were required to control erosion throughout the facility's operating life, an erosion stability analysis was only required for final slope conditions at the time of facility closure.

The TCEQ has issued a draft guidance document, "Guidance for Addressing Erosional Stability during All Phases of Landfill Operation ("Draft Guidance")," interpreting this requirement to assess interim conditions. The Draft Guidance, which is attached at Tab A, provides that the calculated permissible soil loss for intermediate cover phase top dome surfaces and external embankment slopes may not exceed 50 tons/acre/year depending on location/precipitation and slope length. Draft Guidance, p. 2. The Draft Guidance broadly defines the term "external embankment side slopes," which is undefined in the 2006 Revisions, to include slopes which will remain inactive for longer than 180 days. The number of landfill slopes subject to the erosion control analyses for interim conditions, therefore, is significantly increased. The Draft Guidance also creates an ambitious 180-day time frame after construction of intermediate cover to install controls to meet the 50 tons/acre/year standard. *Id.*, p. 3.

2. Groundwater.

The 2006 Revisions also enacted important changes to groundwater monitoring requirements applicable to landfill owners and operations. The most significant change is the requirement that monitoring well spacing not exceed 600 feet without an applicable site-specific technical demonstration that may be supplemented with a multi-dimensional fate and transport numerical model. 30 TEX. ADMIN. CODE § 330.403(a)(2). A copy of a draft TCEQ internal guidance document interpreting this requirement is attached at Tab B. Issues center on how compliance with this standard will be achieved and under what circumstances will the TCEQ allow a site-specific demonstration in lieu of compliance with the 600-foot spacing standard. In addition, it appears that strict compliance with the 600-foot standard may be required. Thus, landfill owners and operators may be required to revise their systems and install additional wells even if their existing systems only slightly deviate from the 600-foot spacing standard.

3. Laboratory QA/QC.

In implementing the 2006 Revisions, the TCEQ is placing increasing emphasis on the use of practical quantitation limits ("PQLs") in the evaluation groundwater monitoring data. A copy of a draft TCEQ internal guidance document relating to the use and interpretation of PQLs is attached at Tab C. It provides that the PQL must be the lowest concentration at which the analytical laboratory can report quantitative data within the specified limits of precision and accuracy.

B. MSW Amendments and Modifications.

In a rule-making completed earlier this year, the TCEQ amended its procedural rules governing the modification and amendment of MSW permits. 30 TEX. ADMIN. CODE §§ 305.62 and 305.70, respectively. These changes have the effect of increasing public participation in the permitting process.

Section 305.70 identifies two types of permit modifications, those requiring notice and those that do not require notice, more informally known as "notice mods" or "non-notice mods." In the recent rule-making the TCEQ expanded the list of those modifications requiring public notice. The rule-making also makes changes to the notice requirements specified in 30 TEX. ADMIN. CODE § 330.59(c)(3) by increasing the notice distance from 500 feet to ¼ mile. Accordingly, applicants requesting permit modifications requiring notice are now required to provide notice to landowners within ¼ mile of the facility. This new notice requirement also applies to new MSW permits and amendments.

In addition, the TCEQ amended its rules governing the amendment of MSW permits to specify the types of changes constituting a major amendment and thus, triggering the opportunity for a contested case hearing. In so doing, the TCEQ also created a new category of changes, often referred to as limited scope major amendments, which reopens for contested case hearing opportunity only those portions of the permit affected by the amendment.

The new rules specify that the following changes constituting a major amendment and requiring the submittal of a full permit application:

(1) an increase in the maximum permitted elevation of a landfill;

(2) a lateral expansion of an MSW facility other than changes to expand a buffer zone;

(3) any increase in the volumetric waste capacity at a landfill or the daily maximum limit of waste acceptance for a Type V processing facility; and

(4) upgrading of a permitted landfill facility to meet the requirements of 40 CFR Part 258, including facilities which previously have submitted an application to upgrade.

30 TEX. ADMIN. CODE § 305.62(i)(1). Applicants seeking to make any of these changes will be required to prepare and submit a full permit application addressing all substantive requirements in Chapter 330 applicable to the facility, regardless of whether the change actually affects those application components. For example, MSW permit applicants for a vertical expansion would be required to submit geologic and hydrogeologic information satisfying the Chapter 330 requirements, even though a vertical expansion over already developed or permitted landfill space does not involve changed geology from that assessed in the previous permitting action. All application components, regardless of effect, could be reopened in a contested case hearing. This MSW policy, which is long-standing practice and now express in the new TCEQ rule, may be contrasted with its counterpart policy in the hazardous waste program, providing that "[w]hen a permit is modified, only the conditions subject to modification are reopened." *See* 30 TEX. ADMIN. CODE § 305.69(d)(6).

The new rules further specify that for all other major amendment applications for MSW facilities, only the portions of the permit and attachments to which changes are being proposed are required to be submitted. *Id.* § 305.62(i)(2). The rule provides examples of changes for which a full application would not be required. These are:

(1) addition of an authorization to accept a new waste stream (e.g. Class 1 industrial waste);

(2) changes in waste acceptance procedures and operating hours outside the hours specified by rule, or authorization to accept waste or operate on a day not previously authorized; and

(3) addition of an alternative liner design under 30 TEX. ADMIN. CODE § 330.135.

Id. Because the rule specifies these changes as examples only, this list is not exhaustive, leaving open the question of what other types of changes will be subject to the more expanded public participation requirements for limited scope major amendments.

In addition to the expanded ¼ - mile notice requirements discussed above, the new rules also institute new requirements for signage as a public notice component. The signage requirements are applicable to new permits or major amendments and require applicants to post signs at their facility advising the public of proposed facility changes. *Id.* §330.57(i)(3). The rule specifies the information required to be posting as well as the required sign dimension and spacing and requires the sign to be posted within 30 days after the executive director's receipt of the application until the close of the final comment period. *Id.*

The new signage requirements are similar to sign posting requirements which are already in place for air permits. *See* 30 TEX. ADMIN. CODE § 39.604. The TCEQ's stated rational for including them as part of the MSW program is to "better ensure that all persons have an opportunity to comment or obtain information regarding MSW activities being proposed in the community." 33 *Tex. Reg.* 4177 (May 23, 2008). The TCEQ reasoned that "potentially affected parties may be outside the area for mailed notice or may not routinely read published notices in the newspaper and could be unaware of a proposed permit action." *Id.* In adopting the final rule, the TCEQ added language, which is similar to that used for internet posting requirements, that the signage requirements are for informational purposes only. 30 TEX. ADMIN. CODE § 330.57(i)(3). Thus, the requirements are not jurisdictional, and any temporary failure to adhere exactly to the signage requirements, such as a blown-down sign, does not affect the Commission's jurisdiction to take action on the permit application.

In the same rule-making, the TCEQ amended its rules concerning the respective duties of owners and operators for the submission of MSW permit applications if a facility is owned and operated by different entities. Section 305.43 formerly provided that it is the operator's duty to submit the permit application if the facility is owned by one person and operated by another. This rule was amended to provide that in this circumstance, the owner may authorize, in writing, the operator to submit applications for a permit, amendment, or modification. *Id.* § 305.43(c). For a new MSW facility, the operator may submit an application for a permit with the written consent of the owner(s) of the land upon which the facility is to be located. *Id.*

C. Computer Recycling.

The Texas Legislature passed House Bill ("HB") 2714 in 2007 requiring the TCEQ to implement a manufacturer-based computer recycling program. The TCEQ has recently adopted rules implementing the program, which is based on a manufacturer responsibility model, and unlike some other state programs such as California's, does not impose a tax or fee on manufacturers, retailers or consumers. *See* 33 *Tex. Reg.* 4506 (June 6, 2008).

The rules establish a new Subchapter I, entitled Computer Equipment Recycling Program, in Chapter 328 and have several key components. First, the new program relates only to the collection, recycling, and re-use of computer equipment used primarily for personal or home business use. 30 TEX. ADMIN. CODE § 328.133(a). Effective September 1, 2008, every manufacturer of computer equipment sold for consumer or

home business use must have a recovery plan for the equipment's convenient collection, recycling, or re-use prior to offering computer equipment for sale in Texas. *Id.* § 328.137. Persons having a compliant collection program by September, 2008, have until July 1, 2008, to submit their recovery plans to the TCEQ. *Id.* § 328.137(e). Examples of convenient collection methods include a system for consumers to return used equipment by mail; a physical collection site open and staffed to receive used equipment; or a collection event held for the return of equipment. *Id.* § 328.137(c).

Retailers and consumers of computers also have responsibilities under the new program. Retailers may not sell new computer equipment unless it is labeled with the manufacturer's brand, and the manufacturer is listed on the TCEQ's list of manufacturers as having a recovery plan and a compliant collection program. *Id.* § 328.139. Consumers remain responsible for any information left on their computer equipment that is collected, recycled, or re-used under the program. *Id.* § 328.141. Manufacturers and retailers are expressly exempt from any liability for information left on the collected, recycled, or re-used computer. *Id.* § 328.147(a).

The new rules require all computer equipment be recycled or re-used in a manner that complies with federal, state, and local laws. *Id.* § 328.149. To assure safe recycling, the TCEQ has adopted as mandatory many of the standards for electronics recycling operating practices approved by the Institute of Scrap Recycling Industries ("ISRI"), Inc. The mandatory practices include requirements for maintaining commercial contracts or equivalent arrangements for transfers of computer equipment for recycling; maintaining records of manifests, bills of lading, waste disposal records, and records documenting the location, condition, and disposition of computer equipment for a minimum three-year period; maintaining written work practices for addressing specified chemicals or constituents such as lead, mercury, and PCBs; measures to minimize the potential for hazardous substance releases; and spill reporting.

Finally, the new rules authorize the TCEQ to conduct audits and inspections to determine program compliance. *Id.* § 328.143(a). Warning notices will be issued for a first violation. *Id.* § 328.143(d). Therefore, the law authorizes penalties for non-compliance, including fines ranging from $1,000 to $10,000 for the second violation, and $25,000 for subsequent violations by a manufacturer. *Id.* § 328.153.

III. Judicial Decisions.

In an opinion issued on July 2, 2008, the Amarillo Court of Appeals determined that a waste disposal company lacked standing to contest the TCEQ's issuance of permit modification to another waste disposal company. *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*, ____S.W.3d ____, 2008 WL 2608648 (Tex. App.—Amarillo, July 2, 2008, No. 07-07-0183-CV).[2]

[2] Unless otherwise provided for by statute, venue for judicial review of agency decisions is in Travis County. TEX. GOV'T Code § 2001.176(b) (West 2008). Therefore, this case would normally have been heard by the Third Court of Appeals in Austin; however, the case was transferred to the Seventh Court of Appeals in Amarillo to equalize dockets among the appellate courts, as authorized by order of the Texas Supreme Court, Misc. Docket No. 06-9136.

After acquiring a landfill from the City of Weatherford, IESI Texas Landfill, L.P. ("IESI") sought a permit modification from the TCEQ. When the TCEQ's Executive Director granted the permit modification, Texas Disposal Systems Landfill, Inc. ("TDSL") filed a motion to overturn that action. The TCEQ Commissioners issued an order upholding the Executive Director's decision to grant the permit modification from which TDSL appealed.

The threshold issue on appeal was whether TDSL had standing to complain about the Executive Director's decision pertaining to the operation of an IESI's landfill. Both TCEQ and IESI filed pleas to the jurisdiction in the district court. TDSL argued, however, that it should be allowed to contest the Executive Director's decision because in its opinion the improper manner in which the agency acted on IESI's modification request potentially jeopardized TDSL's own relationship with its neighbors and hence its own landfill's operation.

The court of appeals rejected this argument and upheld the district court's order dismissing TDSL's appeal. According to the appellate court, TDSL's standing argument was based on mere speculation that it would be injured as a result of the TCEQ's action on IESI's application.

TAB A

GUIDANCE FOR ADDRESSING EROSIONAL STABILITY DURING ALL PHASES OF LANDFILL OPERATION

(30 TAC §330.63(c)(1), §330.305(c), (d) and (e))
02/14/07

I. Understanding of Intent of Rule with Respect to Phased Operation

The intent of the rule is found in the preamble which states "The commission requires, in 30 TAC §330.305(d), that the owner or operator provide long-term erosional stability for the landfill unit during all phases of unit operation, closure, and post-closure care from the previous requirement in 30 TAC §330.55(b)(8), which only requires long-term erosional stability for the final cover design." In accordance with 30 TAC §330.63(c) Facility Surface Water Drainage Report, the landfill owner or operator is required to submit a report demonstrating their plan to minimize erosion during all phases of landfill operations with the intent of controlling soil loss and sediment transport from top dome surfaces and external embankment side slopes.

Landfill cover phases are defined as daily cover, intermediate cover, and final cover. Top dome surfaces and external embankment side slopes, for the purposes of compliance with 30 TAC §330.305(d) are:

a) those above grade slopes that directly drain to the site perimeter stormwater management system (i.e., areas where the stormwater directly flows to a perimeter channel or detention pond designed in accordance with 30 TAC §§330.63(c), 330.303, and 330.305);

b) have received intermediate or final cover; and,

c) have either reached their permitted elevation, or will subsequently remain inactive for longer than 180 days.

Slopes which drain to ongoing waste placement, preexcavated areas, areas that have received only daily cover or areas under construction which have not received waste are not considered external side slopes.

Modern landfill development can take decades and interim top dome surfaces and external embankment side slopes can exist for many years before placement of the final cover system with permanent drainage features. Some past landfill practices have included large, sparsely-vegetated areas without sufficient drainage control features (e.g., berms, benches, terraces, swales, downchutes/letdown structures, etc.), leading to erosion and off-site discharge of sediments.

Management practices utilized for erosion and sediment control may be broadly categorized as nonstructural and structural controls. Nonstructural controls addressing erosion typically include: plans and designs to minimize disruption of the natural features, drainage, topography, vegetative cover features; phased development to minimize the area of bare soil exposed at any given time; plans to disturb only the smallest area necessary to perform current activities; scheduling of construction activities during the time of year with the least erosion potential; and specific plans for the stabilization of exposed surfaces in a timely manner. Structural controls are preventive and also mitigative since they control erosion and sediment movement. Structural controls include vegetative and nonvegetative stabilization of exposed surfaces, perimeter controls, sediment traps, improved sediment basins, silt fences, filter fabrics, stream crossings, etc.

The use of best management practices incorporating structural and nonstructural controls as appropriate should be adequate for the daily cover phase of landfill construction and for soil stockpiles. Final cover should be managed as provided for in the closure and post closure care plan required by 30 TAC 330 Subchapter K, Closure and Post-Closure.

Erosion control for above grade top dome surfaces and external embankment side slopes that drain directly to the site perimeter stormwater management system, have received intermediate cover and either reached their permitted configuration or will remain inactive for longer than 180 days should be managed using a system of nonstructural and structural erosion and sediment controls to meet rule requirements for the intermediate cover phase of landfill construction. The purpose of this guidance document is to discuss designs and calculations and to address specific controls before and after establishment of vegetation on intermediate cover top dome surfaces and external embankment side slopes.

II. Designs and Typical Calculations for Top Dome Surfaces and External Embankment Side Slopes to Demonstrate the Adequacy of the Measures, Practices and/or Devices Proposed:

a. Sample calculations and designs for sizing the necessary drainage collection, conveyance, and/or detention structures in accordance with 30 TAC §330.63(c).

b. Describe soil stabilization practices, perimeter controls, top and side slope runoff controls, collection, conveyance, and containment structures at the areas where they will be installed at the site for the intermediate cover phase top dome surfaces and external embankment side slopes. Include a description of, and specifications for, temporary sediment retention structures for all phases of development.

c. Provide a description of the hydrologic method and calculations used to estimate peak flow rates, peak velocities and run-off volumes as required. Provide information to demonstrate that estimated velocities are below permissible non-erodible velocities under similar conditions. *("similar conditions" is interpreted to mean similar soil, vegetation, other cover type, topography, slope, etc., as the subject surface).*

d. Soil erosion loss may be calculated using the Soil Conservation Service of the United States Department of Agriculture's Universal Soil Loss Equation or equivalent or better methods approved by the executive director. The applicant should provide information to demonstrate that the estimated potential soil loss from the intermediate cover phase top dome surfaces and external embankment slopes does not exceed the permissible soil loss for comparable soil-slope lengths and soil-cover conditions. *Calculated permissible soil loss may not exceed 50 tons/acre/year depending on location/precipitation and slope length.*

The applicant shall demonstrate that the various proposed procedures and typical controls to be implemented on these slopes will ensure that soil loss does not exceed the maximum soil loss specified above. This demonstration should consist of descriptions of where structural controls should be installed (e.g. maximum slope steepness, slope lengths and berms spacing, maximum spacing of drop chutes, maximum spacing of silt fencing, etc.) and parameters for non-structural control (e.g. types of vegetation to be utilized for erosion control, planting schedules, vegetation maintenance, etc.). Specific configurations or development scenarios showing specific locations of structural controls are not required. The applicant should demonstrate that the controls proposed will achieve soil loss that does not exceed the

maximum erosion soil loss specified above for the parameters proposed for installation. The controls proposed to keep soil loss below this maximum soil loss shall be proposed to be installed within 180 days from when the intermediate cover is constructed. Applicants with sediment capture facilities may incorporate the use of sediment capture and intermediate cover replenishment procedures to demonstrate that the net annual soil loss for that facility is less than the above amount.

e. Provide sample hydraulic calculations and designs for sizing the necessary drainage collection, conveyance, and/or detention structures in accordance with 30 TAC §330.63(c).

III. Typical Erosion and Sediment Control Management Practices and Specifications:

a. **Side Slope Controls:** The use of benches, terraces, berms or swales is recommended to decrease down slope velocities of runoff that could cause erosion. Benches, terraces and berms should direct the flow to a protected drainage system (downchute) and outlet. The frequency of spacing should be based on a soil loss as described in the landfill final condition plan or to no more than 50 tons/acre/year. The estimated peak velocity should be less than the permissible non-erodible velocity under similar conditions. Rolled erosion control mats or blankets made from natural or synthetic fiber, or compost/mulch/straw blankets, as example, may also be used as cover on side slopes and on open earthen conveyance structures.

b. **Seeding and Sodding:** Establishment of vegetation on the top dome surfaces and the external embankment side slopes remains the preferred surface protection practice for control of erosion. Perennial vegetative cover from seeding has been shown to remove between 50 and 100 percent of total suspended solids from stormwater runoff, with an average removal of 90 percent (USEPA, 1993). A goal of at least 60% vegetative cover is recommended.

c. **Lining for Conveyance Structures:** If runoff may cause erosion in a conveyance structure, the structure should be lined using grass or sod, turf reinforcement mats, blankets, riprap, concrete, gabions or other appropriate material. Details of temporary and permanent surface stabilization measures for all conveyance structures within development areas at the site must be provided.

d. **Check Dams:** Check dams are constructed using gravel, rock, gabions, compost socks, or sand bags to reduce flow velocity and therefore erosion in a swale or channel. Check dam design criteria should address, at a minimum, control of runoff velocity, hydraulic capacity to store and release runoff in a non-erodible manner, stability of dam construction materials; check dam foundation preparation.

e. **Silt Fences:** Silt fences or fabric filter fences may be used where there is sheet flow. The maximum drainage area to the fence should not exceed the manufacturer's specification but in no case be greater than 0.5 acre per 100 feet of fence. To ensure sheet flow, a gravel collar or level spreader can be used upslope of the silt fence. The silt fence should be installed to reflect the interim erosion and sediment control needs rather than mirror the property lines or limits of disturbance.

f. **Compost Filter Berms:** Compost filter berms, or mesh socks filled with compost material, measuring at least 1 foot high x 2 feet wide, may be installed at the bottom of slopes. The design and placement of compost filter berms must address the prevention of pooled water

over the cover system.

g. **Inlet Protection:** Inlet protection consisting of silt fence barriers, straw bale inlet barriers, block, and gravel drop inlet filters, etc., should be used where appropriate. Inlet protection is suited for small drainage areas (less than 1 acre).

h. **Stabilization Schedule:** Estimates regarding time to stabilize (treat, cover, or vegetate to reduce erosion potential) exposed clearings, stockpiles and fills, and time to establish vegetation should be described.

i. **Wind Erosion Control Measures:** Techniques to minimize wind erosion (blowing of dust or sediments) should be described if appropriate.

j. **Soil Types:** Descriptions of the soil types prevalent in the area (use the USDA/SCS County Soils Map), soil-types to be used for construction and the proposed erosion and sediment control techniques relating to the soil types should be described.

k. **Climate and Weather:** The climate and weather patterns prevalent at the site should be considered in the scheduling of development to take advantage of the pattern in reducing soil erosion and sedimentation.

l. **Water Bodies and Waterways:** Identification of water bodies and waterways on site and adjacent to the site, and a description of plans for their protection from sediment-laden runoff from the site should be described.

IV. **Describe Inspection, Maintenance, and Recordkeeping Frequencies and Techniques:**

a. Describe an inspection and recordkeeping schedule to determine the overall effectiveness for temporary erosion control structures.

b. Installation, regular inspection, and maintenance and record keeping of plan practices should be made part of the training curricula for landfill personnel.

c. Discuss plans for the removal of the temporary erosion control devices as they are replaced with permanent erosion and sediment control devices at the site.

V. **Explanations of terms:**

a. "Permissible non-erodible" velocity as referenced in 30 TAC §330.305(d)(1).

   i. Permissible velocity for sheet flow, this should be related to the type of soil (erodible vs. non-erodible) and the type of vegetation or synthetic cover over which the flow occurs. The USDA has published data on permissible non-erodible velocities based on the soil and vegetation cover-type. Manufacturers of synthetic erosion control covers usually include allowable non-erodible velocities over such surfaces.

b. Permissible soil loss for intermediate and final phases.

i. Permissible soil loss for interim conditions is greater than that considered acceptable for final cover. Although the interim condition can last for decades, unlike final cover conditions, the landfill is still operational. Thus during the operational phase of landfill construction, personnel and equipment are available to remediate erosion conditions and place additional soil. Basing permissible losses in part on the facility's ability to replenish what is lost is an acceptable practice. Additionally, for unavoidable soil loss during the intermediate phase, there should be structures within the site that prevent the losses from leaving the site, e.g. silt screens installed on benches, channels, perimeter ditches, etc., to trap eroded materials prior to reaching the sedimentation basin, or a sedimentation basin (with analysis showing that the sediments will be recovered prior to the flow moving offsite).

ii. The recommended permissible soil loss for the final cover phase remains at 2 to 3 tons/acre/year.

DRAFT

TAB B

INTERNAL GUIDANCE FOR IMPLEMENTING THE 2006 RULE REVISIONS OF SUBCHAPTER J
May, 2008

I. Introduction

This document is to serve as an internal guide for the review of municipal solid waste permit modification (MOD) requests to address the 2006 rule revisions in Title 30 Texas Administrative Code (30 TAC) Chapter 330, Subchapter J.

II. Regulatory Background and Applicability

30 TAC Section (§)330.401(b) requires all MSW landfills to comply with the provisions of Subchapter J by applying for a permit MOD with public notice to revise any inconsistent permit provisions within two years of the effective date of the 2006 rule revisions (March 27, 2006). 30 TAC §330.401(a) states that landfills which have closed pursuant to 30 TAC §330.453, 330.455, or 330.457 may continue to monitor groundwater using the well location requirements contained in previously issued authorizations.

Applicability:

The revised Subchapter J regulations apply to all landfills with the exception of the monitoring well spacing requirements which apply only to those facilities that have not closed pursuant to the above rules prior to March 27, 2006.

Type IAE and Type IVAE facilities are not required to perform groundwater monitoring.

Type IV facilities must perform groundwater monitoring as specified in 30 TAC §330.417, and §330.417(b)(2) states that a groundwater monitoring system must be installed in accordance with 30 TAC §330.403, except for the point of compliance well spacing requirements of 30 TAC §330.403(a)(2). Therefore, Type IV landfills that have not established a point of compliance would be required to submit a permit MOD to conform with the 2006 rule revisions.

Point of Compliance (POC):

Defined in 30 TAC §330.3 as "A vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulated units, and located on land owned by the owner of the facility." The uppermost aquifer is defined in 30 TAC §330.3 as "The geologic formation nearest the natural ground surface that is an aquifer; includes lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary." Aquifer is defined in 30 TAC §330.3 as "A geological formation, group of formations, or portion of a formation capable of yielding significant quantities of groundwater to wells or springs."

POC and well spacing requirements are discussed in 30 TAC §330.403, the key provisions being "A groundwater monitoring system must be installed that consists of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative groundwater samples from the uppermost aquifer as defined in §330.3 of this title (relating to Definitions)," and "The point of compliance monitoring system must include monitoring wells installed to allow determination of the quality of groundwater passing the point of compliance as defined in §330.3 of this title and to ensure the detection of groundwater contamination in the uppermost aquifer. Monitoring well spacing for a

municipal solid waste landfill unit shall not exceed 600 feet without an applicable site-specific technical demonstration that may be supplemented with a multi-dimensional fate and transport numerical flow model as set forth in subsection (e) of this section."

III. General Submittal Requirements and Review Procedures

The revisions to 30 TAC Chapter 330, Subchapter J are self-implementing in that each landfill facility permittee is directed to determine if the facility's groundwater monitoring system and related information conforms to the 2006 revised rules, and to submit to the TCEQ a permit MOD application to revise any inconsistencies. A landfill with an existing approved application that contains a defined POC and a monitoring well (MW) spacing of ≤600 feet is not required to submit a permit MOD to demonstrate compliance with §330.403(a)(2). It should be noted, however, that the new Subchapter J rules grant a one time allowance to a landfill facility to revise its groundwater monitoring program with a permit MOD. Generally, such revisions to the groundwater monitoring would require a major amendment.

The following Table 1 presents the scenarios that the reviewer is likely to encounter with regard to POC and MW spacing submittals.

Table 1. General scenarios and submittal requirements for POC and monitoring well (MW) spacing.

Point of Compliance	Existing Well Spacing (feet)	Proposed Action	Submittal Required
A. Defined[1]	≤600	No change.	Existing POC & MW spacing confirmation.[2]
B. Defined	>600	Reduce to ≤600' MW spacing	Existing POC & new MW locations
C. Defined	>600	Remain at >600' MW spacing	Existing POC & provide MW spacing demonstration
D. Defined	N.A.[3]	Reconfigure POC[4] & ≤600' MW spacing	Justify POC & show new/existing MW locations
E. Defined	N.A.[3]	Reconfigure POC[4] & >600' MW spacing	Justify POC & provide new/existing MW spacing demonstration
F. Not defined	≤600	Define POC	Justify POC
G. Not defined	>600	Define POC & ≤600' MW spacing	Justify POC & show new/existing MW locations
H. Not defined	>600	Define POC & >600' MW spacing	Justify POC & provide MW spacing demonstration

[1] The term "defined" means that a POC has been either previously depicted on a site map or accurately described in text submitted to the agency and authorized via a permit or amendment.

[2] The rules do not require a confirmation submittal; however, the agency encourages permittees to submit a letter and map noting the POC and MW well spacing.

[3] Since the POC is being reconfigured, the existing MW spacing will be evaluated during review of the permittee's proposed action.

[4] The permittee may be proposing to lengthen, shorten, or move the POC closer to or further from the waste boundary.

Scenario A

Scenario A presumes that a landfill has an approved POC and MW spacing ≤600 feet. As noted above, if a permittee's landfill is compliant with the POC and well spacing requirements, then the permittee is not required to submit any information in this regard to the agency. However, permittees in this situation are encouraged to submit a letter discussing the landfill's compliance with regard to §330.401(b) and a map of existing MW locations. The map that is submitted should be a copy of map previously authorized via a permit or amendment. The reviewer should verify that the map has been previously authorized. If so, then a letter notifying the permittee of receipt of the submittal should be generated. If there are questions as to whether the map has been previously authorized, or if there are discrepancies in the submittal and what appears to have been previously authorized, then a letter requesting clarification should be generated.

Scenario B

Scenario B presumes that a landfill has an approved POC and existing MW spacing >600 feet, and is proposing additional wells so that all POC wells are ≤600 feet. The permittee should submit a site map noting the currently authorized POC and all existing and proposed MWs. Information should also be provided regarding proposed MW design to include screened interval(s) and completion details tied to appropriate surface and subsurface elevations. The reviewer should verify that the site map and POC are consistent with the facility's current authorization and that the proposed MW spacing along the POC is ≤600 feet. The proposed new MW design information should be reviewed for consistency with the existing well system. Reference information for this evaluation should include the landfill's Groundwater Characterization Report. If this report can not be found in agency records, then the reviewer should request a copy from the permittee. If inconsistencies are noted or insufficient information provided regarding the POC, MW spacing, or MW design, then clarification should be requested from the permittee.

Scenario C

Scenario C presumes that a landfill has an approved POC and existing MW spacing of >600 feet, and is proposing a MW spacing where some or all of the POC wells are >600 feet. The permittee should submit the information noted in Scenario B and also a demonstration that the proposed well spacing is adequate to allow determination of the quality of groundwater passing the point of compliance. This technical demonstration should address potential plume widths and may include multi-dimensional groundwater flow modeling. The technical demonstration should show that MWs are spaced so that plumes cannot pass the wells undetected. The reviewer should evaluate the proposed MOD as per Scenario B and also review the MW spacing demonstration. If inconsistencies are noted or insufficient information provided regarding the POC, MW spacing, or MW design, then clarification should be requested from the permittee.

Scenario D

Scenario D presumes that a landfill has an approved POC and is proposing to either lengthen or shorten the POC, or move the POC closer to or farther from the waste disposal boundary, and is also proposing a MW spacing of ≤600 feet. The permittee should submit justification for the POC reconfiguration to include, at a minimum, the landfill's Groundwater Characterization Report, any geological or hydrogeological studies performed since the Groundwater Characterization Report, and historical groundwater potentiometric surface maps to depict any variations in groundwater flowpaths over time. The permittee should also provide information as to the existence of any on-going or potential future operations that could alter the groundwater conditions (e.g. dewatering, slurry walls, remediation

activities, etc.). If new MWs are being proposed, then information should be provided regarding proposed MW design to include screened interval(s) and completion details tied to appropriate surface and subsurface elevations. The reviewer should determine if the proposed POC is supported by the submitted information, that the POC well spacing is ≤600 feet, and that the proposed MW design (if applicable) is appropriate. If inconsistencies are noted or questions raised, then clarification should be requested from the permittee.

Scenario E

Scenario E presumes that a landfill has an approved POC and is proposing to either lengthen or shorten the POC, or move the POC closer to or farther from the waste disposal boundary, and is also proposing a MW spacing where some or all of the POC wells are >600 feet apart. The permittee should submit the information noted in Scenario D and also a MW spacing demonstration as discussed in Scenario C. The reviewer should determine if the proposed POC is supported by the submitted information and if the MW spacing demonstration is adequate. If inconsistencies are noted or questions raised, then clarification should be requested from the permittee.

Scenario F

Scenario F presumes that a landfill does not have an approved POC, but it has a downgradient MW spacing of ≤600 feet. The facility's proposed action is to designate a POC with ≤600 feet well spacing. The permittee should submit the information in Scenario D. The reviewer should determine if the proposed POC is supported by the submitted information and that the POC well spacing is ≤600 feet. If inconsistencies are noted or questions raised, then clarification should be requested from the permittee.

Scenario G

Scenario G presumes that a landfill does not have an approved POC and the existing MW spacing is >600 feet. This facility's proposed action is to designate the POC and reduce the POC well spacing to ≤600 feet. The permittee should submit the information noted in Scenario D. The reviewer should determine if the proposed POC is supported by the submitted information, that the POC well spacing is ≤600 feet, and that the proposed MW design is appropriate. If inconsistencies are noted or questions raised, then clarification should be requested from the permittee.

Scenario H

Scenario H presumes that a landfill does not have an approved POC depicted on a site map, and it has a downgradient MW spacing of >600 feet. The facility's proposed action is to designate the POC and have some or all POC monitoring wells spaced >600 feet apart. The permittee should submit the information discussed in Scenario D and a POC well spacing demonstration as discussed in Scenario C. The reviewer should determine if the proposed POC is supported by the submitted information and if the MW spacing demonstration is adequate. If inconsistencies are noted or questions raised, then clarification should be requested from the permittee.

IV. Things to Consider in Reviewing POC and MW Spacing MOD Applications

1. The point of compliance should be clearly identified on a scaled site drawing of sufficient size and detail to depict the waste footprint, buffer zone, perimeter road, perimeter stormwater drainage features, well locations (existing and proposed), and facility boundary. The distances between point of compliance wells should be clearly noted on the drawing. However, if the applicant delineates spacing between groundwater monitoring wells in the text, and the reviewer can

determine through the use of an engineer's scale that the well spacing is less than or equal to 600 feet, then the actual dimensions are not required. If the spacing appears to be greater than 600 feet, then the reviewer should request that the actual spacing be noted between wells.

2. MW spacing should be measured along the point of compliance and wells should not be greater than 600 feet apart. In measuring well spacing around corners, the line measuring the distance between gw wells cannot cross waste. The line should be drawn equidistant from the waste based on existing MW spacing from waste. If any wells in the point of compliance monitoring system are greater than 600 feet apart, then the applicant must provide a demonstration. This demonstration should show that the proposed well spacing is adequate to allow determination of the quality of groundwater passing the point of compliance. This demonstration should address potential plume widths, and show that MWs are spaced so that plumes cannot pass the wells undetected.

3. The endpoints of the point of compliance should be the widest range of apparent groundwater flow direction, as depicted on historical groundwater potentiometric surface maps. Areas of the landfill where the groundwater flow direction appears outward (even if only slightly) away from the waste boundary should be considered downgradient for the purposes of establishing the point of compliance.

4. Any downgradient wells which are proposed to be removed and replaced with new wells as part of this permit revision must continue in the detection monitoring program until the replacement wells have been installed. There should be no gaps or lapses in the groundwater monitoring program as a result of any well repositioning or realignment. If the permittee does not indicate a time frame for installing new monitoring wells, then the reviewer should request this information. Generally, 90 days should be adequate for installing monitoring wells.

5. If a facility has a documented plume of contamination, then the permittee should provide a topographic map which delineates the extent of the plume to aid in the review of proposed well locations provided in response to §330.403(a)(2).

6. Type IV landfills should have an approved POC. If a landfill does not have an approved POC, the permittee should submit the information noted in Scenario D above. Type IV landfills are not required to have a POC well spacing of ≤600 feet.

7. Under the provisions of §330.401(d), an owner/operator of a permitted landfill facility may request a suspension of groundwater monitoring activities if it can be demonstrated that there is no potential for migration of hazardous constituents from the solid waste management unit to the uppermost aquifer. This request for suspension of groundwater monitoring must be submitted as a permit amendment.

8. The permit modification required by §330.401(b) is a notice modification submitted under §305.70(l) and must include the Part I form, payment of the $150.00 application fee, a modification application consistent with §305.70(e), and an adjacent landowners list and map. The submitted revisions should be provided in redline/strikeout format to facilitate agency review.

9. There may be other parts of the permit that need to be revised to maintain consistency throughout the permit as a result of the MOD application. Permittees that revise the location of groundwater monitoring wells may also need to make conforming changes to the Site Development Plan Attachments or eliminate well locations from maps that are not intended to depict the monitoring system. The permittee should be made aware of this via the NOD letter to include a

recommendation that these conforming changes can be made upon approval of the well spacing permit modification.

V. Other 2006 Subchapter J Rule Revisions

The following is a list of the 2006 Subchapter J rule revisions in addition to those discussed above for which the permittee should revise the facility's permit as necessary for consistency. These Subchapter J revisions apply to all Type I and Type IV landfills including closed facilities. Generally, these revisions would be to the facility's GWSAP, and the permittee should submit the revised pages in redline/strikeout format to clearly depict the proposed revisions. The agency would prefer that these GWSAP revisions be submitted in a separate MOD application from the POC and MW spacing MOD application. Since the changes to the GWSAP are administrative in nature, the separate GWSAP modifications may be processed as §305.70(l) modifications without notification. Permittees will not be requested to resubmit these revisions in a separate MOD application if they are included in the MW spacing MOD application.

1. **Field Filtering.** In accordance with §330.405(c), groundwater samples shall not be field-filtered prior to laboratory analysis. The permittee should remove provisions that allow field filtering of groundwater samples. No change is required for facilities that are sampling for total/non-filtered metals as part of their currently authorized sampling plans.

2. **Reporting, Resampling, and Demonstrations.** In accordance with §330.407(b), the permittee must determine if there has been a statistically significant increase (SSI) over background of any tested constituent within 60 days of each sampling event, and if there has been a SSI, the permittee must notify the agency within 14 days of this determination. In accordance with §330.407(c), an annual detection monitoring report is required to be submitted that includes a statement regarding any SSIs during the previous calendar year, a contour map of piezometric water levels in the uppermost aquifer, groundwater flow rate and direction in the uppermost aquifer, and the results of all groundwater monitoring, testing, and analytical work, including a summary of background groundwater quality values, groundwater monitoring analyses, statistical calculations, graphs, and drawings. The annual report must be submitted within 90 days after the facility's last monitoring event in a calendar year. The permittee should revise the reporting requirements in the GWSAP to be consistent with these new rules.

3. **Groundwater Monitoring Constituents.** In accordance with §330.407(a), the monitoring frequency for all constituents listed in §330.419 shall be at least semiannual during the active life of the facility and the closure and post-closure care period unless an alternate frequency is approved by the Executive Director, in which case the monitoring frequency must be no less than annually. §330.419 adopts by reference the Appendix I hazardous constituents listed in 40 Code of Federal Regulations, Part 258. The Appendix I constituent list does not include the water quality parameters formerly required by the MSW Permits Section. The permittee may remove water quality parameters from the list of monitoring constituents and include Appendix I constituents. It should be noted that even though the analysis of water quality parameters (ex: pH, alkalinity, chlorides, sulfates) is not required by 30 TAC §330, trend analysis of the water quality parameters may be useful supporting documentation for future ASD demonstrations.

4. **GWSAP Updates.** The permittee should revise the reporting requirements in the GWSAP to be consistent with the newly revised 30 TAC §330 rule requirements and specified limits for precision and accuracy at the practical quantitation limit. "Reporting limits" should be the practical quantitation limits (PQLs). If the GWSAP does not contain the following

information, then the reviewer should recommend this language be placed into the GWSAP:

"The practical quantitation limit (PQL) is defined as the lowest concentration reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions and is analogous to the limit of quantitation (LOQ) definition in the most recent available NELAC Standard (National Environmental Laboratory Accreditation Conference). The PQL is method, instrument, and analyte specific and may be updated as more data becomes available. The PQL must be below the groundwater protection standard established for that analyte as defined by 30 Texas Administrative Code Section 330.409(h) unless approved otherwise by the TCEQ. The precision and accuracy of the PQL shall be initially determined from the PQLs reported over the course of a minimum of eight groundwater monitoring events. The results obtained from these events shall be used to demonstrate that the PQLs meet the specified precision and accuracy as shown in the table below. The PQL will be supported by analysis of a PQL check sample, which is a laboratory reagent grade sample matrix spiked with chemicals of concern at concentrations equal to or less than the PQL. At a minimum, a PQL check sample will be performed quarterly during the calendar year to demonstrate that the PQL continues to meet the specified limits for precision and accuracy as defined in the table below.

Table 1 – QC Specification Limits for the PQL and Lower Limit of Quantitation Check Samples

COC	Precision (% RSD)	Accuracy (% Recovery)
Metals	10	70-130
Volatiles	20	50-150
Semi-Volatiles	30	50-150

For analytes that the established PQL cannot meet the precision and accuracy requirements in the table above, the owner/operator will ensure the laboratory will submit sufficient documentation and information to the TCEQ for alternate precision and accuracy limits on a case by case basis. Non-detected results will be reported as less than the established PQL limit that meets these precision and accuracy requirements."

TAB C

March 2008
Rev. DRAFT

SPECIFICATION LIMITS FOR PRECISION AND ACCURACY MEASUREMENTS OF THE PRACTICAL QUANTITATION LIMIT

MUNICIPAL SOLID WASTE PERMITS SECTION
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Prepared by
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PURPOSE

To provide staff direction regarding the use and interpretation of Practical Quantitation Limits (PQLs) as statistical limits in accordance with 30 Texas Administrative Code (TAC) Section (§)330.405(f) and §330.407(d). This document was developed by the Municipal Solid Waste (MSW) Permits Section to assist staff in applying the rules.

RULE REQUIREMENTS

The MSW Regulation 30 TAC §330.405 addresses the groundwater sampling and analysis requirements for the samples to be analyzed and 30 TAC §330.407 specifies the detection monitoring program's statistical methods chosen to evaluate groundwater monitoring data from an Municipal Solid Waste Landfill Facility (MSWLF).

Specifically, 30 TAC '330.405(f)(5) requires that: "the statistical method shall account for data below the limit of detection with one or more statistical procedures that are protective of human health and the environment. Any practical quantitation limit that is used in the statistical method shall be the lowest concentration level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions that are available to the facility."

In addition, 30 TAC §330.407(a)(1) also requires: "the owner or operator shall evaluate the background data to ensure that the data are representative of background groundwater constituent concentrations unaffected by waste management activities or other sources of contamination."

DIRECTION

To fulfill the above mentioned rule requirements, the PQL must be the lowest concentration at which the MSWLF's analytical laboratory can report quantitative data within the specified limits of precision and accuracy.

The MSWLF's laboratory must meet three requirements in order to report meaningful results to the MSW Program.

- The reporting limit for each constituent of concern (COC) will be the analytical laboratory's PQL (with exceptions identified on a case-by-case and/or site specific basis).
- The groundwater monitoring data must demonstrate and document on an ongoing basis the analytical laboratory's ability to quantitate at its reporting limits.
- Documentation must exist to support a change to a higher PQL. This documentation may be requested by MSW Permits Section to support changing the PQL for a given constituent.

QUALITY CONTROL (QC) – PQL CHECK SAMPLE

The use of EPA-approved methods alone does not ensure quality data. Therefore, it is necessary to establish a Performance-Based Measurement System (PBMS) to verify the degree of quality actually attained within the analytical methodology. EPA defines PBMS as a set of processes wherein the data needs, mandates, or limitations of a program or project are specified. The PBMS provides criteria for selecting appropriate methods to meet those needs in a cost-effective manner.

A "PQL check sample" is a laboratory reagent grade sample spiked with verified and/or known amounts of COCs at concentrations equal to the PQL and must be the lowest concentration at which the

MSWLF's analytical laboratory can report quantitative data within the specified limits of precision and accuracy. The PQL check sample is carried through the entire preparation and analysis procedure.

Measurement of the PQL QC Criteria

The MSWLF's analytical laboratory will analyze a sufficient quantity of PQL check samples in order to develop their own PQLs and must verify their PQLs over time. Standard, documented procedures will be used for all sample analyses. Reasons for the use of nonstandard procedures must be clearly documented in both the groundwater monitoring data and statistical reports.

REQUIREMENTS OF THE PQL CHECK SAMPLE

40 Code of Federal Regulations Part 258.53(h)(5) defines the PQL as "any PQL that is used in the statistical method must be the lowest concentration level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions that are available to the laboratory."

A PQL must represent the laboratory's lowest level of quantitation and verified as within the PBMS specified limits. After an MSWLF's representative background concentrations have been established, then the MSWLF can perform detection monitoring using any method capable of quantifying the concentrations at or below established background concentrations.

If the recovery of the PQL check sample is not within the specified limits, then corrective action (e.g., re-calibration) will be taken to meet the specified limits before proceeding with analyses of groundwater monitoring samples. The MSWLF's laboratory must include and report results of the PQL check sample with data submitted to the MSW Permits Section. The PBMS specified limits for the PQL's precision and accuracy are as follows.

Table – QC Specification Limits for the PQL and PQL Check Samples

COC	Precision (% RSD)	Accuracy (% Recovery)
Metals	20	80-120
Volatiles	30	65-135
Semi-Volatiles	30	65-135

Note 1: In site-specific / case by case instances, sample reporting limits may be set higher than experimentally determined PQLs to make up for sample dilutions, to avoid verified positive matrix effects or interferences from common reagent contaminants, or for reporting convenience (i.e., to group common compounds with similar but slightly different experimentally determined PQLs (xylenes)).

Note 2: Estimated results below the PQL must always be reported with a data qualifier (J-flag).

Note 3: Non- detected analytes are always reported as less than the PQL.

SPECIFICATION LIMITS OF PRECISION AND ACCURACY OF THE PQL

For inorganics, ongoing precision and accuracy measurements at the PQL must demonstrate the following criteria.

- The PQL must be equal to the concentration of the lowest non-zero standard in the calibration curve.
- Recoveries for a PQL check sample must be within ±20% the true spike concentration amounts.
- Precision must be within ±20% of the PQL check sample's relative standard deviation measurements.
- The PQL should represent the lowest level of quantitation possible for the analytical method within the specified limits for accuracy and demonstrated precision within ±20%.
- The PQL used for measuring a COC should be at or below the representative background concentration when continuing to conducting detection monitoring.
- A PQL check sample is a reagent grade sample that is spiked with COC concentrations equal to the PQL and carried through the entire preparation and analysis procedure.

For organics, ongoing accuracy and precision measurements at the PQL must demonstrate the following criteria.

- The PQL must be equal to the concentration of the lowest non-zero standard in the calibration curve.
- Recoveries for a PQL check sample must be within ±35% the true spike concentration amounts.
- Precision must be within ±30% of the PQL check sample's relative standard deviation measurements.
- The PQL should represent the lowest level of quantitation possible for the analytical method within the specified limits for accuracy and demonstrated precision within ±30%.
- The PQL used for measuring a COC must be at or below the representative background concentration when continuing to conducting detection monitoring.
- A PQL check sample is a reagent grade sample that is spiked with COC concentrations equal to the PQL and carried through the entire preparation and analysis procedure.

DEFINITIONS

Accuracy: Is defined by the degree of agreement between an observed value and an accepted reference value. Accuracy includes a combination of random error (precision) and systematic error (bias) components that are due to sampling and analytical operations. Accuracy is the degree of agreement of a measurement with an accepted reference / true value. Accuracy is to be expressed in terms of a recovery percentage of the reference / true value.

COC: Constituent of Concern, the MSW Groundwater Program requires 40 CFR Part 258 Appendix I constituents for detection monitoring and 40 CFR Part 258 Appendix II constituents for assessment monitoring. Other constituents may be monitored. COCs are sometimes also referred to as analytes.

Precision: The agreement among a set of replicate measurements without assumption of knowledge of the true value. Precision is estimated by means of replicate analyses. The PQL check samples should contain concentrations of COCs above the MDL. The estimates of precision are to be expressed as the relative standard deviation (RSD).

RSD: A measure of precision, calculated as the standard deviation of a set of values divided by the average, and multiplied by 100 to be expressed as a percentage.

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From 1991 to 2000, Ms. Lewis was in private practice at the Chicago law firm of Gardner, Carton & Douglas, where she represented corporate and municipal clients in private-party environmental litigation, and environmental permitting, compliance, and enforcement matters before the U.S. Environmental Protection Agency and numerous state agencies. Ms. Lewis left private practice in 2000 to take a position as in-house environmental counsel at another major integrated oil company in Chicago and Houston before joining Shell in June 2007.

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Mr. McNeil has more than 35 years of experience as a trial lawyer, with the United States Department of Justice and in private practice. He defends companies and senior officers before juries throughout the country in corporate criminal prosecutions and parallel civil proceedings and class proceedings. He also represents lawyers and law firms in civil and criminal proceedings.

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In *The National Law Journal's* "Biggest Defense Verdict of 1999", Mr. McNeil led the successful defense of a national healthcare provider, winning a "slam-dunk defense verdict" in a fraud and conspiracy case. (NLJ, May 22, 2000.) Other trials involving charges of RICO, conspiracy, commercial bribery and fraud have resulted in take-nothing judgments on claimed losses of millions of dollars.

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Mr. McNeil was recognized by Chambers USA 2008 as one of the leading practitioners in Texas for antitrust.

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- *A Second Chance: Thousands of Hours + Millions of Dollars = Two Convictions Vacated*
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INTERNAL CORPORATE INVESTIGATIONS OVERVIEW: INITIATING AN INTERNAL INVESTIGATION AND ASSEMBLING THE INVESTIGATIVE TEAM

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From

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I. INTRODUCTION

Since the 1990s, the business world has been roiled by one corporate scandal after another, each with its own accompanying corporate investigation. Internal investigations have provoked some scandals and have simply dissected others. But regardless of outcome, corporate investigations remain the single most effective management tool for uncovering wrongdoing and instituting remedial relief. Today, more and more companies are vesting legal counsel with a broad mandate to investigate conduct, fashion remedies and communicate findings – good or bad – to enforcement authorities.

Internal Corporate Investigations was first published in 1992, a time when there was no Holder Memo (1999), no Seaboard (2001), no Sarbanes-Oxley (2002), no Thompson Memo (2003), and no McNulty Memo (2006).[1] While, in the intervening years the mechanics of the investigative process have remained largely unchanged, these developments have vastly complicated the investigative process and the role of counsel within it.

For example, most of us thought it rare indeed that an attorney conducting a corporate investigation would himself become a witness in a later criminal trial. Nor would we have envisioned how others would come to regard us as agents of enforcement authorities. And who could have anticipated the dramatic increase in the need for special

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[1] Memorandum from Deputy Attorney General Eric Holder, Jr., Federal Prosecution of Corporations (1999); Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act Release No. 44969 (Oct. 23, 2001) (available at: http://www.sec.gov/litigation/investreport/34-44969.htm); The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (2003) and Memorandum from Deputy Attorney General Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (2006).

litigation committees – wholly independent of management – who retain their own counsel and oversee counsel's investigation, threatening longstanding professional relationships and friendships and leading to divisions with unpredictable results? The protection of confidences has undergone real change. There was a time lawyer and client could be relatively certain confidential communications would remain just that. We now know that the protection of confidences is far less secure. And any discussion of privilege leads directly to the role of the company's external auditors and their demands upon the process. The choice of counsel has taken on enormous added importance. Some companies bear deep scars arising from the selection of lawyer and law firm by the special committee and the ensuing unthinkable cost and unparalleled scope, with little or no comparable benefit.

If we have learned anything over the past two decades, it is that the questions addressed during an internal investigation are far more important – indeed critical – to the future of the company than we ever imagined. From start to finish, legal guidance on matters like scope and document retention and advancing fees and interviewing employees demands skills that allow few if any mistakes of judgment or advice.

Conducting an internal investigation requires scrupulous attention to detail and a full understanding of legal developments and recent experiences of other investigative counsel. These experiences are often chronicled in the public domain and provide keen insights into the process. Before setting out the steps of an internal investigation, we turn to two recent occurrences that without question reshape the task of those involved in

conducting internal investigations: the Sarbanes-Oxley Act of 2002 and the McNulty Memo of 2007.

A. The Sarbanes-Oxley Act of 2002 and Its Aftermath

Any discussion of the investigative process must begin with the Sarbanes-Oxley Act of 2002[2] and its dramatic impact in this area of practice. Aimed at eliminating accounting fraud and implemented as an attempt to restore confidence in corporations, the Act has had an immediate effect on public companies in the United States, as well as the accounting, legal, and investment banking community.

Sarbanes-Oxley imposes heightened requirements on officers, directors, and advisors of corporations to identify material issues before publishing financial statements, and requires that they make affirmative representations about the veracity of financial statements and the health of internal corporate controls. In addition to generally increasing the level of scrutiny given to corporate conduct, Sarbanes-Oxley has most affected internal investigations in three ways.[3]

First, Sarbanes-Oxley and related SEC Rules have increased the number of mechanisms for uncovering allegations of misconduct. Executive officers now publish codes of conduct for their senior financial officers. Each company must report on the health of its

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2 Pub. L. No. 107-204, 116 Stat. 745 (2002).

3 For a more detailed discussion of the effect of Sarbanes-Oxley on internal investigations, see Chapter 16, "SOX It to Me: Internal Investigations in a Sarbanes-Oxley World."

internal reporting processes as well as its financial results. Elaborate certification processes have become commonplace to support the CEO and CFO as they certify the company's financial results. The Act also requires audit committees to set up mechanisms for collecting confidential, anonymous "whistleblower" reports. And wrongdoing disclosed to the chief legal officer by counsel through "reporting up" requirements are only discharged once the company make an "appropriate response." Any one of these mechanisms can uncover evidence of potential misconduct sufficient to require an internal investigation. Taken together, the reporting requirements of Sarbanes-Oxley present a mountain of potential issues facing the company each time it publishes its financials.

Second, Sarbanes-Oxley complicates the analysis of who should conduct and who should supervise an internal investigation. Although the Act is short on specific guidance, a company will frequently form a special committee of the Board and the committee will engage independent counsel to conduct the investigation. The fact that companies have turned to special committees or called upon their independent audit committee is nothing new. What has changed in recent years is the frequency of their investigations. It is not uncommon for the General Counsel to turn to a standing committee like the Audit Committee or to the entire Board to review allegations of misconduct and to determine how those allegations will be investigated. There are times when the investigation must be handled by a Special Litigation Committee whose independence and disinterestedness can withstand any challenge.

Third, Sarbanes-Oxley has widened the constituencies who must ultimately be satisfied with the results of the internal investigations. Sometimes, government agents or the investing public will be apprised of the results of an investigation.[4] More commonly, an internal investigation is conducted under the immediate scrutiny of the company's outside auditors. Because of increasing pressures placed on auditors by Sarbanes-Oxley and other recent regulatory changes, auditors now aggressively seek access to internal investigations, even in the planning stages. When refusing to sign off on financial statements until all issues have been thoroughly run to ground, auditors exercise significant power over a corporation's investigation and can turn even the most straightforward investigation into a significant, time sensitive endeavor.

B. The McNulty Memo of 2007: Cooperation, Waiver and Indemnification

In its 2003 Thompson Memorandum,[5] the Department of Justice redefined traditional notions of cooperation by declaring that, among other factors, waiver of attorney-client privilege and advancement of legal fees could be considered in assessing "cooperation" and thus determining whether a business entity should be criminally charged.

From the outset the Thompson memo drew sharp criticism from many corners of the bar over concern that the new policy effectively required that every company under

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4 *See* Chapter 7, "Disclosure of Results of Internal Investigations to the Government or to Other Third Parties;" *see also* Chapter 12 "No Security: Internal Investigations into Violations of the Securities Laws."

5 Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (2003).

investigation waive its attorney-client privilege or risk being labeled non-cooperative. In response, in 2006 the Department published the McNulty Memorandum, creating a two-tiered approach to requesting waiver of privileged information.[6] The new policy requires that prosecutors obtain written authorization from their U.S. Attorney (who must consult the Assistant Attorney General for the Criminal Division) before requesting waiver; the policy also distinguishes between waiver of purely factual information ("Category I") and attorney-client communications or non-factual attorney work product ("Category II").

Like the debate over waiver, the Department's pronouncement that advancement of legal fees is a factor in charging decisions also received criticism from many sources, most notably United States District Judge Lewis A. Kaplan.[7] Noting that state laws grant corporations the power to advance legal fees to employees prior to formal findings of fault, the McNulty Memorandum reversed course and now precludes prosecutors from considering advancement of legal fees, except in "extremely rare cases."[8]

Whether or not McNulty adequately addresses criticisms of Thompson, the new policy will undoubtedly have implications for internal investigations.[9] At the very least, those

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6 Memorandum from Deputy Attorney General Paul McNulty, Principles of Federal Prosecution of Business Organizations (2006).

7 See United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2000). In its investigation of KPMG, the government discouraged KPMG from advancing legal fees to its employees. Judge Kaplan found that the resulting capped advancement of legal fees – conditioned on the employee's waiver of Fifth Amendment rights – violated both the Fifth and Sixth Amendments to the Constitution.

8 McNulty dictates that advancement of fees should only be considered in charging decisions if the totality of the circumstances shows the advancement of fees was made to impede a criminal investigation.

9 Recent legislation introduced by Senator Arlen Specter, if passed, would forbid government agencies from considering waiver of the attorney-client or work product privileged in a charging analysis. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007).

performing investigations will have to remain cognizant of whether they are discovering (or creating) information that could be subject to waiver as either Category I or Category II information. With respect to advancement of fees, Judge Kaplan's decision is of obvious importance and the McNulty Memorandum, in reversing earlier policy is the Department of Justice's attempt to minimize any uncertainty. As with any policy, there are exceptions and how "extremely rare cases" will be determined throughout the various United States Attorneys' Offices is currently unknown.

II. DIFFERENT TYPES OF INTERNAL INVESTIGATIONS

Internal investigations may arise in a variety of ways and uncover a wide band of problems. Underlying many internal investigations is corporate conduct that can trigger confrontations on a number of fields, each with different opponents, different rules, and different referees. A company's illegal conduct may result in federal and state prosecutions, administrative actions, private litigation, and, many times, difficult dealings with the news media. A lawyer's failure to recognize this reality at the outset will greatly diminish the overall effectiveness of the investigation.

As a consequence, there are several types of internal investigations. One is purely reactive, arising in response to some external event—for example, a grand jury subpoena, a document request by the Inspector General of a government agency, an administrative audit, or a private lawsuit. Another is proactive—the company conducts the internal investigation on its own initiative to determine whether any wrongdoing has occurred

and, if so, to take remedial steps. Finally, many internal investigations fit into neither category but are a mixture of both.

Counsel's role in connection with the internal investigation will vary depending upon the type of investigation under way. For example, if the investigation is triggered by some government action (e.g., grand jury subpoena or administrative audit), counsel may be retained for one or more of three purposes: first, to conduct the investigation; second, to advise the company of its legal rights and potential liabilities; and third, to represent the company in a lawsuit or other proceeding brought against the company by the government or a private litigant. Having a single counsel perform all three roles can be a prudent (and less costly) decision under many circumstances. However, in other circumstances—for example, where the company is likely to waive the attorney-client privilege otherwise protecting the investigation—the company may be better served by retaining one law firm to conduct the investigation and provide legal advice to the company, and a second firm to conduct all later legal procedures. Importantly, for those companies wishing to rely on its investigation to influence governmental decisions, enforcement authorities will wholly discount its value unless the investigation was conducted by truly disinterested and objective counsel.

III. THE INITIAL MEETING

Experience teaches that a crucial event in an internal investigation is the initial meeting between client and the lawyer who will conduct the internal investigation. The lawyer

learns for the first time the conduct at issue and, together with client, begins exploring the steps involved to marshal the facts and analyze their legal consequences. Decisions must be made in this first session, and the judgments underlying those decisions are ones that both the company and counsel must live with throughout the ensuing inquiry. A modest but acceptable agenda for the initial meeting will include discussion along the following lines:

- The starting point: defining the client and deciding whether to conduct an investigation.
- Defining the scope of the investigation.
- Applying the attorney-client privilege and the attorney work-product doctrine.
- Assembling the investigative team.
- Agreeing to lines of reporting and supervision.
- Anticipating what can go wrong.

A. The Starting Point: Identifying the Client and Deciding Whether to Conduct an Investigation

As mentioned before, the first decision is identifying "the client". Should it be the CEO, the Board or its Chairman, the Audit Committee or a Special Litigation Committee? This judgment must be made at the outset, because it clarifies the attorney-client relationship and identifies the person or entity who will later be called on to address remedial actions and employment decisions and potential negotiations with enforcement authorities.

Once the client has been identified, the question must then be asked: Should the company conduct any investigation at all? Why should the company investigate claims that, if true, will subject the company to criminal or civil lawsuits? This impulse—isn't the company better off not knowing—is not irrational and should be addressed head-on at the outset.

The predominant factor in deciding whether to conduct an internal investigation is the existence – actual or potential – of a government investigation or private lawsuit. If the Justice Department or other prosecuting agency has served a grand jury subpoena or is otherwise conducting an investigation, the company has no choice but to conduct its own internal investigation. The same reasoning applies if a former employee has complained to the government about allegedly illegal conduct.

The harder question arises when a company has no knowledge of a government inquiry but becomes concerned of possible wrongdoing. Here, management may be tempted not to investigate itself, hoping that the allegations if material will never become public. The better course favors an investigation. A company is criminally liable for its employees' illegal conduct if employees acted within the scope of their employment and intended, at least in part, to benefit the corporation.[10] The law's reach alone is enough to compel self-analysis and correction.

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[10] *See* United States v. Beusch, 596 F.2d 871 (9th Cir. 1979); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962).

Conducting an internal investigation will enable the company to decide whether to disclose to the government the allegations and the company's findings in response to those allegations.[11] Under some circumstances, disclosing the results of an internal investigation will enable the company to avoid an enforcement action—either because the allegations are unfounded or because, as a result of the company's cooperation, the government chooses not to prosecute the company.[12]

Internal investigations provide another significant advantage to the company—that of enabling the company to formulate its defenses at an early stage in anticipation of later criminal or civil proceedings. For example, while a corporation generally is liable for its employee's acts, such liability might not attach where the employee has acted for personal benefit contrary to the corporation's diligent efforts to prevent such misconduct.[13] In addition, while a company is legally responsible for some acts of misconduct, it is not necessarily liable for the full scope of employee misconduct. A properly conducted investigation will enable the company and its counsel to place the misconduct in its best light, to assert defenses where appropriate and to argue mitigation.

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[11] The topic of disclosure is addressed in detail in Chapter 7, "Disclosure of Results of Internal Investigations to the Government or Other Third Parties."

[12] Memorandum from Deputy Attorney General Paul McNulty, Principles of Federal Prosecution of Business Organizations (2006).

[13] *See, e.g.,* Beusch, 596 F.2d at 878 (due diligence is a factor to be weighed by the jury in determining whether the individual actor intended to benefit the corporation).

Finally, although a corporation generally is not required to disclose a prior crime,[14] in many instances disclosure may be the only means of preventing future criminal conduct. For example, in the field of government contracting, companies are often called upon to certify financial statements, to make accurate financial records available for audit, or otherwise to represent the company's prior conduct. Under these circumstances, disclosing prior misconduct may be the only practical method of preventing the occurrence of another criminal act that will expose the company—and perhaps its individual officers—to further criminal liability.

B. Defining the Scope of the Internal Investigation

In the initial meeting, client and counsel should reach agreement on the scope of the investigation. That scope should correspond to the severity of the matter under investigation. There is a wide difference between suspicion that a bookkeeper has embezzled funds on the one hand, and public allegations of widespread bribery in government procurement procedures on the other.

If the internal investigation results from a recently commenced government inquiry, the scope of the internal investigation is somewhat preordained—one will likely mirror the other. The question of scope becomes more difficult, however, where the allegations of misconduct arise within the company and there is no known government investigation.

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[14] *See* Chapter 7, "Disclosure of Results of Internal Investigations to the Government or Other Third Parties."

There are numerous instances where a company may elect to review internal practices solely for corrective action and not in fear of litigation. A hospital corporation may wish to review and institute new tracking systems in light of recently instituted government regulations; a company may analyze pricing practices in connection with an annual antitrust compliance program; management may be concerned about possible kickbacks by its purchasing department; or a company may suspect drug abuse in the workplace and wish to formulate a remedial plan.

In any of these instances, counsel and management should reach a clear understanding of the scope of the inquiry and should strictly conform all services to the agreed-upon parameters. Such an approach helps to ensure that the results of the investigation are fully protected from unwanted disclosure. If, for example, counsel veers beyond the agreed-upon scope—gathering information and giving advice outside the understood areas of concern—the risk of disclosure increases.[15] Additionally, a clear articulation of the engagement—and thus of counsel's role to obtain facts and render legal advice—makes less likely any challenge to the investigation on grounds that counsel acted as a business advisor, not a lawyer.

The client will want to confirm in writing the scope of the investigation. Whether or not in the form of an engagement letter, the document should state that counsel has been asked to investigate certain allegations; that the investigation is being conducted to enable

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[15] While the attorney-client privilege presumably protects all client communications, the work product privilege may not attach to the lawyer's efforts outside the scope of the engagement (other than client communications) when those efforts are unrelated to the prospect of future litigation. Third-party interviews are one example of this concern.

counsel to advise the company regarding its legal rights, obligations, and potential liabilities; and that all communications with counsel are protected by the attorney-client privilege and thus intended to remain confidential. In some cases, it may be wise to circulate this memorandum among the employees to be interviewed.

C. Applying the Attorney-Client Privilege and Work-Product Doctrine

There can be no greater risk in commencing an investigation than to treat issues of privilege carelessly. Upon the conclusion of the investigation, the company may decide to disclose the results. Importantly, this decision should be one of choice, not the product of carelessness or ignorance.

Thus, before commencing the investigation, both client and counsel should be versed in fundamental principles of privilege. Under the United States Supreme Court's decision in *Upjohn Co. v. United States,*[16] counsel's communications with company employees will be protected by the company's attorney-client privilege under certain described circumstances.[17] Federal and state law give added work product protection if counsel's work is "in anticipation of litigation or for trial."[18]

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16 449 U.S. 383 (1981).

17 *Upjohn* protects these communications if challenged in a federal proceeding; state law, both statutory and common law, provides guidance for protection should the assertion be challenged in a state proceeding.

18 FED. R. CIV. P. 26(b)(3). State laws may vary in their protections afforded the lawyer's work product.

The initial engagement is important to the question of privilege. When management chooses to investigate its own conduct and no legal proceeding is under way, counsel must carefully consider whether its role—the gathering of data, the analysis, the conclusions—will be protected from later, unwanted disclosure. Is management seeking business advice or legal advice? Is counsel performing an investigative service or a legal service? Are employees clearly informed that their communications with company counsel are intended to remain confidential? The answers to all these questions will affect the degree to which the internal investigation can be protected from unwanted disclosure.

D. Assembling the Investigative Team

There may be no more delicate task than reaching agreement on who should conduct the internal investigation. The choice often is between a lawyer and a nonlawyer—for example, in-house security personnel. Except in relatively insignificant matters (e.g., petty theft), lawyers are the better choice to conduct the investigation. This conclusion is arrived at for two reasons.

First, having counsel conduct the internal investigation better enables the company to protect the entire investigation pursuant to the attorney-client privilege and the attorney work-product doctrine. Although an investigation by a nonlawyer may conceivably come within some work product protection, far greater protection comes where a lawyer has conducted the investigation consistent with all available legal privileges.[19]

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[19] *See* Chapter 2, "Implications of the Attorney-Client Privilege and the Work- Product Doctrine."

Second, the internal investigation inevitably will lead to an analysis of the company's legal rights, obligations, and potential liabilities, all issues legal counsel can best address. Although nonlawyers should not supervise the internal investigation, they can perform valuable roles. Many internal investigations deal with complex questions that only specialists can address. Auditors or engineers or specialized technicians can provide invaluable assistance in these areas. Because many of these individuals can be found within the company, their participation will have the added benefit of reducing the cost of the internal investigation.

Once the company decides to have a lawyer conduct the investigation, the next question is whether the lawyer should be a member of the company's law department or outside counsel. There is no simple answer to this question, except to say that it depends upon all the circumstances, including cost. In almost all circumstances, it will be less expensive to have the investigation conducted in-house than to retain outside counsel.

Cost considerations are of obvious importance but should not dominate the determination. Indeed, financial concerns often quickly give way to the more important factor of comparative independence of counsel conducting the investigation. Although the government will not perceive outside counsel as totally independent, outside counsel is presumptively more independent than inside counsel. Inside counsel, after all, has only one client—the company.

This question of independence comes sharply into focus when considering the interview process. If inside counsel both interviews key employees and provides them with legal advice, counsel may find it difficult to approach the investigation with total independence. Additionally, under some circumstances, lawyers employed by the company may themselves be witnesses to the underlying conduct, thus disqualifying themselves from the role of counsel. This potentiality is certainly not remote and should be examined at the outset to prevent future problems during the investigation.

Moreover, if pertinent employees have previously relied on inside counsel for legal advice, they might regard counsel as their personal lawyer during the course of their interviews. Although all witnesses should be told that the company's counsel does not represent them personally, a prior legal relationship between a witness and an inside lawyer can obscure this admonition and create at least a factual dispute over the witness's understanding at the time of the interview.[20]

E. Agreeing to Lines of Reporting and Supervision

Above, we discussed the task of identifying the "client." Who is the "client" and who does the lawyer report to? Will counsel report to the General Counsel? To senior management? To the Chief Executive Officer? To the Chairman of the Board? Or to an Audit or Special Committee?

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[20] *See* Chapter 3, "The Witness Interview Process," for a more complete discussion of this issue.

These questions involve both practical and political problems. Management is vitally interested in the investigation, its progress, and its discoveries. Indeed, it must have *some* information regarding the underlying conduct to meet its responsibilities. Yet what if senior management is itself responsible for the practices under investigation? Steps must be taken, on the one hand, to shield management from unwanted information, and on the other, to insure the integrity of the investigation and its conclusions.

Experience teaches that the best course is to confront this issue early on and resolve it before going forward. Failure to do so only defers these hard questions and makes for a more difficult resolution at later stages in the investigation, when emotions are high (with the possible onset of government action) and objectivity is short.

F. Anticipating What Can Go Wrong

Those who follow this area of practice understand full well the perils found within the investigative process. A publicly traded company may learn all too late that the findings of its investigation are splashed on the front page of local and national newspapers. Thus, management's instinctive judgment that an investigation may generate more bad than good is common. Counsel should anticipate this instinct and should use it as an opportunity to educate the client on the value of a company's self-inquiry. But counsel must also alert the client to the fact that in any investigation, however well managed, there will necessarily be unpredictable bumps, some of which may be harsh.

Inadvertent disclosure of the investigation's results is one such serious risk. There are numerous ways in which the privilege can be compromised and confidences disclosed. Even though counsel scrupulously observes privilege considerations, unwanted disclosure is far from theoretical. A sloppy employee interview can create a passel of later problems. Investigative counsel must approach the interview process along carefully drawn lines. Because of its central importance to the investigative process, mistakes made there can severely compromise the ability of the company later to defend itself. Counsel must clearly define their role—whom they represent and whom they do not. They must set out equally clearly the nature of the investigation and the employee's obligation to maintain the confidentiality of the interview. To do otherwise will unnecessarily cause confusion and invite later problems. Investigative counsel must provide the clearest possible instructions to the witness, informing him of his obligations to the company, the importance of a candid and frank communication and the potential later decision by the "client" to disclose the contents of the interview.

The importance of clear and concise instructions can best be seen by reviewing the indictment in *U. S. v. Singleton.*[21] In that case, a trader for a worldwide energy company was indicted on charges of obstruction of justice, wire fraud and false reporting. The obstruction of justice charge focused upon the trader's statements to independent investigative counsel. Investigative counsel interviewed the trader and informed him that the information he provided might at some later point be disclosed to government authorities. The trader chose to participate in the interview and, according to the indictment, gave false and misleading information to outside counsel. These statements

[21] United States v. Singleton, No. 4:04-cr-514-1 (S.D.T.X. filed Nov. 17, 2004).

later became one of several counts upon which he was indicted. At trial, investigative counsel was subpoenaed by criminal enforcement authorities to testify about the interview, its context in the overall investigation, the questions asked and the answers given.

Defamation actions are far from theoretical in the aftermath of internal investigations. Investigations yield information, and that information must be reported in one form or another within the company and possibly to outsiders. It is often difficult to achieve the proper balance between the company's need to act upon the information and its desire not to incur defamation charges from employees or third parties. This concern is a vital one, however, and should be flagged earlier in the investigation, so that both management and counsel are sensitive to it.

Finally, it is wise to emphasize to the client that during the internal investigation, employees should not create new documents discussing the allegations, except under the strict supervision of counsel. It is also wise to point out that despite this advice, employees may nevertheless do just that. Clear written instructions to employees at all levels will help to minimize this risk. The instructions can be included in a memorandum setting out the nature of the investigation and the documents sought, and providing assistance on responding to any outstanding discovery request.

IV. PRELIMINARY STEPS TO PREPARE FOR GOVERNMENT INVESTIGATIONS

When the internal investigation comes as a result of a criminal inquiry by enforcement authorities, counsel should take immediate steps to prepare management for certain key events that could occur during the course of a criminal investigation. At the outset of an internal investigation, it is impossible to predict each of the issues that will arise in the event of later government investigations but the following sets out several important cautions.

One increasingly common event is the government's use of search warrants. Not long ago, business litigators had only to concern themselves with the case law surrounding grand jury subpoenas *duces tecum.*[22] Increasingly, federal investigators are making use of search warrants as an alternative method of obtaining documents from a company.

The growing use of warrants poses unique concerns to the company and its counsel. By their very nature, search warrants are sudden and without notice. Also, by using warrants, government agents put themselves in a position (arguably improperly) to obtain statements from employees before they have reviewed any documents, before they have consulted with counsel if they choose to do so and before they understand their legal rights.

Moreover, a well-planned and executed search can be a spectacle. When government agents descend upon a company in the midst of its workday—fully armed—the trauma to the individual employees and the company can be enormous. This procedure can pose

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22 FED. R. CRIM. P. 17(c).

enormous costs to the company's treasury and to the employees' morale. Counsel should therefore warn management of the potential use of search warrants and should apprise employees of the procedures to be followed in the event of a search. A written memorandum can prove helpful.

The company should also be warned of potential for government agents' *ex parte* contacts with company employees. The company, and employees thought to be affected, should be apprised of this possibility and of the employees' rights and obligations in the event they are contacted. Employees should *not* be told they cannot speak with government agents. But they can be told what their rights are—they have the right to talk or not to talk, they can consult with counsel before deciding whether to talk, and they can have company counsel present at any interview if they choose. Moreover, there is nothing improper in advising employees that, in view of the strict penalties flowing from enforcement of federal criminal laws and in view of the breadth of case law regarding corporate liabilities, management would prefer to have its counsel attend any interviews of company employees. Finally, counsel is well advised to engage government counsel in discussions, hoping to reach agreements that no current employee will be approached without first talking with company counsel.

V. CONCLUSION

Without doubt, internal investigations pose significant risks to the corporate client. Unexpected turns can occur, mistakes can be made, and, more fundamentally,

misconduct will be uncovered. Yet, clearly the bias favors commencing the investigation and learning of the underlying activity, for good or bad. How else can the company adequately defend itself in any ensuing civil or criminal proceeding?

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CAROLYN AHRENS practices law primarily in the areas of water, utility and environmental law. She also has been active in representing clients on water issues before the Texas Legislature. Carolyn has been a speaker and author on the subject of water and legislative issues on many occasions. She is a dedicated participant in professional associations that are focused on water resources for public water supply. Carolyn serves on the national Board of Directors of the WateReuse Association and Chairs that association's National Legislative Committee. She serves on the Board of Directors of the Texas Water Conservation Association and chaired that association's Water Laws Committee for three terms. Carolyn is a Trustee of the American Water Works Association Water Resources Division and formerly served on the Board of Trustees of the national Water Environment Federation. In her work with the Water Environment Association of Texas, Carolyn has convened the Texas Water Forum, a network of Texas associations that share perspectives on legislative and regulatory issues facing water suppliers.

Carolyn has received the TWCA President's Award for "outstanding dedication, contribution and service to the water resources of the State of Texas;" the Arthur Sidney Bedell Award, presented by the Water Environment Federation "acknowledging extraordinary personal service to the Water Environment Association of Texas;" the Water Environment Association's President's Service Award; and two Watermark awards for raising the public's level of understanding of Texas water issues.

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Southwest Texas State University (B.S. in Education with Highest Honors, 1979; Masters of Education, 1981); University of Texas (J.D. with Honors, 1985). Recipient: Dean's Awards for Academic Achievement in Water Law Seminar, Land Use Planning, and Federal and Texas Public Mineral Land Law. Member: Delta Theta Phi (Tribune, 1984-85); Environmental and Natural Resources Law Society.

Publications/Articles:
Author: "Texas Ends Legislative Session Holding Mixed Bag for Water Reuse," WateReuse Association (June 2001); "In the Interim: An Opportunity for Reuse in Texas," WateReuse Association, (March 2002); "The Kitten that Roared," TWCA Confluence (February 2001); "Water Reuse: Is There a Devil or a Property Right in the Details?," Water Environment & Technology (January 2001); Contributing Author: "Water and Wastewater Service Options for Economically Distressed Areas," under grant from the Texas Water Development Board (December 29, 1999); Co-author: "Report on Terminability of Water Supply Service in Texas and Model Agreement for Fixed-term Wholesale Raw Water Supply," under grant from the Texas Water Development Board (October 31, 1996); Author: "Looking Back–Looking Forward: The YLD Mission," BARRISTER Vol. 21, No. 2 (60th Anniversary Edition, Summer 1994); Co-editor and Contributing Author: "Step Up to the Bar: Surviving Law School," Full Disclosure: Do You Really Want to Be a Lawyer? (1989; 2nd ed. 1992); Author: "Fairness and the Administrative Process," 8 Austin Lawyers Journal (July and August 1987).

Presentations:
"Legislative Update," Texas Water 05, April 6, 2005; "Point of Conflict: Texas Water Law," Urban Water Council Regional Meeting, March 21, 2004; "Water Reuse: Point of Conflict," Water Sources 2004, January 11-14, 2004; "Legislative Outlook: Focus on Texas Water Reuse," WateReuse Symposium XVIII, September 9, 2003; "Water Rights Issues for the Next Legislative Session", Bi-annual Briefing for Legislators and Staff, Texas Section American Water Works Association, August 2, 2002; "Update on Interim Committee Activities," Spring Seminar, Texas Municipal Utilities Association, April 26th, 2002; Panel Presentation, "Water Plan 2002: Driving New Policy," Texas Section American Water Works Association, November 2, 2001; "77th Legislative Session Wrap-up: Water Legislation," San Antonio Section Texas American Water Works Association and Water Environment Association of Texas, September 20, 2001; "Water Reuse in Texas," Gordon Cologne Annual Breakfast, WateReuse Association Symposium XVI, September 8-11, 2001; "Legislative Update," Groundwater Districts 101: Preserving Groundwater through Local Management, Texas Groundwater Legal Defense and Education Fund, August 27-28, 2001; "Texas Water Rights," Fundamentals of Water Law in Texas: Protecting Water Rights, Use and Quality, National Business Institute, July 10, 2001; "Water Reuse in Texas, A Water Rights Perspective," Texas Water 2001, Texas Section American Water Works Association and Water Environment Association of Texas, April 5, 2001; "Is it Water, Water Everywhere or Not Enough to Drink?," North Texas Section Water Environment Association of Texas and Texas Section American Water Works Association Water Conservation and Reuse Division, February 22, 2001; "Texas Surface Water Rights," Water Rights 101, Texas Water Conservation Association, Fall Meeting 2000; "Water Reuse in Texas: An Enigma in Senate Bill 1," State Bar of Texas 12th Annual Texas Environmental

Superconference, August 3-4, 2000; "Water Rights Issues for the Next Legislative Session", Bi-annual Briefing for Legislators and Staff, Texas Section AWWA, Austin, Texas, 1999; "Status Report on Water Rights for Reuse," Texas Section American Water Works Association Alternative Water Strategies Conference, September 17, 1999; "Legislative Update-Summary of Senate Bill 1," Texas Water Law 7th Annual Conference, CLE International, November 13-14, 1997; "Senate Bill 1 and Legislative Update," 2nd Annual Environmental Seminar, Northeast Texas Section Water Environment Association of Texas, June 26, 1997; "Texas Water Reuse and Legislative Update," Texas Public Works Association Annual Conference & Exhibition, June 12, 1997; "Texas Legislative Update," Freese & Nichols, Inc. Fort Worth Conference, June 3, 1997; "Will Water Be There for Reuse," Texas Water '97, Water Environment Association of Texas and Texas Section American Water Works Association Annual Meeting, April 8, 1997; Program Organizer and Moderator: "Practitioners Update on Federal and State Environmental Regulation," American Bar Association Administrative Law and Regulatory Practice Section, American Bar Association Section of Natural Resources, Environmental and Energy Law, State Bar of Texas Environmental Law Section, and Travis County Bar Association, Administrative Law Section, January 31, 1997; "Indirect Reuse–A Panel Discussion," Texas Water Law 6th Annual Conference, CLE International, December 12, 1996; "Respecting Rights of Indirect Reuse in Texas," Regulatory Conference on Environmental Issues for Local Governments, Texas Environmental Equity Alliance, December 5, 1996; "Retaining and Working with Special Counsel," Water Environment Association of Texas Total Project Management Seminar, June 2, 1993; "The National Environmental Policy Act," Executive Enterprises, Inc., November 1994 (Austin), January 1994 (Dallas), November 1993 (Austin) and March 1993 (San Antonio); Program Chair and Moderator: "Managing Environmental Compliance: A Strategic Approach;" Professional Development Series: Water Environment Association of Texas, June 15, 1994; "Retaining and Working with Special Counsel," "Total Project Management," Water Environment Association of Texas, Professional Development Series: "Ultimate Project Management Notebook," June 2, 1993; Program Organizer and Moderator: Administrative Law Seminar, June 1987, and June 1988, Administrative Law Section, Travis County Bar Association.

Professional Affiliations:

Texas Water Conservation Association (Board of Directors, since 2002; Policy Committee, since 2004; Water Reuse Committee, since 2006; Federal Affairs Committee, since 2006; Water Laws Committee Chair 2000-2001, 2001-2002, 2002-2003; Co-chair, "Texas Water Legislation: The Legal Issues," TWCA/TRWA, January 23-24, 2003; Organizer, "Value of Water 101", Fall Meeting 2002; Co-chair, "Water for Texas Future: The Legal Issues," TWCA/TRWA, January 24-25, 2002; Organizer, "Water Quality 101", Fall Meeting, 2001; Co-chair, "Water Allocation in Texas: The Legal Issues," TWCA/TRWA, January 25-26, 2001; Organizer, "Water Rights 101", Fall Meeting, 2000; Ad Hoc Subcommittee on Funding & Water Marketing 1997-1998); *WateReuse Association* (Board of Directors, since 2004; Chair, National Legislative Committee since 2007; Member, National and Legislative Committee and National Regulatory Committee since 2003; Member, Planning Committee for Symposium XVIII, September 2003); *Texas Section WateReuse Association*, Board of Directors, since 2005; *American Water Works Association* (Trustee, Water Resources Division 2007-2010; Chair 2004-2007, Water Regulation and Allocation Committee; Member, Legal Affairs Committee 2000-2002; Liaison to Rates and Charges Subcommittee 2000-2002; Texas Section Conservation & Reuse Committee since 1997; Member, Planning Committee for Water Sources, 2004); *Water Environment Federation* (Board of Trustees 2004-2005, 2005-2006; Director 2000-2003; Government Affairs Committee since 2000; Vice-Chair, GAC Legislative Subcommittee 2002-2004; Constitution and By-laws

Committee 2001-2004; Nominating Committee, 2002-2003); *Water Environment Association of Texas* (Member, Government Affairs Committee since 2005; Member, Executive Board 1995-2005; Member, Management Review Committee 1995-2000, 2002-2003; Member-at-large 1999-2000; Secretary 1995-1999; Chair, Long-range Planning Committee 1996-1997; Annual Meeting Program Committee 1993-2003; Water Reuse Committee 1999-2003; Member, Long-range Planning Committee 1997-2000; Member, Water Reuse Resolution Task Force 1997); Texas Water '96: WEAT and AWWA Texas Joint Annual Meeting Committee 1994-1996); *Water Environment Association of Texas Central Texas Chapter* (President 1994-1995; President-Elect 1993-1994; Vice-President and Programs Chair 1992-1993); *Texas Municipal Utilities Association* (Member).

Bar Associations:
International Young Lawyers Association (National Vice-President for the United States 1998-2000; Liaison to ABA 1996-1998; Executive Committee 1996-2000; Chair, Membership Chair 1997-1999; Seminar / Meeting Organizer for Bureau Elargi: Strategic Planning for Membership, Elmau Germany, Antitrust Seminar: New Orleans, Louisiana, USA, Special Projects: Long-range Plan for Membership Recruiting); *American Bar Association* (Member, 1986-2004; Section of Administrative Law and Regulatory Practice: Co-chair, Membership Committee 1997-1998; Gavel Awards Committee: 2001-2003; Gavel Awards Screening Committee 1994-2001, 2003-2007; Vice-chair, Natural Resources and Environmental Law Committee 1996-1997; Publications Committee 1995-1996; Young Lawyers Division Liaison 1995-1997); *American Bar Association Young Lawyers Division* (Cabinet 1991-1995; Executive Council Coordinator 1994-1995; Executive Council 1990-1995; Chairman, Barrister Magazine Editorial Board 1991-1994; District Representative for Texas 1991-1993; Vice-Chair, National Conferences Team 1990-1991); *State Bar of Texas* (Member: Administrative and Public Law Section and Environmental and Natural Resources Law Section); *Texas Young Lawyers Association* (District Representative to the American Bar Association 1991-1993; Director 1989-1991; Co-Chair, Local Affiliates Committee 1990-1992; Vice-Chair, Legislative Committee 1990-1991); *Travis County Bar Association* (Board of Directors 1989-1990); Travis County Bar Association Administrative Law Section (Board of Directors 1987-1993; President 1989-1990; Programs Committee Chair 1985-1989); *Austin Bar Association*, formerly Travis County Bar Association (Member, Administrative Law Section; Member, Environmental Section); *Austin Young Lawyers Association* (Board of Directors 1987-1993; Secretary 1988-1989).

Professional Honors:
Arthur Sidney Bedell Award, presented by the Water Environment Federation, April 11, 2007, "acknowledging extraordinary personal service to the Water Environment Association of Texas;" President's Service Award, presented by Water Environment Association of Texas, April 4, 2002; Watermark Award, presented by the Texas Section of the American Water Works Association and the Water Environment Association of Texas, April 5, 2001, for "raising the public's level of understanding of Texas' water issues"; President's Award, presented by the Texas Water Conservation Association, March 8, 2001, for "outstanding dedication, contributions, and service to the Association and the water resources of Texas;" Texas Bar Foundation (Life Fellow); Fellows of the American Bar Association Young Lawyers Division (Member); Joseph Pritchard Inn (Member); Founding Fellow of the Travis County Bar Foundation (Life Fellow).

Short Biography
Thomas O. McGarity

Thomas O. McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas School of Law. He has taught Environmental Law, Administrative Law and Torts at UT Law school since 1980. Prior to that he taught at the University of Kansas School of Law.

After clerking for Judge William E. Doyle of the Federal Court of Appeals for the Tenth Circuit in Denver, Colorado, Professor McGarity served as an attorney-advisor in the Office of General Counsel of the Environmental Protection Agency in Washington, D.C.

Professor McGarity has written widely in the areas of Environmental Law and Administrative Law. A new book *Bending Science: How Special Interests Corrupt Public Health Research* (co-authored with his University of Texas colleague Wendy Wagner) was published in May 2008 by Harvard University Press. The Yale University Press will be publishing his most recent book, *The Preemption War: When Federal Bureaucracies Trump Local Juries* will be published in October 2008.

Professor McGarity is immediate past president and a member of the Board of Directors of the Center for Progressive Reform, a nonprofit organization consisting of scholars who are committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment.

Professor McGarity lives in Austin with his wife Cathleen. The eldest of their two daughters is an adjunct assistant professor of music at Montana State University. Their younger daughter is an attorney in Washington, D.C.

Biography for Victor B. Flatt

Victor B. Flatt is currently the Taft Distinguished Visitor in Environmental Law at the University of North Carolina Chapel Hill Law School. His permanent appointment is as the A.L. O'Quinn Chair in Environmental Law and Director of the Center for Environment, Energy, and Natural Resources at the University of Houston Law Center. He received his undergraduate degrees in Chemistry and Math, magna cum laude from Vanderbilt University, where he was a Harold Stirling Vanderbilt Scholar, and his JD degree, cum laude and *order of the coif*, from Northwestern University School of Law, where he was a John Henry Wigmore Scholar. Professor Flatt began his academic career at the University of Washington and accepted the O'Quinn Chair at the University of Houston in 2002. He has visited at the University of Washington School of Law, Seattle University, and the University of Georgia. He has done multiple academic and public lectures on environmental legal issues, gay and lesbian issues, the relationship of law to other disciplines, and media commentary on television, radio, and the printed news.

He has published extensively on environmental law issues in specialty and general law reviews. Five of his articles have been finalists or selected as one of the top environmental law articles of the year in the Journal of Land Use and Environmental Law. He consults with government and non-profit agencies on environmental issues and represented Congressional Amici Boxer, Clinton, Kerry, Jeffords, Leahy and Reed in the Clean Air Act New Source Review case, New York v. EPA. He is a member scholar of the Center for Progressive Reform, and on the Advisory Board of the Blaffer Art Gallery of the University of Houston.

Guillermo Wiener

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Before joining EPA, Mr. Nakayama was a partner with the law firm of Kirkland & Ellis, LLP., working in the environmental and product safety practice area. Since 1998, Mr. Nakayama had served as an Adjunct Professor of Law at the George Mason University School of Law, where he taught Environmental law. Practicing and teaching environmental law provided Mr. Nakayama an appreciation of the challenges of understanding, complying with, and enforcing these complex statutes.

Mr. Nakayama started his career in the military with the United States Navy. After being selected by Admiral Rickover and serving for five years as an officer in the Navy Nuclear Propulsion Program, Mr. Nakayama served for eight years as a civilian manager reporting to Admiral Rickover's successors. In that program, Mr. Nakayama oversaw the manufacture of the prototype reactor for the Seawolf submarine, the SSN-21.

Mr. Nakayama holds bachelor's and master's degrees from Massachusetts Institute of Technology in Nuclear Engineering, and a J.D. from the George Mason University School of Law.

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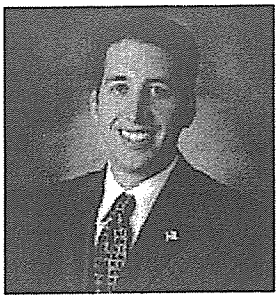
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Publications and Presentations:

"The Tragedy of Another Minute: IWBC Minute 308's Failure to Mend the Rio Grande River." 9 Law and Business Review of the Americas 617 (2003).

"2004 Texas Environmental Case Law Update," presented to Dallas Bar Association Environmental Law Section (Dec. 2004).

"Legal Implications of Sleep Deprivation" (with Daniel W. Shuman and Alexander McCall Smith), in Sleep Deprivation: Clinical Issues, Pharmacology, and Sleep Loss Effects 363 (Clete A. Kushida ed., 2005).

"Enforcement and Compliance Issues in Construction Storm Water Programs in Texas," Lorman Education Services, Conference on "Current Issues in Storm Water Regulation," (Feb. 2007).

NATURAL RESOURCE DAMAGES: LEGAL ISSUES

"A chicken in every pot...."

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I. INTRODUCTION 3
II. LEGAL AUTHORITIES 3
A. Federal 4
B. State 5
III. WHAT ARE NATURAL RESOURCES? 5
A. Natural Resource Services 5
B. Surface Water Resources 6
C. Private Resources 6
D. Air 7
IV. WHO CAN RECOVER NATURAL RESOURCE DAMAGES? 8
A. Federal Trustees 8
B. State Trustees 9
C. Private Parties 10
D. State and Federal Interaction 10
V. THE ASSESSMENT PROCESS 12
A. Issue - Causation 14
VI. OTHER ISSUES 16
A. Cooperation and Participation in the NRDA Process 16
B. Timing Limitations 17
C. Multi-Party Sites and NRD Settlements 18

"A chicken in every pot...."
- Republican Party, circa 1928, often attributed to Herbert Hoover

I. INTRODUCTION

During the election of 1928, campaign literature surfaced in support of the Republican party nominee, Herbert Hoover, promising a "chicken in every pot" AND "a car in every garage" if Hoover were elected. The roaring twenties witnessed great growth and prosperity in the United States, and the politicos were campaigning that the great prosperity of the times would continue forever, well, for at least another four years if they voted for Hoover. Hoover was elected in a landslide, but then, one year later, the stock market collapsed and the country plunged into a nearly decade long depression.

Similar mistaken beliefs may lead people to think they have their remedial obligations in hand, only to one day find a letter in the mail from a natural resource trustee "inviting" them to participate in a "cooperative" assessment to determine the extent of injuries to natural resources. Suddenly, a seemingly endless funnel of complex assessments may absorb thousands or even millions of dollars, all with the knowledge that the assessments are leading to the ultimate payment by the entity of a potentially huge amount to settle or litigate the government's claim for damages to natural resources and the services they provide. While claims for natural resource damages ("NRDs") may not present as severe an economic crisis for an entity as the Great Depression, several high profile settlements have proven that the government's claims for NRDs may indeed be staggering.

This paper outlines the basic elements of natural resource damage claims, and discusses several key legal issues parties should be mindful of when negotiating and/or litigating natural resource damage matters. As might be imagined, space does not permit full or even partial discussion of every issue concerning NRDs, however, it is hoped that this paper and presentation provides a useful starting place for persons faced with an NRD matter.

II. LEGAL AUTHORITIES

NRD claims are intended to restore injured resources to the condition that they were in before hazardous substances or other compounds were released into the environment. Consider for example, an historic manufacturing facility upon which hazardous substances were released. Government regulators, whether it be the TCEQ or EPA, might require soil and/or groundwater remediation. If the site is located along a water body, sediments in the water may also require cleanup. Once the hazardous substances or other compounds are removed from the environment or otherwise rendered "harmless" in terms of the nebulous concept of risk, the EPA's and/or TCEQ's job is generally complete, even though the ecosystems harmed by releases from the site might not have been fully restored to their pre-release condition. This is where the natural resource trustees may then arrive at the site, seeking appropriate restoration of injured natural resources and/or damages to replace, restore, or acquire the equivalent of the injured resources (plus the trustees costs, of course). There are several statutory authorities granting trustees the authority to seek NRDs.

A. Federal

Three federal statutes provide the principle source of authority for NRD claims.[1] CERCLA, the CWA, and OPA are the broadest and most frequently invoked authorities, although other federal statutes and common law principles address NRDs.[2]. For efficiency, space, and timing constraints, this paper will primarily focus on the natural resource damage provisions of CERCLA or "Superfund."[3]

1. CERCLA

Liability for injury to, destruction of, or loss of natural resources under CERCLA is "to the United States Government and to any State."[4] The elements of a CERCLA natural resource damage action under mirror those of a CERCLA cost recovery action, except that a plaintiff must assert that the defendant's release of hazardous substances resulted in an injury to natural resources. The elements of a NRD claim under CERCLA § 107(a)(4) include:

(1) The site in question is a "facility" as defined in § 101(9);
(2) The defendant is a "covered person" under § 107(a);
(3) A "release or a threatened release" of a "hazardous substance" has occurred;
(4) Natural resources within the trusteeship of the plaintiff have been injured; and
(5) The injury to natural resources "resulted from" a release of a hazardous substance.[5]

In addition for potential liability for "damages for injury to, destruction of, or loss of natural resources," responsible parties may also be liable for "the reasonable costs of assessing such injury, destruction, or loss" of natural resources.[6]

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[1] *See* Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") §§ 107(a)(4)(C) and 107(f)(1), 42 U.S.C. §§ 9607(a)(4)(C) and 9607(f) [predicated on releases of hazardous substances to the environment]; Oil Pollution Act ("OPA") §§ 1002(b) and 1006, 33 U.S.C. §§ 2702(b) and 2706 [predicated on releases of oil to navigable waters]; and Clean Water Act § 311(f), 33 U.S.C. § 1321(f) [predicated on releases of pollutants to navigable waters].

[2] *See e.g.*, Marine Protection, Research, and Sanctuaries Act ("MPRSA"), 16 U.S.C. §§ 1443(a), 1432(6) [predicated on releases to marine environments]; and National Park System Resources Protection Act ("NPRSA"), 16 U.S.C. § 19jj [predicated on releases to park property]. Common law authority may also be derived from the so-called "public trust doctrine."

[3] The principles under CERCLA are generally applicable to NRD provisions of other authorities. However, where appropriate, and as space allows, limited discussion of other authorities may be presented for context or to highlight obvious differences/issues.

[4] CERCLA § 107(f)(1).

[5] *See Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1102, 1124 (D. Idaho 2003) (in cases involving commingled hazardous substances, NRD trustees must establish that a release is a 'contributing factor' [more than a de minimis amount-to an extent that at least some of the injury would have occurred if only the Defendant's amount of release had occurred]).

[6] CERCLA § 107(a)(C).

B. State

In addition to the federal provisions related to NRDs, Texas has several statutes authorizing recovery of NRDs. The Texas Oil Spill Prevention and Response Act of 1991, which was promulgated contemporaneously with the federal OPA authorizes recovery of NRDs arising from releases of oil to coastal waters.[7] The Texas Water Code also authorizes recovery of NRDs arising from releases of "waste or other substances" to land owned or held in trust by the State of Texas.[8]

III. WHAT ARE NATURAL RESOURCES?

CERCLA defines natural resources to include all "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. § 18 et seq.]), any state or local government, any foreign government, any Indian tribe, or if such resources are subject to a trust restriction on alienation, any member of an Indian tribe."[9] Furthermore, CERCLA § 101(6) defines "damages" to mean "damages for injury or loss of natural resources...." This circular definition has been construed to mean "monetary quantification stemming from an injury" to natural resources.[10]

A. Natural Resource Services

The federal government has interpreted the term "natural resources" to include not only the physical resources themselves, but also the "services" provided by the natural resources. Services include "physical and biological functions performed by the resource, including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource."[11] Uses of the natural resources or the services they provide must be actual "committed uses," and any "purely speculative uses of the injured resources are precluded from consideration in the estimation of damages."[12] A "committed use" includes "a current public use; or a planned public use of a natural resource for which there is a documented

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[7] Tex. Nat. Res. Code § 40.107

[8] Tex. Water Code § 26.039 and 26.265(d), (g).

[9] *See* CERCLA § 101(16), 42 U.S.C. § 9601(16); *see also* 11 C.F.R. § 11.14(z).

[10] *See In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 681 (D. Mass. 1989); *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1114; 43 C.F.R. § 11.14(l) (defining damages simply as "the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA"). *See also* 43 C.F.R. § 11.80(b), which provides that "[d]amages may also include...the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of the resources and their services to the baseline."

[11] 43 C.F.R. § 11.14(nn).

[12] 43 C.F.R. § 11.84(b)(2).

legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected."[13]

B. Surface Water Resources

With respect of sites adjacent to surface water resources, an injury to "a surface water resource" resulting from a release of hazardous substances occurs when any one of several physical or chemical changes in the quality of the resource are detected.[14] Surface water resources include "the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline and sediments in or transported through coastal and marine areas."[15] An injury is defined to include "a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or a release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance."[16] Thus to the extent sediments at or adjacent to a site are found to have a "measurable adverse change," the natural resource trustees may assert a claim for damages to the sediments and the services they provide.

C. Private Resources

The term "natural resources" has been construed broadly to include private property that is subject to "a substantial degree of government regulation, management, or other form of control."[17] Thus, natural resource trustees may assert trusteeship over those natural resources controlled by the government through ownership, management, trust, or control through federal, state, and local laws.[18] Ultimately, each designated natural resource trustee addresses the determination of whether a private natural resource is a natural resource under CERCLA "based on who the resource belongs to, who it is managed by, who controls the same and how the resource appertains to other resources."[19] Although some courts have held that natural resource trustees may not recover damages for injuries to purely private resources,[20] the reach of the

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[13] 43 C.F.R. § 11.14(h).

[14] 43 C.F.R. § 11.62.

[15] 43 C.F.R. § 11.15(pp).

[16] 43 C.F.R. § 11.14(v).

[17] *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 461 (D.C. Cir. 1989); *see also* 59 Fed. Reg. 14262, 14268 (Mar. 25, 1994).

[18] *See Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1117; *see also* 59 Fed. Reg. at 14268.

[19] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1115; 59 Fed. Reg. at 14268.

[20] *See Ohio*, 880 F.2d at 460 (noting that although preliminary versions of CERCLA included language authorizing recovery for damages to purely private resources, such language was ultimately excluded from the final statute, thus evidencing congressional intent to "quite deliberately exclude private property from the ambit of the natural resource damage provisions").

trustees may indeed extend to natural resources on private property, especially if private lands include "supporting ecosystems" or otherwise "appertain to" injured natural resources. Furthermore, the term natural resources has been interpreted to include resources that are not actually owned by the government.[21]

However, Congress expressly excluded from CERCLA, language that would have allowed recovery of "all damages for personal injury, injury to real or personal property, and economic loss resulting from such release or threatened release."[22] Although natural resource trustees may be barred from asserting claims over "purely private resources,"[23] it is unclear whether the lost services bar as to private resource also applies to lost services. Indeed, damages resulting from purely "economic losses," especially to the extent such damages are incurred by entities other than a state, federal or local government, likely exceed the scope of trustee authority under CERCLA. However, this has not stopped some courts from tacitly approving trustee recovery for such losses.[24]

The ultimate extent of a trustee's authority to assert claims for natural resources has not been fully tested in the courts.[25] Thus, a claim by the government for recovery of damages resulting from injuries to resources on private property or other purely private resources may be one of first impression and subject to several defensive arguments.[26]

D. Air

The definition of natural resources includes "air" as a defined resource. To date, trustees have primarily focused on recovery of damages to soil, water, and biota resources. However, on October 19, 2007, the state trustees in Colorado released a draft natural resource damages assessment plan concerning the former Rocky Mountain Arsenal site, in which the trustees have

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[21] *See id*; *see also* 59 Fed. Reg. at 14265 ("Although CERCLA does not authorize recovery of damages for injuries to purely private resources, the statutory definition of "natural resources" is clearly not limited to resources literally owned by the government...[A]pplicability of CERCLA's natural resource damage provisions does not hinge solely on ownership."); *Artesian Water Co. v. New Castle County,* 851 F.2d 643 at 1117 (3d Cir. 1988) (noting that an aquifer is a natural resource). To date, the potential issues involving double recovery have not been resolved.

[22] *See* Ohio, 880 F.2d at 460; *Statsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1470 (10th Cir. 1993); 59 Fed. Reg. at 14268.

[23] *See Ohio*, 880 F.2d 432.

[24] *See In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. at 683-686.

[25] Recently, several commentators have suggested broad expansions of the government's authority to assert claims for damages to natural resources under both existing authorities and common law principles, such as the Public Trust Doctrine. *See e.g.,* Allan Kanner, The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources, 16 Duke Envtl. L. & Pol'y F. 57 (2005); Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

[26] Broad arguments might include assertions under Article III (lack of standing due to a lack of proprietary interest) and the Commerce Clause (insufficient link to interstate commerce), as well as specific statutory interpretation arguments.

asserted that "releases of noxious odors" to surrounding communities potentially injured air resources. In a time when global warming, acid rain, and other matters concerning air resources are gaining greater attention, this raises the prospect that trustees may look to the NRD provisions under CERCLA or other authorities as a means to recover damages from companies releasing hazardous substances or other deleterious compounds into the atmosphere.

IV. WHO CAN RECOVER NATURAL RESOURCE DAMAGES?

Liability for damages to natural resources under CERCLA is "to the "United States Government and to any State."[27] Only designated Federal, State, or Indian Tribe officials may act on behalf of the public as trustees for natural resources under CERCLA.[28] Private parties and State political subdivisions are not allowed to bring a claim under CERCLA for damages to natural resources.[29]

A. Federal Trustees

Pursuant to CERCLA § 107(f)(2), the President designated the Secretaries of Defense, Interior, Commerce, Agriculture, and Energy as federal trustees for natural resources.[30] The Secretary of Commerce, through the National Oceanic and Atmospheric Administration ("NOAA"), and the Secretary of the Interior through the United States Fish and Wildlife Service ("USFWS"), are the federal trustees involved in most natural resource damage actions. The other departments generally will only become involved when hazardous substances cause injuries to natural resource on, over, or under lands that those departments administer.[31]

The National Contingency Plan ("NCP") further defines the scope of the federal trusteeship over natural resources. Under the NCP the Secretary of Commerce is the trustee for "natural resources controlled by DOC and for natural resources managed or controlled by other federal agencies and that are found in, under, or using waters navigable by deep draft vessels, tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf."[32] Examples of natural resources within the Secretary of Commerce's trusteeship include the following "natural resources and their supporting ecosystems: marine fishery resources; anadromous fish; endangered species and marine mammals; and the resources

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[27] CERCLA § 107(f)(1).

[28] *See* CERCLA § 107(f).

[29] *See, e.g., Artesian Water Co.*, 851 F.2d at 650 (private water company is not authorized to bring NRD claim); *see also Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (D.N.J. 1993) (political subdivision of a state is not a state official authorized to be a natural resource trustee).

[30] *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *as amended by* Exec. Order No. 13016, 61 Fed. Reg. 45871 (Aug. 30, 1996) *and* Exec. Order No. 13286, 68 Fed. Reg. 10619 (Mar. 5, 2003).

[31] *See* 40 C.F.R. § 300.600(b)(4).

[32] 40 C.F.R. § 300.600(b)(1).

of the National Marine Sanctuaries and National Estuarine Research Reserves."[33] The NCP also designates the Secretary of the Interior as trustee for "natural resources controlled by the DOI..., includ[ing] the following natural resources and their supporting ecosystems: migratory birds; anadromous fish; endangered species and marine mammals; federally owned minerals; and certain federally managed water resources."[34]

Under MPRSA, claims can only be brought by the national sanctuary program within the DOC (which manages national marine sanctuaries) for injuries to sanctuary resources. Under NPRSA, only the national park service within the U.S. Department of the Interior can bring claims for injuries to resources within park units.

B. State Trustees

CERCLA § 107(f)(2) provides that the "Governor of each State shall designate State officials who may act on behalf of the public as trustees...." Thus, in addition to the federal trustees, states are authorized to "act on behalf of the public as trustees for natural resources, including their supporting ecosystems, within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state."[35] In Texas, the Texas General Land Office ("GLO"), the Texas Parks and Wildlife Department ("TPWD"), and the Texas Commission on Environmental Quality ("TCEQ") are the designated natural resource trustees. The TCEQ is the designated trustee for surface water, sediments, groundwater, and air resources within the State of Texas. The TPWD is the designated trustee for all fish, wildlife, and other biota within the State of Texas and the habitats upon which they depend. The GLO is the designated trustee for all land, fish, shellfish, fowl, wildlife, biota, vegetation, air, water, groundwater, and other similar resources owned, managed, held in trust, regulated, or otherwise controlled by the State of Texas. State trustees are authorized "to pursue claims for injury to, destruction of, or loss of natural resources as a result of a release of a hazardous substance or a discharge of oil" and may also "seek restoration or replacement of such natural resources, and pursue recovery of reasonable response costs."[36] Involvement of state trustees is generally triggered during the trustee's involvement in the Ecological Risk Assessment phase of the Texas Risk Reduction Program.[37]

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[33] 40 C.F.R. § 300.600(b)(1).

[34] 40 C.F.R. § 300.600(b)(2).

[35] 40 C.F.R. § 300.605.

[36] 30 T.A.C. § 7.124(a)(2).

[37] Memorandum of Understanding between TCEQ, TPWD, GLO, NOAA, USDOI and State of Texas, 30 TAC § 7.124.

C. Private Parties

Although private parties are precluded from bringing independent NRD actions under CERCLA,[38] at least one court has approved limited intervention by private parties in NRD cases. However, such intervention has been restricted to cases involving judicial approval of settlement consent decrees. For example, in *In re Acushnet River*,[39] the court allowed the National Wildlife Federation ("NWF") to intervene in a proceeding involving review of a consent decree proposing to settle the government's NRD claims against a responsible party. According to the NWF, it believed that the government adequately represented its interests until the proposed settlement was announced and sought to challenge the measure of damages sought by the government.[40] The NWF argued that the government relied on an incorrect calculus in deriving the measure of damages. The court allowed the NWF to intervene pursuant to FED. R. CIV. P. 24(b)(2) (concerning permissive intervention) for the limited purpose of briefing and arguing the legal questions before the court.[41]

D. State and Federal Interaction

As might be expected, there is considerable overlap between control of state and federal natural resources. "Water, wildlife, fish, birds, and biota do not stay in one place," and many natural resources are shared among various trustees.[42] Although trustees are encouraged (though not required) to coordinate and cooperate in carrying out the responsibilities of their trusteeship,[43] nothing in CERCLA prohibits individual trustees from bringing separate NRD actions.[44] Likewise, the federal natural resource trustee may, at its discretion, assess damages for

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[38] *See Alaska Sport Fishing Assoc. v. Exxon Corp.*, 34 F.3d 769, 774 (9th Cir. 1994) (private parties' claim for lost use and enjoyment of natural resources was barred under doctrine of res judicata because the plaintiffs sought to recover the same damages that the government had already recovered); *see also Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 681 (D.N.J. 1996) (private parties lacked standing to bring a claim for natural resource damages because only designated natural resource trustees may bring an NRD claim under CERCLA).

[39] *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019 (D. Mass. 1989).

[40] *Id.* at 1023-4.

[41] *Id.* at 1025.

[42] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1117.

[43] *See* 40 C.F.R. § 300.615(a); *see also United States v. Kramer*, 19 F. Supp. 2d 273, 276 (D.N.J. 1998) (consent agreement for NRD claims included provisions incorporating the settling party's obligations to comply with a State NRD Consent Decree).

[44] *See United States v. Asarco Inc.*, 1998 WL 1799392 (D. Idaho) (unreported decision); *see also United States. v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985) (state trustees and federal trustees filed separate NRD actions).

natural resources under the State's trusteeship.[45] Thus if a state trustee has not settled or otherwise litigated its claims for NRDs with a responsible party, then the federal trustees may recover such damages on behalf of the state.

However, various statutory and regulatory provisions provide safeguards to responsible parties against over reaching or "double dipping" by natural resource trustees. CERCLA expressly states "[t]here shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation or acquisition for the same release and natural resource."[46] Furthermore, the Department of Interior regulations governing natural resource damage assessments require a trustee to provide "a statement of the authority for asserting trusteeship, or co-trusteeship" over the natural resources in its Assessment Plan, which is subject to public review and comment.[47] If a trustee has overstepped the bounds of its trusteeship or otherwise attempts to assert claims over a natural resource that another trustee has already asserted authority over, or otherwise recovered damages for, then an objection may be asserted under CERCLA § 107(f)(1).

In *Coeur D'Alene Tribe v. Asarco*, the State of Idaho settled its CERCLA NRD claims with Asarco independent of the tribal and federal trustees. When the tribal and federal trustees subsequently brought an NRD action, Asarco attempted to rely on the prior settlement with the state to avoid some or all of the federal and tribal NRD claims. The court initially held that, although each trustee may bring separate actions for damages to natural resources under the trustees management and control, even for resources that are shared among various trustees, each trustee may only recover "damages in the ratio or percentage of actual management and control that is exercised by each of the various co-trustees."[48] Thus, even though Asarco might have received a windfall because the state may have settled for less than its actual share of natural resources, the court initially ruled that the other trustees could recover the excess amount.

However, on August 9, 2005, the *Coeur D'Alene* court reversed itself and held that "the language of the statute dictates that a co-trustee acting individually or collectively with the other co-trustees may go after the responsible party or parties for the full amount of the damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party."[49] According to the court, even if more than one trustee manages, controls, or holds in trust a particular natural resource, the court's duty does not include apportioning the damage recovery between the various trustees.[50] Instead, "[i]f there is a later disagreement

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[45] Although CERCLA provides that state trustees are authorized to "act on behalf of the public as trustee for natural resources...[and]...shall assess damages to natural resources...for those resources under their trusteeship," CERCLA § 107(f), state trustees are not similarly empowered to recover on behalf of federal trustees.

[46] CERCLA § 107(f)(1).

[47] 43 C.F.R. § 11.31(2).

[48] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1116.

[49] *Coeur D'Alene Tribe v. Asarco Inc.*, Case no. 3:96-cv-00122-EJL, Memorandum Decision and Order at 8 (D. Idaho Aug. 9, 2005).

[50] *See id.*

between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties."[51] Thus, according to the court, to the extent that a state trustee enters into a settlement with a responsible party for natural resources solely within its control, such settlement would be final. However, if such settlement involved natural resources shared with other trustees, then the other trustees "could recover whatever is necessary to accomplish the goals of Congress to restore the environment" and such amount would not be limited by the settlement.

Regardless of the outcome in the *Coeur D'Alene Tribe* litigation, parties should diligently review all damage assessments conducted by the individual and collective natural resource trustees to ensure that any NRDs allegedly attributed to a party are properly apportioned among the trustees and the other PRPs. Additionally, should a party decide to enter into separate settlements with state and federal trustees, a party should ensure that any future settlements or litigation with the individual trustees adequately account for any prior settlements with the other trustees.[52]

A final matter parties should be aware of regarding the interaction of state and federal trustees concerns potential conflicts-of-interest among the trustees or among the trustees and their "parent" government. This is especially an issue at sites wherein the state or federal government may be a responsible party.

V. THE ASSESSMENT PROCESS

The trustee's purpose is to assess the extent of injuries to natural resources and to determine the appropriate means to compensate the public for such injuries.[53] A natural resource damage assessment ("NRDA") is the means by which trustees evaluate the scope of injuries to natural resources and to quantify such injuries into compensable values. Pursuant to CERCLA §301(c),[54] the United States Department of the Interior ("DOI") promulgated regulations for the assessment of natural resource damages.[55] The DOI regulations provide a framework for trustees

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[51] *Id.* at 9.

[52] If a party should enter settlement negotiations with a state for CERCLA NRDs, it should also consider opportunities to materially involve the federal trustees. But even if the other federal trustees are involved in such negotiations, that may not preclude subsequent NRD action by the federal trustees unless they are parties to the settlement. *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1119 (even though record supports fact that United States and State consulted regarding State NRD settlement, the record failed to establish that the United States and the State of Idaho were in privity in reaching the state NRD settlement with the Tribe).

[53] NRD trustees are authorized to "act on behalf of the public to recover" damages for the "injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(f)(1).

[54] *See* 42 U.S.C. § 9651(c).

[55] *See* 43 C.F.R. Part 11 (these regulations apply to NRDA's conducted under CERCLA as well as the CWA). Note that following the *Ohio* case in 1989, the regulations were significantly revised in 1994 and 1996. *See* 59 Fed. Reg. 14262 (Mar. 25, 1994); 61 Fed. Reg. 20559 (May 7, 1996). *See also* 15 C.F.R. Part 990 (OPA). The DOI also recently announced proposed changes to the regulations, primarily emphasizing restoration over economic damages, and authorizing the trustees to rely upon various techniques when assessing restoration

to assess the level of damages[56] consistent with the mandate of CERCLA and are meant to encourage settlement of claims. Natural resource damage assessments conducted pursuant to the regulations receive a rebuttable presumption in court on behalf of the trustee.[57] Under the regulations, there are four phases to an NRDA including the Preassessment phase, Assessment Plan phase, Assessment Implementation phase, and Post-Assessment phase.[58] The Preassessment phase covers notification, coordination, and preassessment screening to ease early decision-making. The Assessment phase includes detailed analysis of the resources damaged and includes either Type A or Type B assessments. Type A assessments are applicable to minor events resulting in damages of less than $100,000.[59] Type B assessments involve detailed economic and scientific studies to determine the scope of damages for larger events.[60]

Under the DOI regulations, and the Type B assessment process in particular, the trustee is authorized to recover the following damages:

> 1. The cost of restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources, including direct and indirect (overhead) costs;[61]
>
> 2. The compensable value of all the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of the resources and their services to baseline;[62]
>
> 3. Any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;[63]
>
> 4. The costs of emergency restoration efforts;[64] and

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methodologies. *See* 73 Fed. Reg. 11081-11087 (Feb. 29, 2008). As of this date, such proposed changes have not been made final.

[56] The regulations define "damages" as "the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources." 43 C.F.R. § 11.14(l).

[57] *See* CERCLA § 107 (f)(2)(C); 43 C.F.R. § 11.11.

[58] *See* 43 C.F.R. § 11.13.

[59] *See* 43 C.F.R. § 11.44(f).

[60] *See* 43 C.F.R. §§ 11.60 to 11.84.

[61] 43 C.F.R. §§ 11.80(b) and 11.83(b). Note that indirect costs might be broad enough to encompass "costs of policy formulation" activities. *See* 59 Fed. Reg. at 14275-6.

[62] *Id.* § 11.80(b). Note that recovery for lost use value is authorized by CERCLA § 301(c)(2), which provides that "such regulations...shall take into consideration factors, including but not limited to, replacement value, use value, and ability of the ecosystem to recover."

[63] *Id.* § 11.15(a)(1); 59 Fed. Reg. at 14280.

5. The reasonable and necessary costs of the assessment.[65]

Services include "physical and biological functions performed by the resource, including the human uses of those functions."[66] The DOI includes in its calculation of the compensable value of lost services any "lost nonuse values such as existence and bequest values" and is "measured by changes in consumer surplus, economic rent, and any fees or other payments collectable by [a government body] for a private party's use of the natural resources."[67] Uses must be actual committed uses and any "purely speculative uses of the injured resources are precluded from consideration in the estimation of damages."[68] The range of public uses of natural resources is broad and includes both recreational and commercial uses.

Generally, the extent of NRDs will not be known until the completion of remedial activities.[69] However, the DOI regulations provide that recoverable damages include injuries resulting from response actions that are "taken or *anticipated.*" (Emphasis added).[70] Thus, the trustees can likely recover for future lost services or uses, so long as they can be reasonably anticipated and estimated at the time of the action.[71]

A. Issue - Causation

CERCLA is silent as to whether liability for damages to natural resources is joint and several. However, government actions have been brought under the assumption that liability for natural resource damages is joint and several and this has not been seriously challenged. Furthermore, courts have similarly assumed, without significant discussion, that responsible parties are strictly liable under CERCLA and that liability for damages to natural resources is

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[64] 43 C.F.R. § 11.15(a)(2).

[65] *Id.* § 11.15(a)(3).

[66] *Id.* § 11.14(nn).

[67] *Id.* § 11.83(c).

[68] *Id.* § 11.84(b)(2).

[69] *Acushnet*, 712 F. Supp. at 1035.

[70] 43 C.F.R. § 11.15(a)(1).

[71] *But see New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004), and subsequent progeny. This was a case involving non-CERCLA claims brought by New Mexico for damages to groundwater resources under a site that was undergoing active voluntary remediation. The court granted summary judgment in favor of the defendants because, *inter alia*, the state was unable to prove that there was a lost use of the groundwater. On appeal, the U.S. Court of Appeals for the 10th Circuit affirmed the district court's dismissal of the State's claims and held that the state of New Mexico could not bring state law claims for natural resource damages to groundwater because such claims were preempted by CERCLA. *New Mexico v. General Electric*, 467 F.3d 1223 (10th Cir. 2006).

joint and several.[72]. However, the issue has not been definitively addressed as an issue by a court and until it is expressly addressed and decided by a court in a relevant jurisdiction, arguments may arise that liability for natural resource damages under CERCLA is something less than joint and several.

Indeed, some commentators and defendants have argued that plaintiffs seeking to recover natural resource damages under CERCLA might be required to meet a more traditional level of causation as part of its prima facie case. CERCLA § 107(a)(4)(C) provides that covered persons are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." The phrase "resulting from" arguably creates ambiguity as to whether CERCLA authorizes imposition of joint and several liability in natural resource damage actions or instead requires proof of causation. However, to date, it does not appear that any court has expressly approved of this argument, and at least one court appears to have dismissed the argument.[73]

On the other hand, the DOI regulations introduced a causation element to NRD claims. The regulations define an injury as "a measurable adverse change, either long- or short-term, in the chemical or physical quality or in the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of hazardous substance."[74] The regulations also define specific causative elements for damages to natural resources including surface water, ground water, air, and biota.[75] For example, to establish whether a hazardous substance actually caused injury to a particular biological resource, the trustee must show that:

> 1. The biological response is often the result of exposure to hazardous substances...[and] must be a commonly documented response resulting from exposure to oil or hazardous substances;

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[72] *See California v. Montrose Chemical Corp.*, 104 F.3d 1507 at n.9 (9th Cir. 1997) (noting that under §107(a)(4), "any owner, operator or other responsible party is strictly liable for all costs of removal or remedial action, any other necessary response costs, damages for injury to natural resources and the costs of any health assessments. This liability is joint and several, subject to the defenses set forth in § 9607(b)."); *Coeur D'Alene Tribe*, 280 F. Supp. 2d 1094 (allowing defendants to argue divisibility in natural resource damages action "as a defense to joint and several liability being imposed").

[73] *See* Brief of Appellant, 1993 WL 13100905 at 31, *United States v. Montrose Chemical Corp.*, 50 F. 3d 741 (9th Cir. 1995). The appellant argued in its brief that the natural resource damages provision of CERCLA does not authorize joint and several liability, but requires proof of causation. Ultimately, this argument was not seriously addressed by the court, except in Footnote 9, wherein the court notes that under § 107(a)(4), liability for natural resource damages is joint and several.

[74] 43 C.F.R. § 11.14(v); *see also* 43 C.F.R. § 11.62 (requiring proof of pathway or link between the hazardous substance released and the natural resource injury).

[75] 43 C.F.R. § 11.62. Note that surface water is defined as "the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline and sediments in or transported through coastal and marine areas." 43. U.S.C. § 11.14(pp).

> 2. Exposure to oil or hazardous substances is known to cause this biological response in free ranging organisms...[and such response has] been documented to occur;
>
> 3. Exposure to oil or hazardous substances is known to cause this biological response in controlled experiments; and
>
> 4. The biological response measurement is practical to perform...and adequately documented in scientific literature.[76]

The DOI's causal link/pathway requirement was upheld in *Ohio v. DOI* during the court's detailed review of the DOI NRD regulations.[77]

VI. OTHER ISSUES

A. Cooperation and Participation in the NRDA Process

Parties are often faced with a choice of whether to cooperate or litigate NRD matters, and parties generally will receive an "invitation" to participate in a cooperative assessment with the trustees. However, liability at some sites may be so extensive or the issues so contentious that litigation may be the only alternative. With a lack of governing precedent in most jurisdictions, parties may be in a position to establish precedent in their jurisdiction, which may be important if a particular party may face NRD actions at several sites in a jurisdiction. Refusal to cooperate also puts the initial burden on the trustees to fund assessment efforts, though such action would undoubtedly increase damages and costs.[78]

For parties that do choose to cooperate, they should do so actively. Cooperating parties should actively comment and provide meaningful input in all phases of the process including selection of the corrective action. Cooperating parties should enter into a NRDA cooperative agreement, which sets forth how the assessment will be funded, how claims will be tolled, how information is shared, and other similar matters. Cooperating parties may find overall costs for the NRDA will be lower than if the matter were litigated, and there is a general collective sharing of information among the trustees and cooperating parties. Naturally, care should be taken in the course of the cooperative process in the event circumstances change and the matter switches to a litigation track.

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[76] 43 C.F.R. § 11.62(f)(2).

[77] *See Ohio*, 880 F.2d at 472; *see also In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 722 F. Supp. 893, 897 n.8 (D. Mass. 1989) (releases must be a contributing factor to the injury to natural resources).

[78] However, note that in *Confederated Tribes and Bands of the Yakama Nation v. United States*, CY-02-3105-LRS (E.D. Wash., Sept. 4, 2007), the court allowed tribal trustees to seek recovery of their assessment costs before a final remedial action plan had even been approved. This suggests some courts might be willing to allow the trustees to seek early reimbursement for past and future NRDA costs at a site.

Whether parties plan to litigate or cooperate with the trustees, they should retain independent experts and consultants to assist in all phases of the NRDA, particularily in comments on draft plans produced by the trustees. Issues for parties to address include, ensuring that the trustees (i) develop plans that comport with and are consistent with the applicable regulations; (ii) consider all potential sources of hazardous substances; (iii) do not make assumptions that are grossly conservative or one-sided; and (iv) give appropriate credit for remedial activities. Parties should work closely with their consultants, experts, and legal counsel in providing comment packages to the trustees. Legal counsel should review drafts to ensure pertinent legal and regulatory issues are appropriately addressed in the technical comments.

Another issue for some sites concerns the trustees' determination of an appropriate baseline. The primary goal of the trustees is to restore injured resources to the condition in which they would have been but for the incident. However, how far back in time the trustees plan to go in determining the so-called "baseline" may be critical, especially in areas that have been highly industrialized for many years. Parties should carefully examine the trustees' use of baseline criteria and ensure such baseline properly accounts for a more "modern" baseline is in accord with the governing statutes and regulations.

B. Timing Limitations

CERCLA provides that natural resource damage actions must be "commenced within 3 years after the later of the following: (A) [t]he date of discovery of the loss and its connection with the release in question; [or] (B) [t]he date on which regulations are promulgated under [CERCLA § 301(c)]."[79] The date on which the regulations were promulgated, March 20, 1987, is generally not an issue of dispute. However, the "date of discovery" is often a matter of factual contention, and is an issue parties should be aware of as they negotiate and/or litigate with the trustees.[80]

For natural resource damage actions brought against "any facility listed on the National Priorities List ("NPL")", or any facility with a scheduled CERCLA remedial action, a trustee must commence its NRD action "within 3 years after the completion of the remedial action (excluding operation and maintenance activities)." In no event may an NRD action be brought "before selection of the remedial action if the [EPA] is diligently proceeding with a remedial investigation and feasibility study."[81]

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[79] CERCLA § 113(g)(1), 42 U.S.C. § 9613(g)(1).

[80] As with most NRD matters, few courts have addressed or settled the "date of discovery" issue. Some courts might adopt a continuous-release trigger, while others might rely on a more knowledge-based trigger. *See, e.g., U.S. v. Montrose Chemical Corp.*, 883 F. Supp. 1396 (C.D. Cal. 1995), *rev'd on other grounds*, 104 F.3d 1507 (9th Cir. 1997).

[81] CERCLA § 113(g)(1). *See also The Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, Case No. 03-0846 (N.D. Okla. 2008) (rejecting tribe's claim for interim and lost use damages as premature because EPA was "diligently proceeding" with its investigation the site). *But see Confederated Tribes v. United States*, CY-02-3105-LRS (E.D. Wash. 2007) (allowing tribal trustees to seek recovery of their assessment costs before a final remedial action plan had even been approved).

Finally, CERCLA provides that NRDs may not be recovered "where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980."[82] This provision appears to require a finding by the court that damages to natural resources occurred after December 11, 1980, *and* releases of hazardous substances occurred after that same date. Thus, if a hazardous substance was released prior to December 11, 1980, and caused the trustees to incur damages to natural resources both before and after December 11, 1980, the trustees would only be able to recover for the damages that occurred after December 11, 1980.[83] Some courts have suggested that "passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA."[84] However, this is not a majority view, and CERCLA itself does not expressly provide for passive releases.[85] Arguably, NRDs attributable to passive releases arising from historic pre-1980 discharges at a site are not recoverable under CERCLA. Additionally, a party might argue as a defense and/or as a point for mitigation, that the bulk of the human-caused releases of hazardous substances occurred prior to December 11, 1980, and, thus, any damages caused by such releases are not recoverable under CERCLA.[86]

C. Multi-Party Sites and NRD Settlements

CERCLA encourages responsible parties to settle their CERCLA liability with the state and federal governments. To encourage such settlements, CERCLA section 113(f)(2) expressly provides that any entity may resolve its CERCLA liability to a State or the United States in an administrative or judicially approved settlement.[87] In addition to extinguishing the contribution rights of non-settling parties at multi-party sites,[88] section 113(f)(2) provides that the potential liability of remaining non-settling parties will be reduced "by the amount of the settlement."

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[82] CERCLA § 107(f)(1).

[83] *See, e.g., In re Acushnet River & New Bedford Harbor Proceedings re: Alleged PCB Pollution*, 716 F. Supp. at 685-686.

[84] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1113.

[85] *Id.* at 1112. *See also* definition of release at CERCLA § 107(22) "release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."

[86] Finally, note that CERCLA § 107(c)(1)(D), may serve to limit claims for NRDs to $50,000,000 for each release or incident involving a release of a hazardous substance.

[87] Section 113(f)(2) specifically provides "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." Indeed, *Champion Laboratories, Inc. v. Metex Corp.*, 2008 WL 1808309 (D.N.J., Apr. 21, 2008), suggests that parties to NRD settlements may have a right to contribution.

[88] *See e.g. Action Manufacturing Co., Inc. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 336 (E.D. Pa. 2006) (holding that parties to previously entered consent decree were not liable in defendants' counterclaim for contribution under § 113(f)).

Thus, if a State or the United States enters a settlement with a party for NRDs at a multi-party site, then the non-settling parties would only receive a credit in an amount equal to what the settling party paid in its settlement to resolve its liability for NRDs.[89] If the amount of the NRD settlement wholly underestimates the settling party's true liability for NRDs, then any non-settling party would be liable for the amount of underpayment by those earlier-settling PRPs.[90] However, in the event the trustee over-settled the NRD liability of a particular settling party, then the trustee would be bound by its prior over-recovery from the settling party, and the non-settling parties may be able to reap the benefit of reduced liability due to the overpayment by the settling party.[91] The primary, if not only, means for a non-settling party to attempt to avoid the risk of an underpayment by a settling party, is to administratively comment upon and/or intervene and formally challenge such settlements when they are reached and announced by the government.[92]

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[89] This presumes the State NRD Settlements involve parties adjudged liable under CERCLA § 107(a).

[90] *See United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 679 (D.N.J. 1989) ("By enacting § 113(f)(2) and § 122(g)(5) of CERCLA in 1986, Congress has plainly indicated that non-settling defendants' contribution claims will be barred, and they will be credited only with the amount of the settlement and nothing more.").

[91] At least two United States Circuit Courts of Appeal have held that the "pro tanto" approach of § 113(f)(2) as applied in government-initiated suits similarly applies in § 113(f)(1) contribution actions implicating purely private party settlements. *See Azko Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999) (rejecting application of the "proportionate share" (pro rata) method); *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004) (same); *Action Manufacturing Co., Inc.*, 428 F. Supp. 2d 288 (same).

[92] *See Azko Nobel Coatings, Inc.*, 197 F.3d at 308.

Biography: Richard Seiler

Richard Seiler is the Program Manager of the Natural Resource Trustee Program of the Texas Commission on Environmental Quality (TCEQ). Since 1995, he has been responsible for directing all of the agency's Natural Resource Trustee activities under the authorities of the Natural Resource Damages provisions of the Comprehensive Environmental Response Compensation and Liability Act, the Clean Water Act, the Oil Pollution Act and the Oil Spill Prevention and Response Act. Prior to this, he served for three years as a Project Manager in the agency=s Damage Assessment and Restoration Program and four years in the Houston regional office of the Texas Water Commission as a Field Inspector in the Environmental Monitoring and Assessment Program.

Mr. Seiler has directed the Trustee activities of the TCEQ with a focus on coordination and cooperation between state and federal agencies, response agencies and members of the regulated community. Under his direction, the Natural Resource Trustee Program of the TCEQ has adopted a cooperative, restoration-based approach to resolving NRD liability at corrective action sites in Texas, emphasizing restoration of injured resources over litigation and monetary damages.

In 2005, Richard was appointed by the Secretary of the Interior to serve on the Natural Resource Damage Assessment and Restoration Advisory Committee to provide advice to the Department of the Interior on its Natural Resource Damage Assessment and Restoration activities, authorities, and responsibilities. The Committee developed numerous recommendations on actions that can be undertaken to achieve faster, more efficient, and more effective restoration of injured natural resources by promoting cooperation among natural resource trustees and potentially responsible parties in lieu of costly and time consuming adversarial processes.

Mr. Seiler represented the TCEQ in the negotiated rule-making of the State=s Natural Resource Damage Assessment rules for coastal oil spills and was responsible for the development of the Memorandum of Agreement between the TCEQ and state and federal Trustees related to the Ecological Risk Assessment procedures of the Texas Risk Reduction Program Rules, which was adopted as rule by the agency.

Mr. Seiler is a member of the Association of State and Territorial Solid Waste Management Officials, Natural Resource Damages Advisory Committee. He holds a Bachelor of Science degree in Agricultural Economics and a Master of Science degree in Wildlife and Fisheries Sciences from Texas A&M University.

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Over 27 years experience related to impact assessment, mitigation, and restoration of natural resources. His expertise is currently focused on integration of science- based strategies to expedite resolution of complex natural resource issues. Has been involved in numerous large and small environmental assessments that encompass aquatic, estuarine, marine, riparian, and terrestrial environments as project manager, lead and contributing scientist, technical negotiator, and expert witness. Mr. Reub has extensive experience related to Natural Resource Damage Assessments (NRDA), habitat restoration, landscape-level conservation planning, Endangered Species Act (ESA) compliance and environmental assessment and permitting. His projects have focused on determining physical and/or chemical impacts to habitats and then developing innovative restoration/ conservation measures for cost effective resolution. Mr. Reub is known for developing and working with interdisciplinary teams to solve interrelated issues ranging from physical and biological relations such as instream flows, fish passage, water and sediment quality, geomorphic changes and vegetation interactions to the social, cultural and political realities associated with natural resources. Mr. Reub has worked in diverse geographic locations including most of the contiguous United States, Alaska, Canada, Colombia, Bolivia, Brazil, Panama, Ecuador, Chile, the Philippines, and Guam.

EXPERIENCE HIGHLIGHTS

- Conducted numerous Natural Resource Damage Assessments (NRDAs) as Project Manager, Technical Lead and/or Expert Witness for various chronic (i.e. hazardous waste sites) and catastrophic (i.e. oil and chemical spills) events, including the Exxon Valdez oil spill (AK), Tampa Bay oil spill (FL), Pt. Wells oil spill (WA), various barge and truck spills, Blackbird Mine NRDA, Atofina Chemicals in Commencement Bay (WA) and Arkema Chemicals in Portland Harbour (OR).
- Developed several landscape-level Habitat Conservation Plans (HCPs) and other Endangered Species Act (ESA) compliance documents including an HCP for the State of Washington for 2.4 million acres of aquatic lands, Puget Sound Prairie Species Candidate Conservation Plan, Russian River Programmatic Biological Assessment, Geoduck Consortium Programmatic BA, among others. Mr. Reub authored an innovative model to quantify ecological effects and benefits to species for planning purposes.
- Served as Technical Lead or Project Manager for 13 Federal Energy Regulatory Commission (FERC) hydroelectric licensing or relicensing projects across the continental United States and Alaska.
- Accumulated extensive experience in environmental assessments of oil and gas development projects from field biologist to Project Manager. Involved in numerous oil field exploration and development programs from the North Slope of Alaska to Bolivia in Latin America. Assisted or managed several large oil and gas pipeline projects in Alaska, Canada, continental United States, Bolivia and Ecuador in Latin America.
- Contributed as Technical Lead or Project Manager for numerous mining Environmental Impact Statements ranging from gravel in Alaska, diamonds in North West Territories of Canada, to Coal in Colombia and gold and copper in Chile.

QUANTIFYING NATURAL RESOURCE DAMAGES

A Perspective of Restoration-Based Emphasis
From
Proposed Revisions to Department of Interiors Natural Resource Damage Regulations

Prepared for

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TEXAS ENVIRONMENTAL SUPERCONFERENCE
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TABLE OF CONTENTS

Introduction 1

Overview of Natural Resource Damage Assessment 1

Statutory Authority 2

Trustees 2

Regulations and Process 2

Measuring Natural Resource Damages 4

Step 1 – Injury Determination 6

Step 2 – Quantification of Natural Resource Service Reductions 6

Step 3 - Damage Determination and Restoration Implementation 9

Overview of Department of Interior's proposed revisions to NRDA Regulations 9

Conclusions 11

References 13

Introduction

Measuring Natural Resource Damages (NRD) is still a relatively unpredictable and evolving process. A recent proposal to revise the Department of Interior (DOI) Natural Resource Damage Assessment (NRDA) regulations brings the DOI's policies and process closer together with that of the Department of Commerce or National Oceanographic and Atmospheric Administration (NOAA); the two main sets of regulations used for NRD cases. The proposed revision to the DOI regulations seems to promote restoration-based and cooperative approaches to settling cases rather than adverse and litigation-based approaches. This new approach is designed to help create a more predictable and efficient process

This paper describes approaches for measuring or quantifying natural resource damages. An overview of NRDA is provided for context. The section on measuring NRD follows and is based on NRDA regulations related to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), The Clean Water Act and The Oil Pollution Act (OPA). The majority of the following summary for the NRDAs are detailed in Department of the Interior (DOI), 43 CFR Part 11, or the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), 15 CFR Part 990.

The following section provides an overview of the proposed revisions to the DOI NRDA regulations. It is focused on aspects for measuring NRD, with an emphasis on restoration-based approaches. A summary is provided with the authors opinions of how the proposed revisions may assist in settling NRD cases.

This paper and associated presentation was developed for the Texas Environmental Superconference - Austin, Texas in August 2008. It expresses the views of the author and does not necessarily portray the views of ENVIRON International Corp.

Overview of Natural Resource Damage Assessment

Following is a brief summary of the NRDA process and general definition of basic terms, tools and concepts. An NRDA may be conducted following the release of oil or hazardous substance(s) that may injure natural resources for which one or more governmental agencies has jurisdiction as trustees for the public. Trustees use NRDA to assess injury to natural resources held in the public trust. Among other definitions, injury may defined as a loss of useable habitat, or exceedance of toxic screening levels in water, sediment or biota tissues that indicate mortality or sublethal damage to Trustee resources is likely. Such assessments are an initial step toward restoring injured resources and services and toward compensating the public for their loss.

Natural resources are broadly defined as land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources. A resource must also belong to, be managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any State, an Indian Tribe, a local government, or a foreign government.

Statutory Authority

The principal federal natural resource damage (NRD) authorities include the following.

- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).
- The Oil Pollution Act (OPA).
- The Clean Water Act (CWA).
- Marine Protection, Research and Sanctuaries Act (MPRSA).
- National Park System Resources Protection Act (NPSRA).

The most common authorities used in NRDA are CERCLA or OPA, which are the focus of this paper. CERCLA provides a comprehensive group of authorities focused on one main goal which is to address any release, or threatened release, of hazardous substances, pollutants, or contaminants that could endanger human health and/or the environment. The main focus of CERCLA is to protect human health but the statute also provides authority for assessment and restoration of natural resources that have been injured by a hazardous substance release or response. OPA provides authority for oil pollution liability and compensation as well as for the Federal government to direct and manage oil spill cleanups. OPA also contains authorities to allow the assessment and restoration of natural resources related to a discharge.

Trustees

Trustees are Federal officials who shall act on behalf of the public for natural resources. The National Contingency Plan (NCP) under CERCLA and OPA requires the President to designate the trustees on behalf of the public, including Federal, State, and Indian Tribe officials. Under OPA, foreign governments can also choose officials to act as Trustees. Responsibility for protection of natural resources falls with Federal, State, and Tribal Trustees because no one individual owns a natural resource; rather, they are held in trust for the public. The two major areas of Trustee responsibility is assessment of injury to natural resources and restoration of natural resources injured or services lost due to a release or discharge.

Regulations and Process

The NRDA regulations provide a detailed process for natural resource Trustees to follow in assessing injuries and damages to natural resources. The regulations also describe the areas where responsible parties (RPs) can participate in the assessment process. The NRDA regulations are not compulsory, but Trustees may follow them to have a rebuttable presumption for their assessment. A rebuttable presumption basically means that the RP would have the burden of proving that the Trustees assessment is incorrect.

Natural Resource Trustees conduct NRDAs to calculate the monetary cost of restoring injuries to natural resources that result from releases of hazardous substances or discharges of oil. Damages to natural resources are evaluated by identifying the functions or 'services' provided by the resources, determining the baseline level of the services provided by the injured resource(s), and quantifying the reduction in service levels as a result of the contamination. Regulations for assessing NRD have been promulgated under both CERCLA and OPA.

DOI Regulations

DOI's regulations provide a framework and standards for two types of assessments; Type A, and Type B. The Type A assessment is simplified procedure that involve use of a computer model to assess damages in a standard manner. Type A models are appropriate for discrete spills of hazardous substances and/or petroleum products up to a few days in duration. Injuries are based on acute exposure via the surface water pathway only.

The Type B process is used in situations that require an individual approach. Both Type A and Type B regulations call for the following four sequential phases in the assessment of damages:

Phase 1: Pre-assessment Phase. A pre-assessment screen is the first step of an NRDA. Trustees must rapidly review available data and determine if additional action is warranted. Trustees must determine whether an injury has occurred and a pathway of exposure exists. The pre-assessment screen is a prerequisite to conducting a formal NRDA.

Phase 2: Assessment Plan Phase. After deciding to perform a NRDA, the Trustees must develop an Assessment Plan to identify how the potential damages will be evaluated. Type A Assessment Plans document that the conditions for use of the Type A procedures are met, provide the site-specific data inputs the Trustee will use to run the computer model, and provide the results of a preliminary application of the model. Type B Assessment Plans to identify the site-specific studies the Trustees will conduct and quality control/assurance procedures. Draft Assessment Plans under both Type A and Type B procedures must be available for public review and comment.

Phase 3: Assessment Phase. The Assessment phase is when the evaluation of injuries and damages is done. The work consists of three steps: (1) injury determination; (2) quantification; and (3) damage determination. Under Type A, these steps are performed through a computer model. Under Type B, the steps are performed through laboratory and field studies. Trustees quantify injuries by identifying the functions or "services" provided by the resource; determining the baseline level of such services; and quantifying the reduction in service levels that result from the impacts.

Phase 4: Post-Assessment Phase. The post-assessment phase is the final step in an NRDA process. After the assessment is complete the Trustees prepare a Report of

Assessment detailing the results of the NRDA and may then seek recovery of damages from the PRP. Damages can include direct and indirect costs "necessary to complete all actions identified in the selected alternative for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources".

NOAA Regulations

NOAA's regulations provide a framework for conducting NRDAs that achieve restoration under OPA. NOAA's natural resource damage assessment regulations include three phases.

Phase 1: Pre-assessment Phase. A pre-assessment screen is the first step of an NRDA. Trustees rapidly review available data and determine if it is likely that the discharge has caused an injury, if response actions will adequately address the injuries, and if feasible restoration alternatives exist. The Trustees then determine whether to conduct restoration planning and proceed with the NRDA.

Phase 2: Restoration Planning Phase. This phase has two basic components: (1) injury assessment; and (2) restoration selection. Injury assessment evaluates whether the discharge has resulted in an adverse change in natural resources and/or services. Trustees quantify the degree and the spatial and temporal extent of the injuries in comparison to baseline conditions. The restoration selection stage examines the requirements and restoration actions to make the public whole. Trustees must develop a Draft Restoration Plan that identifies a primary restoration action to return injured resources to baseline conditions and a compensatory restoration action to compensate for the interim loss of services pending return to baseline conditions. This involves evaluating the range of primary and compensatory restoration alternatives using six specific criteria, selecting and justifying a preferred alternative, and preparing the plans.

Phase 3: Restoration Implementation Phase. The Final Restoration Plan is implemented during this phase. It is either presented to responsible parties for implementation, or funding must be provided to the Trustees for implementation.

Measuring Natural Resource Damages

The measure of damages is the cost of 1.) restoring injured natural resources to their baseline condition, 2.) compensation for the interim loss of injured natural resources pending recovery, and 3.) conducting a damage assessment. The statutes limit "natural resources" to those resources held in trust for the public. The NRD provisions of the statutes are designed to make the public whole rather than punish the responsible party (RP). A natural resource damage assessment (NRDA) is the process of collecting, compiling, and analyzing information to make these determinations. Damages are defined as injury to, destruction of, or loss of natural resources.

The overall intent of the assessment regulations is to assess the extent of injury, natural resource service reductions and eventually natural resource damages (determine appropriate ways of restoring and compensating for damages). Natural resource trustees, acting on behalf of the public, may seek to recover the damages to facilitate recovery of the injured area or restoring injured natural resources to their baseline condition (primary restoration) and to compensate for the interim loss of services occurring prior to full recovery (compensatory restoration).

A simple illustration or the concept of primary and compensatory restoration is provided by NOAA in Figure 1 (from NOAA at http://www.csc.noaa.gov/coastal/economics /habitatequ.htm). The area required for compensatory restoration is related to whether primary restoration occurs or not. Figure 1 shows a depiction of the level of services lost at the injured site (Area X) and the recovery rates with or without primary restoration. If primary restoration occurs, the time for full recovery to baseline is lessened and the amount of area required for compensatory restoration would also be lessened. Regardless of whether or not primary restoration is conducted, the amount of compensation or replacement habitat that provides the biological functions and services equivalent to those that were lost must be determined (Area Y). In some cases, full restoration of the lost services may not be feasible; in which case the area required for compensation would be larger.

Therefore, there are important differences between terms such as risk, injury, service reductions and natural resource damages. For example standards and benchmarks are normally used to understand the risk to natural resources, but this does not translate directly to resource injury. Even injured resources do not necessarily equate to natural resource damages. The quantification of damages is represented by the natural resource services or functions that have been lost due to the hazardous substance release, relative to baseline conditions. Quantifying damages typically requires the demonstration of lost services, such as a change in productivity of a system, shift in community diversity, or change in population levels that affect the human use or enjoyment of the resource.

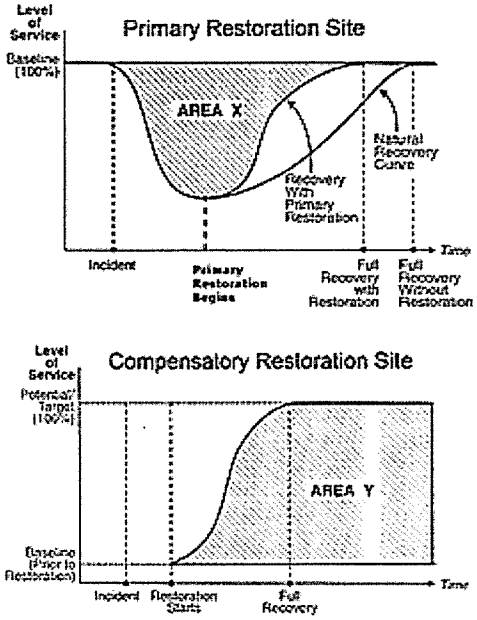


Figure 1. Interim losses of services (X) at the primary restoration site and the corresponding required level of services gained (Y) at the compensatory restoration site (From NOAA at http://www.csc.noaa.gov/ coastal/economics/habitatequ.htm).

The regulation for a DOI Type B NRDA can be divided into three steps for determining damages including:

- Injury determination,
- Quantification of service reductions, and

- Damage determination and restoration implementation.

Step 1 – Injury Determination

The injury determination should establish and document the link between injuries and the release. Type B methodologies provide detailed definitions of injury for NRDA based on measurable adverse changes in the physical and/or chemical quality of the five major natural resource areas (surface water, groundwater, air, geologic and biologic resources). The link between injury and release must be established by showing a clear pathway between the release and the resource, and that concentrations of the released substance were sufficient to cause injury.

Step 2 – Quantification of Natural Resource Service Reductions

Measurement of service reductions requires that natural resource scientists work closely with resource economists in the assessment process. A natural resource service is defined in the regulations as any function that one resource performs for another or for humans (i.e. recreation, habitat, food, water retention). The two principal types of services are use services (value) and nonuse services (value). The term "use value" refers to values for the public's use of natural resources. Many of these values are not actually traded in the marketplace but can be assigned a dollar value. For example, consumptive value attributes a value to lost resource uses of sportsmen and tourists who take wildlife in hunting or fishing. Non-consumptive uses include the value the resource may have to photographers or bird watchers. Valuation of natural resources is not based solely on "use" of a particular resource or set of resources. People may derive value from simply knowing that the resource is there, even if they never actively use it (nonuse value). "Bequest" value, for example, is an element of non-use value and reflects the resource as a legacy passed by the present generation to its children. In the economics literature, natural resource values not related to present use of the resource have been termed "existence," "intrinsic," "passive," and "non-use" values. This is a controversial aspect of valuing natural resources but courts have held that Natural Resource Trustees may recover damages for the public's lost use and non-use values, provided those damages can be reliably calculated.

The first step in estimating natural resource damage service reductions is to estimate the baseline services level or the level of services that the resource would have provided if the release had not occurred. Historical data are the preferred method to determine the physical, chemical, and biological conditions. This data is used to estimate what baseline services would have been without the release. The estimate must account for natural and human induced changes to natural resources services not associated with the release. Seasonal differences in species populations can vary considerably and anthropogenic influences such as commercial or agricultural land use can greatly influence baseline.

Under the DOI regulations, valuation methodologies are used to calculate "compensable values" for interim lost public uses. Valuation methodologies include several economic methods such as marketed methodologies (*e.g.,* market price and/or appraisal) or non-marketed methodologies (*e.g.,* factor income, travel cost, hedonic pricing, unit value, or contingent valuation). Conjoint Analysis has been proposed by DOI for revised regulations. Under the NOAA regulations, Trustees base damages for interim lost use on the cost of "compensatory restoration" actions. Trustees can determine the scale of these actions through methodologies that measure the loss of services over time or through habitat or resource valuation methodologies. Habitat Equivalency Analysis (HEA) or Resource Equivalency Analysis (REA) is a common assessment method used by NOAA and is provided as an acceptable method in the proposed revisions to the DOI regulations to measure restoration related compensation. The following table is a brief summary of these valuation methodologies (from Fed. Reg. 73, No 41).

Methodology	**Description**
Market Price	Determination of compensable value of the injured resources using the diminution in the market price of the injured resources of the lost services. It may be used if the natural resources are traded in the market, and the authorized official determines the market for the resources (or services provided by the resources) is reasonably competitive.
Appraisal	The measure of compensable value is the difference between the with- and without-injury appraisal value determination by the comparable sales approach as described in the Uniform Appraisal Standards.
Factor Income	May be used only if the injured resources are inputs to a production process, which has as an output a product with a well defined market price. It may be used to determine the economic rent associated with the use of resources in the production process, and the in-place value of th resources.
Travel Cost	May be used to determine a value for the use of a specific area. Uses an individual's incremental travel costs to an area to model the economic value of the services of that area. Compensable value of the area to the traveler is the difference between the value of the area with and without a discharge or release.
Hedonic Pricing	May be used to determine the value of non marketed resources by an analysis of private market choices. The demand for non-marketed natural resources is thereby estimated indirectly by an analysis of commodities that are traded in a market.
Unit Value	Unit values are preassigned dollar values for various types of nonmarketed recreational or other experiences by the public. Where feasible, unit values in the region of the affected resource and unit values that closely resemble the recreational or other experience lost with the affected resources may be used.
Contingent Valuation	Includes all techniques that set up hypothetical markets to directly elicit and individual's economic valuation of a natural resource. It can be used to determine use values and explicitly determine option and existence values and losy use values of injured natural resources.

Conjoint Analysis	Like contingent valuation, conjoint analysis is a stated preference method. However, instead of seeking to value natural resources service losses in strictly economic terms, conjoint analysis compares natural resource service losses that arise from injury to natural resource service gains produced by restoration projects.
Habitat Equivalency Analysis	May be used to compare the natural resource services produced by habitat or resource-based restoration actions to natural resource service losses.
Resource Equivalency Analysis	Similar to habitat equivalency analysis. This methodology may be used to compare the effects of restoration actions on specifically identified resources that are injured or destroyed.
Random Utility Model	Can be used to compare restoration actions on the basis of equivalent resource services provided and calculate the monetary value of lost recreational services to the public.

The Habitat Equivalency Assessment Framework

An expanded description of the HEA method is provided here because it is a common tool used in restoration–based settlements, as emphasized in the proposed revisions to the DOI regulations (summarized below). The HEA method is specifically used in cases of habitat injury when the service of the injured area is ecologically equivalent to the service that will be provided by the replacement habitat. This is termed service-to-service approach and assumes the public is willing to accept a one-to-one trade-off between the service lost and the service gained by the restoration (NOAA 1997). When this approach is used for scaling losses of fish, birds, and other wildlife, the method is sometimes termed REA. Figure 2 shows a depiction of the loss in services caused by a spill and the replacement of those services provided through construction of new habitat.

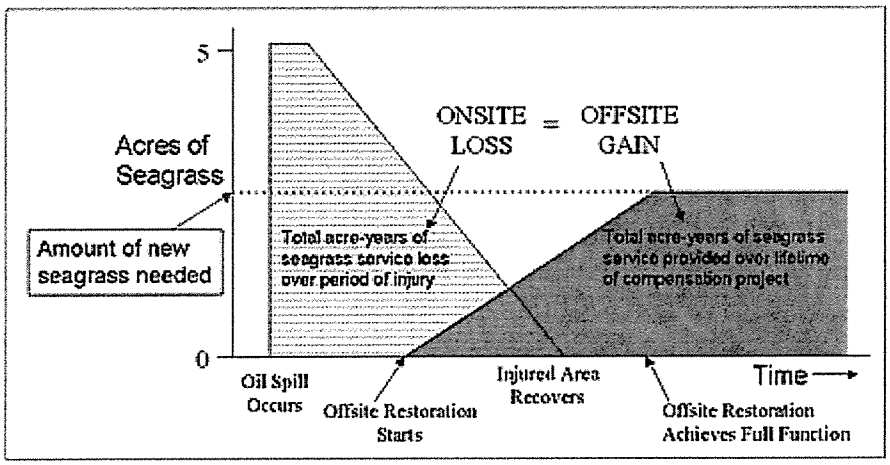


Figure 2. Diagram showing the onsite services lost and the offsite services gained over time (from NOAA 1995).

Step 3 - Damage Determination and Restoration Implementation

Damage assessment is the next step following natural resource service determination. Damage determination is more concerned with legal aspects, but involves translating the service losses into set of activities (i.e. restoration project(s)) or monies required to make the public and environment whole. The Trustees seek compensation for primary restoration, replacement or acquisition of in-kind resources to restore natural resources (including services provided by those natural resources) to their baseline or prerelease condition. Trustees can also seek compensatory restoration for lost use of injured resources for the period it takes the Trustees to restore

Natural Resource Trustees are required to develop and implement plans for the restoration of natural resources. Under CERCLA, monies recovered from an NRD claim are to be used only for restoration or replacement of the injured natural resource, or for acquisition of an equivalent resource. Under OPA, recovered sums are used to reimburse costs incurred by the Trustee while conducting NRDAs and developing and implementing plans for "the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources"

Overview of Department of Interior's proposed revisions to NRDA Regulations

DOI published proposed revisions to NRDA regulations in February, 2008 [73 Fed Reg. 11081]. The proposal would only apply to a Type B NRDA under CERCLA and the CWA. The proposed revisions were based on recommendations from a Natural Resource Damage Assessment and Restoration (NRDAR) Federal Advisory Committee. Key recommendations of NRDAR Advisory Committee were that DOI provide targeted revision of the NRDA regulations to emphasize restoration over economic damages. The proposed rule formally incorporates approaches that Trustees and RPs have been using in settlement-based approaches for several years where cooperative assessments are used. It also better aligns with the process and approach used by NOAA for NRDA.

The proposed DOI revisions include four new examples of project-based assessment technologies. Two are oriented towards economic evaluation and include conjoint analysis, which is similar to contingent valuation, and random utility models. Two examples are oriented towards biological assessment including Habitat Equivalency Analysis (HEA) and Resource Equivalency Analysis (REA).

The committee endorsed a tiered approach to implementing its regulations that would immediately address the option of emphasizing restoration over economic damages in the regulations, while leaving the implementation of a broader range of recommendations to the future. The intent of the proposed revised regulations can be summarized in the preamble section in the federal register:

Estimating option and existence value through the use of contingent valuation methodologies remains controversial. We note, however, that our proposed revision's focus on compensating for public losses pending restoration with restoration actions rather than monetary damages for the economic value of the losses would provide options for comparing functional losses from resource injuries to functional gains expected from restoration actions, which would reduce the need for trustees to seek to recover the monetary value of passive economic losses such as option and existence value. (FR Vol. 73, No. 41, Preamble Section III(B))

The proposed rule attempts to expand options available to trustees in calculating "compensable values" to include the cost of restoration actions that will provide services that offset the interim losses. Under the proposed regulation, a trustee may "use the cost of restoration actions that address service losses to calculate all damages, including all interim losses." Such an option is not formally available to trustees under the current rules. The new proposed rule (Part III A) would modify 43 C.F.R. 11.83(c) "to provide trustees [the] option of estimating compensable values for losses pending restoration utilizing the cost of implementing projects that restore those lost natural resource services."

> *"...by not considering restoration actions to address interim losses until they have already determined and recovered damages can be inefficient and confusing. Providing for a "restoration-based" approach to all damages better comports with CERCLA's overall restoration objective and promotes an earlier focus on feasible restoration options."*

The proposed revised regulation addresses timing of restoration actions by promoting an earlier focus on feasible restoration options. Again, the proposed revised regulation addresses restoration actions and emphasizes a restoration-based and cost-effective approach and was summarized in several areas in the federal register (Part IV (a)) as shown below:

> *"In fact, the proposed revisions should assist in reducing NRDA transaction costs by allowing the Trustees to utilize simpler and more transparent methodologies to assess damages when appropriate."*
>
> *"We also believe that in many cases an early focus on feasible restoration and appropriate restoration actions, rather than on the economic value of public losses, can result in less contention and litigation, and faster, more cost-effective restoration. Meanwhile, existing criteria in the rule for evaluating restoration alternatives – including cost effectiveness – remain intact (see 43 CFR 11.82(d))."*

The current regulations require the Trustees to choose a method that is "feasible and reliable for a particular incident or type of damage to be measured." Factors included in the "feasible and reliable" determination include cost reasonableness, cost effectiveness, and avoidance of double counting. The proposed revisions should provide more

flexibility in attaining a feasible and reliable determination. In theory, the formal adoption of more options for project assessment (including and emphasis on restoration) will help prevent double counting and make the NRDA process more cost-effective through promotion of a settlement-base approach earlier in the process.

Conclusions

The adversarial approaches that were common in early NRDAs are being replaced by an emphasis on restoration and cooperation between Trustees and RPs. This focuses on using approaches that lead to restoration quickly and efficiently as possible is reflected in the DOI's proposed revisions to NRDA regulations.

As described in recent paper by Conner and Gouguet (2004), two fundamental developments open the door to successful partnerships between PRPs and trustees that constitute cooperative NRDA: the advent of restoration-based assessments and the integration of NRDA with remedial (i.e. cleanup) information gathering and decision making process. The article discusses the advantages of the OPA rule, which places primary focus on restoration of the injured resources rather than on the valuation of the lost resources and services.

In a traditional DOI NRDA approach (as provided for in 43 CFR Part 11), one of the last steps is the damage determination, which establishes the amount of appropriate compensation expressed as a dollar amount required to accomplish sufficient natural resource restoration as compensation. An early restoration focus as proposed by the new DOI regulations can allow for evaluation (and potential implementation) of restoration on a parallel track with the injury determination and even with the remedial investigation and feasibility study. This encourages early settlements, cooperation, a reduction in transaction costs and potential accumulation of NRD credits earlier in the process. Early compensatory restoration and the integration of creative and cost-effective actions can have substantial cost savings and immediate benefits to natural resources and human use.

A more cost-effective restoration approach is supported and more officially aligned with the recently proposed revisions of the DOI NRDA rules. In general, policy behind proposed DOI NRDA revisions includes:

- Closer alignment or accord with CERCLA's overall restoration objectives.
- Promotion of an earlier focus on feasible restoration options.
- Reduction of NRDA transaction costs.
- Focus on early restoration actions that can result in settlement-based efforts and more cost effective restoration.

The following are a summary of potential positive changes that the proposed revisions to the DOI NRDA regulations may foster.

1. Although it is understood that human use values are a necessary part of an NRDA, it may be possible to integrate them early in the process and combine them with ecological valuation. Techniques exist to integrate human use values

into a true habitat-based approach rather than as separate assessments. If the evaluation is designed correctly, ecological values are restored and compensated through restoration and the public is also made whole in terms of human uses of those resources. It is possible to insure the integration of inter-related and multiple services provided by restoration projects. It also insures that double-counting of damages is prevented. Both REA and HEA can be designed to account for human use losses in restoration-based compensation.

2. The cost and time to implement quantitative studies to quantify injury and service loss can be enormous. Significant cost and time savings can be achieved through a restoration-based approach. An emerging approach is to use existing information in combination with conservative assumptions in regards lost services, damages and compensation assessments, rather than initiating large and expensive studies that add little to a settlement-based approach. This is particularly effective if a restoration scaling approach is used, such as HEA. This type of NRDA proceedings likely requires a tiered approach. The tiered approach begins with a relatively simple first tier that is directed at settlement of the claims and allows use of existing information and conservative assumptions. The next tiers are represented by increasing effort, cost and complexity. If settlement appears less likely, the later tiers provide for quantitative damage assessment and expensive studies to prepare for litigation.

3. A true restoration-based approach can also promote a new and emerging concept called restoration up-front (RUF). RUF refers to the concept that an entity can gain restoration credits for proactive restoration activities and these credits can be applied to 1.) existing environmental liability, 2.) held in the event of a future liability, or 3.) traded/sold to other entities that need to relieve liability. The concept of RUF in NRD cases has been discussed among industry and trustee groups for several years. The RUF concept appears to be gaining momentum, as evidenced by discussion of restoration banking at a 2006 meeting of the Great Lakes NRDA Roundtable (Stringer 2007, 2008) and a 2008 publication on RUF in Integrated Environmental Assessment and Management (Stahl et al. 2008).

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EPA v. The Clean Air Act: The Courts Speak

Eric Schaeffer
Environmental Integrity Project
July 22, 2008

The Bush Administration took office determined to reshape the Clean Air Act, through a series of actions that would:

- eliminate New Source Review pollution control requirements for power plants and other "grandfathered plants;"
- authorize exemptions from hazardous air pollutants standards for "low risk" sources;
- reduce the "burden" of emissions monitoring; and
- advance the cause of emissions trading.

On July 11, 2008, the D.C. Circuit Court of Appeals vacated the Agency's Clean Air Interstate Rule, which would have required power plants to reduce sulfur dioxide and nitrogen oxide through emissions trading modeled after the acid rain program. In brief, the unanimous decision found CAIR to be "unlawful, because it does not connect states' emission reductions to any measure of their own significant contributions" to pollution in downwind states.

Yet the CAIR decision is only the latest in a series of reversals which, over the past four years, have reduced the Administration's Clean Air Act legacy to ashes. While the federal judiciary has traditionally given administrative agencies wide latitude to implement complex statutes, courts have rejected many of EPA's rules under the so-called "Chevron I" standard, after finding that various rollbacks violated the plain language of the law. As a result, Judge David Sentelle and other prominent conservatives on the DC Circuit have joined the majority or even authored decisions vacating or remanding EPA's handiwork.

Some of the highlights of recent decisions are excerpted below; read together, they present a disturbing pattern. The next administration will need to pick up the pieces, and repair its relationship with a judiciary that appears increasingly convinced that the Environmental Protection Agency is unable to read the laws it has been entrusted to administer.

Vacated: The "Clean Air Interstate Rule" to reduce interstate emissions from power plants that jeopardize attainment of air quality standards (2008)

The Clean Air Interstate Rule (CAIR) may be one of the few examples where the Bush Administration tried to do the right thing, but for the wrong reasons. Through an emissions trading initiative modeled after the Acid Rain Program, the U.S. EPA proposed to limit emissions of sulfur dioxide (SO2) and nitrogen oxide (NOx) from power plants as a means to help states meet federal air quality standards for ozone and fine particles. Power plants are major sources of SO2 and NOx, and their tall stacks shift these pollutants hundreds of miles downwind, where they contribute to the formation of fine particle pollution and (in the case of NOx) ozone.

North Carolina challenged CAIR on the grounds that the reductions it required would not be enough to protect the state's western regions from pollution from upwind sources in neighboring states. Several industry petitioners also attacked the rule, essentially arguing that the emissions trading program it established was arbitrary. The court vacated the entire rule, after finding that EPA could not explain how it met the specific statutory objective of Title I to prohibit:

> "any source or other type of emissions activity within the State from emitting any air pollutants in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any [NAAQS] . . . ." 42 U.S.C. 741(a)(2)(D)(i)(I).

The court granted North Carolina's petition after finding that EPA failed to consider how CAIR would protect air quality in that state from upwind sources in other states. It also agreed with industry petitioners that the emissions trading scheme was arbitrary, because it was not sufficiently related to the requirement to protect one state's air quality from another state's polluters. The court chastised EPA for failing to follow the law:

> "The trading program is unlawful, because it does not connect states' emissions reductions to any measure of their own significant contributions. . . . No amount of tinkering with the rule or revising of the explanations will transform CAIR, as written, into an acceptable rule." *State of North Carolina v. Environmental Protection Agency,* Slip op. No. 05-1244 at 59 (D.C. Cir. 2008).

The CAIR rule would have cut emissions from power plants significantly, and therefore enjoyed broad support from the environmental community. But in this case, the Bush Administration's fascination with emissions trading mechanisms may have blinded it to what the law actually required.

Vacated: Clean Air Act Mercury Rule (CAMR) authorizing "cap and trade" program to reduce mercury emissions (2008)

EPA first proposed regulating mercury emissions from power plants in the year 2000, under the relatively strict standards that apply to toxic air pollutants. The Bush Administration withdrew that proposal in early 2004, and instead proposed setting a ceiling on mercury emissions from power plants nationwide, but allowing individual plants to buy and sell the right to emit mercury under that ceiling. Unlike CAIR, which

proposed a similar "cap and trade" program, the Clean Air Mercury Rule (CAMR) was blasted by environmental groups and many states for reducing emissions too slowly, for not recognizing emissions trading is inappropriate for a pollutant that is highly toxic and falls relatively close to the stack, and for bypassing Section 112 of the Clean Air Act, which requires control of toxic pollutants to the maximum extent feasible.

The DC Circuit made short work of CAMR, finding that EPA was obligated to measure mercury emissions from power plants under Section 112 of the Clean Air Act, based on its initial finding in 2000 that such regulation was "appropriate and necessary." Once the agency made such a determination, the court held that it could be withdrawn without following the delisting provisions of Section 112(c)(9) of the Act, which would have required EPA to determine that mercury emissions posed no real threat to public health or the environment. The court was unanimous in deriding the EPA's efforts to avoid the delisting process and substitute an emissions trading program for the more stringent requirements of Section 112:

> "[EPA's] brief states only that previous applications of Section 112 provisions in response to EGUs' listing were undertaken 'based on the fact that [EPA] had made a positive "appropriate and necessary" finding that was still in place. EPA has reversed that finding.' . . .This explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)." *State of New Jersey v. Environmental Protection Agency*, 517 F.3d 574, 582 (D.C. Cir. 2008).

Remanded: EPA's refusal to regulate carbon dioxide (2007)

A coalition of states, local governments, and environmental organizations petitioned EPA to regulate emissions of carbon dioxide from new motor vehicles under Section 202 of the Clean Air Act. Section 202(a)(1) provides in relevant part that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."

EPA denied the petition, arguing that it was either not authorized to regulate carbon dioxide as a pollutant under § 202 or, alternatively, that it would be unwise to exercise such authority if it could be found in the law. The Supreme Court held that EPA was wrong on both counts, finding that the statute clearly authorized the Agency to regulate carbon dioxide as a pollutant under § 202, and to act if it found carbon dioxide from new vehicles "may reasonably be anticipated to endanger public health or welfare" (i.e. contribute to climate change). The case was remanded for EPA to offer an explanation grounded in the statute for its refusal to regulate carbon dioxide. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007).

On EPA's assertion that the term "any" does not include carbon dioxide, the Court responded:

> "There is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute." *Id.* at 1461.

Responding to EPA's assertion of broad discretion in the matter, the Court wrote:

> "[T]he word 'judgment' is not a roving license to ignore the statutory text." *Id.* at 1462.

> "EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate." *Id.*

Vacated: Portions of the Plywood rule that created a "low-risk" subcategory and extended the compliance deadline (2007)

The federal Clean Air Act requires EPA to establish rules for reducing toxic air emissions that are based on the best available technology. EPA adopted a rule in 2004 that exempted plywood manufacturers from these requirements if they could demonstrate that their air emissions posed a "low risk" to human health. The controversial formula for making such determinations was based on an industry analysis of formaldehyde risk that conflicted with more recent studies by the National Cancer Institute and the National Institute of Occupational Safety and Health, which showed cancer risks to be much higher than previously assumed. The rule also allowed the industry to postpone compliance until after the statutory deadline. The D.C. Circuit Court vacated those portions of the rules, holding them to be "unlawful." *NRDC v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007). The court wrote:

> "[The EPA] has no authority to create a low-risk subcategory scheme that allows harmful emissions in a manner contrary to Congress's statutory scheme." *Id.* at 1372.

> "EPA's policy argument that extensions of time for compliance should be allowed across the board whenever it determines that 'substantial' changes and amendments have been made is not what Congress envisioned." *Id.* at 1373.

> "The agency's errors could not be more serious insofar as it acted unlawfully, which is more than sufficient reason to vacate the rules." *Id.* at 1374.

Vacated: The "Industrial Boilers" Rule, which established less stringent emission control standards for "energy recovery" facilities (2007)

Section 129 of the Clean Air Act requires EPA to establish specific performance standards for "solid waste incineration units" generally, 42 U.S.C. § 7429(a)(1)(A), as well as for "solid waste incineration units combusting commercial or industrial waste" in

particular, id. § 7429(a)(1)(D). Section 129 defines "solid waste incineration unit" as "a distinct operating unit of *any* facility which combusts *any* solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels)." Id. § 7429(g)(1) (emphases added). Despite Congress's use of the term "any," however, EPA attempted to exclude from § 7429 regulation certain solid waste incinerators that are also designed to recover heat to generate energy. The exclusion effectively allowed these energy recovery boilers to qualify for less stringent regulation under the so-called Industrial Boilers rule, instead of being subject to the tighter emissions standards required by the Commercial and Industrial Solid Waste Incinerator Rule (CISWI).

The D.C. Circuit Court ruled that EPA's reclassification conflicted with the Clean Air Act, because Section 129 clearly required that facilities burning hazardous waste be regulated as incinerators, regardless of whether they also recovered heat for energy. Hence, it vacated both the "CISWI Definitions" Rule and the Industrial Boilers Rule for failing to subject energy recovery boilers to the more stringent standards applicable to hazardous waste incinerators. *National Resources Defense Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007).

> "The definition EPA promulgated in the CISWI Definitions Rule ... constricts the scope of this plain, broad language." *Id.* at 1258.
>
> "[T]he statutory definition of 'solid waste incineration unit' is clear and unambiguous as written – and EPA acknowledges as much when it objects to a 'literal' reading of the definition's language." *Id.*

Vacated: Rule expanding "routine repair" loophole, allowing large projects to escape New Source Review and increase emissions (2006)

The Clean Air Act requires facilities to obtain New Source Review permits and install up-to-date pollution controls for "any physical change" that would significantly increase emissions. EPA adopted a rule in 2002 that would have exempted most plant modifications from this requirement, by allowing power plants, refineries, and other facilities to replace up to 20% of an entire unit in a single year without being classified as a physical change. The D.C. Circuit Court of Appeals voided the rule after finding that the exemption was too broad, and contradicted the plain language of the Clean Air Act. *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006). The court wrote:

> "Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view." *Id.* at 887.

Remanded: EPA "New Source Review" rule allowing polluters to avoid record-keeping and evade enforcement (2005)

In 2005, the D.C. Circuit Court remanded a portion of an EPA rule that would allow a utility to forgo keeping records of emissions associated with plant modifications, if it believed that there was no "reasonable possibility" that the modifications would significantly increase emissions. *New York v. EPA*, 413 F.3d 3, 35-36 (D.C. Cir. 2005). The D.C. Circuit remanded, after finding that this circular logic made the rule unenforceable:

> "EPA has failed to explain how, absent recordkeeping, it will be able to determine whether sources have accurately concluded that they have no 'reasonable possibility' of significantly increased emissions." *Id.* at 34.
>
> "[T]he rule allows sources that take advantage of the 'reasonable possibility' standard to avoid recordkeeping altogether, thus thwarting EPA's ability to enforce the NSR provision." *Id.* at 35.
>
> "Without paper trails . . . enforcement authorities have no means of discovering whether the exercise of such judgment was indeed 'reasonable.'" *Id.*

Vacated: Rule exempting certain pollution control projects from new source review (2005)

Some pollution control projects can actually increase emissions of some pollutants while decreasing others. For example, technologies to reduce emissions of nitrogen oxide can sometimes generate significant amounts of carbon monoxide as a byproduct. EPA's New Source Review reforms would have exempted these collateral emission increases from pollution control projects from NSR permit review. But the Court vacated that portion of the rule as conflicting with the plain language of the Clean Air Act. *New York v. EPA*, 413 F.3d at 41-42 (D.C. Cir. 2005).

> "[EPA supports the PCP exemption with] its view that it would be 'absurd' for Congress to discourage PCPs by subjecting them to NSR. But there is nothing inherently 'absurd' about increasing the regulatory cost of projects that increase collateral emissions, and EPA does not demonstrate otherwise." *Id.* at 41.

Remanded: EPA's final rule abruptly reversing its position that Clean Air permits may require additional emissions monitoring if needed to determine compliance (2005)

The Clean Air Act requires Title V permits for major sources of air pollution to include monitoring that is sufficient to measure compliance with emission requirements. EPA had long held that the law allowed both the federal and state agencies to specify

additional monitoring when such permits are issued or renewed, if needed to assure compliance. EPA reversed course in 2004, and announced that the Clean Air Act *prohibited* both EPA and state agencies from beefing up emissions monitoring in the Clean Air Act. The Court vacated the rule as a violation of the Administrative Procedure Act's notice-and-comment requirements. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 993 (D.C. Circuit 2005). Judge David Sentelle took the Agency to task for its flip-flop:

> "Whatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Id.* at 998.

> "[W]e have refused to allow agencies to use the rulemaking process to pull a surprise swicheroo ...." *Id.* at 996.

Remanded: A rule avoiding direct regulation of hazardous air pollutants produced in polyvinyl chloride production by using vinyl chloride as a surrogate pollutant (2004)

The Clean Air Act § 112(d)(1) requires EPA to regulate *each* hazardous air pollutant (HAP) emitted by a major source. Notwithstanding this requirement, EPA may establish limits for "surrogate" pollutants, where it can show that reducing emissions of the surrogate will also reduce emissions of other HAPS subject to regulation. EPA proposed to limit vinyl chloride gas released during polyvinyl chloride production, but failed to even identify other HAPS emitted from PVC plants, or explain how reducing vinyl chloride emissions would reduce other HAPs. Because the EPA had not established a correlation between its proposed surrogate and other HAPS, the D.C. Court of Appeals reversed and remanded the rule, finding it "arbitrary and capricious and not supported in the record." *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004).

> "The EPA reads the requirement that it establish a correlation between the surrogate and the HAP it is attempting to regulate as not requiring identification of the HAP it is attempting to regulate." *Id.*

> "While EPA may be able to know that a correlation exists between one known pollutant and some other unknown pollutants, it has not memorialized that knowledge in such a fashion that . . . a reviewing court can assess." *Id.*

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Experience

Jeff Holmstead, former Assistant Administrator for Air and Radiation at the United States Environmental Protection Agency (EPA), is one of the nation's leading air-quality lawyers and heads the Environmental Strategies Group (ESG) at Bracewell & Giuliani LLP. This innovative group includes experienced environmental litigators and regulatory attorneys, public policy advocates, and strategic communications experts. The ESG advises companies and business groups confronting major environmental and energy-development challenges, both domestically and globally.

From his time in both the government and the private sector, Mr. Holmstead is very familiar with the environmental challenges facing the business community. He works with a range of clients dealing with an increasingly complex regulatory and legal landscape, drawing on his experience in policy development, administrative and legislative advocacy, litigation, and strategic communications. He is currently advising companies on issues related to climate change policy and regulation, Clean Air Act enforcement and regulatory actions, and energy policy — including the development of new coal-fired power plants, renewable energy sources, and electric transmission infrastructure.

Mr. Holmstead headed the Office of Air and Radiation longer than anyone in EPA history. During his tenure, he was the architect of several of the agency's most important initiatives, including the Clean Air Interstate Rule, the Clean Air Diesel Rule, the Mercury Rule for power plants and the reform of the New Source Review program. He also oversaw the development of the Bush Administration's Clear Skies Legislation and key parts of its Global Climate Change Initiative.

Prior to his appointment at EPA, Mr. Holmstead was a partner in the environmental section of Latham & Watkins, an international law firm he joined in 1993. Between 1989 and 1993, Mr. Holmstead served as Associate Counsel to former President George H.W. Bush and, in that capacity, was involved in the passage of the Clean Air Act Amendments of 1990 and the key steps taken to implement that act. From 1987 to 1988, he served as a law clerk to Judge Douglas H. Ginsburg on the U.S. Court of Appeals for the District of Columbia.

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