★ 28th Annual ★

TEXAS ENVIRONMENTAL Superconference



"It's like déjà vu all over again."

Presented by:

- State Bar of Texas Environmental & Natural Resources Law Section
- Air & Waste Management Association, Southwest Section
- Water Environment Association of Texas
- Texas Association of Environmental Professionals
- The Auditing Roundtable
- American Bar Association Section of Environments, Energy & Resources

Supported by: Earth Day Texas

Thursday–Friday • August 4–5, 2016 • Austin, Texas


★ 28th Annual ★
TEXAS ENVIRONMENTAL SUPERCONFERENCE
Superconference



TO: Attendees

FROM: Planning Committee

DATE: August 4, 2016

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 28th Annual Texas Environmental Superconference – "*It's like déjà vu all over again*," our theme being Yogi Berra quotes in particular and baseball in general.

Course materials are both in print (for those who ordered them) and online. The online materials may be downloaded at the section's website, www.texenrls.org, using the password "baseball."

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.

We would appreciate suggestions for themes for next year's conference, which is scheduled, as always, beginning the first Thursday in August, that is, August 3, 2017. Please mark your calendars. Please let us know too if you have any suggested topics for our Wednesday evening program, which traditionally has been a primer on a selected topic.

Please provide any comments or suggestions to any member of the Planning Committee at the conference, or, thereafter, to Jeff Civins at (512) 867-8477 or jeff.civins@haynesboone.com. Thanks!

28th ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

"It's like déjà vu all over again"

Thursday-Friday, August 4-5, 2016
Four Seasons Hotel

Thursday, August 4, 2016

8:00 – 8:35 REGISTRATION/CONTINENTAL BREAKFAST
"If people don't want to come to the ballpark, how are you going to stop them?"

8:35 – 9:00 OPENING REMARKS
"It was impossible to get a conversation going, everybody was talking too much"

Jeff Civins, Texas Environmental Superconference
Allison Exall, Environmental and Natural Resources Law Section, State Bar of Texas
Kevin Smith, Air & Waste Management Association, Southwest Section
Julie Nahrgang, Water Environment Association of Texas
Mike McClellan, Texas Association of Environmental Professionals
Michael Byington, Auditing Roundtable
Danny Worrell, ABA Section of Environment, Energy & Resources
Bruce Fogerty, Earth Day Texas



Moderator: Booker Harrison, TCEQ

Tab 1 9:00 – 9:30 CASE LAW UPDATE
"In theory, there's no difference between theory and practice, but in practice, there is"
Michael Vitris, Beveridge & Diamond, PC

Tab 2 9:30 – 10:15 TCEQ CONTESTED CASE HEARING RULES – TWO PERSPECTIVES
"You wouldn't have won if we'd beaten you"
David Frederick, Frederick, Perales, Allmon & Rockwell, PC
Derek Seal, Winstead PC

10:15 – 10:30 BREAK – *sponsored by Terracon*

[Skit]

Moderator: Gindi Vincent, ExxonMobil Corporation

Tab 3 10:30 – 12:00 AIR QUALITY
"If you don't know where you're going, you'll end up someplace else"
Gabriel Clark-Leach, Environmental Integrity Project
Steve Hagle, Deputy Director, Office of Air, TCEQ
Suzanne Murray, Haynes and Boone, LLP
Matt Paulson, Bracewell LLP
Mark Walters, Jackson Walker,L.L.P.

[Skit]

12:00 – 1:15 LUNCH – *sponsored by ERM*

[Skit]

Moderator: Carolyn Ahrens

Tab 4 1:15 – 2:15 WATER ISSUES
"We have deep depth"
Molly Cagle, Baker Botts L.L.P.
Doug Caroom, Bickerstaff Heath Delgado Acosta LLP
Jason Hill, Lloyd Gosselink Rochelle & Townsend, P.C.

Tab 5 2:15 – 3:00 EPA TCEQ RELATIONS – *"Okay you guys, pair up in threes"*
Ron Curry, Regional Administrator, EPA Region 6
Bryan Shaw, Chairman, TCEQ

3:00 – 3:15 BREAK – *sponsored by Geosyntec*

[Skits]

Moderator: Eddie Lewis, Norton Rose Fulbright

Tab 6 3:15 – 4:15 ENFORCEMENT -- *"We made too many wrong mistakes"*
Tony Benedict, Assistant Attorney General of Texas
Matt Morrison, Pillsbury Winthrop Shaw Pittman LLP
Cheryl Seager, Deputy Regional Counsel for Enforcement, EPA Region 6

Tab 7 4:15 – 4:45 ESA DEVELOPMENTS AFFECTING THE ENERGY INDUSTRY
"He hits from both sides of the plate. He's amphibious."

Melinda Taylor, Director, KBH Energy Center, University of Texas

Tab 8 4:45 – 5:15 INSURANCE RECOVERY FOR ENVIRONMENTAL LIABILITY
"Take it with a grin of salt"
Phil Hunsucker, Hunsucker Goodstein & Nelson PC

[Skit]

5:15 – 6:00 RECEPTION – *"It's getting late early" – sponsored by Cirrus*

Friday, August 5, 2016

8:00 – 8:25 CONTINENTAL BREAKFAST "

8:25 – 8:30 OPENING REMARKS – *"I never said most of the things I said"*

[Skit]

Moderator: Peter Gregg, DuBois Bryant & Campbell

Tab 9 8:30 – 9:15 VAPOR INTRUSION -- *"No one goes there nowadays, it's too crowded"*
Technical Issues: Laurie Haws, ToxStrategies
Legal Perspective: Scott Deatherage

Tab 10 9:15 – 10:15 INSTITUTIONAL GOVERNANCE AND THE ENVIRONMENTAL CRISIS
"How can you think and hit at the same time?"
Elizabeth Bourbon, Valero
Mark Farley, Katten Muchin Rosenman LLP
George Wilkinson, Vinson & Elkins LLP
Earnest Wotring, Baker • Wotring LLP

10:15 – 10:30 BREAK – *sponsored by Pastor, Behling & Wheeler, LLC*

[Skit]

Moderator: Phillip Goodwin, City of Houston

Tab 11 10:30 – 11:15 ENVIRONMENTAL AUDIT POLICY -- Penalties, Privilege, and Immunity--What's in it for me? -- *"If the world were perfect, it wouldn't be"*
Gary Jonesi, Office of Civil Enforcement, EPA DC
Jim Morriss, Thompson & Knight LLP

Tab 12 11:15 – 12:00 THE BP CRIMINAL LITIGATION – A WAR STORY
"Even Napoleon had his Watergate"
David Gerger, Quinn Emanuel Urquhart & Sullivan, LLP
Shaun Clarke, Smyser Kaplan & Veselka, L.L.P.

[Skits]

12:00 – 1:15 LUNCH -- *co-sponsored by CH2MHill & Exponent*

1:15 – 1:30 SBOT ENRLS Meeting
"You should always go to other people's funerals, otherwise they won't come to yours"



Moderator: Cindy Bishop, C Bishop Law PC

Tab 13 1:30 – 2:00 NEWS FROM EPA – *"The future ain't what it used to be"*
James O'Rourke Payne, Jr., Regional Counsel, EPA Region 6

Tab 14 2:00 – 2:30 ENVIRONMENTAL APPEALS – The View from the Bench
"You can observe a lot by just watching"
The Honorable Jeff Brown, Justice, Texas Supreme Court

Tab 15 2:30 – 3:15 ENVIRONMENTAL ISSUES IN DISTRESSED ASSET TRANSACTIONS
"Slump? I ain't in no slump . . . . I just ain't hitting"
John Slavich, Guida, Slavich & Flores, P.C.
Joseph Wielebinski, Munsch Hardt Kopf & Harr PC

Tab 16 3:15 – 3:45 ETHICAL ISSUES INVOLVING PARALLEL PROCEEDINGS*
When you come to a fork in the road, take it"
Barry Hartman, K&L Gates LLP

3:45 ADJOURN – *"It ain't over till it's over" – sponsored by Leggette, Brashears & Graham, Inc.*
Sundaes

*Session includes .5 hours of ethics CLE.

CLE: This course has been approved for Minimum Continuing Legal Education credit by the State Bar of Texas Committee on MCLE in the amount of 12 credit hours, of which 1 credit hour will apply to legal ethics/professional responsibility credit. This program has also been certified by the Texas Board of Legal Specialization for continuing legal education requirements for attorneys and legal assistants in the following specialty fields, for 12 hours each: Administrative Law; Civil Trial Law; Civil Appellate Law; Oil, Gas and Mineral Law; and Real Estate. The course number is: 901354143.

SPONSORS

The Texas Environmental Superconference recognizes its sponsors for their generous support of the conference and the programs of the Environmental and Natural Resources Law Section:

Andrews Kurth LLP • Baker Botts L.L.P. • Baker • Wotring LLP • Beveridge & Diamond, PC • Bracewell LLP • Enoch Kever PLLC • Gardere Wynne Sewell LLP • Guida, Slavich & Flores, P.C. • Haynes and Boone, LLP • Jackson Walker, L.L.P • K&L Gates LLP • Katten Muchin Rosenman LLP • Lloyd Gosselink Rochelle & Townsend, P.C. • Norton Rose Fulbright LLP • Pillsbury Winthrop Shaw Pittman LLP • Strasburger & Price, LLP • The Law Office of William C. Smalling • Thompson & Knight LLP • Vinson & Elkins LLP • Winstead PC

ch2m SM

Cirrus

ERM

Exponent®
Health and Environmental Sciences

Geosyntec consultants
engineers | scientists | innovators

LBG
LEGGETTE, BRASHEARS & GRAHAM, INC.
Professional Groundwater & Environmental Engineering Services

PBW
PASTOR, BEHLING & WHEELER, LLC
ENGINEERING & ENVIRONMENTAL CONSULTING SERVICES

SAGE
ENVIRONMENTAL CONSULTING
Friendly Service, No Surprises!®

Terracon

SUPPORTER:

EARTH DAY TX 2017

Jeff Civins
Haynes and Boone, LLP
Austin, TX

Jeff is senior counsel in the Austin office of Haynes and Boone, LLP, where he maintains an active practice in all aspects of environmental law. Since 1975, Jeff has been assisting clients in compliance matters, transactions, and litigation. Since 1992, Jeff also has been teaching a seminar on Environmental Litigation each spring as an adjunct professor at the University of Texas School of Law.

Jeff is a member of the Advisory Board of UT's Kay Bailey Hutchison Center for Energy, Law, and Business and is a fellow of the American College of Environmental Lawyers. Jeff is the organizer and co-editor of the Thomson Reuters treatise on Texas Environmental Law, the originator of the Thomson Reuters annual compilation of Texas Environmental Laws, a former chair of the Environmental and Natural Resources Law Section of the State Bar of Texas, standing chair of the section's Annual Texas Environmental Superconference, and a former chair of the Central Texas Chapter of the Air & Waste Management Association.

Jeff's honors include: Chambers USA: America's Leading Lawyers--Environment Texas (2003-2015, Star Performer; 2016, Senior Statesman); Best Lawyers in America—Environmental Law (1989-2016); Best Lawyers' 2010 Austin Environmental Lawyer of the Year; Texas Super Lawyer—Texas Monthly (2003-2016); Top 50 Lawyers in Central and West Texas—Texas Monthly (2003-2012); and Top 100 Lawyers in the State—Texas Monthly (2008-2009).

Jeff received an AB in chemistry from Brandeis University, an MS in chemistry from Penn State, and a JD from the UT. Prior to law school, Jeff taught science in public and private schools in New York City.

Booker Harrison
Senior Attorney, Air Quality
Office of Legal Services
Texas Commission on Environmental Quality

Booker has almost 20 years of experience as in-house counsel for the TCEQ. As the Senior Attorney for Air Quality, Booker is responsible for providing legal advice to executive management, the Air Permits and Air Quality Divisions of the Office of Air, and the Program Support Section and Monitoring Operations Division of the Office of Compliance and Enforcement. This includes counsel on interpretation of, and compliance with, the federal and state Clean Air Acts, and other federal and state statutes and rules. Prior to becoming a senior attorney in the Environmental Law Division, Booker was a senior attorney and staff attorney with the Litigation Division. Booker received his JD from the Texas Tech School of Law and an MBA from the Texas Tech Graduate School of Business. He received his BA in Economics from UT.

BEVERIDGE & DIAMOND PC



Michael F. Vitris

Associate
98 San Jacinto Boulevard
Suite 1420
Austin, TX 78701-4296
(T) (512) 391-8035
mvitris@bdlaw.com

EDUCATION

- The University of Texas at Austin (B.A., History, 2006; B.S., Advertising, 2006)
- The University of Texas School of Law (J.D., with Honors, 2012; American Journal of Criminal Law, Articles Editor)

BAR ADMISSIONS & MEMBERSHIPS

- Texas

Michael Vitris maintains a diverse environmental litigation and regulatory practice across a variety of environmental media. Prior to joining Beveridge & Diamond, he represented the Executive Director in enforcement litigation and provided legal counsel to program areas as an attorney at the Texas Commission on Environmental Quality (TCEQ).

Michael's recent litigation/dispute resolution experience includes:

- Supporting the favorable resolution of contested waste and air permitting matters, including propounding and responding to discovery requests, briefing dispositive motions, deposing a protestant party, and drafting key settlement documents.
- Assisting with the defense of Clean Water Act criminal charges arising from alleged wastewater pretreatment violations.
- Representing seller at mediation against buyer's breach of contract claims related to facility's compliance with Spill Prevention, Control, and Countermeasure regulations.

Michael's recent regulatory experience includes:

- Advising clients on various solid waste disposal and wastewater permitting matters under the Texas Solid Waste Disposal Act, Texas Water Code, and other state and federal laws.
- Member of team assisting major oilfield services company with Toxic Substances Control Act (TSCA) compliance audit.
- Counseling clients regarding compliance with Occupational Safety & Health Administration (OSHA) regulations with a focus on Process Safety Management.

While at the University of Texas School of Law, Michael interned at the Texas Governor's General Counsel Office and at the Travis County District Attorney's Office.

Before law school, Michael was a Teach for America Corps member in New York, where he taught sixth and seventh grade social studies.

BEVERIDGE & DIAMOND PC

Case Law Update

Presented at:

State Bar of Texas
28th Annual Texas Environmental Superconference
August 4–5, 2016
Austin, Texas

Michael Vitris
Beveridge & Diamond, P.C.
98 San Jacinto Boulevard, Suite 1420
Austin, Texas 78701-4296
(512) 391-8035 mvitris@bdlaw.com

TABLE OF CONTENTS

I. U.S. Supreme Court 1
A. Army Corps WOTUS Jurisdictional Determinations 1
B. Federal Authority Over State-Owned Waters Flowing Through Federally Managed Preservation Areas in Alaska 1
C. FERC's Demand Response Rule 2
D. FERC Preemption of Maryland Power Plant Rate Incentive 2
II. D.C. Circuit 2
A. NEPA "Hard Look" 2
B. USFS Roadless Rule 3
C. New Source Review 3
D. ESA Listing Decision 3
E. CAA Citizen Suit Venue 4
F. Nonattainment Designation 4
G. CWA Nationwide Permitting 4
H. CERCLA Standing 5
III. Fifth Circuit 5
A. Deepwater Horizon 5
1. Settlement Fund Fraud 5
2. Class Certification in Securities Fraud Suit 5
B. Relief in CAA Citizen Suit 6
C. Renewable Fuel Credits Fraud 7
D. Class Action Fairness Act 7
E. Oil-Water Separators 7
IV. Other U.S. Courts of Appeals 7
A. CAA Preemption of State Common Law Torts 7
1. Ethanol Emissions 7
2. Coal Ash and Dust 8
B. WOTUS Rule 8
C. CAA Citizen Suit Statute of Limitations 8
D. Vessel General Permit for Ballast Water 9
E. Depredation Permits for Take of Migratory Birds 9
V. Texas Federal District Court 9
A. ESA Listing of Lesser Prairie Chicken 9

B. Waste Broker Liability Under CERCLA and TSWDA 10
C. Standing To Challenge NDPES Permit 10
D. EPA Must Pay Attorney's Fees for Enforcement in Non-Jurisdictional Waters 11
VI. Other District Court Opinions 11
A. FWS Depredation Orders and NEPA 11
B. Safe Drinking Water Act Precludes Constitutional Claims 11
C. Failure to Protect Young People From Climate Change 12
D. ESA Listing Decision 12
E. ESA No Jeopardy Finding 12
F. Emissions Standards Under §112 for Hazardous Air Pollutants 13
G. Deepwater Horizon Civil Penalties 13
H. RCRA Improper Disposal of "Solid Waste" 13
I. Natural Resource Damages Statute of Limitations and Ripeness 14
J. Mining Plans Under NEPA 14
K. ESA § 9 Take Provision 14
L. Sage Grouse Resource Management Plans 15
M. Atomic Energy Act Preemption 15
N. BLM Rights of Way Authorizations for Wind Energy 15
O. Forest Service Special Use Permitting 16
P. BLM Hydraulic Fracturing Rule 16
VII. Texas Supreme Court 16
A. Rights of Oil and Gas Lessees to Use the Land 16
B. Texas Clean Air Act Preemption of Houston Ordinance 17
C. Common Law Nuisance in Texas 17
VIII. TEXAS COURTS OF APPEALS 18
A. Homeowner Toxic Tort Action Involving Hydraulic Fracturing Emissions 18
B. Exhaustion of Administrative Remedies in Challenging Wastewater Discharge Permit 18
C. Anti-SLAPP Motion Under Texas Citizens' Participation Act 19
D. Individual Not Liable for Corporate Environmental Violations 19
IX. Cases to Watch 20

TABLE OF AUTHORITIES

Adams v. Grefer, No. 15-31091, 2016 WL 624214 (5th Cir. Feb. 16, 2016) 7
Ark Initiative v. Tidwell, 816 F.3d 119 (D.C. Cir. 2016) 3
BCCA Appeal Group, Inc. v. City of Houston, 13-0768, 2016 WL 1719182 (Tex. Apr. 29, 2016) 17
Boler v. Early, 16-10323, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016) 11
Bundorf v. Jewell, 142 F. Supp. 3d 1133 (D. Nev. 2015) 15
Cerny v. Marathon Oil Corp., 480 S.W.3d 612, 615 (Tex. App.—San Antonio 2015, pet. filed) 18
Coyote Lake Ranch, LLC v. City of Lubbock, 14-0572, 2016 WL 3176683 (Tex. May 27, 2016) 16
Crosstex N. Texas Pipeline, L.P. v. Gardiner, 15-0049, 2016 WL 3483165 (Tex. June 24, 2016) 17
Ctr. for Biological Diversity v. Otter, 1:14-CV-258-BLW, 2016 WL 233193 (D. Idaho Jan. 8, 2016) 14
Dalton Trucking, Inc. v. U.S. Environmental Protection Agency, 808 F.3d 875 (D.C. Cir. 2015) 4
Defenders of Wildlife v. Jewell, 815 F.3d 1 (D.C. Cir. 2016) 3
Defs. of Wildlife v. Jewell, 14-247-M-DLC, 2016 WL 1363865 (D. Mont. Apr. 4, 2016) 12
Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., No. 15-20030, 2016 WL 3063302 (5th Cir. May 27, 2016) 6
FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) 2
Friends of Animals v. Ashe, 808 F.3d 900 (D.C. Cir. 2015) 3
Friends of Animals v. Clay, 811 F.3d 94 (2d Cir. 2016) 9
Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016) 2
In re Idaho Conservation League, 811 F.3d 502 (D.C. Cir. 2016) 5
In re Oil Spill by the Oil Rig "Deepwater Horizon", 148 F. Supp. 3d 563 (E.D. La. 2015) 13
In re U.S. Dep't of Def., EPA Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261 (6th Cir. 2016) 8
Juliana v. United States, 6:15-CV-1517-TC, 2016 WL 1442435 (D. Or. Apr. 8, 2016) 12
Lake Eugenie Land & Development, Inc. v. BP Exploration & Production, Inc. (In re Deepwater Horizon), No. 15-30574, 2016 WL 1397663 (5th Cir. Apr. 8, 2016) 5
Little v. Louisville Gas & Elec. Co., 805 F.3d 695 (6th Cir. 2015) 8
Ludlow v. BP, P.L.C., 800 F.3d 674 (5th Cir. 2015), cert. denied, No. 15-952, 2016 WL 361661 (U.S. May 2, 2016) 5
Mayo v. Jarvis, No. CV 14-1751, 2016 WL 1254213 (D.D.C. Mar. 29, 2016) 12
MEMC Pasadena, Inc. v. Goodgames Indus. Sols., LLC, No. 4:13-CV-599, 2015 WL 6473385 (S.D. Tex. Oct. 27, 2015) 10
Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015) 8
Morello v. State, 03-15-00428-CV, 2016 WL 2742380, (Tex. App.—Austin May 6, 2016, no. pet. h.) 19
N. Illinois Gas Co. v. City of Evanston, Illinois, 14-CV-9227, 2016 WL 521002 (N.D. Ill. Feb. 10, 2016) 13
Nat. Res. Def. Council v. EPA, 808 F.3d 556 (2d Cir. 2015) 9

Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 14-1225, 2016 WL 1639661 (D.C. Cir. Apr. 26, 2016) 2
New York v. Next Millennium Realty, LLC, 06CV1133SJFAYS, 2016 WL 527058 (E.D.N.Y. Feb. 9, 2016) 14
Ouachita Riverkeeper, Inc. v. U.S. Envtl. Prot. Agency, 3:14-CV-4495-L, 2016 WL 215472 (N.D. Tex. Jan. 19, 2016) 10
Permian Basin Petroleum Ass'n v. Dep't of the Interior, 127 F. Supp. 3d 700 (W.D. Tex. 2015) 9
Public Employees for Envtl. Responsibility v. U. S. Fish & Wildlife Serv., 2016 WL 1254214 (D.D.C. 2016) 11
Sierra Club & Pub. Citizen v. Texas Comm'n on Envtl. Quality, 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.) 18
Sierra Club de Puerto Rico v. EPA, 815 F.3d 22 (D.C. Cir. 2016) 3
Sierra Club v. McCarthy, 15-CV-01165-HSG, 2016 WL 1055120 (N.D. Cal. Mar. 15, 2016) 13
Sierra Club v. Okla. Gas & Elec. Co., 816 F.3d 666 (10th Cir. 2016) 8
Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31 (D.C. Cir. 2015) 4
Sierra Club v. United States Forest Serv., 15-CV-10154, 2015 WL 5729091 (E.D. Mich. Sept. 30, 2015) 16
Sturgeon v. Frost, 136 S. Ct. 1061 (2016) 1
Tex. Comm'n on Envtl. Quality v. ExxonMobil Corp., No. 03-14-00667-CV, 2016 WL 1406859 (Tex. App. Apr. 8, 2016 20
Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC, 485 S.W.3d 184 (Tex. App.—Corpus Christi 2016, no pet.) 19
Treasure State Resources Industry Ass'n v. Environmental Protection Agency, 805 F.3d 300 (D.C. Cir. 2015) 4
U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016) 1
United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015) 7
United States v. Gunselman, No. 13-10409, 2016 WL 1397615 (5th Cir. Apr. 8, 2016) 7
United States v. Lipar, CV H-lO-1904, 2015 WL 7681272 (S.D. Tex. Aug. 30, 2015) 11
Virginia Uranium, Inc. v. McAuliffe, 147 F. Supp. 3d 462 (W.D. Va. 2015) 15
W. Expl. LLC v. U.S. Dep't of the Interior, 315CV00491MMDVPC, 2015 WL 7195156 (D. Nev. Nov. 16, 2015) 15
WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't, CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016) 14
Wyoming v. U.S. Department of the Interior, 136 F. Supp. 3d 1317 (D. Wyo. 2015) 16

CASE LAW UPDATE

This paper compiles selected cases that have been decided in federal and state courts since August 2015 and may be of interest to the Texas environmental practitioner. Included are notable cases from Texas courts as well as other jurisdictions that do not encompass Texas. This update does not purport to be comprehensive, nor is it intended to constitute legal advice.[1]

I. U.S. Supreme Court

A. Army Corps WOTUS Jurisdictional Determinations

In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), the Court unanimously held that an approved jurisdictional determination (JD) by the Corps is reviewable under the Administrative Procedure Act (APA) as a final agency action. Corps regulations allow property owners to request JDs, which specify whether a particular property contains "waters of the United States" subject to the permitting requirements of the Clean Water Act. At issue were "approved" JDs, which definitively state the presence or absence of such waters and are binding on the Corps and EPA for five years. The Court held that these approved JDs were final under the APA because they (1) mark the consummation of the agency's decision-making process as to whether a particular property contains jurisdictional waters, and (2) give rise to direct and appreciable legal consequences. Additionally, as in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), the mere fact that the agency might revise its determination based on new information did not make an otherwise definitive decision non-final.

B. Federal Authority Over State-Owned Waters Flowing Through Federally Managed Preservation Areas in Alaska

In *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016), the Court unanimously reversed (8–0) the Ninth Circuit, holding that Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA) does not give the National Park Service (NPS) authority to ban hovercrafts on state-owned waters flowing through federally managed preservation areas. Under ANILCA, 104 million acres of land were placed into "conservation system units" (CSUs), which include all federally protected land in Alaska, as well as over 18 million acres of state, Native Corporation, and private land. ANILCA provides for numerous Alaska-specific carve outs to NPS's general authority over federally managed preservation areas. Pertinent here, ANILCA § 103(c) distinguishes between "public" and "non-public" lands within CSUs. According to the Ninth Circuit's reading of ANILCA, if NPS wanted to regulate "public" and "non-public" land in an Alaska-specific way, it would have to regulate the "non-public" land pursuant to rules applicable outside Alaska, and the "public" land pursuant to Alaska-specific provisions. The Court found this reading implausible. The Court, however, did not reach the remainder of the parties' arguments, including whether the Nation River qualifies as "public land" for purposes of ANILCA, whether NPS has authority to regulate activities on the Nation River, or whether NPS has authority under ANILCA over "public" and "non-public" lands within the boundaries of CSUs in Alaska.

---

[1] Grant Tolley and Matthew Schneider provided invaluable research and drafting assistance on this project.

C. FERC's Demand Response Rule

In *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016), the Court upheld FERC's "demand-response" rule. The rule requires wholesale electricity market operators to pay the same price to providers for conserving energy as to generators for producing energy, so long as a "net benefits test" is met to ensure the money paid for conserving energy actually saves consumers money. The D.C. Circuit vacated the rule, holding that FERC had exceeded its authority because the rule directly regulates the retail electricity market. The Supreme Court reversed.

The Federal Power Act (FPA) authorizes FERC to regulate "the sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice "affecting" such rates. 16 U.S.C. §§ 824(b) and 824e(a). However, the FPA leaves to the states the power to regulate "any other sale." *Id* (b). The Court held both that (1) demand response directly affects wholesale rates and (2) the rule does not regulate retail sales. The Court also held that the rule was not arbitrary and capricious because FERC weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice.

D. FERC Preemption of Maryland Power Plant Rate Incentive

In *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), the Court held that a Maryland regulatory program, under which a Maryland electricity generator was required to participate in a regional transmission organization's capacity auction but guaranteed a rate distinct from the clearing price for its interstate sales of capacity, was preempted by the Federal Power Act (FPA). Maryland was attempting to encourage construction of new in-state generation, but its program was preempted by the FPA's grant to FERC of exclusive jurisdiction over interstate wholesale rates.

II. D.C. CIRCUIT

A. NEPA "Hard Look"

In *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 14-1225, 2016 WL 1639661 (D.C. Cir. Apr. 26, 2016), the D.C. Circuit denied the environmental group's motion to intervene in a license renewal proceeding for a nuclear power plant in Pennsylvania. NRDC sought to present "new and significant" information regarding severe accident mitigation alternatives (SAMAs). The court held that the Nuclear Regulatory Commission's decision to deny the request to intervene was reasonable. NRDC's action constituted a challenge to a general rule which is improper in an individual adjudication. Further, while NEPA requires a "hard look," the statute does not mandate a particular process for doing so. Specifically, NRDC argued that the 1989 SAMA analysis is no longer valid due to changed conditions. The NRC however interpreted an agency rule (Rule L) to treat SAMA analysis generically and therefore foreclosed further evaluation. The court held that this was reasonable given the extensive nature of the first analysis. Therefore the agency determination that a second effort would not provide enough value to justify the resource expenditure was valid.

B. USFS Roadless Rule

In *Ark Initiative v. Tidwell*, 816 F.3d 119 (D.C. Cir. 2016), the D.C. Circuit upheld the U.S. Forest Service's decision to exempt 8,300 acres of federal land in Colorado from the roadless rule. The Forest Service issued a state specific roadless area management rule in 2012 (2012 Colorado Rule) that removed 8,300 acres from the 4.2 million acres roadless land inventoried. The land removed had already been designated for "ski area management" in special use permits or forest plans. Environmental groups including Ark Initiative challenged the rule's application to a proposed skiing trail through the excluded acreage. Ark's challenge to the rule as arbitrary and capricious under the APA was denied. The court held that although the action constituted a change in policy with respect to the treatment of that acreage, the agency provided adequate justification and did not rely on findings contradictory to its early actions.

C. New Source Review

In *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22 (D.C. Cir. 2016), the D.C. Circuit dismissed a suit to vacate the EPA rule implementing the Clean Air Act's new source review permitting scheme in non-attainment areas. The suit challenged the 1980 EPA rule requiring a facility to emit 100 tons of the pollutant for which an area is in non-attainment before new source review (NSR) procedures are activated. Sierra Club argued that lead is dangerous at much lower levels and argues the facility that brought the area into nonattainment emits less than the facility that precipitated the dispute (a waste incineration plant that emits 0.31 tons of lead per year). Sierra Club argued the rule essentially created a loophole to nonattainment. The D.C. Circuit dismissed on timeliness grounds and did not reach the merits of the case.

D. ESA Listing Decision

In *Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016), the D.C. Circuit upheld a decision by the U.S. Fish and Wildlife Service (FWS) to withdraw a proposal to list the sagebrush lizard in Texas and New Mexico. FWS withdrew the proposal on the basis of new information provided to it in the comments on the proposal. A better understanding of the BLM plans for federal lands in New Mexico, along with successful voluntary agreements in New Mexico and the development of a conservation plan in Texas prompted FWS to withdraw the listing. Defenders challenged only the application of the FWS Policy allowing consideration of voluntary agreements, not the policy itself. The court rejected this challenge holding the FWS decision was not arbitrary or capricious. Specifically the court dismissed challenges that the Texas plan failed criterion listed in the policy requiring sufficient certainty in implementation and sufficient certainty in effectiveness. The court held that the FWS could have made that decision from the facts presented.

In *Friends of Animals v. Ashe*, 808 F.3d 900 (D.C. Cir. 2015), the D.C. Circuit dismissed a conservation group's claim that U.S. Fish and Wildlife Service (FWS) failed to make a listing determination on 10 species of sturgeon in the required time. The statute requires that after a petition, the FWS make an initial determination within 90 days. If that decision is positive, FWS must make a listing decision within 12 months of the original petition date. The FWS did not do either in this case. Nonetheless, the court dismissed the challenge because the 60-day notice of intent, required to be given by law, was given relative to the failure to issue a final determination,

not the failure to issue an initial determination. As such, it was premature. The court noted that "the Service's approach may not be the most efficient" but "that the statute compels it."

E. CAA Citizen Suit Venue

In *Dalton Trucking, Inc. v. U.S. Environmental Protection Agency*, 808 F.3d 875 (D.C. Cir. 2015), the D.C. Circuit ruled that EPA's authorization of California Nonroad Fleet Requirements could not be challenged in the D.C. Circuit. Transportation groups challenged the authorization as in violation of CAA § 209 which grants California an exemption from preemption under certain circumstances. Venue under the Clean Air Act is governed by §307(b)(1) which allows review in the Court of Appeals for the District of Columbia of locally or regionally applicable final actions under certain conditions. Review is allowed only if there is a "nationwide scope or effect," and EPA found that its final action was based on a determination of nationwide impact. In the case at issue, however, neither requirement was met, and therefore the only proper venue is in the Court of Appeals for the appropriate circuit (here, the Ninth Circuit).

F. Nonattainment Designation

In *Treasure State Resources Industry Ass'n v. Environmental Protection Agency*, 805 F.3d 300 (D.C. Cir. 2015), the D.C. Circuit dismissed two challenges to nonattainment designations under the Clean Air Act (CAA). In the first challenge, an industry group challenged the classification of Yellowstone County, Wyoming as a nonattainment area under the sulfur dioxide NAAQS. The challengers argued that the EPA relied on outdated data and misapplied the CAA when it acted retroactively. The court disagreed, holding the data was "robust enough to be reliable" and that there was no reasonable reliance on preexisting law so the determination did not constitute impermissible retroactivity. The second classification challenge was brought by a steel company who claimed the sulfur dioxide nonattainment designation of Wayne County, Michigan was unreasonable because it was not also made for neighboring Monroe County, Michigan which contains a large coal-fired power plant. The EPA's use of county borders, however, is not arbitrary according the court, as the statute defines nonattainment at "any area." Nothing in the definition requires a simultaneous decision on both counties. Finally, even absent a mandate, EPA offered sufficient reasons as to why it has deferred a decision, thus the agency did not violate the APA's minimal rationality standard.

G. CWA Nationwide Permitting

In *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015), the D.C. Circuit dismissed the environmental group's NEPA and Clean Water Act challenges to a 593 mile oil pipeline from Illinois to Oklahoma. The Sierra Club argued first that the NEPA analysis conducted was invalid because it did not consider the effects of the entire pipeline. The court rejected this scoping argument, however, noting that only five percent of the pipeline's length required any sort of federal action. Thus, the consideration of environmental impacts in the discrete segments was appropriate. Additionally, Sierra Club challenged that the pipeline makes 1,950 water crossings that violate the Clean Water Act. Specifically, the petitioners argued that the authorization pursuant to Nationwide Permit 12 was invalid because they did not properly account for cumulative effects. The court rejected this argument, however, holding that

cumulative effects can be done on a regional rather than pipeline-wide basis, and that the Corps properly explained its conclusions.

H. CERCLA Standing

In *In re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir. 2016), the D.C. Circuit held that an environmental group had standing regarding a hardrock mining regulation, thus allowing the court to approve a joint motion for a consent order to establish a schedule for the rulemaking. CERCLA §108(b)(1) requires EPA to promulgate regulations requiring classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of associated risk. The statute required such regulations to be completed within five years (by 1985) but it was not until 2009, however, that EPA published a priority notice that it would first develop financial assurance rules for the hardrock mining industry. EPA then delayed the completion date for the regulation prompting environmental organizations to petition the court for a writ of mandamus. The court avoided the question of whether a writ of mandamus might be proper, instead holding that because at least one petitioner had standing to challenge EPA's failure to promulgate regulations, the consent agreement is valid and the writ is moot. One of the Conservation League's members was held to have shown that EPA's failure to regulate has caused and continues to threaten injuries-in-fact by virtue of his living, working and recreating near hardrock mining facilities.

III. FIFTH CIRCUIT

A. Deepwater Horizon

1. Settlement Fund Fraud

In *Lake Eugenie Land & Development, Inc. v. BP Exploration & Production, Inc. (In re Deepwater Horizon)*, No. 15-30574, 2016 WL 1397663 (5th Cir. Apr. 8, 2016), the Fifth Circuit upheld a district court decision ordering a commercial fishing company to return funds it received from the Deepwater Horizon settlement fund and barring the company from receiving future payments. The company was awarded over $280,000 for lost shrimping revenue, but investigation revealed the claims were fraudulent. The company had presented that the lost revenue they claimed was from shrimping activities alone when, in fact, over 80 percent was for marine debris cleanup, an ineligible activity. The court also upheld the reasonableness of the sanctions applied by the lower court.

2. Class Certification in Securities Fraud Suit

In *Ludlow v. BP, P.L.C.*, 800 F.3d 674 (5th Cir. 2015), cert. denied, No. 15-952, 2016 WL 361661 (U.S. May 2, 2016), the Fifth Circuit affirmed a lower court decision allowing investors who bought BP stock after the Deepwater Horizon spill to file a class action lawsuit against BP for alleged securities fraud concerning the oil flow rate after the spill, but denying class certification to investors who purchased stock before the spill and alleged misrepresentations concerning BP's pre-spill safety procedures. The investors alleged violations of §10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5.

The post-spill investors calculated damages using an "out-of-pocket losses" measure, which calculates the damages as the difference between the allegedly inflated price at which the plaintiffs bought their stock, and the theoretical price that the BP stock would have traded for had the relevant information been properly disclosed. The court found this model of damages proper.

The court found improper, however, the pre-spill investors' use of a "materialization-of-risk" damages theory. This theory posited that BP defrauded the pre-spill investors into taking heightened risk by overstating the efficacy of the safety procedures, resulting in loss to the shareholders when the risk materialized. The court rejected this theory, holding that the model must determine risk tolerance for each shareholder because some shareholders might have purchased stock regardless of knowledge of the true risk of a spill.

B. Relief in CAA Citizen Suit

In *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. 15-20030, 2016 WL 3063302 (5th Cir. May 27, 2016), the Fifth Circuit reversed and remanded a district court opinion awarding no relief to environmental groups that had alleged over 18, 000 CAA Title v. permit violations at Exxon's Baytown, TX facility. The district court ruled in favor of Exxon after a 13-day bench trial, finding that even though its emissions went above the permitted limit at times, it was not enough to warrant a penalty. The Fifth Circuit panned the trial court's ruling as "irreconcilably inconsistent."

In the original complaint, the environmental group alleged that Exxon (1) repeatedly violated a permit condition "stating that emissions from 'upset' events are not authorized under any circumstances," (2) repeatedly emitted pollutants at rates in excess of the hourly emission limits set forth in permit emission rate tables, (3) repeatedly emitted highly reactive volatile organic compounds ("HRVOCs") at rates in excess of a 1,200 lbs/hr emission limit, (4) repeatedly violated a prohibition on visible emissions from flares lasting more than five minutes during any two consecutive hours, and (5) repeatedly violated a number of other permit requirements as reflected in deviation reports filed with the Texas Commission on Environmental Quality.

The district court found that 94 of the thousands of alleged permit violations were "actionable" under the citizen suit provision of the CAA, yet the court declined to order declaratory judgment, injunctive relief, or any of Plaintiffs' request for $641 million in civil penalties. Notably, the district court's judgment on penalties went beyond merely concluding that no penalty was warranted for the violations it found actionable. Rather, the district court determined that even if *every* alleged violation were actionable, it would not impose a penalty.

The Fifth Circuit found that (1) the district court erred in finding only 94 "actionable" permit violations; (2) the district court abused its discretion when it weighed less lengthy/less serious violations against more lengthy/more serious violations in its assessment of the CAA penalty factors; and (3) the district court erred in failing to consider certain evidence of Exxon's economic benefit from noncompliance. Accordingly, the court vacated the district court judgment and remanded for assessment of penalties based on the correct number of actionable violations.

C. Renewable Fuel Credits Fraud

In *United States v. Gunselman*, No. 13-10409, 2016 WL 1397615 (5th Cir. Apr. 8, 2016), the Fifth Circuit upheld an individual's conviction and sentence for wire fraud, money laundering, and violations of the CAA stemming from the sale of false fuel credits. The individual produced no commercially usable renewable fuel, but he sold more than 46 million Renewable Identification Numbers (RINs) for more than $40 million. The court affirmed the individual's conviction of 51 counts of wire fraud, 24 counts of money laundering, and 4 counts of making a false statement under the CAA. The court also affirmed the sentence of more than 15 years in prison and order to pay $54.9 million in restitution under the Mandatory Victims Restitution Act.

D. Class Action Fairness Act

In *Adams v. Grefer*, No. 15-31091, 2016 WL 624214 (5th Cir. Feb. 16, 2016), the Fifth Circuit held that a class action lawsuit alleging personal injury and property damage from contamination exposure may not be removed to federal court under the Class Action Fairness Act (CAFA). The plaintiffs argued that filing an amended petition commenced a new action, thereby opening a new window for removal under CAFA. However, the court held that, under Louisiana law, a suit is commenced only at the time the original petition is filed, absent special circumstances. Accordingly, plaintiffs' filing of an amended petition that merely substituted deceased plaintiffs for their heirs did not commence a new action under CAFA.

E. Oil-Water Separators

In *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), the Fifth Circuit reversed an oil company's convictions for violating the CAA and the Migratory Bird Treaty Act (MBTA). The charges stemmed from waste water treatment activity at the company's Corpus Christi refinery. The company was convicted for knowingly operating uncovered tanks as oil-water separators without the emission control devices required by the CAA, and for "taking" migratory birds that perished in the tanks in violation of the MBTA. The court held that the jury instructions were erroneous as to the definition of oil-water separators under CAA regulations. Additionally, because it was undisputed that the tanks at issue did not have the component parts that would make them oil-water separators under the CAA regulations, the court reversed the CAA convictions. The court also reversed the MBTA convictions because the MBTA only criminalizes intentional "takings," and the bird deaths at issue were unintentional.

IV. OTHER U.S. COURTS OF APPEALS

A. CAA Preemption of State Common Law Torts

1. Ethanol Emissions

In *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015), the Sixth Circuit held that the CAA does not preempt property owners' state common law negligence, nuisance, and trespass claims against a whiskey distillery for ethanol emissions that allegedly caused "whiskey fungus" to grow on their properties. The court held that even though the

distillery's federally enforceable operating permit did not set a cap for fugitive emissions, the states were free to regulate these emissions under a more stringent standard pursuant to the CAA's states' rights savings clause. The court held that other parts of the CAA and the legislative history of the CAA are fully consistent with this conclusion. The court also relied on the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to conclude that Congress did not intend to regulate the entire field of air pollution to the extent that no room was left for state-law nuisance and negligence claims.

The Sixth Circuit, therefore, reached the same result as the Third Circuit did in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir 2013), in holding that the CAA does not preempt claims brought by plaintiffs under the common law of the source state.

2. Coal Ash and Dust

In *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695 (6th Cir. 2015), the Sixth Circuit held that the CAA does not preempt property owners' state common law nuisance, trespass, negligence, negligence per se, and gross negligence claims based on a power company's emission of dust and ash from its coal-fired power plant. The court reasoned that the preemption claims were disposed of by the court's decision in the materially indistinguishable case of *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015).

B. WOTUS Rule

In *In re U.S. Dep't of Def., EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016), the Sixth Circuit held that it has jurisdiction to directly review the "waters of the United States" (WOTUS) rule. Prior to publication of this decision, the court issued a nationwide stay of the rule. Since that time, numerous parties filed motions to dismiss, arguing that the court lacked jurisdiction and that the matter should first go to the district court. The court disagreed.

CWA §509(b)(1) identifies seven kinds of actions by EPA that are reviewable directly in the circuit courts. Here, two of those actions—subsection (E) ("approving or promulgating any effluent limitation or other limitation") and subsection (F) ("issuing or denying any [NPDES] permit")—support the court's finding. By clarifying the definition of "waters of the United States," the rule has the indirect effect of altering permit issuers' authority to restrict point-source operators' discharges into covered waters. This alteration inevitably results in expansion of regulatory authority in some instances and imposition of additional restrictions on the activities of some property owners. The rule is therefore subject to direct circuit court review under § 509(b)(1)(E). Similarly, the court found that the rule impacts permitting requirements, thereby affecting the granting and denying of permits, which triggers § 509(b)(1)(F). Accordingly, the court denied all motions to dismiss and left the stay in place.

C. CAA Citizen Suit Statute of Limitations

In *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666 (10th Cir. 2016), the Tenth Circuit held that Sierra Club's CAA citizen suit against a power company for failure to obtain a Prevention of Significant Deterioration permit for modification of a coal-fired boiler was time

barred because the action was filed more than five years after modification commenced. The court also held that the group's claims for declaratory and injunctive relief were precluded under the concurrent remedy doctrine because they were based on the same facts as the time-barred claim for civil penalties.

D. Vessel General Permit for Ballast Water

In *Nat. Res. Def. Council v. EPA*, 808 F.3d 556 (2d Cir. 2015), the Second Circuit remanded parts of EPA's 2013 Vessel General Permit for ship ballast water, a major driver of the spread of invasive species. The court held that EPA acted arbitrarily and capriciously by (1) failing to consider onshore treatment options; (2) simply applying the standard of the International Maritime Organization, and thus failing to set technology-based effluent limits (TBELs) that reflected the best achievable technology (BAT); (3) issuing narrative water quality-based effluent limits (WQBELs) rather than numeric WQBELs because the narrative standard is too imprecise to ensure compliance; and (4) failing to ensure compliance with the WQBELs by requiring permittees only to report the *expected* date and composition of ballast discharges, and not the actual specifications of the ballast discharges. The court left in place the 2013 permit during remand.

E. Depredation Permits for Take of Migratory Birds

In *Friends of Animals v. Clay*, 811 F.3d 94 (2d Cir. 2016), the Second Circuit upheld a "depredation permit" issued to the Port Authority of New York and New Jersey. The permit authorized the emergency take of migratory birds that threaten to interfere with aircraft at John F. Kennedy International Airport. FWS issued the permit under 50 C.F.R. § 21.41, which authorizes FWS to issue depredation permits that authorize the taking (or possession or transport) of migratory birds that are causing injury to certain human interests. The permit at issue contained take quotas for 18 species of birds and an "emergency-take" provision that empowered the Port Authority to take migratory birds that pose a direct threat to human safety. An animal rights organization challenged the permit, alleging that § 21.41 does not authorize the emergency-take provision. The court disagreed, holding that the regulation gives FWS authority to issue permits with non-species specific emergency-take provisions. To hold otherwise would place officials in the untenable position of having to choose between violating federal law and deliberately ignoring serious threats to human safety.

V. TEXAS FEDERAL DISTRICT COURTS

A. ESA Listing of Lesser Prairie Chicken

In *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015), the court vacated an FWS rule listing the lesser prairie chicken as threatened under the ESA. Section 4(b) of the ESA requires the Secretary to make listing decisions "solely on the basis of the best scientific and commercial data available . . . and after taking into account those efforts, if any, being made by any State . . . to protect such species . . . ." In 2003, FWS issued its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE). The PECE allows FWS to consider conservation efforts that have not yet been implemented or demonstrated their effectiveness, so long as FWS evaluates the certainty that the conservation

effort will be implemented and effective. Five states—Texas, Colorado, Kansas, New Mexico, and Oklahoma—are undertaking conservation efforts for the lesser prairie chicken as part of a rangewide plan (RWP). The court held that FWS failed to properly apply the PECE to the RWP when deciding to list the lesser prairie chicken as threatened. FWS failed to evaluate the cumulative effects of all lesser prairie chicken conservation efforts as required by the policy, instead reviewing the RWP in isolation. Accordingly, FWS acted arbitrarily and capriciously, and its errors warrant vacatur of the final rule and listing determination. The district court declined a motion to amend its final order in February 2016 noting that FWS failed to show that the court committed a clear error of law in the prior ruling or that remand would prevent a manifest injustice. *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. 7:14-CV-50, 46 ELR 20045 (W.D. Tex. Feb. 29, 2016). On May 5, 2016, the defendants filed a notice of appeal to the Fifth Circuit. *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. 16-50453, (5th Cir. docketed May 5, 2016).

B. Waste Broker Liability Under CERCLA and TSWDA

In *MEMC Pasadena, Inc. v. Goodgames Indus. Sols., LLC*, No. 4:13-CV-599, 2015 WL 6473385 (S.D. Tex. Oct. 27, 2015), the court held that a waste broker is liable as an arranger under CERCLA and the Texas Solid Waste Disposal Act (TSWDA). The suit arose in connection with the disposal of waste at the U.S. Oil Recovery Superfund site in Texas. The broker claimed that it lacked sufficient decision-making authority over the disposal activity to be liable as an arranger. However, the court disagreed. Although CERCLA § 107(a)(4) expressly requires that transporters select the disposal site to be deemed liable, the provision applying to arrangers, § 107(a)(3), lacks this requirement. In addition, one can "arrange" or "plan" for something even when another party has the ultimate authority to decide. Here, the broker constituted an arranger because the broker suggested and coordinated the disposal site, arranged for transport of the waste, and received invoices directly from the disposal site and delivered them to the manufacturer with a 10–26% markup for the broker's services. Additionally, because the broker is liable under CERCLA as an arranger, the court also found the broker liable under the TSDWA.

C. Standing To Challenge NDPES Permit

In *Ouachita Riverkeeper, Inc. v. U.S. Envtl. Prot. Agency*, 3:14-CV-4495-L, 2016 WL 215472 (N.D. Tex. Jan. 19, 2016), the District Court held that the environmental group lacked standing to challenge the EPA's decision to not object to an Arkansas draft water discharge permit issued under the state NPDES permitting program. The court held that the environmental group's alleged injuries stemmed not from EPA inaction but from the state level agency's decision to grant the permit. Therefore the plaintiff failed to show how its injuries might be redressed if it prevailed in the suit. The group had sought an order declaring that the permit violated the CWA and remand of EPA's decision not to object. The court held the group lacked standing, however, because there was no redressability and causation with respect to EPA. The court found no authority upon which EPA might object to a permit issued four years prior by a state. Moreover, a state and not EPA issued the permit that was the source of plaintiff's injury, meaning EPA could not be considered the cause. The court did note that the plaintiff could have challenged the sufficiency of the permit under the CWA but chose not to.

D. EPA Must Pay Attorney's Fees for Enforcement in Non-Jurisdictional Waters

In *United States v. Lipar*, CV H-IO-I904, 2015 WL 7681272 (S.D. Tex. Aug. 30, 2015), the District Court dismissed EPA's enforcement action against a developer and ordered the Agency to pay the attorney's fees incurred. The government attempted to prosecute Lipar for filling wetlands in connection with two developments which it claimed have a continuous surface connection to jurisdictional waters. The court, however, held that the wetlands were nonjurisdictional under the continuous connection or significant nexus tests established in *Rapanos v. U.S.*, 547 U.S. 715 (2006). The court then imposed sanctions on the government because its conduct "has been oppressive and dishonest" in continuing to investigate and prosecute for ten years despite no evidence showing these waters were jurisdictional.

VI. OTHER DISTRICT COURT OPINIONS

A. FWS Depredation Orders and NEPA

In *Pub. Employees for Envtl. Responsibility v. United States Fish & Wildlife Serv.*, CV 14-1807, 2016 WL 3030228 (D.D.C. May 25, 2016), the court vacated two FWS depredation orders that would reauthorize the killing of double crested cormorants. The issue before the court was the remedy imposed for NEPA violations. FWS argued that vacatur was inappropriate because it would cause significant disruptions to the regulated community and have adverse impacts on fisheries and aquaculture. The court disagreed, however, holding that the forecasted harms were too speculative and imprecise to overcome the presumption of vacatur in NEPA violations.

In an earlier decision in the case, *Public Employees for Envtl. Responsibility v. U. S. Fish & Wildlife Serv.*, 2016 WL 1254214 (D.D.C. 2016), the district court held that FWS violated NEPA when it reissued the depredation orders without conducting an environmental impact statement (EIS). The FWS issued an EA and a FONSI but the court determined that FWS did not take the requisite "hard look" at the impact on cormorant populations. FWS employed a number of studies in its EA that projected cormorant populations out to 2014, not out to 2019 which is the end date authorized in the orders. The court noted that it appeared that FWS simply reused its findings from the 2009 EA. Moreover, the court found that FWS did not consider a reasonable range of alternatives as is required.

B. Safe Drinking Water Act Precludes Constitutional Claims

In *Boler v. Early*, 16-10323, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016), the court held that it lacks subject matter jurisdiction over a class action suit stemming from the lead contamination crisis in Flint, Michigan. The class alleged that their constitutional rights were violated by the contamination. The court held, however, that the constitutional claim to "safe drinking water" under §1983 is precluded by the Safe Drinking Water Act (SDWA). The SDWA and the corresponding EPA regulations occupy the field of safety of public water systems. The remedial devices available under the SDWA or any applicable state law are evidence of Congressional intent to preclude §1983 claims.

C. Failure to Protect Young People From Climate Change

In *Juliana v. United States*, 6:15-CV-1517-TC, 2016 WL 1442435 (D. Or. Apr. 8, 2016), a magistrate judge recommended that the district court deny motions to dismiss a lawsuit alleging the United States government is failing to protect a group of young people from climate change. The court held that plaintiffs' claim, although "a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit," met the requirements for standing in that they allege concrete injuries. Moreover, the court held that for the purposes of the pleading stage, the plaintiffs' claim of causation is sufficient in "that EPA's action/inaction with respect to the regulation of greenhouse gases allegedly results in the numerous instances of emissions that purportedly cause or will cause the plaintiffs harm." The government and industry intervenors also argued that the plaintiffs failed to raise a valid constitutional claim because there is "no right to be free from greenhouse gases." The court found that at this stage, the alleged deliberate indifference is enough to move forward and whether it sufficiently "shocks the conscious" is a question for future proceedings. Finally, the court refused to dismiss plaintiffs' claim that public trust doctrine provides some substantive due process protections within the navigable waters of Oregon.

D. ESA Listing Decision

In *Defs. of Wildlife v. Jewell*, 14-247-M-DLC, 2016 WL 1363865 (D. Mont. Apr. 4, 2016), the court held that FWS violated the Endangered Species Act (ESA) when it decided not to list the wolverine as a threatened species. FWS proposed to list the wolverine in 2013, but withdrew the proposal in 2014. Specifically, the court held that FWS erred in determining that climate change and projected spring snow cover would not impact wolverine reproduction in the near future. FWS unreasonably dismissed scientific studies showing snow cover reduction without supporting its conclusion. FWS also erred in concluding that small population size and low genetic diversity do not pose an independent threat to wolverine viability in the United States. By incorporating these determinations into the withdrawal, FWS' decision against listing the wolverine as threatened under the ESA was deemed arbitrary and capricious under the APA.

E. ESA No Jeopardy Finding

In *Mayo v. Jarvis*, No. CV 14-1751, 2016 WL 1254213 (D.D.C. Mar. 29, 2016), the district court remanded part of the addendum to an FWS biological opinion issued concerning the incidental taking of grizzly bears in Grand Teton National Park and surrounding lands. The National Park Service issued a joint management plan for bison and elk herds in 2007 that called for an elk reduction program. As a part of the analysis of the plan, an FWS biological opinion was issued addressing potential impacts on grizzly bear populations, concluding that there was no jeopardy and that one incidental taking was anticipated. In 2013 after a bear was killed by hunters, the Park Service reinitiated consultation with FWS and issued an addendum to its biological opinion increasing the anticipated take to five bears. Environmental groups challenged the addendum as well as the reduction program. The court rejected NEPA and Organic Act claims, but upheld the argument that FWS failed to account for other incidental takes authorized through other programs since 2007 when it issued its addendum. The failure to consider the environmental baseline as it stood in 2013 called for remand of the addendum.

F. Emissions Standards Under §112 for Hazardous Air Pollutants

The district court in *Sierra Club v. McCarthy, 15-CV-01165-HSG,* 2016 WL 1055120 (N.D. Cal. Mar. 15, 2016), granted a motion for summary judgement in part requiring EPA to either promulgate revised emissions standards for the pulp mill and nutritional yeast manufacturing source categories or issue a determination that new standards are not required. Under §112, EPA is required to promulgate an emissions standard requiring the maximum degree of reduction using the "maximum achievable control technology" (MACT) for each source category. EPA must review the standards and control technologies at least every eight years and either revise or issue a determination that revisions are not necessary. EPA promulgated standards for both source categories in 2001 but has not performed the required technology-based reassessment. Sierra Club filed suit seeking to require EPA to perform its rulemaking obligations. EPA did not contest its failure of statutory obligations and the court held that EPA must make a revision or determination of no revision within two years of the initiation of the lawsuit – October 1, 2017.

G. Deepwater Horizon Civil Penalties

In *In re Oil Spill by the Oil Rig "Deepwater Horizon",* 148 F. Supp. 3d 563 (E.D. La. 2015), the district court held a petroleum company liable for $159.5 million in civil penalties under the Clean Water Act. The court had previously held that Anadarko was an "owner" of an "offshore" facility within the meaning of the CWA from which harmful quantities of oil were discharged. *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010,* 844 F. Supp. 2d 746, 762 (E.D. La. 2012), *aff'd in part sub nom. In re Deepwater Horizon,* 753 F.3d 570 (5th Cir. 2014). The court here decided that the eight factors outlined in the statute to consider when assessing penalties weighed in favor of a remedy despite the ownership by a non-operator. In particular, the seriousness of the discharge led the court to assess a penalty of $50 per barrel.

H. RCRA Improper Disposal of "Solid Waste"

In *N. Illinois Gas Co. v. City of Evanston, Illinois,* 14-CV-9227, 2016 WL 521002 (N.D. Ill. Feb. 10, 2016), the district court dismissed the city's RCRA claim against two power and gas companies concerning methane leaking from gas pipelines and waste oil contamination from a retired manufacturing facility. The court held that methane gas does not meet the definition of "solid waste" under RCRA, and therefore its release does not constitute a violation. The court held in dicta that the city could claim a release of waste oil into the pipeline that breaks down into methane gas under RCRA. But the court explained that in the instant case the city did not provide adequate statutory notice relating to endangerment as a result of the waste oil. *See* 42 U.S.C. §6972(b)(2)(A). Here the notice was deemed to be insufficiently specific "to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." The allegations about coal tar present in the pipeline would not have provided notice about widespread release of waste oil. Moreover, assuming coal tar and waste oil were referencing the same substance, the notice did not attribute any of the methane to waste oil release or the presence of coal tar in the pipelines. As a result, the court dismissed the action.

I. Natural Resource Damages Statute of Limitations and Ripeness

In *New York v. Next Millennium Realty, LLC*, 06CV1133SJFAYS, 2016 WL 527058 (E.D.N.Y. Feb. 9, 2016), the district court held that the state may seek response costs and natural resource damages under CERCLA for a site that was listed on the NPL five years after the state commenced the action and sixteen years after the state discovered the contamination. The court first held defendants liable for the state's past response actions under §107(a) in responding to the contamination at and emanating from the site. The court also held defendants liable for natural resources damages. The defendants claimed the action was time barred or premature. With respect to the former, the court held that a plain reading of §113(g)(1) necessitates a holding that a natural resources damages claim for an NPL site is timely so long as it commenced within three years after the completion of the remedial action notwithstanding that such a claim would have been untimely under §113 at the time of listing on the NPL. The suit is not premature because §113(g)(1) provides that a suit may not be filed before selection of the remedial action. EPA here has selected the remedial action for the area so the claim is thus ripe and not limited.

J. Mining Plans Under NEPA

In *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016), the district court found that OSM violated NEPA when it approved a mining plan amendment when it failed to notify the public of FONSI for the proposal and did not take the requisite "hard look" required in preparing the document. The court held that one of NEPA's primary purposes is to keep the public informed of environmental decisions and the failing to notify the public of the FONSI cannot be excused under the harmless error doctrine. Moreover, the court held that the preparation of the FONSI failed to take a "hard look" as is required. The court specifically noted that OSM failed to provide adequate information beyond the EA completed by BLM in 2006. That EA however explicitly avoids analysis of site-specific mining and reclamation planning. Thus, by relying on a document that specifically did not analyze the surface mining permit and associated plan, OSM did not put forth a convincing statement of reasons. The court went on to impose a 240-day deadline for the government to remedy its violations, upon which automatic vacatur is imposed if the process is not complete.

K. ESA § 9 Take Provision

In *Ctr. for Biological Diversity v. Otter*, 1:14-CV-258-BLW, 2016 WL 233193 (D. Idaho Jan. 8, 2016), the district court required the State of Idaho to propose a plan to protect the Canada lynx, a threatened species, from being inadvertently captured or killed by trappers licensed by that state to trap other animals. The state does not limit the number of traps a licensee may set each year, but they must notify if they trap a "non-target" animal. Environmental groups filed suit alleging that four unintended captures which occurred between 2012 and 2014 constitute a taking under §9(a)(1)(B) of the ESA. The suit also claimed the trapping regulations fail to adequately protect the Canada lynx. The Court held that the trappings constituted a "take" despite objections that no causation on behalf of a state actor or trapper existed. Moreover, defendants' arguments that the Tenth Amendment limits the injunctive relief available to the court were rejected on grounds that compelling parties to meet their obligations under ESA is

within the authority granted by Congress. Finally, the court rejected arguments that an incidental take statement issued by FWS pursuant to the Convention on International Trade in Endangered Species of Wilf Fauna and Flora (CITES) agreement did not exempt three of the four takings. The defendants argued that takes by licensed bobcat trappers that occurred during bobcat season should be exempted under the CITES ITS. The lack of a limit on incidental takes specific to Idaho (as opposed to nationwide) as well as the failure to consider a take where the lynx is released unharmed led the court to reject the CITES ITS as applied to the trapping in question.

L. Sage Grouse Resource Management Plans

In *W. Expl. LLC v. U.S. Dep't of the Interior*, 315CV00491MMDVPC, 2015 WL 7195156 (D. Nev. Nov. 16, 2015), the district court refused to grant a preliminary injunction to stop the implementation of amendments to resource management plans intended to protect the greater sage grouse habitat. The Bureau of Land Management and U.S. Forest Service plans covering 67 million acres of federal land were amended in response to a Fish and Wildlife Service's investigation into listing the species as endangered. An alternative to listing is to rely on existing regulatory mechanisms including land management plans. A group of mining companies and counties challenged the resulting plan amendments claiming that restrictions on travel and grazing, the net conservation gain standard and the sagebrush focus area designations will injure them. The court held, however, that plaintiffs failed to allege an irreparable harm necessitating a preliminary injunction.

M. Atomic Energy Act Preemption

In *Virginia Uranium, Inc. v. McAuliffe*, 147 F. Supp. 3d 462 (W.D. Va. 2015), the district court dismissed a suit by a Virginia uranium company that sought to argue that a state law prohibiting uranium mining permits was preempted by the Atomic Energy Act. The company sued the governor and various state environmental officials. The court first held that those officials are too attenuated to the law in question and are therefore immune from suit. The court noted that a generalized duty to enforce state law or a supervisory power will not strip these officials of Eleventh Amendment immunity. Moreover, the court held that the Atomic Energy Act does not preempt the Virginia statute. The AEA does not regulate conventional mining of nonfederal uranium deposits, and therefore does not occupy the field that the state statute regulates. Additionally, the state statute does not frustrate the realization of Congressional intent behind the AEA as it does not impede activities on federal lands.

N. BLM Rights of Way Authorizations for Wind Energy

In *Bundorf v. Jewell*, 142 F. Supp. 3d 1133 (D. Nev. 2015), the district court, upon motions for reconsideration of a prior remand order, vacated and remanded a DOI record of decision (ROD), environmental impact statement (EIS), and biological opinion (BO) concerning a large wind energy project in Nevada. The court had previously found that the defendants had not adequately explained conclusions that appeared in the ROD, EIS and BO, and thus remanded for further explanation. Upon reconsideration, the district court held that vacatur was appropriate instead of a remand for reconsideration because of the numerous analytical gaps present in the administrative record. The plaintiffs argued that remand without vacating the rule "essentially gives the Federal Defendants two bites at the apple" allowing "post-decision explanations" to fill

in the gaps. Specifically, DOI must address the lack of analysis on impacts to desert tortoises, bald eagles, golden eagles and species of bat.

O. Forest Service Special Use Permitting

The district court in *Sierra Club v. United States Forest Serv., 15-CV-10154*, 2015 WL 5729091 (E.D. Mich. Sept. 30, 2015), *aff'd*, 15-2457, 2016 WL 3606742 (6th Cir. June 30, 2016) held that the Forest Service did not violate NEPA and the APA when it reissued a special use permit to an energy company in the Huron-Manistee National Forest. The 30-year special use permit allows the company to continue operating a portion of 1,100 mile crude oil pipeline the extends from Superior, Wisconsin to Sarnia, Ontario. An 8.1 mile section of the pipeline, which was built in 1953, runs through the forest and the plaintiff challenged the issuance of a 30-year permit. Specifically, plaintiff challenged the designation of the permit as falling under a categorical exclusion from NEPA. The categorical exclusion was appropriate because there were no changes to the scope and intensity of the activities regulated by the Forest Service, the decision will have no effect on endangered species, and renewal of the permit constitutes only an administrative action that does not authorize any change to the existing pipeline. Consequently, the group's claim that the Forest Service was required to analyze cumulative impacts or prepare an EIS was without merit.

P. BLM Hydraulic Fracturing Rule

In *Wyoming v. U.S. Department of the Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015), the district court granted a preliminary injunction preventing BLM from enforcing a hydraulic fracturing rule for federal and Native American lands. The court granted the preliminary injunction holding that the plaintiff met the "likely to succeed on merits" threshold. In particular, the court addressed the contention that the BLM lacks statutory authority to issue a rule on hydraulic fracturing. Congress amended the Safe Drinking Water Act in 2005 to specifically clarify that the statute did not regulate energy exploration using that technology. The Court held that the removal of fracturing from EPA's authority under the SDWA expresses the intent to remove the practice from federal regulation entirely unless it involves the use of diesel fuels. *Id* at 1337. Moreover, the court went on to hold that even if BLM had authority to regulate, it lacks the evidentiary support in the administrative record to avoid a finding of arbitrariness. The record reflects the lack of evidence showing hydraulic fracturing is a risk to groundwater. The court further held that industry plaintiffs met the requirements of an irreparable injury and that the preliminary injunction will not inconvenience BLM thus supporting the decision to grant.

VII. TEXAS SUPREME COURT

A. Rights of Oil and Gas Lessees to Use the Land

In *Coyote Lake Ranch, LLC v. City of Lubbock*, 14-0572, 2016 WL 3176683 (Tex. May 27, 2016), the Texas Supreme Court extended the accommodation doctrine, commonly applied to oil and gas, to groundwater. The doctrine allows oil and gas lessees to use surface land as is reasonably necessary to extract the resource but with due regard for the rights of the surface owner. The case involved a ranch 90 miles northeast of Lubbock for which the city had purchased water rights in 1953. Lubbock recently proposed to increase its operations. Plaintiffs

objected claiming that the increased drilling and surface disturbance would cause erosion and limit their surface rights. The accommodation doctrine is predicated on the principle that conflicting titles should act with due regard for each other's rights. Texas courts have applied the doctrine only when mineral interests are involved. The Texas Supreme Court held that given the commonalities between mineral and groundwater estates, as well as in their conflicts with surface estates, the doctrine should apply to groundwater interests as well.

B. Texas Clean Air Act Preemption of Houston Ordinance

The Supreme Court of Texas held in *BCCA Appeal Group, Inc. v. City of Houston, 13-0768*, 2016 WL 1719182 (Tex. Apr. 29, 2016) that a city air-quality ordinance was preempted by the Texas Clean Air Act and the corresponding enforcement mechanisms in the Texas Water Code. The City of Houston first enacted an air quality ordinance in 1993 to be enforced by TCEQ and then amended it in response to perceived "lax enforcement efforts." *Id* at 1. The ordinance conflicts with the statute because it provides for criminal prosecution of violations without requiring a written report to TCEQ, without giving TCEQ an opportunity to review, and without allowing TCEQ to exercise its discretion to determine the appropriate remedy. The court also held that the registration requirement (a facility must register with the city prior to operation) conflicts with the statute by making it unlawful to operate under only a TCEQ permit within the city limits, yet lawful elsewhere in the state. The court struck these portions of the ordinance but upheld the lower court's holding that the ordinance's incorporation of TCEQ rules does not violate the nondelegation doctrine of the Texas Constitution.

C. Common Law Nuisance in Texas

In *Crosstex N. Texas Pipeline, L.P. v. Gardiner*, 15-0049, 2016 WL 3483165 (Tex. June 24, 2016), the Texas Supreme Court held that the landowner plaintiffs presented legally sufficient evidence supporting the jury's finding that Crosstex—the owner/operator of the compressor station neighboring plaintiffs' property—acted negligently in creating the continuous loud noise and vibrations that constituted a nuisance.

The opinion serves as a de facto treatise on negligence law in Texas and synthesizes the Texas Supreme Court's precedents dating back to 1856. First, the court clarified that under Texas law, nuisance is a "condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." Second, the Court explained that nuisance refers not to a particular cause of action or to a defendant's conduct, but instead "to the particular type of legal injury that can support a claim or cause of action seeking legal relief." Third, the court noted nuisance requires a showing that the defendant acted culpably—nuisance injuries may not be premised on accidental interference. A nuisance claim must fall within one of three general categories: intentional nuisance, negligent nuisance, or strict-liability nuisance.

Ultimately, the court affirmed the court of appeal's judgment remanding the case to the trial court for a new trial to be governed by the principles newly announced.

VIII. TEXAS COURTS OF APPEALS

A. Homeowner Toxic Tort Action Involving Hydraulic Fracturing Emissions

In *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612 (Tex. App.—San Antonio 2015, pet. filed), the court upheld a lower court decision granting summary judgment against homeowners who brought a negligence and private nuisance action against hydraulic fracturing operators for alleged toxic emissions that had damaged the homeowners' health and property.

The court held that the homeowners' claims were toxic tort claims, thus requiring at least a scintilla of expert testimony showing causation. Under Texas law, an expert's failure to rule out alternative causes of injury renders the opinion unreliable, and legally constitutes no evidence. The court found that the homeowners failed to satisfy this standard. First, the homeowners' experts presented epidemiological studies showing excess risks of certain symptoms complained of by the homeowners, such as headaches, nausea, eye and throat irritation, in groups exposed to noxious chemical odors. However, the court found this testimony insufficient because the experts failed to show that the homeowners are similar to the subjects in the studies, or were exposed to similar doses as those in the studies. In addition, the homeowners presented no evidence differentiating between the homeowners' preexisting health problems and the new health problems they claim arose after exposure to hydraulic fracturing emissions. Second, the homeowners presented expert testimony that excessive levels of benzene, nitrogen dioxide, and other hazardous chemicals were present at the homeowners' property, and that excessive levels of the same chemicals were found at three of defendant's nearby facilities. However, this evidence was also insufficient to establish causation because it showed only that the homeowners had some exposure to chemicals found at defendants' facilities, but it did not negate other possible sources of the chemicals.

Finally, even considering the stricken lay witness affidavits about the foul odors, dust, noise, and traffic, the evidence did not link defendants' operations as the proximate cause of the conditions complained of by the homeowners. The court held that the affidavits were too conclusory and speculative because they simply stated a conclusion without explanation. Accordingly, the court affirmed the granting of no-evidence summary judgment in favor of the hydraulic fracturing companies.

B. Exhaustion of Administrative Remedies in Challenging Wastewater Discharge Permit

In *Sierra Club & Pub. Citizen v. Texas Comm'n on Envtl. Quality*, 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.), the court held that the environmental organizations failed to exhaust administrative remedies before filing their challenge to a wastewater discharge permit issued to the Southwestern Electric Power Company by the Texas Commission on Environmental Quality (TCEQ).

TCEQ has exclusive jurisdiction over wastewater discharge permits; accordingly, under the exclusive jurisdiction doctrine, TCEQ had sole authority to make an initial determination in the wastewater discharge permit dispute. Furthermore, the Texas legislature has provided an exclusive remedy by which parties can challenge TCEQ's permitting decisions—the contested

case hearing. However, in order to invoke the remedy, a party must be an "affected person," with a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing, and not merely an interest common to the general public. Here, Sierra Club was required to demonstrate that they were affected persons and fully participate in a contested case hearing before seeking judicial review. Accordingly, the court affirmed the district court's order dismissing for lack of subject matter jurisdiction.

C. Anti-SLAPP Motion Under Texas Citizens' Participation Act

In *Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC*, 485 S.W.3d 184 (Tex. App.—Corpus Christi 2016, no pet.), a waste processor sued an environmental non-profit alleging tortious interference and business disparagement claims. The court affirmed denial of the anti-SLAPP motion as to the tortious interference claim and reversed dismissal of the anti-SLAPP motion as to the business disparagement claim.

First, the court found that the processor had established a prima facie case for tortious inference and affirmed the lower court's denial of the anti-SLAPP dismissal motion. Here, the non-profit had canvassed city residents to write letters to officials to protest the contract and leaders of the non-profit had voiced negative comments at public meetings about how no one wanted the processor in the city.

Second, the court found that the processor did not prove the malice element of a business disparagement claim and reversed the lower court's denial of the anti-SLAPP dismissal motion. The processor alleged that the environmental group made the following disparaging statements: (1) the processor had an unsatisfactory compliance record with the TCEQ for its other facilities; (2) the processor does not comply with the laws of Texas; (3) the processor would accept toxic liquid waste or toxic industrial waste; and (4) residents had to boil their water to avoid getting sick after a wastewater plant discharge. However, the court held that even if the environmental group had published these statements against the economic interests of the processor, such statements alone would not be enough to prove that the environmental group made those statements with malice.

D. Individual Not Liable for Corporate Environmental Violations

In *Morello v. State*, 03-15-00428-CV, 2016 WL 2742380, (Tex. App.—Austin May 6, 2016, no. pet. h.), the court ruled that Morello was not liable as a matter of law for the actions of his limited liability corporation and therefore was not responsible for the associated environmental violations. The violations stemmed from a prior owner who had committed to undertaking various groundwater corrective actions in exchange for permits. The State sued because those corrective actions had not occurred in accordance with the compliance plan. The State argued that such "wrongful acts" were covered by common law doctrine. Under Texas common law an individual can be held liable for tortious or fraudulent acts in their role as a corporate agent. In the instant case, however, the state failed to meet that threshold as the violations at issue were not fraudulent or tortious. The decision reverses a trial court's grant of summary judgement holding that Morello was required to pay $367,250 in civil penalties for violations of TCEQ rules including the failure to provide financing for the company's operations. The court remanded the case for further proceedings.

IX. CASES TO WATCH

In *Tex. Comm'n on Envtl. Quality v. ExxonMobil Corp.*, No. 03-14-00667-CV, 2016 WL 1406859 (Tex. App. Apr. 8, 2016 (opinion not official and subject to change until officially released), the Texas Court of Appeals held that, as a matter of first impression, the Texas Commission on Environmental Quality (TCEQ) is not precluded from simultaneously issuing orders under both (1) a provision of the Texas Solid Waste Disposal Act (TSWDA) authorizing TCEQ to issue orders selecting remedial actions at listed facilities and (2) under a provision of the TSWDA allowing TCEQ to issue orders if it appears that there is an actual or threatened release of solid waste that presents an imminent and substantial endangerment to public health and safety or the environment. The court also held that an appeal of an order issued under the former TSWDA provision (i.e. the provision authorizing TCEQ to issue orders selecting remedial actions at listed facilities) is reviewed under a "preponderance of the evidence test," rather than a "substantial-evidence standard." After finding that the TSWDA gave the trial court subject matter jurisdiction over the order at issue, the court affirmed the trial court's order denying TCEQ's motion to dismiss for lack of jurisdiction.

BEVERIDGE & DIAMOND PC

Case Law Update

"In theory, there's no difference between theory and practice, but in practice, there is."

Michael F. Vitris

August 4, 2016

U.S. Army Corps of Engineers v. Hawkes Co., Inc.,

136 S. Ct. 1807 (2016)

- Jurisdictional determinations by Army Corps of Engineers under CWA are final agency actions under the APA
- Unanimous decision with three concurrences

BEVERIDGE & DIAMOND PC

Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.,

2016 WL 3063302 (5th Cir. May 27, 2016)

- CAA Citizen Suit
- Vacated district court decision that had refused to impose penalties
- Remanded for assessment of penalties for violations considered "actionable" by Fifth Circuit

BEVERIDGE & DIAMOND PC

United States v. Gunselman,

2016 WL 1397615 (5th Cir. Apr. 8, 2016)

- Upheld individual's conviction and sentence for sale of false fuel credits
- 51 counts wire fraud; 24 counts money laundering; 4 counts false statement under the CAA
- 15 years prison; $55M restitution

BEVERIDGE & DIAMOND PC

United States v. CITGO Petroleum Corp.,
801 F.3d 477 (5th Cir. 2015)

- Reversed company's conviction for violating CAA and Migratory Bird Treaty Act
- Erroneous jury instructions re: definitions of oil-water separators under CAA
- Bird deaths at issue were unintentional

BEVERIDGE & DIAMOND PC

Coyote Lake Ranch, LLC v. City of Lubbock,
2016 WL 3176683 (Tex. May 27, 2016)

- Case of first impression
- Accommodation doctrine extended to groundwater

BEVERIDGE & DIAMOND PC

BCCA Appeal Group, Inc. v. City of Houston,

2016 WL 1719182 (Tex. Apr. 29, 2016)

- TX CAA and its enforcement (TX Water Code) preempt Houston air-quality ordinance
- Intent of legislature for TCEQ to determine remedy in each case
- Requirement for facility to register would moot TCEQ permit requirement

BEVERIDGE & DIAMOND

Crosstex N. Texas Pipeline, L.P. v. Gardiner,

2016 WL 3483165 (Tex. June 24, 2016)

- Landowners adjacent to compression station alleged nuisance, negligence, and gross negligence due to noise
- Court clarified nuisance law
- Remanded for new trial

BEVERIDGE & DIAMOND

Cerny v. Marathon Oil Corp.,

480 S.W.3d 612 (Tex. App.—San Antonio 2015, pet. filed)

- Private action re: toxic emissions from hydraulic fracturing
- Affirmed district court judgment dismissing claims alleging harm to health and property

BEVERIDGE & DIAMOND

Sierra Club & Pub. Citizen v. TCEQ,

2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.)

- Group failed to exhaust administrative remedies before filing their challenge to a wastewater discharge permit
- Required to demonstrate that they were affected persons and fully participate in a contested case hearing before seeking judicial review

BEVERIDGE & DIAMOND

Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC,

485 S.W.3d 184 (Tex. App.—Corpus Christi 2016, no pet.)

- Waste processor sued an environmental non-profit alleging tortious interference and business disparagement claims
- Processor established prima facie case on tortious interference claim
- Processor did not prove malice element of business disparagement claim

BEVERIDGE & DIAMOND

Morello v. State,

2016 WL 2742380 (Tex. App.—Austin May 6, 2016, no. pet. h.)

- Ruled that individual not liable as a matter of law for LLC's environmental violations
- Individual's acts were not fraudulent or tortious
- Reversed ~$375K summary judgment for violations of TCEQ rules

BEVERIDGE & DIAMOND

Defenders of Wildlife v. Jewell,

815 F.3d 1 (D.C. Cir. 2016)

- Upheld USFWS decision to withdraw proposal to list the sagebrush lizard in Texas and New Mexico

BEVERIDGE & DIAMOND PC

Sierra Club v. U.S. Army Corps of Engineers,

803 F.3d 31 (D.C. Cir. 2015)

- Dismissed NEPA/CWA challenges to 500+ mile pipeline from IL to OK
- Environmental group alleged NEPA analysis was invalid and pipeline made ~2,000 illegal water crossings

BEVERIDGE & DIAMOND PC

Merrick v. Diageo Americas Supply, Inc,
805 F.3d 685 (6th Cir. 2015)

- Ethanol emissions from whiskey distillery
- CAA does not preempt state law negligence, nuisance, and trespass claims

BEVERIDGE & DIAMOND PC

In re U.S. Dep't of Def., EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.,
817 F.3d 261 (6th Cir. 2016)

- Court has jurisdiction to directly review WOTUS rule
- Court denied all motions to dismiss and left stay in place

BEVERIDGE & DIAMOND PC

Permian Basin Petroleum Ass'n v. Dep't of the Interior,

127 F. Supp. 3d 700 (W.D. Tex. 2015)

- Vacated US FWS rule listing lesser prairie chicken as threatened under ESA

BEVERIDGE & DIAMOND PC

United States v. Lipar,

2015 WL 7681272 (S.D. Tex. Aug. 30, 2015)

- Dismissed enforcement action against developer for filling wetlands
- Government ordered to pay defendant's attorney's fees due to "oppressive and dishonest" conduct

BEVERIDGE & DIAMOND PC

Ouachita Riverkeeper, Inc. v. EPA,

2016 WL 215472 (N.D. Tex. Jan. 19, 2016)

- Environmental group lacked standing to challenge EPA's decision to not object to a draft NPDES permit issued under the state permitting program
- Alleged injuries stemmed not from EPA inaction but from the state-level agency's decision to grant the permit

BEVERIDGE & DIAMOND

Boler v. Early,

2016 WL 1573272 (E.D. Mich. Apr. 19, 2016)

- Court lacks subject matter jurisdiction over class action related to Flint, MI crisis
- Constitutional claim to "safe drinking water" precluded by Safe Drinking Water Act

BEVERIDGE & DIAMOND

N. Illinois Gas Co. v. City of Evanston, Illinois,

2016 WL 521002 (N.D. Ill. Feb. 10, 2016)

- Court dismissed RCRA claim concerning methane leaking from gas pipelines and waste oil contamination from a retired manufacturing facility
- Court held that methane gas does not meet the definition of "solid waste" under RCRA, and therefore its release does not constitute a violation

BEVERIDGE & DIAMOND PC

Juliana v. United States,

2016 WL 1442435 (D. Or. Apr. 8, 2016)

- Denied motion to dismiss regarding failure to protect people from climate change
- "A novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit"

BEVERIDGE & DIAMOND PC

Thank You!

For more information, contact:

Michael Vitris
Beveridge & Diamond, P.C.
Austin, Texas
(512) 391-8035 | mvitris@bdlaw.com

BEVERIDGE & DIAMOND PC

David O. Frederick – Frederick, Perales, Allmon & Rockwell, P.C.
Austin, Texas (512) 469-6000

Mr. Frederick is a "partner" in the Austin firm of Frederick, Perales, Allmon & Rockwell, P.C.. He holds BSEE and JD degrees. He started his legal career as counsel for the Judiciary Committee of the Texas House of Representatives and, thereafter, was an assistant district attorney. For several years, he conducted energy research at the University of Texas. Since the mid-1980s, he has been in private practice. He and his firm represent the plaintiff/opposition side of environmental disputes before regulatory bodies, in court and at the legislature. He is admitted to practice before the usual assortment of state and federal bars.

His view is that an honest margarita is composed of 3 parts tequila, 2 parts fresh lime juice, and two parts triple sec. Good tequila makes a difference. He uses Hornitos.

- April 2016

SB 709: Continuing the Accretion of Power to the Administrative State

David Frederick
Frederick, Perales, Allmon & Rockwell, PC
August 4, 2016

SB 709 continues a string of small, but real, successes by regulated industries to transfer power from members of the public to the administrative state. Hearing rights have been withdrawn in permitting disputes dealing with what have been characterized as the emission of *de minimis* quantities of air contaminants (2001),[1] concrete batch plants with "enhanced" controls (2003),[2] injection of non-hazardous brine water from a drinking water treatment plant (2007),[3] and certain amendments of production area authorizations for in-situ uranium mines (2013).[4] The 2001 TCEQ "sunset bill" truncated party discovery rights for most TCEQ proceedings; so, the hearing right remained, but it was made less effective.[5] SB 709 restricts the right and makes the right less effective.

Some historical context: Separation of Powers. Centralized governmental power was suspect at the time of the founding of our State. Texas's approach to the separation of powers within government has always been strict, more so than at the federal level.

When the US Constitution was drafted, the deficiencies of decentralized power under the Articles of Confederation were on the minds of the delegates to the constitutional convention. A majority of the convention delegates rejected an express declaration, such as Thomas Jefferson had proposed for the Constitution of the State of Virginia, that the three branches of government may not be intermixed.[6]

In contrast, delegates to Texas's 1836 constitutional convention chose to adopt separation-of-powers language patterned after that earlier advocated by Thomas Jefferson.[7] These delegates faced circumstances that imbued the Texas Constitution with a certain distrust of governmental power. As they drafted the Texas Constitution, they faced an advancing Mexican army and were uncertain of when they might need to disband for their own safety. They were simultaneously receiving pleas from assistance from other "Texans," such as William Travis, who was battling Mexican troops at the Alamo.[8] Tyranny was very much at their doors.

During this "Gilded Age" (roughly, 1870 to 1900), corruption characterized

---

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

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

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

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

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

6 The Federalist No. 48 (James Madison, M'Lean edition).

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

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

government at all levels.[9] At that time, memories of the Civil War were still fresh, and the citizenry had "suffered under a corrupt and autocratic regime that featured a carpetbag legislature, a despised governor, and his appointed judges."[10] Big business was not, in those days, viewed as a friend of the people: a commentator at the time noted that, in cooperation with the railroads, Standard Oil had done everything with the Pennsylvania Legislature but refine it.[11]

As a result, the Texas Constitution (1836 and 1876) set out a strict separation of powers requirement. The Framers of the Texas Constitution would be appalled at the aggregation of pooled power – legislative, judicial, and executive – that today is held by administrative agencies. This is, surely, not what they had in mind.

The Framers of the Texas Constitution would have been familiar with nuisance disputes that were then handled by the courts.[12] As the Fifth Circuit Court of Appeals has noted, "[n]uisance principles form the core doctrinal foundation for modern environmental statutes."[13] The Texas Supreme Court has noted, "[m]any disputes that were once litigated in the courts are now, for all practical purposes, litigated in the agencies."[14]

The environmental permitting process has evolved, roughly, as one by which to prospectively consider the adverse impacts of an activity in a manner that reduces the need for nuisance suits.[15] This is not to say that the permitting process has simply replaced nuisance suits or has rendered nuisance suits unnecessary.[16] But, it is to say that incorporating contested case processes, which are rather like judicial processes, to permitting decisions where facts are in dispute is entirely consistent with Texas's historical practices and with the deep skepticism of governmental power that has underlain Texas government since its outset.

Some historical context: the State Administrative Procedure Act. The State's Administrative Procedure Act was adopted in 1975.[17] That was 30 years after the federal act, and it was not an easy slog, in Texas. In Texas, disagreement as to the proper type of judicial review for agency decisions was the primary obstacle to passage of an administrative procedure act. This disagreement, in turn, arose from disagreements as to how much power, particularly, judicial power, should be entrusted to administrative agencies.

---

9 Harold H. Bruff, "Separation of Powers under the Texas Constitution," 68 Tex. L. Rev. 1337, 1338 (1990)

10 *Id.* at 1339.

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

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

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

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

15 *Id.*

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

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

APA debate in the 1950s. Even though the development of an Administrative Procedure Act for Texas moved at a glacial pace, the need for one had been recognized by thoughtful analysts in Texas by the mid-1940s. The 1930s and 1940s bred many nominally temporary social welfare and wartime agencies at the federal level. Many of those agencies proved to not be temporary. In the colorful analogy of attorney C.C. Small, writing in the Texas Bar Journal in 1947, "Great difficulty is experienced in ridding ourselves of the vast number of temporary bureaus that sprang up during the war. Once a barnacle gets rooted into the Ship of State, it takes a real political storm to displace it."[18] Mr. Small, in the vein that would have been that of Texas's Founding Fathers, went on to reflect the sentiment of many in the Texas legal community at the time that, "[a]dministrative agencies lean too far toward the idea that 'the individual is nothing, the State is everything.'"[19]

During the 1950s, Southern Methodist University Professor Whitney Harris ardently advocated for a state administrative procedure act. As Professor Harris couched it, "Left to its own devices, [the administrative process] threatens to convert traditional democratic processes into a new form of government by the few— an absolutism of bureaucracy..."[20] Another lawyer writing in the Texas Bar Journal in the early 1950s stated his belief that, "[t]he greatest danger in the extension of executive and administrative powers lies in the fact that it destroys the constitutional separation of the powers of government, which is the very basis of a republican form of government. The separation of the powers of government is the means by which the people in a democracy retain control of their government."[21] This level of apprehension about the risks to individual liberty that attend agency decisionmaking, combined with constitutional limitations on the power of the judiciary to rectify agency missteps, made forging an administrative procedure act particularly difficult.

Professor Harris criticized the then-existing system of administrative law and procedure for its failure to make regulations easily accessible to the public[22] and for the "substantial evidence *de novo*" review standard by which the judiciary sought to correct errors made by administrative agencies.[23] As he saw it, "[p]erhaps the most serious defect in the system is the absence of uniform rules of procedure" in agency proceedings.[24] He published a proposed administrative procedure act for Texas in 1951,[25] and it formed the basis of the State Bar's initial attempt at legislation.[26]

---

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

19 *Id.* at 381.

20 Note 25: Whitney R. Harris, "An Administrative Procedure Act for Texas," 5 Sw. L.J. 125, 127 (1951).

21 Bennett B. Patterson, "Procedure Act Opposed," 16 TEX. B.J. 377, 466 (1953).

22 Whitney R. Harris, "The Administrative Law of Texas," 29 TEX. L. REV. 213, 216 (1950).

23 *Id.* at 229–30.

24 *Id.* at 229.

25 Whitney R. Harris, "An Administrative Procedure Act for Texas," 5 Sw. L.J. 125, 125 (1951).

26 Whitney R. Harris, "Administrative Procedure Act," 15 TEX. B.J. 7 (1952).

The State Bar proposal provided for publication of agency rules and called for substantial evidence judicial review of agency decisions, except in cases where some form of *de novo* review was required by legal principles or statute.[27] This, then, was a proposal, at least insofar as was concerned judicial review of agency decisions, that followed the federal model and presaged the method we use today, It was massaged over the year and was ultimately approved by the Bar membership for presentation to the Legislature. But, it was not, however, all that well-received and attracted strong criticism from some members of the Bar.[28] The proposal's acceptance of substantial evidence judicial review, in at least some circumstances, was the largest point of controversy.

One critic declared, in a June 1953 Texas Bar Journal article, that:

> We therefore propose that instead of the proposed Administrative Procedure Act, a statute should be enacted which would provide that in all controversies before the administrative agencies in the state of Texas, in which private rights and property are involved and determined, an appeal *de novo* shall be permitted to the District Court ... [and] the judgment of the court shall be based upon the preponderance of the evidence introduced before the District Court without reference to the evidence introduced before the administrative agency ....[29]

This writer also criticized the proposed act as "an effort to dignify an arbitrary and bureaucratic administrative process with some semblance of legal procedure" and, thereby, to add power to the administrative estate at the expense of the judiciary.[30]

The proposal was sufficiently controversial that it was not submitted to the Legislature.

In 1956, the Texas Judicial Council initiated a study of state administrative procedure acts that became, in 1957, a report to the Governor.[31] That study reported that "members of the Bar Committee did not appear to be in favor of the broad Texas Administrative Procedures Act which had been proposed by that group earlier."[32]

APA debate in the very late 1950s and early 1960s. In 1959, a bill made it through the Legislature that, but for the Governor's veto, would have made *de novo* review of administrative decisions the rule for appeals from all such decisions.[33] During that session, there had also been a

---

27 Harris, *supra* note 26, at 34.

28 *See, e.g.*, Bennett B. Patterson, "Procedure Act Opposed," 16 TEX. B.J. 377 (1953).

29 *Id.* at 467.

30 *Id.* at 465.

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

32 *Id.*

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

proposed constitutional amendment that, had it not failed in the Legislature, would have removed the separation-of-powers bar to true *de novo* review that the courts had repeatedly found existed.[34] The courts had repeatedly struck down laws directing that "appeals" of administrative agency orders test in court the reasonableness of the orders by true trial *de novo*.[35]

In the 1961 legislative session, Representative L. DeWitt sponsored House Joint Resolution 32, which was ultimately approved by the Legislature and submitted to the voters in 1962 as a constitutional amendment.[36] This resolution provided in the clearest possible terms that the Legislature could enact laws prescribing whatever manner of judicial review of agency decisions the Legislature deemed appropriate, "and the courts of Texas shall have no power or authority to refuse, deny, or change the manner of such appeals, if brought in the manner provided by general law, even though such appeals shall be provided *de novo* as that term is used in appeals from Justice of the Peace Courts to County Courts."[37]

In 1962, the State Bar submitted the language of H.J.R. 32 to its membership for a referendum vote.[38] The referendum passed the Bar's membership.[39] Nonetheless, despite legislative and State Bar support, the constitutional amendment failed adoption in the November 1962 general election.[40]

An administrative procedure act bill[41] was introduced in the Texas House in 1963. It provided for substantial evidence review of agency decisions. The bill died in the House Judiciary Committee.

APA debate in the 1971 and 1973 Sessions. For the 1971 session, the State Bar again sponsored an administrative procedure act bill, H.B. 761, which was carried by Representative Tim Von Dohlen.[42] This bill was based on the 1961 Model State Administrative Procedure Act. H.B. 761 provided for nonjury judicial review on the agency record and did not specify a manner of review, but it explicitly did not change *de novo* review for the Railroad Commission's orders.[43] H.B. 761

---

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

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

36 Tex. H.J. Res. 32, 57th Leg., R.S. (1961).

37 *Id.*

38 "Bar to Vote in Oct.: De Novo Amendment," 25 TEX. B.J. 745 (1962).

39 "Referendum: Bar members approve de novo issue, other two questions," 25 TEX. B.J. 960 (1962).

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

41 H.B. 967, 58th Leg., R.S. (1963).

42 Tex. H.B. 761, 62nd Leg., R.S. (1971).

43 Tex. H.B. 761, 62nd Leg., R.S. (1971). The Railroad Commission jealously guarded the process for judicial review of its decisions, and the Railroad Commission's opposition to the 1959 proposed administrative procedure act (Tex. H.B. 440) that passed the legislature was the first reason cited by the Governor in his veto

was referred to the House Judiciary Committee, where it died.

In 1973, H.B. 248, authored by Representatives Von Dohlen and Finney, carried forward a slightly modified version of H.B. 761 from the previous session.[44] The text regarding judicial review of agency decisions remained as it had been in H.B. 761 from the previous session. The bill was referred to the House Judiciary Committee, where it died. H.B. 248 had an identical companion Senate bill, S.B. 81, which made it through the Senate.[45] That Senate bill was referred to the House Judiciary Committee, where it died.

The 1974 Constitutional Convention. It is tempting to say that it was the Texas Constitutional Convention of 1974 that finally cleared a path for those seeking to codify the substantial evidence review limited to the agency record. During 1974, Texas held a constitutional convention, to which the senators and representatives were the delegates.[46] Though the convention failed to agree on a document to submit to the voters for approval, the process of scrutinizing Texas's governance served as a legitimate educational experience for the delegates and their staffs. A parade of legal authorities testified before the Judiciary Committee of the convention, some explaining how they believed a true *de novo* review violated the separation of powers under the Texas Constitution. It is difficult to say that this testimony altered the deeply-held beliefs of some delegates that *de novo* judicial review of agency decisions was preferable, but passage of the Texas Administrative Procedure Act in the next legislative session with little opposition at least suggests that such testimony likely and finally convinced the Legislature, as a whole, that true *de novo* review was not constitutional, under the constitution as it stood at the time.[47]

The 1975 Legislative Session and passage of the APA. The Texas Administrative Procedure Act passed in the 1975 session.[48] The Texas APA statutorily codified the substantial evidence standard of review based on the record created before the agency.[49]

Unlike bills filed in previous sessions, the Texas APA quickly passed out of committee during the 1975 session. Senator Max Sherman sponsored the bill, S.B. 41, which became the state's APA.[50] It was considered at the first working meeting of the Senate Intergovernmental Relations Committee that session and was passed out of the committee without amendment that

---

proclamation on that bill. Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959).

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

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

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

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

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

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

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

same day.[51] Senator Sherman had the chair of the State Bar's Administrative Law Section, Dudley McCalla, in attendance to respond to questions from committee members.[52]

To allay concerns at the absence of a *de novo* standard of review, Mr. McCalla assured the committee members that the bill before them would result in more robust agency proceedings. In response to inquiry from Senator Ogg regarding how one could justify judicial review on the agency record, when some agencies, such as the Banking Board, severely limited the parties in the presentation of their cases, Mr. McCalla laid out a broad administrative due process right arising from the bill. He said, "I am in total agreement with you [regarding the fairness the present process]. And, the practitioners before that agency and all others who are familiar with that don't feel that it is [fair] either, and that is why this bill has evolved as it has."[53] On being pressed about how the proposed bill would change the process at the Banking Board, McCalla replied that the process would be altered to ensure the development of a more complete record.[54] In response to Senator Ogg's question as to whether the Banking Board, under the bill, would still be able to arbitrarily limit a party's opportunity to cross examine, Mr. McCalla said, "Not under this bill."[55] Senator Ogg asked, "They cannot?" Mr. McCalla replied, "No sir! Full opportunity for cross-examination in order to determine the truth of the matter is provided . . . This act is designed to cure that sort of situation [where cross-examination would be unavailable]."[56]

Further restrictions on citizen power and participation in TCEQ decisions are unwarranted.

Initially, one has to ask why the TCEQ process would be singled out for lessened citizen power and participation. A wide range of administrative agencies in Texas use the contested case hearing process for a variety of proceedings. These include the Public Utility Commission (PUC), the RRC, the Office of the Comptroller, the Workforce Commission, the Department of Insurance, groundwater districts, and many others.[57] Bills have not been anything like

---

[51] *Tex. S.B. 41 Actions, 64th Leg., R.S.*, LEGISLATIVE REFERENCE LIBRARY OF TEXAS, http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=64-0&billtypeDetail=SB&billNumberDetail=41&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited May 25, 2014).

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

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

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] TEX. LABOR CODE ANN. §§ 410.151–.169 (West 2014) (regarding contested case hearings on workers' compensation disputes before the Texas Workforce Comm'n); TEX. WATER CODE ANN. §§ 36.401–.419 (West 2014) (providing for contested case hearings with regard to certain permits issued by groundwater conservation districts); TEX.UTIL. CODE ANN. § 102.006 (West 2014) (providing for contested case hearings with regard to regulation of rates and services of a gas utility); TEX. UTIL. CODE ANN. § 36.105 (West 2014) (providing for hearings on electric rate changes); TEX. UTIL. CODE ANN. § 53.105 (West 2014) (providing for hearings on rate changes by telecommunications utilities); TEX. INS. CODE ANN. § 2703.202 (West 2014) (requiring that the Commissioner of the Texas Department of

so regularly introduced in recent legislative sessions to restrain public power and participation at these agencies. It hardly seems defensible to single out and restrict citizens or local governments seeking to protect quality-of-life issues in administrative proceedings, while letting citizens and businesses that seek to protect financial interests in administrative proceedings continue to enjoy trial-like benefits. (And, of course, there is actually some environmental protection that goes on *via* Railroad Commission contested hearings.)

Secondly, one should view with deep suspicion claims that the TCEQ contested case hearing process burdens in any noticeable way the "Texas Miracle," as the economic successes of Texas are currently characterized in some circles. It is not as if Louisiana or Oklahoma is booming, while Texas wilts.

There just are not very many permit applications that are affected by the alleged inconveniences of the TCEQ contested case hearing process. In the law review article cited at note **Error! Bookmark not defined.**, *supra*, data are presented showing that, in FY 2007 and 2008 (the last years for which data have been analyzed), only 0.5% of administratively complete applications for new or amended water quality permits actually went through the TCEQ contested case hearing process to a decision by the Commission.[58] In the same time period, only 7 of the 88 (8%) administratively complete applications for new or amended Prevention of Significant Deterioration air quality permits received by TCEQ were even referred to the State Office of Administrative Hearings.[59] Of the administratively complete applications for new or amended solid waste permits in these fiscal years, two (9%) were referred to the State Office of Administrative Hearings, and one (4.5%) actually completed the contested case hearing process and received a decision from the Commission.[60]

If one flat-out eliminates the TCEQ contested case hearing process, one not only goes against a strong Texas tradition of questioning centralized government power, one also loses demonstrated benefits. The

---

Insurance order a contested case regarding a premium increase if requested by certain qualifying entities); TEX. INS. CODE ANN. § 2254.004 (West 2014) (requiring a contested case hearing on the request of an insurer to determine whether the rate order is excessive or unfairly discriminatory); TEX. NAT. RES. CODE ANN. § 85.205 (West 2014) (providing that no rule or order pertaining to the conservation or the prevention of waste of oil and gas may be adopted by the Railroad Commission except after notice and hearing); TEX. NAT. RES. CODE ANN. § 92.004 (West 2014) (providing that the Railroad Commission shall hold a hearing on an application to create a qualified subdivision); TEX. TAX CODE ANN. § 154.1145 (West 2014) ("Unless otherwise provided by this [Tax Code Chapter 154 regarding cigarette taxes], the comptroller shall conduct all hearings required by this chapter in accordance with Chapter 2001, Government Code.").

[58] See, note 1, "A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions," at text associated with footnote 203, *et seq.*

[59] See, note 1, "A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions," at text associated with footnote 212, *et seq.*

[60] See, note 1, "A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions," at text associated with footnote 237, *et seq.*

contested case hearing process has a track record of correcting factual errors and legal deficiencies remaining after the public comment process. An example of this is laid out in some length in the law review article referenced, here, at note **Error! Bookmark not defined.**.[61] In the example, the SOAH the ALJ issued a PFD recommending denial of the permit due to the proposed location of treatment plant units within wetlands, wetlands that neither the permit applicant nor the TCEQ staff been able to recognize.[62] Ultimately, the Commission adopted the ALJ's recommendation that the permit be denied on the wetlands grounds. A full development of this type of information and analysis does not generally occur in the span of the comment process, where, certainly, TCEQ Executive Director's evaluation of information may be limited. In many cases, an applicant has had years to develop its analysis of an application, and the public can hardly be expected to provide an equally thorough analysis in thirty days.

Importantly, additional permit conditions resulting from the hearing process typically reflect terms determined necessary for a permit to meet the minimum requirements of TCEQ's rules.[63] Before the Legislature, representatives of the regulated community often attack these agreements as reflecting a flaw in the process; they characterize the agreements as the results of extortion. But, more often than not, protestants are willing to reach an agreed-upon resolution of the disputed issues that reflects a solution-oriented approach to the process that should be encouraged, not denigrated.

What are the issues with SB 709?

Against this background, industry advocates last session succeeded in passing a bill, SB 709, to further limit citizen access to the APA contested case hearing process and to somewhat diminish the value of the process for those who are able to invoke it. The bill was very imprecisely drafted, so there is plenty of uncertainty about it, e.g., the bill's repeated reference to the rights that are tied to comments on a permit application, as opposed to the standard for federally delegated or authorized programs that tie rights to comments made on a draft permit. That said, the following is a survey of what appear to be some of the more noteworthy aspects of the bill as it was ultimately adopted.

A copy of SB 709 is Attachment A to this paper.

Degree of detail required, if the commenter is to adequately describe an issue for hearing. SB 709 added a provision to § 2003.047, Tex. Gov't Code, that requires issues referred by TCEQ to SOAH for hearing be "detailed and complete." In its rulemaking, TCEQ rejected the

---

[61] See, note 1, "A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions," at text associated with footnote 295, *et seq*.

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

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

suggestion of the Texas Oil and Gas Association ("TXOGA") that TCEQ require commenters to identify specific objectionable draft permit terms in their comments. It did this in the context of responding to comments on 30 TAC §§ 50.115 and 55.201; the first addresses issues referred by TCEQ to SOAH and the second addresses the commenters' requests to TCEQ for hearings. TCEQ acknowledged its duty to submit to SOAH a list of issues that is "detailed and complete," but TCEQ's explanations for rejecting TXOGA's suggestion pretty clearly indicate that the issues raised by a commenter to TCEQ need not meet this standard.

As a practical matter, the duty imposed on the TCEQ is unenforceable; the judiciary will defer to the agency's determination of what the imprecise phrase in legislation it implements was intended to mean.

The degree of detail about an issue that must be included in a citizen comment in order to preserve that issue for hearing remains undefined in State law. Federal case law interpreting EPA comment requirements has emphasized that the purpose of the comment process is not to foreclose public participation but, rather, is to provide notice to the EPA so that it can address issues in the early stages of the administrative process. *Adams v. U.S. E.P.A.*, 38 F.3d 43, 52 (1st Cir. 1994)(citing to 44 Fed. Reg. 32,885 (1979) and *In the Matter of Broward County, Florida*, NPDES Appeal No. 92–11, 11 (1993)).

Trial scheduling issues. SB 709 added another provision to § 2003.047 that limits the duration of the contested hearing to 180 days, from the date of the preliminary hearing to the issuance of the proposal for decision. The parties may extend that period by agreement. The ALJ may extend the period, if failure to do so would "unduly" deprive a party of due process or other constitutional right.

The bill debate gives no indication of how much deprivation of a right is an "undue" deprivation. The bill also raises the question of exactly what are one's *constitutional* rights in an administrative proceeding at TCEQ. Not much attention has been paid by Texas courts to the process parties to administrative cases are due and that arises from the constitution, on the one hand, as opposed to arising from a statutory source, on the other hand. There is a quagmire of law to be navigated regarding constitutionally-protected rights in administrative proceedings that are not, themselves, clearly concerned with a party's property interest, such as an interest in a job or in a business investment.

The 180-day limit could well lead to more TCEQ cases being tried without the use of prefiled testimony. Historically, the State Office of Administrative Hearings has insisted on having 60 days in which to write a PFD, after the close of the hearing on the merits. A "small-ish" hearing could easily last 3 days, and a week's hearing is not uncommon. The TCEQ staff has historically insisted on and been granted by the ALJ two weeks or more after the protestants prefile their direct testimony in which to prepare the staff's testimony, and the TCEQ staff filing will surely precede the hearing by a couple of weeks. Even in the most compressed of pre-trial schedules, ALJs accord the protestants two or three weeks in which to prepare direct testimony, after the permit applicant has filed its direct testimony. So, of the 180 days, somewhere in the neighborhood of 120 days, at a minimum, will be used for some activity other than discovery. That leaves 60 days

for a member of the public to learn if he or she is to be allowed to participate as a party, at all, and to come to just generally understand the permit application and hire experts and formulate and receive responses to a single round of written discovery and take whatever depositions are going to be taken.

Practitioners to whom I have spoken expect that, in cases in which the parties do not all agree to a substantial extension of time, prefiled testimony will be dispensed with. That would allow all parties to continue discovery until, maybe, 30 days out from the hearing. It will also lead to more expense, more serious R. 194 practice at the agency (a good thing) and the risk of more factual holes in the hearing record.

The legal inference that the permit applicant's burden of proof has been met. Yet another amendment that SB 709 makes to § 2003.047 is the shifting of the burden of coming forward with evidence from the permit applicant to the protestants. If certain routine filings and "other sufficient supporting documentation in the administrative record of the permit application" are made, the law now infers that the permit applicant's burden of proof has been met, unless the protestants "demonstrate" by "evidence" that, as to one of the referred issues, the draft permit violates a "specifically applicable" requirement. If a protestant were to do such a thing, SB 709 provides that both the permit applicant and the agency staff may jump in to present additional "evidence."

As an initial matter, note that "other sufficient supporting documentation in the administrative record of the permit application" is a new and otherwise undefined phrase in the law. We have, in the APA, a definition of the administrative record of a contested case. For the "application," not so much. This might encompass letters, emails, news clippings and all manner of unsworn, and certainly not-cross-examined, stuff.

The protestant, however, in order to nullify the legal presumption that the permit applicant has met its burden of proof, has to present – presumably, in the contested hearing – "evidence" that some state or federal law is "specifically applicable" and is violated by the draft permit. Most lawyers would not expect emails, articles from scientific journals, briefs of counsel and the like would rise to the level of evidence, and few ALJs would admit it as such.

This provision may further complicate the State's retention of various delegated or authorized federal environmental programs, too. The Austin Court of Appeals has recently ruled that a commenter on a draft permit must also participate in the contested case hearing process, in order to exhaust the commenter's administrative remedies in a permit challenge for which a contested case hearing is theoretically available. *Sierra Club, et al., v. Texas Commission on Environmental Quality, et al.*, 2016 WL 1304928, at 4 (Tex. App. – Austin 2016, no pet.)(the *Pirkey* case).

This decision is at odds with various federal environmental regulations that require state programs, if they are to be operated in lieu of federal programs, "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage and assist public participation in the permitting process." 40 C.F.R§ 123.30 (NPDES delegation). Participation in a contested case hearing is

not a requisite to appeal within the federal system. TCEQ and industry advocates, presumably, will try to re-interpret the *Pirkey* case so as to retain control of the implementation of the federal environmental programs. SB 709 complicates that effort, because it sets in statute the inference of the State that permit terms that go unchallenged in a proceeding referred to SOAH are legally sound. The commenter who does not participate in the contested case hearing, even if the commenter somehow gets around the *Pirkey* case, will be confronted at the courthouse with a claim of issue preclusion. See, *Restatement (Second) of Judgments* § 27, p. 250 (1980) and, for example, *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1303-1304 (2015).

As a small but curious aside, consider how one knows that a legal requirement is "specifically" violated by a draft permit term. As we know, every word the legislature uses it uses for a purpose. What is the purpose for that word? It is pretty easy to determine when a draft permit term violates an applicable legal requirement. It is pretty easy to determine when a permit term allows an activity to which a legal requirement does not apply. But, exactly how does one make a determination as to whether a legal requirement is "specifically" applicable to an activity; what if it were only implicitly applicable?

Justiciable interest and the WCS cases. SB 709, again, by amendment to § 5.115 of the Water Code, attempts to limit the universe of members of the public who may be parties to contested case proceedings. It does this by adding text closely paralleling that in a part of a paragraph from *Sierra Club v. Texas Commission on Environmental Quality*, 455 S.W.3d 214 (Tex. App – Austin 2014, rev. den.)(here, the *WCS* case). Industry advocates have characterized SB 709 as codifying the *WCS* case. That is an overstatement; the *WCS* case painted with a broad brush. The text of the *WCS* case that was added to § 5.115 by SB 709 is the text, at 223, that says the TCEQ may, among other things, "weigh and resolve matters that may go to the merits of the underlying application" in determining the "affected person" or otherwise status of a would-be party seeking a contested case hearing.

The significance of this language is, obviously, that it can be read to open the door for TCEQ to just decide the merits of the docket on the basis of the pre-contested-case filings in the docket and, having decided the merits show a would-be party could not reasonably have apprehensions of harm arising from the to-be-permitted activity, deny any or all persons "affected" status. Whatever may prove to be the long-term impact of the *WCS* case on "affected person" decisions, however, the language from the WSC case that is enshrined in § 5.115 by SB 709 is enshrined as subordinate to the statute's general principle that an "affected person" is one who has a "personal justiciable interest" at stake. §5.115(a). There is a large body of law on "justiciable interest," and that will provide some ballast against unbridled TCEQ discretion to reject would-be parties.

Does SB 709 deprive corporations, partnerships, and the like of organizational standing? SB 709 further amended § 5.115 to provide that only a "group or association" that, itself,

timely filed comments and that has a member who could be a party to the contested case hearing may be a party to that hearing. So, for "groups" and "associations" there is only representational standing, not organizational standing. SB 709 does not define what constitutes a group or association.

The intent of this provision was to exclude organizations like Sierra Club from contested proceedings, and Sierra Club is a corporation, so it is probable that the term "group" covers corporations. In any event, henceforth, a group, say, an investment group of some sort, that owns a piece of property downstream from a waste water discharge, for example, will not be able to litigate to protect that property, unless the group also has a "member" who, individually, has standing.

This new provision in § 5.115 will also prevent the formation of an admissible party after the comment period. Frequently, neighbors of a facility seeking a permit will comment individually on the draft permit and not form a group to represent their collective interests, until near the time of the preliminary hearing. That will, now, be too late. I would expect contest case hearings in the future to have a greater number of parties, more filings and, generally, to be less-well-organized.

This provision of SB 709, like several others, also raises issues for State implementation of the federally delegated and authorized environmental programs. The provision, by encumbering would-be citizen parties, is at odds with providing "an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage and assist public participation in the permitting process."

AN ACT
relating to procedures for certain environmental permit applications.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2003.047, Government Code, is amended by adding Subsections (e-1), (e-2), (e-3), (e-4), (e-5), (i-1), (i-2), and (i-3) to read as follows:

(e-1) This subsection applies only to a matter referred under Section 5.556, Water Code. Each issue referred by the commission must have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner. The list of issues submitted under Subsection (e) must:

(1) be detailed and complete; and

(2) contain either:

(A) only factual questions; or

(B) mixed questions of fact and law.

(e-2) For a matter referred under Section 5.556 or 5.557, Water Code, the administrative law judge must complete the proceeding and provide a proposal for decision to the commission not later than the earlier of:

(1) the 180th day after the date of the preliminary hearing; or

(2) the date specified by the commission.

(e-3) The deadline specified by Subsection (e-2) may be extended:

(1) by agreement of the parties with the approval of the administrative law judge; or

(2) by the administrative law judge if the judge determines that failure to extend the deadline would unduly deprive a party of due process or another constitutional right.

(e-4) For the purposes of Subsection (e-3)(2), a political subdivision has the same constitutional rights as an individual.

(e-5) This subsection applies only to a matter referred under Section 5.557, Water Code. The administrative law judge may not hold a preliminary hearing until after the executive director has issued a response to public comments under Section 5.555, Water Code.

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

ATTACHMENT A

(1) the draft permit meets all state and federal legal and technical requirements; and

(2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

(1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and

(2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

SECTION 2. Section 5.115, Water Code, is amended by amending Subsections (a) and (d) and adding Subsection (a-1) to read as follows:

(a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

(a-1) The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings. For a matter referred under Section 5.556, the commission:

(1) may consider:

(A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;

(B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;

(C) the administrative record, including the permit application and any supporting documentation;

(D) the analysis and opinions of the executive director; and

(E) any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to the commission by the executive director, the applicant, or a hearing requestor; and

(2) may not find that:

(A) a group or association is an affected person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right; or

(B) a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

(d) The commission shall adopt rules for the notice required by this section. The rules must provide for the notice required by this section to be posted on the Internet by the commission.

SECTION 3. Section 5.228(c), Water Code, is amended to read as follows:

(c) The executive director shall participate as a party in contested case permit hearings before the commission or the State Office of Administrative Hearings to:

(1) provide information to complete the administrative record; and

(2) support the executive director's position developed in the underlying proceeding, unless the executive director has revised or reversed that position.

SECTION 4. Subchapter M, Chapter 5, Water Code, is amended by adding Section 5.5553 to read as follows:

Sec. 5.5553. NOTICE OF DRAFT PERMIT. (a) This section applies only to a permit application that is eligible to be referred for a contested case hearing under Section 5.556 or 5.557.

(b) Notwithstanding any other law, not later than the 30th day before the date the commission issues a draft permit in connection with a permit application, the executive director shall provide written notice to the state senator and state representative of the area in which the facility that is the subject of the permit is located.

SECTION 5. (a) The changes in law made by this Act apply only to:

(1) a permit application that is filed with the Texas Commission on Environmental Quality on or after the effective date of this Act; or

(2) a judicial proceeding initiated on or after the effective date of this Act that challenges an act or decision of the Texas Commission on Environmental Quality made during a permit proceeding.

(b) A permit application filed or a judicial proceeding initiated before the effective date of this Act is governed by the

law in effect when the permit application was filed or the judicial proceeding was initiated, and the former law is continued in effect for that purpose.

(c) Notwithstanding Subsection (a), the changes in law made by this Act do not apply to:

(1) a permit application:

(A) filed after the effective date of this Act; and

(B) that is substantially similar to a permit application for which a draft permit has been issued and that was:

(i) filed before the effective date of this Act; and

(ii) withdrawn at the request of the permit applicant; or

(2) a judicial proceeding:

(A) initiated after the effective date of this Act; and

(B) that is substantially similar to a judicial proceeding initiated before the effective date of this Act that has been dismissed at the request of the permit applicant.

(d) Not later than January 1, 2016, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act. For an application filed after the effective date of this Act but before the adoption of rules to implement the changes in law made by this Act, the commission shall provide sufficient notice to the applicant and other participants in the permit proceeding that the changes in law made by this Act apply to the proceeding.

SECTION 6. This Act takes effect September 1, 2015.



Austin
512.370.2807 Direct
512.370.2850 Fax
dseal@winstead.com

St. Mary's University School of Law
- J.D., 1996

University of Texas at Austin
- B.A., Economics, 1991

Derek Seal

Shareholder

Environmental Law; Public & Regulatory Law; Government Relations; Energy Industry; Alternative Energy Industry

Derek Seal brings over 24 years of regulatory and legislative experience to Winstead's Environmental Law Practice Group. Derek is a former General Counsel of the Texas Commission on Environmental Quality (TCEQ). Prior to this position, he was Counsel to former TCEQ Chairman Kathleen Hartnett White. Before joining the TCEQ in November 2002, he served in the combined roles of General Counsel in the Texas Legislature for the House Committee on Environmental Regulation and General Counsel and Chief of Staff for Representative Warren Chisum, who was the Chairman of that committee.

Representative Experience

- Experience with all aspects of administrative law, with a focus in environmental permitting and enforcement
- Specific representative experience includes successfully assisting clients in the following types of matters:
  - TCEQ contested case hearings
  - Water supply and water rights
  - Wastewater discharge permitting, including industrial wastewater discharge permits, municipal discharge permits and permits involving the land application of treated effluent
  - Water utility and wastewater utility regulation
  - Air permitting matters, including amendments, modifications and permit alterations, and agency reviews of permit renewals
  - Compliance with regulatory requirements, including the use of the Texas Environmental, Health, and Safety Audit Privilege Act
  - TCEQ regulatory enforcement orders
  - Obtaining Innocent Owner Operator/Certificates
  - Remediation of properties affected by underground petroleum storage tanks
  - Drafting legislative initiatives and formulating legislative strategies relating to natural resources and the environment
  - Agency rulemakings and policy development before the TCEQ and Texas Low-Level Radioactive Waste Disposal Compact Commission
  - Environmental due diligence

Professional & Community Involvement

- State Bar of Texas, Environmental & Natural Resources Law

Section

- American Bar Association
- Austin Bar Association (Environmental Law Section)
- Air and Waste Management Association (Central Texas Chapter)
- Participant in the Association of Chemical Industry of Texas, Texas Oil and Gas Association, and the Texas Water Conservation Association
- University Masonic Lodge No. 1190 (former Board Member of the University Lodge Foundation)
- Austin Christian Fellowship Church

Awards & Recognition

- *The Best Lawyers in America* - Environmental Law, Woodward/White, Inc., 2016
- Chambers and Partners USA Guide: America's Leading Business Lawyers, 2013-2015

Admitted to Practice

- Texas, 1996

Presentation Topics

- Texas Bar CLE Advanced Administrative Law Course (legislative update)
- Austin Industry Environmental Attorneys (TCEQ contested case hearing reform)
- Texas Aggregate and Concrete Association's 2015 Sustainability Conference (TCEQ contested case hearing reform)
- Air and Waste Management Association 2013 Hot Air Topics Conference (TCEQ-EPA litigation)
- Environmental Section of the Tarrant County Bar Association (legislative update)
- Co-author for the 2013 Environmental Superconference (legislative update)
- Air and Waste Management Association Annual 2012 Conference (air permitting)
- Winstead's Energy and Environmental Law Practice Group's Oil and Gas Seminars (air permitting)
- American Bar Association Tort Trial and Insurance Practice Section (crisis management)
- Air and Waste Management 2011 Association Workshop (oil and gas air emissions)
- Texas Chemical Council 2011 Environmental, Health, and Safety Conference (TCEQ Sunset)
- Texas Public Policy Foundation (federal ambient air quality standards)
- Texas Conservative Coalition Research Institute-Energy and Envt. Task Force (SOAH)
- Texas Aggregate and Concrete Association (legislative update)
- The Woodlands Bar Association (legislative update)
- State Bar, Oil and Gas Section in the Spring of 2008 (citizens environmental suits)
- Texas Conservative Coalition Research Institute (groundwater regulation)
- Texas Bar CLE Advanced Administrative Law Course (rulemaking)

28th Annual Texas Environmental Superconference

"It's like déjà vu all over again"

Thursday-Friday, August 4-5, 2016
Four Seasons Hotel, Austin, Texas

TCEQ CONTESTED CASE HEARING RULES

"You wouldn't have won if we'd beaten you"

Derek Seal
Winstead, PC
401 Congress Ave., Ste. 2100
Austin, Texas 78701
(512) 370-2807
dseal@winstead.com

TABLE OF CONTENTS

Page

I. INTRODUCTION 2

II. SENATE BILL 709 CONTESTED CASE HEARING REFORMS 2

A. Legislative Intent and Changes Made by SB 709 to TCEQ's Contested Case Hearing Process 3

1. Predictability in the Timeframe for a Contested Case Hearing 3
2. TCEQ Commission Discretion in Granting a Contested Case Hearing Request 4
3. Prima Facie Demonstration Established by the Administrative Record and TCEQ's Preliminary Review 5

B. TCEQ Rulemaking 5

III. THE AFTERMATH – THE PETITION TO REVOKE FEDERAL DELEGATION 6

A. The Petitioners' Judicial Review Arguments are Based Primarily on Exhausting Administrative Remedies in Order to Establish Standing to Invoke the Jurisdiction of a State Court 6

1. TCEQ's Rules Do Not Expressly Preclude Consideration of Aesthetic, Environmental, or Recreational Interests in Granting a Contested Case Hearing Request 7
2. The SB 709 Requirement for a Hearing Requester to Demonstrate "Likely Impacts" of a Permit Application is Consistent with Article III Standing Requirements 8
3. Consideration of the Merits of a Permit Application Does Not Interfere with Article III Standing Requirements 9
4. Deferential State Court Review of a TCEQ Decision on a Request for a Contested Case Hearing Does Not Narrow Article III Standing Requirements 10

B. Changes to a Protestant's Burden in a Contested Case Hearing 11

IV. CONCLUSION 13

SENATE BILL 709, ACTS 2015, 84TH LEG., CH. 116 14

PETITION FOR ADMINISTRATIVE ACTION 22

I. Introduction

Evidentiary hearings have been engrained in the environmental permitting process in Texas for over 50 years, as far back as 1961.[1] After decades of debate regarding appropriate governance of evidentiary hearings held by administrative agencies such as the Texas Commission on Environmental Quality ("TCEQ") and its predecessor agencies, the Texas Legislature ("Legislature") enacted the Texas Administrative Procedure Act ("APA") in 1975.[2] The 1975 version of the APA included codification of the definition of "contested case" that still exists in Texas Government Code § 2001.003(1).[3] TCEQ and its predecessor agencies conducted in-house contested case hearings involving air, water quality and waste permitting until 1995 when the Legislature created the Natural Resources division within the State Office of Administrative Hearings ("SOAH") and moved TCEQ's contested case hearings to SOAH.[4]

The Legislature has maintained a vigilant interest in the contested case hearing process applicable to environmental permitting since the inception of evidentiary contested case hearings.[5] Most recently, with the enactment of Senate Bill 709 ("SB 709") in 2015, the Legislature changed several key aspects of how TCEQ's contested case hearings work for air, water quality and waste permitting.[6] See Attachment A for the text of SB 709.

II. Senate Bill 709 Contested Case Hearing Reforms

After a heated policy debate, SB 709 became effective on September 1, 2015. During the legislative committee process, 37 witnesses testified or registered support for the Senate version of the bill, and 14 witnesses testified against or registered opposition.[7] On the House version of the bill, 59 witnesses testified or registered support, and 30 witnesses testified against or registered opposition.[8] During Senate debate, Senators offered 4 amendments, and during House debate House members offered 15 amendments.[9] Ultimately, the bill was approved on second reading in the Senate by a vote of 21 in favor and 10 opposed, and in the House by a vote

---

1 Appellee TCEQ's Brief at 10-11, *Sierra Club v. Tex. Comm'n on Envtl. Quality*, No. 03-14-00130-CV (Tex. App. Austin -2015), citing Act of Aug. 8, 1961, 57th Leg., 1st C.S., ch. 42 § 4(b), 1961 Tex. Gen. Laws, 156, 159; *see also* Tex. House Environmental Regulation Committee, *Hearing on Environmental Permitting Process at the Texas Commission on Environmental Quality*, May13, 2014, 83rd Leg. (statement of Robert Martinez, TCEQ).

2 Eric Allmon and David Frederick, *A Defense of the Contested Case Hearing Process*, at 182-192, 44:2 Tex. Envtl. L.J. 175 (2014), citing Texas Administrative Procedure and Texas Register Act, Tex. S.B. 41, Act of April 22, 1975, 64th Leg., R.S. ch. 61, 1975 Tex. Gen. Laws 136.

3 *Id.* at 191.

4 Acts 1995, 74th Leg., ch. 106, § 1 (S.B. 12), effective September 1, 1995; *see also* Tex. House Environmental Regulation Committee, (statement of Robert Martinez, TCEQ), explaining that before 1995 when air, water quality and waste permitting were consolidated in TCEQ's predecessor, the Texas Natural Resource Conservation Commission, contested case hearings for air permits were conducted by the Air Control Board, for water quality at the Water Quality Board (and Texas Water Commission), and for waste at the Department of Health. The Commissioners reserve the ability to conduct a contested case hearing on a matter rather than delegating to SOAH. *See* Tex. Water Code §§ 5.102 and 5.311.

5 *See* Allmon and Frederick at 192-200 for a description of legislative efforts and changes relating to TCEQ's contested case hearing process between 1995 and 2013.

6 Acts 2015, 84th Tex. Leg., ch. 116 (S.B. 709), § 1, effective September 1, 2015.

7 Senate Committee Report, Senate Natural Resources & Economic Devt. Committee, Witness List for S.B. 709, 84th Tex. Leg., R.S. (March 31, 2015).

8 House Committee Report, House Committee on Envtl. Regulation, Witness List for H.B. 1865, 84th Tex. Leg., R.S. (March 31, 2015).

9 Senate Journal, 84th Tex. Leg., at 946-48 (April 16, 2015); House Journal, 84th Tex. Leg., at 2234-2244, 2297-2298, 2326-2327 (April 30, 2015).

of 92 in favor and 50 opposed.[10] Thus, the Legislature did not pass SB 709 without a healthy amount of debate and consideration of the various provisions in the bill.

A. Legislative Intent and Changes Made by SB 709 to TCEQ's Contested Case Hearing Process

Supporters of SB 709 asked the Legislature for several changes to make TCEQ's contested case hearings fairer and more balanced from the supporters' perspective.[11] However, the legislative record shows that preserving public participation in TCEQ's permitting process remained a legislative priority.[12] The legislative record provides insights into what the Texas Legislature intended to accomplish by passing SB 709, which impacts three primary facets of the TCEQ's contested case hearing process, as discussed below.[13]

1. Predictability in the Timeframe for a Contested Case Hearing

At the outset, legislators expressed concern that:

> Today's [TCEQ] contested case process puts Texas at a competitive disadvantage economically. . . . Companies in competing states can obtain necessary environmental permits in six months to break ground. The same process can take up to two years in Texas. Other states point to the slow Texas environmental permitting process when courting industry prospects.[14]

Supporters argued that limiting the timeframe for TCEQ's contested case hearings would provide certainty in the environmental permitting process and would facilitate construction of new or expanded facilities and generate new economic activity.[15]

In order to address the concern regarding the length of time a contested case hearing may take, SB 709 expressly requires the Administrative Law Judge ("ALJ") to complete the proceeding and issue a proposal for decision within 180 days after the preliminary hearing.[16] However, the TCEQ Commissioners ("Commissioners") can shorten the 180-day timeframe,[17] and it can be extended by agreement of the parties with approval of the ALJ, or by the ALJ if failure to extend would unduly deprive a party of due process or another constitutional right.[18]

---

10 Senate Journal, 84th Tex. Leg., at 948 (April 16, 2015); House Journal, 84th Tex. Leg., at 2244-45 (April 30, 2015).

11 House Research Organization, Bill Analysis, C.S.H.B. 1865, at 5, 84th Tex. Leg. R.S. (April 30, 2015).

12 *See for example* Senate Research Center, Bill Analysis Tex. S.B. 709 (As Filed) at 1, 84th Tex. Leg., R.S. (March 27, 2015); Senate Research Center, Bill Analysis Tex. S.B. 709 (Enrolled), at 1, 84th Leg., R.S. (June 9, 2015); House Comm. on Envtl. Regulation, Committee Report, Bill Analysis (84R 26615) at 1, Tex. S.B. 709, 84th Leg., R.S. (2015).

13 Although SB 709 included multiple changes to TCEQ's contested case hearing process, this article focuses on three of the most substantial changes.

14 Senate Research Center, Bill Analysis, S.B. 709 (As Filed) at 1.

15 House Research Organization, Bill Analysis, C.S.H.B. 1865, at 5.

16 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.047(e-2).

17 *Id.*

18 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.047(e-3).

2. TCEQ Commission Discretion in Granting a Contested Case Hearing Request

The legal standards upon which the Commissioners must base their evaluation of whether to grant a hearing request has been a topic of historic controversy and litigation. At one point, the TCEQ's general counsel publically stated that "If the commission cannot reject a hearing request that is as weak as this one, then the commission is in trouble."[19] Supporters of SB 709 reasoned that the legislature should limit the right to trigger a contested case hearing to only:

> [T]hose contesting the permit application [who are] personally affected and had been participating in the process prior to contesting a specific case. In the past, associations or groups could be considered affected even if no individual person could be identified that was affected in his or her own right early in the process. The bill therefore would discourage groups from inappropriately contesting cases to further a broad agenda or for frivolous reasons.[20]

To address the issue of how the TCEQ evaluates hearing requests, the Legislature adopted the approach taken by the Texas Third Court of Appeals, which found that:

> TCEQ enjoys the discretion to weigh and resolve matters that may *go to the merits of the underlying application*, including the *likely impact the regulated activity* . . . will have on the health, safety, and use of property by the hearing requester and the use of natural resources.[21]

In addition to codifying the Texas Third Court of Appeals' approach, SB 709 codifies that the Commissioners' evaluation of a hearing request may include the administrative record and other supporting documentation, the analysis and opinion of the executive director, and any other expert reports or other information submitted by the applicable deadlines.[22]

SB 709 also expressly precludes the Commissioners from finding that hearing requesters are "affected persons" entitled to a contested case hearing in certain circumstances. A group or association cannot be an affected person unless the group or association identifies by name and physical address in a request for hearing a member of the group or association who would be entitled to a hearing in the person's own right.[23] Any hearing requester cannot be an affected person unless the hearing requester timely submits comments.[24] Further, the commission may only refer an issue to a contested case hearing if a detailed and complete issue was raised in a comment by an affected person.[25]

---

19 *See* Allmon and Frederick at 194, citing Robert Elder, Jr., *High Court Reignites Fight Over Permits*, Wall St. J., Sept. 9, 1998, at T1.

20 House Research Organization, Bill Analysis, C.S.H.B. 1865, at 5.

21 *Sierra Club v. Tex. Comm'n on Envtl. Quality & Waste Control Specialists*, 455 S.W.3d 228, at 235 (Tex. App. – Austin 2015)(pet. denied)(emphasis added).

22 S.B. 709, 84th R.S. (2015), Sec. 2; Tex. Water Code § 5.115(a-1).

23 S.B. 709, 84th R.S. (2015), Sec. 2; Tex. Water Code § 5.115(a-2)(A).

24 S.B. 709, 84th R.S. (2015), Sec. 2; Tex. Water Code § 5.115(a-2)(B).

25 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.47(e-1).

3. Prima Facie Demonstration Established by the Administrative Record and TCEQ's Preliminary Review

In passing SB 709, the Legislature tacitly agreed with arguments by supporters that TCEQ's preliminary approval should serve as the starting place for a contested case hearing.[26] Supporters reasoned that TCEQ's preliminary approval of an application creates a presumption that the application meets all requirements because "TCEQ is legally obligated to thoroughly review permit applications and only issue a draft permit that meets [all legal and technical requirements and is protective of public health and the environment."[27]

Thus, SB 709 provides that:

> [F]iling with [SOAH] the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that . . . the draft permit meets all state and federal legal and technical requirements . . . and a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.[28]

However, the presumption created by TCEQ's preliminary approval may be rebutted by any party by an evidentiary showing that "one or more provisions in the draft permit violate a specifically applicable state or federal requirement."[29] If the presumption is rebutted, the applicant and TCEQ may present additional evidence to support the draft permit.[30]

B. TCEQ Rulemaking

After the enactment of SB 709, TCEQ published proposed rules to implement the bill on August 21, 2015.[31] TCEQ received extensive comments from 15 entities.[32] In adopting the rules to be effective on December 31, 2015, TCEQ acknowledged that all commenters agree that TCEQ's rulemaking project for SB 709 accurately reflects the legislation.[33] As discussed in detail below, the U.S. Environmental Protection Agency (the "EPA"), Region 6, submitted comments that became the foundation for a challenge to TCEQ's federally delegated permitting programs.

---

26 House Research Organization, Bill Analysis, C.S.H.B. 1865, at 5.

27 Senate Research Center, Bill Analysis, Tex. S.B. 709 (Enrolled) at 1.

28 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.047(i-1).

29 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.047(i-2).

30 S.B. 709, 84th R.S. (2015), Sec. 1; Tex. Gov't Code § 2003.047(i-3).

31 40 TexReg. 5225 (August 21, 2015).

32 *See for example* 40 TexReg. 9643 (December 25, 2015); Not all commenters provided comments on every section of the proposed rulemaking.

33 *Id.* at 9643.

III. The Aftermath – The Petition to Revoke Federal Delegation

The Environmental Defense Fund and Caddo Lake Institute ("Petitioners") filed a Petition for Administrative Action (the "Petition") with EPA on January 11, 2016, requesting EPA to review and withdraw delegation of certain federal permitting authority from TCEQ, primarily based recent statutory changes in SB 709. See Attachment B for the Petition.[34] The Petition largely mirrors the EPA Region 6 comments filed with TCEQ during the rulemaking for SB 709,[35] and reflects many of the concerns expressed by opponents of SB 709. The Petition suggests that the changes required by SB 709 are inconsistent with judicial review and public participation requirements of the federal Clean Air Act (the "CAA") and the federal Clean Water Act (the "CWA"), and requests that EPA withdraw delegation to TCEQ of these federal programs.[36]

As a practical matter, EPA has historically approached withdrawal petitions by encouraging or directing EPA regions to "[m]ake every effort to assist the State and the Petitioner(s) to resolve their concerns jointly without necessitating . . . commencement of formal withdrawal proceedings."[37] In 95% of the 58 petitions to withdraw state delegation of a federal program filed through June 2012, EPA's response was to informally investigate the allegations, during which EPA often requested a response from the state, interacted with the petitioner, and independently researched the allegations.[38] The 5th U.S. Circuit Court of Appeals and other federal courts have granted EPA very broad discretion to take a variety of actions regarding the Petition.[39] However,

A. The Petitioners' Judicial Review Arguments are Based Primarily on Exhausting Administrative Remedies in Order to Establish Standing to Invoke the Jurisdiction of a State Court

The Petition correctly cites to an EPA rule requiring the same opportunity for judicial review of a state-issued CWA permit in state court as would be provided in federal court for a federally-issued CWA permit.[40] The Petition also correctly cites to EPA's interpretation that Congress intended standing for judicial review of state-issued PSD/NSR permits to be based on Article III of the U.S. Constitution ("Article III").[41] For the reasons stated below, however, standing for judicial review in state court is substantially the same as in federal court.[42] Thus,

---

34 The Petition is available on the Environmental Defense Fund's website at: http://blogs.edf.org/climate411/files/2016/01/EDF-CLI-CWA-CAA-petition-to-EPA-FINAL-1-11-16.pdf?_ga=1.29787199.1284468119.1469112395

35 *See generally* 40 TexReg. 9641 et seq. for various TCEQ responses to EPA's comments.

36 The Petition also alleges that TCEQ and local governments have inadequate funding to administer delegated federal CAA and CWA permitting programs, which is not addressed in this article.

37 Hammond & Markell, at fn. 135, citing memorandum from Charles H. Sutfin, Director of EPA's Water Permits Division, to Water Permits Program Managers Regions I-X, [CWA] State Program Withdrawal Petitions – Response Procedures and Status Update (May 4, 2000).

38 *Id.* at 334, 336, and fn. 136.

39 *See generally Id.* at 335-340 (2013), citing in part *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (EPA's decision not to initiate withdrawal of delegation to TCEQ of RCRA authority was an exercise of unreviewable enforcement discretion).

40 *See* 40 C.F.R. § 123.30; *see also Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act*, 61 Fed.Reg. 20775, (May 8, 1996).

41 *EPA Approval and Promulgation of Air Quality Implementation Plans; Texas [PSD]; [GHG] Tailoring Rule Revisions*, 79 Fed.Reg. 66626, at 66635 (November 10, 2014).

42 40 Tex.Reg 9641 et seq., citing Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program, at 27-29 (December 24, 1997), Section XIX, Supplement to 1993, 1996, and 1998 Statements of Legal Authority for Texas' CAA Title V Operating Permit Program by the Attorney General of the State of Texas (October 2001), State of Texas Office of Attorney General Statement for Class I, III, IV and V Underground Injection Wells (2003).

SB 709 does not impose standing requirements in state court that are stricter than federal standing requirements.[43]

The primary argument in the Petition is founded in the requirement that only a person who has exhausted administrative remedies may invoke the jurisdiction of a state court to review a TCEQ-issued CWA or PSD/NSR permit.[44] The purpose of the exhaustion of administrative remedies doctrine is to require a complainant to point out to the agency the alleged mistakes in order to give the agency the chance to discover and correct its own errors before going to court.[45]

The requirement to exhaust administrative remedies is "well established in both federal and state jurisprudence of administrative law."[46] The crux of the argument is that SB 709: (i) restricts who can qualify as an "affected person" to participate in a contested case hearing, and therefore (ii) restricts further than Article III who can legally exhaust administrative remedies and trigger judicial review.

When adopting the judicial review provision of EPA's CWA rule, EPA expressly recognized that "States are free . . . to impose reasonable requirements that administrative remedies be exhausted in order to preserve the opportunity to challenge final permitting actions in State court."[47] As explained below, Texas' requirements for exhaustion of administrative remedies are reasonable.

1. TCEQ's Rules Do Not Expressly Preclude Consideration of Aesthetic, Environmental, or Recreational Interests in Granting a Contested Case Hearing Request

The first exhaustion of administrative remedies/standing argument is that SB 709 precludes TCEQ from basing an affected person determination on a person's aesthetic, environmental, or recreational interests. Although the Petition correctly states that SB 709 does not *expressly* include recreational, aesthetic, and environmental interests as a consideration in whether a hearing requester is an affected person, SB 709 did not change an existing TCEQ rule expressly requiring TCEQ to consider "the likely impact of the regulated activity on the *use of the impacted natural resource by the person*"[48] in determining whether a hearing requester is an affected person. Thus, SB 709 does not change current law regarding whether recreational, aesthetic, and environmental interests will require state courts to affirm the denial of contested case hearing requests.

---

43 EPA has taken the position that "[T]he CAA does not require that the process for judicial review of the grant or denial of a PSD permit issued under a SIP approved PSD program be identical to that provided when the EPA or a delegated agency is the permit issuer." 79 Fed.Reg. 66635.

44 *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

45 *Tex. Air Control Bd. V. Travis Cnty.*, 502 S.W.2d 213, 215-16 (Tex. Civ. App.- Austin, 1973, no writ).

46 *Id.* at 215, citing *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969).

47 40 C.F.R. § 123.30; 61 Fed.Reg. 20773 (May 8, 1996).

48 30 Tex. Admin. Code § 55.203(c)(5)(emphasis added).

2. The SB 709 Requirement for a Hearing Requester to Demonstrate "Likely Impacts" of a Permit Application is Consistent with Article III Standing Requirements

The second exhaustion of administrative remedies/standing argument is that SB 709 expressly allows TCEQ to consider the "likely impact" of a permit on a hearing requester's interests when it determines whether to grant a request for a contested case hearing. Despite the argument in the Petition, TCEQ's rules have long included consideration of the "likely impact" of a regulated activity, predating the enactment of SB 709.[49] The Petition nevertheless suggests that the "likely impact" consideration that has long been in TCEQ's rules and recognized by Texas courts requires a *showing of causation*, which the Petition says creates a higher bar than the "fairly traceable" standard required for federal standing. However, the legal authority cited involves a case in which standing for judicial review in federal court was established by eyewitness and expert evidence attributing sulfur dioxide emissions to the defendant (i.e., the *likely impact* was *fairly traced* to the defendant).[50]

Further, the U.S. Supreme Court has held that Article III standing contains three elements:

(i) a personal showing of suffering some *actual or threatened injury* as the result of the putative illegal conduct of the defendant;

(ii) the alleged injury must be *fairly traceable* to the challenged action; and

(iii) the injury must be *likely redressed by a favorable decision* for the plaintiff.[51]

The Texas Supreme Court recently observed that the ""cornerstone" of the [affected person definition which includes likely impact] denotes the constitutionally minimum requirements for litigants to have standing to challenge governmental actions in [state] court,"[52] which are almost identical to the aforementioned Article III standing requirements for judicial review in federal court. The Texas Supreme Court's requirements for an affected person determination and standing for judicial review in state court are a concrete and particularized injury in fact, not common to the general public, that is:

(i) *actual* or imminent;

(ii) *fairly traceable* to the issuance of the permit as proposed; and

(iii) *likely to be redressed by a favorable decision* for the hearing requester.[53]

The Texas Supreme Court based the standards for standing in state court and in making the affected person determination on the very same federal constitutional standards for standing cited

---

[49] 30 Tex. Admin. Code § 55.203(c)(4).

[50] *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, at 792-93 (5th Cir. 2000)(emphasis added).

[51] *Id.* at 792; *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, at 472 (1982)(emphasis added).

[52] *Texas Comm'n on Envt'l Quality v. City of Waco*, 413 S.W.3d 409, 417 (Tex. 2013).

[53] *Id.* (emphasis added).

by the Petitioners.[54] Thus, for the reasons stated by the Texas Supreme Court, the standards for making the affected person determination are the same as the standards for constitutional standing in state courts and for Article III standing in federal court.

3. Consideration of the Merits of a Permit Application Does Not Interfere with Article III Standing Requirements

The third exhaustion of administrative remedies/standing argument is that SB 709 allows the TCEQ to consider the *merits of an application* in determining whether a hearing requester is an affected person who merits a contested case hearing. As noted above, SB 709 codified recent Texas appellate court decisions describing TCEQ's discretion to consider a variety of factors in evaluating a hearing request, including the *merits of the application*.[55]

The backdrop of the court's decision was an administrative record that included unchallenged evidence that the application met all regulatory requirements and technical supporting documentation that the proposed activities would not adversely impact the environment.[56] TCEQ relied upon the merits-based evidence in the administrative record as a tool to evaluate whether the hearing requesters were affected persons.

Federal courts have held that if jurisdictional facts necessary to establish standing are inextricably intertwined with the merits, it is proper to find that jurisdiction exists and deal with the jurisdictional objection when the merits are considered.[57] However, TCEQ's consideration of a hearing request in a permit proceeding is very different than a federal court's consideration of a jurisdictional plea. In a TCEQ proceeding, there is a well-developed draft permit, sworn statements of accuracy and completeness, engineering and technical evaluations and other information that the Texas Supreme Court has likened to evidence.[58] In direct contrast, there may be little if any evidence on the merits of a claim when a jurisdictional plea is considered in federal court.

Further, federal courts have power to make factual findings that are decisive of standing (which is required for a court to have jurisdiction) and have broad authority to consider factual evidence that is extrinsic to the standing issue.[59] Under this broad authority, federal courts can allow the

---

[54] *Id.* at 417, citing inter alia *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, at 801 (Tex. App. 2011, rev'd), citing inter alia *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-447 (Tex. 1993), citing inter alia *Sierra Club v. Morton*, 405 U.S. 727, at 731 (1972), *Lujan*, 504 U.S. 560 (1992); *Valley Forge Christian College*, 454 U.S. 472 (1982).

[55] *Sierra Club v. Tex. Comm'n on Envt'l Quality*, 455 S.W.3d 214, at 223-24 (Tex. App- Austin 2014)(citing *City of Waco*, 413 S.W.3d at 420 (Tex. 2013))(emphasis added). In clearly establishing that the merits may be considered in the affected person determination, the Texas Supreme Court overturned a decision by the Texas 3rd Court of Appeals holding that the merits could not be considered. *See City of Waco*, 413 S.W.3d at 420, 425 (Tex. 2013), overturning the holding in *City of Waco v. Tex. Comm'n on Envtl. Quality, 346 S.W.3d 781* (Tex. App. 2011, rev'd). EPA Region 6 inquired of TCEQ during the rulemaking for SB 709 how allowing consideration of the merits does not interfere with Article III standing requirements for judicial review. *See* 40 TexReg 9666-67 (December 2015).

[56] *Id.* at 224-225.

[57] *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, at fn 3 (1st Cir. 2001).

[58] *City of Waco*, 413 S.W.3d 421 (Tex. 2013).

[59] *Williamson*, 645 F.2d 412-13 (5th Cir. 1981); *Valentin*, 254 F.3d 363-64 (1st Cir. 2001).

merits of a claim to be considered in summary judgment proceedings in making a jurisdictional determination (i.e., does the plaintiff have standing).[60]

In relying on U.S. Supreme Court precedent, the 11th Circuit clarified that a federal court can dismiss a case for lack of subject matter jurisdiction where the basis of jurisdiction implicates the merits of the claim, if the underlying claim appears to be "immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[61]

Further, the 5th Circuit has recently recognized "the district court must weigh evidence and assess the merits insofar as they weigh on jurisdiction."[62] The court cited two of its prior decisions "stand[ing] for the proposition that a district court is not barred from deciding a jurisdictional fact simply because that fact is intertwined with, or also is, a merits fact."[63] In that case and the cases relied upon by the 5th Circuit as precedent, a federal court took evidence and considered the merits of the underlying claims in determining jurisdiction.

Analogizing the above described cases and arguments to TCEQ's contested case hearing process, TCEQ can consider the merits of an application in evaluating whether a hearing requester is an affected person in a manner entirely consistent with federal judicial review standards. Thus, legal precedent supports SB 709's inclusion of a merits-based consideration of an application in evaluating a hearing request.

4. Deferential State Court Review of a TCEQ Decision on a Request for a Contested Case Hearing Does Not Narrow Article III Standing Requirements

The fourth argument tied to exhaustion of administrative remedies/standing is based on the deferential standard of review a state court would apply to a TCEQ decision to deny a hearing request. Although the arguments in the Petition are not clear, they seem to be that a state court's deferential standard of review applied to the denial of a hearing request impermissibly narrows who could qualify for a contested case hearing, thereby impermissibly narrowing the requirements for standing beyond the Article III standing thresholds. The Petition specifically suggests that the deferential standard of review is problematic if aesthetic, environmental, or recreational interests are not sufficient to establish affected party status, because a state court would impliedly be required to defer to an incorrect TCEQ decision to deny a hearing request.

As explained in TCEQ's response to a similar comment from EPA during TCEQ's rulemaking for SB 709:

> [T]he opportunity for judicial review has not changed since Texas received delegation of the [CWA] program, thus, the [CWA] program continues to meet the requirements of 40 CFR §123.30. . . .

---

60 *See for example Lawrence v. Dunbar*, 919 F.2d 1525, at 1530 (11th Cir. 1990)(emphasis added), citing inter alia *Williamson*, 645 F.2d 415-16 (5th Cir. 1981), *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 732 (11th Cir. 1982), and *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (3d Cir. 1977).

61 *Id.* at 1530, citing *Bell v. Hood*, 327 U.S. 678 (1945).

62 *Box v. Dallas Mexican Consulate Gen.*, 2015 U.S. App. LEXIS 14742, *16 (5th Cir. 2015).

63 *Id.* at *17, citing *Jason v. FIE Corp.*, 302 F3d 515 (5th Cir. 2002) and *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169 95th Cir. 1994).

> [A] Texas Attorney General's opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution . . . specifically states that "(a)ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of the United States Constitution." [This] is applicable to [sic] every act of the Commission subject to the Texas Clean Air Act.[64]

Further, the process for challenging an EPA-issued permit at the EPA's Environmental Appeals Board ("EAB") and the process for challenging a TCEQ-issued permit in a contested case hearing are substantially similar. Moreover, like the TCEQ process in which TCEQ asserts that a person must participate in a contested case hearing to exhaust administrative remedies, in the EPA process, a person must seek EAB review of a permit application as a prerequisite to judicial review.[65] However, even if administrative remedies have been exhausted under the EAB/EPA process, a person seeking to judicially challenge an EPA-issued permit must nevertheless also meet Article III standing requirements to invoke the jurisdiction of the court.[66] As discussed above, the standards for TCEQ's affected person determination are the same as the standards for constitutional standing in state courts and for Article III standing in federal court.[67] Thus, the deferential judicial review of a TCEQ decision on whether to grant a request for a contested case hearing based on the affected person determination is of no meaningful consequence since the Article III standards and the standards for the affected person determination are the same.

Thus, SB 709 does not change judicial review standards that have already been approved by EPA, and because the standards for TCEQ's affected person determination are the same as the Article IIII standards for establishing standing. Further, as previously discussed, SB 709 does not expressly preclude consideration of aesthetic, environmental, or recreational interests in the affected party determination.

B. Changes to a Protestant's Burden in a Contested Case Hearing

The Petition also suggests that SB 709 requires a protestant to bear the burden of proof, which the Petition suggests limits effective public participation. Contrary to the Petitioners' arguments, as explained in TCEQ's response to comments on the rulemaking for SB 709:

> [T]he burden of proof remains with the applicant since it is the moving party, and [sic] the evidentiary standard is by a preponderance of the evidence. . . . [T]he burden of proof for an applicant's direct case in a [contested case hearing] has been met by the submittal of the administrative record to and its admittance into the evidentiary record . . .[68]

---

64 40 Tex.Reg 9664 (December 25, 2015).

65 *See* 40 C.F.R. § 124.19(e).

66 *See for example* 33 U.S.C. § 1342(b)(standing to challenge an EPA-issued CWA permit); *Tex. Indep. Producers & Royalty Owners Ass'n* v. *EPA*, 410 F.3d 964, at 971-72 (7th Cir. 2005).

67 The standards are an injury in fact, a causal link between the injury and the challenged action, and redressability through a favorable decision. *See Texans United for a Safe Econ. Educ. Fund,* 207 F.3d at 792 (5th Cir. 2000); *Lujan,* 504 U.S. at 560 (1992); *Valley Forge Christian College* 454 U.S. at 472 (1982); *City of Waco*, 413 S.W.3d at 420, 425 (Tex. 2013)(citations omitted).

68 40 Tex.Reg 9689 (December 25, 2015).

If EPA were to agree with the burden of proof argument, EPA would be indicting EPA's own rules and EPA's own permitting program. EPA's own rules require that a person requesting that the EAB review an EPA decision to issue a CWA or PSD/NSR permit must make:

> [A] *showing* that [a] condition in question is based on: (1) A finding of fact or conclusion of law which is *clearly erroneous*, or (2) An exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review.[69]

Further, EPA's own guidance states that:

> A petitioner requesting EAB review "*bears the burden of demonstrating* that [EPA] based the decision on a clearly erroneous finding of fact or conclusion of law or that the [EAB] should exercise its discretion to review an important policy matter . . . "[70]
>
> "[A] petition for review must specifically identify disputed permit conditions and *demonstrate why* review is warranted."
>
> "A petitioner *must support its allegations with solid evidence* that the permit issuer clearly erred in its decision."[71]
>
> "For permit challenges based on technical issues, the [EAB] *expects a petitioner to present* "references to studies, reports, or other materials to provide relevant, detailed, and specific facts and data about permit matters that were not adequately considered by a permit issuer.""[72]
>
> "There is no appeal as of right from the [EPA's] permit decision . . . the petitioner has the burden of demonstrating that a permit decision warrants review."[73]

Thus, under EPA's own process, EPA's draft permit is presumed to meet all requirements and a protestant bears the burden to explain and present evidence regarding alleged deficiencies in order to trigger EAB review. If a petitioner meets its burden to trigger EAB review of an EPA permitting decision, then the EAB allows EPA and the applicant to respond with briefing, and may allow for oral argument.[74] The process enacted by SB 709 is similar in this regard, since a TCEQ draft permit and supporting documentation is a prima facie demonstration that all requirements have been met (i.e., it is presumed to meet all requirements), but a party in a contested case hearing may rebut the prima facie demonstration with its own evidence.[75] The primary difference between EPA's and TCEQ's process after the passage of SB 709 is protestants have more tools and opportunities to challenge the TCEQ executive director's draft permit through discovery, prefiled expert testimony, and cross examination.

---

[69] 40 C.F.R. § 124.19(a) (appeal of EPA-issued CWA or CAA permits)(emphasis added).

[70] *The Environmental Appeals Board Practice Manual*, U.S. EPA, Environmental Appeals Board (1103B), EPA (September 2010), Section IV.D.2.b., at 41 (citations omitted). (emphasis added)

[71] *Id.* at 42.

[72] *Id.*

[73] *Id.* at 50.

[74] *Id.* at 48-4950.

[75] Tex. Gov't Code § 2003.047(i-2), added by SB 709.

IV. Conclusion

SB 709 substantially changed TCEQ's contested case hearing process. Nonetheless, if history serves as an indicator, business and industry, other nongovernmental organizations and state policymakers will continue to scrutinize TCEQ's contested case hearings process.

ATTACHMENT A

SENATE BILL 709, ACTS 2015, 84TH LEG., CH. 116

S.B. No. 709

AN ACT

relating to procedures for certain environmental permit applications.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2003.047, Government Code, is amended by adding Subsections (e-1), (e-2), (e-3), (e-4), (e-5), (i-1), (i-2), and (i-3) to read as follows:

(e-1) This subsection applies only to a matter referred under Section 5.556, Water Code. Each issue referred by the commission must have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner. The list of issues submitted under Subsection (e) must:

(1) be detailed and complete; and

(2) contain either:

(A) only factual questions; or

(B) mixed questions of fact and law.

(e-2) For a matter referred under Section 5.556 or 5.557, Water Code, the administrative law judge must complete the proceeding and provide a proposal for decision to the commission not later than the earlier of:

(1) the 180th day after the date of the preliminary hearing; or

(2) the date specified by the commission.

(e-3) The deadline specified by Subsection (e-2) may be extended:

(1) by agreement of the parties with the approval of the administrative law judge; or

(2) by the administrative law judge if the judge determines that failure to extend the deadline would unduly deprive a party of due process or another constitutional right.

(e-4) For the purposes of Subsection (e-3)(2), a political subdivision has the same constitutional rights as an individual.

(e-5) This subsection applies only to a matter referred under Section 5.557, Water Code. The administrative law judge may not hold a preliminary hearing until after the executive director has issued a response to public comments under Section 5.555, Water Code.

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

(1) the draft permit meets all state and federal legal and technical requirements; and

(2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection

(i-1) by presenting evidence that:

(1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and

(2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

SECTION 2. Section 5.115, Water Code, is amended by amending Subsections (a) and (d) and adding Subsection (a-1) to read as follows:

(a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

(a-1) The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case

hearings. For a matter referred under Section 5.556, the commission:

(1) may consider:

(A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;

(B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;

(C) the administrative record, including the permit application and any supporting documentation;

(D) the analysis and opinions of the executive director; and

(E) any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to the commission by the executive director, the applicant, or a hearing requestor; and

(2) may not find that:

(A) a group or association is an affected person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right; or

(B) a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

(d) The commission shall adopt rules for the notice required

by this section. The rules must provide for the notice required by this section to be posted on the Internet by the commission.

SECTION 3. Section 5.228(c), Water Code, is amended to read as follows:

(c) The executive director shall participate as a party in contested case permit hearings before the commission or the State Office of Administrative Hearings to:

(1) provide information to complete the administrative record; and

(2) support the executive director's position developed in the underlying proceeding, unless the executive director has revised or reversed that position.

SECTION 4. Subchapter M, Chapter 5, Water Code, is amended by adding Section 5.5553 to read as follows:

Sec. 5.5553. NOTICE OF DRAFT PERMIT. (a) This section applies only to a permit application that is eligible to be referred for a contested case hearing under Section 5.556 or 5.557.

(b) Notwithstanding any other law, not later than the 30th day before the date the commission issues a draft permit in connection with a permit application, the executive director shall provide written notice to the state senator and state representative of the area in which the facility that is the subject of the permit is located.

SECTION 5. (a) The changes in law made by this Act apply only to:

(1) a permit application that is filed with the Texas Commission on Environmental Quality on or after the effective date

of this Act; or

(2) a judicial proceeding initiated on or after the effective date of this Act that challenges an act or decision of the Texas Commission on Environmental Quality made during a permit proceeding.

(b) A permit application filed or a judicial proceeding initiated before the effective date of this Act is governed by the law in effect when the permit application was filed or the judicial proceeding was initiated, and the former law is continued in effect for that purpose.

(c) Notwithstanding Subsection (a), the changes in law made by this Act do not apply to:

(1) a permit application:

(A) filed after the effective date of this Act; and

(B) that is substantially similar to a permit application for which a draft permit has been issued and that was:

(i) filed before the effective date of this Act; and

(ii) withdrawn at the request of the permit applicant; or

(2) a judicial proceeding:

(A) initiated after the effective date of this Act; and

(B) that is substantially similar to a judicial proceeding initiated before the effective date of this Act that has been dismissed at the request of the permit applicant.

(d) Not later than January 1, 2016, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act. For an application filed after the effective date of this Act but before the adoption of rules to implement the changes in law made by this Act, the commission shall provide sufficient notice to the applicant and other participants in the permit proceeding that the changes in law made by this Act apply to the proceeding.

SECTION 6. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 709 passed the Senate on April 16, 2015, by the following vote: Yeas 22, Nays 9; and that the Senate concurred in House amendments on May 13, 2015, by the following vote: Yeas 21, Nays 10.

Secretary of the Senate

I hereby certify that S.B. No. 709 passed the House, with amendments, on May 1, 2015, by the following vote: Yeas 83, Nays 37, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

ATTACHMENT B

PETITION FOR ADMINISTRATIVE ACTION

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR ADMINISTRATIVE ACTION

Environmental Defense Fund ("EDF") and Caddo Lake Institute ("CLI") (collectively, the "Petitioners") respectfully petition the U.S. Environmental Protection Agency ("EPA") to review and withdraw its delegation of permitting authority to the Texas Commission on Environmental Quality ("TCEQ") under the Clean Water Act ("CWA"). This includes delegations for National Pollution Discharge Elimination System ("NPDES") permitting, pretreatment permitting for publicly owned treatment works, and sludge management permitting. The Petitioners also respectfully petition EPA to: find that Texas's new source review permitting program under the Clean Air Act ("CAA") is substantially inadequate to comply with the CAA; promptly notify Texas of such inadequacies; and, require Texas to correct such inadequacies in its state implementation plan within a reasonable time period. We also hereby request that EPA promptly put in place a federal plan correcting deficiencies should Texas fail to act. *See, e.g.*, 42 U.S.C. § 7410(c)(1); 40 C.F.R. § 52.21; 40 C.F.R. Part 124. EDF and CLI request that EPA: formally respond to this petition in writing, as required by 40 C.F.R. § 123.64(b)(1); notify the State of Texas that it is not administering its approved and delegated programs under the CAA and CWA in accordance with federal law as required by 42 U.S.C. § 7410(k)(5) and 33 U.S.C. § 1342(c)(3); and schedule a public hearing regarding these violations, *id.*; 40 C.F.R. § 123.64(b)(1).

EDF and CLI petition EPA to withdraw Texas's delegated CWA authority and to require revisions to Texas's CAA new source review program in light of ongoing noncompliance with federal standards and recent amendments to Section 2003 of the Texas Government Code and Sections 5 and 7 of the Texas Water Code. These amendments prevent TCEQ from adequately implementing delegated and approved programs under the CWA and CAA. The amendments would: (1) restrict and limit the public's ability to obtain judicial review of TCEQ's permitting decisions; (2) reduce opportunities for public participation by increasing the burden on permit opponents in a contested case hearing; and (3) provide inadequate resources for implementation and enforcement of the CAA and CWA. These amendments violate the requirements for delegated authority under the CWA and for an adequate new source review[1] permitting program under the CAA.

This petition is made pursuant to Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), as well as the CAA and CWA. *See* 42 U.S.C. § 7410(k)(5); 33 U.S.C. § 1342(c)(3). The Administrator may initiate CWA withdrawal proceedings on her own initiative

[1] Petitioners use the terms "new source review" and "NSR" in this Petition to indicate both the prevention of significant deterioration ("PSD") program under CAA Title I, Part C, 42 U.S.C. §§ 7470–7492, and the nonattainment new source review program under Title I, Part D, 42 U.S.C. §§ 7501–7515.

or "in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part." 40 CFR § 123.64(b)(1).

I. Federal Requirements

State programs for implementing and enforcing the CAA and CWA must meet the requirements of federal law, including requirements for judicial review, public participation, and adequate resources for enforcement activities. The CWA requires EPA to withdraw delegated authority should state programs fail to meet these requirements. The CWA requires that "[a]ny State [NPDES] permit program . . . shall at all times be in accordance with this section and [EPA] guidelines." 33 U.S.C. § 1342(c)(2). Pursuant to Texas's delegated authority under the CWA, EPA must "review, on an annual basis, the legal authority upon which the [TCEQ's] TPDES program is based, including State statutes and regulations . . . [and] the [TCEQ's] public participation policies, practices, and procedures." EPA-TNRCC Memorandum of Agreement Concerning the National Pollutant Discharge Elimination System, 68 (May 5, 1998). If the Administrator determines that "a State is not administering a program approved under this section in accordance with the requirements of this section . . . the Administrator shall withdraw approval of such program" after notifying the State of such a determination. 33 U.S.C. § 1342(c)(3). Further, the Administrator may withdraw a delegated program if the "State's legal authority no longer meets the requirements of this part" due to, *inter alia*, "[a]ction by a State legislature." 40 C.F.R. § 123.63(a).

The CAA requires each state to adopt and submit to EPA a state implementation plan ("SIP") that includes a permit program to address emissions from new or modified sources of air pollution. 42 U.S.C. § 7410(a)(2)(C). EPA has codified minimum requirements for these state permitting programs, including public participation and notification requirements. *See* 40 C.F.R. §§ 51.160–51.164 & 51.166. If, after approving a SIP, EPA later finds that it has become "substantially inadequate" to comply with the CAA, then EPA "shall require the State to revise the plan as necessary to correct such inadequacies." *Id.* § 7410(k)(5). EPA, in turn, has a duty to put in place a federal plan when a state fails to make a required submission—in this case taking timely corrective action. 42 U.S.C. § 7410(c).

A. Judicial Review Requirements

State programs must provide opportunities for judicial review of state permitting decisions that are consistent with federal law. Under the CWA, "[a]ll states that administer . . . a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State." 40 C.F.R. § 123.30; *see also* 33 U.S.C. § 1369(b)(1). EPA regulations specify that a state program will meet this standard if "State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." 40 C.F.R. § 123.30. And "[a] State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." *Id.* Examples of overly-narrow restrictions that would not meet federal standards include "if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review." *Id.* EPA has recognized that "if

State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose." 61 Fed. Reg. 20,772, 20,775 (May 8, 1996).

Similarly, EPA has interpreted the CAA to require an opportunity for state judicial review of new source review permits. *See, e.g.*, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (proposing to disapprove of Virginia's PSD SIP due to state law standing requirements limiting judicial review); 72 Fed. Reg. 72,617, 72,619 (Dec. 21, 2007) (approving South Dakota's PSD program); 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012) (approving a portion of California's PSD program).

EPA has interpreted these requirements to mean that a state must provide for access to judicial review of permitting decisions that is at least as broad as federal court standing requirements under Article III of the United States Constitution. *See, e.g., Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon*, 63 Fed. Reg. 65,783, 65,783 (Nov. 30, 1998); *see also Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) (upholding EPA disapproval of a state permit program where the state's standards for challenging a permit were more stringent than Article III requirements). Article III requires a potential litigant to show: "(1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury; and (3) likelihood that the injury would be redressed by a favorable judicial action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992). The injury alleged may "reflect aesthetic, conservational, and recreational as well as economic values." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

B. Public Participation Requirements

State programs must also provide opportunities for public participation in permit decision-making and failing to do is sufficient for EPA to withdraw delegated CWA authority or to disapprove of a State's new source review SIP. Under the CWA, State programs must "provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30. EPA may withdraw delegated authority if the State's program "fail[s] to comply with the public participation requirements of this part" including requirements for public hearings. 40 C.F.R. § 123.63(a)(2)(iii). Under the CAA, there are public participation requirements for state NSR permitting programs. *See* 42 U.S.C. § 7470(5); *id.* § 7475(a)(2); 40 C.F.R. §§ 51.160–51.164; *id.* § 51.166(q). If EPA finds that a state permitting program does not meet the CAA's public participation requirements, then EPA "shall require the State to revise the plan as necessary to correct such inadequacies." *Id.* § 7410(k)(5).

C. Enforcement and Resource Requirements

State agencies who have delegated authority must have adequate resources to enforce federal law. Under the CWA, in order for program approval, states must provide adequate funding. 40 C.F.R. § 123.22(b). In addition, one basis for withdrawing a state's CWA program is when the enforcement program fails "to seek adequate enforcement penalties." 40 C.F.R. §

123.63(a)(3)(ii). Similarly, the CAA requires that state NSR permitting programs and regulations are sufficient to assure the achievement of the health-based national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7410(a)(2)(C). Thus, the CAA recognizes that NSR permitting programs are a critical component to achieving the NAAQS. If a state dedicates inadequate resources to its NSR permitting programs, then it increases the risk that its air quality will violate the CAA's bedrock health protections. Further, the state must have adequate personnel, funding and authority under State and local law, without prohibition, to carry out the NSR permitting programs. 42 U.S.C. § 7410(a)(2)(E). This is a central requirement.

II. Texas's CWA and CAA Programs No Longer Meet Federal Requirements

EPA delegated authority to the State of Texas to implement CWA permitting programs, and recently approved the Texas SIP establishing public participation requirements for CAA new source review permits. *See* 63 Fed. Reg. 51,164 (Sept. 24, 1998) (NPDES program delegation); 79 Fed. Reg. 551 (Jan. 6, 2014) (SIP approval).

As described above, State program approval is contingent upon meeting federal requirements. Recent amendments to the Texas Code violate the federal requirements for judicial review, public participation, and resource adequacy for enforcement under the CWA and CAA. As demonstrated below, the amendments make Texas's programs deficient under the CWA and CAA, and EPA has the authority and obligation to revoke delegated CWA authority from Texas and require revisions to the Texas CAA SIP to address these deficiencies.

A. The New Requirements for "Affected Person" Status Restrict Access to Judicial Review of Permitting Decisions

Texas's recently-passed Senate Bill ("SB") 709 narrowed the universe of people who qualify as "affected persons" who may participate in contested case challenges to permit applications. TCEQ's position has historically been that one who fails to participate in the contested case hearing process at the agency, if that process is available in a particular situation, has failed to exhaust his or her administrative remedies. Exhaustion of administrative remedies is a prerequisite to judicial review in Texas state court. So, TCEQ's narrowing of the range of persons who may qualify as "affected persons" deprives some persons of judicial review rights guaranteed to them by federal law. For example, SB 709 added to Texas Water Code § 5.115—the state "affected person" statute—a new subsection a-1 that specifies the variables the TCEQ may consider when making "affected person" determinations, and that section does not include a person's recreational, aesthetic or environmental interests. The section also imports the "harm" showing a person must make to prevail on the merits to the showing a person must make to secure standing to litigate in the first instance. In its September 18, 2015 comments on TCEQ's proposed rules implementing SB 709, EPA identified many of these same concerns with the role of contested case hearings in TCEQ's public participation process.

In order to contest a TCEQ permitting decision under the CWA or the CAA's new source review program, a party may request a "contested case hearing" before the Texas State Office of Administrative Hearings. TEX. WATER CODE ANN. § 5.556; TEX. HEALTH AND SAFETY CODE ANN. § 382.056(n) (applying Water Code § 5.556 procedures to public hearing requests on CAA new source review permits). TCEQ may only grant such a request if the Commission determines

that the person requesting a contested case hearing is an "affected person." In addition, the Texas Administrative Procedure Act requires that a party exhaust all available administrative remedies before the party can seek judicial review of an agency's final decision. TEX. ADMIN. PROCEDURE ACT § 2001.171. In litigation before the Court of Appeals for the 3rd District of Texas, TCEQ has taken the position that "a person must exhaust the contested case hearing procedure before seeking judicial review of the merits of a permit" because a "court may not consider a party's challenge to the merits of a permit if those issues had not been tried first in a contested case hearing." Appellee TCEQ's Brief at 7-8, *Sierra Club v. TCEQ*, No. 03-14-00130-CV (Tex. App. 2015). SB 709 significantly narrows the criteria that TCEQ "may consider" in making "affected person" determinations and these new criteria are more restrictive than federal Article III standing requirements. *See* SB 709, *amendments to* TEX. WATER CODE ANN. § 5.115(n-1). As a result, some interested persons or associations that would be entitled to judicial review in federal court of a federally-issued air or water permit, will be foreclosed from obtaining judicial review in Texas state court if the exact same air or water permit were issued by TCEQ.

The Fourth Circuit has found that EPA's disapproval of a state permit program under the CAA was permissible where the state's standards for who could challenge a permit were more stringent than the Article III requirements for standing. *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996). In that case, Virginia law required a permit opponent to show a "pecuniary and substantial interest" in order to have standing to challenge the permit. *Id.* at 879. The Court held that Virginia's standing requirements were more restrictive than federal Article III standing requirements, which allow challenges based upon, *inter alia*, aesthetic, recreational, or environmental interests. *Id.* EPA disapproved Virginia's permit program because it limited access to judicial review of agency decisions in a manner inconsistent with federal requirements.

Similarly, the overly-restrictive requirements under SB 709 render TCEQ's permitting programs under the nation's environmental laws inadequate: they are stricter than the requirements for Article III standing and limit the public's ability to seek judicial review of permits. Specifically, SB 709 does not include recreational, aesthetic, and environmental interests amongst the criteria that TCEQ may consider in making an affected person determination. EPA has recognized that "if State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose." 61 Fed. Reg. 20,772, 20,775 (May 8, 1996). In accordance with this requirement, the Texas Administrative Code provides that TCEQ "shall" consider the "likely impact of the regulated activity on the use of the impacted natural resource by the person" who is seeking affected person status. 30 TAC §§ 55.203(5), § 55.256. However, SB 709 excludes this as a consideration when TCEQ makes an "affected person" determination, thus narrowing, beyond federal requirements, the types of injuries on which an affected person determination may be based. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("[T]he interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values.").

This narrower definition of affected person under SB 709, in turn, restricts the public's ability to obtain judicial review of a permitting decision in state court. If TCEQ denies a permit

opponent's request for a contested case hearing, then the opponent will be unable to exhaust its available administrative remedies before the administrative agency, which is a prerequisite for judicial review under Texas law. *See Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 527 (Tex. App. 2002) ("[A] trial court is generally without jurisdiction if the plaintiff fails to exhaust his administrative remedies."). Administrative exhaustion is jurisdictional and courts are "obliged" to determine whether parties have exhausted all remedies before the agency. *Entergy Corp. v. Jenkins*, No. 01-12-00470-CV, 2014 WL 5780638, at *2 (Tex. App. Nov. 6, 2014). Furthermore, courts review TCEQ's decisions to deny a hearing request under an abuse of discretion standard. *Sierra Club v. TCEQ*, 455 S.W.3d 214, 222-23 (Tex. App. 2014). Therefore, when a party who has been denied affected person status challenges that threshold determination in state court, the court will review TCEQ's determination under state law, including SB 709, for an abuse of discretion. Applying such a deferential standard of review to TCEQ's application of SB 709's narrow affected person criteria will likely require state courts to affirm any contested case denial based upon a permit opponent's aesthetic, recreational, or environmental interests because those interests are not amongst those that TCEQ "may consider" pursuant to SB 709.

Furthermore, SB 709 requires that the party seeking affected person status demonstrate that TCEQ's decision "likely impact[s]" their interests; this imposes a higher burden on a permit opponent to demonstrate causation at the standing stage than is required under federal law. Federal standing law requires only that the claimed injury be "fairly traceable" to the regulated activity for a party to have standing. Although a permit opponent must "establish causation if they are to prevail on the merits, they need not do so to establish standing." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 793 (5th Cir. 2000). In requiring the impact on the protestant's health, safety, or use of property to be "likely" rather than simply "fairly traceable," SB 709 creates a higher bar to participate in a contested case hearing than required under federal law.

Moreover, SB 709 also permits TCEQ to consider the "merits of the underlying application" in making an affected person determination. While Texas courts may "consider relevant evidence submitted by the parties when necessary to resolve jurisdiction issues," *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004), full consideration of the merits in determining affected person status is inappropriate under federal law. *See Merrimon v. Unum Life Ins. Co.*, 758 F.3d 46 (1st Cir. 2014) (for standing, "a plaintiff does not need to show that her rights have actually been abridged: such a requirement would conflate the issue of standing with the merits of the suit. Instead a plaintiff need only show that she has a colorable claim to such right." (citations omitted)); *Arreola v. Godinez*, 546 F.3d 788, 794–95 (7th Cir. 2008). SB 709's authorization for TCEQ to consider the merits of the application in making an affected person determination, rather than just the evidence relevant to the determination, is inconsistent with federal law.

In summary, SB 709 places impermissible limits on opportunities for judicial review of TCEQ permitting decisions. As a result, Texas's programs for implementing and enforcing the CAA and CWA violate federal requirements. Therefore, EPA should review and withdraw delegated CWA authority from Texas, and find that Texas' CAA new source review SIP is substantially inadequate and warrants prompt corrective action.

As further evidence that the Texas Legislature has disregarded the limits of EPA's delegation of CWA permitting authority, the Texas House passed House Bill ("HB") 912 in 2015, which would have eliminated local governments' opportunity to challenge or seek judicial review of a permit application. HB 912 was left pending in a Senate committee when the State Constitutional time limit on the legislative sessions expired. HB 912 would require TCEQ to dismiss a downstream local government's protest of a TPDES permit application when the protestant is subject to less stringent requirements than the requirements established by the permit. In directly instructing TCEQ to dismiss these protests, this bill would eliminate the ability of local governments to challenge wastewater discharge permits in order to protect the human health and environment of their communities. This is inconsistent with federal requirements for opportunities for judicial review of permitting decisions. *See, e.g.*, 33 U.S.C. § 1342(b)(2) (state programs must "provide an opportunity for public hearing before ruling on each such [permit] application.") The TCEQ raised no objection about HB 912 as being contrary to requirements for Federal delegation under the CWA, or any other objection. Thus, the practice in Texas is that standing, not only for downstream governments, but for all prospective parties, is subject to serious curtailment.

B. The Increased Burden on Permit Opponents in Contested Case Hearings Impedes Effective Public Participation in Permitting Decisions

For those permit opponents who are able to meet the restrictive "affected person" requirements and are granted a contested case hearing, SB 709 now requires that they bear the burden of proving that the permit violates state or federal requirements. Under SB 709, the act of filing a permit and the TCEQ Executive Director's preparation of a draft permit creates the presumption that the permit meets all state and federal requirements and is adequate to protect human health and the environment. *See* SB 709, *amendments to* TEX. GOV'T. CODE § 2003.047(i-1). Rather than the responsibility for demonstrating the permit is adequate falling on the permit proponent in a contested case hearing, the opponent must now present evidence that the draft permit violates a "specifically applicable state or federal requirement." *See id.* § 2003.047(i-2)(2).

By shifting the burden of proof and requiring opponents to put forth evidence demonstrating that the permit violates state or federal requirements, SB 709 limits effective public participation. While federal law does not require an opportunity for a contested case hearing, once the procedure is in place, it must comport with fundamental principles of the adversarial process and must not hinder the public's ability to participate. *See, e.g.*, 42 U.S.C. § 7470(5) (PSD permit decisions must be "made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process"); *id.* § 7475(a) (prohibiting construction unless owner/operator demonstrates requirements are met); 40 C.F.R. § 123.30. Permit opponents, who have far less access to information regarding the permit and its health and environmental impacts, will have to provide experts and acquire sufficient information—much of which is in the possession and control of the permit applicant—to demonstrate that the permit should not be issued. *See, e.g.*, *id.* § 7475(a)(2) (public hearing on PSD permit must afford opportunity for interested persons "to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, [and] control technology requirements.") The public is one

critical source of scrutiny in evaluating permit applications, and shifting the burden of proof to opponents will inhibit the public's ability to effectively and rigorously participate in permitting decisions. This could result in weaker levels of protection in the permit, possibly below federal requirements, and less rigorous assessment by TCEQ, as aided by the public, before it makes its final permitting decisions.

The shift in burden of proof under SB 709 impermissibly hinders opponents' ability to participate in contested case hearings in violation of federal public participation requirements.

C. TCEQ and Local Government Agencies Have Insufficient Resources to Adequately Implement and Enforce Federal Programs

The amendments and recent budget cuts impair state and local agencies' ability to implement and enforce federal programs due to inadequate funding and resources. In delegating authority to Texas under the CWA, EPA relied on Texas's representations that it had sufficient resources to appropriately administer the programs. For example, as part of its delegation determination, EPA "reviewed the resources [TCEQ] will devote to the TPDES program . . . and determined that [TCEQ] has the capacity to administer the program upon assumption." 63 Fed. Reg. 51,164, 51,176 (Sept. 24, 1998). Further, EPA concluded that "the State will need to provide adequate resources for [the period more than two years after delegation] in a timely manner, and the State . . . expressed the intention to do so." *Id.* at 51,177. Finally, EPA warned that "[i]f a state were to fail to ensure adequate resources to administer an authorized program, there could be potential grounds for program withdrawal under 40 CFR 123.62." *Id.* It is clear that EPA's delegation to Texas was dependent on sufficient funding and resources dedicated to implementing and enforcing federal programs, which is no longer the case.

Over the past ten years, Texas's spending on environmental protection has significantly decreased while new energy development in Texas has significantly increased. In the 2007 fiscal year, the Texas Commission on Environmental Quality (TCEQ) spent $596 million. By 2014, this dropped to $374 million;[2] adjusted for inflation, this is a 45% decrease in total agency expenditures.[3] This has been accompanied by an even sharper 51% decrease in general revenue legislative appropriations to TCEQ, from $494 million in 2008 to $305 million in 2015.[4] Texas is out-of-step nationally. In 2012, Texas spent $39.65 per capita on natural resources—this is the fifth-lowest of all the states and only 57% of the national average.[5]

---

[2] Texas Transparency, Spending by Agency, http://www.texastransparency.org/State_Finance/Spending/Spending_by_Agency.php.

[3] Calculated using the U.S. Bureau of Labor Statistics' Consumer Price Index Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl.

[4] Conference Committee Report, Texas General Appropriations Act, 2008 and 2009 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2008-09.pdf); 2010 and 2011 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2010-11.pdf); 2012 and 2013 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2012-13.pdf); and, 2014 and 2015 (http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2014-15.pdf).

[5] U.S. Census 2012 Annual Survey of State Government Finances, https://www.census.gov/govs/state/historical_data_2012.html.

These budget cuts have had a tremendous impact on Texas's clean air program expenditures, which makes up the majority of total TCEQ spending. In 2005, Texas spent $342 million on air quality assessment and planning; in 2013, these expenditures were only $171 million, and TCEQ projects to only spend $119 million in 2017.[6] Spending and staffing for Texas's air permitting programs has remained steady as the number of air permits processed has briskly increased. In 2005, Texas spent $11.4 million dollars on air permitting and reviewed 5,741 permit applications.[7] In 2013, Texas spent $14.3 million dollars and reviewed 9,482 permit applications.[8] Adjusted for inflation, this marks a 42% decrease in expenditures per permit application.[9] At the same time, staffing levels have not increased, so the number of permits that must be reviewed per each air permitting staff member has doubled: from twenty-seven in 2006 to fifty-four in 2014.[10]

Furthermore, another bill the Texas Legislature passed this session, House Bill 1794 ("HB 1794"), would also limit the resources available to implement and enforce the delegated federal programs. HB 1794 caps the penalties that a local government may collect in an environmental enforcement action at $2,150,000 and limits the time period in which local governments may bring such an action. This will decrease the resources available to local agencies that have received CAA and CWA enforcement authority from TCEQ. TCEQ relies upon these local agencies to help broaden and deepen CAA and CWA enforcement capacity within Texas.

If TCEQ and local agencies do not have sufficient funding to implement and enforce the CAA and CWA, Texas would no longer be in compliance with federal law, which provides a basis for EPA to withdraw its CWA delegation and require revisions to Texas's NSR SIP.

III. Relief Requested

EDF and CLI request the following specific relief from EPA:

1. Issue a formal finding of Texas's program deficiencies under the Clean Water Act and Clean Air Act, as discussed above;

---

[6] TCEQ Legislative Appropriations Request by Fiscal Year: 2008 and 2009 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_07/037_07.pdf); 2010 and 2011 (http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/037_10/037_10.pdf); 2012 and 2013 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_12.pdf); 2014 and 2015 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037_14.pdf); and, 2016 and 2017 (https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/037-16.pdf).

[7] *Id.*

[8] *Id.*

[9] *See supra* n. 2.

[10] *See supra* n. 5.

2. Find that Texas's CAA new source review SIP is substantially inadequate, promptly notify Texas of such inadequacies, and require Texas to correct such inadequacies in its state implementation plan within a reasonable time period pursuant to 42 U.S.C. § 7410(k)(5);

3. Promptly put in place a federal implementation plan for Texas's NSR permitting program if the state does not correct the inadequacies in its SIP (*see, e.g.*, 42 U.S.C. § 7410(c)(1) & 40 C.F.R. § 52.21);

4. Conduct a public hearing and issue a notice of CWA deficiency to Texas pursuant to 33 U.S.C. § 1342(c)(3); and,

5. Assume administration of Texas's water permitting programs under the CWA if Texas does not take prompt corrective action as required by that statute.

IV. Conclusion

For the foregoing reasons, EDF and CLI respectfully request that EPA grant our Petition for Administrative Action. Thank you for your time and consideration of this urgent matter.

Dated: January 11, 2016.

Respectfully submitted,

James D. Marston
Vice President, U.S. Climate & Energy
Environmental Defense Fund
301 Congress Ave., Suite 1300
Austin, TX 78701
(512) 478-5161

Richard Lowerre
Executive Director
Caddo Lake Institute
707 Rio Grande, Suite 200
Austin, TX 78701
(512) 482-9345

Graham G. McCahan
Senior Attorney
Environmental Defense Fund
2060 Broadway St., Suite 300
Boulder, CO 80302
(303) 440-4901

28th Annual Texas Environmental Superconference
"It's like déjà vu all over again"

Thursday-Friday, August 4-5, 2016

TCEQ CONTESTED CASE HEARING RULES

"You wouldn't have won if we'd beaten you"

Yogi Berra's Perspective

Derek Seal
Winstead, PC
401 Congress Ave., Ste. 2100
Austin, Texas 78701
(512) 370-2807
dseal@winstead.com

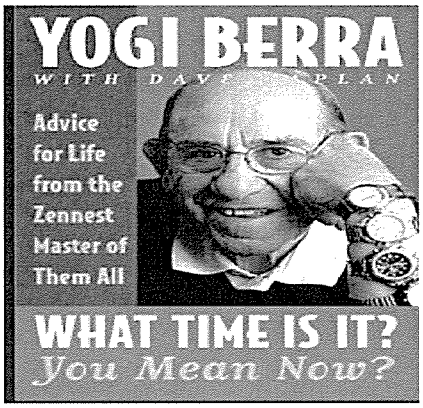
WINSTEAD WINSTEAD PC ATTORNEYS

Contested Case Hearing Defined

"Contested Case" means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing. *Government Code 2003.001(1).*

WINSTEAD WINSTEAD PC ATTORNEYS

We're lost, but we're making good time.



Yogi comments in a magazine interview that applicants in a contested case hearing can seem to be lost in time, even though their lawyer says everything is going as expected.

Applications for TCEQ Permits/Amendments Subject to Contested Case Hearings

- Air Quality - Health & Safety Code, Chapter 382
- Water Quality - Water Code, Chapter 26
- Injection Wells – Water Code, Chapter 27
- Waste – Health & Safety Code, Chapter 361
- Water Rights – Water Code, Chapter 11
- Water Utility Districts – Water Code Chapters 49 & 54
- Radioactive Waste - Health & Safety Code, Chapter 401

Little League baseball is a very good thing because it keeps the parents off the streets.

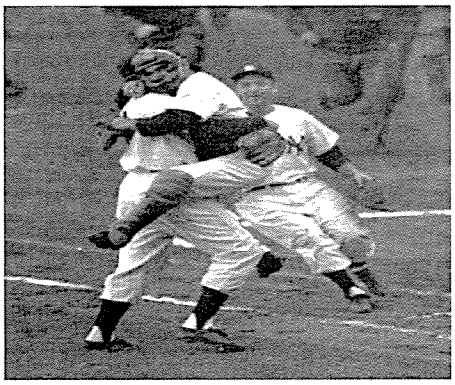


Yogi is explaining to his Little League team that just like Little League keeps parents off the streets, contested case hearings on TCEQ permits keeps lawyers off the streets.

Contested Case Hearing Example: *Corpus Christi Caller Times, August 7, 2015*

Buckeye Texas Partners LLC donated to the newly established Environmental Justice Housing Fund in exchange for the fund's parent group, Citizens for Environmental Justice, dropping a legal challenge against a [TCEQ] permit the company was seeking to expand its operations here. . . . The fund is used to pay for families who live in the area to move out. It was established earlier this year after a different [TCEQ] permit challenge was settled for more than $2 million.

We were the underwhelming underdogs.



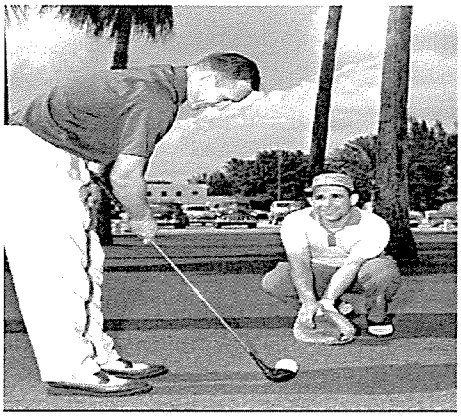
Yogi celebrating the withdrawal of the hearing requests on his permit application.

TCEQ Contested Case Hearing Statistics Annually Since 2010

- 1,300 to 1,650 applications subject to hearing request
- Hearing requests are received on 65 to 95 applications
- 10 to 35 hearings granted

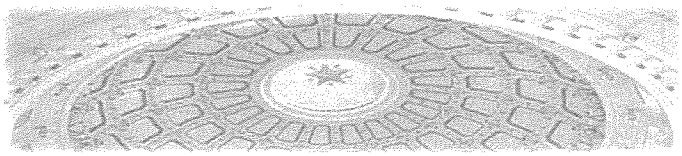
TCEQ Testimony, May 13, 2014
House Environmental Regulation Committee

90% of putts that are short don't go in.



Yogi is using a golfing demonstration to show that although more than 90% of permits are issued without a contested case hearing, hearing requests are granted if the requesters use the right club and are bona fide affected persons.

Legislative Reforms in 2015



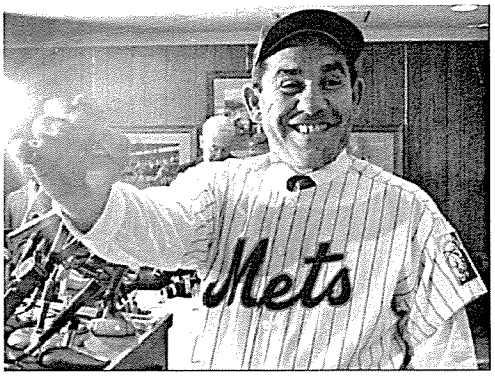
Interim Report
to the 84th Legislature

House Committee on
Environmental Regulation



December 2014

Little things are big.



Yogi is using one of his seemingly little but significant championship rings to explain how concerns about the contested case hearing process became big enough to garner legislative attention.

Coalition of Business and Industry Support for Contested Case Hearing Reform

Contested Case Reform: *Smart Policy to Make Texas Competitive*

SB 709 by Senator Fraser/HB 1865 by Representative Morrison

Today's Contested Case Process Puts Texas at a Competitive Disadvantage Economically

- Texas is competing against other Gulf Coast states for major economic investments.
- Texas is at a serious disadvantage because of the length of time it can take to get a permit for any major environmental project if there is a contested case hearing.
- Companies in competing states can obtain necessary environmental permits in 6 months to break ground. The same permits can take up to 2 years in Texas. Other states point to the slow Texas environmental permitting process when courting industry prospects.

Preserves Public Participation & Environmental Protection

- **SB 709 and HB 1865** do not abolish, repeal, or otherwise eliminate the contested case process. The bills preserve the current public participation opportunities available in the environmental permitting process at TCEQ.
- The bills codify recent Texas court decisions that affirm TCEQ's discretion to determine who is an affected party in a contested case.
- The bills establish that the starting place for a contested case hearing is a presumption that a draft permit issued by TCEQ meets all legal and technical requirements and is protective of public health and the environment. TCEQ is legally obligated to thoroughly review permit applications and only issue a draft permit that meets this standard.

Attracts Investment & Jobs to Texas

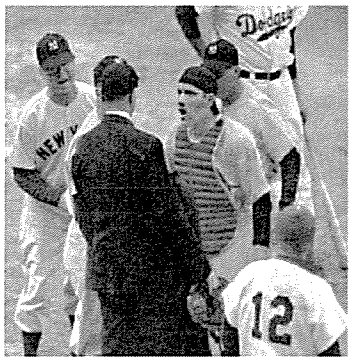
- Texas must ensure an efficient, fair and competitive process that attracts economic investment and jobs to our communities.
- **SB 709 and HB 1865** bring the Texas permitting process closer in line with competing states and makes progress in leveling the playing field for Texas to attract major investments and jobs here.
- The bills deliver certainty to investors by establishing a six-month timeframe for the contested case hearing process.

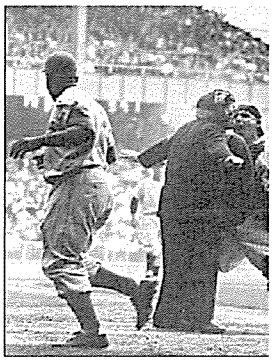
Addresses Abuses of the Contested Case Process

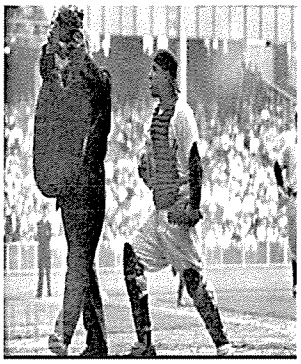
- Some use the contested case process merely to delay or obstruct economic investment in Texas.
- **SB 709 and HB 1865** require an organization requesting a contested case to identify its affected party representative at the time the contested case hearing is requested, not months into the process.
- The bills require that only a person or group that has openly participated in the TCEQ permitting process may trigger a contested case hearing on a permit.

Legislative advertising paid for by the Texas Association of Manufacturers.

There are some people who, if they don't already know, you can't tell 'em.





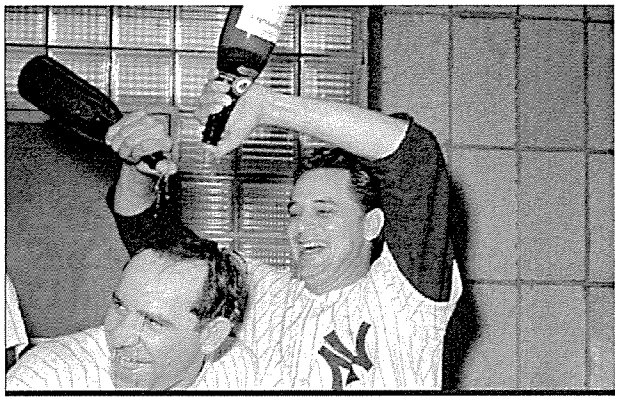


Although the contested case hearing process is difficult to explain to legislators, Yogi offered his opinion to various key legislative leaders about TCEQ's contested cases.

SB 709 – Three Prongs to Contested Case Hearing Reform

- Limits the duration of a hearing to 180 days
- Narrows the universe of hearing requesters who are entitled to a hearing
- A draft permit and sufficient supporting documentation is a *prima facie* demonstration that the application meets all requirements
- Applicable to air quality, water quality, waste, and UIC permit applications filed with TCEQ after September 1, 2015

Congratulations. I knew the record would stand until it was broken.

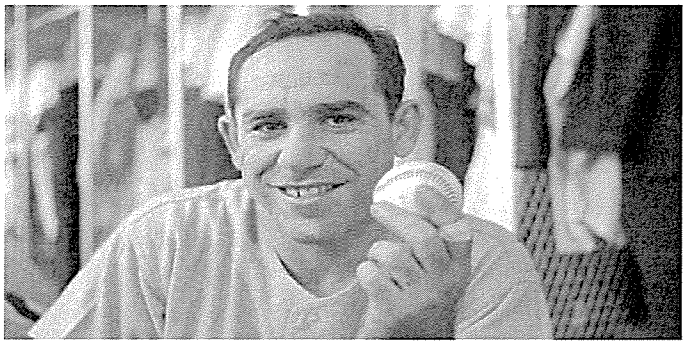


Yogi celebrates Senate Bill 709 being the first major legislative changes enacted regarding the TCEQ contested case hearing reforms since House Bill 801 in 1999.

SB 709 - Prong 1
180 Day Limit on Contested Case Hearing

- After the preliminary hearing, an Administrative Law Judge must issue a Proposal for Decision within 180 days, or an earlier date specified by the TCEQ Commissioners
- The deadline can be extended by agreement of the parties, or if failure to extend would deprive a party of due process or other constitutional rights

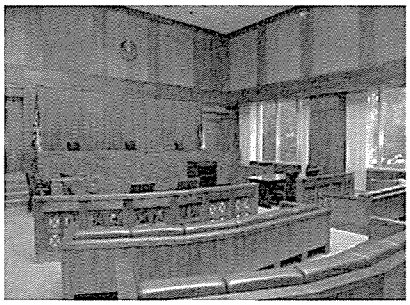
It's not too far; it just seems like it is.



Yogi is using a baseball analogy to explain why he supports the 180 day timeline. He says that he cannot play ball without his TCEQ permits, and that a contested case hearing can delay the game and make it seem like the permit will be issued at the end of a very long road.

SB 709 - Prong 2
Legislatively Narrows the Contested Case Hearing Gate

Codifies *Sierra Club v. TCEQ & Waste Control Specialists* (April 2014), Texas 3rd Court of Appeals



Broad TCEQ Commission discretion to deny hearing requests based on:

- technical data
- expert reports
- the merits of the application
- likely impact of the regulated activity

If you can't imitate him, don't copy him.

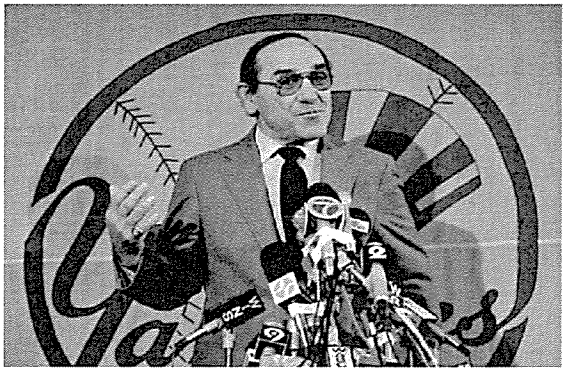


The Texas Legislature codified holdings of the Texas 3rd Court of Appeals the same way Yogi's friend taught Yogi how to smoke a cigar.

SB 709 - Prong 3
Prima Facie Burden of Proof

- An applicant meets a *prima facie* burden of proof that the application complies with all requirements via the filing of the draft permit and supporting technical documents in the permitting file
- Protestants may overcome the *prima facie* demonstration by providing specific evidence that a provision in the draft permit does not meet a legal or technical requirement
- The applicant may rebut any evidence presented by protestants

I wish I had an answer for that because I'm tired of answering that question.



Yogi is attempting to explain that the applicant meets his burden of proof by filing the administrative record, but that the applicant's *prima facie* demonstration does not shift the burden of proof.

EPA's Letter on *Prima Facie* Burden of Proof



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202 – 2733

March 31, 2015

The Honorable Eddie Rodriguez
Texas House of Representatives
Vice Chair
Texas House Committee on Environmental Regulation

Dear Mr. Rodriguez:

I am writing in response to your letter dated March 27, 2015, in which you asked for EPA's input regarding legislation that has been filed this session with the Texas Legislature that would alter the Texas Commission on Environmental Quality's (TCEQ's) permitting processes, and what impact, if any, these proposed statutory changes might have on the EPA's approval or authorization of federal programs in the State. In particular, you asked for input regarding House Bills 1865 and 1247, which would create a presumption during contested case hearings that the draft permit meets all applicable federal and state legal and technical requirements.

As you are aware, federal environmental programs that are approved or authorized to be operated by state agencies must be operated consistent with federal law. EPA is concerned that as currently drafted, House Bills 1865 and 1247 could be read to impact the applicability of federal requirements to federal permit programs being implemented by the TCEQ. These proposed bills appear to shift the burden of proof during a contested case hearing away from the party seeking the permit to those potentially impacted by the permittee's operations, thereby affecting Texas' public participation process. Although a contested case hearing process is not required as part of a federally-approved program, EPA needs to ensure that state processes and legislation do not impede or conflict with federal law. Thus, the changes suggested in House Bills 1865 and 1247 should be reviewed by EPA to ensure they do not interfere with federal requirements or alter the basis for one or more program approvals.

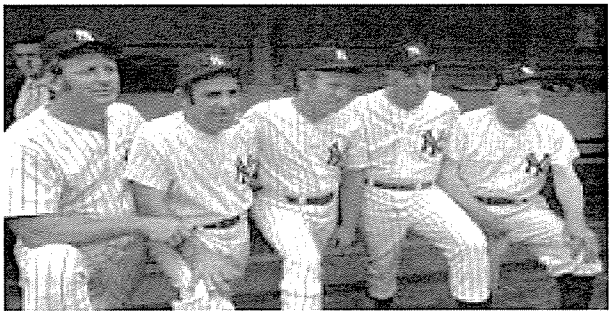
As noted in your letter, the EPA has a long history of consulting with the Texas Legislature in regard to the potential impacts of statutory proposals on the EPA's approval or authorization of federal programs in the State of Texas. We have long enjoyed a productive relationship with the Texas Legislature and are always available to engage in discussions with you about this, FB or any other legislation being considered by the Legislature.

Thank you for your consideration in this matter.

Sincerely,

David W. Gray, Director
External Affairs

Never answer an anonymous letter.

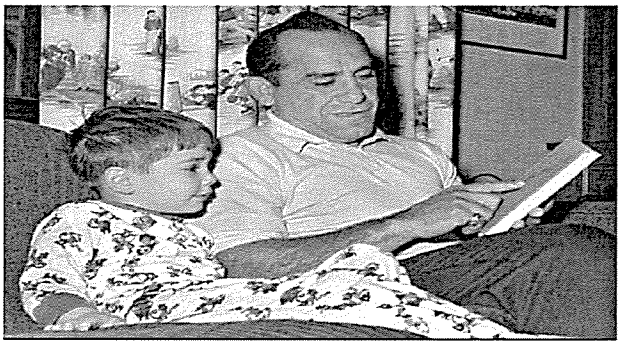


Yogi and his colleagues are not concerned with responding to EPA's letter.

SB 709 – Miscellaneous

- Issues may not be referred unless an affected person raised the issue in a comment
  - no "piggybacking" on issues raised by persons who do not qualify to be a party
- Hearing requesters must raise detailed issues
- Organizations must specifically name the member upon whom their request for a hearing is based
  - No shopping for members who trigger standing at late stages
- Response to Comments must be available prior to the preliminary hearing
- Posting of permit application notices by TCEQ on the internet
- 30 day notice to local legislators prior to issuance of the draft permit

I'm not going to buy my kids an encyclopedia. Let them walk to school like I did.

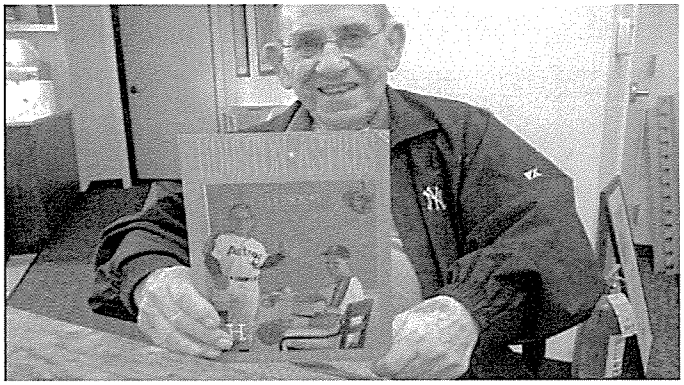


Yogi is explaining to his kids that they need to carefully read Senate Bill 709 and TCEQ's rules to understand the new TCEQ contested case process.

TCEQ Rulemaking

- TCEQ proposed rules were published in the Texas Register on August 21, 2015.
- EPA's comments:
  - Rebutting the *prima facie* demonstration may result in a *de facto* bar to judicial review
  - Consideration of the underlying merits in evaluating hearing requests interferes with standing for judicial review
  - Participation in a contested case hearings should not be a prerequisite to judicial review
- TCEQ adopted rules in December 2015 that are a straightforward implementation of SB 709.

Well, I used to look like this when I was young and now I still do.

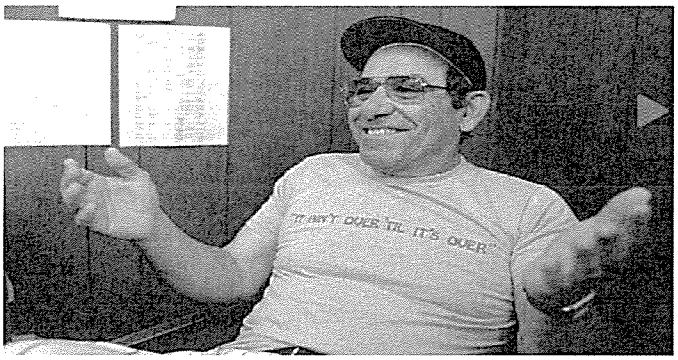


Yogi insists that in the same way his appearance in his later years did not change, EPA's comments on TCEQ's rulemaking are similar to the EPA's comments regarding Senate Bill 709.

Future Developments

- The first contested case hearing that is subject to SB 709 will set precedent for future contested case hearings
  - Discovery logistics
  - Who to depose/right to cross examination if the applicant does not offer experts
  - Whether a 180 timeframe will necessitate the end of pre-filed testimony in favor of live hearings, etc.

I always got nervous the nights we played in the World Series. First pitch I was nervous. Then after that, forget it; I'd start playing.

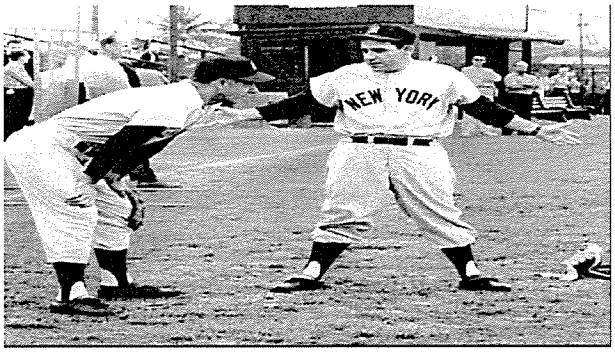


Yogi provides advice regarding the uncertainty in the first contested case hearing under TCEQ's new rules.

Petition Requesting EPA Withdraw of Federal Delegation

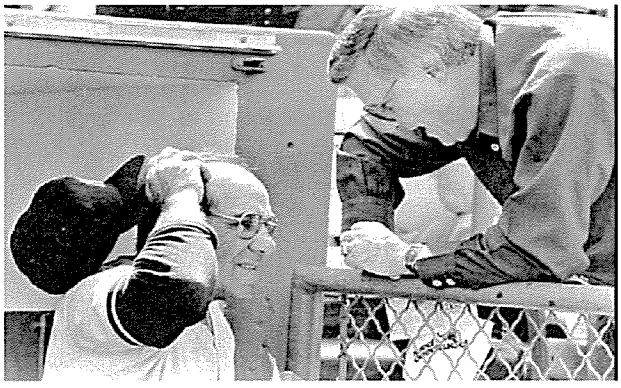
- Environmental Defense Fund/Caddo Lake Institute Petition for Administrative Action
  - Requesting EPA to revoke delegation to TCEQ of permitting authority under the federal Clean Water Act and the federal Clean Air Act
  - Repeated EPA's comments made during the TCEQ rulemaking

Every time I see him, he's not there.



Yogi found it interesting that the arguments raised in the petition for EPA to withdraw from TCEQ delegated authority to issue certain federal permits are the same arguments EPA raised in comments to TCEQ and that protestants raised in a recent case in the Texas 3rd Court of Appeals.

If you ask me anything I don't know, I'm not going to answer.



Yogi advises from his experience with George Steinbrenner to only answer questions for which there is an answer.

WINSTEAD
ATTORNEYS

Derek Seal
Winstead, PC
401 Congress Ave., Ste. 2100
Austin, Texas 78701
(512) 370-2807
dseal@winstead.com

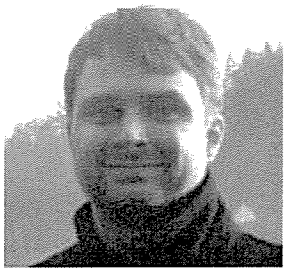
Austin Dallas Fort Worth Houston San Antonio The Woodlands Washington, D.C.



Gindi Eckel Vincent is an author, speaker, blogger, and Counsel at ExxonMobil Corporation.

Gindi has practiced law for 18 years and currently provides environmental legal support for ExxonMobil's downstream and chemicals businesses. Prior to her tenure at ExxonMobil, she worked at Pillsbury Winthrop Shaw Pittman helping energy companies solve complex environmental challenges. Gindi received her J.D. from Vanderbilt Law School, B.A. from Ouachita Baptist University, and studied abroad at University of Oxford's Magdalen College and Moscow State University.

Gindi has served in numerous leadership roles including President of the Women's Energy Network of Houston, the executive committee of Greater Houston Women's Chamber of Commerce, and Chair of the Texas Young Lawyers Association. She has been recognized as one of Houston's 50 Most Influential Women, one of Houston's Top 25 Role Models, and Houston's Outstanding Young Lawyer. Gindi and her husband Bray are the proud parents of six year old triplets.



Gabriel Clark-Leach

Clean Air Act Attorney: Environmental Integrity Project
www.environmentalintegrity.org
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 637-9478

Gabriel has been working as attorney with EIP since graduating from the University of Texas at Austin law school in 2009. His practice focusses on Clean Air Act permitting and rulemaking for coal-fired power plants, petroleum refineries, and petrochemical plants. Gabriel regularly represents public interest organizations and individuals in administrative proceedings before the TCEQ and EPA. He has also represented clients in state court and federal court. Recently, EPA issued two orders partially granting Title V petitions that Gabriel filed concerning Title V permits for the H.W. Pirkey Power Plant and the Deer Park Chemical Plant and Refinery. Gabriel is currently representing several public interest organizations in a Texas state court appeal of the TCEQ's failure to timely grant or deny eight Title V permit applications.

Improving Public Participation in Texas's Title V Permitting Program

28th Annual Texas Environmental Superconference

Gabriel Clark-Leach
Environmental Integrity Project

Table of Contents

I. Introduction 1

II. Analysis 3

A. The Title V Permitting Process Provides Unique Opportunities for Public Involvement in the State's Regulation of Major Sources 3

B. The Title V Permitting Process in Texas is Not Working as it Should 6

C. Why Bother Trying to Fix a Broken Program? 10

1. Title V Permits are Too Important to Ignore 10

2. Though Underutilized, The Title V Permitting Process Encourages EPA to Exercise Broad Discretion to Address Address Non-Compliant Permits 12

III. Issues Addressed by Recent EPA Objections to Texas Title V Permits 12

A. H.W. Pirkey Power Plant 13

B. Shell Deer Park Chemical Plant and Refinery 15

IV. Conclusion 17

Improving Public Participation in Texas's Title V Permitting Program

By: Gabriel Clark-Leach[1]

I. Introduction

Congress created the Clean Air Act's Title V operating permit program in 1990 to "enable . . . source[s], States, EPA, and the public to understand better the requirements to which . . . [a] source is subject, and whether the source is meeting those requirements."[2] Before the Title V permitting program was established, State Implementation Plans ("SIPs") provided the primary basis for enforcement of the Act.[3] Because SIP requirements are often stated in general terms, it is not always clear how SIP requirements apply to particular sources. This ambiguity not only creates uncertainty for regulated entities, it also complicates enforcement actions for state and federal agencies, because judges have difficulty determining whether and how SIP requirements apply to sources.[4] The Title V program was meant to counteract this complexity by compiling, in a single document, all the applicable requirements for each major source.[5] After the Title V permitting program was created, "SIP[s] remain[ed] the basis for demonstrating and ensuring attainment and maintenance with national ambient air quality standards," but Title V permits became the primary method for ensuring compliance with requirements in the SIP for major sources.[6] Title V permits must include monitoring, recordkeeping, and reporting methods sufficient to assure ongoing compliance with each applicable requirement and may not restrict the right of regulators or the public to rely on any credible evidence to demonstrate non-compliance with applicable requirements.[7]

---

[1] Gabriel Clark-Leach has been working as an attorney with the Environmental Integrity Project since 2010. The Environmental Integrity Project is a non-partisan, non-profit public interest organization working to improve enforcement of federal environmental statutes. www.environmentalintegrity.org

[2] *Operating Permit Program*, 57 Fed. Reg. 32250, 32251 (July 21, 1992).

[3] A state's SIP is the set of federally-approved strategies for attaining and maintaining compliance with National Ambient Air Quality Standards and other requirements in the Act, as described at 42 U.S.C. 7410. Provisions in Texas's SIP are listed at 40 C.F.R. § 52.2270.

[4] 57 Fed. Reg. 32,265-66 ("Currently, many enforcement actions are hindered by disputes over which Act requirements apply. Under the permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act's requirements apply to the particular source will be resolved during the permit issuance and subsequent review process.").

[5] 42 U.S.C. § 7661c(a) and (c); *Commonwealth of Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source.").

[6] 57 Fed. Reg. 32,258.

[7] *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits . . . . It also mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions."); *Order Granting in Part and Denying in Part Petition for Objection to Permit*, In the Matter of Southwestern Electric Power Company's H.W. Power Plant, Order on Petition No. VI-2014-01 at 13 (February 3, 2016) ("Pirkey Order") ("Consistent with the CAA, the EPA, states, and citizens can use any credible evidence to prove compliance and non-compliance with the CAA, including compliance and non-compliance with title V permits.")

In theory, the Title V permitting program was supposed to remedy frustrations expressed by different stakeholders by resolving inherent ambiguity in SIP-driven regulation and enforcement: On the one hand, operators would have a clearly-termed permit that explained exactly what they need to do to comply with the Act. On the other, those charged with enforcing the Act (regulators and the public) would not need to waste time arguing with operators about which requirements apply to a particular source. In retrospect, Congress's confidence that the Title V permitting program would significantly simplify enforcement of the Act seems naïve. While it is true that the Act is very complicated and that rules often contain ambiguities, it is also true that the politicization of environmental regulation, the sophistication and competing interests of the stakeholders involved, and the amount of money at stake ensure that enforcement of the Act will always be a highly contested and controversial process. These kinds of deep-seeded political tensions cannot be resolved by shifting the focus of Clean Air Act enforcement from a set of rules to a permit that describes how those rules apply to a particular source. Implementation of the Title V permitting process, just like SIP-based enforcement, will always be a subject of contention.

In states like Texas, where environmental regulation is especially politicized, the Title V program has not come close to achieving its programmatic goals. While the program was intended to improve compliance with applicable requirements, it has been used to relax such requirements or to render them unenforceable.[8] While the program was intended to invite greater federal oversight of state programs by granting EPA authority to review and veto state Title V permitting decisions, EPA has been unable to diligently review Texas's Title V permitting decisions and unwilling to decisively correct improper implementation where it is identified.[9] While the program was meant to require the TCEQ to issue permits that make it clear which requirements apply to each major source on a reasonably prompt timeline, Texas's Title V permits are a "tedious maze" of regulatory citations that create more ambiguity than they resolve and are issued at a slow pace that often serves to frustrate public participation and federal review.[10] In cases where EPA has objected to Texas Title V permits, the TCEQ has declined to make prompt revisions to satisfy the objection as the law requires.[11]

---

[8] *See, e.g., Order Granting Motion for Partial Summary Judgment, Sierra Club v. Energy Future Holdings,* Civil Action No. W-12-CV-108 (W.D. Texas, February 10, 2014) (holding that applicable SIP limits were unenforceable during periods of non-routine operation, because the power plant's Title V permit did not require operator to report exceedances of regulatory limit as deviations during non-routine operation).

[9] For example, EPA sent a fair notice letter to all operators who had obtained a PAL permit prior to EPA's approval of Texas's PAL rules informing them that Texas's PALs were state-only permits that did not modify federal requirements. Nonetheless, EPA has not objected to a Texas Title V permit for incorporating a state-only Texas PAL as a federally-enforceable permit.

[10] *Objection to Title V Permit No. O1420, Citgo Refining and Chemical Company, Corpus Christi Refinery* (October 29, 2010) at 4; *see also,* Public Comments Regarding Draft Renewal Permit No. O1267, available electronically at: http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=200661682016092&doc_name=20160401%20Total%20Title%20V%20Renewal%20Comments%2Epdf

[11] *See, e.g.,* Public Comments on the Executive Director's Response to EPA's Objection to Title V Permit No. O31, available electronically at:

This paper provides an account of the author's experience with the Title V permitting as an attorney for a public interest group in Texas. In particular, this paper will examine how Title V permitting has been used to thwart citizen enforcement of federal requirements and how the TCEQ and EPA's failure to diligently execute their duties has made it difficult for the public to obtain judicial and federal administrative review of State permitting decisions that undermine the enforceability of federal requirements. Despite these difficulties, the paper also explains why increased engagement in the process by public interest groups and federal regulators is crucial.

II. Analysis

A. The Title V Permitting Process Provides Unique Opportunities for Public Involvement in the State's Regulation of Major Sources

While the Title V permitting program is imperfect, public interest organizations must learn to effectively use it to ensure that public health protections established by the Act remain enforceable. Indeed, it is *because* the Title V program's ideal of a clearly enforceable regime that provides an objective and indisputable catalogue of legally applicable requirements for each major source will never be fully realized that members of the public must learn to effectively use the process to protect their interests. If the public (and EPA) opt out of the process, there will be no counterbalance to the constant push against federal oversight by Texas and regulated entities. And despite imperfections in the way the program has been implemented, several features of the program make it a powerful tool for public interest organizations and individuals to influence implementation of the Act's requirements:

First, the program allows for robust public participation whenever a Title V permit is issued, revised, or renewed. Groups and individuals may file comments on and request a hearing concerning most permitting actions.[12] If the TCEQ fails to correct deficiencies identified during the public comment process, those who commented may seek state court judicial review or federal administrative review of the Commission's permitting decision.[13] The right to petition EPA to object to a Title V permit is particularly important, because it is one of the few opportunities the public has to compel EPA to evaluate and respond to complaints about Texas's implementation of Clean Air Act requirements. For example, the Act does not establish an express right to petition EPA to object to New Source Review permits issued under Title I of the Clean Air Act or to compel EPA to correct a state's failure to implement its SIP, even if the

---

http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=675385832016175&doc_name=FOP%2031%2Epdf

[12] 42 U.S.C. §§ 7661a(b)(6) and (7); 30 Tex. Admin. Code §§ 122.312, 122.320, and 122.340.

[13] 42 U.S.C. §§ 7661a(b)(6), 7661d(b)(2); 30 Tex. Admin. Code § 122.360. While Texas's rule does not expressly state that members of the public may petition EPA to object to a minor revision of a Title V permit, this right is guaranteed by the Act and has been recognized by at least one federal court. *Order Granting Motion for Partial Summary Judgment, Sierra Club v. Energy Future Holdings,* Civil Action No. W-12-CV-108 ("Although Texas Title V rules do not enumerate any procedures for objections to applications for minor permit revisions, the rules likewise do not expressly prohibit concerned individuals from objecting to such a revision.").

state's faulty implementation has resulted in widespread violations. The right to petition EPA to object to the TCEQ's Title V permitting decisions is also significant because EPA possesses far more expertise on relevant issues than state or federal court judges and because EPA is not required to defer to the TCEQ's interpretation of federal requirements, including SIP requirements.[14] In cases where EPA denies a petition or declines to answer it, the law provides avenues for appeal.[15] In cases where EPA grants a public petition and the TCEQ declines to correct a permit's deficiencies, the Act requires EPA to revise and issue or deny the permit itself.[16] If EPA fails to fulfill this duty, the Act allows citizens to file suit to force its hand.[17] When EPA takes over the permitting process, it is required to comply with its own federal Title V permitting regulations and need not give effect to Texas's policy determinations regarding provisions in the Texas SIP.[18] In short, when EPA takes over a permit, it takes over a permit. As public participation in the permitting process increases, and as EPA is compelled to take action on deficient Texas Title V permits, it will create an incentive for the TCEQ to pay more attention to public comments and to resolve issues that might draw an objection.

Second, because Title V permits must assure compliance with nearly every emission limit and operating requirement that applies to a particular source, the Title V public participation process is an opportunity for affected individuals and organizations to address just about any aspect of the TCEQ's implementation of Clean Air Act requirements with respect to a particular source.[19] If the TCEQ has erred by omitting an applicable requirement, has included a condition that creates an exemption or undermines the enforceability of an applicable requirement, that issue may be raised in Title V comments. While the TCEQ might not correct deficiencies identified in public comments, the Act allows members of the public to appeal that failure in state court or to petition EPA to object to the permit.

Third, each step of the permitting process is subject to reasonable deadlines, which should ensure that members of the public are able to obtain prompt judicial and/or federal administrative review of the TCEQ's permitting decisions. The TCEQ is required to take final

---

[14] *See, e.g., American Cyanamid Co. v. EPA*, 810 F.2d 493, 498 (5th Cir. 1987) (granting Chevron deference to the EPA's interpretation of a Louisiana SIP even though it conflicted with the state's interpretation of its own regulation); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("[T]he state's interpretation of the regulations incorporated into the SIP, even if binding as a matter of state law, is not directly dispositive of the meaning of the SIP"). Note also, that EPA's objection to a state-issued Title V permit is not itself subject to judicial review. 42 U.S.C. § 7661d(c).

[15] *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2012).

[16] 42 U.S.C. § 7661d(c); 40 C.F.R. § 70.7(g)(5); *Sierra Club* v. *Johnson,* 500 F.Supp.2d 936 (N.D. Illinois, May 21, 2007) (holding that the Administrator has non-discretionary duty to issue or deny permit after 90-day period expires); *Wild Earth Guardians* v. *Jackson,* 885 F.Supp.2d 1112, 1118 (D. New Mexico, August 2, 2012) ("EPA ...concedes that it is subject to an obligation to ... [issue or deny a Title V permit] after the 90-day period expires").

[17] 42 U.S.C. § 7604(a); *see n16.*

[18] 42 U.S.C. § 7661d(c); *see also* 40 C.F.R. Part 71 (Federal Operating Permit Program).

[19] 42 U.S.C. § 7661c(a) and (c). *See also,* 40 C.F.R. § 70.2 (listing "applicable requirements" that must be contained in a Title V permit).

action on a complete Title V application within 18 months after receipt.[20] Unless the TCEQ requests additional information or informs the operator that an application is incomplete, it becomes complete by operation of law 61 days after it is filed.[21] When the TCEQ submits a proposed permit to EPA for review, EPA has 45 days to object to it.[22] If EPA fails to object to a proposed permit, members of the public who commented on the draft permit have 60 days to petition EPA to object to the permit.[23] EPA has 60 days to grant or deny these petitions.[24] If EPA objects to a Title V permit, the TCEQ must revise the permit to satisfy EPA's objection within 90 days.[25] If the TCEQ fails to meet this deadline, EPA must issue or deny the permit itself.[26]

Table 1: Title V Permitting Timeline

Action	**Deadline for Action**	**Total Review Period**
Application Filed	--	--
Application Administratively Complete	61 Days	61 Days
TCEQ Final Action on Complete Application	18 Months	1 Year, 8 Months
EPA Review Period	45 Days	1 Year, 9.5 Months
Public Petition Period	60 Days	1 Year, 11.5 Months
EPA Petition Response	60 Days	2 Years, 1.5 Months
TCEQ Revisions Satisfying Objection	90 Days	2 Years, 4.5 Months
EPA Response to TCEQ Revised Permit	90	2 Years, 7.5 Months

Thus, even in a *worst-case scenario*—where EPA fails to object to a deficient Title V permit until petitioned to do so; takes the entire period of time allowed to respond to a petition before granting the petition; the TCEQ declines to correct the deficiencies identified by the objection; and the EPA corrects and reissues the permit itself—the total period of time from the submission of a complete application to the TCEQ until EPA's final action on it *should* not take more than three years.

[20] 42 U.S.C. § 7661b(c); Tex. Health & Safety Code § 382.0542(b)(1); 30 Tex. Admin. Code §§ 122.139(3), 122.345.
[21] 40 C.F.R. § 70.7(a)(4); Tex. Health & Safety Code § 382.0543(c); 30 Tex. Admin. Code § 122.134(a).
[22] 42 U.S.C. § 7661d(b)(1).
[23] *Id.* at § 7661d(b)(2).
[24] *Id.*
[25] 42 U.S.C. § 7661d(c); 40 C.F.R. §70.7(g)(5).
[26] 42 U.S.C. § 7661d(c); 40 C.F.R. §70.7(g)(5).

B. The Title V Permitting Process in Texas is Not Working as it Should

The TCEQ and EPA's failure to comply with Title V permitting deadlines and the agencies' unwillingness to squarely address permit deficiencies in the way the Act requires has significantly diminished the effectiveness of public participation in Texas's permitting process. The actual situation in Texas is much worse than even the worst-case scenario described above. While this situation is frustrating for public interest advocates, it is not inevitable.

Below is a chart showing the timeline for the TCEQ's review for each of the 20 Title V projects on which the author has filed comments with the TCEQ:[27]

Table 2: Timeline of TCEQ's Review of Title V Permit Renewals[28]

Permit/Source	Date Application Submitted	Date TCEQ Proposed Final Action	EPA Review Period (End)	TCEQ Final Action on Permit	Time from Application to Final Action (18-Month Deadline)
O26 SWEPCO Welsh Power Plant	3/3/2009	*Still Pending*			7 Years, 4 Months, 12 Days and Counting
O1541 Blanchard Refining Galveston Bay Refinery	3/3/2009	*Still Pending*			7 Years, 4 Months, 12 Days and Counting
O1386 Motiva Port Arthur Refinery	4/6/2009	*Still Pending*			7 Years, 3 Months, 9 Days and Counting
O1668 Shell Deer Park Chemical Plant	4/15/2009	1/30/2014	3/21/2014	4/1/2014	4 Years, 11 Months, and 17 Days
O1669 Shell Deer Park Refinery	5/20/2009	1/30/2014	3/21/2014	4/1/2014	4 Years, 10 Months, and 12 Days
O1229 ExxonMobil Baytown Refinery	5/17/2010	6/27/2016			6 Years, 1 Month, 28 Days and Couting
O1498 Valero Port Arthur Refinery	7/5/2011	*Still Pending*			5 Years, 10 Days, and Counting

[27] The author also filed comments on LCRA's Title V renewal, but withdrew those comments pursuant to an agreement with LCRA.

[28] Highlighted fields indicate that a deadline has been missed.

O1445 Flint Hills Corpus Christi East	7/22/2011	*Still Pending*			4 Years, 11 Months, 23 Days, and Counting
O1440 Phillips 66 Borger Refinery	8/12/2013	*Still Pending*			2 Years, 11 Months, 3 Days, and Counting
O2212 Dow Freeport Salt Domes	10/3/2013	5/12/2015	7/3/2015	7/16/2015	1 Year, 9 Months, and 13 Days
O1513 BP Amoco Texas City Chemical Plant	11/14/2013	*Still Pending*			2 Years, 8 Months, 1 Day, and Counting
O3711 Pasadena Refinery	5/30/2014	*Still Pending*			2 Years, 1 Month, 15 Days, and Counting
O3674 Kinder Morgan Galena Park Condensate Splitter	11/12/2014	*Still Pending*			1 Year, 8 Months, 3 Days, and Counting
O1267 Total Port Arthur Refinery	2/3/2015	*Still Pending*			1 Year, 5 Months, 12 Days, and Counting
O12 SPSC Tolk Power Plant	12/22/2015	*Still Pending*			6 Months, 23 Days, and Counting

Table 3: Timeline for the TCEQ's Review of Minor Title V Permit Revisions

Permit/Source	**Date Application Submitted**	**Date TCEQ Proposed Final Action**	**EPA Review Period (End)**	**TCEQ Final Action on Permit**	**Time from Application to Final Action (18-Month Deadline)**
O53 Luminant Martin Lake Power Plant	12/12/2011	*Still Pending*			4 Years, 7 Months, 3 Days, and Counting
O65 Luminant Big Brown Power Plant	12/13/2011	*Still Pending*			4 Years, 6 Months, 15 Days, and Counting
O64 Luminant Monticello Power Plant	12/14/2011	*Still Pending*			4 Years, 6 Months, 14 Days, and Counting
O31 AEP Pirkey Power Plant	3/27/2013	7/15/2014	9/5/2014	9/22/2014	1 Year, 5 Months, and 26 Days

O1553 ExxonMobil Baytown Olefins Plant	8/29/2014	4/21/2016	6/10/2016	6/29/2016	1 Year and 10 Months

Table 4: Timeline for EPA's Review of Petitions Concerning Above-Listed Projects

Permit/Source	Petition Filed	EPA Response to Petition	Days from Petition to EPA Response (60-Day Deadline)
O2212 Dow Freeport Salt Domes	8/31/2015	*Still Pending*	319 Days and Counting
O1668 Shell Deer Park Chemical Plant	5/19/2014	9/24/2015	493 Days
O1669 Shell Deer Park Refinery	5/19/2014	9/24/2015	493 Days
O31 AEP Pirkey Power Plant	10/29/2014	2/3/2016	462 Days

In sum, of the twenty Title V projects the author has commented on (beginning in 2012), none are complete. The TCEQ has only taken action on five of the twenty applications. The TCEQ's action on four of these five applications was late. Of the fifteen applications that are still pending, the TCEQ's action on thirteen is already overdue. In some cases, the TCEQ has missed its deadline to issue or deny a permit by several years. Of the five permits issued by the TCEQ, the author has petitioned EPA to object to four.[29] EPA partially granted three of these petitions, but only after EIP brought suit to compel its response.[30] The fourth petition is still pending. The TCEQ's response to EPA's objections was also tardy and, in each case, failed to correct the deficiencies identified in the objection order. While the Clean Air Act requires EPA to correct and re-issue (or deny) these permits itself, EPA has not yet indicated whether or when it will fulfill this duty.

To make the permitting process function better, members of the public must learn to better utilize the procedural hooks provided by the Act to effectively assert their interests. Just as operators have learned that they may use Title V permits to effectively limit the enforceability of federal requirements; just as the TCEQ has learned that—in the absence of diligent EPA oversight—it can use the permitting process to push forward controversial policies, the public must learn how to use provisions in the law that allow them to compel the TCEQ and EPA to perform their duties and to seek substantive review of decisions that fail to give full effect to the Act's public health protections.

When Congress created the Title V permitting program, it anticipated that state permitting agencies may attempt to thwart judicial and federal administrative review of Title V

[29] The deadline to petition EPA to object to the remaining permit has not passed.
[30] The issues addressed by EPA's objection orders are addressed in Section III below.

permitting decisions by dragging out the permit issuance process.[31] As a countermeasure to state delay, the Act requires state Title V permitting programs to "provide that a failure . . . to [timely] act on a permit application or renewal applications . . . shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought . . . to require that action be taken by the permitting authority of such application without additional delay."[32] Consistent with the Clean Air Act, the Texas Health and Safety Code provides a cause of action for any person who has commented on a pending application to compel action on the application without delay after the TCEQ's 18-month deadline has passed.[33] In such cases, the Act also anticipates and blocks the argument that the TCEQ lacks resources to timely issue Title V permits by (1) requiring states to impose fees on operators at a level sufficient to fund a properly implemented permitting program and (2) requiring that fees collected actually be used to fund Title V permitting activities.[34] Thus, the TCEQ's failure to fulfill its obligation to collect enough money to properly implement its program is not a good reason for a judge to decline to order the Commission to act on languishing permit applications without additional delay. Though this cause of action has not been widely used, it provides a promising avenue to compel the TCEQ to act on permit applications.[35]

Likewise, the Clean Air Act provides a cause of action for members of the public to compel EPA to perform its obligations under the Act. If EPA fails to timely grant or deny a Title V petition, the petitioner may sue the Administrator under 42 U.S.C. § 7604(a). If EPA fails to timely take control of an objectionable permit after the state agency fails to correct it, citizens may sue to compel EPA's action under this same provision. These Title V deadline suits are usually very straight-forward and allow plaintiffs to recover attorney fees.

To improve implementation of the Title V permitting process in Texas, public interest organizations and individuals must be willing to use *all* the opportunities for involvement the Act provides. Because groups and individuals in Texas have not yet learned to make effective use of these opportunities throughout the entire permitting process, their interests are not adequately represented in permits issued by the TCEQ. It is not enough to file compelling comments on a draft permit if the TCEQ dismisses those comments without changing the permit. It is not enough to petition EPA to object to a permit if EPA refuses to answer the petition. It is not even enough to compel EPA to object to a permit if the TCEQ refuses to modify the permit consistent with EPA's instructions. To effect real change, groups and individuals must be willing to diligently exercise their right to compel the TCEQ to issue permits that straight-forwardly and unambiguously assure compliance with the Act's public health protections.

---

[31] *See, e.g.*, 42 U.S.C. § 7661a(b)(7).
[32] *Id.*
[33] Tex. Health & Safety Code §§ 382.0542(c) and 382.0543(d).
[34] 42 U.S.C. § 7661a(b)(3); 40 C.F.R. § 70.9.
[35] EIP, Sierra Club, Air Alliance Houston, and Texas Campaign for the Environment have a case pending in Travis County District Court to compel the TCEQ to action on eight applications for new or renewed Title V permits. *See*, Plaintiffs' Amended Original Petition, *Environmental Integrity Project et al v. TCEQ*, Cause No. D-1-GN-15-005394, In the District Court of Travis County, Texas, 201st Judicial District.

C. Why Bother Trying to Fix a Broken Program?

If the Texas Title V permitting program is broken, why should public interest organizations, individuals affected by pollution from major sources, and EPA sink any time, trouble, or money into trying to fix it? Indeed, since Title V permits simply compile substantive requirements established elsewhere, would it not be more effective for the public and EPA to focus on improving Texas's regulation of air quality through engagement with the rulemaking and NSR permitting processes? The short answer is "no."

1. Title V Permits are Too Important to Ignore

While engagement in the rulemaking and NSR permitting processes is important, it is not a substitute for diligent engagement in the Title V permitting process. This is so, because Title V permits are the primary vehicle for enforcing Clean Air Act requirements against major sources.

While EPA and public interest organizations may believe that the most effective way to influence the TCEQ's regulation of major sources is to focus on rulemakings that establish requirements that apply to many sources, controlling what Texas's rules say is not sufficient to control how they are implemented. As Congress recognized when it created the Title V program, there is often ambiguity about the way rules apply to particular sources. And even in cases where a rule's text is unambiguous about how it should apply to individual sources, that clarity matters little if the TCEQ's Title V permits establish exceptions to those clear requirements or include provisions that make them unenforceable.

The Title V permitting process is the primary forum the Clean Air Act provides for interested parties to hash out what the law requires of each major source and courts have not been inclined to second guess the content of a Title V permit in an enforcement proceeding. For example, federal courts have repeatedly held that the Act precludes citizen suits to enforce otherwise applicable requirements that have been omitted from a Title V permit. The reasoning behind these holdings is concisely explained in *Sierra Club v. Otter Tail,* the most well-known decision on this issue:

> Sierra Club contends that the 2001 modifications at the plant made it a "new source" subject to NSPS limits on sulfur dioxide emissions, and that Otter Tail has continued to operate the plant in violation of those limits. The district court dismissed this claim as an impermissible collateral attack on Otter Tail's Title V operating permit. It concluded that Sierra Club should have raised the claim administratively, under 42 U.S.C. § 7661d, during the period when the South Dakota DENR and EPA were reviewing Otter Tail's application for a modification to its permit to authorize the project. Had it done so, Sierra Club would have been able to obtain judicial review of the NSPS issue in this court under *id.* § 7607(b)(1). Because § 7607(b)(2) precludes judicial review of EPA action "with respect to which review could have been obtained" under subsection

(b)(1), the district court determined that it lacked subject matter jurisdiction over the NSPS claim.[36]

Courts in Texas have adhered to Otter Tail to dismiss claims against operators for violating requirements that are omitted from or undermined by Title V permits issued by the TCEQ. In an unreported case from the Federal District Court for the Southern District of Texas, a judge followed *Otter Tail* to dismiss a citizen group's attempt to enforce New Source Review heat input limits from a permit that was not incorporated into the defendant's Title V permit.[37] In a more recent decision, a federal district court for the Western District of Texas held that a Compliance Assurance Monitoring ("CAM") provision in the Title V permit for Luminant's Big Brown Power Plant, which stated that Luminant did not need to report exceedances of the deviation limit during planned MSS activities made it impossible for plaintiffs to demonstrate non-compliance with the applicable standard during those periods.[38] This same court also held that Luminant's application for a minor revision to incorporate exemptions to SIP requirements contained in the Company's NSR permit made the exemptions effective even before the TCEQ approved the application.[39]

While federal courts have not held that 42 U.S.C. § 7607(b)(2) prohibits EPA from enforcing requirements improperly omitted from Title V permits,[40] some decisions suggest that EPA's failure to promptly object to deficient permits may bar enforcement of omitted requirements.[41]

Because Title V permits often serve as the final word on which requirements apply to each major source, and because the Title V permitting process is the most complete method for engaging and challenging Texas's implementation of Clean Air Act requirements, the public and EPA must become more involved in the process to improve compliance with the Act.

---

[36] *Otter Tail Power Co.*, 615 F.3d 1019.

[37] *Texas Campaign for the Environment v. Lower Colorado River Authority*, 2012 WL 1067211, *6-10 (S.D. Texas, March 28, 2012) (unreported).

[38] *Order Granting Partial Summary Judgment, Sierra Club v. Energy Future Holdings*, Civil Action No. W-12-CV-108 (W.D. Texas, February 10, 2014).

[39] *Sierra Club v. Energy Future Holdings,* 2014 WL 2153913 at *19 (W.D. Texas, March 28, 2014) (unreported) ("Further, because Luminant has applied for a revision of its Title V permit and identified the revised Permit No. 56445 as a provisional term and condition, Texas's EPA-approved regulations make this current version of the permit federally enforceable in this case."). Note, however, that Luminant may still be held liable for violations of SIP requirements during the application review process if it is later determined that the requested changes cannot be made through the minor revision process. 30 Tex. Admin. Code § 122.210(d) ("The permit holder may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.").

[40] *United States v. Ameren*, 2016 WL 728234 at *26-27 (E.D. Missouri, February 24, 2016).

[41] *See, e.g., United States v. AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994).

2. Though Underutilized, The Title V Permitting Process Encourages EPA to Exercise Broad Discretion to Address Non-Compliant Permits

As the facts discussed above demonstrate, the TCEQ's control over the pace of Title V permit reviews and EPA's reticence to object to Title V permits may effectively shield operators from enforcement for non-compliance with applicable requirements that are omitted from or undermined by their Title V permits. On the other hand, it may not. While it may take years, Title V permits must eventually be issued and permitting decisions may eventually be challenged by the public or vetoed by EPA. While EPA has been reluctant to exercise its full oversight authority under Title V in recent years, interested parties should be aware that Title V creates a balance of power that favors EPA over states in cases where EPA does object to a permit. First, if EPA objects to a Title V permit, the state permitting authority must promptly revise the permit to meet the objection.[42] Texas's rules expressly require the TCEQ to revise its permits to "satisfy" any EPA objection.[43] States may not extend this deadline by challenging EPA's objection in court, because EPA's objection orders are unreviewable.[44] When the state permitting authority revises a permit in response to an objection, EPA must determine whether the response resolves the objection. If a state permitting agency fails to timely submit a revised permit or EPA determines that the state's response is insufficient, EPA is obligated to take control of the permit and may revise the permit to reflect its own policy preferences with respect to applicable requirements.[45] EPA's determination that a state-agency's revision in response to an objection fails to satisfy the objection is also unreviewable.[46] EPA's intervention in the Title V permit process is only subject to judicial review *after* EPA has revised and issued or denied a final Title V permit.[47] While operators may challenge a permit issued by EPA, federal courts must defer to EPA's permitting decisions and policy preferences, and will overturn the permit only if it is manifestly unreasonable. Thus, using the Title V permitting process to characterize source obligations in a way that conflicts with the letter of the law or with EPA's reading of the law creates a risk that EPA will be able to force revisions to the permit that reflect policy determinations on a wide range of requirements that the operator may view as unfavorable. The more present that threat becomes, the greater the incentive to omit objectionable terms will become.

III. Issues Addressed by Recent EPA Objections to Texas Title V Permits

EPA has recently issued two orders partially granting and partially denying three petitions to object to Title V permits issued by the TCEQ. These orders favorably resolve many issues that have also been raised in EIP's comments concerning pending Title V applications.

---

[42] 42 U.S.C. § 7661d(b).
[43] 30 Tex. Admin. Code § 122.360(h)(2).
[44] 42 U.S.C. § 7661d(c).
[45] *Id.*
[46] *Id.*
[47] *Id.*

The most recent order objects to a minor revision of the Title V permit authorizing operation of Southwestern Electric Power Company's ("SWEPCO") H.W. Pirkey Power Plant. The other two objection orders address the TCEQ's renewal of Title V permits authorizing operations of Shell's Deer Park Chemical Plant and Refinery. This section of the paper summarizes the substance of these objections and the status of these three permitting projects.

A. H.W. Pirkey Power Plant

The TCEQ's permitting practices with respect to planned maintenance, startup, and shutdown activities at major sources, particularly at coal-fired power plants, has been a significant focus of EIP's recent work in Texas. Though the Clean Air Act prohibits states from issuing permits that modify SIP requirements with respect to any stationary source, the TCEQ has issued many NSR permits in recent years that appear to do just that.[48] Specifically, the TCEQ has issued permits to nearly every coal-fired power plant in Texas that purport to authorize particulate matter and opacity emissions exceeding applicable limits in the Texas SIP during planned MSS activities.[49] Many of these permits were issued without any public notice or opportunity for comment. However, because operators must apply for a revision to incorporate changes to a source's NSR permits, EIP has been able to file comments objecting to the TCEQ's proposed incorporation of SIP exemptions as federally enforceable conditions of power plant Title V permits. EIP has flagged this issue in comments concerning Title V permits for the H.W. Pirkey Power Plant, the Welsh Power Plant, the Martin Lake Power Plant, and the Big Brown Power Plant. To date, the TCEQ has only responded to EIP's comments concerning the MSS authorization for the H.W. Pirkey Power Plant.

In his response to EIP's H.W. Pirkey comments, the TCEQ's Executive Director claimed that 30 Tex. Admin. Code § 101.221(d) provided him with the necessary authority to revise regulatory limits.[50] Commenters petitioned EPA to object to the permit, because: (1) the SIP limits apply during periods of planned MSS; (2) the TCEQ's rule at § 101.221(d) does not provide the Executive Director with authority to revise SIP limits; (3) incorporation of the MSS authorization's SIP exemption undermines the enforceability of SIP limits; and (4) the MSS authorization may not be incorporated into Pirkey's Title V permit via minor revision, because it

---

[48] 42 U.S.C. §§ 7410(i) and 7416.

[49] The specifics of this practice are addressed at length in a petition EIP filed with EPA on behalf of several public interest organizations requesting that the Administrator take various actions to enforce the Texas SIP and Title V of the Clean Air Act. Available electronically at: http://www.environmentalintegrity.org/wp-content/uploads/Petition-to-EPA-over-Texas-coal-plants.pdf

[50] 30 Tex. Admin. Code § 101.221(d) provides that: " Sources emitting air contaminants that cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules when so determined and ordered by the commission. The commission may specify limitations and conditions as to the operation of such exempt sources. The commission will not exempt sources from complying with any federal requirements, including New Source Performance Standards (40 Code of Federal Regulations Part 60) and National Emission Standards for Hazardous Air Pollutants (40 Code of Federal Regulations Parts 61 and 63)."

violates an applicable requirements and minor revisions may not be used to establish changes that violate applicable requirements.[51]

On February 3, 2016, EPA issued an order partially granting and partially denying the Pirkey petition.[52] EPA objected to the permit, because it created ambiguity about the applicability of SIP limits during planned MSS activities and because it relaxed BACT requirements for periods of maintenance (as opposed to startup and shutdown). EPA provided TCEQ with the following instructions for correcting the permit's deficiencies:

> In responding to this objection, the EPA directs the TCEQ to revise Pirkey's 2014 Title V Permit to ensure that it requires that the opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) apply during periods of planned MSS. The EPA also directs the TCEQ to revise the title V permit record accordingly. To the extent that the title V permit incorporates by reference conditions from an NSR permit, such incorporation may not supersede the opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), which are distinct applicable requirements derived from the SIP. Because the SIP contains no source-specific exemption, the title V permit must still ensure that the SIP opacity and PM limits apply during periods of planned MSS. The TCEQ may address the EPA's objection in various ways, including, but not limited to, revising only the title V permit. One option for addressing this objection would be to clarify the title V permit terms and conditions as described above.
>
> Another option to respond to this objection may be to revise the title V permit to incorporate the 2014 NSR Permit in lieu of the 2012 NSR Permit and also to revise the 2014 NSR Permit to provide the necessary clarity and, thus, avoid potentially conflicting terms and conditions in the Title V permit. To the extent the TCEQ elects to revise the 2014 NSR Permit and that permit continues to include alternative BACT limits for startup and shutdown periods, the TCEQ should ensure that its permitting record explains how those limits reflect BACT for the operating conditions that apply. We note that Condition 18.D. of the 2014 NSR Permit applies to planned maintenance, as well as startup and shutdown periods. While the EPA has recognized the permissibility of properly justified alternative BACT limits for periods of startup and shutdown, we have also stated that such limits are not justifiable for periods of scheduled maintenance or for malfunctions. . . . As the EPA explained in its 2010 Texas SIP Approval, maintenance activities can and should be scheduled during process shutdown. . . . Thus, to the extent the 2014 NSR Permit continues to include alternative BACT

[51] The petition is available electronically at: https://www.epa.gov/sites/production/files/2015-08/documents/pirkey_petition2014.pdf

[52] This order is available electronically at: https://www.epa.gov/sites/production/files/2016-02/documents/pirkey_response2014.pdf

limits for periods of MSS, the TCEQ should address why it believes such alternative limits are needed for planned maintenance.[53]

The TCEQ did not follow these instructions to revise the Pirkey permit. Instead, the Executive Director revised the permit's statement of basis to include a new interpretation of the SIP limits at issue. According to the revised permit, Texas never intended for its SIP opacity and particulate matter limits to apply to coal-fired power plants that use an electrostatic precipitator to control emissions of particulate matter during non-routine operation.[54] Because the SIP limits never applied to the Pirkey power plant during non-routine operations, the Executive Director contends that the MSS authorization could not establish an exemption to applicable requirements.

EIP timely filed comments on the proposed revision contending that (1) the proposed revision is too late and that EPA must revise issues with the permits itself; (2) the Executive Director's revision fails to address EPA's objection to alternative BACT requirements for maintenance activities at the power plant; and (3) the Executive Director's interpretation of SIP provisions conflicts with the unambiguous language of the rules, the structure of the SIP, and is contradicted by the TCEQ's past practices.[55] Though EPA did respond to the Executive Director's proposed revision on July 15, 2016, the author has not yet been able review this filing.

B. Shell Deer Park Chemical Plant and Refinery

On May 19, 2014, EIP, Sierra Club, and Air Alliance Houston filed two petitions requesting that the Administrator object to the TCEQ's renewal of Title V permits for Shell's Deer Park Chemical Plant and Refinery.[56] These petitions raised many different issues related to the permits' incorporation by reference of NSR authorizations, monitoring sufficiency, and the incorporation of construction authorizations issued under rules that were not part of the Texas SIP. On September 24, 2015, EPA issued an order partially granting and partially denying these petitions.[57]

EPA objected to the permits for the following reasons and provided the following instructions for the TCEQ to correct the permits' deficiencies:

---

[53] Pirkey Order at 11-12.
[54] The revised statement of basis is available electronically at: http://tceq.state.tx.us/assets/public/permitting/air/publicnotice/24487SOB.pdf
[55] These comments are available electronically at: http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=675385832016175&doc_name=FOP%2031%2Epdf
[56] The Deer Park Chemical Plant petition is available electronically at: https://www.epa.gov/sites/production/files/2015-08/documents/dpr_petition2014.pdf The Deer Park Refinery petition is available electronically at: https://www.epa.gov/sites/production/files/2016-03/documents/shell_deer_park_refinery_petition_5-20-14.pdf
[57] EPA's Deer Park Oder is available electronically at: https://www.epa.gov/sites/production/files/2015-09/documents/dpr_response2014.pdf

- The Title V permits' incorporation by reference of permit by rule requirements was ambiguous about how PBRs applied to units at the chemical plant and refinery;

  To correct this deficiency, EPA instructed the TCEQ to: (1) identify the specific units covered by each claimed PBR; (2) identify PBRs that established site-wide requirements; (3) ensure that the Title V permits include all current PBRs and do not reference permits that no longer apply; (4) provide a list of emission units for which only general requirements are applicable; (5) make it clear that records for demonstrating compliance with PBRs must be made available to the public; and (6) ensure that the Title V permits are clear and unambiguous as to how PBR emission limits apply to particular emission units.[58]

- The chemical plant Title V permit failed to include any monitoring requirements to assure compliance with PM_{10} limits for pyrolysis furnaces;

  To correct this deficiency, EPA instructed the TCEQ to "identify the monitoring, recordkeeping, and reporting to be used to assure compliance with the PM_{10} emission limits," and "document the rationale for how these monitoring requirements assured compliance[.]"[59]

- Monitoring requirements in the chemical plant and refinery Title V permits failed to assure compliance with VOC and benzene limits;

  To correct this deficiency, EPA instructed the TCEQ to identify Title V permit monitoring sufficient to assure compliance with applicable VOC and benzene limits and to explain on the record the rationale for the selected monitoring.[60]

- The permits failed to address Shell's apparent non-compliance with 30 Tex. Admin. Code § 116.116(d), which requires PBR authorization for sources covered by a Subchapter B permit to be incorporated into the Subchapter B permit upon renewal or amendment.

  To correct this deficiency, EPA instructed the TCEQ to (1) explain the status of PBRs identified by the petitions; and (2) demonstrate how the TCEQ's actions regarding PBRs claimed by Shell was consistent with 30 Tex. Admin. Code § 116.116(d)(2).[61]

In response to EPA's objection order, the TCEQ revised the permits' statements of basis to include an explanation as to the sufficiency of the monitoring requirements in the Title V

[58] Shell Deer Park Order at 15-16.
[59] *Id.* at 17-19.
[60] *Id.* at 27.
[61] *Id.* at 36.

permits, inserted project numbers associated with PBRs that did not apply site-wide into the Title V permits' NSR Authorizations by Unit Reference Tables, identified PBRs that applied site-wide, and revised the statements of basis to explain the TCEQ's policy for incorporating or consolidating PBRs into existing permits. EIP, Sierra Club, and Air Alliance timely-filed comments explaining why these changes did not address EPA's objections and petitioned EPA to revise and re-issue the permits itself.[62] EPA also filed comments identifying deficiencies in the revised permits.[63] To date, EPA has not responded to EIP's petition to revise and re-issue the permits, nor has it indicated whether or when it plans to take additional action to ensure that Shell's permits are revised to assure compliance with applicable requirements.

IV. Conclusion

The Title V permitting process is a crucial—perhaps *the* crucial—point of interaction between stakeholders concerned about Texas's implementation of Clean Air Act requirements. While the Act provides other avenues for public and federal regulatory oversight of Texas's regulations and policies, gains achieved through these avenues will do little to improve compliance with the Act unless they are made enforceable against specific sources in Title V permits. To date, public interest groups and EPA have failed to make sufficient use of the opportunities for intervention that the Title V permitting program encourages. These opportunities are real and must be used to improve the enforceability and transparency of the Act's public health protections in Texas.

[62] EIP, Sierra Club, and Air Alliance Houston's comments are available electronically at: http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=829378952016124&doc_name=Gabriel%2D2%2Epdf

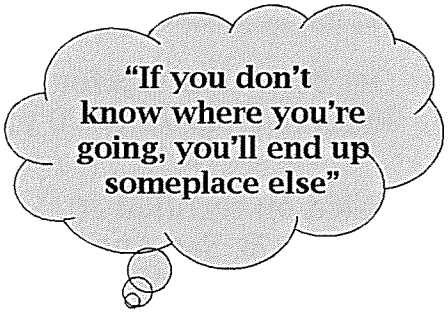
[63] EPA's comments on the revised permits are available electronically at: http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=456459642016125&doc_name=Shell%20Deer%20Park%20Comment%20Letter%20050316%2Epdf

Steve Hagle, P.E.

Deputy Director, Office of Air
Texas Commission on Environmental Quality

Steve Hagle is the Deputy Director for the Office of Air at the Texas Commission on Environmental Quality. Steve has also worked as the Director and Assistant Division Director of the Air Permits Division; as a technical specialist in the Operating Permits Division; in the Office of Air Quality Deputy's office; and the New Source Review Permits Division as a permit engineer, Technical Specialist, and manager of the Chemical and Technical Specialist Sections. He joined the Texas Air Control Board in 1987. Prior to 1987 he worked for NL Industries conducting laboratory evaluation of enhanced oil recovery prospects and field work with Measurement-While-Drilling well logging tools. He graduated from Oklahoma State University with a B.S. Degree in Chemical Engineering.

Telephone: (512) 239-1295
e-mail address: steve.hagle@tceq.texas.gov



Steve Hagle, P.E.

Deputy Director
TCEQ Office of Air

Overview

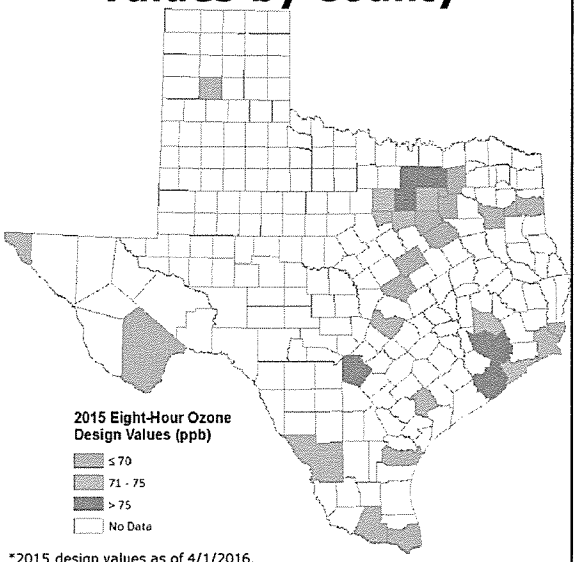
- 2015 Ozone Standard
- Start-up, Shutdown, Malfunction (SSM) SIP call
- 2010 SO_2 1-hour Standard

2015 Eight-Hour Ozone NAAQS

- Oct 2015 - NAAQS for ground-level ozone lowered from 75 to 70 ppb.
- Based on certified 2015 air monitoring data, DFW, HGB, San Antonio, & El Paso areas are measuring levels above the new ozone standard.
  - State recommendations expected to be based on 2015 Design Value (Oct 2016)
  - Final EPA designation expected to be based on 2016 Design Value (Oct 2017)

CSA/CBSA	County	2015 8Hr Ozone DV (ppb)
Dallas-Fort Worth	Denton	83
Houston-The Woodlands	Brazoria	80
Dallas-Fort Worth	Tarrant	80
Houston-The Woodlands	Harris	79
San Antonio-New Braunfels	Bexar	78
Dallas-Fort Worth	Collin	76
Dallas-Fort Worth	Dallas	75
Dallas-Fort Worth	Parker	75
Houston-The Woodlands	Galveston	73
Dallas-Fort Worth	Hood	73
Dallas-Fort Worth	Johnson	73
Houston-The Woodlands	Montgomery	73
El Paso-Las Cruces	El Paso	71
Dallas-Fort Worth	Rockwall	70
Killeen-Temple	Bell	69
Dallas-Fort Worth	Ellis	68
Longview-Marshall	Gregg	68
Beaumont-Port Arthur	Jefferson	68
Austin-Round Rock	Travis	68
Dallas-Fort Worth	Kaufman	67
Waco	McLennan	67
Tyler-Jacksonville	Tyler	67
Longview-Marshall	Harrison	66
Dallas-Fort Worth	Navarro	66
Beaumont-Port Arthur	Orange	66
Amarillo-Borger	Randall	66
Corpus Christi-Kingsville-Alice	Nueces	65
Brewster County	Brewster	64
Dallas-Fort Worth	Hunt	64
Victoria-Port Lavaca	Victoria	64
Brownsville-Harlingen-Raymondville	Cameron	59
Laredo	Webb	59
McAllen-Edinburg	Hidalgo	56

2015 Ozone Design Values by County

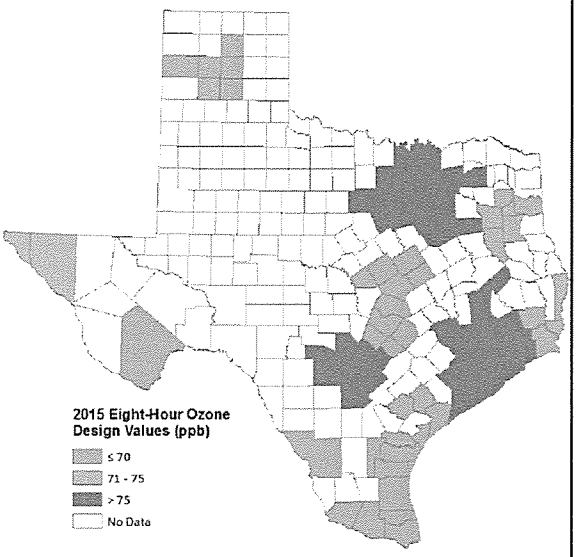


*2015 design values as of 4/1/2016.

**The Brewster County, Randall County, and Polk County monitors are part of the Clean Air Status and Trends Network (CASTNET) of monitors and report data directly to the EPA. Polk County does not have a valid design value for 2015.

2015 Ozone Design Values by CSA

CSA/CBSA	2015 8Hr Ozone DV (ppb)
Dallas-Fort Worth	83
Houston-The Woodlands	80
San Antonio-New Braunfels	78
El Paso-Las Cruces	71
Killeen-Temple	69
Austin-Round Rock	68
Beaumont-Port Arthur	68
Longview-Marshall	68
Tyler-Jacksonville	67
Waco	67
Amarillo-Borger	66
Corpus Christi-Kingsville-Alice	65
Brewster County	64
Victoria-Port Lavaca	64
Brownsville-Harlingen-Raymondville	59
Laredo	59
McAllen-Edinburg	56



*2015 design values are calculated as of 4/1/2016.

**The Brewster County, Randall County, and Polk County monitors are part of the Clean Air Status and Trends Network (CASTNET) of monitors and report data directly to the EPA.

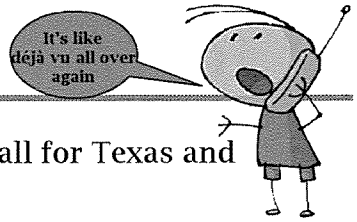
Ozone Design Values (DV)

Area	Certified 2015 Ozone Design Values (parts per billion)	Preliminary 2016 Ozone Design Values as of July 15, 2016 (parts per billion)
DFW	83	80
HGB	80	78
San Antonio	78	71
El Paso	71	70
Hood County	73	69
Beaumont-Port Arthur	68	68
Killeen-Temple-Fort Hood	69	67
Austin	68	66
Tyler-Longview-Marshall	68	66
Waco	67	63
Victoria	64	63
Corpus Christi	65	63
Big Bend	64	59
Lower Rio Grande Valley	59	57
Mission-Edinberg-Mercedes	56	55
Laredo	59	54

Estimated Impacts of 2016 4th High Values on Classification

Area	Prelim 4th High in 2015 (ppb)	4th High in 2016 for Potential Marginal (ppb)
Austin	73	77-106
BPA	74	72-101
Corpus	65	83-112
DFW	88	48-77
El Paso	72	71-100
HGB	86	50-79
Killeen-Temple	67	74-103
San Antonio	80	61-90
Tyler-Longview	68	79-108
Victoria	70	81-110
Waco	68	82-111

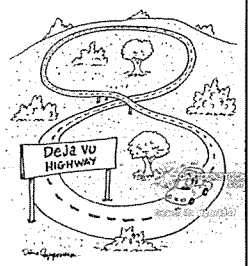
SSM SIP Call



- 6/12/15: EPA published SIP Call for Texas and 35 other states
- FCAA prohibits affirmative defense provisions in SIPs
  - TCEQ's affirmative defense criteria in 30 TAC §101.222(b)-(e) are approved in Texas' SIP
- Challenge in D.C. Court of Appeals
- All States are required to revise their SIPs by 11/22/16 or be subject to a FIP

SSM SIP Call – TCEQ Rulemaking

- 7/6/16: TCEQ proposed new §101.222(k) and (l)
  - NOT proposing to remove affirmative defense
  - (k): TCEQ rules are not intended to limit federal court jurisdiction or discretion
  - (l): Delayed applicability until all appeals are extinguished
- 7/8 – 8/8/16: Comment Period
- 8/8/16: Public hearing in Austin
- 11/2/16: Proposed adoption date



2010 1-hour SO_2 Standard

- June 2010 – new 1-hour standard of 75ppb
- July 2013 – initial designations finalized only for areas monitoring over standard
  - No areas in Texas monitoring over standard
- March 2, 2015 Sierra Club v. EPA Consent Decree
  - Sierra Club and others sued for failure to complete designations
  - CD set schedule for EPA to complete all designations
  - States appealing

2010 1-hour SO_2 Standard

- Designation Schedule
  - July 2, 2016: Areas with new monitored violations and large sources - 12 EGUs in Texas
    - Extended to August 31st for four Luminant sources
  - Dec 31, 2017: Sources that will be not meet the January 1, 2017 monitoring date contained in the Data Requirements Rule (DRR)
  - Dec 31, 2020: Sources that will be monitored

2010 1-hour SO_2 Standard

- Data Requirements Rule (DRR) - 8/10/15
  - States must characterize air quality for SO_2 sources ≥2,000 tpy
    - Modeling, monitoring, or enforceable limits
  - 24 Sources in Texas ≥2,000 tpy threshold (includes 12 CD sources)
- TCEQ continues to hold the position that designations should be based on monitoring not modeling
- However, some of the deadlines in the CD and DRR compelled the use of modeling

2010 1-hour SO_2 Standard

- Twelve large CD sources
  - Seven designated unclassifiable/attainment
  - One unclassifiable
  - Four TBD
- Remaining Twelve DRR sources
  - One will be characterized by modeling
  - TCEQ will deploy monitors at eleven – does not include Big Brown, Martin Lake, and Monticello
- Monitors
  - Must be operational 1/1/2017
  - EPA has approved all monitor locations



Suzanne Murray
Partner
suzanne.murray@haynesboone.com

Dallas
2323 Victory Avenue
Suite 700
Dallas, Texas 75219

T +1 214.651.5697
F +1 214.200.0710

Practices and Industries

- Environmental
- Permitting, Regulatory Counseling and Compliance
- Energy, Power and Natural Resources
- Litigation
- Energy Litigation

Education and Clerkships

- J.D., University of New Mexico School of Law, 1994, *Natural Resource Law Reporter*, Editor, 1993-1994
- B.A., Trinity University, 1990
- Intern to Reena Raggi, Eastern District of New York, Spring 1994
- Intern to Michael H. Dollinger, Southern District of New York, Spring 1994

Bar Admissions

- Texas
- New York

Court Admissions

- U.S. District Court for the Southern District of New York
- U.S. District Court for the Eastern District of New York

For more than 20 years, Suzanne Murray has enjoyed the practice of environmental law in the public and private sectors. She is a strategic thinker committed to achieving results who has experience as a member of the federal Senior Executive Service, as an in-house counsel and in large law firms in Texas and New York. Through this practice, Suzanne has proven results in all major areas of environmental law, and has built strong and productive relationships with State and Federal partners, the regulated community, environmental advocacy groups and communities which benefit her clients and help them achieve win-win outcomes in complex, multi-faceted environmental resolutions.

Suzanne draws on this real world experience to help clients achieve their objectives in acquisitions, rule challenges, government investigations, permitting, defense of enforcement actions, crisis management and emergency response, compliance audits, fuels, climate regulation and carbon trading matters. She currently represents many Fortune 50, mid-cap and small companies in the energy, industrial, finance, real estate, agricultural and retail sectors.

Prior to joining Haynes and Boone, Suzanne served at the U.S. Environmental Protection Agency (EPA) and was the Regional Counsel for Region 6 from 2008 to 2015. As Regional Counsel she was the general counsel for the EPA Region responsible for all regulatory and enforcement matters in Arkansas, Louisiana, New Mexico, Oklahoma and Texas. This universe includes 75 percent of the Petrochemical production in the nation, 50 percent of the refinery capacity, 58 percent of the oil production, 68 percent of natural gas production, 60 percent of the country's hazardous waste and the country's largest beef and poultry-producing states. During her time at the EPA, Suzanne was awarded several commendations for "Outstanding Performance" by the EPA and DOJ. Under her leadership, her office also constantly produced 20 percent of the Nation's environmental results with only 8 percent of the national resources.

As a result, Suzanne had a seat at the table for policy and enforcement matters in every major environmental issue over the last 10 years, including the Clean Power Plan, the Waters of the US Rule,

Regional Haze and the EPA National Enforcement Priorities. She has substantive experience in all federal environmental statutes, particularly the CAA, CWA, RCRA, CERCLA, OPA, TSCA, NEPA and FIFRA. Suzanne personally negotiated more than 50 judicial and administrative cases as counsel for EPA and as special counsel for DOJ, including several global settlements under the refinery initiative. She drafted and negotiated NOVs and FOVs and administrative and judicial complaints, consent decrees and consent orders. She was responsible for referring cases to DOJ and has a deep understanding of the law and process for both civil and criminal matters.

In this capacity she represented EPA in high profile matters such as the "Deepwater Horizon" response, Hurricane Katrina response and EPA's enforcement of all national enforcement priorities, including Next Generations Enforcement, the Refinery Initiative, the Power Plant Initiative, Energy Extraction, Hazardous Waste Enforcement including Mineral Processing, Clean Water Act, including drinking water, NPDES and OPA programs, and Clean Air Act initiatives involving NSR, Title V and Air Toxics. Most of these major cases involved multi-year litigations and negotiations.

On the counseling side, she has a comprehensive understanding of Title V permitting requirements, deviation reporting, the development of compliance plans and Title V objections and permit challenges. She also has a first-hand understanding of the reporting requirements for excess emissions and emergency response. She supervised the issuance of GHG permits in the state of Texas and successfully defended two challenges to GHG permits at the EAB. She also has experience in all aspects of water permitting, underground injection, RCRA permitting and cost recovery, removal and remedial actions under Superfund laws and re-development under federal and state Brownfields programs and state and federal audit policies.

Suzanne also serves on the advisory board for the Kay Bailey Hutchison Center for Energy, Law and Business at the University of Texas.

Selected Publications and Speeches

- "Environmental Enforcement and Next Gen Enforcement Tools: Views from Enforcement Defense Counsel," webinar, presenter, Air & Waste Management Association, December 8, 2015.
- "Confronting Climate Change: Policies and Opportunities," moderator, the French Americ-Can Climate TalkS (FACTS), Rice University, October 2, 2015.
- "Views from Enforcement Defense Counsel: What to Make of

EPA's NextGen Enforcement," panelist, the 2015 Air & Waste Management Association – 108th Annual Conference & Exhibition, Raleigh, North Carolina, June 24, 2015.

Professional and Community Activities

- Texas Horse Park Foundation Board – Board Member
- Chair, American Ireland Fund, Emerald Ball, 2014
- Girl Scout leader for more than 10 years
- Advocacy for people with cognitive disabilities
- Member Angels of Charity, Catholic Charities of Dallas
- Advisory Board, Kay Bailey Hutchison Center for Energy, Law and Business at the University of Texas

COMPANIES FACING INCREASING SCRUTINY OVER ENVIRONMENTAL-RELATED DISCLOSURES

Suzanne Beaudette Murray and Phong Tran[1]

Entities that file disclosures with the Securities and Exchange Commission ("SEC") should be aware of recent actions by regulators and shareholders questioning the sufficiency of opinion statements made in environmental-related disclosures. Most recently, on March 31, 2016, the SEC announced a settlement with Navistar International Corp. to address charges that the company, an Illinois-based heavy duty trucking company, misled investors when it "failed to fully disclose the company's difficulties obtaining Environmental Protection Agency ("EPA") certification" of a particular truck engine. The SEC also filed separate charges in the Northern District of Illinois against the company's former CEO, Daniel Ustian, alleging that he aided and abetted Navistar's violations when he "engaged in a cover-up" that misled investors.

The SEC suit follows recent enforcement efforts by the New York Attorney General ("NYAG") and shareholder lawsuits that also alleged misstatements and omissions in corporate disclosure documents relating to (i) compliance with environmental regulations, (ii) environmental risk factors, and/or (iii) corporate governance disclosure requirements. Moreover, the U.S. Supreme Court's decision in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), has created additional uncertainty regarding liability for opinion statements made in disclosure documents. In light of these markers, a perfect storm for increased regulatory intervention is brewing.

I. The Navistar Enforcement Action

According to the SEC complaint, Navistar allegedly spent more than $700 million to develop an engine using exhaust gas circulation ("EGR") to lower nitrogen oxide emissions sufficient to meet Clean Air Act standards. An EGR-only engine would be highly competitive, as others in the industry were using EGR in addition to selective catalytic reduction ("SCR") technology so their engines would meet environmental limits. However, the company experienced substantial difficulties in developing and certifying a competitive EGR engine. Instead of disclosing these difficulties, Navistar allegedly misled investors in numerous SEC filings, press releases, and public conference calls regarding the status of obtaining EPA certificates for the EGR engine. Ultimately, Navistar announced that it was abandoning the development of its engine and adopting the SCR technology used by its competitors. Following this announcement, Navistar's stock price plummeted. Without admitting or denying the charges, Navistar agreed to a $7.5 million penalty to settle the SEC's allegations.

In the SEC's complaint against Ustian, the SEC accuses the CEO of a "progressively desperate and fraudulent scheme" that led investors to believe that Navistar's efforts to produce a commercially competitive EGR-only engine were proceeding without major engineering or EPA roadblocks. "When public companies and top executives discuss important regulatory developments with investors, they must tell the whole truth," said SEC director of enforcement Andrew J. Ceresney.

RETURN TO TABLE OF CONTENTS

II. The New York State Attorney General

Under New York's Martin Act, the NYAG is authorized to prosecute "any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or promise." Pursuant to these powers, the NYAG can subpoena any document from any entity in the state, keep an investigation secret (or make it public), and file civil or criminal charges at any time. Although originally intended to combat financial fraudsters, the NYAG has employed the Martin Act since 2002 for a variety of purposes, including using the act's broad powers to enforce the NYAG's own climate change agenda.

On November 6, 2015, the NYAG issued a Martin Act subpoena to ExxonMobil seeking information related to the company's climate change research and its concurrent funding of outside groups whose purpose was to question climate change theories. ExxonMobil filed its response in December 2015.

Shortly thereafter, on November 9, 2015, Peabody Energy—the world's largest private-sector coal company—settled an eight-year dispute with the NYAG regarding allegedly false and materially incomplete statements Peabody made about climate change in its 10-K filings. This dispute stems from Martin Act subpoenas issued by the NYAG in 2007 to five companies (including Peabody) in which the NYAG alleged that the companies, among other things, did not attempt to evaluate or quantify the financial implications of greenhouse gas ("GHG") regulations or include any strategies to comply with reduced carbon dioxide emissions requirements. In 2008 and 2009, three of the companies reached settlements pursuant to which each company agreed to retool disclosure practices regarding financial risks associated with climate change. Peabody settled under similar terms. The investigation into the remaining company is still pending.

III. The Omnicare Decision

On March 24, 2015, the Supreme Court issued its decision in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*. The ruling addressed when an issuer may be held liable for material misstatements or omissions under Section 11 of the Securities Act of 1933 for statements of opinion in a registration statement. Among other things, the Supreme Court held that an issuer can be liable for a statement of opinion, even if honestly believed, if it fails to disclose material facts that conflict with what a reasonable investor would, in context, expect about the issuer's basis for the opinion.

The Court's holding could potentially create substantial uncertainty regarding liability for opinion statements, inevitably increasing litigation over the issue. Although addressing Section 11 liability, the *Omnicare* decision is instructive as to how courts and regulators may determine liability for opinion statements made in other types of disclosure filings—in particular, disclosures related to environmental matters. In fact, lower courts have already applied the *Omnicare* reasoning to other securities law provisions beyond Section 11.

IV. Shareholders and the Class Action Bar

Not surprisingly, class action attorneys have filed a number of recent lawsuits against companies alleging deficiencies in environmental-related disclosures. For example, two lawsuits were recently filed in the Southern District of New York related to a November 2015 disaster in Brazil

in which at least 13 people were killed and many others injured when a dam burst at a mining site. Among the allegations, the plaintiffs alleged that the company disregarded the "precarious" environmental conditions at the mine and issued "materially false and misleading statements concerning the Company's commitment to safety . . . at the mine sites."

Further, in *Loritz v. Exide Technologies*, investors brought suit accusing Exide, an automotive and industrial battery maker, and its executives of falsely touting the company's compliance with environmental regulations and failing to disclose that one of the company's plants was releasing dangerous levels of hazardous waste. These actions prompted state regulators to shut down the plant and seek $40 million in penalties. The plaintiffs won certification of a single liability-only class in July and are currently seeking certification for a group of noteholders.

Similarly, a shareholder class action was filed against Sempra Energy alleging that a natural gas leak at the company's storage facility caused local residents to become sick. Notably, the shareholder complaint followed on the heels of a lawsuit by local residents for damages allegedly caused by the leak. According to the shareholder complaint, Sempra, among other things, failed to publicly disclose that "an extended hazardous gas leak would constitute a serious threat to public health and safety."

Plains All American Pipeline, L.P., was also subject to various shareholder lawsuits stemming from an oil pipeline spill along the Pacific coastline. Among the claims, the plaintiffs have alleged that the company failed to disclose a lack of internal controls relating to its pipeline operations and falsely touted compliance with federal environmental regulations. Further, the plaintiffs allege that the company issued false and misleading statements following the spill, allegedly downplaying the magnitude of the environmental damage caused by the oil spill.

Shareholder scrutiny of environmental disclosures is likely to only intensify with the promulgation of stricter greenhouse gas emissions regulations. Indeed, the Environmental Defense Fund, one of the world's largest non-profit environmental organizations, recently published a report directed at oil and gas industry investors scrutinizing the industry's disclosure practices with respect to GHG emissions. In particular, the report urges investors to demand better climate risk disclosure and sets out metrics to support quantitative reporting of methane gas emissions.

V. Federal Regulatory Scrutiny Is Ramping Up

In 2010, the SEC adopted its landmark interpretive guidance on climate change disclosure. To date, the guidance has had little effect on the breadth of companies' environmental disclosures. But its adoption shined a spotlight on the SEC's growing concern in this area. Importantly, the SEC's general reporting rules require disclosure of any additional material information necessary to make required statements not misleading. In the environmental context, these rules require disclosure of "all other environmental information of which the average prudent investor might reasonably be informed." To date, the SEC has not filed any actions concerning climate-related disclosure issues, but recently published a concept release "seek[ing] public comment on modernizing certain business and financial disclosure requirements," including sustainability disclosures like climate change and resource scarcity.

Three recent events, moreover, have set the stage for increased regulatory scrutiny. First, in January 2016, the U.S. Government Accountability Office issued a report reviewing the effectiveness of the SEC's guidance on climate disclosure. Among other things, the report revealed that since issuing the guidance in 2010, the SEC has taken only one of three planned actions to determine if additional action is needed on climate change disclosures. According to the report, no additional actions were taken because of shifting circumstances and evolving priorities at the SEC.

Next, on March 14, 2016, more than 30 investor groups promoting sustainable investments asked the SEC to investigate whether Enviva Partners LP—a wood pellet manufacturer—is complying with the SEC's guidance on climate change disclosures. The groups claim that the SEC's lax enforcement of the guidance can lead "to disclosures which exaggerate climate benefits" which can "lead to misguided investment decision making." Among the claims, the groups allege that Enviva "misleads investors on the environmental and climate benefits of their products." Moreover, the letter asks the SEC to more closely monitor companies' climate benefit claims; establish and enforce guidelines for those claiming climate benefits; and require companies to disclose the assumptions that underlie those claims.

Finally, on March 24, 2016, the SEC issued a letter stating that ExxonMobil must allow shareholders to vote on a proposal that would force the company to outline for investors how climate change and related legislation could affect the company's profitability. This ruling follows an earlier disclosure by the Justice Department that it had forwarded a request to the FBI to investigate whether ExxonMobil violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act, by not disclosing the dangers of climate change to its investors. Congressman Ted Lieu of California has also asked the SEC to investigate whether the company made misstatements in its filings. Additionally, Congressman Lieu and two other Congress members asked the Justice Department to investigate whether Shell Oil violated RICO for participating in a similar "pattern of deception" as ExxonMobil. Together, they too asked the SEC to investigate whether Shell Oil "similarly violated securities laws by not disclosing climate change related material risks."

VI. Takeaways

In light of heightened scrutiny, companies must be vigilant about disclosing environmental risks—especially risks related to climate change—in their filings and carefully consider all known and potential factors when formulating an environmental risk profile. Companies should also determine whether additional disclosures are necessary and ensure the accuracy and consistency of all information disseminated to regulators and investors.

Suzanne Beaudette Murray is a Partner at Haynes Boone in the Dallas office.

Phong Tran is an Associate at Haynes Boone in the Dallas office.

ENDNOTES

[1] Copyright © 2016.

Matt Paulson

Bracewell LLP

Matt represents companies in the oil and gas, refining, power and chemical manufacturing industries on environmental matters, including strategic permitting, regulatory compliance, investigations, enforcement and civil and appellate litigation. His work includes advising clients on environmental issues arising under the Clean Air Act, the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act, and other state and federal environmental laws.

Matt regularly advises clients at the early project planning stages, assisting with scoping a broad array of regulatory and permitting requirements across all media and disciplines, from environmental and safety, to US Coast Guard and US Department of Transportation requirements, to land use, local registration and licensing obligations, and other federal, state, and local requirements that can affect project timing and viability.

Matt also provides assistance on crisis management and prevention, including responding to major accidents, conducting internal investigations associated with allegations of criminal and civil wrongdoing, preparing risk management, emergency response, and business continuity plans, and preparing for inspections by regulatory authorities.

P: +1.512.494.3659

F: +1.512.479.3920

matthew.paulson@bracewelllaw.com

Risk Management Program Amendments and Control of Methane Emissions from Oil and Gas Sources

28th Annual Texas Environmental Superconference

by Matt Paulson, Bracewell LLP

EPA Proposes Broad Expansion of Risk Management Program Regulations

Table of Contents

I. Introduction. 2

II. The Proposed Changes to the Incident Investigation Requirements Could Increase the Number and Type of Incidents that Require Investigation. 2

III. The New Definition of "Root Cause" Could Mandate Identification and Correction of Management System Failures Even Where No Such Failures Exist. 2

IV. The Proposed Rule Could Allow Regulators to Require Third-Party Audits in Response to Almost Any RMP Violation. 3

V. Rigid Third-Party Auditor Qualifications Could Exclude Many Experienced Auditors. . 3

VI. Requirement to Broadly Disclose Audit Findings Could Undermine the Audit Process. . 3

VII. Safer Technology and Alternatives Analysis Could Require Facilities to Prepare Burdensome Justifications for Technology and Design Choices. 3

VIII. Coordination Requirements Could Overwhelm Some Local Responders, Exposing Facilities to Enforcement. 4

IX. Public Disclosure Requirements Could Impose Unnecessary Burdens and Mandate Public Release of Sensitive Security Information. 4

X. Possible Legal Arguments Supporting Challenges to Final Rule. 4

XI. Conclusion. 7

I. Introduction

The U.S. Environmental Protection Agency's ("EPA" or the "Agency") proposed amendments to the Risk Management Program ("RMP") regulations ("Proposed Rule"), which follow the Agency's 2014 Request for Information, would impose significant changes to existing prevention program, emergency response preparedness, and information availability requirements, without furthering the program's goal of accident prevention and release detection.

II. The Proposed Changes to the Incident Investigation Requirements Could Increase the Number and Type of Incidents that Require Investigation

Although EPA describes the changes as a "clarification" of existing requirements, the revised definition of "catastrophic release" and associated changes to the incident investigation requirements have the potential to significantly increase the number of incidents requiring formal investigation. The current rule's limitation to incidents with offsite impacts would be expanded to cover incidents with only onsite impacts, and the type of incidents that require a formal investigation would be expanded beyond the current rule's focus on incidents that present imminent and substantial endangerment.

In addition, because the current rule requires incidents that could reasonably have resulted in catastrophic releases to be investigated in the same manner as incidents that actually resulted in such releases, the expanded definition has the potential to cause a significant increase in the number of formal investigations required under the program. Finally, the Proposed Rule's reference to such incidents using the undefined term "near miss" could create further confusion regarding when a formal investigation is required, exposing owners/operators to increased enforcement risk.

III. The New Definition of "Root Cause" Could Mandate Identification and Correction Of Management System Failures Even Where No Such Failures Exist

Under the current rule, facility owners/operators are required to discuss the factors that contributed to incidents in investigation reports. The Proposed Rule would replace this requirement with a requirement to determine the "root cause" of the incident. Although many companies already utilize some form of root cause analysis as part of their general approach to incident investigation, the Proposed Rule would define "root cause" in such a way that human error could never be the underlying cause of an incident.

More importantly, the Proposed Rule could dictate and prejudge the outcome of the investigation by mandating that the cause be a management system failure, and then require that system failure to be corrected. Because every incident does not stem from a correctable failure in a facility's management system, the Proposed Rule could threaten management system integrity by requiring unnecessary and counterproductive changes in response to each and every incident.

IV. The Proposed Rule Could Allow Regulators to Require Third-Party Audits in Response To Almost Any RMP Violation

Under the Proposed Rule, any significant noncompliance with the RMP rules could allow a regulator to require that a facility's next compliance audit be conducted by a third party pursuant to a series of new requirements. This would include an alleged violation of the RMP's general duty clause, a broad and vague mandate to operate a safe facility, a violation of which EPA often alleges in RMP enforcement simply because an incident occurred. Although the preamble to the Proposed Rule highlights the "limited" instances where the third-party audit requirement would be triggered, EPA would have wide latitude to require any facility to conduct a third-party audit simply by conducting an inspection and alleging a General Duty Clause violation.

V. Rigid Third-Party Auditor Qualifications Could Exclude Many Experienced Auditors

The Proposed Rule sets forth rigid qualifications for third party auditors that could essentially exclude the vast majority of experienced auditors. Specifically, auditors must not only have knowledge of the RMP program and required certifications and training, but the lead auditor must be a licensed professional engineer. In addition, the auditors must not only have experience with the source-type being audited, but with the specific process units involved. Finally, no member of the audit team can have conducted consulting services for the owner/operator in the past three years, and they cannot provide such services for an additional three years following the audit. In fact, the requirements are so difficult to meet, that EPA has proposed to build in a process whereby facilities can petition the agency to waive certain requirements, anticipating on the front end that the requirements are too difficult to meet.

VI. The Requirement to Broadly Disclose Audit Findings Could Undermine the Audit Process

The Proposed Rule would require draft and final audit reports to be provided to EPA and local emergency planners. In addition, facilities would be required to submit a response to each finding and a schedule for "promptly" addressing each finding. EPA makes clear in the preamble that the audit reports and findings responses would become public once submitted.

Requiring public disclosure of audit findings minimizes the freedom and candor that is so essential to the audit process. Where such reports will be made public, public relations and legal exposure considerations are heightened. In addition, consideration would need to be given to making the reports understandable to a lay audience. All of these factors necessarily affect the process in a way that does not benefit the prevention and detection of accidental releases.

VII. Safer Technology and Alternatives Analysis Could Require Facilities to Prepare Burdensome Justifications for Technology and Design Choices

The Proposed Rule would require facilities in three industry sectors – chemical manufacturing, coal and petroleum products manufacturing, and paper manufacturing – to evaluate the "feasibility" of safer technologies and alternatives when conducting process hazard assessments.

Areas to be evaluated include inherently safer technologies and designs, passive and active measures, and procedural measures.

EPA rejected the same requirement in its 1996 RMP rulemaking because the Agency did not believe it would yield significant benefits. EPA now claims that such measures and technologies are "becoming more widely available and being adopted by some companies." However, no generally accepted methodology exists for making such assessments, which necessarily involve complex decisions requiring scientific and engineering expertise across a daunting range of areas. As a result, mandating such an assessment could be unworkable, creating a significant paperwork burden while focusing attention away from real hazard analysis.

VIII. Coordination Requirements Could Overwhelm Some Local Responders, Exposing Facilities to Enforcement

The Proposed Rule could impose significant burdens on facility owners/operators to orchestrate coordinated drills and exercises with local emergency responders and to document such coordination, including conclusions reached through the process. In areas where multiple facilities are located, local responders may not be available and/or may not have the financial resources to participate in these activities at the frequency and on the timetable required under the Proposed Rule. As a result, facilities could be at risk of enforcement for issues that are entirely outside of their control.

IX. Public Disclosure Requirements Could Impose Unnecessary Burdens and Mandate Public Release of Sensitive Security Information

Finally, the Proposed Rule includes new requirements to make information available to local responders and the public. While some of the information is already publicly available, calling into question the need for the requirement in the first place, other information required to be disclosed would have little or no benefit. For example, the Proposed Rule would require a summary of safer technology and alternatives analyses to be provided to local responders. Still other information could pose security risks, including a requirement to make summaries of facility-specific emergency response programs and exercises available to the general public.

X. Possible Legal Arguments Supporting Challenges to Final Rule

Lack of Statutory Authority

- Unauthorized delegation of enforcement authority
- No authority under CAA § 112(r) to require evaluation and approval of technology/design choices
- No authority to require certification of individual RMP requirements
- No authority to regulate incidents that have no offsite consequences

Violation of Statute

- Failure to coordinate and consult with OSHA
- CAA § 112(r)(7)(D) requires EPA to consult with OSHA on rulemakings and coordinate RMP rules with OSHA PSM rules
- RMP third-party audits would require facilities to undertake separate, uncoordinated RMP and PSM audits
- Failure to promulgate "reasonable" regulations
- CAA § 112(r)(7)(B)(i) requires EPA to "promulgate reasonable regulations and appropriate guidance . . ."

Lack of Adequate Notice and Opportunity to Comment

- Vagueness of STAA requirement
- Mischaracterization of substantive changes as streamlining/clarifications/technical corrections
- Mandate to list all applicable regulations, codes and standards did not previously exist

Inadequate Regulatory Impact Analysis

- No discussion of market failure/compelling need
- No baseline established to measure costs/benefits
- No data on incremental benefits
- No cost/benefit analysis performed on substantive changes couched as streamlining/clarifications/technical corrections
    - List all applicable RAGAGEP
    - Continuing obligation to update PSI
    - Expansion of training requirements

Not Supported by Administrative Record

- Lack of adequate cost/benefit analysis

Contravenes Federal Rules of Civil Procedure

- Prohibition on claims of legal privilege over audit reports

Lack of Due Process

- Allowing one private party to regulate another private party violates the Fifth Amendment's Due Process Clause

Violates Anti-Deficiency Act

- Designed to prevent agencies from incurring expenditures that exceed appropriations
- Third-party audits would shift inspection and enforcement costs from EPA to owners/operators

Contravenes Chemical Facility Anti-Terrorism Standards Act (CFATS)

- CFATS requires submittal of security vulnerability assessment and site security plan
- Information provided is protected from public disclosure and exempt from FOIA
- Allowing audit reports to be released to the public through FOIA requests could undercut CFATS

Contravenes Chemical Safety Information Site Security and Fuels Regulatory Relief Act (CSISSFRRA)

- CSISSFRRA criminalizes unauthorized release of off-site consequence analyses and risk management plans; limits OCA review to restricted-access reading rooms
- Subjecting audit reports to public release under FOIA could undercut CSISSFRRA.

Violates EPCRA

- Rule would allow LEPCs to opt out of emergency response, thereby requiring the facility to become a responding site, regardless of capabilities
- But EPCRA requires LEPCs to be involved in emergency planning

XI. Conclusion

Recent incidents, including the 2013 fire and explosion at the West Fertilizer facility in West, Texas are not indicative of a problem with the existing program, but rather, with implementation and compliance. Accordingly, EPA's resources should be focused on ensuring compliance with the current rules, and not on mandating inflexible and burdensome requirements that are unlikely to result in any benefit to preventing and detecting accidental releases. The rule may actually have the unintended consequence of negatively impacting emergency response preparedness and prevention, all as part of a larger, legally questionable effort to outsource enforcement and shift investigation costs to the regulated community.

Control of Methane Emissions from Oil and Gas Sources and EPA's Source Determination Rule

Table of Contents

I. Introduction. 9

II. New Source Regulations. 9

III. Information Collection Request – Existing Oil and Gas Sources. 9

IV. Source Determination Rule 10

I. Introduction

On May 12, 2016, EPA issued regulations designed to control methane emissions from new oil and gas sources ("New Source Regulations"). In addition, EPA released a draft information collection request ("ICR") regarding methane emissions from existing oil and gas sources intended to support future existing source regulations. Finally, also on the same day, EPA issued a "clarification" regarding aggregation of oil and gas sector emissions sources for air permitting purposes. All of these actions are part of the Obama Administration's Climate Action Plan, designed to address climate change and fulfill the Administration's Paris commitments.

II. New Source Regulations

Some Changes From the Proposed Rule Should Benefit Industry

EPA made several changes from the proposed rule that should benefit industry. Specifically, the final rule will allow the use of the Method 21 sniffer test in lieu of expensive optical gas imaging equipment when conducting leak surveys. In addition, EPA has provided a process to request approval to utilize new technologies to monitor leaks. Finally, the final rule extends the time for leaks detected during surveys to be repaired. EPA originally proposed that leaks must be repaired within 15 days. The final rule requires that repairs must be made within 30 days unless the repair will require a shutdown that will increase emissions.

Other Changes Will Significantly Increase the Burden on Industry

The final rule does not include the proposed exemption for low production wells, and instead will require leaks from new wells with low production rates to be monitored. In addition, the final rule includes an increase in the number of times that leaks from compressor stations must be monitored – from twice per year in the proposed rule to four times per year in the final rule. Finally, EPA removed the proposed performance-based schedule for monitoring leaks and instead set a schedule that applies to all well sites (twice per year) and compressor stations (four times per year). The performance-based schedule included in the proposed rule would have incentivized companies with low methane leak rates by reducing their reporting burdens.

III. Information Collection Request – Existing Oil and Gas Sources

In conjunction with the release of the final new source standards, EPA also issued a proposed information collection request that would require oil and gas companies to provide detailed information regarding existing sources – a first step toward the regulation of emissions from existing oil and gas sources. The ICR is intended to provide EPA with information related to oil and gas operations, include the types and numbers of emission sources, and the technologies used to control emissions.

Once published in the *Federal Register*, the public will have 60 days to comment on the burden and feasibility of complying with the proposed ICR. OMB will make the final decision regarding whether the burden imposed on industry is appropriate given EPA's data needs.

One important and concerning aspect of the ICR is that EPA does not believe that the information being sought should be considered confidential business information. Because EPA will make the information collected publicly available, companies should closely examine the proposed ICR to verify the accuracy of EPA's conclusion that such public disclosures will not have an adverse impact on competition or business operations.

IV. Source Determination Rule

Also in conjunction with its release of the new source standards and the ICR for existing sources, EPA issued a "clarification" regarding the definition of source for oil and gas sector air permitting. EPA's source determination rule should provide the sector with some clarity and limit the instances where distant sites are required to be considered part of a single source.

Regulatory Background

In 1979, the D.C. Circuit held that EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four statutory terms that comprise a stationary source (i.e., structure, building, facility, or installation). *Alabama Power Co. v. Costle*, 636 F.2d 323, 397 (D.C. Cir. 1979). In response, EPA devised a three-factor test that only allowed sources to be aggregated if they 1) belong to the same industrial grouping, 2) are under the control of the same person (or persons under common control), and 3) are located on one or more contiguous or adjacent properties.

Although the first two criteria have had their share of controversies, EPA's Source Determination Rule focuses on the third criterion as applied to oil and gas sources – whether the sources are located on contiguous of adjacent properties. Over time, EPA guidance and applicability determinations created a complex analysis that resulted in considerable uncertainty due in large part to the agency's refusal to specify a distance beyond which plants cannot be considered adjacent, and instead focused on the functional relationship between the sites. This approach was especially problematic in the oil and gas sector, where entire production areas are connected by pipelines.

The Wehrum and McCarthy Memos

In 2007, EPA issued guidance on aggregation of oil and natural gas operations which emphasized the importance of proximity, noting that several states used a presumption that units located outside a quarter-mile radius were not adjacent. *See* William L. Wehrum, *Source Determinations for Oil and Gas Industries* (Jan. 12, 2007) (Wehrum Memo). However, in 2009,

EPA withdrew the Wehrum Memo, claiming that it had placed too much emphasis on the proximity of sources and that the functional relationship between sources should still be considered, where appropriate, as part of a case-by-case analysis. *See* Gina McCarthy, *Withdrawal of Source Determinations for Oil and Gas Industries* (Sept. 22, 2009) (McCarthy Memo).

The Summit Petroleum Decision

In *Summit Petroleum Corporation v. EPA*, No. 09-4348 (6th Cir. Aug. 7, 2012), the Sixth Circuit held that EPA's functional relationship approach to oil and gas source determinations was unreasonable and contrary to the plain meaning of the term adjacent. In particular, the court rejected EPA's suggestion that the term "adjacent" requires undertaking an analysis of the functional relationship between the two plants.

EPA's December 2012 Guidance and the NEDACAP Decision

In response to *Summit*, EPA issued a memorandum in December 2012 instructing the regional offices that *Summit* only applies in the Sixth Circuit, but in all other jurisdictions permitting authorities should continue to assess the functional relationship between emission sources. In March 2013, EPA's policy of using different air permitting criteria in different parts of the country was challenged in court and ultimately vacated based on a finding that national uniformity in the application of EPA's permitting rules required a consistent application of the *Summit* decision. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 13-1035 (D.C. Cir. May 30, 2014) (NEDA/CAP).

The Source Determination Rule

No doubt influenced at least in part by the *Summit* and *NEDA/CAP* decisions, the final rule sets a more clear-cut standard by clarifying that sources are only adjacent if they are located on the same site or sites that share equipment and are located within ¼ mile of each other. This clarification should help eliminate situations where emissions from sources that are located 10 or 20 miles apart were aggregated together during the permitting process, hopefully providing some much needed certainty regarding aggregation of oil and gas sector emissions sources.

BRACEWELL

28th Annual Texas Environmental Superconference - Air Quality Panel

RMP Amendments, Methane Rules, and ERC Developments

August 4, 2016

Matt Paulson
Bracewell, LLP

BRACEWELL

RMP Amendments

- Incident Investigations
  - Key Provisions
    - Revised definition of "catastrophic release"
    - New defined term – "root cause"
    - Addition of undefined term – "near miss"
  - Takeaways
    - Potential for significant increase in number of formal investigations
    - Releases with only on-site impacts can trigger formal investigation
    - Mandates identification and correction of management system failures even where no such failures exist

BRACEWELL

RMP Amendments (cont.)

- Third-Party Compliance Audits
  - Key Provisions
    - Required for RMP-reportable accident or SNC
    - Rigid auditor qualifications
    - Submittal to EPA – no legal privileges apply
    - "Promptly" address deficiencies
  - Takeaways
    - Could be required in response to almost any violation
    - Rigid qualifications could exclude many qualified auditors
    - Disclosure could fundamentally undermine audit process

BRACEWELL

RMP Amendments (cont.)

- Safer Technologies and Alternatives Analysis
  - Key Provisions
    - Limited to Program 3 facilities in three industries
    - Requires "feasibility" evaluation when conducting PHAs
  - Takeaways
    - Would require burdensome justifications for technology and design choices that could be second-guessed later
    - EPA rejected same approach in '96 rulemaking

BRACEWELL

RMP Amendments (cont.)

- Emergency Response Preparedness
  - Key Provisions
    - Documentation of coordination with local responders
    - Annual tabletop emergency response and notification exercises
    - Five-year field exercises
  - Takeaways
    - Potential to overwhelm local responders
    - Owners/operators bear enforcement risk

BRACEWELL

RMP Amendments (cont.)

- Information Availability
  - Key Provisions
    - LEPC disclosure requirements
    - Public availability of information
  - Takeaways
    - Could result in public release of sensitive security information
    - Lack of clarity regarding extent of information disclosure

BRACEWELL

RMP Amendments (cont.)

- Potential Legal Challenges
  - Theme – illegal outsourcing of enforcement authority
  - Key Arguments
    - Lack of statutory authority
    - Violation of statute
    - Lack of adequate notice/opportunity to comment
    - Inadequate RIA
    - Lack of support in administrative record
    - Lack of due process
    - Conflicts with other federal laws

BRACEWELL

Methane Rules

- New Source Regulations – Changes from Proposal
  - Allows use of Method 21 sniffer test in lieu of expensive optical gas imaging equipment for leak surveys
  - Allows approval requests for new leak detection technologies
  - Exemption for low production wells not in final rule
  - Increases number of times per year that leaks from compressor stations must be monitored – from 2 times to 4 times
  - Proposed performance-based schedule removed and replaced with set schedule – 2 times per year for well sites; 4 times per year for compressor stations

BRACEWELL

Methane Rules (cont.)

- ICR - Existing Oil and Gas Sources – 5/12/2016
  - Part 1
    - Identify all facility types and the number and type of equipment at each facility
    - Mail to all known sources by 10/30/16; 30 days to respond
  - Part 2
    - Send to subset of Part 1 respondents based on statistical sampling
    - Will include onshore production, gathering, processing, compression/transmission, pipeline, natural gas storage, and LNG import/export
    - Date unclear, but selected respondents will have 120 days to respond

9

BRACEWELL

Methane Rules (cont.)

- ICR - Existing Oil and Gas Sources (cont.)
  - July 8, 2016 – Voluntary request for information on emerging technologies
    - Covers innovative technologies to detect, measure, and mitigate emissions

10

BRACEWELL

Methane Rules (cont.)

- Source Determination Rule for Oil and Gas Sources
  - Functional interrelatedness option rejected
  - "Adjacent" means:
    - Located on the same site; or
    - Located on sites that share equipment and are within ¼ mile from each other

BRACEWELL

ERC Developments

- Inter-Pollutant Credit Use
- Inter-Basin Credit Use
- EBT Rule Revisions

BRACEWELL

MATT PAULSON

Partner, Austin

512.494.3659

matt.paulson@bracewelllaw.com

Texas
New York
Washington, D.C.
Connecticut
Seattle
Dubai
London

bracewelllaw.com

13

Mark Walters has had two lives as a lawyer. First, 15 years as a trial lawyer/litigator defending catastrophic personal injuries, class actions, and other complex tort and business cases nationwide, including jury and bench trials in state and federal court and state and federal appeals. In 2009, Mark left the private practice of law for public service, joining the Environmental Protection Division of the Texas Attorney General's office. For almost six years he represented the State of Texas and its agencies, including the Texas Commission on Environmental Quality, the Department of Parks and Wildlife, the Texas General Land Office, the Public Utility Commission, the Railroad Commission, and the Department of Transportation. He returned to the litigation group at Austin office of Jackson Walker in July 2015, but he still counts his former colleagues at the Attorney General's office and his state-agency clients as among his closest friends. Since returning to JW, Mark has focused on state and federal regulatory issues, with an emphasis on environmental and environmental-related litigation.

Jackson Walker

28th Annual Texas Environmental Superconference

"It's Like Déjà Vu All Over Again"

August 4-5, 2016

Austin, Texas

EPA's Clean Power Plan Litigation Outlook: Key Issues and the Effect of the Stay

Mark Walters
Jackson Walker L.L.P.
100 Congress Ave., Suite 1100
Austin, TX 78701
512-236-2000
mwalters@jw.com

Jackson Walker

EPA's Clean Power Plan Litigation Outlook: Key Issues and the Effect of the Stay

By: Mark Walters, Jacob Arechiga, and Mike Nasi

I. INTRODUCTION

One hundred fifty seven parties filed thirty nine petitions challenging the Environmental Protection Agency's (EPA's) Clean Power Plan regulations (CPP or the Rule)—regulating the emission of carbon by existing fossil-fuel fired electric power plants—promulgated by EPA under Section 111(d) of the Clean Air Act (42 U.S.C. § 7411(d)) . A table of all the participants is attached as Appendix A to this paper.

Most, if not all, of the challengers moved to stay the Rule pending the outcome of the litigation. The United States Court of Appeals for the District of Columbia Circuit unsurprisingly denied the motions to stay, but, on February 9, 2016, the Supreme Court unexpectedly issued an unprecedented stay of the Rule, which will last throughout the pendency of the litigation, including review by the Supreme Court.

Not to be outdone, the D.C. Circuit dropped a bombshell of its own. Arguments before a three-judge panel had been scheduled for June 2-3, 2016. On May 16, however, the court cancelled that argument and instead set en banc argument before the full court (minus two judges who are recused) for Tuesday, September 27, with a possible second day of argument on September 28. Although not unprecedented, the court's announcement was unusual and took litigants on both sides by surprise. It likely means that the D.C. Circuit's opinion will not be issued until after the November 2016 Presidential election.

To date, briefing has reached over 4,000 pages, including the stay motions, but not including the numerous amicus briefs that have been filed on both sides. In addition, a voluminous appendix was filed with the Supreme Court as part of the stay briefing, and an even more voluminous joint appendix (in lieu of an administrative record) was filed with the D.C. Circuit after the merits briefs were filed.

This paper attempts in a few pages to distill two things from the many thousands of pages submitted to the courts: (1) What are the key legal arguments in the briefs that will be the focus of the oral argument in September and (2) what is the effect of the Supreme Court's stay?

II. KEY LEGAL ARGUMENTS RAISED IN THE BRIEFS

Petitioners challenging the Rule divided the issues into two categories and filed two separate briefs based on these categories:

> (A) Core Legal Issues (those that would strike down the Rule in its entirety) and

(B) Procedural/Record-Based Issues (those that could potentially be fixed on remand).

A. Core Legal Issues

i. *Outside the Fence* - "Generation shifting" from coal-fired electric power plants to gas-fired power plants and renewable sources of energy is not a valid best system of emission reduction (BSER).

- *Background*:
  - CAA § 111(d) directs EPA to establish "standards of performance" for certain existing sources of air pollution, here coal- and gas-fired electric power plants.
  - Statute (CAA § 111(a)(1)): *"The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."*
  - EPA argues that "generation shifting," that is forcing owners of coal-fired power plants to shift to generation by natural gas and renewable energy is a "best system of emission reduction" within the meaning of CAA § 111. Petitioners argue that "generation shifting" is not a valid BSER.
- *Petitioners' Argument*:
  - Standards of performance and emission reduction measures have to be implementable at individual sources. EPA is inappropriately applying its standards to a combination of "sources" and other "non-sources" of electricity that EPA cannot regulated under the Clean Air Act but in which a utility could invest (like electric generation produced by renewable energy), rather than individual sources. Also, the existing-source limits are lower than the limits for new sources and cannot be met with control technology by any existing sources.
  - The proposed rule contained no numerical emissions limits. The final rule included numerical emissions limits for coal- and gas-fired power plants, but these limits were lower than the limits for new sources in the companion new source performances standards under § 111(b). Also, these limits were not achievable by any existing units.
  - Under *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), a "source" is limited

to one facility, not a combination of facilities. EPA's prior regulations and practice are inconsistent with EPA's interpretation. Further, it is no answer to say emissions credits can be purchased under cap and trade programs, when those programs do not now exist and may never exist for some.

- Generation shifting and regulating the electric grid as a "system" is inconsistent with the definition of standard of performance and there is no limiting principle on how many energy and infrastructure "systems" EPA might try to regulate in this fashion. The Supreme Court's recent decisions in *UARG v. EPA*, 135 S. Ct. 2427 (2014) and *King v. Burwell*, 135 S. Ct. 2480 (2015) (the second Affordable Care Act case) have found that courts should "greet ... with a measure of skepticism" claims by federal agencies to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy" and make "decisions of vast economic and political significance," especially in areas outside an agency's "expertise."

- *EPA Argument:*

  - Generation shifting is "adequately demonstrated" and "system" is a very broad term that can mean an interconnected electric grid.

  - States can decide if they would like to implement at-the-source limitations (run less, install carbon capture utilization and sequestration (CCUS)).

  - The numerical limits in the Rule do not actually apply to sources. They are "effective" emissions limits. It is up to states to come up with actual emission limits for sources.

  - EPA's system is intimately connected with and derived from the nature of the interconnected electric power grid. It does not follow that similar "systems" of emission reduction could or would be employed in other 111(d) rulemakings.

ii. *112 Preemption* - CAA § 111 precludes regulation of existing sources already regulated under CAA § 112.

- *Background*:

  - Statute (CAA § 111(d)(1)) (emphasis added): *"The Administrator shall... establish[ ] standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is* ***not*** *included on a list published under section [108(a)] of this title* ***or emitted from a source category which is regulated under section [112] of this title...*** (as codified in the U.S. Code)."

- *Petitioners' Argument*:
  - The statute is clear: fossil-fuel fired electric power plants are regulated under CAA § 112 by the Mercury and Air Toxics Standards (MATS) Rule, and therefore, cannot be subject to standards of performance under CAA § 111(d).
  - *AEP v. Connecticut*, 564 U.S. 410, 448 n.7 (2011): "EPA may not employ § [111](d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ [108-110], or the "hazardous air pollutants" program, § [112]. *See* § [111](d)(1)."
  - The Senate's "conforming amendment" in the 1990 CAA (see bullet 2 under "EPA Argument") was not codified. Even if there are two versions, they should be reconciled, which would still prohibit regulation. See *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000).
  - EPA does not have authority to choose which "version" to make legally operative; this is a lawmaking power not entitled to agency deference. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001).
  - EPA's more recent (raised for the first time in their final brief) argument (see the last two bullet points under "EPA Argument") creates confusion in the statute, rather than using the plain reading EPA has relied upon for years.
- *EPA's Argument*:
  - The Rule is ambiguous and, thus, EPA should be given discretion to apply it as it sees fit.
  - A separate Senate "conforming amendment" creates a "second version" of CAA § 111(d)(1) which makes it ambiguous and EPA's interpretation is entitled to *Chevron* deference. The Senate's conforming amendment retains language from the pre-1990 version of § 111(d), which precluded regulation under § 111 of pollutants regulated under § 112, not source categories regulated under § 112.
  - Because the word "not" is absent from the third item in the 111(d) list, the statute's literal reading does not make sense because it would provide that "the Administrator shall...establish[ ] standards of performance for any existing source for any air pollutant...emitted from a source category which is regulated under section [112]..." In other words, read literally, the third alternative would not preclude regulation under CAA of source categories regulated under § 112. To the contrary, it would *require* regulation under 111 of all pollutants from source categories regulated under § 112. This doesn't

make sense; therefore, the Rule is ambiguous.

iii. *Commandeering* - The Rule commandeers states and state officials into carrying out federal law and policy in violation of the 10th Amendment.

- *Petitioners' Argument*:
  - This is coercive federalism, not cooperative federalism. If states do not implement this Rule, EPA has threatened imposition of a federal plan to tell coal plants to run less. EPA can't order the construction of more gas plants or more renewable energy, so states are then put in the position of (a) ordering other sources to make up the difference or (b) doing nothing and facing the politically unpalatable possibility of power shortfalls and blackouts. Intervenor-Petitioners highlighted how the Rule forces states to implement EPA's Rule—to enact new state legislation, to promulgate new state rules, and to create entirely new state regulatory structures to carry out the Rule's mandate.
- *EPA's Argument*:
  - The Rule is textbook cooperative federalism. EPA imposed overall emissions limits and made a number of suggestions, but states are free to meet the guidelines in any way.

iv. *EPA Regulation of State Utility Markets* - In enacting Clean Air Act ("CAA") § 111, Congress did not authorize EPA to engage in state utility regulatory action like this.

- *Petitioners' Argument*:
  - The Rule asserts novel and vast authority never before claimed by EPA. EPA also seeks to invade a traditional state regulatory domain—electric power generation and transmission. EPA has previously promulgated standards for existing sources under § 111(d) a handful of times. It has never previously claimed the power it is claiming here to remake the nation's electric generation system.
- *EPA's Argument*:
  - The Rule is not nearly as far reaching as Petitioners contend. It merely builds on existing industry trends and is within EPA's authority to regulate carbon emissions. Coal is on the way out, and the industry is shifting towards more generation by natural gas and renewable sources anyway.

B. Procedural/Record-Based Issues

i. *Inadequate Notice of Changes Between the Proposed and Final Rules* - EPA

inappropriately finalized a rule that is simply too different from the Proposed Rule.

- *Petitioners' Argument*:
  - The final Rule is fundamentally different from the Proposed Rule and is reversible error warranting vacatur (e.g., EPA's changes from state-based emission rates to a nationally uniform rate and the expansion of the Rule to impact multiple additional units**).**
  - As part of the record issues brief, the petitioners attached a comparison between the proposed rule and the final rule showing language that was deleted and added. The additions and deletions swamp the text that remains. Unfortunately, at 96 pages, it is too long to attach to this paper, but it is publicly available.
- *EPA's Argument*:
  - The final Rule is a logical outgrowth of the proposed Rule because affected parties should have anticipated that the relevant modification was possible. There is not a "substantial likelihood" that different procedures would have "significantly changed" the Rule.

ii. *Flawed BSER* - EPA's Best System of Emissions Reduction is not "adequately demonstrated" or "achievable" and is based on a flawed administrative record.

- *Petitioners' Argument*:
  - Even assuming that "generation shifting" can be BSER under § 111(d), EPA has not met its burden to demonstrate that it is "adequately demonstrated" and that the performance standards derived from the BSER are "achievable."
  - EPA's BSER is not "demonstrated" or "achievable" by individual sources and is not "flexible." Reliance on the availability of a trading program is not sufficient to save the Rule.
  - The Rule is based on three building blocks: 1) coal-fired units will be able to meet certain heat rate improvements; 2) natural gas units will be able to reach a 75% utilization target; and 3) a significant amount of new renewable–energy units will be constructed. All of these are based on false modeling, inaccurate assumptions, and other erroneous actions by EPA.
  - EPA has failed to account for grid reliability or infrastructure needs. EPA failed to ensure a reliable electric supply in the Electric Reliability Council of Texas (ERCOT) region (which is not interconnected with the rest of the country) and to account for the disproportionate impact on cooperatives (e.g., EPA fails to

account for single-unit cooperatives that service poor rural members).

- *EPA's Argument*:
  - The CAA's use of "system" is expansive and includes the Rule's BSER approach. EPA looked to technological means to achieve emissions reductions (co-firing, carbon sequestration) but found that Building Block 2 (coal-to-gas switch) and Block 3 (huge expansion of renewables) would be less expensive and would better meet statutory factors.

iii. *Inadequate Credit for Investments Already Made* - The Rule penalizes low- and non-emitting generation sources and companies/states that have already reduced emissions.

- *Petitioners' Argument*:
  - EPA excludes large portions of the electricity grid (existing renewable, nuclear, hydroelectric, co-generation, waste-to-energy) as compliance options. EPA also arbitrarily discriminates against low- and zero-emitting sources built before January 1, 2013, resulting in the punishment of early investors in these resources. Although EPA claims to have accounted for these sources by factoring them sources into its "baseline" numbers, this is not enough; nothing in the Rule indicates that any early-adopting States' 2012 emission baseline was adjusted to account for low- or zero-emission generation.

- *EPA's Argument*:
  - EPA appropriately imposes a January 1, 2013, cut-off because only facilities that commence operation or increase generation capacity on or after January 1, 2013, can be assumed to reduce fossil fuel-fired emissions from the baseline level. Pre-2013 reductions have already been accounted for in the baseline and enhance the states' ability to comply.

iv. *One Size Does Not Fit All* - The Rule should have been tailored to individual state issues.

- *Petitioners' Argument*:
  - The Rule will result in unique harms to numerous states, including: Wisconsin (failed to consider nuclear plant's imminent retirement); Arizona and Utah (failed to account for trading between states and Indian Tribes); Wyoming (EPA doubled limits in final rule, failed to consider endangered species act issues, etc.); Utah (imposed limits unrepresentative of historic emissions, which impedes state's ability to protect its most sensitive air shed); New Jersey (failed to account for deregulation of energy services); and North Carolina

(exclusion of prior emissions reductions). See also the Texas-specific discussions regarding impacts to ERCOT and transmission planning, referenced above and below.

- *EPA's Argument*:
  - The Rule provides states considerable flexibility to design standards tailored to their individual circumstances. EPA also rebuts the other state-specific claims.

v. *Laundry List of Additional Errors* - The Rule has several other important shortcomings.

- *Petitioners' Argument*:
  - EPA has arbitrarily and capriciously: 1) required mass-based state plans to include provisions to prevent "leakage," which effectively makes new units subject to the Rule; 2) failed to create subcategories for various coal types, including lignite; 3) failed to consider limitations on renewable energy, including transmission planning, with Texas as a key example (and nothing supports EPA's prediction that sufficient transmission can be in place by 2022 and EPA did not otherwise respond to concerns expressed by the North American Electric Reliability Corporation (NERC) and regional transmission organizations); and 4) relied on a fundamentally flawed cost-benefit analysis.
- *EPA's Argument:*
  - Allowing "leakage" would undermine the purpose of the Rule—the Rule's anti-leakage requirements safeguard emissions performance equivalent to the uniform rates;
  - The two subcategories in the Rule (steam units and combustion turbines) are sufficient and there is no mandate for EPA to create additional subcategories, and because EPA had subcategorized for lignite in the past (MATS Rule) does not compel EPA to subcategorize in this Rule;
  - EPA determined that Building Block 3 (renewable generation) would not result in significant additional transmission capacity needs; and
  - Petitioners' challenges to EPA's cost-benefit analysis are irrelevant because EPA did not (nor was it required to) use that analysis when considering costs and EPA found that the costs were reasonable.

III. THE EFFECT OF THE SUPREME COURT'S STAY OF THE CLEAN POWER PLAN

C. Legal/Procedural Background

All, or virtually all, of the parties challenging the Rule sought a stay in the D.C. Circuit. On January 21, 2016, the D.C. Circuit denied all the stay motions, stating only that the moving parties had not satisfied the "stringent requirements of a stay pending court review," which include demonstrating a likelihood of success on the merits and irreparable harm if a stay is not granted. Instead of a stay, the D.C. Circuit set the case on an expedited briefing schedule, with opening briefs due February 19, and oral argument set for June 2.

Numerous state and industry challengers applied to Chief Justice Roberts for an emergency stay. On Tuesday, February 9, 2016, the Supreme Court, in a 5-4 decision, granted the applications, staying the 111(d) Rule through the conclusion of the litigation.

All sides agree that the stay is unprecedented. It is the first time the Supreme Court has blocked any challenged EPA rule—indeed any federal regulation—from taking effect before the D.C. Circuit has reviewed and passed on challenges to its merits. The Court gave no reason for its action, but to obtain a stay, it normally must be shown that there is a "reasonable probability" that at least four justices will agree to hear the case, that there is a "fair prospect" that a majority of the Court will find that the lower court's decision was erroneous, and that "irreparable harm" will result if a stay is not granted.

Although responses to the Court's decision differ markedly, all agree that the stay was a major rebuke to the D.C. Circuit panel that refused to grant a stay (after examining the same evidence) and which will also decide the merits of the legal challenge to the Rule. There is certainly a general feeling that the grant of the stay might cause the panel to be more circumspect in its review.

D. What is the effect of the stay on the deadlines in the Clean Power Plan Rule?

Five stay applications were submitted to the Supreme Court. Three requested "an immediate stay of the" Rule. These applications were filed by (a) a coalition of 29 states and state regulatory agencies led by West Virginia and Texas; (b) a coalition of business associations led by the U.S. Chamber of Commerce and the National Association of Manufacturers; and (c) the state of North Dakota.[1]

An application filed by Peabody Energy and Murray Energy requested "an immediate stay of the final [R]ule,"[2] and, in addition, argued in its "Conclusion" section that "the [Rule's] magnitude and scope are unprecedented. It should be stayed, and all deadlines in it suspended, pending

[1] *See* Stay App. by 29 States and State Agencies, No. 15A773 at 1 (Jan. 26, 2016); Stay App. of Business Ass'ns, No. 15A787, at 1 (Jan. 27, 2016); Stay App. of North Dakota, No. 15A793, at 1 (Jan. 29, 2016).

[2] Coal Industry Stay App., No. 15A778 at 1 (Jan. 27, 2016).

the completion of all judicial review."[3]

Finally, the application filed by a coalition of utilities and allied parties, including electric cooperatives, asked the Court to "immediately stay the effectiveness of the final [R]ule,"[4] and, additionally, specifically requested "an immediate stay of [the Rule] extending all compliance dates by the number of days between publication of the rule and a final decision by the courts, including this Court, relating to the rule's validity." *Id.* at 22 (emphasis added).

The text of each stay order is the same:

> "The application for a stay submitted to the chief justice and by him referred to the Court is granted. The Environmental Protection Agency's (EPA's) "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.
>
> Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application."

These orders stay the Rule and any and all of its deadlines that pass while the litigation is pending. In addition, the general rule is that a judicial stay "halt[s] or suspends[s]" a regulation by "suspending the source of the authority to act"[5] and maintain[s] the status quo pending a final determination of the merits of the suit."[6]

Applying this general rule to the stay of the 111(d) Rule would result in a stay and extension of every one of the Rule's deadlines from the stay was granted, February 9, 2016, until the final conclusion of the litigation. In the context of the Clean Power Plan rule, this would be much more significant than it would be for many other rules. It would include not just a stay and extension of the rule's initial 2016 deadline to file a state plan or request a two-year extension (and the 2018 deadline to file a state plan if an extension is granted), but also the 2022 deadline to begin emissions reductions and the 2030 final compliance deadline.

Just such a stay and extension of all the Rule's deadlines was expressly requested by the utility and allied petitioners, and arguably at least impliedly request by the other applicants. Further, the EPA's response in the Supreme Court stated that it understood all applicants to be seeking a

---

[3] *Id.* at 36 (emphasis added).
[4] Stay App. of Utility and Allied Parties, No. 15A776 at 1 (Jan. 27, 2016).
[5] *Nken v. Holder*, 556 U.S. 418, 428 (2009).
[6] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

stay of all the Rule's deadlines,[7] and that "[t]he effect of such relief would be that, even if the Rule is ultimately held to be valid, every sequential step in the Rule's implementation (including, for example, the 2030 deadline for full compliance by regulated sources) would be delayed for a significant period."[8]

EPA has pointedly not taken a position on the effect of the stay on future deadlines, calling it premature to speculate about whether all of the deadlines will be extended by the length of the stay if the Rule is upheld. Other supporters of the Rule have opined that later deadlines, like the 2022 emissions-reductions deadline and 2030 final-compliance deadline may not necessarily be tolled or may not be tolled for as long as the entire length of the stay.

Regardless of the ultimate merits of these arguments, one thing is certain: the Supreme Court's stay of the Rule and its deadlines will remain in place even if the D.C. Circuit rules in the EPA's favor and upholds the Rule. It is unimaginable that the losing side at the D.C. Circuit will not petition the Supreme Court for review, and it is virtually certain that that petition will be granted—especially if the D.C. Circuit rules in the EPA's favor.[9]

E. If the Rule is ultimately upheld, when will state plans be due?

Even assuming the D.C. Circuit issues an opinion shortly after oral argument—and even on a fast track it should take a few weeks—the earliest the case could be taken up by the Supreme Court is during the term that begins in October 2016. Traditionally, the Court issues opinions in important cases—and this surely qualifies as an important case—on the last few days of the term, which ends in late June or early July.[10]

The only directly relevant judicial precedents for how compliance deadlines will be reinstated upon the lifting of a stay are the Nitrogen Oxide State Implementation Plan (NO_x SIP) call and the Cross State Air Pollution Rule (CSAPR). In the NO_x SIP call case, when the stay was lifted, the EPA extended the deadlines for SIP submissions by the amount of time the stay had been in place because doing so was necessary to "restore the status quo preserved by the stay."[11]

Similarly, in CSAPR, the D.C. Circuit stayed the Rule shortly before it was to go into effect in January of 2012. After facial challenges were successful at the D.C. Circuit, but ultimately rejected by the Supreme Court, the D.C. Circuit opted to lift the stay during the pendency of

---

[7] *See* On Applications for Immediate Stay of Final Agency Action, Memorandum for the Federal Respondents in Opposition at 2-3, Nos. 15A773, 15A776, 15A778, 15A787, 15A793 (Feb. 4, 2016).

[8] *Id.* at 3.

[9] Justice Scalia's death does not change this analysis because, by tradition, it only takes four votes for the Supreme Court to accept a case for review.

[10] However, the fact that a stay has been entered might cause the Court to push up the announcement of the opinion somewhat. In the Cross State Air Pollution Rule case, the D.C. Circuit stayed the Rule before it went into effect. The Supreme Court issued an opinion upholding the Rule against a facial challenge in April, rather than at the end of term.

[11] Order, *Michigan v. EPA*, No. 98-1497, ECF 524995 (D.C. Circuit, June 22, 2000).

EPA's resolution of deficiencies in the Rule identified by the court in its decision on remand against the EPA on the as-applied challenges. The EPA reinstituted the start date and the subsequent deadlines three years into the future from the original dates, which was nearly the exact amount of time the stay was in effect.

If a similar approach is followed for the 111(d) Rule (assuming it is ultimately upheld) approximately 16-18 months would be added to the original schedule.

Assuming it is possible for EPA to shorten some of the deadlines, and perhaps even maintain the 2030 final compliance deadline, if the Rule is ultimately upheld, it would not be legal or feasible for the EPA to require states to compress into one year all the work they would have been expected to complete between October 2016 and September 2018 (when initial state plans would have been due under the Rule for those states receiving a two-year extension of the original 2016 deadline)—this would render the stay a nullity and not preserve the status quo. And, even if the EPA could shorten deadlines to negate some of the effect of the stay, and even if it could do so by fiat, without having to go through notice and comment rulemaking, it would still almost certainly take several months to finalize these new deadlines, which would delay the state-plan deadline to no sooner than the Fall of 2019, almost exactly a year after it was initially required.

F. The states' responses to the stay and the effect of the stay on voluntary compliance with the Rule.

Some of the states that intervened in the litigation in support of EPA and the Rule have said that they will continue to work on state plans notwithstanding the Supreme Court's order. Likewise, EPA has said it will work with states that voluntarily choose to proceed while the stay is pending. EPA appears to agree, however, that it likely lacks authority to approve any state plans until the stay is lifted.

In contrast, several states have made it clear that they will not proceed with state planning activities and have urged other states to follow their lead. The first to speak on the issue were the Attorneys General of West Virginia and Texas when they sent a letter to the presidents of the National Association of Regulatory Utility Commissioners (NARUC) and the National Association of Clean Air Agencies (NACAA), arguing that states should suspend state planning activities given that the legal effect of the Supreme Court's ruling was to stay all the Rule's deadlines. Wisconsin Governor Scott Walker followed suit with an Executive Order saying basically the same thing.

At present, twenty states are continuing planning to comply with the rule, notwithstanding the stay, although not necessarily at the same pace or the same levels as they would have done had the stay not been granted—in some cases, "planning to comply" may mean simply determining what will need to be done if the stay is upheld, while in others it may meaning working towards achieving the goals in the Rule as if the stay had not been granted. Nineteen states have suspended all or virtually all planning, and eight are "assessing" compliance (three states—

Alaska, Hawai'i and Vermont—and the District of Columbia are exempt).

As discussed in the prior section, even assuming the Rule is ultimately upheld, the most likely result is that the Rule's deadlines will be extended by the amount of time the stay was in place. This is especially true for the earlier deadlines, in particular the 2018 deadline for submitting final states plans and quite possibly the 2022 start date to begin emissions reductions.

Further, if the Rule survives in whole or in part, it is unknown what a surviving rule would include; it is therefore impossible to know with certainty what a fully compliant state plan would look like. Further, the EPA may itself make modifications after the litigation is over and before any deadlines come into effect.

Finally, with Justice Scalia's passing, there is no guarantee that the litigation will be concluded by mid-2017. For institutional reasons, the Chief Justice, and, indeed, the entire Court, may not wish to decide a case of this magnitude without a full complement of justices, regardless of the party affiliation of the president who appoints the next justice. If the Senate succeeds in delaying the appointment of a new justice until after the next presidential election, this may (but not necessarily will) delay final resolution of the challenges to the rule until the 2017 term (which begins in September 2017). In that event, however, it is possible, that the Court might not wait until the end of the next term (i.e., until June or July 2018), to issue its decision but might do so earlier.

Jackson Walker

APPENDIX A — Table of Key Participants (Organized by Party or Joint-Party)
Clean Power Plan (111(d) Rule) Litigation
Docket 15-1363 and Consolidated Cases, D.C. Circuit Court of Appeals

PETITIONERS (Oral Argument September 27, 2016)

States:

1. Alabama
2. Arizona (Corporation Commission)
3. Arkansas
4. Colorado
5. Florida
6. Georgia
7. Indiana
8. Kansas
9. Kentucky
10. Louisiana (State and Dept. of Env. Quality)
11. Michigan
12. Mississippi
13. Missouri
14. Montana
15. Nebraska
16. New Jersey
17. Nevada (as Amicus only)
18. North Carolina (Dept. of Env. Quality)
19. North Dakota
20. Ohio
21. Oklahoma
22. South Carolina
23. South Dakota
24. Texas
25. Utah
26. West Virginia
27. Wisconsin
28. Wyoming

Electric Cooperatives:

1. National Rural Electric Cooperative Association
2. Arizona Electric Power Cooperative, Inc.
3. Associated Electric Cooperative, Inc.
4. Basin Electric Power Cooperative
5. Big Rivers Electric Corporation
6. Brazos Electric Power Cooperative, Inc.
7. Buckeye Power, Inc.
8. Central Montana Electric Power Cooperative
9. Central Power Electric Cooperative, Inc.
10. Corn Belt Power Cooperative
11. Dairyland Power Cooperative
12. Deseret Generation & Transmission Co-Operative
13. East Kentucky Power Cooperative, Inc.
14. East River Electric Power Cooperative, Inc.
15. East Texas Electric Cooperative, Inc.
16. Georgia Transmission Corporation
17. Golden Spread Electrical Cooperative, Inc.
18. Hoosier Energy Rural Electric Cooperative, Inc.
19. Kansas Electric Power Cooperative, Inc.
20. Minnkota Power Cooperative, Inc.
21. North Carolina Electric Membership Corp.
22. Northeast Texas Electric Cooperative, Inc.
23. Northwest Iowa Power Cooperative
24. Oglethorpe Power Corporation
25. Powersouth Energy Cooperative
26. Prairie Power, Inc.
27. Rushmore Electric Power Cooperative, Inc.
28. Sam Rayburn G&T Electric Cooperative, Inc.
29. San Miguel Electric Cooperative, Inc.
30. Seminole Electric Cooperative, Inc.
31. South Mississippi Electric Power Association
32. South Texas Electric Cooperative, Inc.
33. Southern Illinois Power Cooperative
34. Sunflower Electric Power Corporation
35. Tex-La Electric Cooperative of Texas, Inc.
36. Upper Missouri G. &T. Electric Cooperative, Inc.
37. Wabash Valley Power Association, Inc.
38. Western Farmers Electric Cooperative
39. Wolverine Power Supply Cooperative, Inc.

Public Power:

1. American Public Power Association
2. Kansas City Board of Public Utilities

3. Minnesota Power
4. Municipal Electric Authority of Georgia

Labor:

1. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO
2. International Brotherhood of Electrical Workers
3. United Mine Workers of America

Other Utility And Coal Interests:

1. Utility Air Regulatory Group
2. American Coalition for Clean Coal Electricity
3. American Coke and Coal Chemicals Institute
4. Alabama Power Company
5. Big Brown Lignite Co., LLC
6. Big Brown Power Co. LLC
7. CO2 Task Force of the Flor. Elec. Pwr. Coord. Grp.
8. Georgia Power Co.
9. Gulf Power Co.
10. LG&E Energy LLC
11. Lignite Energy Council
12. Luminant Big Brown Mining Co. LLC
13. Luminant Mining Co., LLC
14. Luminant Generation Co., LLC
15. Mississippi Power Co.
16. Mont.-Dakota Util. Co. (div. of MDU Res. Grp., Inc.
17. Murray Energy Corporation
18. National Mining Association
19. Newmonth Nevada Energy Investment
20. Newmont USA Limited
21. NorthWestern Corp. (dba Northwestern Energy)
22. Oak Grove Management Co., LLC
23. Prairie State Generating Co.
24. Sandow Power Co. LLC
25. Westar Energy, Inc.
26. West Virginia Coal Association

Other Trade Groups:

1. American Chemistry Council
2. American Foundry Society
3. American Forest & Paper Assoc.
4. American Fuel & Petrochemical Manufacturers
5. American Iron & Steel Institute
6. American Wood Council
7. Association of American Railroads
8. Brick Industry Assoc.
9. Buckeye Institute for Public Policy Solutions
10. Chamber of Commerce of the USA
11. Competitive Enterprise Institute
12. Electricity Consumers Resource Council
13. Energy & Environmental Legal Institute
14. Energy-Intensive Manuf. Work. Grp. on GHG Reg.
15. Entergy Corporation
16. Independence Institute
17. Local Government Coalition for Renewable Energy
18. National Assoc. of Home Builders
19. National Assoc. of Manufacturers
20. National Federation of Independent Business
21. National Lime Assoc.
22. National Oilseed Processors Assoc.
23. Portland Cement Assoc.
24. Rio Grande Institute
25. Sutherland Institute
26. Tri-State Generation & Transmission Assoc. Inc.

PETITIONERS' MOTIONS TO HOLD ISSUES IN ABEYANCE

1. Am. Forest & Pap. Assoc. Inc. and Am. Wood Council
2. Biogenic CO2 Coalition
3. National Alliance of Forest Owners

INTERVENORS FOR PETITIONERS

1. Dixon Bros., Inc.
2. Gulf Coast Lignite Coalition
5. Norfolk Southern Corp.
6. Peabody Energy Corp.

3. Joy Global, Inc.
4. Nelson Bros. Inc.
7. Wesco International, Inc.

AMICUS CURIAE FOR PETITIONERS

205 Members of Congress – 34 senators and 171 representatives led by Senate Majority Leader Mitch McConnell (R-Ky.). The lawmakers are all Republicans with the exception of West Virginia Democratic Sen. Joe Manchin

Legal nonprofits, other challengers:

1. 13 individual scientists and economist
2. 60Plus Association
3. 166 State and Local Business Associations
4. Former State PUC Commissioners
5. Hispanic Leadership Fund
6. Landmark Legal Foundation
7. The Loggers Assoc. of Northern California
8. Merit Oil Co.
9. Morning Star Packing Co.
10. Municipal Electric Authority of Georgia
11. National Black Chamber of Commerce
12. Pacific Legal Foundation
13. Pedernales Electric Cooperative, Inc.
14. Service Employees International Union
15. Southeastern Legal Foundation
16. State of Nevada and Consumers' Research
17. Texas Public Policy Foundation

RESPONDENT – EPA

INTERVENORS FOR RESPONDENT (EPA)

States:

1. California (& California Air Resources Board)
2. Connecticut
3. Delaware
4. Hawaii
5. Illinois
6. Iowa
7. Maine
8. Maryland
9. Minnesota (Minnesota Pollution Control Agency)
10. New Hampshire
11. New Mexico
12. New York
13. Oregon
14. Rhode Island
15. Vermont
16. Washington
17. Massachusetts
18. Virginia

Counties, Cities:

1. Broward County, Florida
2. City of Austin d/b/a Austin Energy
3. City of Boulder
4. City of Chicago
5. City of New York
6. City of Philadelphia
7. City of Seattle
8. City of South Miami
9. District of Columbia

Environmental & Public Health Groups:

1. Advanced Energy Economy
2. American Wind Energy Association
3. American Lung Association
4. Center for Biological Diversity
5. Clean Air Council
9. Environmental Defense Fund
10. Kanawa Forest Coalition
11. Keepers of the Mountains Foundation
12. Mon Valley Clean Air Coalition
13. Natural Resources Defense Council

6. Clean Wisconsin	14. Ohio Valley Environmental Council
7. Coal River Mountain Watch	15. Sierra Club
8. Conservation Law Firm	16. West Virginia Highlands Conservancy.
Pro-CPP Utilities and Industry Groups:	
1. Calpine Corporation	4. NY Power Authority
2. National Grid Generation, LLC	5. Pacific Gas and Electric Co.
3. Nextera Energy, Inc.	6. Southern California Edison Co.
AMICUS CURIAE FOR RESPONDENTS	
Counties, Cities:	
1. 54 Cities, Counties and Mayors	
Environmental & Public Health Groups:	
1. American Academy of Pediatrics	9. Inst. for Policy Integrity at NY Univ. School of Law
2. American College of Occ. & Envir. Medicine	10. National League of Cities
3. American College of Preventive Medicine	11. National Medical Assoc
4. American Medical Association	12. Nat. Assoc. for Medical Direction of Respiratory Care
5. American Public Health Association	13. Public Citizen, Inc.
6. American Thoracic Society	14. Sustainable Business Organizations
7. Citizens Utility Board	15. U.S. Conference of Mayors
8. Consumers Union	
Other EPA Allies:	
1. Adobe, Inc.	9. Former State Energy & Env. Officials
2. Amazon.com	10. Google Inc.
3. Apple.com	11. Grid Experts
4. Blue Cross and Blue Shield of Mass., Inc.	12. Idea North America Services, LLC
5. Climate Scientists	13. Mars, Inc.
6. Catholic Climate Covenant, et al.	14. Microsoft Corp.
7. Current & BiPart. Former Members of Cong.	15. Union of Concerned Scientists
8. Former EPA Admins. Ruckelshaus and Reilly	

Jackson Walker

28th Annual Texas Environmental Superconference

"It's Like Déjà Vu All Over Again"

August 4-5, 2016

Austin, Texas

EPA's BART & Regional Haze Rulemakings in Texas

Mark Walters
Jackson Walker L.L.P.
100 Congress Ave., Suite 1100
Austin, TX 78701
512-236-2000
mwalters@jw.com

Jackson Walker

EPA's BART & Regional Haze Rulemakings in Texas

By Mark Walters, Mike Nasi, and Jacob Arechiga

On January 5, 2016, EPA published a final rule partially disapproving Texas' and Oklahoma's State Implementation Plans (SIPs) for regional haze and imposing Federal Implementation Plans (FIPs) (hereinafter the Rule or the Regional Haze Rule). The Rule states:

> The EPA is partially disapproving the Texas [SIP] revisions for not adequately addressing other requirements of the regional haze program related to reasonable progress, the long-term strategy, and the calculation of natural visibility conditions. The EPA is promulgating a [FIP], which includes sulfur dioxide (SO_2) emission limits for fifteen EGUs located at eight coal-fired power plants, to address these deficiencies.[1]

The Rule is a partial disapproval only. EPA did not address Texas' reliance on the Clean Air Interstate Rule (CAIR) rather than the Cross-State Air Pollution Rule (CSAPR). EPA had previously issued a limited disapproval of Texas' regional haze SIP based on its reliance on CAIR, without promulgating a FIP. EPA had also previously disapproved several separate "infrastructure SIP revisions" submitted by Texas regarding down-state impacts on visibility protection (e.g. various $PM_{2.5}$, ozone, NO_2, and SO_2 NAAQS), but also deferred action on promulgating a FIP to address these "deficiencies."[2]

Although the Rule concerns both Texas' and Oklahoma's regional haze plans, the substantive requirements of the Rule fall almost entirely within Texas, rather than Oklahoma. If upheld, the Rule – via SO_2 emissions limits – will require seven Texas coal-fired electric generating units (unit or EGU) to install new scrubbers, seven units to upgrade their existing scrubbers, and one unit (San Miguel) to continue to operate its upgraded scrubber. These units, including the compliance timelines, averaging times, coal usage, existing environmental controls, and other factors are identified in Attachment A – Regional Haze FIP Targeted Units.

The regional haze provisions of the Clean Air Act (CAA) require certain listed major stationary sources of air pollution to install the "best available retrofit technology" (BART) for "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any"[3] federal Class I areas (national parks and similar areas). The SO_2 emission limits in the Regional Haze Rule, however, are not based on the BART requirements of the regional haze provision, but rather on EPA's finding of deficiencies in Texas' plan for "reasonable progress goals and long term strategy."

Regarding BART limitations, EPA has previously found that compliance with CSAPR would serve as a replacement for BART requirements. In other words, compliance with CSAPR would mean that a

[1] U.S. Environmental Protection Agency, Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze, Final Rule, 81 Fed. Reg. 296, 296 (Jan. 5, 2016).

[2] *Id.*

[3] CAA § 169A(b)(2)(A) & (g)(7); 42 U.S.C. § 7491(b)(2)(A) & (g)(7).

state would not have to perform a separate BART analysis for each unit. However, in the litigation challenging CSAPR, the D.C. Circuit, on remand from the Supreme Court, found that EPA's budgets under 42 U.S.C. § 7410(a)(2)(D)(i), the "good-neighbor" provision of the CAA, impermissibly over-controlled Texas for ozone-season NOx and SO_2.[4] EPA has since proposed new ozone-season NOx limits and is expected to propose new SO_2 limits soon. But, with respect to regional haze, EPA concluded in the Regional Haze Rule "that it would not be appropriate to finalize [its] proposed determination to rely on CSAPR as an alternative to SO_2 and NOx BART for EGUs in Texas at this time."[5] However, EPA added that, regarding the units discussed above, the finalized emissions controls outlined in the Rule would be "sufficient to satisfy the SO_2 BART," because they "are currently the most stringent available."[6]

LITIGATION CHALLENGING THE TEXAS REGIONAL HAZE RULE

The State of Texas and numerous other parties filed petitions for review challenging Texas' regional haze FIP in federal court. These suits will ultimately focus on the merits of the regional haze rule FIP, including whether EPA improperly required Texas to conduct a source-specific analysis, whether EPA can use the regional haze rule's "reasonable progress goals" to impose requirements on BART-exempt sources and requirements beyond BART for other sources, and whether EPA can ignore real-world monitoring data and its own CSAPR-is-better-than-BART modeling demonstrating that all EPA's 2018 goals will be met without additional controls.

On July 15, 2016, however, the Fifth Circuit issued an important decision on pre-merits venue/jurisdictional issues that potentially has ramifications far beyond this litigation and the Regional Haze Rule.[7] The court's detailed opinion also signals that the court has serious concerns about the Rule's ability to survive the challenges to its merits.

In the published Rule, EPA claimed that is of "nationwide scope or effect," even though it concerns the SIPs of only two states—Texas and Oklahoma—and has effects only in one state—Texas. Under CAA § 307(b), if a rule is "locally or regionally applicable," any challenge must be filed in the United States Court of Appeals "for the appropriate circuit"—i.e., the circuit that includes the locality or region. If, however, the rule is "based on a determination of nationwide scope and effect" by EPA and that determination is published, then review can be had only in the D.C. Circuit.

EPA took the position that its published determination that the rule is of nationwide scope and effect is unreviewable and requires all challenges to be heard in the D.C. Circuit. The challengers contended that EPA's decision is reviewable and, notwithstanding EPA's statements to the contrary, its decision is not based on a determination of nationwide scope and effect. On June 22, 2016, the Fifth Circuit heard oral argument on these issues and also on the motions of the challengers to stay the implementation dates of the Rule pending the Court's ultimate determination of its legality. As a

[4] *EME Homer City Generation, L.P., v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).
[5] Jan. 5, 2016 rule at 302.
[6] *Id.*
[7] *State of Texas v. EPA*, No. 16-6-118 (5th Cir. July 15, 2016).

precautionary measure, suits were also filed in the D.C. Circuit and the Tenth Circuit (where Oklahoma is located), in case it were later determined that one of those courts was the proper forum and the Fifth Circuit was not. Those actions have essentially been in a holding pattern pending the Fifth Circuit's decision.

In its July 15, 2016, decision, the Fifth Circuit denied EPA's motion to dismiss or, in the alternative, to transfer the case to the D.C. Circuit, and it granted the petitioners' motion to stay the Rule pending review.

With respect to jurisdiction and venue, the court held that the CAA grants jurisdiction to all the courts of appeal, but divides venue between the D.C. Circuit and the regional courts of appeal depending on whether the action in question is national or regional/local.

The court summarily rejected EPA's claim that EPA's determination was unreviewable, concluding that the court, not EPA, had the authority to determine questions of jurisdiction and venue.

Likewise, the court had no trouble concluding that, notwithstanding EPA's assertions to the contrary, the Rule was not based on a determination of "nationwide scope and effect. Instead, EPA's decisions were all based "on a number of intensely factual determinations . . . . related to the particularities of the emissions sources in Texas and the confluence of factors impacting visibility at two locations in Texas and one in southwest Oklahoma."[8] Therefore, the court concluded, the Rule was of local or regional applicability, and venue was proper in the Fifth Circuit, not the D.C. Circuit.

Finally, in granting the petitioners' motion for stay, the court found that petitioners had a likelihood of success on the merits with respect to four of the five grounds they asserted: (1) requiring source-specific analysis when it is not supported by the CAA or Regional Haze Rule; (2) disapproving Texas' consultation with Oklahoma because Oklahoma failed to ask for a source-specific analysis; (3) imposing emissions controls that go into effect after the end of the ten-year period covered by EPA's regulation under which it disapproved Texas' and Oklahoma's plans; and (4) failing to adequately consider the effect of the Rule on grid reliability in Texas. The court did not rule on petitioners' claim that EPA failed to adequately consider the costs of the Rule.

EPA's Regional Haze Actions Continue: Arkansas Proposed FIP

EPA has taken actions regarding BART and reasonable progress/long-term strategy provisions of other states' regional haze SIPs and EPA proposed/finalized FIPs. This includes the recent proposal to impose similar limitations as seen in the Texas FIP on Arkansas.

[8] *Id.* slip op. at 19-20.

On April 8, 2015, EPA published in the *Federal Register* a proposed FIP to impose regional haze requirements on Arkansas.[9] The FIP is expected to be finalized in August 2016, subject to a Sierra Club and EPA consent decree.[10]

The Arkansas FIP follows EPA's March 12, 2012, disapproval of Arkansas' regional haze SIP.[11] EPA disapproved of Arkansas' BART control analyses and determinations for nine units at six facilities and the reasonable progress analysis and goals set by Arkansas; EPA also partially disapproved of Arkansas' long-term strategy for making reasonable progress. EPA claims that sources in Arkansas are contributing to visibility impairment at Class I visibility areas in Arkansas and Missouri. EPA has proposed source-specific SO_2, NOx, and/or PM BART control determinations for six different units in Arkansas. EPA also – citing to "reasonable progress requirements " – proposes two alternative options for controlling emissions from the coal-fired Entergy Plant in Independence, Arkansas:

- Option 1 - Controls for emissions of SO_2 and NOx for Units 1 and 2 of the Entergy Independence Plant.
- Option 2 - Controls for emissions of SO_2 for the first planning period.

In order to meet these emissions controls, certain units would have to install significantly capital-intensive emissions controls within five years of publication of the final rule (i.e. by August 2021).

Arkansas is in the Eighth Circuit. In *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013), that court was fairly deferential to EPA's partial disapproval of Arkansas' regional-haze planning, affirming most, but not all, of EPA's conclusions. Petitioners challenging the Arkansas rule will undoubtedly rely heavily on the Fifth Circuit's conclusion that the regional haze reasonable progress provisions of the CAA does not allow EPA to require source-specific BART analysis.

[9] U.S. EPA, Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan, Proposed Rule, 80 Fed. Reg. 18,944 (Apr. 8, 2015).
[10] *Sierra Club v. McCarthy*, No. 4:14CV00643 JLH, Final Decree (E.D. Ark. Nov. 3, 2015).
[11] Approval and Promulgation of Implementation Plans; Arkansas; Regional Haze State Implementation Plan; Interstate Transport State Implementation Plan To Address Pollution Affecting Visibility and Regional Haze; Final Rule, 77 Fed. Reg. 14,604 (Mar. 12, 2012).

Attachment A: Regional Haze FIP Targeted Units

Scrubber Upgrades (3 years to comply)		**Scrubber Retrofits** (5 years to comply)	
UNIT	**Final SO_2 Limit (lbs/MMBtu)***	**UNIT**	**Final SO_2 Limit (lbs/MMBtu)***
Sandow 4	0.20	Big Brown 1	0.04
Martin Lake 1	0.12	Big Brown 2	0.04
Martin Lake 2	0.12	Monticello 1	0.04
Martin Lake 3	0.11	Monticello 2	0.04
Monticello 3	0.06	Coleto Creek 1	0.04
Limestone 1	0.08	Tolk 171B	0.06
Limestone 2	0.08	Tolk 172B	0.06
San Miguel**	0.60		

* 30 boiler operating day SO_2 emission limit.

** San Miguel will have one year to comply, though EPA does "not anticipate the need for the installation of any additional equipment" at the San Miguel unit.

Jackson Walker LLP

Mark Walters
Jackson Walker L.L.P.
mwalters@jw.com
(512) 236-2000

TIMELINE OF THE MERCURY AND AIR TOXICS STANDARD

August 4, 2016



- The 1990 Amendments to section 112 of the Clean Air Act require EPA to prepare for and report to Congress by November 15, 1993, a study of the health and environmental effects of the emission of hazardous air pollutants (HAPs) from electric utility steam generating units. EPA is required to regulated the emission of HAPs from such units if determines that regulation is "appropriate and necessary" in light of the study.

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio | Texarkana | jw.com | 1.866.922.5559



- 1997: EPA completes the "Mercury Study Report to Congress."
- 1998: EPA sends the "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units" to Congress.



- 2000: EPA issues a determination that it is "appropriate and necessary" to regulate the emission of HAPs from electric utility steam generating units and officially "lists," under CAA § 112, these units as sources of HAPs. This requires EPA to issues standards for Maximum Achievable Control Technology (MACT) by 2004.

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio | Texarkana | jw.com | 1.866.922.5559



- EPA's determination is challenged in court, but the D.C. Circuit dismisses it as premature.
- 2005: EPA "delists" electric steam generating units as sources of HAPs and proposes the Clean Air Mercury Rule (CAMR), under which mercury emissions will be regulated by standards of performance under CAA § 111 rather than as HAPs under § 112.



- 2008: The D.C. Circuit holds that EPA's attempted "delisting" was invalid and vacates CAMR. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *cert. denied* 555 U.S. 1169 (2009).

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio | Texarkana | jw.com | 1.866.922.5559



- February 16, 2012: EPA publishes the Mercury and Air Toxics Standard (MATS a/k/a the electric utility MACT) to replace CAMR. *National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9304 (Feb. 16, 2012). Multiple petitions for review are filed by states, industry, and others.



- December 10, 2013: After full briefing on the merits, a three-judge panel of the D.C. Circuit hears oral argument.



- April 14, 2014: In a 2-1 decision, the D.C. Circuit panel affirms the MATS rule and rejects the challenges. *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court grants three petitions for review on the issue of whether, in making its "appropriate and necessary" determination, EPA properly declined to consider costs, given that the estimated costs of the rule would be approximately $9.6 billion and the direct quantifiable benefits $4-6 million per year.



- March 25, 2015: Supreme Court hears oral argument.
- June 29, 2015: Supreme Court reverses D.C. Circuit, in a 5-4 decision, holding that EPA erred in failing to consider costs and benefits. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio | Texarkana | jw.com | 1.866.922.5559



- December 15, 2015: Following remand, additional briefing, and oral argument, the D.C. Circuit declines to vacate the rule and instead remands it to EPA without vacatur, leaving the rule in place and effective while EPA considers costs.

- April 16, 2016: EPA publishes its *Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*, 81 Fed. Reg. 24420 (April 16, 2016). Six petitions for review have been filed in the D.C. Circuit, including one by a group of states, including Texas.



- Round two of the MATS litigation squarely tees up the "co-benefits" issue. EPA's own cost estimate at the time of the original rule estimated approximately $6 million in benefits from mercury reduction and an additional $37-$90 billion in benefits from reductions in particulate matter. But PM is not the object of the MATS rule and is regulated separately under CAA § 110.

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio | Texarkana | jw.com | 1.866.922.5559



CAROLYN AHRENS
Of Counsel
Booth, Ahrens & Werkenthin, P.C.
206 East 9th Street, Suite 1501
Austin, Texas 78701
512.472.3263
Carolyn@baw.com

Carolyn Ahrens practices law primarily in the areas of groundwater and surface water rights and regulation, water supply contracts, utility and environmental law including water quality. She also has been active in representing clients on legislative issues affecting water supply and regulation. She is dedicated to obtaining, defending, and securing the water rights and supplies of the firm's clients, through both traditional and nontraditional permitting and contracting strategies and is positioned to work effectively toward intergovernmental, regional and statewide solutions.

Ms. Ahrens is an active participant in professional associations that are focused on water resources for public, power, and industrial water supply. At the state level, Ms. Ahrens is honored to serve on the board of the Texas Water Conservation Association (TWCA). She chaired that association's Water Laws Committee under three association presidents and is active with the Surface Water Committee, Policy Committee, Federal Affairs Committee, and General Environmental Panel. She also served on the National Board of Directors of the WateReuse Association and chaired its National Legislative Committee. She chaired the American Water Works Association's Water Resources Sustainability Division that encompasses national committees on Climate Change, Groundwater, Source Water Protection, Water Desalting, Water Resource Planning and Water Reuse. Ms. Ahrens was a Trustee of the Water Environment Federation whose mission is to preserve and enhance the global water environment.

Ms. Ahrens twice received the prestigious TWCA President's Award for "outstanding dedication, contribution and service to the water resources of the State of Texas." Among other industry awards, she received a 2012 President's Award from the WaterReuse Association for "dedication, passion and vision" and two Watermark awards for raising the public's level of understanding of Texas water issues. Ms. Ahrens is a Life Fellow of the Texas Bar Foundation, a Fellow of the American Bar Association Young Lawyers Division, a member of the Joseph Pritchard Inn, and a Founding Fellow of the Travis County Bar Foundation. For the International Young Lawyers Association, Ms. Ahrens served on the Executive Committee as National Vice-President for the United States, the highest office for national representatives.

CAROLYN AHRENS
Of Counsel
Booth, Ahrens & Werkenthin, P.C.

Publications/Articles:
Editorial Board: Western Water Law & Policy Reporter (2008-2009); *Author:* "The Texas Legislature's 81st Regular Session: An Overview on Water Issues," Western Water Law & Policy Reporter (August/September 2009); "A Different Kind of Water War: Texas Addresses Invasive Aquatic Plant Species," Western Water Law & Policy Reporter (July 2009); "Texas Supreme Court Denies Review in Environmental Flow Appropriation Case," Western Water Law & Policy Reporter (June 2009); "Still Smarting from 2008 Storms, Texas Explores Legislation to Address the Power to Supply Water," Western Water Law & Policy Reporter (May 2009); "Climate Change and Water in Texas," Western Water Law & Policy Reporter (April 2009); "Texas Comptroller Analyzes the State's 'Liquid Assets,'" Western Water Law & Policy Reporter (March 2009); "Texas Water Development Board Maps out the Future of Desalination on the 'Third Coast,'" Western Water Law & Policy Reporter (February 2009); "Texas Water Conservation Advisory Council Recommends Actions to Make Water Conservation Savings a Reality," Western Water Law & Policy Reporter (January 2009); "Texas Supreme Court Judges "Historic Use" of Groundwater by both Quantity and Purpose," Western Water Law & Policy Reporter (December 2008); "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); *Chairman of the Editorial Board 1991-1994:* BARRISTER (Publication of the American Bar Association Young Lawyers Division); *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:
Speaker: "Introduction to Surface Water Rights in Texas," Water in Texas: What Every City Official Needs to Know, Texas Municipal League, March 1-2, 2012; "A Perspective on Water Marketing Policy in Texas," Should Water be Treated as a Commodity?, League of Women Voters, Austin Area, November 5, 2011: "The Special Laws of Permitting Groundwater Use in Texas," 23rd Annual Environmental Superconference 2011, State Bar of Texas, August 4-5, 2011; "Texas Groundwater Regulation," The Auditing Roundtable, South Central Regional Meeting, August 3, 2011; "Groundwater Reduction Plans: A Case Study from Within the Lone Star Groundwater Conservation District Regarding Compliance and Alternative Water Supplies," The Changing Face of Water Rights 2011, State Bar of Texas, February 24-25, 2011; "Legislative Update," Texas Water 05, April 6, 2005; "Water Resources - Croc Hunter Challenge," State Bar of Texas 14th Annual Environmental Superconference, August 5-6, 2004; "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; "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 Organizer and/or Moderator: "Water Panel: Developments in Groundwater, Surface Water, and Water Quality", State Bar of Texas 28th Annual Environmental Superconference, August 4-5, 2016; "Overcoming Institutional Obstacles to Desalinated Supply," MSSC 2011 Annual Salinity Summit, February 17-18, 2011; "National Legislative and Water Policy Outlook Session", WateReuse Annual Symposium, September 8-9, 2008; "Policy Point-Counterpoint", State Bar of Texas 18th Annual Environmental Superconference, August 7-8, 2008; "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 Austin Bar Association, Administrative Law Section, January 31, 1997; "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; Administrative Law Seminar, June 1987, and June 1988, Administrative Law Section, Austin Bar Association.

Professional Affiliations:

Texas Water Conservation Association (Board of Directors, since 2002; Surface Water Committee, since 2015; 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, 2004-2012; Chair, National Legislative Committee 2007-2009; Chair, Nominating Committee, 2005-2012; Member, National and Legislative Committee and National Regulatory Committee 2003-2012; Member, Planning Committee for Symposium XVIII, September 2003). *WateReuse Texas* (Trustee, 2012-2015; Board of Directors, 2005-2015). *American Water Works Association* (Chair, Water Resources Sustainability Division, 2010-2013; Vice-chair, Water Resources Sustainability Division, 2009-2010; Trustee, Water Resources Division 2007-2010; Chair 2004-2007, Water Regulation and Allocation Committee; Member, Sustainability Initiative Coordinating Committee, 2010-2013; Member, Legal Affairs Committee 2000-2002; Liaison, Rates and Charges Subcommittee 2000-2002; Member, 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; Member, Government Affairs Committee 2000-2004; Vice-Chair, GAC Legislative Subcommittee 2002-2004; Member, Constitution and By-laws Committee 2001-2004; Member, Nominating Committee, 2002-2003; Member, Water Reuse Committee, since 2001). *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; Member, Annual Meeting Program Committee 1993-2003; Member, 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).

Bar Associations:

International Young Lawyers Association (Presidential Delegate 2000-03; National Vice-President for the United States 1998-2000; Liaison to ABA 1996-1998; Executive Committee 1996-2003; 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; Member, Gavel Awards Committee: 2001-2003; Gavel Awards Screening Committee 1994-2001, 2003-2015; 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). *Austin Bar Association* (Board of Directors,

2011-12, 1989-1990); Environmental Law Section (President, 2011-12); Administrative Law Section (Board of Directors 1987-1993; President 1989-1990; Programs Committee Chair 1985-1989); (Member, Administrative Law Section and Environmental Law Section). *Austin Young Lawyers Association* (Board of Directors 1987-1993; Secretary 1988-1989).

Professional Honors:
2012 Dave Reque President's Award, presented by President Brian Good on behalf of the *WaterReuse Association*, September 10, 2012, for "dedication, passion and vision;" President's Award, presented by President Jeff Taylor on behalf of the *Texas Water Conservation Association*, March 4, 2010, for "outstanding dedication, contributions, and service to the Association and the water resources of Texas;" 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 President C.E. Williams on behalf of 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).

Education:
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.

Admitted: State Bar of Texas, 1985.

Molly Cagle



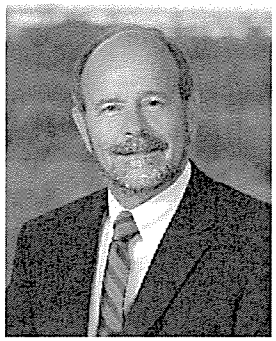
PARTNER
98 San Jacinto Boulevard
Suite 1500
Austin Texas 78701-4078
United States of America
+1.512.322.2535
+1.512.322.3635 fax
molly.cagle@bakerbotts.com

Molly counsels clients on virtually every kind of environmental matter and represents them before various agencies and in federal and state courts. *Chambers USA* described her in their 2004 publication of *America's Leading Business Lawyers* as a "renaissance lawyer, a true litigator" who is especially praised for her "effectiveness" and "top notch negotiation skills."

In the enforcement area, she has litigated and negotiated settlements for clients under the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and their state analogs, as well as Superfund. Molly has counseled on audit issues, under both the state audit law and federal policy. She also has both resolved and tried disputes regarding water supply and utility issues.

Molly's other major area of practice is permitting work before the U.S. Environmental Protection Agency and Texas Commission on Environmental Quality (and its predecessor agencies), as well as the Texas Parks & Wildlife and Railroad Commission of Texas. With regard to air and solid waste, Molly has handled a variety of contested cases, including incinerator and BIF air and hazardous waste permitting. She represents clients in State Implementation Plan (SIP) issues as well. On both a state and federal level, Molly has assisted clients in rulemaking petitions and in preparing comments on agency rules. She also has assisted clients in bringing litigation to challenge environmental legislation and rules. Molly has testified before the United States and Texas Senates, and has served as a testifying expert on environmental issues in a number of cases.

Douglas G. Caroom
dcaroom@bickerstaff.com



Doug Caroom is a partner in the law firm of Bickerstaff Heath Delgado Acosta LLP in Austin, Texas. He is Board Certified in Administrative Law by the Texas Board of Legal Specialization, and his principal practice areas include water law, environmental law, and administrative law. Doug was admitted to the Texas Bar in 1974 and is also admitted to practice before the U.S. Court of Appeals for the Fifth Circuit and the U.S. District Courts for the Northern and Western Districts of Texas. He is a graduate of the University of Texas at Austin (B.A., 1968; M.A., 1971) and the University of Texas School of Law (J.D., with honors 1974).

Mr. Caroom served as Assistant Attorney General of Texas from 1974-1981, and was head of the Water Law Section from 1976-1977. At the Environmental Protection Division of the Texas Attorney General's office, he served as Assistant Chief from 1977-1978 and Chief from 1978-1981. Mr. Caroom was an adjunct professor in Water Law at the University of Texas School of Law in 1987. He served as Co-editor of the Texas Environmental Compliance Update from 1994-95 and is the co-author of "Water Law," Annual Survey of Texas Law, 43 Southwestern Law Journal 413 (1989); 44 Southwestern Law Journal 441 (1990). As a member of the State Bar of Texas, he served as editor and chairman of the Environmental and Natural Resources Sections from 1977-78 and 1980-81, respectively. Mr. Caroom has over 30 years of experience representing clients on water-related issues.

EVOLVING TEXAS GROUNDWATER LAW

"You can observe a lot by watching," –Y.B.

Douglas G. Caroom

Introduction

For almost 100 years following adoption of the Absolute Ownership Doctrine and the Rule of Capture in the *East* case,[1] Texas groundwater law was relatively stable, if not always free of controversy. During the last twenty years, as demands for new sources of water supply continue to grow, legislative and judicial developments have continually changed the legal landscape for Texas groundwater law. Much of this is attributable to the focus on water resource planning that was initiated in 1997 by Senate Bill 1.[2]

This paper will examine Texas groundwater law, both where we are now and how we got here, with some speculation on where we may be headed.

Groundwater

(a) Definition

Groundwater or underground water is water occurring under the surface of the land. The term "groundwater" can include percolating water[3] or artesian water,[4] but not the underflow of a surface water river or stream[5] or the underground flow of water in confined channels. Groundwater is presumed to be percolating, unless proven otherwise.[6]

Texas, unlike most other western states, has a statewide regulatory program only for surface water, and not for groundwater. Recent trends in Texas law provide for the creation of

---

[1] *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904) (known as the *East* case).

[2] Act of June 2, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in scattered sections of the Water Code, Government Code, Agriculture Code, Tax Code, and Health & Safety Code); *See* Hubert and Bullock, Senate Bill 1: The First Big and Bold Step Toward Meeting Texas' Future Water Needs, 30 Tex. Tech L. Rev. 53 (1999).

[3] *See* TEX. WATER CODE ANN. § 36.001(5).

[4] *See* discussion below at § 14:2(b)(3).

[5] *Pecos County Water Control and Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App. — El Paso 1954), writ refused n.r.e. (holding that groundwater is water occurring under the surface of the land other than underflow of a surface water river or stream).

[6] *Pecos County Water Control and Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App. — El Paso 1954), writ refused n.r.e.; *see also Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. — Austin 1989), writ denied, (Oct. 25, 1989) (citing *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 54 A.L.R. 1397 (1927) ("In the absence of such testimony, the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property.")).

local groundwater conservation districts to provide some regulation of groundwater. These local districts control withdrawals and uses of groundwater within their jurisdictions. In Texas, surface water is considered property of the State, while groundwater and the right to capture groundwater is considered the property of the owner of the surface estate and treated much like a mineral or oil and gas, with some differences.[7]

(b) Exceptions

Certain categories of underground water, however, are legally distinct from "groundwater," in terms of the ownership interest and/or the applicable regulatory jurisdiction. Each of these distinct categories of underground water is summarized below:

Underflow of a Watercourse

"Underflow" is that portion of the flow of a surface watercourse that flows through the sand and gravel deposits beneath the surface of the bed of a stream.[8] Underflow is hydrologically connected to the surface flow of the stream and moving in the same direction as the surface water.[9] Underflow is considered to be property of the State, and the principles governing allocation and use of surface water apply.[10]

Underground Streams in Defined Channels

The courts make a critical distinction between percolating groundwater and groundwater flowing in defined subterranean channels and streams. The landowner's rights with respect to groundwater flowing in a well-defined and known subterranean stream are the same as would apply for a surface watercourse. The subsurface watercourse, however, must have all the characteristics of a surface watercourse. These characteristics are beds, banks that form a channel, and a current of water.[11] This determination is made on a case by case basis, and to date no subterranean streams have been found in Texas.[12]

---

[7] For a brief discussion relating to the nature of a landowner's property interest, vis-à-vis the regulatory authority of groundwater districts, *see* §§ 14:2(c) and (d) below.

[8] *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 276, 54 A.L.R. 1397 (1927).

[9] 30 TEX. ADMIN. CODE § 297.1(55).

[10] TEX. WATER CODE ANN. § 11.021(a) (definition of "state water").

[11] *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. — Austin 1989), writ denied, (Oct. 25, 1989). In *Denis*, downstream landowners sought declarations that upstream landowners did not have any authority to appropriate waters adjacent to Kickapoo Springs for irrigation purposes. The court of appeals held that, absent proof that the subterranean watercourse possessed all the characteristics of a surface watercourse, the presumption of percolating groundwater is not rebutted. Also, the fact that springflow makes a sufficient addition to streamflow to be of benefit to downstream riparian owners does not make the underground flow qualify as an underground stream.

[12] The (former) Texas Water Commission attempted to apply this principle to the Edwards Aquifer, declaring it a subterranean watercourse by finding that the aquifer had all of the characteristics of a subterranean stream. The District Court of Travis County disagreed, and the Legislature reinforced this conclusion when it declared the Edwards Aquifer "a unique natural resource ... but not an underground stream." *See* Act of June 11, 1993, 73rd Leg., R.S., ch. 626, § 1.01, 1993 Tex. Gen. Laws 2350.

Artesian Water

Artesian water is groundwater confined under pressure by an impermeable geologic layer, capable of flowing "above the first impervious stratum below the surface of the ground" when properly cased in a well.[13] Texas courts have applied the principles applicable to percolating groundwater to artesian water. The only significant distinction is the existence of statutory provisions prohibiting the waste of artesian water[14] and requiring the approval of the Texas Commission on Environmental Quality (TCEQ) in certain circumstances for withdrawal.[15]

(c) The "Rule of Capture" and Common Law Restrictions

In *Houston & Texas Central Railway Co. v. East*, the Texas Supreme Court adopted the English common law rule of *Acton v. Blundell*[16] that the owner of the land might pump unlimited quantities of water from under his land, regardless of the impact that action might have upon his neighbor's ability to obtain water on his own land. This right is referred to as the "right to capture." Neither an injunction nor damages will lie to prevent such action.

Only two significant limitations exist at common law on the landowner's right to capture and use percolating water. First, the landowner cannot capture and use percolating water maliciously with the purpose of injuring a neighbor or in a manner that amounts to wanton and willful waste of the resource.[17] Second, since 1978 an action for damages will lie for the negligent pumping of groundwater that causes subsidence of neighboring land.[18]

The *Comanche Springs* case[19] applied the principles of the *East* case to groundwater uses even if those uses affect surface water supplies. The plaintiff, a statutory senior appropriator of surface water, complained that the defendant's well had reduced surface springflow of Comanche Springs to such an extent that insufficient water was available for irrigation. The court ruled that the plaintiff's right to use the water attached only after the water emerged from the ground. Prior to such emergence, the defendant could use any amount of water, regardless of the impact upon others.[20]

A surface estate owner need not use groundwater on the premises of the surface estate. At common law, the surface estate owner may sell the groundwater he captures below his surface

---

[13] TEX. WATER CODE ANN. § 11.201.

[14] TEX. WATER CODE ANN. § 11.205.

[15] TEX. WATER CODE ANN § 11.202. Pursuant to §§ 11.202(d) and (e), permission is required from the TCEQ for wells producing greater than 5,000 gallons per minute from the Edwards Aquifer.

[16] *Acton v. Blundell*, 1843 WL 5768 (U.K. Ex Ct 1843).

[17] *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 801 (1955).

[18] *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 30, 9 Envtl. L. Rep. 20452, 5 A.L.R.4th 591 (Tex. 1978).

[19] *Pecos County Water Control and Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App. — El Paso 1954), writ refused n.r.e.

[20] *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d at 505–06.

estate for off-site use by a third party.[21] The use of groundwater at a distant location, even though most of the water may be lost in transit, is also permissible. In *City of Corpus Christi v. City of Pleasanton*,[22] the Texas Supreme Court approved Corpus Christi's transportation of artesian well water along 118 miles of surface watercourses to its diversion point, even though at times as much as two-thirds to three-fourths of the original supply was lost in transit due to evaporation, seepage, and transportation.[23]

In 1999, the Texas Supreme Court in *Sipriano v. Great Spring Waters of America, Inc. a/k/a Ozarka*[24] was urged to reconsider the holding of *East* and to change the common law rule of capture to the beneficial use doctrine or a rule of reasonable use. The rule of reasonable use would limit the common law right of a surface owner to take water from a common reservoir by imposing liability on landowners who "unreasonably" use groundwater to their neighbors' detriment. Acknowledging that the efficacy of the groundwater management methods chosen and implemented by the Legislature through Chapter 36 of the Texas Water Code "has been a matter of considerable debate," the court nevertheless declined to change the rule of capture. The court concluded that it was inappropriate at that time to "insert itself into the regulatory mix," given the Legislature's express preference for managing groundwater through local groundwater districts.[25]

(d) Groundwater Ownership

The legal nature of groundwater ownership in Texas has been recently litigated in various contexts, and also further addressed by the Legislature.

In the context of groundwater rights transactions, the most notable development is the *City of Del Rio* case.[26] *City of Del Rio* involved a property conveyance by a private party to a municipality, specifically regarding whether the landowner legally could—and properly did—reserve to itself the corresponding groundwater rights when conveying the surface estate. The landowner Trust had conveyed to the City a 15-acre tract from a ranch that it owned, from which tract the Trust had not previously produced groundwater. In the transaction, the Trust reserved all water rights associated with that tract, but did not expressly reserve easement rights that would allow the Trust to produce groundwater from the tract once it was conveyed to the City. In a challenge following the City's drilling of a high capacity well on the 15-acre tract, the court of appeals affirmed the trial court's declaratory judgment in favor of the Trust: the Trust's reservation of water rights was valid and enforceable, and the Trust had the right to sever and convey the groundwater rights beneath the 15-acre tract.[27]

---

[21] *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 54 A.L.R. 1397 (1927).

[22] *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955).

[23] Limitations on a landowner's ability to alienate and transport groundwater may exist within groundwater conservation districts, as discussed in § 14.2(e)(1)(B) below.

[24] *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999).

[25] *Sipriano*, 1 S.W.3d at 80.

[26] *See City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App. — San Antonio 2008).

[27] *City of Del Rio*, 269 S.W.3d at 617.

The issue of "ownership in place," as distinct from ownership only following water production, has recently been squarely addressed by the Texas Supreme Court in a case in which landowners brought "takings" claims based on the permitting decisions of the Edwards Aquifer Authority (EAA).[28] Affirming the judgment of the court of appeals, the court held that "land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation."[29] The court's analysis included an extensive review of the major rule of capture cases and legislative treatment of groundwater rights and regulation, and the court concluded that the oil and gas case law precedent of recognizing both the rule of capture and ownership in place is also appropriate for groundwater.[30] The court affirmed the authority of the EAA and other groundwater conservation districts (GCDs) to regulate groundwater production, but recognized that such regulation can result in a compensable takings claim under the Texas Constitution. The takings claims were remanded for further proceedings.[31]

Even prior to the *Day* decision, the Legislature had amended Chapter 36 of the Texas Water Code to expressly recognize "that a landowner owns the groundwater below the surface of the landowner's land as real property," and that "[n]othing in [the Water Code] shall be construed as granting the authority to deprive or divest a landowner [including lessees, heirs, or assigns] of the groundwater ownership and rights" described in Section 36.002. The amended statute also incorporates the common law exceptions and defenses under the rule of capture reflected in Texas case law, and specifies that the landowner is not entitled to capture a specific amount of groundwater below the surface of his land. GCDs must consider in their rulemaking these ownership rights, the public interest in conservation, protection, recharge, waste prevention and subsidence control, and the goals developed as part of the GCD's statutorily required management plan.[32] GCDs continue to have authority to impose well spacing or tract size requirements, and to limit groundwater production, as discussed below.[33]

In addition to these common law and statutory parameters, restrictive covenants or municipal ordinances that prohibit drilling water wells may limit the right of a landowner to use groundwater, subject to the rule of capture.[34]

---

[28] *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 178 O.G.R. 817 (Tex. 2012).

[29] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 817.

[30] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 823, 828–32.

[31] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 843.

[32] TEX. WATER CODE ANN. § 36.101(a).

[33] TEX. WATER CODE ANN. § 36.002 (as amended by H.B. 4112, 84th Leg., R.S. (2015)). The statute expressly does not affect the regulatory authority of the Edwards Aquifer Authority or the subsidence districts.

[34] *See, e.g., Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 149 O.G.R. 170 (Tex. App. — Fort Worth 2001) (upholding restrictive covenants put in place by a subdivision developer).

(e) Groundwater Conservation Districts and Subsidence Districts

Groundwater, like other species of real property, is subject to reasonable regulation under the police power to protect the public health and welfare. Moreover, like oil and gas property rights, this general authority is supplemented by the mandates of the Conservation Amendment, §59, Article XVI of the Texas Constitution. Exercise of the State's regulatory authority to date has been limited to local or regional districts, known as underground water or groundwater conservation districts, usually created on a local option basis. The Legislature has emphasized that groundwater districts are the State's preferred method of groundwater management, "in order to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater."[35]

Thus, the unrestricted common law rule of capture is becoming increasingly rare in Texas, primarily due to the proliferation of local governmental entities with statutory authority to regulate withdrawal of groundwater: groundwater conservation districts (GCDs) and subsidence districts. As of November 2015, there are two subsidence districts and 99 GCDs[36] throughout Texas. The Texas Water Development Board (TWDB) relates that increasingly more of the land and groundwater resources of Texas are under the jurisdiction of one of these districts. As of this writing, two-thirds of Texas counties are fully or partially within a GCD or a subsidence district, and more than 85% of the groundwater produced in Texas is within one of these districts.[37] Thus, a starting point in addressing almost any groundwater issue is to determine whether the property is within a GCD or a subsidence district and, if so, what the applicable rules of that district are.[38]

GCDs Subject to Water Code Chapter 36

(A) Creation

GCDs can be created either by the TCEQ, upon petition pursuant to provisions of Chapter 36 of the Texas Water Code,[39] or by special act of the Legislature. By far the more common practice has been legislative action. A third mechanism by which to create a GCD is through the designation of a priority groundwater management area, as discussed in §14.2(e)(1)(C) below.

---

[35] TEX. WATER CODE ANN. § 36.0015 (as amended by H.B. 200, 84th Leg., R.S. (2015)).

[36] Of this total number, there are 98 confirmed GCDs and one other district, the Aransas County GCD, created by the 84th Legislature in 2015 and pending confirmation election.

[37] *See* Texas Water Development Board, GCD Facts, *available at* http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp (based on 2008 data on reported groundwater usage); and TWDB Map (rev. Nov. 2014), *available at* http://www.twdb.texas.gov/mapping/doc/maps/GCDs_8x11.pdf.

[38] Detailed information and maps of groundwater conservation districts are available on the "Groundwater" page of TWDB's website: http://www.twdb.texas.gov. Contact information, as well as copies of district rules and management plans for most GCDs, can also be found through this website.

[39] *See* TEX. WATER CODE ANN. §§ 36.011 et seq.

In creating a GCD by special legislation, the Legislature may modify the powers, authorities, management, or funding mechanisms provided by general law. In most cases, however, the authority of legislatively created districts tracks the Chapter 36 provisions closely. Typically, districts have the power to incur debt, levy taxes and/or charge production fees, charge for services, adopt rules for those services, enter contracts, obtain easements, and condemn property.[40] Because of the many differences particular to each district, it is important to review the enabling legislation and rules of a specific GCD in order to determine the parameters of its powers and duties.

(B) Powers

Chapter 36 of the Texas Water Code provides the current codification of general law applicable to GCDs. The directors of each local district determine the extent to which a GCD's substantial discretionary powers are exercised and the manner in which they are exercised.[41] Each GCD establishes its own rules based on its unique enabling legislation and its application of Chapter 36 provisions; therefore, the rules of every GCD differ from those of the others.

The regulatory authority of a GCD is extremely broad, and a GCD may implement that authority in two ways: rulemaking and permitting. A GCD has general authority to make and enforce rules, "including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater."[42] Because the statute's "waste" definition includes physical quantities, quality, and protection against degradation from other sources, a GCD's charge to prevent waste, by itself, gives the district far-reaching authority under its rulemaking power.

The extent of a GCD's rulemaking and permitting power has been addressed by the courts, as discussed above in §14:2(d) and in other ways. In the *High Plains* case, the Amarillo Court of Appeals refused to recognize the authority of a groundwater district to deny or revoke permits for "disproportionate takings" in relation to tract size.[43] Reaffirming the rule of capture doctrine, the court rejected the district's actions because the groundwater district lacked any "clear authority" to regulate pumping in this manner, as must be expressly granted by the Legislature.[44] The court further concluded that the Legislature had not established reasonable standards to guide groundwater districts in exercising their rulemaking powers in this manner.[45]

---

[40] *See* TEX. WATER CODE ANN. §§ 36.101 et seq.

[41] GCDs, however, are subject to TCEQ's oversight authority to ensure a GCD's compliance with Chapter 36 provisions, and are also subject to review by the State Auditor under the direction of the legislative audit committee. *See generally* TEX. WATER CODE ANN. Ch. 36, subch. I.

[42] TEX. WATER CODE ANN. § 36.101.

[43] *South Plains Lamesa Railroad, Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770 (Tex. App. — Amarillo 2001).

[44] *South Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d at 779–80.

[45] *South Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d at 780.

The Legislature responded to the *High Plains* decision by amending Chapter 36 of the Texas Water Code to explicitly provide that a groundwater district may make and enforce rules limiting groundwater production based on tract size or well spacing,[46] and limiting production in other ways.[47]

In another case, the Texas Supreme Court ruled that, although GCDs are authorized to "preserve historic or existing use" by their groundwater production rules consistent with their management plan,[48] a district's discretion thus to protect existing wells and production must be tied both to the amount and the purpose of the prior use. The court held invalid a district's scheme for issuing permits for out-of-district water transfers in a manner that effectively allowed only certain irrigating historic users to obtain such transfer permits, regardless of the fact that the purpose of use would be changed by the transfer.[49]

A GCD's rulemaking power has also been challenged under the Private Real Property Rights Preservation Act.[50] In *Bragg v. Edwards Aquifer Authority*,[51] the plaintiff challenged a groundwater district's rulemaking powers on the grounds that the Act requires a district to perform a takings impact assessment. The Texas Supreme Court held that the EAA's adoption of well permitting rules was an exercise of its statutory authority to prevent waste and protect the rights of owners of an interest in groundwater. As a result, the statutory requirement for a takings impact assessment did not apply to the Authority in this context.

Thus, GCDs have broad rulemaking power. A GCD has the authority to adopt rules providing for the spacing between water wells and regulation of groundwater production, including by well production limits, limits based on acreage or tract size or defined acreage assigned to a well site, rate of production limits, or by managed depletion.[52] Most GCDs have adopted some form of regulation over well spacing, groundwater production, or both.[53] The Legislature has expressly provided authority for GCDs, based on their determinations of varying conditions, to adopt different rules for each aquifer, aquifer subdivision, geologic strata, or overlying area within their boundaries. A GCD may select its method of regulating groundwater production based on the hydrogeological conditions of the aquifer(s) within the district.[54]

---

[46] TEX. WATER CODE ANN. §§ 36.002, 36.101, 36.116.

[47] TEX. WATER CODE ANN. § 36.116.

[48] TEX. WATER CODE ANN. § 36.116(b).

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

[50] TEX. GOV'T CODE ANN. §§ 2007.001 et seq.

[51] *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729 (Tex. 2002).

[52] TEX. WATER CODE ANN. § 36.116.

[53] *See generally* Texas Alliance of Groundwater Districts, *TAGD Groundwater Conservation District Index* (summarizing information regarding nearly all of the existing confirmed districts), *available at* http://www.texasgroundwater.org/resources/gcdi.html.

[54] TEX. WATER CODE ANN. §§ 36.116(d) to (e).

With the exception of "exempt wells"[55] all wells in a GCD must be permitted by the district before withdrawal of groundwater from the well. Although there remain many variations among GCDs' substantive permit requirements, in recent years the Legislature has gradually been standardizing the procedural (notice and hearing) requirements governing GCD permit processing, through amendments to Chapter 36 of the Water Code.[56] If a district distinguishes between wells producing water for use inside and those producing water for out-of-district use, it may not impose more restrictive permit conditions on transporters than it imposes on existing in-district users.[57] Wells existing at the time of district creation are normally "grandfathered" or given historic use permits, and thus exempted from more stringent permit conditions that may apply to wells that are constructed later. A permit may impose limits on spacing and production on the bases discussed above. A GCD may adopt rules requiring the owner or operator of a well (except exempt domestic and livestock wells) to report groundwater withdrawals.[58] GCDs must, to the extent possible and based on proper applications, issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desired future condition (DFC) developed under Section 36.108 of the Texas Water Code. GCDs must manage total groundwater production on a long-term basis to achieve such applicable DFCs, with identified considerations including the amount of modeled available groundwater determined by TWDB, estimates of production from exempt wells, production authorized under existing permits, estimated actual production from permitted wells, and yearly precipitation and production patterns.[59] This process is discussed below in §14:2(e)(1)(C).

Not only may districts enforce rules and permits through suits for injunctive relief, but Section 36.102 of the Texas Water Code grants GCDs the authority to impose civil penalties and recover attorney's fees for enforcement litigation.[60] A GCD may enforce its rules "against any person," but if the person is a governmental entity that has violated the district's rules, the limits on the amount of fees, costs, and penalties that a district may impose constitute a limit of liability of the governmental entity for the violation.[61]

---

[55] Certain wells producing water for domestic and livestock use, oil and gas exploration and production, and mining are statutorily exempt from permitting. TEX. WATER CODE ANN. § 36.117(b). Additionally, the legislation creating a GCD may include additional exemptions, and a GCD's rules may expand the statutory exemptions to other classifications of wells. TEX. WATER CODE ANN. § 36.117(a). However, a previously granted exemption may be cancelled (and permitting and/or production rules imposed) if the use of the groundwater withdrawals from the exempt well changes. TEX. WATER CODE ANN. § 36.117(d).

[56] *See generally* TEX. WATER CODE ANN. Ch. 36, subch. M (as amended by H.B. 2179, 84th Leg., R.S. (2015)).

[57] TEX. WATER CODE ANN. § 36.122.

[58] TEX. WATER CODE ANN. § 36.111(b).

[59] TEX. WATER CODE ANN. § 36.1132.

[60] Landowners or others who have a right to produce groundwater from land that is either adjacent to or within a half-mile radius of a well illegally drilled or operated, or from which groundwater is produced in violation of a district production limitation rule, may also sue the well owner to enforce district rules and permit requirements and to seek monetary damages attributable to those violations. TEX. WATER CODE ANN. § 36.119(b) to (c). Prior to filing suit the aggrieved party must first file a written complaint with the GCD having jurisdiction over the wells. TEX. WATER CODE ANN. §§ 36.119(g) to (h).

[61] TEX. WATER CODE ANN. § 36.102(e); *see Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756 (Tex. 2011) (per curiam) (involving a suit by a GCD for a city's failure to file required monthly reports and to pay groundwater export fees).

General law GCDs can be funded through *ad valorem* taxes. The authorized statutory maximum is 50 cents/$100 assessed valuation and must have voter approval. Additionally, following voter authorization, a GCD may issue tax supported bonds.[62] Funding GCDs through the imposition of water use fees upon pumpers in the district has become increasingly frequent.[63] Such production fees may be assessed in lieu of, or in conjunction with, any taxes otherwise levied by the GCD, and may be based on the amount of permitted annual withdrawal from a well, or on the amount actually withdrawn. Unless otherwise provided in a district's special legislation, these annual production fees are statutorily capped at $1 per acre-foot for water used for agricultural use, and $10 per acre-foot for water used for any other purpose.[64]

(C) Management of Groundwater Resources

Each groundwater conservation district is required to develop a management plan that addresses various management goals. Those goals include, as applicable, promoting the most efficient use of groundwater; controlling and preventing waste and subsidence; addressing conjunctive surface water management issues, natural resource issues, and drought conditions; addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, and brush control; and addressing the DFCs adopted by the district.[65] District management plans are to include specific objectives, performance standards, detailed actions, and procedures designed to effectuate the plan; estimates of modeled available groundwater in the district based on the DFCs; and estimates of groundwater movement, supply, and demand.[66]

Chapter 36 requires a GCD to develop its plan (or any plan amendments) using the district's best available data (as well as any groundwater availability modeling information provided by the TWDB) and to forward its plan to the regional water planning group, to be used in that group's planning process.[67] A GCD's plan must be approved by the TWDB, which has procedures to mediate and resolve conflicts between a GCD's approved management plan and an approved regional water plan or the state water plan.[68] The district must also adopt rules necessary to implement its management plan, and a district's rulemaking and permitting authority is limited until it has an approved management plan.[69] A GCD must ensure that its management plan and corresponding rules reflect goals and objectives consistent with achieving

---

[62] TEX. WATER CODE ANN. § 36.201.

[63] *See generally* Texas Alliance of Groundwater Districts, *TAGD Groundwater Conservation District Index* (summarizing information regarding nearly all of the existing confirmed districts), *available at* http://www.texasgroundwater.org/resources/gcdi.html (identifying approximately one-third of GCDs as funded either by production fees, or a combination of production fees and tax revenues).

[64] TEX. WATER CODE ANN. § 36.205(c).

[65] TEX. WATER CODE ANN. §§ 36.1071(a), 36.108.

[66] TEX. WATER CODE ANN. § 36.1071(e).

[67] TEX. WATER CODE ANN. §§ 36.1071(b), (h). For a further discussion on regional water planning, *see* § 14:10(b) below.

[68] TEX. WATER CODE ANN. § 36.1072.

[69] TEX. WATER CODE ANN. § 36.1071(f).

the relevant desired future conditions, adopted through the joint planning process described below.[70]

The boundaries of most GCDs do not follow aquifer boundaries; therefore, often more than one GCD has jurisdiction over a single aquifer. Accordingly, the TWDB has designated "groundwater management areas" (GMAs) for major and minor aquifers across the state as a tool for coordination among GCDs.[71] A GMA is an area designated by the TWDB as an area suitable for management of groundwater resources.[72] To the extent possible, its boundaries coincide with the boundaries of a groundwater reservoir or a subdivision of a groundwater reservoir.[73] A GMA is only an identified geographic area; it is not an entity with groundwater management authority.

GCDs within a GMA are required to engage in a joint planning process with other districts in the management area that share the same aquifer or portion of an aquifer. At least every five years, the districts must consider groundwater availability models and other data and adopt (by a 2/3 vote of district representatives) new or amend existing DFCs for the aquifers within the management area.[74] This DFC process includes detailed requirements for notice of meetings and hearings and for public comment; specified considerations for the GCDs' proposal and approval of desired future conditions; further hearing and reporting requirements that each GCD must satisfy; adoption (again, by 2/3 vote) by the GCD group; and submission to the TWDB of the adopted conditions along with an "explanatory report" for the management area.[75]

The DFCs adopted by the GCDs are subject to review by the TWDB, on petition by entities such as a district, a regional planning group, or a "person with a legally defined interest" in the groundwater in the area.[76] If challenged by an "affected person," various aspects of the joint planning process or its results are subject to review by the TCEQ.[77] The Commission has enhanced enforcement mechanisms for failure of a groundwater district to submit its management plan, to participate in joint planning, or to adopt rules designed to achieve the desired future conditions of GMA groundwater resources. These enforcement mechanisms include issuing orders requiring the district to take certain actions, dissolving the district's board and calling an election, requesting the Texas Attorney General to place a district into receivership, and dissolving the district.[78]

---

[70] TEX. WATER CODE ANN. § 36.1085.

[71] TEX. WATER CODE ANN. § 35.004(a).

[72] TEX. WATER CODE ANN. § 35.002(11).

[73] TEX. WATER CODE ANN. § 35.004(a).

[74] TEX. WATER CODE ANN. § 36.108. Background materials and further details on this joint planning within each of the sixteen GMAs can be found on the TWDB's website, at http://www.twdb.texas.gov/groundwater/management_areas/index.asp.

[75] TEX. WATER CODE ANN. §§ 36.001(30), 36.1081 to 36.1086, 36.063, 36.108.

[76] TEX. WATER CODE ANN. § 36.1083. This statute was substantially amended in 2015, with more detailed provisions for this review process. *See* H.B. 200, 84th Leg., R.S., §§ 4, 5, and 6 (2015).

[77] TEX. WATER CODE ANN. § 36.3011. This statute was substantially amended in 2015, with more detailed provisions for this review process. *See* H.B. 2767, 84th Leg., R.S., § 16 (2015).

[78] TEX. WATER CODE ANN. §§ 36.3011, 36.303, 36.3035.

Another way in which the State addresses groundwater management is through the designation of a priority groundwater management area (PGMA). A PGMA is an area with no GCD, designated by the TCEQ as an area that is experiencing, or is expected to experience within the next fifty years, critical groundwater problems, including surface water or groundwater shortages, land subsidence resulting from groundwater withdrawal, or contamination of groundwater supplies.[79] The TCEQ and the TWDB must annually review the need for additional PGMA designations.[80] Based on a report prepared by TCEQ's executive director,[81] the TCEQ then conducts an evidentiary hearing to consider (a) designation of a PGMA, and (b) whether that PGMA should be added to an existing GCD, or whether one or more GCDs should be created to cover all or a part of the PGMA.[82] Following TCEQ issuance of an order taking one of these actions, the landowners in the PGMA may either: (a) create one or more Chapter 36 GCDs; (b) have the PGMA annexed to an adjoining GCD; or (c) create one or more GCDs through the legislative process.[83]

The TCEQ has completed numerous PGMA studies and update studies, and several study areas have been designated as PGMAs, either by TCEQ order or based on previous statutory provisions. In other cases, the TCEQ has determined that certain PGMA study areas do not meet the criteria for designation and no further evaluation is planned.[84]

Edwards Aquifer Authority

One notable special law GCD is the Edwards Aquifer Authority (EAA).[85] The EAA was created in response to growing competing demands on this sole source aquifer from municipal users, irrigators, industrial users, recreational users, and endangered species, all of whom rely upon the aquifer or spring flows from the aquifer to satisfy their needs.[86] In order to sustain and protect this resource and the diverse interests dependent upon it, the Legislature established a permit system based upon an existing user's convincing evidence of beneficial use without waste of groundwater during an historical period, which began on June 1, 1972 and ended May 31,

---

[79] TEX. WATER CODE ANN. §§ 35.002(12), 35.007(a).

[80] TEX. WATER CODE ANN. §§ 35.002(12), 35.007(a).

[81] TEX. WATER CODE ANN. § 35.007.

[82] TEX. WATER CODE ANN. § 35.008.

[83] TEX. WATER CODE ANN. § 35.012(a).

[84] More detailed information regarding PGMAs and the evaluation process can be found on the TCEQ's website, http://www.tceq.state.tx.us/groundwater/groundwater/pgma.html.

[85] For a detailed discussion of the Edwards Aquifer Authority and terminology relating to its operations, *see* Darcy Alan Frownfelter, *Edwards Aquifer Authority* (ch. 17), *in* Essentials of Texas Water Resources (Mary K. Sahs ed., 4th ed. 2016).

[86] The Sierra Club contributed to the impetus for the passage of the EAA Act by bringing numerous challenges under the Endangered Species Act against the pumpers of the Edwards Aquifer for taking or harming the habitat of five endangered species. *See Sierra Club v. Glickman*, 156 F.3d 606, 29 Envtl. L. Rep. 20159 (5th Cir. 1998); *Sierra Club v. City of San Antonio*, 115 F.3d 311, 38 Fed. R. Serv. 3d 194, 28 Envtl. L. Rep. 20124 (5th Cir. 1997); *Sierra Club v. City of San Antonio*, 112 F.3d 789, 44 Env't. Rep. Cas. (BNA) 1982, 27 Envtl. L. Rep. 21051 (5th Cir. 1997); *Sierra Club v. Lujan*, 36 Env't. Rep. Cas. (BNA) 1533, 1993 WL 151353 (W.D. Tex. 1993).

1993. The EAA Act has survived numerous facial constitutional challenges and has been upheld as constitutional.[87] However, the EAA's cap on total permitted withdrawals has been modified, as have its provisions for a "critical period management plan."[88] The Texas Attorney General has issued an opinion that the EAA's statute did not authorize it to reduce the withdrawal rights of irrigation users and "averagers," or to issue interruptible junior withdrawal rights.[89]

Subsidence Districts

Another important example of a special law district created for groundwater regulation, but which is expressly not governed by the provisions of Chapter 36, is the Harris-Galveston Coastal Subsidence District (Subsidence District).[90] The Subsidence District was created in response to significant subsidence resulting from the withdrawal of groundwater and contributing to increased flooding. To minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure and to control and prevent subsidence, the Subsidence District is authorized to regulate the spacing of wells and the production of groundwater from those wells.[91] Before a well may be drilled or operated within the boundaries of the Subsidence District, the owner or operator of the well must obtain a permit from the district.[92] The Subsidence District utilizes a combination of mandatory planning and substantial permit fees to create strong financial incentives for water users to increase their reliance on surface water and decrease groundwater use. The Act creating the Subsidence District has been challenged and upheld as constitutional by the Texas Supreme Court.[93] Another such similar district created by special legislation is the Fort Bend Subsidence District.[94]

(f) Regulatory Takings

In *EAA v. Day*, the Texas Supreme Court recognized that GCD regulations could result in a regulatory taking if a property owner were denied the right to produce his fair share of the available groundwater. Two categories of *per se* takings were recognized: (a) takings that involve a physical invasion of the property; and (b) takings that deprive the owner of "all

---

[87] *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996). Moreover, a recent decision addressing the EAA's filing deadline for historical use declarations held that the EAA Act became effective on the date of the *Barshop* decision. *Cf. Edwards Aquifer Authority v. Chemical Lime*, Ltd., 291 S.W.3d 392 (Tex. 2009).

[88] Act of May 28, 2007, 80th Leg., R.S., ch. 143, §§ 12.02, 12.06, 2007 Tex. Gen. Laws 5901, 5903 (S.B. 3).

[89] Tex. Att'y Gen. Op. No. GA-0498 (2007). *See also* discussion in § 14:2(d) above regarding takings claims against the EAA.

[90] The district's enabling legislation is now codified in Chapter 8801 of the Special District Local Laws Code. For more detailed discussion of subsidence district issues and authority, *see* Michael Booth et al., *Chapter 36 Groundwater Conservation Districts and Subsidence Districts* (ch. 16), *in* Essentials of Texas Water Resources (Mary K. Sahs ed., 4th ed. 2016).

[91] TEX. SPEC. DIST. CODE ANN. § 8801.119.

[92] TEX. SPEC. DIST. CODE ANN. § 8801.155.

[93] *See Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 563 S.W.2d 239 (Tex. 1978).

[94] The district's enabling legislation is now codified in Chapter 883 of the Special District Local Laws Code.

economically beneficial use" of the property.[95] A third category of regulatory taking involved the balancing test from the U.S. Supreme Court's *Penn Central* precedent,[96] by which the economic impact on the claimant, interference with reasonable investment backed expectations, and the nature of the regulation are balanced.[97] Because the case below was decided on EAA's motion for summary judgment, the record lacked adequate evidence to consider and rule upon Day's taking claim and was remanded. On remand the case was settled, with EAA compensating Day almost $1 million for his lost water rights.

Another regulatory takings claim against EAA was presented in *Edwards Aquifer Authority v. Bragg.*[98] Like Day, the Braggs were denied most of the water rights claimed for their two pecan orchards and filed claims that their property had been taken without compensation. The trial court agreed and ordered compensation of over $730,000 for both water rights. On appeal EAA argued that a taking under the *Penn Central* standard had not been shown, that the claim should be barred by limitations, and that the damage calculation was incorrect. The San Antonio Court of Appeals found a taking under the *Penn Central* standard and ruled that the claim was viable under a 10-year limitations standard. It ruled that the proper measure for damages was the best and highest use of the property (*i.e.*, as pecan orchards) before and after regulation by EAA. On remand, the jury awarded the Braggs $2,551,049 as compensation for the taking, along with $1,972,784 in prejudgment interest.[99]

Thus, the possibility of regulatory takings claims will be a factor for GCD consideration in developing and implementing their regulatory programs.

(g) Trends for the Future

The Texas Supreme Court's most recent decision addressing groundwater rights, *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 WL 3176683 (Tex. May 27, 2016), dealt with production of severed groundwater rights under a blanket easement to develop, produce and transport the groundwater. Specifically, the issue was application of the accommodation doctrine developed for oil and gas production. That doctrine requires that existing uses of the surface be accommodated in production of the mineral estate if reasonably possible. The doctrine had not previously been applied to production of groundwater.

The trial court ruled that it does apply and enjoined development of a well field by the City of Lubbock. The Amarillo Court of Appeals reversed, saying that the accommodation doctrine had never previously been applied to groundwater production and that the decision of whether to establish this new precedent was one for the Texas Supreme Court.[100]

---

[95] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 838-839.

[96] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978).

[97] 369 S.W.3d at 840.

[98] 421 S.W.3d 118 (Tex. App. — San Antonio 2013, pet. denied).

[99] *Glenn and Jolynn Bragg v. Edwards Aquifer Authority, et al,* Cause No. 06-11-18170CV, in the 38th Judicial District Court, Medina County, Final Judgement, May 17, 2016.

[100] *City of Lubbock v. Coyote Lake Ranch*, 440 S.W.3d 267, 275 (Tex. App. — Amarillo 2014, pet. denied).

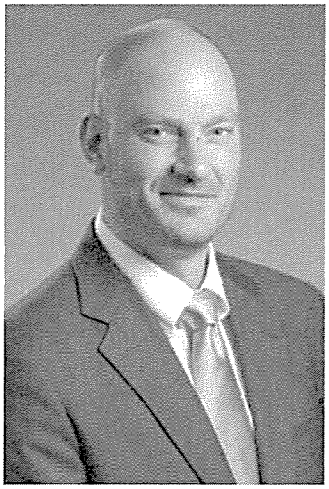
In an opinion by Justice Hecht, author of the *EAA v. Day* opinion, the Supreme Court accepted the invitation of the court below and applied the accommodation doctrine to production of groundwater. In so doing, the Court emphasized the close legal similarity between mineral rights and groundwater rights and ruled that severed groundwater rights, like mineral rights, are a superior estate to the surface estate, entitled to use the surface for development of the underground resource even without an easement.

Given the growing close connection between the law of groundwater rights and that of mineral rights, regulation by GCDs can only become more challenging.

Lloyd Gosselink
ATTORNEYS AT LAW

JASON T. HILL PRINCIPAL

jhill@lglawfirm.com | 512.322.5855



Jason counsels municipalities, groundwater conservation districts, regional water districts and other State political subdivisions, commercial and industrial interests, and individual landowners on water resources management, water rights, water utilities, and other water supply planning issues. He also advocates for his clients before the Texas District and Appellate courts, as well as the State Office of Administrative Hearing, Texas Commission on Environmental Quality, and other agencies of the State of Texas.

PRACTICE AREAS

- Water
- Litigation

PROFESSIONAL LICENSES & EDUCATION

- Admitted to State Bar of Texas (2004)
- Admitted to U.S. District Courts for the Northern District of Texas
- J.D., Baylor University School of Law (2004)
- B.A., Texas Tech University (1997)

REPRESENTATIVE EXPERIENCE

- Represents clients in contested case hearings before the State Office of Administrative Hearings, the Railroad Commission of Texas, and other political subdivisions
- Provides counsel and representation to clients on matters involving surface water rights permitting, groundwater production permitting, underground injection control permitting, water rights and water permitting issues raised in real property transactions, water and wastewater utility service area boundaries and Certificates of Convenience and Necessity, water supply planning and management, environmental regulatory compliance, and Texas Commission on Environmental Quality rulemaking initiatives
- Assists groundwater conservation districts with the development and implementation of district rules and permitting programs, comprehensive management plans, desired future conditions of regulated aquifers, and with district enabling legislation and Chapter 36, Water Code compliance

PUBLICATIONS AND PRESENTATIONS

- Administrative Decision-Making in Texas Groundwater Regulation, State Bar of Texas 24th Annual Advanced Administrative Law Course, June 2012
- Surveying the Ethics Minefield for Water Professionals, Texas Ground Water Association Annual Conference, January 2012
- Challenges to Desired Future Conditions & Managed Available Groundwater Determinations – Is HB 1763 Working?, Texas Water Conservation Association/Texas Rural Water Association, Austin, Texas, January 2011
- The Tip of the DFC Spear: Regulation through Rules and Permits, Groundwater Conservation Districts of North Texas Board Member Seminar, November 2011
- Exemptions and Exclusions from Water Production and Appropriation Permitting Requirements in Texas, CLE International Texas Water Law, Austin, Texas, September 2010
- Exempt Uses in Surface Water and Groundwater: Groundwater Exemptions, CLE International Texas Water Law, Austin, Texas, September 2010
- Texas Water Litigation, The Water Report, Issue No. 76, June 15, 2010
- Interaction of Mineral Development, Water Regulations, and Exempt Use, State Bar of Texas 10th Annual Changing Face of Water Rights Advanced Course, Austin, Texas, April 2009
- Exemptions from Groundwater and Surface Water Permitting Requirements in Texas: A Primer, State Bar of Texas 10th Annual Changing Face of Water Rights Advanced Course, Austin, Texas, April 2009

PUBLICATIONS AND PRESENTATIONS, CONTINUED

- Complying with Water Quality Laws and Regulations, Texas Water Laws and Regulations Seminar, Arlington, Texas, February 2009
- The Wonderful World of Water... Ethical Dilemmas for Professionals, Texas Ground Water Association Annual Convention, Galveston, Texas, January 2009
- Deep Well Disposal in Texas: Myths, Mysteries and Facts of Underground Injection Control, Texas Water Conservation Association Fall Conference, San Antonio, Texas, October 2008
- Being Smart With Enforcement: Using Common Sense to Develop, Execute and Defend Your District's Enforcement Approach, Texas Alliance of Groundwater Districts, Austin, Texas, July 2008
- Water, Water: Is It Really Everywhere?, Forum for Dispute Resolution in Rural Texas, Texas Dispute Resolution System, Kerrville, Texas, June 2007
- A Piece to a Different Puzzle: The Junior Priority Provision and its Place in the Texas Water Law Picture, 34 Tex. Envtl. L.J. 290 (2004)

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

- Austin Bar Association
- Austin Young Lawyers Association
- State Bar of Texas
- Environmental and Natural Resources Law Section of the State Bar of Texas
- Administrative and Public Law Section of the State Bar of Texas
- Texas Ag Industries Association
- Texas Alliance of Groundwater Districts
- Texas Rural Water Association
- Texas Water Conservation Association

HONORS AND AWARDS

- Selected for inclusion by Thomson Reuters in Texas Super Lawyers – Rising Stars Edition 2010 and 2011
- The Best Lawyers in America©: 2015 and 2016
- 2011 Recipient of the Texas Water Conservation Association "President's Award"

TRENDING ISSUES AND DEVELOPMENTS IN TEXAS SURFACE WATER REGULATION

Jason Hill
jhill@lglawfirm.com

James Aldredge
jaldredge@lglawfirm.com

Lloyd Gosselink Rochelle & Townsend, P.C.

28th Annual Texas Environmental Superconference
August 4-5, 2016
Austin, Texas

TABLE OF CONTENTS

Page

I. Overview of Surface Water Regulation in Texas 1

II. Conveyances Using Bed and Banks 2

III. Recent Developments 3

A. Brazos River Authority Application for System Operation Permit 3

B. R. E. Janes Gravel Co. v. Zachary Covar, et al. 5

C. TCEQ v. Texas Farm Bureau 6

D. Indirect Reuse of Edwards Aquifer Groundwater 7

This paper outlines and explains current developments in surface water regulation in Texas. It begins with an overview of general surface water and reuse concepts under Texas law. The discussion then turns to four recent surface water matters that could shape surface water regulation in Texas.

I. Overview of Surface Water Regulation in Texas

Surface water resources can be divided into two groups: state water and diffuse surface water. When the term "surface water" is used, it usually is meant to refer to state water and not diffuse surface water. Diffuse surface water is water "which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow." *City of Princeton v. Abbott*, 792 S.W.2d 161, 163 (Tex. App.—Dallas 1990, writ denied) (quoting *Stoner v. City of Dallas*, 392 S.W.2d 910, 912 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.)) (internal quotations omitted). Diffuse surface water is the private property of the owner of the land upon which it gathers and remains such until it enters into a natural watercourse. *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied) (citing *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 228 (Tex. 1936)).

In contrast to diffuse surface water, state water is the "water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state[.]" Tex. Water Code § 11.021(a). These waters are called state water because all such waters are, by statute, property of the State of Texas. *Id.* The rivers, streams, lakes, and other bodies of water referenced in Section 11.021 are commonly known as watercourses.

A "watercourse" is defined by TCEQ rules as "a definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter, with some degree of regularity, depending on the characteristics of the sources)." 30 Tex. Admin. Code § 297.1(59). Texas courts have further described watercourses as having:

(1) a defined bed and banks,
(2) a current of water, and
(3) a permanent source of supply.

Domel 6 S.W.3d at 353 (quoting *Hoefs v. Short*, 273 S.W. 785 (Tex. 1925)) (internal quotations omitted). Courts have considerable discretion when considering the three factors listed in *Domel*. For example, the required "permanent" source of water supply can be rainfall. *Hoefs*, 273 S.W. at 787. Also, a watercourse does not have to be a constantly flowing stream. *Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 605–08, 297 S.W. 225, 227–28 (Tex. 1927).

The statutory definition of state water includes the underflow of watercourses in addition to the "ordinary flow[.]" Tex. Water Code § 11.021(a). Underflow is defined in TCEQ rules as water "in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow." 30

Tex. Admin. Code § 297.1(55). Although underflow is physically in the ground, it is considered to be surface water for regulatory purposes.

The State of Texas owns all surface water in every watercourse in Texas and holds it in trust for the use of its citizens. Tex. Water Code § 11.0235. With few exceptions, any person wishing to take water from a watercourse or store water within a watercourse may only do so with express authorization from the state through a TCEQ permit. *Id.* §§ 11.022, .121.

Texas Water Code Section 11.027 provides that "As between appropriators, the first in time is the first in right." This provision establishes the priority-based water right management system known as Prior Appropriation. Non-riparian diversion rights are managed on a time priority basis, accordingly. In ideal conditions, all water rights owners are able to take water from the watercourse, regardless of priority. Priority becomes invoked when a water shortage, such as during drought conditions, prevents a senior water right holder from fully exercising his or her diversion right. Under these circumstances, a senior priority water right holder may "call" on junior water rights to stop diverting or impounding to free up water and make it available for the senior water right holder's use.

Water rights in the Rio Grande, San Antonio, Nueces, Lavaca, and Guadalupe River basins, their associated coastal basins, the Concho River segment of the Colorado River basin, and the lower Brazos River basin, are subject to regulation and oversight by a watermaster. Tex. Water Code § 11.326, et seq. The watermaster programs ensure water rights compliance by monitoring stream flows, reservoir levels, and water use on a daily basis. They coordinate uses between water rights holders in the basins managed by their programs by enforcing water right priority.

In watermaster areas, water rights holders must notify the watermaster of the intent to divert before the diversion takes place. Assuming that the water is available and that the water right holder has not exceeded, nor will not exceed, the annual authorized appropriation of water, the watermaster then authorizes the diversion and records it against the right. Watermaster programs include staff deputies who make routine field inspections of authorized diversions to insure compliance with the water right.

II. Conveyances Using Bed and Banks

Reuse of water resources in Texas is generally divided into two categories—direct and indirect. A person or entity with a legal right to divert and beneficially use surface water typically has the right to reuse that water prior to discharging it into a watercourse. *See* Tex. Water Code § 11.046(c); *see* 30 Tex. Admin. Code §§ 210.1, .51. Such reuse is known as direct reuse.

In addition, the Texas Water Code provides a means for using a state watercourse as a natural pipeline to convey and subsequently divert water for beneficial use. Tex. Water Code § 11.042. Often this authorization is used to transport treated wastewater effluent from a discharge outfall to a diversion point downstream. In this context, such reuse is referred to as indirect reuse. Authorizations granted under Sections 11.042(b) and (c) are known as bed and banks permits because they involve the discharger/diverter's use of the "bed and banks" of the watercourse as a conduit for moving water from the point of discharge to the point of diversion.

Texas Water Code Section 11.042(b) allows the TCEQ to authorize the diversion and reuse of discharged return flows derived from privately owned groundwater. In comparison, Section 11.042(c) allows TCEQ to authorize the conveyance and subsequent diversion of water derived from other sources (*e.g.*, surface water-based return flows, raw groundwater, raw surface water derived from an interbasin transfer, etc.).

A subject of much interest in recent years has been how Sections 11.042(b) and (c) are to be read alongside of Texas Water Code Section 11.046(c), which was enacted concurrently with Sections 11.042(b) and (c). Act of June 1, 1997, 75th Leg., R.S., ch. 1010, §§ 2.06-.07, 1997 Tex. Gen. Laws 3610, 3620 (codified at Tex. Water Code § 11.042(b)-(c), .046(c)). Section 11.046(c) provides:

> Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of a permit, certified filing, or certificate of adjudication for the purposes and locations of use provided in the permit, certified filing, or certificate of adjudication. Once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.

Section 11.046 generally addresses issues relating to surplus water. In Section 11.002(10) of the Texas Water Code, the Legislature has defined "surplus water" to mean "water in excess of the initial or continued beneficial use of the appropriator." Sections 11.042(c), specifically, and 11.046(c), when read together, raise important questions. Can an existing water right holder obtain a bed and banks authorization under Section 11.042(c) for the continued beneficial use (*i.e.*, indirect reuse) of its surface water-based treated effluent, or does Section 11.046(c) make those flows subject to reservation for instream uses, beneficial inflows, or to appropriation by someone other than the disharger? These questions are currently being addressed at the agency and in the courts in two key cases discussed below: R.E. Janes Gravel Co. v. Zachary Covar, et al., and the application by the Brazos River Authority for a system operation permit.

III. Recent Developments

A. Brazos River Authority Application for System Operation Permit[1]

In 2004, the Brazos River Authority ("BRA") filed a water rights application with the TCEQ for a permit authorizing BRA to operate its numerous reservoirs throughout the Brazos River Basin as a system, thereby making available more than one million acre feet of unappropriated water.

BRA's application included a request for an appropriative right under Section 11.046(c), Water Code, to divert and use its existing and future return flows and the existing and future return flows of others in the basin. Historically, the TCEQ had only authorized use of return flows through bed and banks permits with few exceptions, and never on the scale requested by BRA.

---

[1] SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR.

The Executive Director recommended that BRA's request for its own return flows be granted as a bed and banks authorization under Sections 11.042(b) and (c), and not as an appropriation under Section 11.046(c). The Executive Director recommended that BRA not be granted a water right to divert return flows discharged by entities other than BRA.

The State Office of Administrative Hearings ("SOAH") held a contested case hearing on the system operation permit application in 2011. In 2012, the TCEQ remanded the application for a second hearing. The TCEQ required SOAH to take evidence in the form of a Water Management Plan ("WMP") to be developed by BRA in support of its application and the draft permit. The Commissioners also directed the ALJs to limit their analysis of return flow availability to current return flows only, not projected future return flows. BRA developed, and the TCEQ Executive Director preliminarily approved, a draft WMP in 2013. Before SOAH could convene a second hearing, however, TCEQ adopted new standards for environmental flow provisions in Brazos River Basin water rights pursuant to Senate Bill 3 (the "SB 3 Standards"). The SOAH judges certified a question to TCEQ regarding whether and how the new SB 3 Standards should apply to and be incorporated into the system operation permit. The Commissioners responded that the standards did apply to the application. The TCEQ ordered BRA to revise the proposed WMP that accompanied the application to conform to the SB3 standards.

SOAH convened a hearing on remand in early 2015. TCEQ considered the SOAH judges' proposal for decision on the WMP and system operation permit at its regular agenda meeting on January 20, 2016.

BRA's proposed system operation permit, to be managed under the WMP, presented three key issues for TCEQ's review: (1) how should TCEQ determine the amount of additional water available for BRA's diversion and use in light of the intervening drought, (2) whether sedimentation in BRA's system reservoirs reduced the modeled available water, and (3) how BRA may be authorized to divert both surface and groundwater-based return flows discharged by both BRA from its wastewater treatment plants and by other entities in the basin.

Regarding drought, the judges proposed a special condition that would require BRA to study the severity of the drought that ended shortly after the remand hearing on the WMP, and that if BRA finds a new drought of record has occurred that impacts hydrology and water availability in the Brazos River Basin, the permitted appropriation volume will be adjusted accordingly. In addition, the SOAH judges proposed that the TCEQ reduce the overall appropriation authorization to BRA by 14 percent based on loss of storage due to sedimentation in BRA's system reservoirs.

With respect to return flows, the ALJs concluded that Sections 11.042(b) and (c) and Section 11.046(c) address mutually exclusive scenarios. Section 11.042(b) and (c), the judges reasoned, provide the vehicle for BRA to secure authorization to divert and indirectly reuse its own return flows. Section 11.046(c), by contrast, is the vehicle for BRA to secure authorization to divert and use the return flows of others, rationalizing that all discharged return flows become available for appropriation under Section 11.046(c) unless the return flows are accounted for in a bed and banks authorization issued to the discharger pursuant to Section 11.042(b) or (c).

The TCEQ agreed with the majority of the SOAH findings in the proposal for decision, but remanded the matter once again to address the effects of reservoir sedimentation on water

availability under the draft permit and to address issues relating to reuse. With respect to sedimentation, the Commissioners directed the judges to add the 14 percent appropriation reduction back into the permit and develop a new special permit condition that directs the WMP to reduce the authorized diversion by 14 percent of the total authorized appropriation volume, but that allows BRA to demonstrate in the future that it has developed additional sources to offset the 14 percent reduction.

The Commissioners also issued two important rulings concerning BRA's proposed indirect reuse. First, they agreed with the ALJs that Sections 11.042 and 11.046(c) of the Water Code address mutually exclusive scenarios—the former governs the indirect reuse of one's own discharges, the latter governs requests to divert and beneficially use the discharges of others. The Commissioners concluded that Section 11.046(c) allows the TCEQ to grant BRA's request for a water right to appropriate return flows discharged by other entities. They also determined that BRA can only be granted authorization to divert and reuse its own return flows through a bed and banks authorization under Sections 11.042(b) and (c).

In addition, the Commissioners went on to conclude that BRA treated all return flows the same in the application—*i.e.*, it did not distinguish between the volumes of its own return flows versus the volumes of the return flows of others. The Commissioners remanded the matter on this issue, as well, so that the ALJs could determine if BRA's original application, and the evidentiary record compiled during the first two phases of the hearing, supported granting the bed and banks authorization for BRA to divert its own return flows, and to distinguish between its own return flows and the return flows of others.

Following briefing on the remanded issues by the parties, the judges issued a supplemental proposal for decision on June 3, 2016 that addressed the sedimentation storage reduction special condition requested by the TCEQ and recommended granting a bed and banks authorization to BRA as part of the proposed system operation permit. Parties filed exceptions to the supplemental proposal on June 23, 2016. Replies to exceptions were filed with TCEQ on July 12, 2016. The TCEQ will likely consider the matter during a regular agenda meeting this fall.

B. R. E. Janes Gravel Co. v. Zachary Covar, et al.[2]

The City of Lubbock owns Water Use Permit No. 3985, which allows the City to secondarily use treated wastewater effluent derived from water imported from the Canadian River Basin for certain beneficial purposes. In addition to relying on surface water imported from the Canadian River Basin, Lubbock also relies on groundwater produced from the Ogallala Aquifer for its public water supply. Lubbock traditionally land-applied its treated wastewater effluent.

In May 2003, the City began discharging its groundwater-based and imported surface water-based treated effluent into a tributary of the Brazos River (the "North Fork") for the first time. In April 2004, the City applied to amend Permit 3985 to authorize a bed and banks conveyance of its treated effluent and subsequent reuse. The application was filed under Section 11.042(b) and 11.042(c). The application was protested by multiple parties, including a downstream water right owner—R. E. Janes Gravel Company ("Janes Gravel").

---

[2] No. 14-15-00031-CV, in the Fourteenth District Court of Appeals.

In January 2013, the TCEQ granted the application in the form of Water Use Permit No. 3985A. Permit 3985A authorizes Lubbock to use the North Fork to convey its groundwater-based and imported surface water-based return flows to a downstream diversion point for subsequent reuse. In addition, Permit 3985A makes clear that neither the groundwater-based component of the conveyed discharges, nor the imported surface water-based component of the conveyed discharges, is subject to priority in the Brazos River Basin. Janes Gravel appealed the TCEQ's decision to grant Permit 3985A to Travis County District Court. The District Court affirmed the decision of the TCEQ, and Janes Gravel appealed to the Court of Appeals, where the case was assigned to the Fourteenth District Court of Appeals in Houston.

Janes Gravel argues that Section 11.046(c) prevents Lubbock from diverting its Canadian River Basin-sourced discharges out of priority, instead giving Janes Gravel, a Brazos River Basin appropriator, a senior right to the flows. Janes Gravel argues that under Section 11.046(c), Lubbock forever abandoned its right to divert and reuse its imported surface water-based effluent because Lubbock began discharging before requesting a bed and banks authorization. Citing the *Domel* and *Day* decisions, Janes Gravel argues that—at least as far as Permit 3985A concerns state water transferred to the Brazos River Basin from the Canadian River Basin for Lubbock's use—such effluent now becomes part of the normal flow of the Brazos River Basin subject to Janes Gravel's existing appropriation as soon as Lubbock discharges it.

TCEQ and Lubbock argued that Section 11.046(c) simply does not apply to Permit 3985A because the water discharged by Lubbock is not surplus water. Specifically, Lubbock argues that surplus water is defined as water in excess of the initial or continued beneficial use of the appropriator. Because none of the water authorized for diversion under Permit 3985A is in excess of the City's continued beneficial use, it does not fall within the scope of Section 11.046. Finally, the City argues, even if the discharges authorized for diversion under Permit 3985A are subject to 11.046(c), the provision applies "unless expressly provided otherwise in the permit." The City argues that Permit 3985 gave the City exclusive right to secondarily reuse all of the treated effluent derived from imported Canadian River Basin surface water. Lubbock argues that Janes Gravel has no legal right to the effluent under Permit 3985, and Permit 3985A does nothing to change that.

The parties presented oral argument in the case to the Fourteenth Court of Appeals on November 17, 2015. A decision from the court is expected any time.

C. TCEQ v. Texas Farm Bureau[3]

In 2011, the Texas Legislature passed Texas Water Code Section 11.053 which, *inter alia*, required the TCEQ to adopt rules for the administration of water rights during periods of drought or other emergency shortage of water. The TCEQ adopted such rules on May 3, 2012. 30 Tex. Admin. Code §§ 36.1-.8 [hereinafter Drought Rules]. Generally, the Drought Rules allowed TCEQ to temporarily adjust or suspend water rights in a river basin when a downstream senior water right is unable to take surface water under its water right during emergency periods posing a hazard to public health or safety, or when drought conditions in the river basin are classified as at least moderate by the National Drought Mitigation Center. *Id.* § 36.2-.3.

---

[3] 460 S.W.3d 264, 266 (Tex. App.—Corpus Christi 2015, pet. denied).

Importantly, based on TCEQ's interpretation of Section 11.053(b) of the Texas Water Code, the Drought Rules allowed TCEQ to effectively grant exemptions from adjustment or suspension orders based on a water right's purpose of use. Specifically, the Drought Rules authorized the Executive Director to allow some municipal and electric generation water rights to continue diverting water even when a senior downstream water right cannot be fully exercised due to drought or emergency conditions.

In 2012, following adoption of the Drought Rules, the Dow Chemical Company ("Dow"), based on its senior water right in the lower Brazos River Basin, requested that the TCEQ suspend upstream water rights due to drought conditions in the basin and Dow's resulting inability to fully exercise its water right. In accordance with the Drought Rules, the Executive Director issued an order suspending upstream water rights with priority dates junior to Dow's. The Executive Director's order allowed a number of municipal and electric generation water rights owners to continue diverting even though those water rights were junior to Dow and junior to other water rights—primarily agricultural rights—that were suspended.

On December 12, 2014, the Texas Farm Bureau (the "Farm Bureau") sued the TCEQ in Travis County District Court seeking declaratory and injunctive relief in the form of an invalidation of TCEQ's adopted Drought Rules. The Farm Bureau argued that Section 11.053 did not authorize TCEQ to adopt rules that allow for exemptions based on purpose of use. Instead, the Farm Bureau argued, Section 11.053 expressly required all drought orders issued by TCEQ to be "in accordance with the priority of water rights established by Section 11.027[.]" Tex. Water Code § 11.053(a).

The Travis County District Court granted the Farm Bureau's request, declaring the Drought Rules invalid in their entirety and enjoining TCEQ for further enforcement of the Drought Rules as adopted by TCEQ. TCEQ appealed the judgment, and the appeal was sent to the Thirteenth District Court of Appeals in Corpus Christi. On April 2, 2015, the Court of Appeals affirmed the district court judgment. *Tex. Comm'n on Envtl. Quality v. Texas Farm Bureau*, 460 S.W.3d 264, 266 (Tex. App.—Corpus Christi 2015, pet. denied). The Court of Appels held that a plain reading of the statute indicates that "the Legislature intended for the priority system established under section 11.027 to take precedence in any type of suspension or adjustment" under the Drought Rules. *Id.* at 271.

The TCEQ filed a petition for review with the Texas Supreme Court, which the Supreme Court denied on February 19, 2016. With that, the questions regarding the validity of the Drought Rules were finally resolved. The statute, however, remains in place and continues to require that "[the TCEQ] shall adopt rules to implement this section[.]" Tex. Water Code § 11.053(c). The TCEQ has not yet proposed new rules to replace the invalidated ones. There is no timeline for when the TCEQ must do so, if it must do so at all.

D. Indirect Reuse of Edwards Aquifer Groundwater

The San Antonio Water System ("SAWS") filed an application with TCEQ under Section 11.042(b) for a bed and banks authorization to divert and reuse in excess of 100,000 acre-feet of groundwater-based return flows that SAWS discharges annually into the San Antonio River Basin. The Guadalupe-Blanco River Authority ("GBRA") owns water rights on the Guadalupe

River downstream of the point where the San Antonio River flows into the Guadalupe River, immediately upstream of San Antonio Bay.

A substantial amount of the treated effluent that SAWS ultimately discharges originates as groundwater from the Edwards Aquifer. While Section 11.042(b) of the Texas Water Code provides for the diversion and reuse of groundwater-based return flows, the Edwards Aquifer Authority Act (the "EAA Act") separately defines reuse[4] and requires that water produced from within the Edwards Aquifer Authority (the "EAA") be used within the boundaries of the EAA.[5]

GBRA filed an expedited declaratory judgment action in Travis County District Court under Chapter 1205 of the Texas Government Code arguing, *inter alia*, that the EAA Act definition of "reuse" excludes indirect reuse and mandates that it be used within the EAA boundaries. The specific nature of these two provisions of the EAA Act, GBRA argued, work to deprive TCEQ of jurisdiction to issue a bed and banks authorization to SAWS for the diversion and reuse of return flows originally produced from within the EAA. GBRA asserted that TCEQ's issuance to SAWS of the requested bed and banks application would create a cloud over revenue that GBRA has pledged to secure bonds to finance GBRA's ability to operate under its state water appropriation rights downstream of the San Antonio River. *Guadalupe-Blanco Riv. Auth. v. Tex. Atty Gen.*, No. 03-14-00393-CV, 2015 WL 868871 at *1 (Tex. App.—Austin Feb. 26, 2015, pet. denied).

TCEQ, SAWS, and several intervening parties opposed GBRA's request for declaratory relief. Each party filed pleas to the court's jurisdiction. Intervening parties argued that the declarations sought by GBRA were beyond the scope of the Expedited Declaratory Judgment Act, which allows for declarations relating to the issuance of public securities such as bonds. *Id.* at *3. TCEQ argued that TCEQ has exclusive jurisdiction under Section 11.042(b) to issue indirect reuse authorizations for all groundwater-based return flows, irrespective of whether such were derived from the Edwards Aquifer or any other groundwater source. Additionally, TCEQ argued that the district court also lacked jurisdiction because GBRA had not exhausted administrative remedies available to challenge TCEQ's jurisdiction by contesting the SAWS application at the TCEQ. Accordingly, TCEQ argued, GBRA's claims were not ripe for adjudication by the district court. *Id.*

The Travis County District Court granted the pleas to the jurisdiction. GBRA appealed, and the Third District Court of Appeals affirmed, holding that GBRA's reliance on the Expedited Declaratory Judgment Act was misplaced. *Id.* at *4. The Court determined that GBRA's requested relief did not concern the legality or validity of GBRA's bonds as is required under Chapter 1205 of the Government Code. *Guadalupe-Blanco Riv. Auth.*, 2015 WL 868871 at *4. The Court of Appeals did not directly address the issue of TCEQ's jurisdiction under Section 11.042(b) over Edwards Aquifer-sourced return flows.

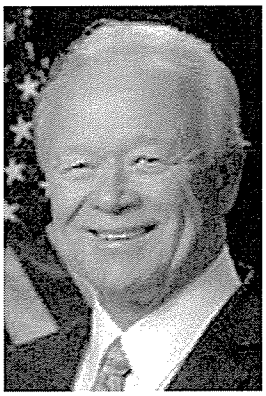
GBRA appealed the decision of the Third District Court of Appeals to the Texas Supreme Court. On May 27, 2016, the Supreme Court denied GBRA's petition for review. GBRA has indicated that it will file a motion for rehearing and requested an extension of its deadline to file a motion for rehearing, which the Supreme Court granted on June 8, 2016. The case is not final yet.

---

4 EAA Act § 1.03(19).

5 EAA Act § 1.34(a).

Arguing similar jurisdictional grounds, GBRA filed a request for a contested case hearing with the TCEQ on an application by New Braunfels Utilities ("NBU") for a bed and banks authorization to divert and reuse Edwards Aquifer-sourced groundwater-based return flows. NBU's requested diversion point is upstream of several water rights owned by GBRA. In addition to its hearing request, GBRA submitted a plea to the TCEQ's jurisdiction, as it did in its declaratory judgment action. The TCEQ has scheduled the NBU application for a referral hearing on August 3.



Ron Curry, Administrator for EPA's South Central Region (Region 6)

In 2012, Ron Curry was appointed the EPA's Region 6 Administrator. Ron has more than 36 years of management experience in local, state, and federal government, as well as the private sector.

In a region that produces over 62 percent of the nation's oil and gas products, Ron has worked with federal, state, local, tribal, business, and community officials to protect the environment and public health. He successfully implemented the nation's largest greenhouse gas permitting program and guided its smooth transition to the state of Texas. He stresses the importance of environmental justice by reaching out to US/Mexico border and fenceline communities as well as developing supplemental environmental projects.

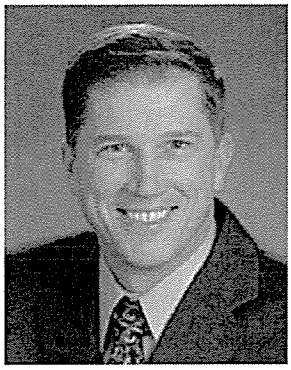
Before joining the EPA, Ron worked with the University of New Mexico on the development of its Energy/Water/Environment Nexus Studies program and served eight years as the longest serving Secretary of the New Mexico Environment Department. He oversaw the regulation of the Los Alamos and Sandia National Laboratories and the implementation of standards to protect the air, water, and land of New Mexico. He also served as administrator for the Village of Los Ranchos and as a city manager in Santa Fe.

Earlier in his career, Ron was a senior public affairs specialist for Gram Inc. and vice president of CEI Enterprises, a manufacturing firm. Ron has over 20 years of experience in private business including 10 years owning a small business franchise started with his father.

Ron's interest in the environment grew during his manufacturing career while marketing products to the South Coast Air Quality District in California. He brings to the EPA a keen understanding of federal environmental regulations impacts on business owners and entrepreneurs as well as state and local governments.

Bryan W. Shaw, Ph.D., P.E.

Dr. Bryan W. Shaw of Elgin was appointed to the Texas Commission on Environmental Quality by Gov. Rick Perry on Nov. 1, 2007. The Texas Senate confirmed his appointment on May 5, 2009 and he was appointed chairman on Sept. 10, 2009.



Shaw is 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 concentrates on air pollution, air pollution abatement, dispersion model development and emission factor development. Shaw was formerly 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.

Shaw served as a member of the U.S. Environmental Protection Agency (EPA) Science Advisory Board (SAB) Committee on Integrated Nitrogen, as well as the EPA SAB Environmental Engineering Committee and the 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. Since his appointment to the TCEQ, Shaw has served on the Texas Environmental Flows Advisory Group and as chair of the Texas Advisory Panel on Federal Environmental Regulations.

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.

EDDIE LEWIS

Eddie Lewis is a partner in the Houston office of Norton Rose Fulbright. He is the firm's Head of Environmental, United States.

He focuses his practice in the environmental law area, including environmental litigation, enforcement, compliance counselling, remediation, permitting, auditing, and transactional matters. Prior to joining Norton Rose Fulbright, Eddie worked as a chemical engineer. His practice frequently involves legal issues in which complex technical issues are at the forefront.

Eddie graduated from The University of Texas School of Law, J.D., with honors and Texas A&M University, B.S., Chemical Engineering. He is repeatedly ranked in *Chambers & Partners,* Texas: Environmental guide; *Best Lawyers'* The Best Lawyers in America; and *The Legal 500* US, Environment: transactional and regulatory guide.

eddie.lewis@nortonrosefulbright.com
713-631-3760

ANTHONY W. BENEDICT (Tony) has been an Assistant Attorney General in the Texas Attorney General's Office, Environmental Protection Division, for over 16 years. During his time at the Attorney General, Tony's primary concentration has been on enforcement litigation. Prior to joining the Texas Attorney General's Office, Tony was counsel at Phillips Petroleum Company for about 15 years, where he primarily handled general litigation, including environmental litigation. During his last two years with Phillips, he focused exclusively on environmental regulatory, compliance, and litigation. Tony graduated from Sul Ross State University in Alpine, and the University of Texas School of Law.

THE ATTORNEY GENERAL OF TEXAS
KEN PAXTON

TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

ANTHONY W. BENEDICT
ASSISTANT ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION DIVISION

Views expressed are those of the presenter, do not constitute legal advice, and are not official opinions of the Office of the Texas Attorney General

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

- ADMINISTRATIVE ENFORCEMENT
  - TCEQ refers case to SOAH
  - Administrative penalties
  - Technical requirements

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

- CIVIL ENFORCEMENT
  - Texas Attorney General files case in District Court
  - Civil penalties
  - Injunction
    - TRO
    - Temporary Injunction
    - Permanent Injunction
  - Attorney's fees

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

"This is really different because it is not the same as the other thing."

- CIVIL ENFORCEMENT: DIFFERENCES
  - Civil penalty is mandatory daily for each violation, with a minimum per violation per day
  - Attorney's fees are based on market rate
  - Injunction

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

"It's the little things that are really big deals."

- CIVIL ENFORCEMENT: CONSEQUENCES
  - Mandatory daily and minimum penalty can be substantial
  - Civil and criminal contempt for violating injunction may result in incarceration
  - Attorney's fees at market rate add up and are in addition to penalties

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

- RESOLUTION WITH THE TEXAS ATTORNEY GENERAL: EXPECTATIONS
  - Judgment after trial or formal court proceedings
  - Voluntary agreement by an Agreed Final Judgment

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

- AGREED FINAL JUDGMENT
  - Must include penalty
  - Must include attorney's fees
  - Must include injunctive relief unless problems are resolved
  - No broad form "settlement release"
  - Not confidential
  - Statutory public comment and approval process
  - No SEPs

OVERVIEW OF TEXAS CIVIL ENVIRONMENTAL ENFORCEMENT

- COMMON MISTAKES
  - Not explaining how problem is fixed and won't happen again
  - Focusing on changing Texas Attorney General expectations for resolution
  - Long PowerPoint or other presentation on general environmental stewardship, rather than the case issues

pillsbury

Washington, DC
1200 Seventeenth Street, NW
Washington, DC 20036
Tel. +1.202.663.8036
Fax. +1.202.663.8007

Houston
2 Houston Center
909 Fannin, Suite 2000
Houston, TX
77010-1028
Tel. +1.713.276.7660
Fax. +1.713.276.7673

Practices / Industries

Environmental

Litigation

Corporate Investigations & White Collar Defense

Environmental Enforcement Strategies Group

Admissions

District of Columbia

Education

J.D., Fordham University School of Law

M.B.A., Fordham University

B.S., Chemical Engineering, Lehigh University



Matthew W. Morrison
Partner
matthew.morrison@pillsburylaw.com

Matt Morrison is a partner in the law firm's Environmental practice and is located in the Washington, DC and Houston offices. Mr. Morrison has over 25 years of experience providing compliance counseling and environmental litigation representation involving the Clean Air Act, Clean Water Act, Superfund, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, and the Endangered Species Act.

Prior to entering private practice, Mr. Morrison served as the Acting Director and Associate Director of the Air Enforcement Division in EPA's Office of Civil Enforcement. He also served as Deputy Director of EPA's Office of Criminal Enforcement, Forensics, and Training.

In addition to his leadership roles at EPA, Mr. Morrison served for over thirteen years as a trial and then supervising attorney in the Environmental Enforcement Section at the U.S. Department of Justice.

Prior to becoming an attorney, Mr. Morrison was a chemical engineer whose duties included process modernization and environmental compliance.

Mr. Morrison is an Adjunct Professor at the George Washington University School of Law, instructing students on the provisions and policies of the Clean Air Act and its regulations.

Mr. Morrison is currently admitted to practice law in Washington, DC and will soon be admitted in Texas.

Honors & Awards

- *Legal 500 US*, Environmental Litigation (2015-2016)
- Seventeen EPA medal awards for exceptional and outstanding service (1993 - 2009)
- Three Justice Department Special Achievement Awards (1998 - 2008)
- EPA Award for Extraordinary Efforts in Litigation (2007)
- EPA Award for Outstanding Contributions toward the Enactment of Superfund Reform (1995)
- Justice Department Special Commendation Award for Outstanding Service (2005)
- Special Assistant U.S. Attorney Commendation for Outstanding Service (E.D.Va. 2007)
- United States Senior Executive Service (2011)
- Beta Gamma Sigma National Honor Society for Business Schools (1990)

pillsbury

Affiliations
Member, District of Columbia Bar Association

Publications

EPA Doubles Down with Expansive New Methane Regulation, 6/16/2016

A New Day in Chemical Regulation, 6/13/2016

EPA Charts Middle Path for Making "Stationary Source" and "Major Source" Determinations, 5/16/2016

Risky Business: EPA Plans Enhanced Enforcement Focus on Chemical Safety, 2/19/2016

Supreme Court Blocks Obama Administration's Clean Power Plan, 2/11/2016

Four Things You Need to Know About Courts' Rejection of Clean Air Act Preemption of State Common-Law Claims
, January 2016

Sixth Circuit Rejects Clean Air Act Preemption of State Common Law Claims: Four Things to Know, 11/20/2015

EPA Aircraft GHG Emissions Regulations Take Flight, 6/24/2015

What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption
, April 2015

Will EPA Be Able to Avoid Regulating Existing Sources of Methane?, 2/12/2015

Recent Cases on Clean Air Act Preemption of Common Law Torts Upend Conventional Wisdom , 1/27/2015

Three Obstacles to EPA's O_3 Rule: Industry Opposition, Implementation, and Congressional Oversight , 12/29/2014

The U.S. Supreme Court Upholds EPA's Cross-State Air Pollution Rule in *EPA v. EME Homer City Generation, L.P.*, Paving the Way to Further Use of Cap-and-Trade Programs to Control Emissions of SO2 and NOx from Electric Power Plants., 5/9/2014

pillsbury

Inside EPA's Enforcement Program

Trends in Individual Accountability and Risk Management

August 4, 2016

Texas Superconference

By Matthew Morrison

Pillsbury Winthrop Shaw Pittman LLP

Targeting Individuals in Enforcement

Sept 2015 – New DOJ policy – "Individual accountability for corporate wrongdoing" – by Deputy AG Sally Yates

Some points in the policy expand upon existing practices, but certain approaches are definitely new, particularly for civil enforcement.

pillsbury

Quick review of major differences between civil and criminal referrals

- Civil
  - 80% of civil cases handled at main Justice (Environmental Enforcement Section); the remainder handled in the respective U.S. Attorneys office
  - Focus has historically been on *corporate* behavior (though Yates Memo will change this to some degree)
  - OECA management is heavily involved in settlement and in litigation decisions

pillsbury

Differences between civil and criminal enforcement

- **Criminal**
  - About 75% handled by respective U.S. Attorneys offices; balance handled by main DOJ
  - Autonomy in U.S. Attorneys Offices; OECA management is typically not involved in plea and litigation decisions
  - Main investigators are agents, not scientists
  - Focus generally on individual behavior



pillsbury

Six Principles of Individual Accountability

1. To be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.

   (Relevant to criminal pleas / sentencing and civil settlement penalty amounts)

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation

   (Allows govt to assess corporate culpability at the same time)

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another

   (Gives full range of remedies; parallel proceeding agreements still used)

pillsbury

Six Principles of Individual Accountability

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
   (Requires AG or US Attorney approval otherwise)

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
   (There must be a plan if corporation goes is before individuals)

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.
   (Mimics individual deterrence of criminal prosecution in civil context)

pillsbury

Potential Impacts of DOJ Memo

- Expands on the already-existing DOJ practices in criminal cases (makes adherence strict) but takes it to civil matters.
- A self-reporting company seeking cooperation credit will have to make a full disclosure to DOJ that includes identifying culpable individuals.
- Poses new challenges for internal corporate investigations—particularly the ability to protect privileged information while still receiving credit for cooperating.
- Corporate internal investigations should proceed with great care, and corporate executives should now be on notice that a company may be obligated to put them in the target sights of DOJ.



Risky Business – EPA's New Focus on Risk Management



pillsbury

Increase in General Duty Clause Enforcement

- EPA in recent years has been stepping up enforcement of the "general duty" provisions of the Clean Air Act, which require sources to develop and implement plans to manage the risk of releases at their facilities

- Review – "General Duty" Clause requirements, for facilities with extremely hazardous substances:
  - Know the chemicals hazards
  - Assess the consequences of releases
  - Design and operate the facility to prevent the releases
  - Minimize the consequences of any releases
  - Develop and implement risk management plans to prevent, detect, and respond to releases

General Duty Clause Enforcement Ramp Up

- Since January 2014, more than 360 companies have paid roughly $20 million in penalties to resolve 112(r) claims by EPA
  - EPA has often taken the position that an injury or release almost always suggests a violation
  - No clear guidance or regulations exist, however, to specifically define what a responsible operator should be doing to avoid violations
  - Voluntary industry work practices are often used as a sword to "backdoor violations" against companies that choose to not follow the voluntary measures

pillsbury

EPA Doubles Down -- New Two-Pronged Approach to Enhancing Risk Management

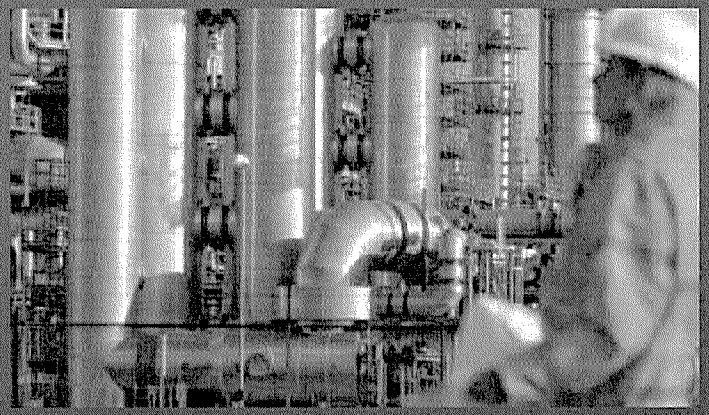
- February 2016 – EPA announces new enforcement priority focused on reducing the risks of accidental chemical releases from chemical and other industrial facilities

- February 2016 – Days later, EPA issues a proposed rule that would increase industry's obligations under the Agency's Risk Management Program (RMP)

EPA's Proposed Risk Management Rule

Three Components

1. Accident Prevention Program
2. Emergency Response
3. Data Availability



* The proposal varies some requirements based on category of the facility as Program 1 (most risk), 2, or 3, and describes "high risk" facilities (increased likelihood of EPA/state inspections / enforcement)
  - Proximity to densely populated areas
  - Quantity and number of extremely hazardous substances utilized
  - History of accidents and incidents

pillsbury

EPA's Proposed Risk Management Rule – 1. Accident Prevention Program

- Requires an incident investigation that includes a root cause analysis when there is a catastrophic release or an incident that could have resulted in a catastrophic release
- Requires facilities to contract with an independent third party to perform a compliance audit after the facility has a reportable release (self-audits would no longer suffice)
- Requires certain industries, such as refiners and chemical manufacturers, to do an analysis of whether safer technology alternatives are feasible, as part of their process hazard analysis
  - Perhaps biggest ticket item in proposal; key unresolved issue is whether all feasible safer technologies will have to be implemented

pillsbury

EPA's Proposed Risk Management Rule – 2. Emergency Response Program

Facility owners and operators must:

- Coordinate with local emergency responders at least annually
- Conduct notification exercises at least annually
- Conduct "tabletop" emergency response exercises at least annually
- Conduct an actual full field exercises at least every five years or within a year of any reportable incident

pillsbury

EPA's Proposed Risk Management Rule – 3. Data Availability Program

Facilities would be required to:

- Provide certain basic information about the facility to the public through means such as a facility website (or library, government database, etc.)

- Provide the local emergency response authorities with summaries of compliance audits, emergency response exercises, accident history and investigation reports (fi there were reportable incidents) and any "inherently safer technologies" implemented at the facility.

- Hold a public meeting with the local community after a reportable incident.

Bottom Line on Facility Risk Management

- Taken together, the proposed rule and new enforcement focus at on risk management means EPA will likely begin aggressively enforcing the new rule when it is finalized later this year

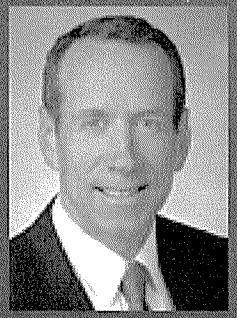
- Comment period for the new enforcement initiatives has run; comment period for rule runs for 60 days upon publication in Federal Register

What companies can do now to prevent risk management enforcement in the future

- Review chemical use, storage, and handling practices
- Consider whether non-regulated chemicals can be substituted for regulated ones
- Reduce stored quantities below RMP thresholds where possible
- Conduct internal 112(r) compliance audit through counsel and work with state regulators to ensure satisfaction with activities
- Engage in comment on the proposed rule

pillsbury

Thank you



Matt Morrison
Environmental Partner
202.663.8036
matthew.morrison@pillsburylaw.com
1200 Seventeenth Street, NW, Washington, D.C. 20036
909 Fannin Street, Houston, TX 77010

Matt has more than 25 years of experience working on federal environmental enforcement matters. Prior to joining Pillsbury, Matt served as the Acting Director and Associate Director of the Air Enforcement Division in EPA's Office of Civil Enforcement. He also served as Deputy Director of EPA's Office of Criminal Enforcement, Forensics, and Training.

In addition to his leadership roles at EPA, Matt served for over thirteen years as a trial and then supervising attorney in the Environmental Enforcement Section at the U.S. Department of Justice.

Prior to becoming an attorney, Matt was a chemical engineer whose duties included process modernization and environmental compliance.

Matt is an Adjunct Professor at the George Washington University School of Law, instructing students on the provisions and policies of the Clean Air Act and its regulations.

pillsbury

CHERYL T. SEAGER has been the Deputy Regional Counsel for Enforcement for EPA Region 6 in Dallas, Texas since 2010. Prior to her work as Deputy, she worked in EPA criminal program for over twenty years. In her role as Regional Criminal Enforcement Counsel, she served as a Special Assistant United States Attorney for four of the judicial districts in Region 6, assisting with the investigation and prosecution of numerous environmental criminal cases. She received the Agency's Gold Medal for her role in the prosecution and trial in the Craven Laboratories, Inc. case. She received her Bachelor of Science degree from Southeastern Massachusetts University, and a Master of Education degree from Northeastern University, and her J.D. from Case Western Reserve University School of Law. She is admitted to practice in Massachusetts and Texas.

Environmental Enforcement in Region 6

"I Never Said Half the Things I Said"

28th Annual Texas
Environmental Superconference

Cheryl T Seager
Deputy Regional Counsel for Enforcement
EPA Region 6
August 4-5, 2016

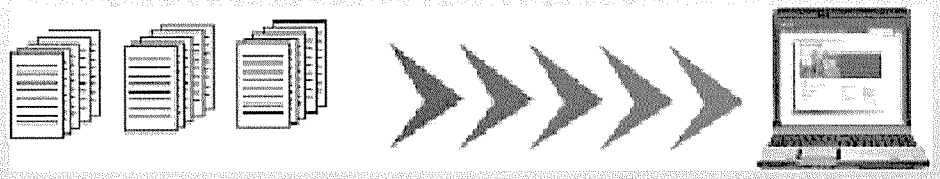
EPA Enforcement Goals

"Little League Baseball is a Very Good Thing Because it Keeps The Parents Off The Streets"

- Tough civil and criminal enforcement for violations that threaten communities and the environment
- Vigorous enforcement program for the future - Next Generation Compliance
- Strong EPA/state/tribal environmental protection

What is Next Generation Compliance?

- An EPA strategy to improve environmental compliance using:
  - advances in information technology,
  - pollutant monitoring technology,
  - and rule design principles.

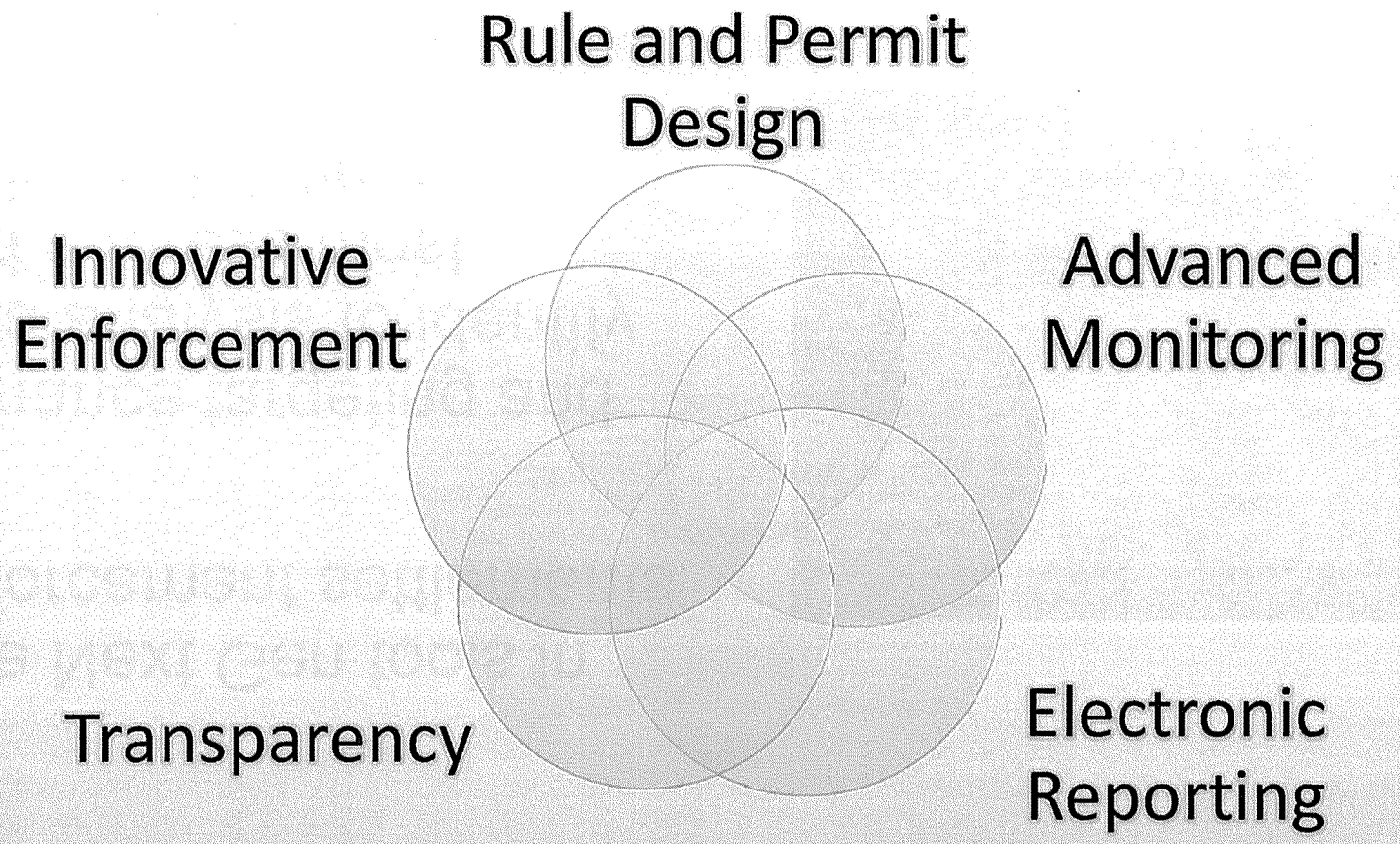




Why Next Gen Compliance?

- Drivers
  - Noncompliance
  - Information gaps
  - Government resources
- Opportunity
  - Advanced Monitoring Technology
  - Information Technology
  - Expand use of best and innovative practices

Integrated Next Generation Compliance Components



Innovative Enforcement

- Use Next Gen tools in enforcement settlements
- Enhance targeting and data analysis to identify and address most serious violations
- New enforcement approaches



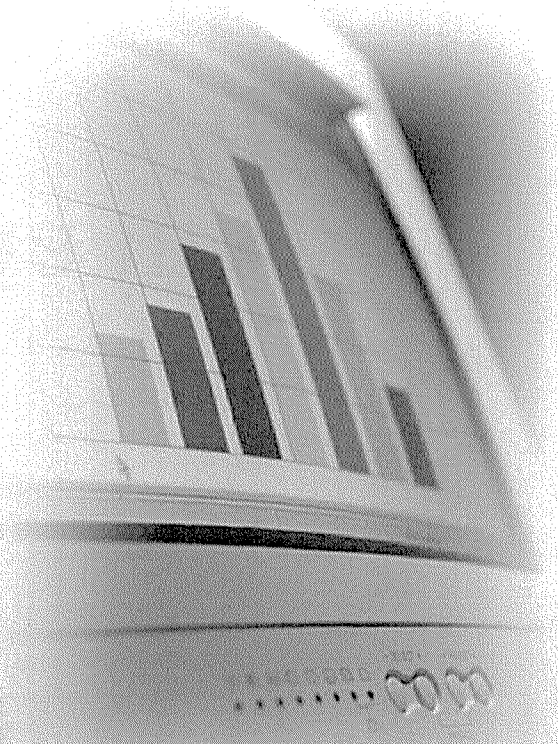
REGION 6 RCRA DATA MINING

"THE FUTURE AIN'T WHAT IT USED TO BE"

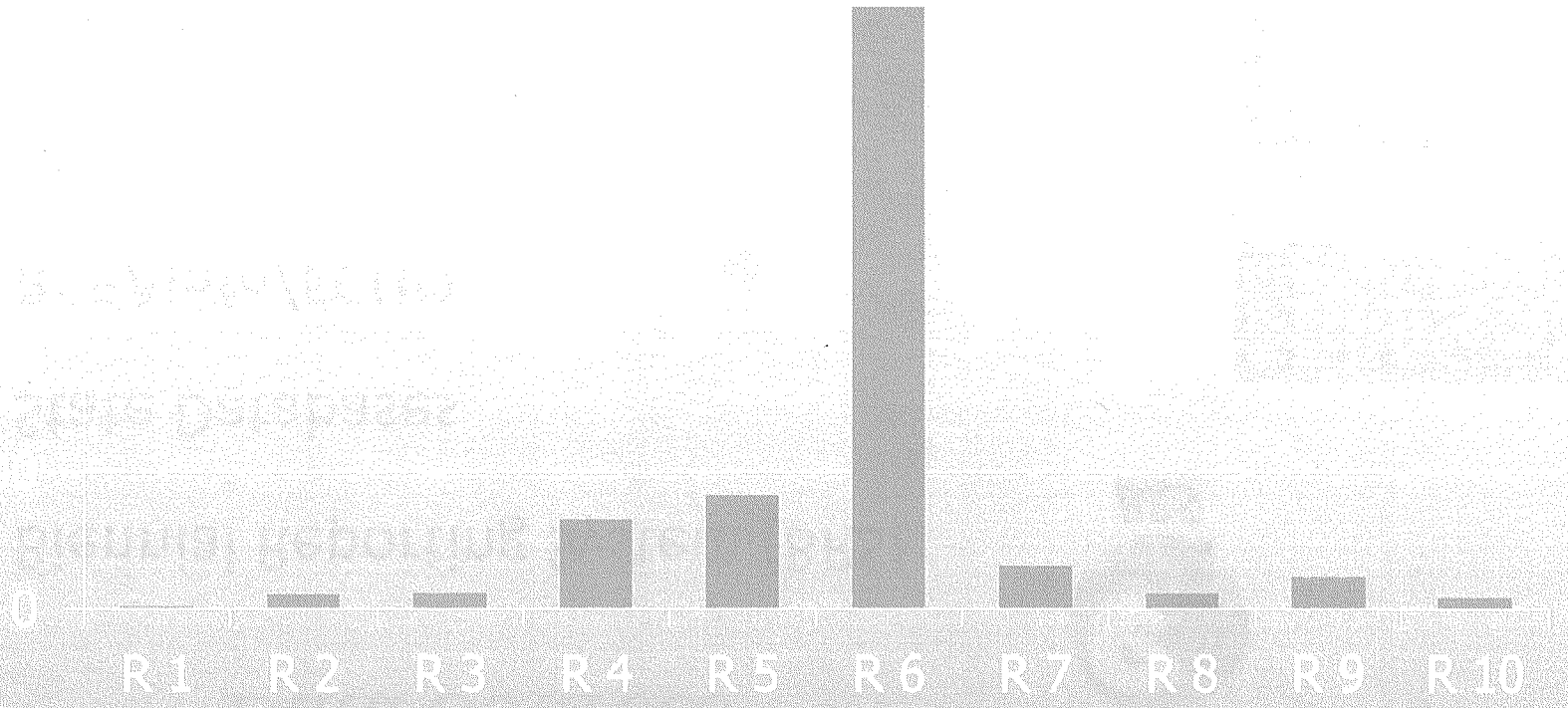
Using Available Data in Enforcement

NextGen RCRA Compliance Goals

- Safe and proper management of hazardous wastes
- Use existing data to track cradle to grave movement of wastes
- Achieving compliance through effective targeting

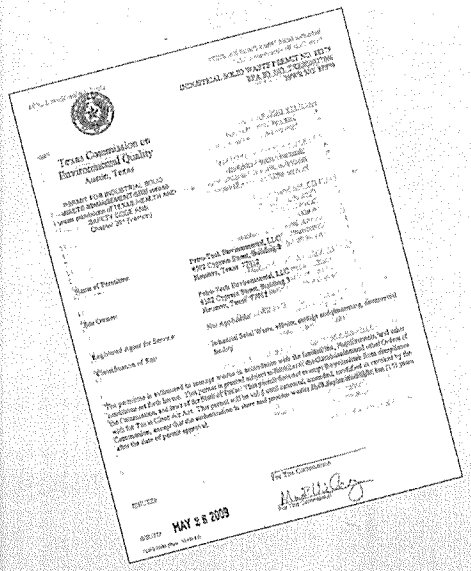


Hazardous Waste Generated (tons)



Data Sources

- Biennial Reporting System (BRS)
- State Databases
- RCRAinfo/ECHO
- TRI
- EPCRA
- TSD Permits
- TSD Data



Things to look for in the data

- SQGs and CeSQGs which have reported large quantities of HW generation
- P-listed waste
- Land disposal restrictions
- Waste determinations
- Hazardous waste sent on Bills Of Landing
- Exemptions
- One-time clean outs

Challenges

- Large volumes of available data
- Data availability and different formatting
- Inconsistent data sets
- Varying definitions
- Inaccurate data entry
- Inconsistent data audits (QA/QC)
- Limited State and Federal resources

Next Gen Results

- Using available data to proactively evaluate compliance at RCRA-regulated facilities
- Establishing a repeatable targeting process that prioritizes evaluation on a WORST FIRST basis
- Working efficiently to maximize limited resources

SEPs – Efficiently and Effectively Including SEPs in Settlements "A Nickle Ain't Worth a Dime Anymore"

- In 2015 EPA issued an Update to the 1998 U.S. EPA Supplemental Environmental Projects (SEP)Policy, which provides guidance on when and how SEPs can be included in the Agency's civil settlements.
- *https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy*

SEP Update Highlights

- Guidance for EPA case teams to consider SEPs early in settlement negotiations and to proactively suggest SEP ideas to defendants, in appropriate cases.

- Encouragement of appropriate public outreach to affected communities, both by the defendant and by EPA;

- A clarified discussion of SEP legal guidelines, intended to make "nexus" requirements and augmentation issues easier to understand;

- A revised, more flexible approach to assessing stipulated penalties in the event a SEP is not satisfactorily completed;

SEP Update Highlights

- A restructured discussion of how to calculate and appropriately mitigate the final settlement penalty;
- A checklist to help defendants and EPA staff do the necessary analysis to ensure the SEP does not augment appropriations or federal funding;
- A consolidation of all SEP-related certifications that need to be included in the text of the settlement agreement;
- A new explanation of the role of third parties who implement or receive SEPs, clarifying that defendants are responsible for the selection of any third parties, and remain responsible for full performance of the project.

What Is EJ 2020?
"If The World Were Perfect, it wouldn't Be"

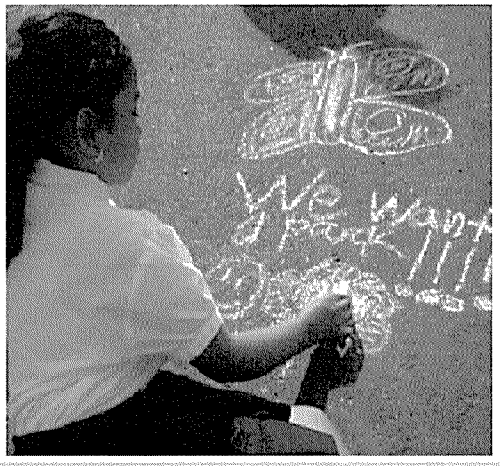
- **EJ 2020** is EPA's strategic plan for **environmental justice** for the years 2016-2020
- **EJ 2020** builds on the foundation of **EJ 2014** and thirty years of work by communities and partners
- **EJ 2020** takes environmental justice to the **next level**



Vision

By 2020, we envision an EPA that integrates environmental justice into everything we do, cultivates strong partnerships to improve on-the-ground results, and charts a path forward for achieving better environmental outcomes and reducing disparities in the nation's most overburdened communities.

Achieving this vision will help to make our vulnerable, environmentally burdened, and economically disadvantaged communities healthier, cleaner and more sustainable places in which to live, work, play and learn.



EJ 2020 Goals

Goal I: Deepen EJ Practice in EPA to improve health & environment of overburdened communities	Goal II: Work with partners to expand our positive impact within overburdened communities	Goal III: Demonstrate progress on significant national EJ challenges
• Rulemaking • Permitting • Compliance & Enforcement • Science	• States & Local Governments • Federal Agencies • Community-Based Work • Tribes and Indigenous Peoples	• Lead Disparities • Small & Tribal Drinking Water Systems • Fine Particle Air Pollution • Hazardous Waste Sites

Goal 1 – Deepen EJ in EPA Programs

- Institutionalize EJ in rulemaking through guidance, training, monitoring, evaluation, community involvement & rigorous assessment of EJ analyses
- Direct more enforcement resources to address pollution & public health burdens from environmental law violations & undertake strategies in 100 overburdened communities
- Establish framework & tools for considering EJ in EPA-issued permits; Design & implement "joint learning" process with regulatory partners
- Implement EJ Research Roadmap to develop tools for a stronger scientific basis for action on EJ & cumulative impacts as well as research to inform cumulative risks

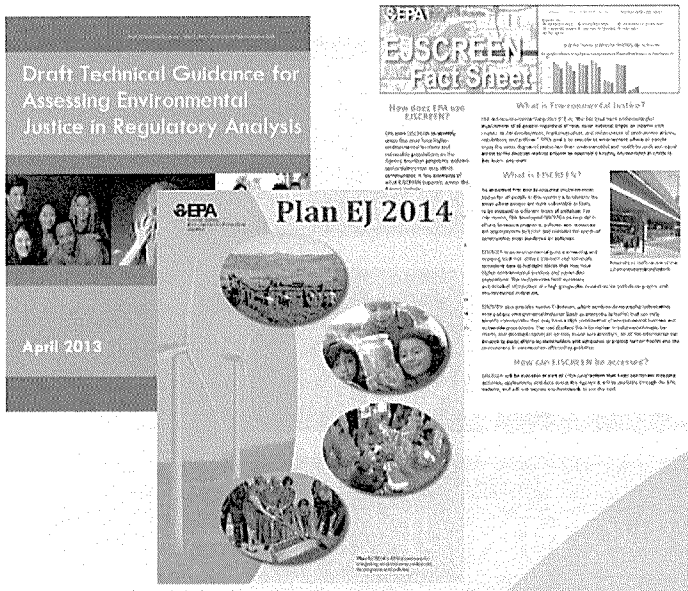
Goal 2 – Work with Partners

- Work collaboratively with states and local governments to identify best practices, support learning, foster cross-program planning and establish shared expectations
- Support communities through best practices for community-based work, including community revitalization efforts
- Advance EJ in federal agencies through integrating EJ in the NEPA process & addressing impacts from the goods movement
- Implement EPA Policy on EJ for Working With Federal Recognized Tribes and Indigenous Peoples

Goal 3 – Demonstrate Measurable Progress

- Work to eliminate disparities in childhood blood lead levels
- Achieve air quality that meets fine particle pollution national ambient air quality standards for low-income populations
- Work to ensure all people are served by community water systems that meet health-based standards, particularly small and tribal systems
- Reduce human exposure to contamination at hazardous waste sites, with focus on minority, low-income & vulnerable communities

Taking EJ to the Next Level



Build on foundation of Plan EJ 2014

Maximize current opportunities for positively impacting communities

Chart path forward for better environmental outcomes and measurable reduction of disparities

Key Anticipated Results

- Improve on-the-ground benefits for overburdened communities
- Institutionalize EJ in EPA decision-making
- Robust partnerships with states, tribes & co-regulators
- Strengthen ability to take action on EJ & cumulative impacts
- Better address complex national environmental justice issues

Timeline

Draft EJ 2020 Framework

April 2015

Final Draft EJ 2020

May 2016

Public Comment Period (May 23, 2016 to July 7, 2016)

Tribal Consultation Period (June 2 – July 18)

Final EJ 2020 Plan

Summer 2016

"You Wouldn't Have Won if We'd Beaten You"



STILL A HERO to 12-year-old Cheryl Tyson and other members of the graduating class at St. Mary's Grammar School is Ray Jarvis, Red Sox hurler who started the Saturday debacle that saw the Oakland Athletics romp 21-7 over Boston. Jarvis is a favorite with the girls at St. Mary's, and Cheryl, daughter of Patrolman and Mrs. George Tyson of 237 Winthrop St., asked him to attend a graduation party she held Saturday afternoon. Belted out in the third inning by the A's, Jarvis, who lives in Providence, stopped at the party on his way home and met

Melinda E. Taylor

Taylor is a Senior Lecturer and Executive Director of the Kay Bailey Hutchison Center for Energy, Law, and Business at the University of Texas. At the law school, she teaches courses on environmental law and oversees the Center, which publishes policy and legal analyses, offers interdisciplinary courses to law and business students, and sponsors symposia and conferences. Prior to joining the faculty of the Law School in 2006, Taylor was the Director of the Ecosystem Restoration Program for the Environmental Defense Fund, a national, nonprofit conservation organization. Taylor was a partner at the law firm Henry, Lowerre, Kelly & Taylor from 1991-1993. She served as Deputy General Counsel of the National Audubon Society from 1988-1991. At Audubon, she was responsible for managing the organization's litigation docket and supervising a project aimed at reducing pollution from oil and gas drilling. She was an associate at Bracewell & Patterson in Washington, DC from 1986-1988, where she specialized in energy and environmental law.

Taylor graduated from the University of Texas School of Law in 1986. She also holds a B.A. from the University (Plan II, *cum laude, Phi Beta Kappa*) (1983).

Protecting Species or Hindering Energy Development?
How the Endangered Species Act Impacts Energy Projects on Public Lands in the West

Melinda Taylor[1], Romany Webb[2], and Vanessa Puig-Williams[3]

Since it was enacted in 1973, the Endangered Species Act ("ESA" or "Act") has been one of the most celebrated environmental laws, but also one of the most reviled. Though passed by Congress with strong bipartisan support (it passed the House of Representatives by a 379 vote margin and the Senate unanimously[4]), the ESA has faced growing opposition by industry and developers frustrated by its ability to slow projects down and by environmentalists discouraged by its failure to reverse the decline of many of the nation's most imperiled plants and animals.

Much of the criticism has been directed towards section 7 of the ESA, which requires federal agencies to ensure that actions they undertake or authorize do not jeopardize threatened or endangered species by consulting with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS").[5] Industry groups argue that the consultation process frequently delays and sometimes halts much needed energy, transportation, water supply, and other projects and often dramatically increases project costs. Environmentalists disagree with this view and contend that the process actually rarely stops anything and that the FWS lacks the backbone to impose meaningful conservation requirements that would be costly or inconvenient for the project developer.

In recent years, industry complaints about the ESA have found a sympathetic ear in Congress and some members have sought to amend the Act, to weaken its protections. From 2011 to 2015, lawmakers introduced a whopping 164 bills and riders aimed at reducing the scope and applicability of the ESA, including by preventing listing or mandating the delisting of species, and otherwise limiting the implementation of the Act.[6]

In 2015 we decided to delve deeply into section 7 of the ESA, to analyze how it actually works in practice and to assess the validity of various parties' claims about the consultation

---

[1] Taylor is a Senior Lecturer and Executive Director of the Kay Bailey Hutchison Center for Energy, Law, and Business at the University of Texas at Austin.

[2] Webb is a Post-Graduate Research Fellow in the KBH Energy Center. Her current research focuses on managing the environmental impacts of energy production.

[3] Puig-Williams is an Affiliated Fellow in the KBH Energy Center. She currently practices conservation law and writes on endangered species issues.

[4] 119 Cong. Rec. 25,694 and 30,167-30,168 (1973).

[5] 16 U.S.C. § 1536(a)(2). Federal agencies must consult with FWS on any proposed action that may affect listed terrestrial and freshwater species and with NMFS on any proposed action that may affect listed marine species. The consultations discussed in this paper were carried out by FWS.

[6] Jamie Pang and Noah Greenwald, Center for Biological Diversity, Politics of Extinction: The Unprecedented Attack on Endangered Species and the Endangered Species Act (2015), *available at* http://www.biologicaldiversity.org/campaigns/esa_attacks/pdfs/Politics_of_Extinction.pdf.

process. We focused on the impact of consultation under section 7 on energy development on public land. This paper is an overview of our study and key findings. In a nutshell, we learned that only a small fraction of energy projects developed on public land are reviewed at all under section 7. When it applies, the consultation process appears to go quickly and smoothly for the vast majority of oil and gas projects, for a variety of reasons. On the other hand, consultation on solar energy and wind energy projects tends to be lengthy and complicated. The FWS has taken steps in recent years to improve the consultation process for energy projects, including by issuing programmatic biological opinions to cover multiple similar actions. By and large, the industry representatives whom we interviewed spoke favorably about their experiences with the programmatic biological opinions, but expressed lingering concerns about various aspects of the consultation process.

Our study focuses on energy projects involving oil, gas, solar, and wind energy development (together "energy projects") on public lands, largely because energy developers have been among the fiercest critics of the ESA. The Western Energy Alliance, for example, has argued that:

> Misuse of the ESA can prevent energy development . . . Far too often the ESA has been used as a means to prevent or delay responsible economic activity rather than for species protection. When applied too broadly . . . the ESA can have very negative economic and job impacts on western states, local communities, and the nation.[7]

In addition, the Obama Administration has made the development of renewable energy projects on public lands a priority. The Energy Policy Act of 2005 established a goal for the Secretary of the Interior to approve 10,000 MWs of electricity from non-hydropower renewable energy projects on public lands by 2015. The Department of the Interior ("DOI") achieved the goal ahead of schedule in October 2012.[8] Building on that effort, the President's Climate Action Plan, released in 2013, directed the DOI to approve an additional 10,000 MW of renewable energy capacity on public lands by 2020.[9] We were curious about the extent to which the section 7 consultation process could interfere with achieving this goal.

Ours is not the first analysis of section 7 consultations. For example, a 2015 study published by the National Academy of Science analyzed 88,290 consultations undertaken

---

[7] Western Energy Alliance, *Endangered Species Act (ESA),* WILDLIFE, http://www.westernenergyalliance.org/knowledge-center/wildlife/endangered-species-act-esa. (last visited Feb. 25, 2016).

[8] Press Release, U.S. Department of the Interior Bureau of Land Management, Salazar Authorizes Landmark Wyoming Wind Project Site, Reaches President's Goal of Authorizing 10,000 Megawatts of Renewable Energy (October 9, 2012).

[9] The President's Climate Action Plan, Executive Office of the President (June 2013).

between January 2008 and April 2015 nationwide.[10] The study found that, "[i]n contrast to conventional wisdom about section 7 implementation, no project was stopped or extensively altered as a result of FWS finding jeopardy or adverse modification" during consultation.[11] The median duration of consultation also was found to be far lower than the maximum time allowed by the ESA.[12] Notably, however, in calculating the duration of consultations the study's authors did not include the time spent discussing a project with the federal agencies before consultation is officially initiated. Nor did the authors analyze the extent to which these discussions resulted in changes to the projects.[13]

Our study aims to provide a more complete picture of the effect of section 7 consultations on energy projects. We reviewed consultations undertaken pursuant to section 7 between FY 2010 and FY 2014 involving energy projects on land managed by the Bureau of Land Management ("BLM"). As the majority of BLM-managed land is located in the western half of the country, the analysis focuses on energy project consultations in the seventeen westernmost states in the continental U.S., as well as Hawaii.[14] We did not analyze any consultations undertaken in other states.

We obtained basic information about each consultation, including a brief description of the project involved and a list of species affected, from FWS's Tracking and Integrated Logging System ("TAILS"). We also reviewed the biological opinions ("BOs") and concurrence letters issued in each consultation. We then selected a subset of individual consultations for further study. With respect to those, we interviewed agency staff and, where possible, industry representatives involved in the consultations to gain a better understanding of how they played out in practice.

Background: The Endangered Species Act and Section 7

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[15] Under the ESA, an "endangered species" is one which is in danger of extinction throughout all or a significant portion of its range and a "threatened species" is one which is likely to become endangered in the foreseeable future.[16] Section 4 of the ESA provides that FWS must determine whether a

---

[10] Jacob W. Malcom and Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE 15844 (2015).
[11] *Id.* at 15344-15849.
[12] *Id.*
[13] The authors did note, however, that "[s]ome agencies are proposing projects with reduced impacts because they are coordinating more closely with FWS to shape the projects well before consultations begin." See *Id.* at 15847.
[14] Our study includes energy projects on BLM lands in FWS regions 1, 2, 6, and 8.
[15] 16 U.S.C. § 1531(b).
[16] *Id.*, § 1532(6), (20).

species is endangered or threatened due to one or more factors listed in the statute.[17] Only after a species is listed is it entitled to protection under the ESA.[18]

The two primary mechanisms through which the ESA protects listed species are set out in sections 7 and 9. Under section 7, federal agencies must ensure that their actions are "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [any critical] habitat" of those species.[19] Section 9 prohibits both federal and non-federal actors from "taking" endangered species, with "take" defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[20]

Section 7 of the ESA establishes a process by which a federal agency (commonly referred to as the "action agency") may consult with FWS about proposed actions. The consultation process is designed to assist the action agency to fulfill its duty to ensure that its actions do not jeopardize listed species or destroy or adversely modify critical habitat. Consultation is required whenever an action proposed to be conducted, funded, or authorized by the agency may affect listed species. The agency's determination as to the effects of an action, and the need for consultation, is set out in a biological assessment ("BA").[21]

Subject to limited exceptions, the action agency must complete its BA within 180 days and submit it to FWS.[22] Based on the findings in the BA, the action agency may request that FWS initiate consultation on an informal or formal basis. Informal consultation occurs when the action agency determines that an action "may affect, but is not likely to adversely affect" a listed species. If the action may have adverse effects, formal consultation must be undertaken.

When the action agency requests informal consultation, FWS must respond within 30 days indicating whether it concurs that adverse effects are unlikely.[23] If FWS concurs, it will provide a "concurrence letter" to the action agency, thereby terminating the consultation process and the action may go forward with no further review from FWS.[24]

If the action agency determines that the proposed action may have adverse effects, it requests formal consultation with FWS. During the formal consultation process, FWS assesses whether the action is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. This review may last up to 90 days, after which time FWS must

---

[17] *Id.*, § 1533(a)(1)(A-E).
[18] Tenn. Valley Auth. V. Hill, 437 U.S. 153 (1978).
[19] 16 U.S.C. § 1536(a)(2).
[20] *Id.* § 1538(a)(1)(B)-(C). See also § 1532(19).
[21] 50 CFR § 402.12(a).
[22] 16 U.S.C. § 1536(c); 50 CFR § 402.12(i).
[23] 50 CFR § 402.12(j).
[24] *Id.* § 402.13(a).

issue a biological opinion ("BO") within 45 days.[25] The BO reflects FWS's view as to whether the project will result in jeopardy to listed species, based on its consideration of the current status of the species and analysis of the various effects (direct, indirect, interrelated, and interdependent) of the action, and the cumulative effects of other non-federal activities.[26]

If FWS determines that an action is likely to jeopardize listed species or adversely modify critical habitat, the action agency may still move forward, but risks being prosecuted by a third party for breach of section 7 of the ESA or a violation of the take prohibition in section 9. FWS is required by the Act to notify the agency of any alternative methods of implementing the action ("reasonable and prudent alternatives" or "RPAs"), which would enable it to avoid violating the ESA.[27] RPAs are not identified for actions that are considered unlikely to jeopardize listed species. The BOs for those actions may include discretionary conservation measures designed to lessen any adverse impacts on listed species.[28]

Where FWS determines that a federal action that is unlikely to jeopardize the continued existence of a listed species may nonetheless result in a take thereof, it will prepare an incidental take statement for the action.[29] Though the ESA generally prohibits take of a listed species, FWS may permit take which is incidental to, and not the purpose of, an otherwise lawful activity.[30] The incidental take statement specifies the amount or extent of take due to the action, identifies reasonable and prudent measures to minimize take, and outlines terms and conditions to be observed in implementing the measures.[31] The reasonable and prudent measures, and the terms and conditions for implementing them, must not "alter the basic design, location, scope, duration or timing of the action and may involve only minor changes," according to the FWS's regulations.[32]

Interagency Consultation in Practice

Within the general parameters described above, interagency consultations vary significantly in practice, depending on a range of factors. The process may be impacted by the nature of the proposed action, the location in which it is to occur, and the species found therein. For most projects, the process is highly collaborative and involves significant discussions and negotiations between FWS, the action agency (BLM, for the energy projects we researched), and the applicant (if any).

---

[25] 16 U.S.C. § 1536(b)(1)(A), (3)(A).
[26] Relevant non-federal activities may include state, tribal, local, or private activities that are reasonably certain to occur in the project area.
[27] 50 CFR § 402.14(h)(3). See also § 402.14(g)(5).
[28] *Id.* § 402.14(j). See also § 402.14(g)(6).
[29] *Id.* § 402.14(g)(7)(i).
[30] 16 U.S.C. § 1536(b)(4).
[31] 50 CFR § 402.14(i)(1).
[32] *Id.* § 402.14(i)(2).

Before officially requesting consultation, the action agency and FWS discuss the project, so that FWS may provide its initial views on the impacts of the action. FWS encourages such pre-consultation discussions, on the grounds that they give the applicant an opportunity to make adjustments and incorporate mitigation measures in the design phase, resulting in fewer or less severe impacts on species and their habitat. We learned from FWS staff that pre-consultation discussions can last 18 months or more, depending on the complexity of the project.[33] The discussions among the parties often continue after the initiation of consultation. The parties may exchange information regarding the likely impacts of the project, and agree on measures to minimize the impacts. In formal consultations, FWS may provide the action agency and applicant a draft of its BO and invite them to provide comments.[34]

Programmatic Consultations

Traditionally, consultations have been done separately for individual federal actions. Individual consultations take significant time to complete and can be expensive to carry out. In addition, some commentators have expressed concern that, where consultation is undertaken separately for each action, FWS may fail to adequately address the cumulative impacts of all actions. FWS may not be aware of small projects that are determined by the action agency to have "no effect" on listed species and, as a result, may fail to consider those projects when assessing the cumulative effects of other activities.

To address these concerns, FWS has increasingly utilized a programmatic consultation process in recent years. The term "programmatic consultation" refers to consultations evaluating the effects of:

- Federal agency programs that establish general guidelines for particular types of actions (e.g., land use plans);
- Multiple actions of the same or similar type; or
- A group of different actions proposed to occur within the same area.

In each case, following consultation FWS issues a programmatic biological opinion ("PBO") that addresses the effects of future actions of a specified type and sets out general conservation measures that apply to those actions.

When an action covered by a PBO is proposed, additional documentation is generally required. The documentation will take one of two forms:

---

[33] The consultation lengths reported in this study do not include time spent on pre-consultation discussions. We understand from discussions with agency staff that this time is generally not recorded by FWS and BLM.

[34] FWS is required to discuss with the action agency and applicant its basis for any finding in the BO, pursuant to regulation. FWS must, if requested, make available to the action agency its draft BO. See 50 CFR § 402.14(g)(5).

- Under the "tiered programmatic consultation approach," for actions covered by a PBO, FWS may issue a tiered BO. This is similar to a standard BO in that it analyzes the likely effects of the action and identifies conservation measures to offset those effects. It is, however, generally easier to complete because it incorporates data and analysis from the previous BO.
- Under the "appended programmatic consultation approach," an action covered by a PBO may be appended thereto, eliminating the need for a separate BO. In such cases, the action agency will notify FWS that it considers a proposed action to be consistent with the PBO. FWS may issue a letter confirming the agency's view and appending the action to the PBO.

In the course of this study, we reviewed the following five programmatic consultations, which apply to a number of the energy projects we analyzed:

- The Oil and Gas PBO dated July 17, 1996, as revised and extended on September 28, 2001, addressing small scale projects associated with BLM's oil and gas leasing program in Kings and Kern Counties in California (the "California Oil and Gas PBO");[35]
- The 1999, 2005, and 2009 PBOs issued with respect to the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("RIP"), which applies to projects involving water depletions from the Upper Colorado River Basin;[36]
- The 2006 PBO issued with respect to the Platte River Recovery Implementation Program ("PRRIP"), which covers projects involving water depletions from the Platte River Basin;[37]
- The 2005 PBO on BLM's Wind Energy Development Program;[38] and
- The 2012 PBO on BLM's Solar Energy Program.[39]

---

[35] Memorandum from Field Supervisor, Ecological Services Sacramento Field Office, Fish and Wildlife Service, to Caliente Resource Area Manager, Bureau of Land Management (July 17, 1996) (on file with authors); Memorandum from Assistant Field Supervisor, Sacramento Fish and Wildlife Office, to Manager, Bureau of Land Management (Sept. 28, 2001) (on file with authors).

[36] Memorandum from Regional Director, Region 6, Fish and Wildlife Service, to Geographic Assistant Regional Director, Southern Geographical Area, Region 6 (Dec. 1999) (on file with authors); Memorandum from Regional Director, Region 6, Fish and Wildlife Service, to Assistant Regional Director, Ecological Services, Region 6 (Jan. 10, 2005) (on file with authors); Memorandum from Colorado Field Supervisor, Ecological Services, Fish and Wildlife Service, to Area Manager, Western Colorado Area Office, Bureau of Reclamation (Dec. 4, 2009) (on file with authors).

[37] Memorandum from Steve Anschutz, Field Supervisor, Nebraska Ecological Services Field Office, U.S. Fish and Wildlife Service, to Michael J. Ryan, Regional Director, Great Plains Region, Bureau of Reclamation and Mike Stempel, Assistant Regional Director, Fisheries and Ecological Services, Region 6, U.S. Fish and Wildlife Service (June 16, 2006) (on file with authors).

[38] Letter from Richard E. Sayers, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants, U.S. Fish and Wildlife Service to Kathleen Clarke, Director, Bureau of Land Management (Nov. 30, 2005) (on file with authors).

There may be other PBOs relevant to energy development on BLM lands, which we did not review for this study.

Energy Development on BLM Lands

The federal government owns 28 percent of land in the U.S., or approximately 650 million acres, of which more than three-quarters is managed by the DOI. Within the DOI, BLM is the largest land manager, with responsibility for approximately 247 million surface acres and 700 million subsurface (mineral) acres.[40] The bulk of the acreage is located in the western U.S., primarily in Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming. Approximately one-third of all domestically produced energy currently comes from public lands.[41]

BLM's management of public lands is governed by the Federal Land Policy and Management Act ("FLPMA")[42], which requires it to apply the principle of "multiple use," such that land is "utilized in the combination that will best meet the present and future needs of the American people."[43] FLPMA requires BLM to develop and periodically revise land use plans that specify uses for various tracts of public land.[44] Land use plans, also referred to as Resource Management Plans ("RMPs"), "form the basis for every action and approved use on the public lands."[45]

The development of an RMP constitutes a "federal action" for the purposes of section 7 of the ESA. BLM will, therefore, consult with FWS under section 7(a)(2) prior to issuing a new RMP. Consultation is also required whenever BLM proposes to revise or amend the RMP. Finally, reinitiation of consultation is required when additional species are listed as threatened or endangered or if significant new information becomes available that suggests there is a need to reevaluate the effects of the RMP.

Consultation on RMPs is governed by a Memorandum of Agreement ("MOA") executed on August 30, 2000 between BLM, FWS, NMFS, and the U.S. Forest Service.[46] Conservation

---

[39] U.S. DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE, ENDANGERED SPECIES ACT CONSULTATION FOR SOLAR ENERGY PROGRAM (2012), *available at* http://solareis.anl.gov/documents/docs/SolarPEIS_Biological_Opinion.pdf.

[40] U.S. Department of the Interior Bureau of Land Management, *The Bureau of Land Management: Who We Are, What We Do,* ABOUT THE BLM, http://www.blm.gov/wo/st/en/info/About_BLM.html (last updated Jan. 26, 2012).

[41] U.S. DEPARTMENT OF THE INTERIOR, AMERICAN ENERGY FOR AMERICA'S FUTURE: THE ROLE OF THE U.S. DEPARTMENT OF INTERIOR 3 (2004), *available at* https://archive.org/details/americanenergyfo3388unit.

[42] 43 U.S.C. §§ 1701 et seq.

[43] *Id.* §§ 1701(a)(7), 1702(c).

[44] *Id.* § 1717,

[45] U.S. Department of the Interior Bureau of Land Management, Land Use Planning, http://www.blm.gov/wo/st/en/prog/planning/planning_overview.html (last updated Mar. 30, 2016).

[46] Memorandum of Agreement on Endangered Species Act Section 7 Programmatic Consultations and Coordination, Between Bureau of Land Management, Forest Service, National Marine Fisheries Service, and Fish and Wildlife Service, Aug. 30, 2000, *available at* http://www.blm.gov/or/esa/reports/Procedures/Interagency_MOA_for_Plan_and_Programmatic_Consultation.doc. (hereinafter "MOA on Programmatic Consultations").

measures designed to mitigate any adverse effects on listed species resulting from development carried out pursuant to the RMPs are developed through a programmatic consultation carried out under the auspices of the MOA.

Individual energy projects are authorized through a permit process overseen by BLM. For most projects, this authorization takes the form of a right of way ("ROW"). A ROW is the privilege of passing over or through land owned by another entity (DOI, in this case). FLPMA authorizes BLM to issue ROWs over public lands for renewable energy projects.[47] BLM also has authority to permit the development of federally-owned onshore oil and gas resources under the Mineral Leasing Act and does so through the sale of leases of public land and issuance of permits to drill.[48]

BLM's Role in Oil and Gas Development

BLM is authorized to lease public land for oil and gas development pursuant to section 14 of the Mineral Leasing Act.[49] Prior to selling a lease to an oil and gas developer, the relevant state office of BLM must consult with FWS if listed species are likely to be affected. There is no single, uniform approach to consultation on oil and gas lease sales. Rather, each state office has developed its own procedures. Based on discussions with BLM staff, we understand that most state offices do not consult on individual lease sales where consultation has already occurred on the applicable RMP and the lease is in accordance with the RMP. The state offices take the view that the act of leasing does not, by itself, have any effect on listed species. Rather, the lessee is required to obtain a separate authorization (an application for permit to drill, or "APD"), which authorizes development. A detailed assessment of effects on listed species is, therefore, typically left until the lessee requests an APD.

In several states, including Colorado, New Mexico, and Wyoming, consultation is undertaken on lease sales that give rise to additional effects not considered during review of the applicable RMP. BLM is currently in the process of updating its RMPs, many of which are over 20 years old. Until the updates are completed, BLM state offices are, in many cases, routinely consulting on individual lease sales.[50] Such consultations generally proceed on an informal basis, with FWS undertaking a simplified review, wherein it merely confirms that the lease contains stipulations to protect listed species, and does not analyze the likely effects of development under the lease.[51]

---

[47] 43 U.S.C. § 1761 (2016).

[48] 30 U.S.C. § 185 (2016).

[49] *Id.* § 223.

[50] One example is the Carlsbad RMP, which covers 2.7 million acres in southeastern New Mexico, and which was issued in 1988. See U.S. Department of the Interior Bureua of Land Management, Carlsbad Resource Management Plan Revision, http://www.blm.gov/nm/st/en/fo/Carlsbad_Field_Office/carlsbad_rmp.html (last updated May 18, 2015).

[51] Lease stipulations are developed by BLM on an ad hoc basis, outside of the formal planning process. We understand from discussions with agency staff that FWS is typically not involved in the development of lease

BLM's Role in Renewable Energy Development

Under section 501(a)(4) of FLPMA, BLM may grant ROWs over public lands, authorizing use of that land for "systems for generation, transmission, and distribution of electric energy," including renewable generating facilities.[52] To date, BLM has permitted 33 utility scale solar energy projects with a combined capacity of 9,278 MW.[53] The agency has also authorized 39 wind energy projects with a combined capacity of 5,557 MW and over 100 wind energy testing facilities.[54]

BLM's experience with renewable energy projects is relatively recent, compared to oil and gas projects. The first utility scale solar project on public lands was approved by BLM in 2010. In the early years of interest in solar projects, BLM did not have any policy or guidance in place with respect to siting. BLM responded to development applications on a case-by-case basis, with no overarching development plan in place. As a result, a number of early projects were located in ecologically sensitive areas, which resulted in a backlash from environmental groups.

In response to the criticism, BLM created a Solar Energy Program in 2012 that spans six western states with solar energy potential: Arizona, California, Colorado, Nevada, New Mexico, and Utah.[55] BLM identified certain areas of public land that are excluded from solar energy development and created solar energy zones ("SEZs") where developers are incentivized to locate projects by ensuring more efficient permitting procedures. BLM defines a SEZ as "an area within which the BLM will prioritize and facilitate utility-scale production of solar energy and associated transmission infrastructure development."[56] BLM amended RMPs in those states that were affected by the Solar Energy Program and consulted with FWS about the impacts on listed species.

On July 20, 2012, FWS issued a PBO concluding that the Solar Energy Program is not likely to jeopardize the continued existence of 17 listed species or destroy or adversely modify designated critical habitat. FWS determined that "the selection of [SEZs], exclusion of certain areas from eligibility for solar development, application of design features to all the solar

---

stipulations. The stipulations are, however, incorporated into RMPs as they are revised and will be reviewed by FWS when it consults on the revised RMP.

[52] 43 U.S.C. § 1761(a)(4).

[53] U.S. Department of the Interior Bureau of Land Management, *New Energy for America,* RENEWABLE ENERGY RESOURCES, http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html (last updated Jul. 1, 2015).

[54] *Id.*

[55] Bureau of Land Management Solar Energy Program, *Western Solar Plan,* Solar Energy Program, http://blmsolar.anl.gov (last visited Mar. 10, 2016).

[56] Solar Energy Development Programmatic EIS Information Center, *Solar Energy Zones,* http://solareis.anl.gov/sez/index.cfm (last visited Mar. 10, 2016).

developments that will occur, and the review process . . . are likely to contribute to the conservation of listed species."[57]

Wind projects are also relatively new for BLM. Seeking to encourage the development of such projects, in August 2006, BLM adopted a comprehensive Wind Energy Development Program ("WDEP") to guide wind energy site testing and development projects in the western U.S., excluding Alaska.[58] BLM amended 52 RMPs in nine states to specify areas where wind development will be allowed and where it will not be permitted, unless the applicable RMP is amended.[59]

BLM consulted with FWS pursuant to section 7 of the ESA in developing the WEDP. FWS found that future development under the WEDP may adversely affect nine endangered and threatened species, but is unlikely to jeopardize their continued existence, because developers will be required to comply with best management practices ("BMPs").[60] The BMPs were revised in 2008 to provide updated guidance for wind energy development.[61] Additional strategies for reducing the impacts of wind energy development are set out in guidelines published by FWS in March 2012, which include BMPs related to siting, construction, and operations designed to reduce risks to species.[62] Compliance with the BMPs is voluntary and does not relieve the developer of any obligations he/she may have under the ESA.[63] FWS will, however, consider a developer's efforts to comply with the BMPs when assessing what action (if any) to take in an ESA enforcement situation.[64]

---

[57] U.S. DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE, ENDANGERED SPECIES ACT CONSULTATION FOR SOLAR ENERGY PROGRAM 1 (2012), *available at* http://solareis.anl.gov/documents/SolarPEIS_Biological_Opinion.pdf.

[58] U.S. Department of the Interior Bureau of Land Management, Record of Decision: Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments (2006), *available at* http://windeis.anl.gov/documents/docs/WindPEISROD.pdf.

[59] The nine states are Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[60] Letter from Richard E. Sayers, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants, U.S. Fish and Wildlife Service to Kathleen Clarke, Director, Bureau of Land Management (Nov. 30, 2005) (on file with authors).

[61] U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, INSTRUCTION MEMORANDUM No. 2009-043; WIND ENERGY DEVELOPMENT PROGRAM Attachment 1 (2008), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2009/IM_2009-043.html.

[62] U.S. FISH AND WILDLIFE SERVICE, LAND-BASED WIND ENERGY GUIDELINES (2012), *available at* https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

[63] *Id.* at vi.

[64] *Id.* at vii.

Our Study Results

Total Number of Consultations for Energy Projects, FY 2010 – FY 2014[65]

	Formal Consultations	Informal Consultations	Total
Oil and Gas Projects	24	119	143
Solar Projects	19	8	27
Wind Projects	6	3	9
TOTAL	49	130	179

1. Oil and Gas Projects

Our research identified a total of 179 consultations relating to energy projects on BLM lands undertaken from FY 2010 through FY 2014. The vast majority (80%) of those consultations involved oil and gas development. However, the number of consultations relating to oil and gas projects is small when assessed relative to all oil and gas developments permitted by BLM during that period. Only approximately ten percent of all oil and gas projects authorized on BLM land during FY 2010 through FY 2014 were subject to consultation.[66]

None of the formal consultations involving oil and gas projects resulted in a finding of jeopardy to listed species or destruction or adverse modification of critical habitat. In two of the consultations, FWS determined that the project may result in the taking of listed species and issued an incidental take statement, outlining RPMs to minimize take. The BOs for those and other projects included details of various conservation measures which the project proponent had agreed to implement. Agency staff indicated that the conservation measures are usually proposed by BLM and/or the project proponent.

Of the 24 formal consultations relating to oil and gas projects, 21 (88%) proceeded in a streamlined manner under one of the PBOs, either the RIP or PRRIP, which apply to oil, gas, and other projects involving water diversions from the Upper Colorado and Platte River basins, respectively. FWS did not undertake a detailed assessment of the likely impacts of any of these projects, nor identify project-specific mitigation measures, but rather concluded that the RIP or

---

[65] The above totals are based on consultations recorded in TAILS. TAILS may not include all consultations undertaken on energy projects on BLM land during the study period. Potentially excluded consultations include those proceeding under the appended programmatic consultation approach discussed above.

[66] There was a total of 19,977 wells drilled on BLM lands during the study period, with the highest number being in Wyoming (6,425 wells) and the lowest in Nevada (22). See BUREAU OF LAND MANAGEMENT, NUMBER OF DRILLING PERMITS APPROVED BY FISCAL YEAR ON FEDERAL LANDS (2015), *available at* http://www.blm.gov/style/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION_/energy/oil_gas_statistics/data_sets.Par.65795.File.dat/numberofapdsapproved.pdf.

PRRIP will mitigate any adverse project effects. The reviews were therefore completed quickly, with the longest taking 65 days.

Just three (13%) of the formal consultations involving oil and gas projects underwent the traditional, individualized review process. One of those – a reinitiation of consultation on a the California Oil and Gas PBO– was undertaken in response to a request from BLM for changes to the incidental take statement in the original PBO. It was a lengthy process, taking 574 days to complete. The other traditional formal consultations were completed more quickly, lasting an average of 133 days. Each consultation related to a unique project involving the development, over multiple years, of oil and gas resources in Colorado.[67] FWS concluded that neither project would not jeopardize the continued existence of any listed species or result in the adverse modification of critical habitat. The finding was based on a commitment, by the project proponent, to implement certain measures to minimize any adverse impacts, and the measures were similar for both projects, because the same species were involved in both.

The majority (83%) of consultations involving oil and gas development during the study period were conducted on an informal basis. Between FY 2010 and FY 2014, 119 informal consultations were undertaken for oil and gas projects, almost five times the number of formal consultations. Of the 119 informal consultations, 94 (79%) were completed within 30 days, the timeframe specified in FWS regulations.[68] Of the remaining 25 consultations, the majority were completed within 60 days, though some lasted in excess of 120 days. The average length of review of all 119 informal consultations was 27 days. This does not include time spent on pre-consultation discussions, however. Based on interviews with agency staff, we understand that the extent of pre-consultation discussions varies depending on the nature of the project and the field office handling the consultation, among other factors.

2. Renewable Energy Projects

A significantly larger percentage of renewable energy projects on BLM land were subject to consultation during the study period. From FY 2010 through FY 2014, 36 consultations were undertaken for renewable projects, of which 27 (75%) involved solar energy development and nine (25%) involved wind projects. We estimate that those numbers represent 82% of all solar energy developments and 71% of all wind energy developments authorized by BLM during the study period.

[67] Memorandum from the Western Colorado Supervisor, FWS, to the Field Manager, BLM (Jul. 15, 2010) (on file with authors) (stating that the project proponent proposed a five-year program of oil and gas exploration and development, involving the drilling of up to 107 wells on 12 existing and 67 new well pads, and associated access roads, pipelines, and handling facilities); Memorandum from the Western Colorado Supervisor, FWS, to the Field Manager, BLM (Sep. 3, 2013) (on file with authors) (indicating that the project proponent proposed a four-year program of oil exploration, involving the drilling of up to 108 wells on 12 new well pads, and associated access roads and pipelines).

[68] 50 CFR § 402.12(j).

From the end of 2009 through 2014, FWS engaged in 17 traditional (not programmatic) formal consultations for 14 utility-scale solar projects. All but one of those consultations involved impacts to the Mojave desert tortoise. In all of the consultations, FWS determined that the proposed project was not likely to jeopardize the continued existence of the desert tortoise (or the Peninsular bighorn sheep and flat-tailed horned lizard, in the case of one project). FWS issued incidental take statements authorizing a certain number of takes of desert tortoises, provided that BLM and the applicant comply with the conservation measures in the BO. Because all but one of the BOs involved the desert tortoise, the conservation measures in each are similar. The measures were developed in a collaborative fashion with FWS, BLM, and the project proponent, according to the agencies and industry representatives whom we interviewed.

Most of the solar project formal consultations carried out during the study period were not completed within the 135 day time limit in the ESA. This is likely because they are large in scale and relatively new to BLM lands, as noted previously. It appears, however, that BLM's Solar Energy Program has helped to streamline the process. A recent study by the Wilderness Society indicates that the average permitting time for projects inside a SEZ is about 50% less than projects outside solar energy zones.[69] The reduced overall permitting time includes reduced time required for consultations, because the SEZ projects are tiered to a PBO.

Between FY 2010 and FY 2014, BLM and FWS engaged in only eight informal consultations for solar projects. One of those projects resulted in issuance of a non-concurrence letter from FWS to BLM stating that the project may affect the peninsular bighorn sheep. Formal consultation for the Imperial Valley Solar Project was required.

The smallest number of section 7 consultations conducted during the study period related to wind energy development. Of the 179 consultations undertaken from FY 2010 through FY 2014, only nine (5%) involved wind projects. Of those, six were formal consultations and three were informal. In each formal consultation, FWS found that the wind development would not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat, provided the developer implemented certain conservation measures. As with oil and gas and solar projects, we understand that the conservation measures are generally proposed by the developer and/or BLM and discussed with FWS prior to and during the consultation process.

The average length of the formal consultations relating to wind energy development was 172 days, calculated from the initiation of consultation to publication of a BO, and

[69] See THE WILDERNESS SOCIETY, FACT SHEET: SOLAR ENERGY ZONES (2015) *available at* https://wilderness.org/sites/default/files/SEZ%20permitting%20time%20fact%20sheet.pdf.

excluding time spent on pre-consultation discussions. According to agency staff we interviewed, in most cases the delay in publishing the BO was likely due to staffing constraints. In just two consultations were the BOs published within the maximum (135 days) time limit set out in the ESA. The shortest consultation lasted nine days, for a project able to take advantage of the streamlined review process in the RIP and PRRIP.

Discussion and Conclusions

As discussed above, only a small number of energy projects on BLM land were subject to consultation under section 7 of the ESA between FY 2010 and FY 2014. Over that period, however, the number of energy projects subject to consultation annually has increased, largely because of the growth in the number of renewable energy projects on BLM lands. The growth in renewable energy projects reflects national policies (federal tax incentives, for example) designed to spur investment in solar and wind projects.

None of the energy projects subject to consultation during the study period were found to jeopardize listed species or destroy or adversely modify critical habitat. All projects were, therefore, allowed to proceed without substantial modification. We learned from discussions with FWS staff, however, that some projects were cancelled by the developer during or after consultation. It is not possible, based on the data we obtained from FWS, to ascertain the exact number of cancelled projects, or the reasons for cancellation. Although most cancellations were likely attributable to financial or business considerations, it is possible that some occurred in response to concerns expressed by FWS regarding the potential for jeopardy to listed species.

Based on discussions with agency staff and industry representatives, the consultation process appears to be highly collaborative, with significant back-and-forth discussions among FWS, BLM, and the project proponent. This is particularly true with respect to renewable energy projects. The novelty of such projects on public lands, as well as their large size and inevitable impact on species and habitats, result in considerable effort and time spent by all parties to develop conservation measures. This process has, on occasion, led to substantial delays and/or major changes to the project location and footprint.

Our analysis suggests that most recent consultations involving energy projects on BLM lands were completed fairly quickly. This is particularly true of consultations relating to oil and gas projects, which took an average of 33 days, well below the 135 day time limit set in the ESA. Consultations on renewable energy projects generally took longer, with consultations for solar projects lasting 131 days on average and wind project consultations lasting 144 days on average. It is important to note that these figures do not include the often significant time spent discussing a project prior to the official start of consultation.

Despite the fact that no projects were stopped by the ESA during the study period, implementation of the Act may nevertheless hinder energy development in some circumstances. The industry representatives we interviewed for this study emphasized that the consultation requirement in section 7 of the ESA can and often does lead to significant project delays. This claim is disputed by environmentalists, who argue that most consultations are completed within the time limits set in the statute. Our research shows that most formal consultations relating to oil and gas projects were completed within the statutory time limits, but renewable energy projects often took longer.

Even where the statutory time limits are officially met, project delays may occur as a result of lengthy pre-consultation discussions undertaken before the official clock starts on consultation. Industry representatives expressed frustration with the time involved in these discussions. They also expressed concerns about inconsistencies in the treatment of similar projects. Industry complained that the assessment of project effects and the measures required to minimize those effects often varies between and even within FWS offices. As a consequence, similar projects may be treated differently, depending on the FWS staff assigned to the consultation. This leads to considerable uncertainty for developers, a problem acknowledged by several of the agency staff we interviewed.

Inconsistencies and delays do not arise to the same extent where projects are covered by a PBO. The PBOs recently issued by FWS cover multiple actions of the same type or in the same area. When a covered action is proposed, BLM and FWS may agree to append the action to the existing PBO, or use the PBO as a foundation for further analysis, leading to greater consistency in the treatment of each action. Indeed, as one industry representative we interviewed noted, the existence of a PBO can remove much of the "subjectivity that can be injected [into consultations] by individual staff." Others, however, warned that this is not always the case and that the PBO may be subject to different interpretations over time, particularly when there is staff turnover.

The agency staff and industry representatives we interviewed generally agreed that the existence of a PBO greatly streamlines the consultation process. This is confirmed by our research. As an example, between FY 2010 and FY 2014, 21 oil and gas projects and one wind energy project were subject to consultation under the RIP and PRRIP. All of those consultations were completed quickly, with the longest lasting 97 days. Across all 22 consultations, the average length of review was just 27 days, calculated from the date consultation was officially requested. We understand from discussions with agency staff and industry representatives that there are generally no or few pre-consultation discussions for projects covered by the RIP and PRRIP.

Specific programmatic consultations have been undertaken with respect to renewable energy projects on BLM lands. For example, as part of its Wind Energy Development Program,

BLM consulted with FWS on the likely impact of future wind energy projects on nine threatened and endangered species. To minimize any adverse impacts, various BMPs were developed for wind projects that may affect those species. Those BMPs continue to guide the conservation measures adopted in individual project consultations. This not only provides greater certainty for developers, but should also ensure the consultation process runs more smoothly.

Similar efforts have been taken to streamline consultation on solar energy projects. Before the development of BLM's Solar Energy Program, FWS had to ensure that the location of projects would not interfere with habitat connectivity for the Mojave desert tortoise. On occasion, this meant that the project footprint or location had to be altered during consultation. With the development of SEZs, developers should have more certainty over the landscape level conservation measures with which they will be required to comply. The consultation process should run more efficiently, while ensuring protection of listed species and their habitats.

Agency and industry representatives we interviewed agreed that there has been progress made in recent years to streamline and regularize the consultation process for energy projects on BLM lands. The data we analyzed confirms this conclusion. As BLM, FWS, and the renewable energy industry gain experience with the new PBOs for wind and solar projects, the extent of improvement will become clearer.

Phil Hunsucker is the founder and Chairman of Hunsucker Goodstein PC, a boutique law firm that focuses on environmental and insurance coverage issues. For over 30 years, Phil has been a trial lawyer and counselor. Early in his career, Phil gained considerable first-chair trial experience while serving in the United States Army Judge Advocate General's Corps. Phil has been the lead lawyer in environmental, toxic tort, and environmental insurance coverage litigation, representing a wide range of clients nationwide. Since 2009, Phil consistently has been chosen by his peers as a Super Lawyer. Phil is a 1982 graduate of the Dedman School of Law at Southern Methodist University. Phil is admitted to practice in Texas, California, Oregon and Washington.

Funding Remediation of Environmentally Impaired Properties: Strategies That Maximize Resources





Philip C. Hunsucker and Michael D. Goodstein
HUNSUCKER GOODSTEIN PC

1 OVERVIEW

This paper discusses redevelopment strategies to resolve complex issues at environmentally contaminated properties (referred to as brownfield properties) and provides several case studies to highlight successes at two properties. Many less complicated environmentally impaired properties have already been redeveloped and returned to productive use. Many more challenging brownfields remain underutilized. This paper highlights creative funding strategies for brownfields and discusses methods that can be used to resolve issues associated with owning and redeveloping a contaminated site, including financing hurdles, cost recovery actions, liability concerns, and maintaining a vision for the end use. Historic insurance assets, CERCLA cost recovery and RCRA citizen suits, grants and tax incentives, and state voluntary cleanup programs are among the tools discussed. This paper also provides practical tips for ensuring that these funding sources are maximized and that costs incurred in remediating brownfields can be recovered to the greatest extent possible. Two case studies are highlighted: The Evansville Greenway Site in Evansville, Indiana; and the Quanta Resources Site in Long Island City, New York.

At the Evansville Greenway Site in Indiana, the Evansville Greenway and Remediation Trust used creative sources of funding to transform a contaminated former scrap yard into a beautiful greenway and bike path—a key part of a planned 42-mile walking/biking trail encircling the City of Evansville, Indiana. The Evansville Greenway and Remediation Trust was able to marshal brownfield grants, over $3,500,000 in insurance assets, and $4,375,000 from other responsible parties through cost-recovery litigation. This case-study demonstrates how a variety of funding options can be combined for restoring brownfield properties for reuse.

The Quanta Resources Site involved entry of a notorious abandoned waste oil processing facility (previously operated by a convicted environmental criminal) into New York State's Voluntary Cleanup Program. Strategic site investigation efforts, combined with extensive analysis of historic documents, led to the identification of responsible parties and a negotiated resolution that will restore the property and adjacent parcels for future commercial use.

Businesses today routinely have responsibility for potential brownfield properties which have not yet been cleaned up and put back to use. These businesses have often resisted redevelopment due to the costs of investigation and cleanup. As infill and urban centers continue to become more popular and greenfield sites become more expensive and less available, developers and property owners are reconsidering these more challenging brownfield sites. Governments have recognized the future investment potential, including a revitalized tax base and job creation, and have created some incentives for cleanup and redevelopment of brownfield properties across the United States.[1] As the easier brownfields are swiftly brought back into productive use, property owners, other responsible parties, and governments are encountering more complicated and risky brownfield properties. This paper explores both the opportunity and challenge of brownfield redevelopment, provides an overview of available tools for redeveloping more complicated contaminated properties, and offers two case studies which bring many of these issues and potential solutions to light.

The United States Environmental Protection Agency ("EPA") broadly defines a brownfield site as a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.[2] The EPA's brownfields program was designed to empower states, communities and other stakeholders to work together to prevent, assess, safely clean up, and sustainably reuse brownfields.[3]

2 INTRODUCTION

There are numerous economic, environmental and social benefits that a community can expect when brownfields are redeveloped, including increases in the local tax base and new job growth, reuse of existing infrastructure, development pressure taken off undeveloped land, cleaner air, and reduced natural habitat destruction.[4] Redeveloped brownfield properties tend to have greater location efficiency than alternative development scenarios at greenfield properties. According to one study, redevelopment of brownfields may result in a 33 to 57 percent reduction in vehicle miles travelled and a

---

[1] The United States Conference of Mayors. January 2010. *Recycling America's Land: A National Report on Brownfields Redevelopment, Volume VIII.* Washington, D.C., 14 at 7.
[2] U.S. EPA/Brownfields and Land Revitalization. September 2010. *About Brownfields.* www.epa.gov/brownfields/about.html.
[3] *About Brownfields.* www.epa.gov/brownfields/about.html.
[4] EPA Brownfields Grant Guidelines. August 2010. *Frequently Asked Questions,* http://www.epa.gov/brownfields/proposal_guides/FY11_FAQs.pdf at 44; *About Brownfields.* www.epa.gov/brownfields/about.html.

corresponding reduction in air pollution emissions, including greenhouse gases.[5] This study also showed an estimated 47 to 62 percent reduction in stormwater runoff when brownfields are redeveloped instead of greenfields.[6] The study concluded that residential property values are likely to increase once a nearby brownfield is assessed or cleaned up.[7] The study further concluded that cleaning up a brownfield site can increase overall property values within a one-mile radius by $0.5 to $1.5 million.[8] Additionally, anecdotal surveys indicate a reduction in crime in recently revitalized brownfield areas.[9] All of these factors make brownfield redevelopment a highly attractive investment for local governments where tax and other incentives for redevelopment can be pursued.

There are also a number of challenges associated with redeveloping contaminated property. The average time it takes to redevelop a brownfield site, according to a survey performed by the United States Conference of Mayors, is four and a half to five years.[10] The most frequently identified impediment to brownfield redevelopment is cleanup funds and financing, followed by poor market conditions, and liability issues.[11] Most businesses are concerned with the potential liability involved with redeveloping a contaminated site. These concerns are compounded when dealing with a site with more extensive contamination that may be leaching into groundwater or onto neighboring properties.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") regulates the cleanup of hazardous substances and imposes liability for cleanup on potentially responsible parties.[12] As the courts have interpreted CERCLA to be a strict liability statute, to establish liability it is only necessary to prove that a potentially responsible party is either a former or current owner or operator of a facility, a person who arranged for the disposal or treatment of hazardous substances, or a person who transported hazardous substances to the site.[13] To establish liability under CERCLA, it is not necessary to prove that the potentially responsible person is at fault for the contamination.[14] This broad reach of liability and ensuing uncertainty can deter brownfield remediation if prospective developers are not adequately protected from potential liability, which requires a careful strategy for redevelopment. Potential liability and uncertainty also complicate financing options. Lenders have historically been reluctant to finance the

---

[5] EPA Brownfields Benefits Postcard. November 2010. *The EPA Brownfields Program Produces Widespread Environmental and Economic Benefits*, http://www.epa.gov/brownfields/overview/brownfields_benefits_postcard.pdf.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Recycling America's Land: A National Report on Brownfields Redevelopment* at 8. (This time frame, however, is likely impacted by the current market conditions which are having a similar impact on greenfield development as well).
[11] *Id.* at 9.
[12] 42 U.S.C. § 9607.
[13] EPA Superfund 20th Anniversary Report. October 2010. The Birth of Superfund, chap. 2, http://www.epa.gov/superfund/20years/ch2pg6.html; U.S. EPA/Cleanup Enforcement. June 2010. *Superfund Liability.* http://www.epa.gov/compliance/cleanup/superfund/liability.html.
[14] *The Birth of Superfund*, chap. 2.

redevelopment of contaminated property. The evolution of environmental laws, however, has created a better climate for such investment.

Since the passage of the 2002 Brownfield Amendments and the creation of the *bona fide prospective purchaser exemption*, more and more developers and lenders are willing to invest in the remediation of a brownfield property. Of course, the willingness to invest in a brownfield property can decrease as concerns over the extent of the contamination increase. Selecting environmental professionals and environmental attorneys with a broad range of skill and experience on these projects, who can craft and execute sophisticated strategies for more difficult brownfield properties, can have a huge impact on the success of a brownfield redevelopment.

3 Finding the Resources to Clean-up Contaminated Properties

Often the more complex and longstanding brownfield sites are a top priority of the community's development plan. However, the known contamination and uncertainty in how best to address it can continue to impede redevelopment of these properties for years on end. The primary challenge to redeveloping these properties is finding the resources to jumpstart the cleanup and move the redevelopment forward. Due to the increased risks of liability, traditional financing is sometimes unavailable or at the very least less easy to come by, in the initial stages. Brownfield projects often must supplement traditional funding with outside grants, creative financing, and/or additional capital to encourage financial institutions or investors to make the loan. This section of the paper provides an overview of several financing options and legal mechanisms to consider as part of a brownfield redevelopment strategy.

A. Insurance

Historical insurance assets, which are often overlooked, can provide important funds to allow a remediation project to begin. It is our experience that many clients do not realize the full potential value of older insurance policies to help address present day problems and issues. This source of funding may be used to start the remedial investigation and develop the basis for a CERCLA cost recovery action and/or a citizen suit under the Resource Conservation and Recovery Act ("RCRA") to pursue other liable parties for their share of the cleanup costs. Much of the contamination to be addressed in remediating a brownfield site may have occurred during a time period when historic insurance policies provide coverage for environmental contamination. This may be true whether or not the party responsible is still in business, bankrupt or dissolved.

Comprehensive General Liability policies that predate 1971 most often do not contain any exclusion for environmental contamination. Starting in 1973, many insurance carriers added an exclusion for pollution, unless there was a sudden and accidental release.[15] By 1985, most insurance carriers amended their standard policies to attempt to exclude

[15] 2 RCRA and Superfund: A Practice Guide, 3d § 16:26 (2010).

coverage for pollution.[16] Thus, the policies that are most likely to be available to address environmental contamination, and potentially provide funding for brownfield remediation projects, are comprehensive general liability policies issued before 1985. Such policies should be located and evaluated by an experienced environmental insurance coverage attorney as soon as possible.

Although there is common standard language that was used by many carriers during these time periods, every policy is different and the language of the policy and the particular situation must be evaluated to determine whether insurance coverage assets are potentially available to fund the investigation and remediation. Obtaining coverage from the insurance carrier also requires particular steps be followed to provide proper notice and tender. Triggering of historic insurance coverage by environmental insurance coverage attorneys can lead to important assets for brownfield remediation.

B. Cost Recovery

While the broad reach of CERCLA's liability scheme can impede brownfield redevelopment by causing fear of liability and uncertainty, if used correctly, CERCLA cost recovery actions can also be an effective and indispensable component of the redevelopment strategy at a complicated brownfield site. CERCLA was enacted with three primary objectives: to establish prohibitions and requirements concerning closed and abandoned hazardous waste facilities; to establish a trust fund to provide for cleanup when no responsible party can be identified; and, to provide for liability of parties responsible for the release of hazardous waste into the environment.[17] The statute provides that any responsible party associated with a site "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for" any "necessary costs of response incurred by any other person consistent with the National Contingency Plan."[18]

The United States Supreme Court has interpreted CERCLA Section 107 to create a private right of action for the recovery of response costs.[19] The plaintiff may be the United States, a State, an Indian Tribe or "any other party" including a party that itself is potentially responsible (e.g., the current owner or developer).[20] Recoverable costs are "necessary costs of response" that are incurred "consistent with the National Contingency Plan."[21] Costs are considered "necessary" under the CERCLA regulations "if incurred in response to a threat to human health or the environment."[22] The National Contingency Plan is the set of regulations EPA promulgated to govern the investigation and

---

[16] *Id.*
[17] U.S. EPA/Superfund. October 2010. *CERCLA Overview.* http://www.epa.gov/superfund/policy/cercla.html.
[18] 42 U.S.C. § 9607(a)(4)(B).
[19] U.S. EPA/Cleanup Enforcement. May 2009. *Superfund Frequently Asked Questions: Aviall and Atlantic Research.* http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/aviall-faqs.html.
[20] 42 U.S.C. § 9607(a)(4)(B); *United States v. Atlantic Research*, 551 U.S. 128 (2007).
[21] 42 U.S.C. § 9607(a)(4)(B).
[22] *Reg'l Airport Auth. of Louisville v. LFG*, LLC, 460 F.3d 697, 703 (6th Cir. 2006).

remediation of contaminated properties.[23] A response action is consistent with the National Contingency Plan when the "action . . . evaluated as a whole, is in substantial compliance with the applicable requirements . . . and results in a CERCLA-quality cleanup."[24] However, "[c]osts otherwise necessary and consistent with the [National Contingency Plan] may nonetheless be unrecoverable if the steps taken were extravagant or otherwise unreasonably costly."[25] Costs will also be unrecoverable when they are "duplicative of other costs, wasteful, or otherwise unnecessary to address the hazardous substances at issue."[26] Courts have held that "necessary costs" include those costs that are "closely tied to the actual cleanup" including "work performed in identifying other PRPs."[27] According to the Supreme Court, "tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for"[28] and therefore such costs are recoverable from responsible parties in a CERCLA cause of action.

In addition to CERCLA, RCRA contains a citizen suit provision which may be brought against any person in violation of a permit, statute, or regulation[29] or against any person creating an imminent and substantial endangerment to human health or the environment.[30] Through these citizen suits provisions, RCRA "provides a powerful tool for those seeking to compel liable parties to participate in funding an investigation and cleanup of a contaminated property—it is, in essence, a federal statutory nuisance theory."[31] RCRA also provides that "any person" may bring a citizen suit action,[32] including the current property owner or developer. The statute authorizes courts to award costs of litigation, including reasonable attorney fees, to the prevailing or substantially prevailing party,[33] which are "benefits not normally available to the claimant pursuing cleanup or cost recovery" under CERCLA.[34] Moreover, because "RCRA sanctions extend to contamination from production of petroleum materials, which is expressly exempted from CERCLA," RCRA citizen suits can be used to address properties contaminated by petroleum products, in addition to other hazardous substances.[35] Under the right conditions, RCRA citizen suits can augment a CERCLA cost recovery strategy, or even play the lead role in a brownfield redevelopment strategy to compel parties responsible for the contamination to assist with the remediation phases of the redevelopment project.

---

[23] 40 CFR § 300.
[24] 40 CFR § 300.700(c)(3)(i).
[25] *ITT Indus. v. BorgWarner, Inc.*, 700 F. Supp. 2d 848, 880 (W.D. Mich. 2010) (quoting *Nw. Mut. Life Ins. v. Atl. Res. Corp.*, 847 F. Supp. 389, 401 (E.D. Va. 1994)).
[26] *Waste Mgmt. of Alameda County, Inc. v. E. Bay Reg'l Park Dist.*, 135 F. Supp. 2d 1071, 1099 (N.D. Cal. 2001).
[27] *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994).
[28] *Id.*
[29] 42 U.S.C. § 6972(a)(1)(A).
[30] 42 U.S.C. § 6972(a)(1)(B).
[31] Neuman, Reed W., "You Mean They Can Sue? Creative Citizens Environmental Lawsuits can Burnish Traditional Remedies" at 44.
[32] 42 U.S.C. § 6972(a)(1).
[33] 42 U.S.C. § 6972(e).
[34] Neuman, "You Mean They Can Sue?" at 44.
[35] *Id.*

For more challenging brownfield properties, CERCLA cost recovery actions and RCRA citizen suits can be integrated into the strategy as a key component to fund the investigation and remediation phase of the redevelopment. If there are viable past owners and operators, arrangers, or transporters, CERCLA cost recovery and/or RCRA citizen suits can be the additional component needed to complete the redevelopment project. Significantly, these authorities can be used both by current property owners, and others with an interest in affected property (for example, owners of security interests in affected properties) who can likewise use these authorities to compel environmental cleanup.[36]

C. Federal Grant Programs

Another component to a redevelopment strategy that may provide initial capital to help move the redevelopment project forward is federal grant programs either through the local or State government or directly to the owner or developer. The Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Law) authorizes the EPA to award grants on a competitive basis for the assessment and cleanup of brownfield properties.[37] The EPA Brownfields Program draws on these grants to empower States, communities, Indian Tribes, and non-profit organizations to prevent, inventory, assess, cleanup, and reuse brownfield properties.[38] EPA provides funding for three different types of grants: Brownfields Assessment Grants; Brownfields Revolving Loan Fund Grants; and Brownfields Cleanup Grants. Brownfields Assessment Grants provide funds to inventory, characterize, assess, and conduct planning and community involvement related to brownfields. These grants are given to cover a period of three years and can be used either community-wide or for a site-specific project. For a site-specific project, applicants may request up to $200,000 to address either hazardous waste or petroleum contamination, but may request a waiver from the $200,000 limit and request up to $350,000 for a specific site.[39]

Brownfields Revolving Loan Fund Grants provide funds to capitalize a revolving fund used to make loans and provide subgrants to carry out cleanup activities at brownfields. These grants are issued for a period of up to five years. Applicants can apply for up to $1,000,000 to capitalize their own revolving loan fund.[40] The Brownfields Law requires applicants to provide a 20 percent cost-share for Revolving Loan Fund grants. Such a cost share may be in the form of a contribution of money, labor, material, or services, but cannot include administrative costs.

Applicants may not use more than 50 percent of the awarded funds for subgrants and may not subgrant to themselves. Additionally, a Revolving Loan Fund grant recipient cannot make a loan or subgrant to a party potentially liable for the contamination.[41]

---

[36] *See, e.g., DMJ Assocs. LLC v. Capasso*, 288 F. Supp. 2d 262, 271-72 (E.D.N.Y 2003).
[37] 42 U.S.C. § 9604(k).
[38] Public Law 107-118 (H.R. 2869): Small Business Liability Relief and Brownfields Act.
[39] U.S. EPA. Aug. 2010. *Proposal Guidelines for Brownfields Assessment Grants*, pp.4-5, http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-10-09.pdf.
[40] *Proposal Guidelines for Brownfields Assessment Grants at* 4.
[41] EPA Fiscal Year 2011 Guidelines for Brownfields Revolving

The third type of grant—Brownfields Cleanup Grants—provide funds to carry out cleanup activities at specific brownfield properties owned by the applicant.[42] An applicant may request up to $200,000 per brownfield site to address hazardous substances and/or petroleum contamination.[43] The performance period for Brownfields Cleanup Grants is 3 years and the applicant must be the sole owner of the site at the time it submits a grant proposal.[44]

Like the Revolving Loan Fund grants, the Brownfields Law requires applicants to provide a 20 percent cost-share and such cost share may be a contribution of money, labor, material, or services, but cannot include administrative costs.[45] Applicants must have conducted a Phase II environmental site assessment prior to submitting a grant proposal.[46]

For Brownfield Assessment and Revolving Loan Fund grants, eligible recipients include State, local and Tribal governments, government entities, and redevelopment agencies created by a State or local government. For Brownfield Cleanup Grants, eligible recipients include State, local and Tribal governments, government entities, and non-profit organizations. For-profit organizations are not eligible for Brownfields Grant funding from EPA.[47] For sites contaminated by hazardous substances, those who may be found liable for the contamination under CERCLA—including government entities—are not eligible for grants.[48]

Any of the Brownfields Grants can be used to purchase environmental insurance. The amount of insurance must be, however, less than 100 percent of the total grant or loan awarded.[49] The Brownfields Grants program does not specify what type of environmental insurance qualifies under the program, but the guidelines encourage successful applicants to work closely with EPA to ensure that the environmental insurance policy purchased with grant funds does not cover ineligible expenses such as paying for a penalty or fine, paying a federal cost share requirement, or paying for a response cost at a brownfields site for which the recipient of the grant is potentially liable under CERCLA.[50] Types of environmental insurance include Professional Liability Coverage (environmental-specific "errors and omissions" insurance for engineering and legal firms with environmental practices), Owner/Operator Liability Coverage (coverage for parties conducting work or operating at the site), Cleanup Cost-Cap or Stop-Loss Coverage

---

Loan Fund (RLF) Grants. August 2010. Proposal Guidelines for Brownfields Revolving Loan Fund Grants at 5, http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-10-10.pdf.

[42] *Proposal Guidelines for Brownfields Assessment Grants* at 4.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] EPA Brownfields Grant Guidelines, pp. 10-11; *About Brownfields.* www.epa.gov/brownfields/about.html.

[48] *Proposal Guidelines for Brownfields Assessment Grants* at 12.

[49] EPA Brownfields Grant Guidelines at 16.

[50] *Id.* at 14.

(coverage designed to limit the cost of uncertainties by covering the cleanup costs over and above budgeted costs), and Re-opener or Regulatory Action Coverage (provides coverage if a regulator reopens a previously approved cleanup).

Grant applications are evaluated on a number of factors, including economic and environmental needs of the targeted communities, plans for the property's redevelopment and the feasibility of that vision, outside funding sources and partnerships in addition to the Brownfields Grants, and economic, environmental, health, and social benefits of the reuse of the site.[51]

The EPA Brownfields Grants have provided significant funding to the assessment, cleanup, and revitalization of brownfields. As of February 2013, as a result of the Brownfields Grants, 20,066 properties have been assessed, 837 cleanups have been completed, 38,575 acres made ready for reuse, and $19.2 billion dollars have been leveraged for brownfields.[52] For fiscal year 2012, EPA awarded $69.3 million in new Brownfields Grants for funding necessary to assess, cleanup and redevelop contaminated properties, boost local economies and create jobs.[53] EPA provided grants to 245 grantees including Indian tribes and communities in 39 states.[54] Highlights of the projects planned with the grant funding include: the cleanup and redevelopment of a major industrial area in DeKalb County, Georgia; the cleanup and redevelopment of a maritime charter school in Providence, Rhode Island; the cleanup of a former Chrysler/American Motors plant in Kenosha, Wisconsin; and the rehabilitation of a former manufacturing plant, a mill and an electric plant into 150 multifamily rental units in North Carolina.[55]

In addition to the EPA Brownfields Grants, all States and Puerto Rico also have a Clean Water State Revolving Fund for planned corrective action to improve communities' water quality. The EPA provides the States with the seed money and the States use this fund to make loans to communities, individuals, and others for high priority water-quality activities.[56] As money is paid back into the revolving loan fund, new loans can be made for other improved water-quality activities. Brownfields that suffer from water quality impairment or projects that are attempting to prevent water quality issues can access the Clean Water State Revolving Fund to receive low or no-interest loans for water quality projects. In total, the Clean Water State Revolving Fund program has more than $27 billion in assets and has funded over $74 billion in clean water projects, providing over

---

[51] *Proposal Guidelines for Brownfields Assessment Grants* at 3.
[52] EPA Brownfields and Land Revitalization, *Brownfields Program Accomplishments*, www.epa.gov/brownfields/overview/bf-monthlyreport.html.
[53] EPA Brownfields and Land Revitalization, Grant Announcements, www.epa.gov/swerosps/bf/pilot_grants.html.
[54] *Id.*
[55] *Id.*
[56] U.S. EPA. May 1999. *The Clean Water State Revolving Fund Program.* EPA 832-F-99-051, Washington, D.C., 2, http://water.epa.gov/grants_funding/cwsrf/upload/2002_06_28_cwfinance_cwsrf_cwsrf.pdf.

24,688 low-interest loans to date.[57] In recent years, the Clean Water State Revolving Fund program has provided more than $5 billion annually to fund water quality protection projects.[58] In addition to annual contributions, the American Recovery and Reinvestment Act of 2009 provided the Clean Water State Revolving Fund program with $4 billion to fund high priority wastewater infrastructure projects.[59]

Entities that are eligible for Clean Water State Revolving Fund loans include communities, municipalities, individuals, citizen groups, and non-profit organizations.[60] Each State sets its own priorities for the money in its revolving fund and can approve projects. While traditionally used to build or improve wastewater plants, loans can also be used for: controlling agricultural, rural and urban runoff; excavating and disposing of underground storage tanks; constructing wetlands as a filtering mechanism; safely capping and abandoning wells; excavating, removing and disposing of contaminated soils; demolishing tunnels; and performing Phase I, II, and III environmental site assessments.[61]

D. Tax Incentives

Tax increment financing and other tax incentives should also be considered in a brownfield redevelopment strategy. Tax increment financing is created through local governments' assessment of property values. The incremental difference in tax revenues between the original assessment rate and the new, higher assessed rate (based on a clean and developed site) is then used to finance the cleanup and redevelopment.

In addition to tax increment financing, a number of states also provide state tax credits for costs incurred for the remediation of contaminated properties.[62] Some states provide eligible properties with a tax rebate upon the completion of a brownfield redevelopment project. The local taxing authority takes the difference in the appraised property value between the original assessment value (i.e., the contaminated and/or abandoned site) and the new, higher assessment value (i.e., the clean and developed site)[63] and then

---

[57] U.S. EPA. November 1999. *Brownfields Federal Programs Guide.* EPA 560-F-09-501, Washington, D.C., 74, pp.46-47, http://www.epa.gov/brownfields/partners/2009_fpg.pdf; The Clean Water State Revolving Fund Program.

[58] *Brownfields Federal Programs Guide*, pp.46-47; *The Clean Water State Revolving Fund Program.*

[59] *Id.*

[60] Brownfields Federal Programs Guide at 47.

[61] U.S. EPA/Mid-Atlantic Brownfields and Land Revitalization. July 2010. *Federal Program Guide - Environmental Protection Agency.* http://www.epa.gov/reg3hwmd/bflr/fed_prog_guide/epa.html.

[62] Northeast-Midwest Institute. *State Brownfields Income Tax Credit Programs.* October 2009, http://www.nemw.org/images/State%20Brownfields%20Tax%20Credit%20Chart%2010-09.pdf. and U.S. EPA/Brownfields and Land Revitalization. September 2010. *State and Tribal Response Programs Agreements.* http://epa.gov/brownfields/state_tribal/moa_mou.htm.

[63] 65 EPA Brownfields and Land Revitalization. September 2010. *Available Funding Mechanisms.* www.epa.gov/brownfields/funding.html. *See also*, for example: Colorado Department of Public Health and the Environment. *Hazardous Materials and Waste Management Division How to Apply for the Colorado Brownfields Tax Credit*, http://www.cdphe.state.co.us/hm/bftaxhowto.html; Maryland Department of Business and Economic Development Business Resources. *Brownfields Revitalization Incentive Program.* http://www.choosemaryland.org/businessresources/pages/bro

provides a discount on this difference for a set period of years which can dramatically reduce property taxes during this period. These tax credits can prove to be an extremely valuable tool for highly contaminated properties where the contamination has greatly reduced the property value. Remediation and redevelopment will have a significant impact on the property value and a credit on this differential could be highly effective in securing financing or propelling the redevelopment project to completion.

In addition to the state baseline brownfield tax credit, some states also provide additional benefits for redeveloping properties within state "enterprise" or "urban development" zones. For example, in these zones, some states allow for extended tax credits over a period of ten years as opposed to five years,[64] while other states provide for double the tax credits for properties.[65] Brownfield properties are often located within such zones and thus the brownfield redevelopment projects can capitalize on these additional tax benefits. Many states offer a wide variety of incentives to brownfield redevelopment projects and it is worth the time to investigate these potential sources of funding.[66]

From time-to-time, there has also been a federal brownfields tax credit available at eligible properties.[67] The federal brownfields tax credit allows environmental cleanup costs to be fully deductible in the year incurred, rather than capitalized and spread over a period of years.[68] The federal tax incentive was initially enacted in 1997 and extended through December 31, 2011.[69] Previously filed tax returns can also be amended to include deductions for past cleanup expenditures.[70]

In addition to the state and federal brownfields tax credits, there are also numerous other tax incentives to consider.[71] For instance, for brownfields projects in rural and urban low-income communities, funding may be available through the New Markets Tax Credit Program administered by the Community Development Financial Institutions Fund under the U.S. Department of the Treasury.[72] The New Markets Tax Credit Program was created to expand the availability of credit, investment capital, and financial services in distressed

---

wnfields.aspx.; Michigan Economic Development Corporation Brownfield Tax Incentives. June 2010. *Brownfield Fact Sheets*. http://www.michiganadvantage.org/cm/files/Fact-Sheets/BrownfieldSBT.pdf.; New York State Department of Environmental Conservation. *Brownfield Cleanup Program*.

[64] Maryland Code, Tax - Property Article § 9-229(f); Maryland Department of Business and Economic Development Business Resources. *Brownfields Revitalization Incentive Program*. http://www.choosemaryland.org/businessresources/pages/brownfields.aspx.

[65] Michigan Economic Development Corporation Brownfield Tax Incentives. June 2010. *Brownfield Fact Sheets.* http://www.michiganadvantage.org/cm/files/Fact-Sheets/BrownfieldSBT.pdf.

[66] For a slightly dated, but helpful source of information, *see* Charles Bartsch and Barbara Wells. *Northeast-Midwest Institute State Brownfield Financing Tools and Strategies*. April 2005. www.nemw.org/images/stories/documents/BFStateFinTools.pdf.

[67] 26 U.S.C. § 198.

[68] 26 U.S.C. § 198(a).

[69] U.S. EPA. December 2011. *Brownfields Tax Incentive Fact Sheet*, www.epa.gov/brownfields/tax/ti_factsheet.pdf.

[70] *Id.*

[71] *See* generally U.S. EPA/Brownfields and Land Revitalization. October 2010. *Funding and Financing for Brownfields*. http:www.epa.gov/swerosps/bf/mmatters.html.

[72] U.S EPA. June 2005. *Brownfields Solutions Series: New Markets Tax Credits.* EPA-560-F-05-223, Washington, D.C., 2, http:epa.gov/brownfields/tax/nmtxcr_0605.pdf.

urban and rural communities. The Program provides federal income tax credits in return for new investments in eligible businesses, ranging from small business start-ups, to real estate development. [73] In addition, the U.S. Department of Housing and Urban Development administers the Brownfields Economic Development Initiative competitive grant program to stimulate and promote economic and community development. The Brownfields Economic Development Initiative assists municipalities with the redevelopment of abandoned, idle and underused industrial and commercial facilities where expansion and redevelopment is burdened by environmental contamination.[74] The purpose of these grants is to finance projects that will result in job creation and increases in the local tax base. Brownfields Economic Development Initiative grants can be used to address site remediation costs or, when used in conjunction with other financing, to acquire a brownfield property and convey the site to a private sector party at a discounted price to initiate the redevelopment.[75] In 2012, the Department of Housing and Urban Development announced $30.5 million in Brownfields Economic Development Initiative ("BEDI") grants.[76] These programs are always evolving and expanding and can be a very helpful and worthwhile component to a brownfields redevelopment strategy.

4 State Voluntary Programs

Other essential tools to consider for brownfield remediation are state voluntary cleanup or remediation programs. Beginning in the mid-1990s, EPA increased its partnerships with state voluntary programs to address the cleanup of brownfields and to strengthen and build program capacity.[77] State voluntary cleanup programs allow private parties to implement a streamlined remediation approach with concurrence and oversight from the state in exchange for a qualified release on liability. The qualified release on liability is an assurance that the remediated site will not later become the subject of a state enforcement action. While the qualified release only pertains to state enforcement actions, to encourage remediation under these programs, EPA has entered into a number of memoranda of agreements (also known as memoranda of understanding) with states, whereby EPA agrees that it will consider properties that have completed the state's voluntary cleanup program "of no interest." These agreements promote coordination between the programs and define general roles regarding the cleanup of sites.[78] To date, approximately half of the states have entered into memoranda of agreement with EPA to provide qualified protection to properties completing the state's voluntary program.[79]

---

[73] *Brownfields Solutions Series: New Markets Tax Credits*.
[74] U.S. Department of Housing and Urban Development/Community Planning & Development. August 2010. *Brownfields Economic Development Initiative (BEDI).* http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm.
[75] U.S. Department of Housing and Urban Development/Community Planning & Development. February 2010. *BEDI Quick Facts.* http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bedifacts.cfm.
[76] 77 Fed. Reg. 5043-5044, Feb. 1, 2012.
[77] U.S. EPA/Cleanup Enforcement. January 2009. *Voluntary Cleanup Programs.* http://www.epa.gov/oecaerth/cleanup/revitalization/state.html.
[78] *State and Tribal Response Programs Agreements.*
[79] *Id.*

States' voluntary programs are designed to encourage private parties to investigate and remediate brownfield properties to protect public health and the environment, accelerate cleanup of brownfields, and provide liability releases and finality to brownfield cleanups.[80] State programs allow private parties to adopt a remediation approach that is typically more flexible and self-directed. This flexibility is especially necessary for the more complicated and difficult brownfield properties that would be impossible to return to background (or pristine) conditions. For example, state voluntary cleanup programs permit the developer to take into account the property's end use, which allows the redevelopment strategy to allow an acceptable amount of contamination to remain at the property, rather than requiring a remediation to background (or pristine) levels. The state voluntary cleanup programs can rely on institutional controls and deed restrictions, which document these decisions and ensure that the future property use remains consistent with the degree of remediation completed at the property.

State voluntary remediation programs also often allow developers to incorporate the cleanup of the site into the site's development phases. For instance, as opposed to requiring the removal of all of the contaminated soil on the site, developers can incorporate a vapor barrier or indoor air quality control system and then remove only as much contaminated soil as is necessary for the building's design. Similarly, developers can permit contaminated soil to remain on-site during the initial phases of the redevelopment and, at a later stage, integrate a capped design into the landscape and paving plans. These are only a few examples of the added flexibility developers can utilize through states' voluntary cleanup programs. For highly contaminated properties, the states' voluntary programs can often provide a much-needed vehicle to expeditiously address the contamination at the site, complete the redevelopment project and ensure the necessary liability protections.

State programs continue to be at the forefront of brownfields cleanup and redevelopment, as both the public and private markets recognize the responsibilities and opportunities of state response programs in ensuring protective and sustainable cleanups. The increasing number of properties entering into state programs emphasizes the states' growing role in brownfields cleanup. State programs are continuing to adapt to meet the changing needs of property owners and communities.

5 Case Studies

A. Evansville Greenway and Remediation Trust

One site where Hunsucker Goodstein PC ("HG") was able to successfully marshal a combination of resources was the Evansville Greenway and Remediation Trust Site in Evansville, Indiana, a historic scrap yard. This case-study demonstrates how a strategy based on accessing historic insurance assets, securing funding from state grant programs, forming partnerships with the state environmental agency through its voluntary

[80] U.S. EPA. November 2009. *State Brownfields and Voluntary Response Programs: An Update from the States.* EPA-560-F-09-522, Washington, D.C., 172, http://epa.gov/brownfields/state_tribal/update2009/bf_states_report_2009.pdf.

remediation program, and successfully bringing cost recovery actions against responsible parties can effectively turn an abandoned and bankrupt piece of property into a valued public resource for the community.

The Evansville Greenway Trust Site is an excellent example of the successful integration of environmental remediation and redevelopment of an abandoned brownfield property. The effort resulted in a centerpiece for the City of Evansville's park system. The project team received an Environmental Stewardship Award from the National Association of Environmental Professionals for this remediation and redevelopment project.

The General Waste Products scrap yard consisted of two properties – the River Yard and the Main Yard.[81] General Waste operated a scrap metal business at these properties from the 1950s to 1998.[82] After General Waste closed its business in the late 1990s, the City of Evansville sought to acquire the General Waste Products Main Yard, which was perfectly situated to become the trailhead for a planned 42-mile walking/biking greenway encircling the City.[83]

Testing, however, revealed the presence of numerous hazardous substances, including high levels of polychlorinated biphenyls and lead.[84] The City of Evansville obtained a state brownfield assessment grant to complete the initial site characterization which helped initiate the site's redevelopment.

Although General Waste Products had already closed its business in the 1990s and had no apparent assets, HG, working with a consultant and other partners, was able to locate historic insurance policies. On behalf of General Waste Products, the defense provisions of these historic insurance policies were triggered. The insurance carrier initially disputed the coverage, and only after pursuing litigation against the insurance company was HG able to negotiate a settlement whereby the parties agreed to establish the Evansville Greenway and Remediation Trust. The carrier loaned a total of approximately $3.5 million to the Trust, in addition to paying for previously incurred investigation and defense costs. These assets were used to fund immediate investigation and remediation of the Main Yard.[85]

Under the Trust Agreement, the Trust was also tasked to engage in various activities in support of the cleanup effort, including cost recovery from other responsible parties under applicable environmental laws.[86] On behalf of the Trust, HG initiated an investigation to identify the parties who had sent electrical equipment containing polychlorinated biphenyls and lead containing batteries to the General Waste scrap yards. Despite the fact that many of these transactions occurred decades ago and that many of the records had been lost over time, HG was able to identify the largest contributors of polychlorinated

---

[81] *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*, 661 F. Supp. 2d 989, 992 (S.D. Ind. 2009).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 993.
[86] *Id.*

biphenyl and lead to General Waste. Much of the key information came from recovered business documents and the former President of General Waste and other employees, including truck drivers and account managers.

After identifying the responsible parties who sent hazardous substances to General Waste, HG initiated and pursued cost-recovery litigation pursuant to state and federal environmental laws on behalf of the Trust.[87] The legal battle over responsibility for cleaning up the polychlorinated biphenyl and lead contamination ended upon the court's approval of a negotiated settlement, which ensured a payment totaling $4,375,000 was made to the Trust.[88] This money "will be used to meet the express purposes of the Trust, including the investigation and remediation of contamination at the Properties."[89] In approving the settlement, the Court noted that:

> The settlement is clearly in the public interest because the funds the Settling Parties have agreed to pay will be material in helping to effectuate a timelier restoration of the RiverYard and/or reimbursement for remediation costs at the Main Yard and appear to be proportional to the harm allegedly caused by the parties. Although the settlement funds will not cover the total amount of the projected cost of remediation of the Properties, they will cover a substantial percentage of the currently anticipated costs.[90]

Both the Main Yard and the River Yard were entered into Indiana's Voluntary Remediation Program ("VRP"), which allowed the Trust to implement the remediation with oversight from the Indiana Department of Environmental Management. Entering the property into the VRP allowed the redevelopment team to negotiate a more creative and financially viable cleanup approach, including the use of institutional controls. As part of the cleanup strategy, the property owners agreed to an environmental restrictive covenant that, among other things, prohibits any residential use of the property and bars the installation of drinking water wells. The cleanup approaches and environmental restrictions were entirely compatible with the intended future uses of the properties. The environmental restrictive covenant runs with the land and is binding on the owners and subsequent owners and the restrictions apply until the State determines that the restriction may be removed. A Certificate of Completion was obtained for remediation of the Main Yard,[91] which has been added to the greenway as the Shirley James Gateway Plaza, an important link in Evansville's Pigeon Creek Greenway Passage.[92] The Trust has also completed remediation of the River Yard, which will be returned to productive commercial use. This case also incorporated the City of Evansville's power of eminent domain into the redevelopment strategy. A government entity is shielded from CERCLA liability when

---

[87] *See id.*

[88] *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*, 2010 WL 3781565, at *3 (S.D. Ind. Sept. 20, 2010).

[89] *Id.* at *4.

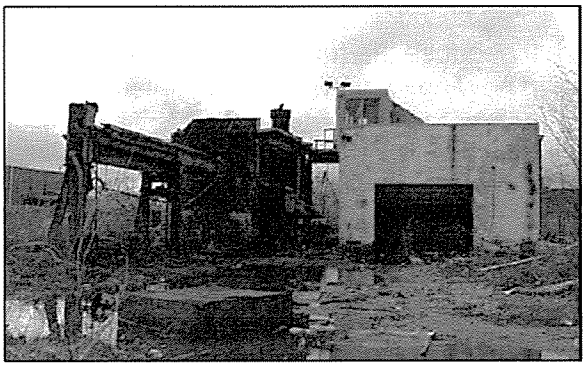
[90] *Id.* at *3.

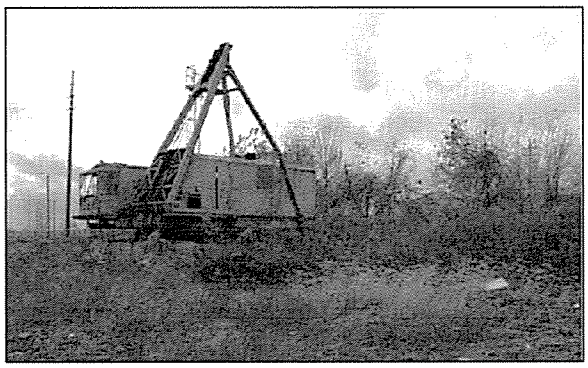
[91] *Evansville Greenway & Remediation Trust*, 661 F. Supp. 2d at 1001-02.

[92] City of Evansville, Indiana. *Pigeon Creek Greenway Passage.* http://evansvillegov.org/Index.aspx?page=589.

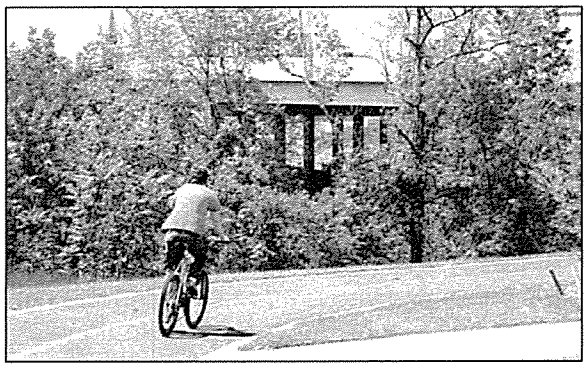
it acquires the property by escheat, or through any other involuntary transfer or through the exercise of its eminent domain authority by purchase or condemnation.[93] This is an essential tool "for local and state governments who would like to help solve a problem without turning themselves into potentially responsible parties." [94] The project also benefited from municipal involvement which provided additional local funding to complete the purchase of the Main Yard along with federal funds. The significance of the transformation of the General Waste scrap yard brownfield into a key piece of the Evansville Greenway can perhaps best be captured in these before and after photos of the Main Yard.

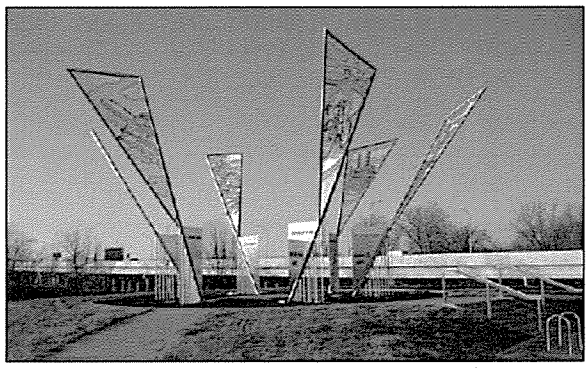
Before:





After:





[93] *Evansville Greenway & Remediation Trust*, 661 F. Supp. 2d at 1007 (quoting 42 U.S.C. § 9601(35)(A)(ii)).
[94] *Evansville Greenway & Remediation Trust*, 661 F. Supp. 2d at 1007.

B. Quanta Resources Site

The second case study discussing the Quanta Resources Site in Long Island City, New York demonstrates how historical research into prior owners and operators, strategic planning of the enforcement strategy, coordination with a State's investigative authority and brownfields program, and a proactive litigation approach can lead to the successful resolution of brownfields problems. In this situation, HG was able to successfully pursue cleanup and cost recovery to place an abandoned waste oil reprocessing facility in Long Island City, New York into the New York State Department of Environmental Conservation brownfields program. The two-acre Quanta Resources Site had a long and notorious environmental history, but environmental remediation of this abandoned property had eluded state and federal regulators for decades. The problems at this site were well-documented, yet the problems had persisted for many years as the property's redevelopment was stymied due to its complexity and uncertainty. It took a determined citizen suit enforcement strategy by secured creditors to initiate the process.

The Quanta Resources Site is located on Review Avenue in Long Island City, New York.[95] It was initially owned and operated by Russell Mahler. Mahler and his companies collected liquid wastes from numerous industrial facilities located in the northeastern United States.[96] Mahler's companies had a long history of criminal environmental activities, including bribing a New York City sanitation officer to gain access to five of New York City's landfills to illegally dispose of chemical and industrial wastes,[97] and disposing of approximately 2,000,000 gallons of oily wastes through a borehole in Pennsylvania that led to underground mine works drained by the Butler Tunnel, which leads directly to the Susquehanna River.[98] Mahler had used the Review Avenue Site for storage of hazardous wastes and many of the tanks on the site leaked, overflowed and spilled their contents onto the ground during Mahler's operations.[99]

The Review Avenue Site was subsequently purchased and operated by Quanta Resources Corporation, which likewise accepted and stored over 70,000 gallons of toxic polychlorinated-biphenyl contaminated and other contaminated oils in deteriorating and leaking containers at the site.[100] In 1981, Quanta Resources Corporation attempted to abandon the site in bankruptcy, arguing that the site was "burdensome" and "of inconsequential value" to the bankruptcy estate.[101] Upon abandonment, the bankruptcy

---

[95] *DMJ Assocs. LLC v. Capasso*, 288 F. Supp. 2d 262, 264 n.1, 265 (E.D.N.Y 2003).
[96] *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 256 (3d Cir. 1992).
[97] *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 476 (S.D.N.Y. 1990); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1022 (2d Cir. 1991); *Aetna Cas. And Surety Co. v. General Dynamics Corp.*, 783 F. Supp. 1193, 1207 (E.D. Mo. 1991), affirmed in part and reversed in part, *Aetna Cas. and Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707 (8th Cir.1992).
[98] *United States v. Alcan Aluminum Corp.*, 964 F.2d at 256; E. Magnuson, "The Poisoning of America" Time. Sept. 22, 1980. http://www.time.com/time/magazine/article/0,9171,952748,00.html.
[99] *Aetna Cas. And Surety Co. v. General Dynamics Corp.*, 783 F. Supp. 1193, 1207 (E.D. Mo. 1991), affirmed in part and reversed in part, *Aetna Cas. and Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707 (8th Cir. 1992).
[100] *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 497 (1986).
[101] *Midlantic Nat. Bank*, 474 U.S. at 497. The United States Supreme Court ultimately held that the bankruptcy abandonment would not be allowed because the bankruptcy code did not sweep broadly

Trustee removed the 24-hour guard service and shut down the fire suppression system,[102] placing the public at risk "of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage or death through personal contact" from exposure to the toxic substances stored at the site.[103] The City of New York conducted an initial removal action to stabilize the site, but did nothing to address the contaminated subsoil.[104]



Photo courtesy of http://habitatmap.org/markers?marker_id=108-quanta-resources.

Nearly two decades later, HG sought to fund and complete cleanup of the Quanta Resources Site and adjacent contaminated property through an action brought pursuant to CERCLA, RCRA, and New York State common law public nuisance.[105] HG represented the holder of a security interest in property adjacent to the Quanta Resources Site.[106] Defendants in the action included both Quanta Resources Corporation and numerous industrial operations that allegedly disposed of hazardous wastes at the site during the 1973 through 1980-time period.[107] HG conducted significant historic research into the operations of the Mahler Companies, Quanta Resources Corporation, and the previous environmental actions brought against these corporations to identify the suppliers of hazardous wastes to the Quanta Resources Site.[108] A lawsuit was filed in 1997, and sought a judgment that these defendants were jointly and severally liable for the contamination of the adjacent properties over which a security interest was held, and an

---

enough to allow a trustee to "abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat. Bank*, 474 U.S. at 507. Through this decision, Quanta Resources Corporation remained the legal owner of the site.

[102] *Midlantic Nat. Bank*, 474 U.S. at 498.

[103] *Midlantic Nat. Bank*, 474 U.S. at 499 n.3.

[104] *Midlantic Nat. Bank*, 474 U.S. at 498.

[105] *DMJ Assocs. LLC v. Capasso*, 288 F. Supp. 2d 262, 266 (E.D.N.Y 2003).

[106] *DMJ Assocs. LLC*, 288 F. Supp. 2d at 265, 268 n.2.

[107] *DMJ Assocs. LLC*, 288 F. Supp. 2d at 265.

[108] *See, e.g., Aetna Cas. & Surety Co. v. General Dynamics Corp.*, 783 F. Supp. 1193, 1207 (E.D. Mo. 1991), affirmed in part and reversed in part, *Aetna Cas. & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707 (8th Cir. 1992); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 256 (3d Cir. 1992); *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 476 (S.D.N.Y. 1990); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1022 (2d Cir. 1991); *Midlantic Nat. Bank*, 474 U.S. at 497.

injunction to require defendants to clean up the contamination at their expense, in addition to litigation costs and attorney's fees.[109]

Following the filing of the litigation, in 2001 the New York Department of Environmental Conservation required "[a] group of parties identified by the [State] as having a transactional relationship with the processing facility—including the generator defendants in the DMJ action" to conduct a study of the Quanta Resources Site because environmental data suggested that contaminants from the property may be migrating through the subsurface.[110] Among other things, the study was designed to determine:

> whether there is a plume migrating from the facility; whether and to what extent it is affecting off-site areas, including the neighboring property in which DMJ has an interest; and whether those conditions warrant a remedial action.[111]

The study confirmed the presence of soil and groundwater contamination, including the presence of petroleum hydrocarbons, chlorinated solvents, polychlorinated biphenyls, heavy metals, and poly-aromatic hydrocarbons.[112] Light non-aqueous phase liquids were detected in 24 of 29 onsite and offsite monitoring wells.[113]

The lawsuit was allowed to proceed, despite the existence of contemporaneous enforcement action by the New York State Department of Environmental Conservation ("DEC"), because the court determined that in enacting RCRA "Congress clearly intended citizen's suits to be an integral part of the enforcement efforts for this federal environmental law, supplementing where necessary the actions of state and federal agencies, and offering a judicial forum to avoid undue delay"[114] The defendants moved for a stay of the citizen suit until the DEC had completed the remedial investigation and feasibility study ("RI/FS"). The defendants argued that although Congress has not authorized an agency to decide legal issues, the agency's expertise may, nevertheless, prove helpful to the court in resolving difficult factual issues and therefore, the court should delay its review of the case until after the agency has completed its process.[115] However, the court found more persuasive language contained in the RCRA citizen suit provision where Congress clearly signaled that the federal courts have a duty to hear and decide such cases and carefully limited the deference the courts should pay to the expertise of an agency.[116] Accordingly, the court denied the defendants' motion and allowed the citizen suit to proceed.[117]

---

[109] *DMJ Assocs. LLC*, 288 F. Supp. 2d at 266.
[110] Neuman, "You Mean They Can Sue?" at 46.
[111] *Id.*
[112] HabitatMap/Maps. 2010. Quanta Resources Site Habitat Map. http://abitatmap.org/markers?marker_id=108-quanta-resources.
[113] *Id.*
[114] *DMJ Assocs. LLC*, 228 F. Supp. 2d at 229.
[115] *Id.* at 228.
[116] *Id.* at 230.
[117] *Id.* at 233.

The use of the RCRA citizen's suit provisions, in conjunction with CERCLA cost recovery authorities, has been heralded as "a novel approach that may ultimately prove more significant to parties liable for conditions at contaminated properties" than use of CERCLA cost recovery authorities in isolation.[118] The litigation was resolved in a confidential settlement, and the Quanta Resources Site and several of the adjacent contaminated properties have now been placed in the New York Department of Environmental Conservation Brownfields Program and full investigation and remediation is underway.[119] The Record of Decision issued by the Department of Environmental Conservation for the remedial action requires an estimated $15,560,000 remedy, which includes a recovery system to address and resolve the Light Non-Aqueous Phase Liquid subsurface contamination.[120] Once the property has been remediated, the property may also be eligible for New York State tax credits.[121] The New York State Brownfield Cleanup Program provides a variety of tax incentives for remediated brownfield property and credits for brownfield cleanup costs and environmental remediation insurance costs.[122]

6 Conclusion

These two case studies demonstrate success stories at two complicated brownfield properties, where some of the strategies and tools outlined above were utilized. For each such project, especially at more complicated brownfields properties, there is not a one-size-fits-all solution. Instead, each brownfield project requires its own custom-designed strategy to locate sources of funding, identify responsible parties, initiate remedial efforts and use available state programs to ensure completion of cost-effective and protective remedies and redevelopments.

Understanding the available strategies and tools, and planning from the initiation of each brownfield project to use them effectively, can keep the project on track and moving toward resolution. Incorporating some or all of these tools into an integrated strategic plan is essential to successful redevelopment at complicated brownfield properties.

---

[118] Neuman, "You Mean They Can Sue?" at 44.

[119] *DMJ Assocs. LLC v. Capasso, Case No. 97 CV 7285 (DLI) (RML), 2008 WL 4515799 * 3 (E.D.N.Y. Oct. 2, 2008); Quanta Resources Site Habitat Map.*

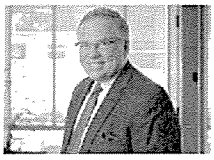
[120] *Id.*

[121] New York State Department of Taxation and Finance. April 2010. *New York State Tax Credits Available for Remediated Brownfields*. Publication 300, 24, http://www.tax.state.ny.us/pdf/publications/multi/pub300.pdf.

[122] New York Statute Tax Law, Articles 1 §§ 21 & 23, Article 9 § 187-g & 187-h.

HUNSUCKER
GOODSTEIN
HGNLAW.COM

Hunsucker Goodstein PC is a boutique law firm that handles environmental and insurance coverage matters for businesses throughout the United States. A number of our attorneys previously represented the United States government in environmental matters or represented insurance carriers, giving Hunsucker Goodstein PC a unique perspective. Hunsucker Goodstein PC has a nationwide practice with offices in California and Washington D.C., Denver and Seattle. Hunsucker Goodstein PC represents businesses in the complete range of environmental and insurance coverage matters, and also handles environmental matters for Indian Tribes and State and local governments.



Philip C. Hunsucker

Hunsucker Goodstein PC
California and Seattle

Tel: *+1 925-299-5104 (direct)*

Fax: *+1 206 -260-3400*

Email: *phunsucker@hgnlaw.com*

URL: *www.hgnlaw.com*

Phil Hunsucker is the founder and Chairman Hunsucker Goodstein PC, a boutique law firm that focuses on environmental and insurance coverage issues. For over 30 years, Phil has been a trial lawyer and counselor.

Early in his career, Phil gained considerable first-chair trial experience while serving in the United States Army Judge Advocate General's Corps.

Phil has been the lead lawyer in environmental, toxic tort, and environmental insurance coverage cases, representing a wide range of clients nationwide. From 2009 to 2016, Phil has been recognized as a Thompson Reuters Super Lawyer.

Phil is a 1982 graduate of the Dedman School of Law at Southern Methodist University.

Phil is admitted to practice in Texas, California, Oregon and Washington.



Michael D. Goodstein

Hunsucker Goodstein PC
Washington D.C.

Tel: *+1 202-895-5380*

Fax: *+1 202-895-5390*

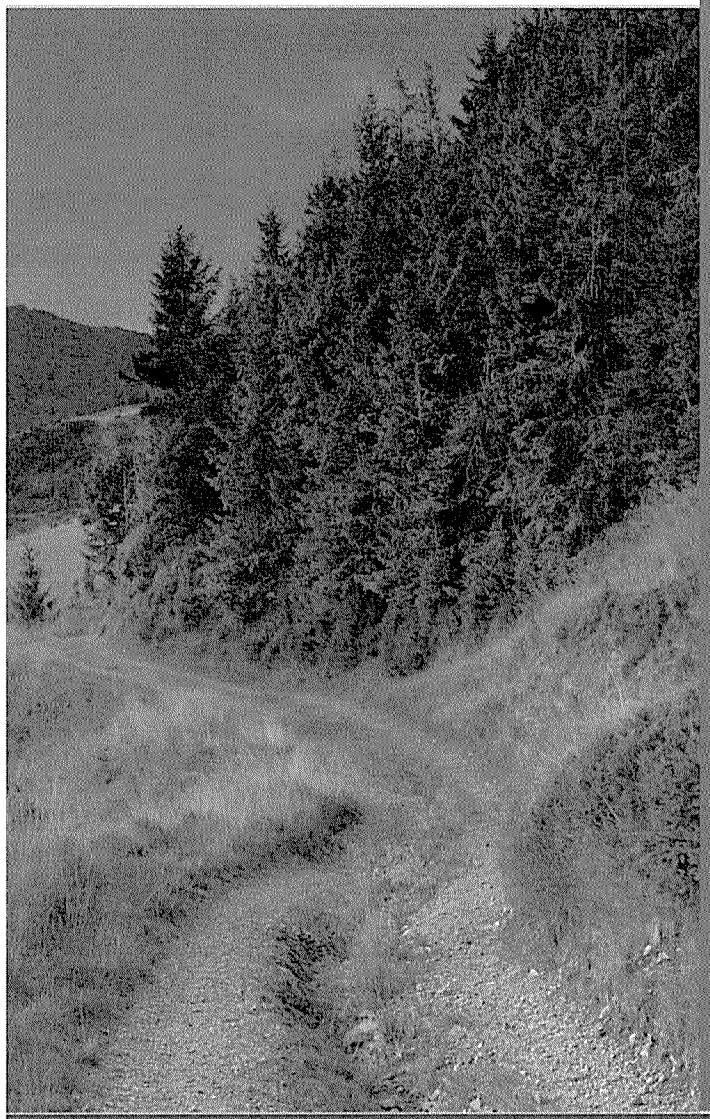
Email: *mgoodstein@hgnlaw.com*

URL: *www.hgnlaw.com*

Michael Goodstein heads the Washington, D.C. office with lead counsel responsibilities in a wide variety of environmental matters for public and private clients. These include litigation involving federal and state environmental laws, toxic torts, property damage, and insurance coverage. Mr. Goodstein has been recognized as a top Washington, D.C. environmental attorney by Washingtonian magazine, as well as Thompson Reuters Super Lawyers. He regularly represents companies with operations in the United States on environmental and related matters.

Prior to joining Hunsucker Goodstein, Mr. Goodstein served with the U.S. Justice Department in the Environmental Enforcement Section for 12 years. The John Marshall Award, one of the Department of Justice's highest honors, was twice awarded to Mr. Goodstein for outstanding legal achievement. He has also received the Gold Medal from the Administrator of the United States Environmental Protection Agency for his contributions to the Clean Water Act enforcement program.

HUNSUCKER
GOODSTEIN
HGNLAW.COM



Found Money: Using Insurance Assets to Fund Environmental Work

Philip C. Hunsucker

HUNSUCKER
GOODSTEIN
HGNLAW.COM

Phil Hunsucker



- Trial Lawyer Since 1982
- Successfully Litigated Many Complex and Difficult Cases
- National Practice – Live near Seattle, Washington

- History:
  - Former U.S. Army Judge Advocate
  - Formerly a Partner in a National Law Firm
  - Founder, Hunsucker Goodstein PC
- Focus:
  - Environmental Litigation
  - Toxic Tort Litigation
  - Insurance Coverage Litigation
- Admitted:
  - State Courts: Texas, California, Oregon and Washington
  - Federal Courts: All Texas districts, except Southern; Arizona; All California districts, Oregon & Washington districts; All Wisconsin districts.

HUNSUCKER GOODSTEIN
HGNLAW.COM

Legacy Commercial General Liability ("CGL") Policies

Point 1 Valuable asset for insured and for cleanup

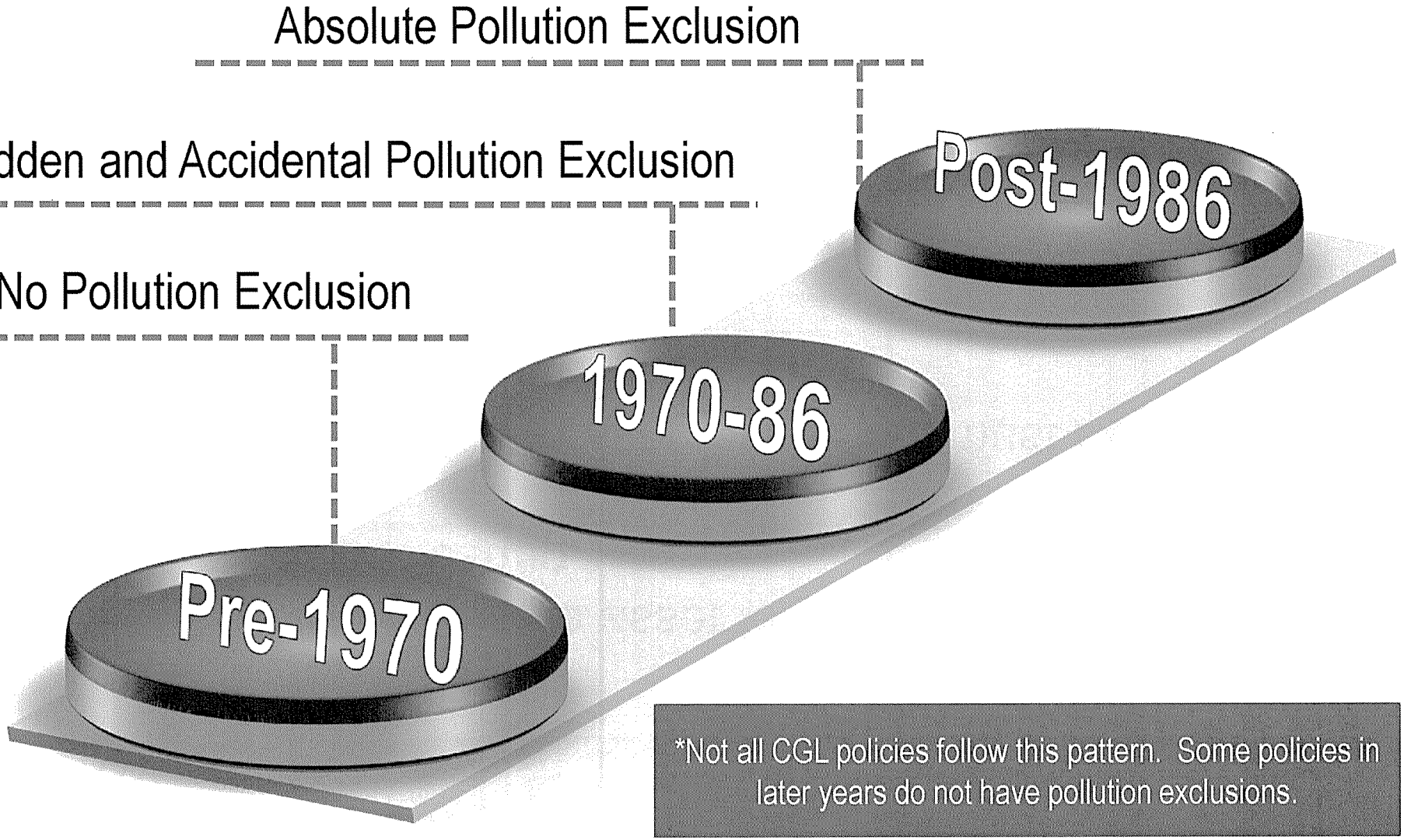
Point 2 A pre-existing asset, but must be pursued

Point 3 Often under realized and underutilized

Point 4 Source of "Found Money"

HUNSUCKER GOODSTEIN
HGNLAW.COM

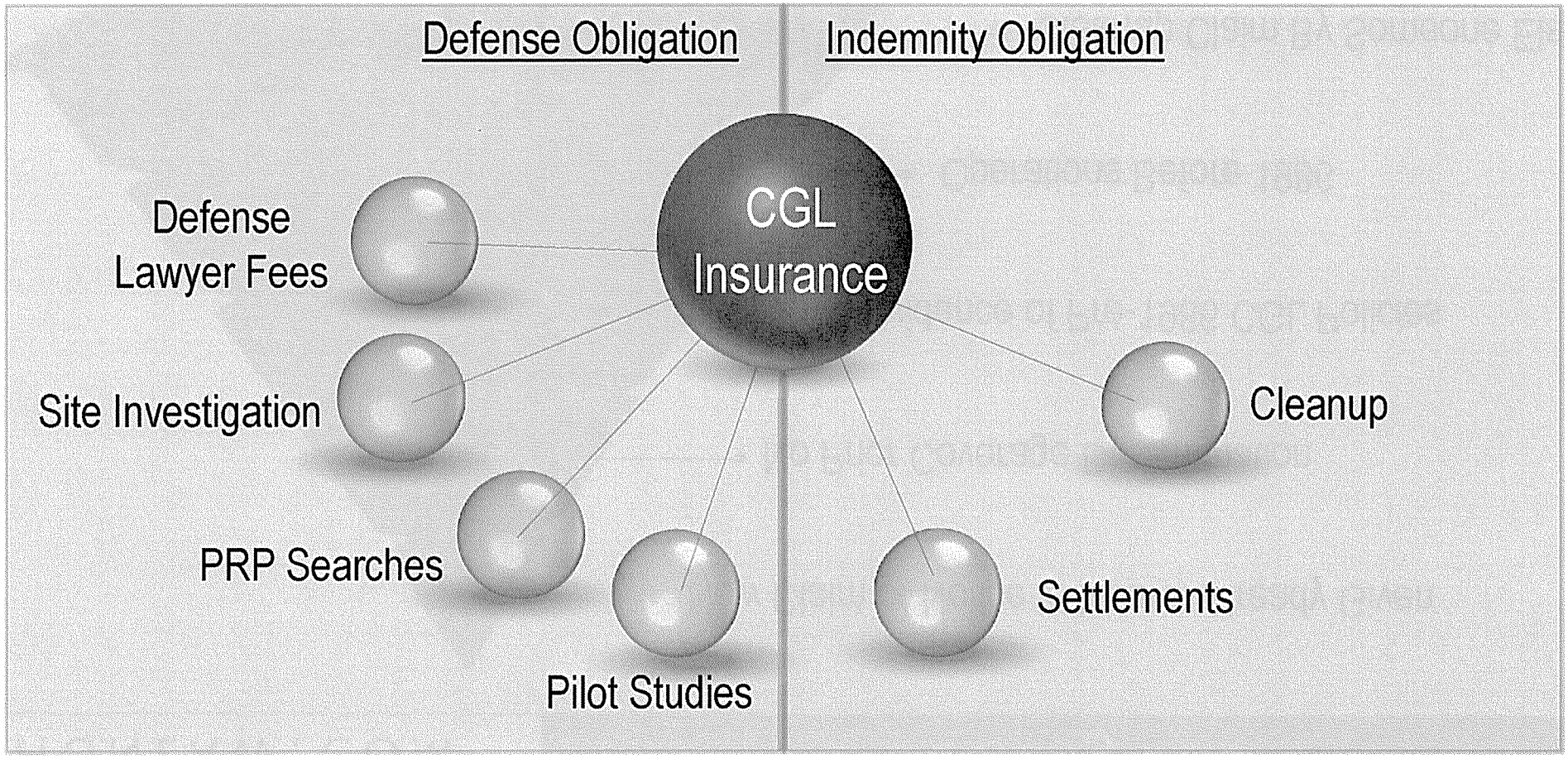
Typical* CGL Policies



*Not all CGL policies follow this pattern. Some policies in later years do not have pollution exclusions.

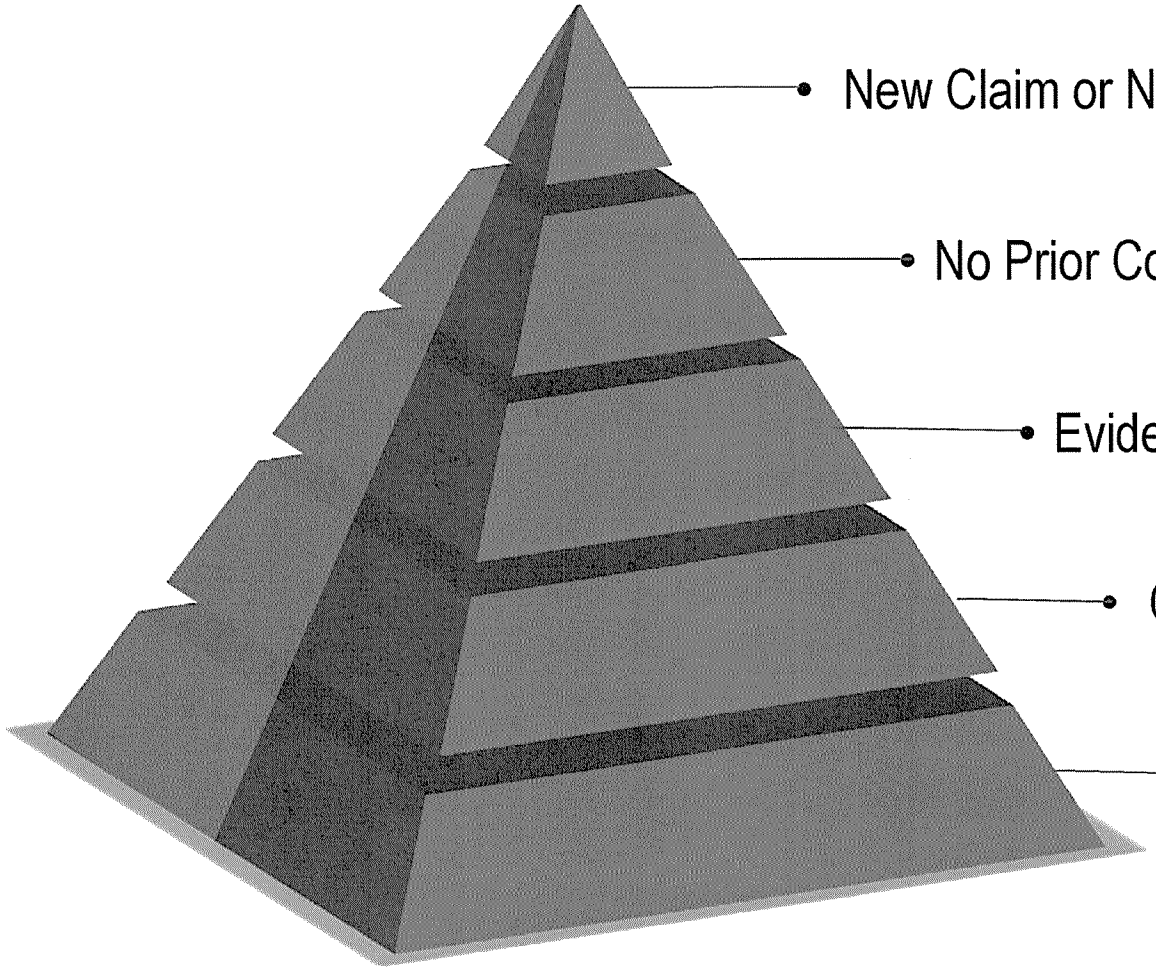
HUNSUCKER GOODSTEIN
HGNLAW.COM

What It Can Pay For



HUNSUCKER GOODSTEIN
HGNLAW.COM

When It Is Most Worth Looking Into



- New Claim or Notice to Insurer Already Given
- No Prior Coverage Determination
- Evidence of Pre-1986 CGL Policies
- Operations Before 1986
- Cleanup Claim By Someone Else (Regulator or Other Person)

Site-Specific Analysis

- Case law varies from state-to-state.
- Specific facts of the site matter.
- Texas law is good for a policyholder.

HUNSUCKER GOODSTEIN
HGNLAW.COM

Key Texas Pollution Coverage Cases

- *Duty to Defend:*

  McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co., 477 S.W.3d 786, 787 (Tex. 2015), *reh'g denied* (Jan. 22, 2016) (Duty to defend a "suit" in a comprehensive general liability policy includes superfund cleanup proceedings conducted by the Environmental Protection Agency the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980.)

- *Trigger of Coverage:*
  - *Pilgrim Enterprises, Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488 (Tex. App. – Houston (1st Dist.) 2000) (Exposure to contaminants, rather than the release of them, was the triggering event for property damage coverage as a result of pollution.).
  - *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24 (Tex. 2008) (In a construction defect case, property damage, a comprehensive CGL policy occurred when actual physical damage to the property occurred. But under the "eight corners" rule of Texas insurance law, the insurer's defense duty turns on the policy's terms and the plaintiff's allegations. The duty is triggered if the plaintiff alleges facts that would give rise to any claim against the insured that is covered by the policy.)

HUNSUCKER GOODSTEIN
HGNLAW.COM

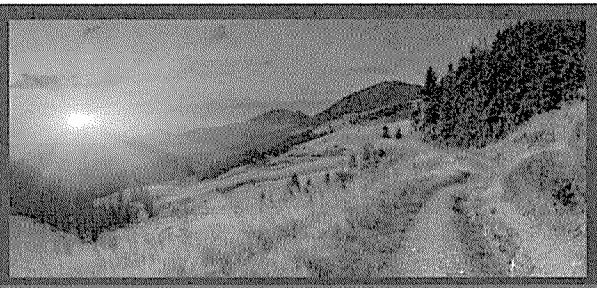
Key Texas Pollution Coverage Cases

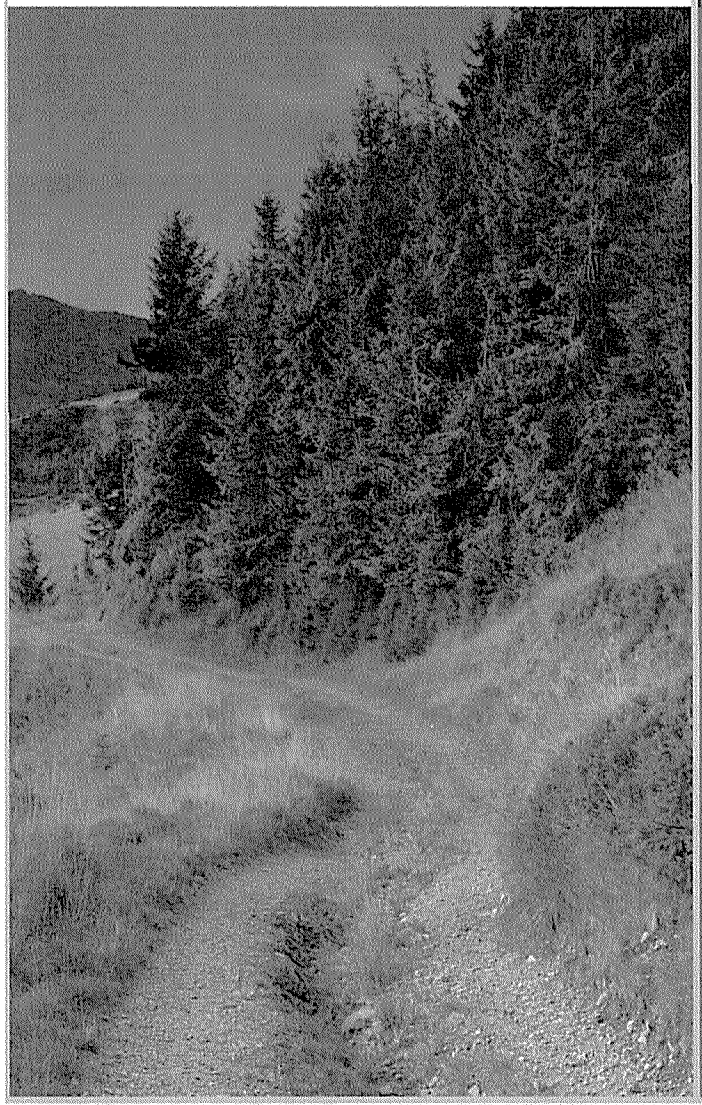
- *"Absolute" Pollution Exclusion:*

  Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc., 907 S.W.2d 517, 518 (Tex. 1995) ("Absolute pollution exclusions" in insurance policies unambiguously apply to exclude damage coverage from an accidental explosion.)

- *Standard or "Sudden and Accidental" Pollution Exclusion:*
  - *Mesa Operating Co. v. California Union Ins. Co.*, 986 S.W.2d 749, 758 (Tex. App. - Dallas 1999, *pet. denied*)(term "sudden" has a temporal component and that an ongoing condition of sufficient duration cannot constitute a sudden event).
  - Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800 (Tex. App. - Austin 1999, *pet. denied*)("Sudden" as used in the "sudden and accidental" exception to the exclusion includes a temporal element requiring the release to be swift, rapid, or abrupt.).
  - *Saint Paul Surplus Lines Ins. Co. v. Geo Pipe Co.*, 25 S.W.3d 900 (Tex. App. – Houston (1st Dist.) 2000) (Hole in oil well tubing allegedly caused by corrosion of weld was not "sudden.")

HUNSUCKER
GOODSTEIN
HGNLAW.COM

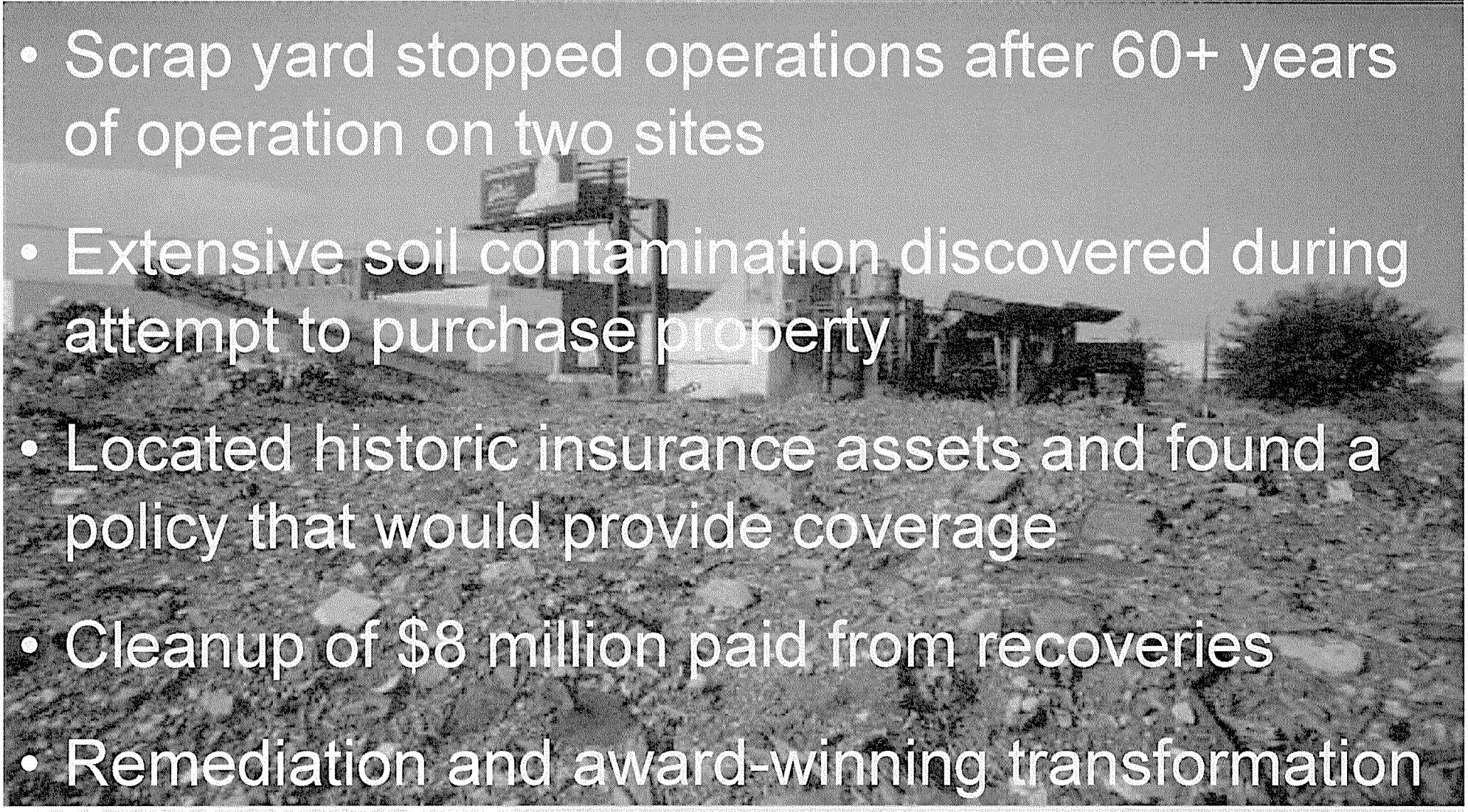




Case Studies

HUNSUCKER GOODSTEIN
HGNLAW.COM

Case Study 1
Abandoned Scrap Yard



- Scrap yard stopped operations after 60+ years of operation on two sites
- Extensive soil contamination discovered during attempt to purchase property
- Located historic insurance assets and found a policy that would provide coverage
- Cleanup of $8 million paid from recoveries
- Remediation and award-winning transformation

HUNSUCKER GOODSTEIN
HGNLAW.COM

Case Study 2
Perchlorate in Wells

- Perchlorate in drinking water supply wells of a former flare and rocket manufacturing facility
- Aerospace and fireworks companies sued for investigation and cleanup
- Hundreds of millions of dollars at stake with multiple PRPs and operations dating as far back as World War II
- Insurance paid for investigation and defense – over $7 million *so far*
- Insurance paid resolve claims against – over $9 million in settlements *so far*
- Defense paid by insurance developed information to prove U.S. Government liability for a huge part of the remedy

HUNSUCKER GOODSTEIN
HGNLAW.COM

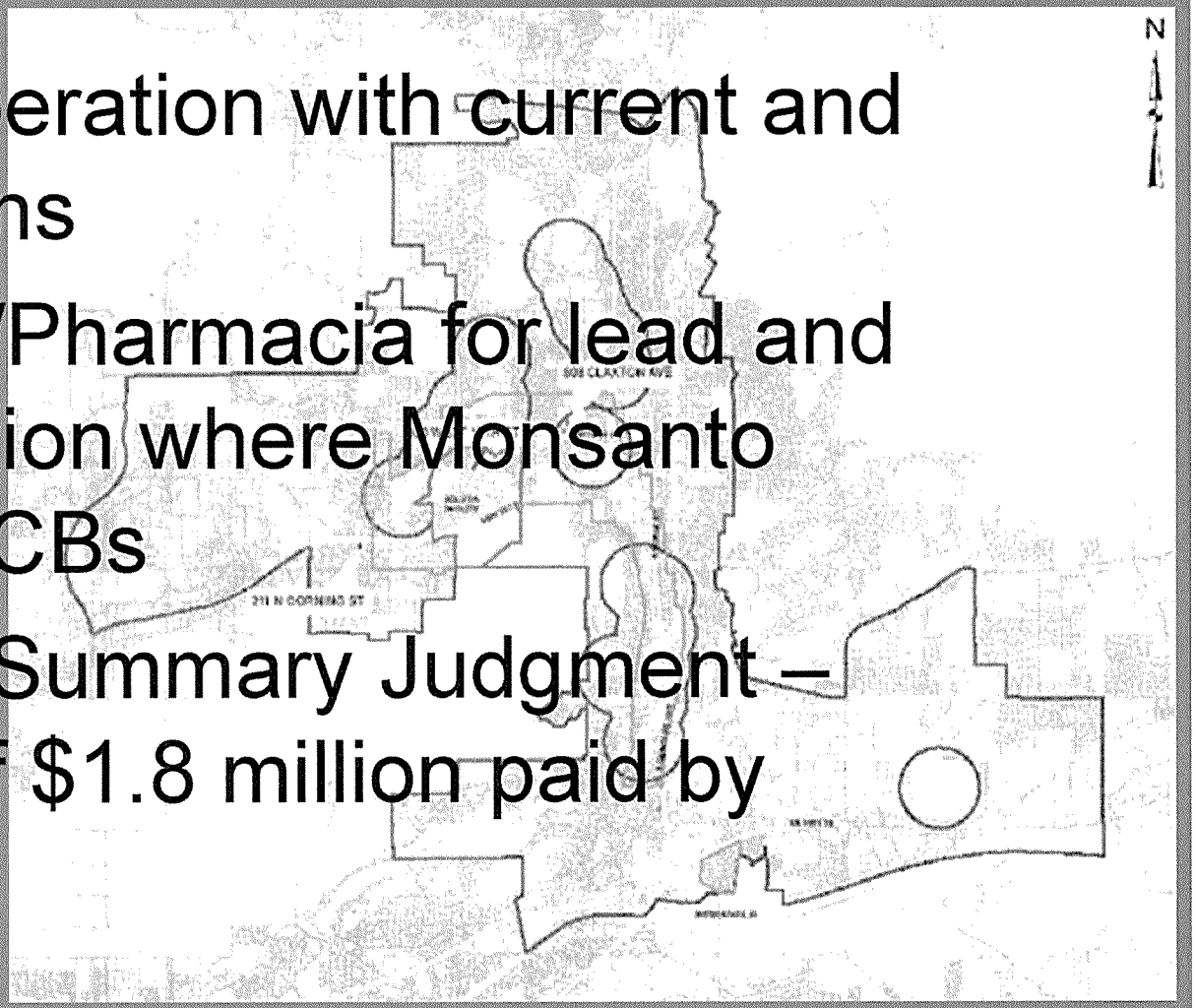
Case Study 3 Lumber Company

- Extensive contamination across site from wood treating chemicals
- Regulatory agency issued order to investigate and remediate
- Over $2,000,000 in coverage obtained from insurer settlement insurance policies stored in boxes in a shed
- Cleanup completed by consultant and paid by insurance

HUNSUCKER GOODSTEIN
HGNLAW.COM

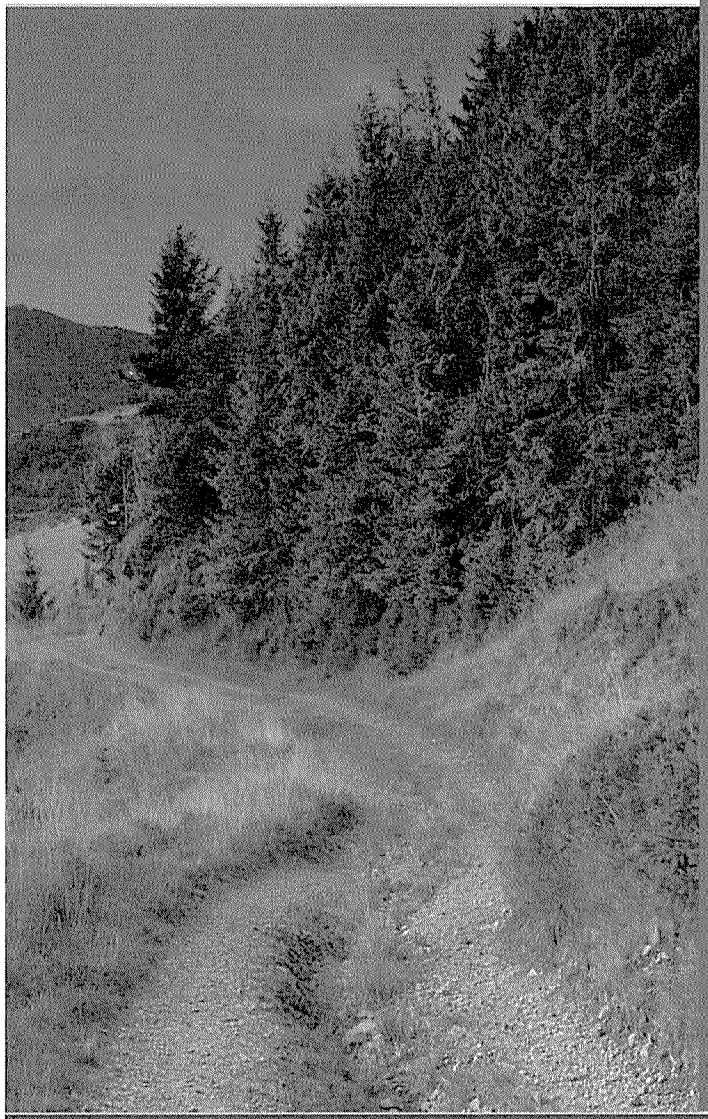
Case Study 4
Manufacturing Business

- Metal casting operation with current and historic operations
- Sued by Solutia/Pharmacia for lead and PCB contamination where Monsanto manufactured PCBs
- Result: Win on Summary Judgment – defense costs of $1.8 million paid by insurance

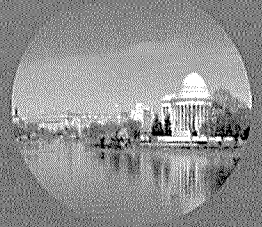


HUNSUCKER GOODSTEIN

HGNLAW.COM



Washington D.C.
5335 Wisconsin Ave. NW, Suite 360
Washington, D.C. 20015
P: 202-895-5380



San Francisco Bay Area
3717 Mt. Diablo Blvd., Suite 200
Lafayette, CA 94549
P: 925-284-0840



Denver, Colorado
730 17th Street, Suite 220
Denver, CO 80202
P: 720-465-4338



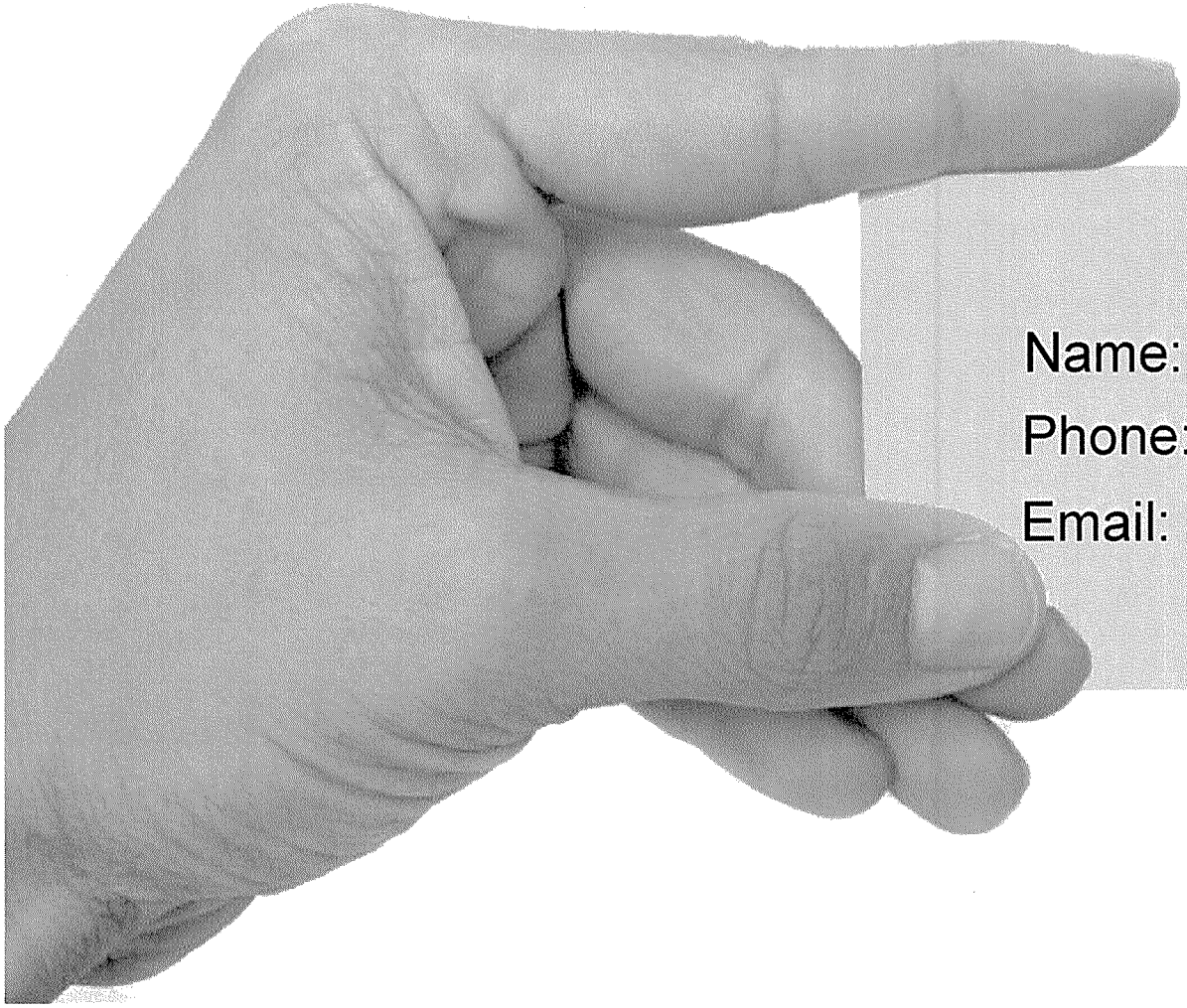
Los Angeles, CA
355 S. Grand Avenue, 24th Floor
Los Angeles, CA 90071
P: 213-943-1370



Seattle, WA
801 2nd Avenue, Suite 800
Seattle, WA 98104
206-489-5621

HUNSUCKER
GOODSTEIN
HGNLAW.COM

Phil Hunsucker



Contact Information

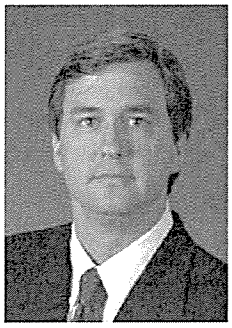
Name: Philip C. Hunsucker

Phone: (925) 299-5104 (Direct)

Email: phunsucker@hgnlaw.com

DBC
DUBOIS BRYANT & CAMPBELL

Peter T. Gregg
(512) 381-8085
pgregg@dbcllp.com
303 Colorado, Suite 2300
Austin, TX 78701
www.dbcllp.com



PETER T. GREGG
Direct: (512) 381-8085
Email: PGregg@dbcllp.com

Peter Gregg's legal career has been devoted to representing clients in environmental regulatory and litigation matters. His practice includes a focus on environmental issues involving waste management and contaminated properties, including state and federal CERCLA matters, RCRA corrective action and compliance counseling, transactions involving contaminated properties, and counseling on state and federal regulatory cleanup programs. He also represents clients on all manner of air, water, waste management, and water and wastewater utility regulatory issues (permitting, enforcement, and general compliance matters).

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. He spent several years as in-house environmental counsel at international energy company El Paso Corporation prior to returning to private practice in Austin as a partner in a national environmental law firm. During his years in private practice he has represented national and international clients within the chemical, petroleum refining, and oil and natural gas production, processing and transportation industries, among others, as well as various local and regional manufacturing and utility interests.

Mr. Gregg is a former Chair of the Texas Bar's Environmental and Natural Resources Law Section and a former Chair of the Houston Bar Association's Environmental Law Section. He is listed in The Best Lawyers in America, Environmental Law, Woodward/White, Inc. (2009-2016) and The Best Lawyers in America, Litigation-Environmental, Woodward/White, Inc. (2011-2016). He is AV Peer Review Rated.

Dr. Laurie Haws is a Managing Principal Scientist with ToxStrategies, Inc., and is based in Austin, Texas. She is a board-certified toxicologist with over 26 years of experience in the areas of toxicology, human health risk assessment, risk communication, and scientific and regulatory policy.

Dr. Haws has significant experience evaluating potential human health risks associated with exposures to a wide variety of chemicals and metals present as additives, ingredients, or contaminants in foods, consumer products, personal care products, pharmaceuticals, medical devices, and environmental media (air, water, soil, and sediments). She also has substantial experience conducting complex multipathway risk assessments to address concerns about stack and fugitive air emissions associated with a variety of industrial operations. In addition, Dr. Haws has extensive experience assessing potential human health risks associated with personal, occupational, and community-wide exposures to air contaminants, particularly associated with chemical, petrochemical, and shale gas exploration and production activities. Dr. Haws has experience designing, conducting, and interpreting data from biomonitoring studies, and is adept at using such data to assess concerns regarding potential exposures. She is skilled at evaluating data concerning modes and mechanisms of action and in using this type of data to make determinations regarding the relevance of findings to humans, as well as in conducting weight-of-the-evidence analyses for both cancer and non-cancer risk assessments. Dr. Haws has employed these skills to develop state-of-the-science toxicity values and associated media-specific screening levels for a variety of toxicants. She has conducted studies evaluating metabolism and disposition of a variety of halogenated aromatic hydrocarbons and has experience designing and implementing both cross-fostering and developmental toxicity studies. While Dr. Haws is an internationally-recognized expert concerning the toxicity of and exposures to dioxin-like compounds, she has conducted assessments involving many different toxicants throughout her career including chlorinated hydrocarbons, aromatic hydrocarbons, glycol ethers, other organic solvents, volatile organic compounds, pesticides, phthalates, metals, persistent organic pollutants, etc. She is knowledgeable about a number of state and federal regulatory program and has assisted in the preparation of reports for submission to regulatory agencies such as the FDA, EPA, and California's Proposition 65 program. Dr. Haws also has substantial experience working with federal, state, and local government agencies, industry, trade associations, legislative representatives, the media and members of the general public on matters related to the toxicity of chemicals encountered in our daily lives.

Dr. Haws has a diverse background, having worked as a researcher, as a regulatory toxicologist with a government agency, and as a scientific consultant. In fact, a substantial portion of her career has been spent in the government sector, both as a researcher and most recently as a manager in the Toxicology and Risk Assessment Section at the Texas Commission on Environmental Quality (TCEQ). In her position with the TCEQ, Dr. Haws was responsible for overseeing all human health risk assessment activities and was one of the primary authors of the agency's comprehensive risk-based corrective action rule (the Texas Risk Reduction Program (TRRP) rule).

Dr. Haws is an author on over 39 peer-reviewed publications and has presented at numerous scientific conferences. She is an active member of numerous professional societies including the Society of Toxicology, Society for Risk Analysis, American College of Toxicology, the

Toxicology Forum, and the Regulatory Affairs Professional Society. Dr. Haws has served on numerous elected and appointed committees within the Society of Toxicology, including serving as president of the Risk Assessment Specialty Session. In addition, Dr. Haws has served on a number of scientific panels, technical workgroups, and advisory committees, including the World Health Organizations Toxic Equivalency Factor Review Panel. She also recently served as the Chair of the International Symposium on Halogenated Persistent Organic Pollutants held in San Antonio, Texas in September of 2010. Currently Dr. Haws is serving on the Exposure and Human Health Committee of the USEPA's Science Advisory Board.

Vapor Intrusion – Solid Ground or Quicksand?

Laurie C. Haws, Ph.D., DABT
ToxStrategies, Inc.

The science underlying the vapor intrusion (VI) pathway (i.e., the migration of volatile compounds from the subsurface to indoor air) has evolved substantially over the past two decades, as have federal and state regulatory programs and associated guidance documents. Over time, there has been increased focus on the VI pathway and, as a result, this pathway is now driving remedial decisions at an increasing number of environmental sites, particularly at those with chlorinated solvents in shallow groundwater. Site-specific factors create a myriad of outcomes unique to each location. This paper describes some of the recent regulatory and toxicology information relevant to assessment of the VI pathway, as well as some of the challenges associated with indoor air sampling.

Regulatory

With the increased focus on the VI pathway in recent years, regulatory agencies have developed a host of rules, guidance documents and tools for assessing this pathway. These efforts have impacted investigations and remedial actions under federal and state environmental programs (e.g., CERCLA, RCRA, voluntary cleanup programs, etc.), as well as decision-making in transactional due diligence. For example, on February 29, 2016, the USEPA published in the Federal Register a Notice of Proposed Rulemaking to add a subsurface VI component to the Hazard Ranking System (HRS), which is the principal mechanism that USEPA uses to evaluate sites for placement on the National Priority List (NPL) sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This addition will allow the HRS to directly assess health risks from subsurface VI in the ranking of new NPL sites. The potential future ramifications of this proposal to the CERCLA and other federal programs are unclear and the subject of much speculation at this point. In transactional due diligence for all appropriate inquiry (CERCLA liability protection), evaluation of vapor migration has become part of the ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment (ESA) Process (E1527-13). This requirement may lead to a more detailed assessment or investigation of VI during property transactions.

Regulatory agencies have issued detailed guidance as well as specific VI risk policies, practices, and tools, such as USEPA's VI screening level (VISL) calculator. In June, 2015, EPA finalized its Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air. In some USEPA regions, most notably in USEPA Region 9 (discussed further under toxicology), chemical-specific guidance has been issued. Many states have developed subsurface VI guidance and VI risk policies, but not all states have subsurface VI programs. Moreover, states with subsurface VI remediation programs vary in their authority, resources, and remediation criteria. Several states, including Texas, have considered VI risk in regulatory decisions in some programs for many years, but have not yet developed official guidance or VI risk policies. In this respect, there remains a lack of national consistency in the identification, evaluation, and remediation of subsurface VI sites. Although the ASTM E1527-13 standard offers national guidance for evaluating vapor

migration, it defers more detailed VI assessments or investigations to the best professional judgment of the qualified environmental professional conducting the ESA.

Challenges Associated with Indoor Air Sampling

Indoor air sampling can involve significant challenges and limitations associated with data collection, evaluation, and interpretation. Some of the most significant challenges associated with collection of indoor air samples include the following:

1. Sample collection challenges typically involve equipment malfunctions and sampling location difficulties. For example, canister flow controllers can clog, impeding a full sample collection. Sample volumes that are too small require additional air, which in turn, raises detection limits. Some areas in a home may not be sufficiently accessible to sample the air, such as crawl spaces that are too narrow to place canisters. Finally, data analysis challenges arise where there are significant differences in duplicate sample results.

2. As volatile compounds are often present in ambient air, it is important to sample ambient air simultaneously to provide an additional line of evidence for assessment of the VI pathway. For example, if the concentrations in ambient air are the same or higher than what is measured indoors, that suggests that VI may not be occurring.

3. Similarly, if a building has a crawl space, it is important to sample air in the crawl space air simultaneously to provide an additional line of evidence for assessment of the VI pathway. For example, if the volatile compound of interest is non-detect in the crawl space, while concentrations indoors are quite high, that suggests that the measured concentrations may be due to an indoor source.

4. Indoor air data can be especially difficult to interpret due to the potential for numerous indoor air sources. Items that are known to be sources of chemicals in indoor air include household products, building materials, cleaning products, and smoke. USEPA has created a database of indoor air concentrations, but the range of concentrations is broad. Residential surveys **prior to sampling** are an important part of any indoor air sampling program and, along with hand-held monitors, can help identify some of the potential indoor air sources of chemicals.

Toxicology and Screening Levels

One of the major drivers of VI risk policy developments in recent years has been the inhalation toxicity criteria for trichloroethylene (TCE). This presentation covers one of the most

controversial science policy decisions at the USEPA, with potentially far reaching implications to exposure and human health risk assessment practices within major environmental programs (CERCLA, RCRA, CAA, CWA, TSCA) and for transactional due diligence. In brief, the USEPA derived an inhalation reference concentration (RfC) for TCE based on two co-critical studies. One of the two studies that USEPA relied upon, a study by Johnson et al. 2003[a], reported fetal cardiac malformations in pregnant rats exposed to TCE in drinking water. The methodology and results of this study, USEPA's weight of the evidence methodology, and its selection of this study in the derivation of a TCE reference concentration have been subject to significant scientific scrutiny in the past few years. Despite all the scientific controversy surrounding USEPA's RfC derivation, USEPA has not revised its position regarding use of the flawed study by Johnson et al. 2003. In July, 2014, USEPA Region 9 issued recommendations for interim measures for the management of inhalation exposures to TCE from subsurface vapor intrusion which are unnecessarily and unjustifiably alarming based on this flawed study, including temporary relocation of occupants, indoor air treatment, and installation and operation of engineered exposure controls. Other government agencies such as the Agency for Toxic Substances Disease Registry (ATSDR) and a host of state environmental agencies are now in turn relying on the Johnson et al. (2003) study or USEPA's acceptance of the study, as well as upon the interim measures outlined in the USEPA Region 9 (2014) memorandum.

An additional issue that has arisen with respect to toxicity criteria has been the recent recommendation by the USEPA in their recent 2015 VI guidance that OSHA permissible exposure limits (PELs) should not be used to assess indoor air exposure from vapor intrusion for workers. In this guidance document, USEPA explicitly states that "OSHA recognizes that many of its permissible exposure limits (PELs) are outdated and inadequate for ensuring protection of work health." USEPA goes on to state that "PELs (and TLVs), however, are not intended to protect sensitive workers, may not incorporate the most recent toxicological data, and may differ from EPA derivations of toxicity values with respect to weight-of-the-evidence considerations and the use of uncertainty factors." As such USEPA recommends calculating VI screening levels for workers in a manner similar to residential screening levels and includes this exposure scenario in their online VISL calculator.

Finally, it should be noted that in some instances, the Agency for Toxic Substances and Disease Registry (ATSDR) may be called upon to conducat a Health Consultation or Health Assessment at a specific site. Importantly, as part of the consultation, ATSDR can develop and recommend unique screening levels that may differ from USEPA and state guidance. This often serves to create confusion at sites.

These policy, sampling and toxicology issues are just a part of the continually evolving landscape underlying vapor intrusion evaluations.

---

[a] Johnson, PD, Goldberg, SJ, Mays, MZ, Dawson, BV. 2003. Threshold of trichloroethylene contamination in maternal drinking waters affecting fetal heart development in the rat. Env. Health Perspectives 111:289-292.

SCOTT D. DEATHERAGE
S DEATHERAGE LAW, PLLC

ENVIRONMENT.ENERGY.WATER

6718 AVALON AVENUE
DALLAS, TEXAS 75214
214-356-0979
SCOTT@SDEATHERAGELAW.COM

Legal Experience

Scott Deatherage advises clients on a variety of environmental and energy matters. His practice focuses on permitting, compliance, administrative law and judicial litigation on a variety of environmental issues including air emissions, wastewater discharges, hazardous waste, hazardous substances and toxic substances.

He represents clients before local, state and federal environmental agencies, and state and federal courts. He has significant experience representing oil and gas, industry, finance and real estate clients with respect to environmental matters. In 25-years practicing in Texas, he has developed substantial expertise in environmental matters affecting the oil and gas industry, in exploration and production, refining, pipeline and terminals, and marketing.

He has advised clients on natural gas power plant, biofuels, gas to liquid, wind, solar, and other renewable energy projects, including siting and environmental permits and other legal issues, and has advised clients regarding government and utility incentives relating to renewable and energy efficiency projects, as well as property tax exemptions and abatement.

He has experience in water related matters including groundwater and surface water rights and allocation, groundwater and surface water leases and sales agreements, and water quality and wastewater discharge matters and permits.

He also advises clients in the areas of climate change and greenhouse gas regulation, including greenhouse gas reporting, state and federal greenhouse gas permits, greenhouse gas offsets and carbon credits, environmental and climate change disclosure, and corporate strategies for dealing with climate change and greenhouse gas issues on a proactive basis.

Honors and Awards

Texas Super Lawyers, Environmental; Best Lawyers in Dallas, Dallas Magazine; Best Lawyers in America, Environmental, Dallas Environmental Lawyer of the Year (2010 and 2015); America's Leading Lawyers for Business; Who's Who Legal, Texas.

Professional Affiliations

- Adjunct Professor, University of Texas at Austin, Climate Change Law Course
- Member, Institute for Energy Law; former Chair, IEL Power and Alternative Energy Committee;
- Member, American Bar Association; former Chair, Environmental Disclosure Committee; Natural Resources Section; Administrative Law and Regulatory Practice Section; Environment, Energy, and Resources Section;
- Member, State Bar of Texas; Environmental and Natural Resources Law Section (selected to serve on the board of the ENRLS Committee, 1998-2001); Member, Administrative Law Section;
- Member, Dallas Bar Association; Environmental Law Section, Chair 1997, member of the Executive Council and various officer positions 1991-1997, Program Co-Chair 1996-1997;
- Member, Dallas Chamber of Commerce Environmental Committee;
- Member, Principal Solar Advisory Board;
- Former Texas Representative, State Law Advisory Committee for the Bureau of National Affairs Environmental Due Diligence Guide

Education

Harvard Law School, J.D., 1987, cum laude
University of Oklahoma, B.A., 1984, Highest Honors

Selected Publications and Presentations

Carbon Trading Law and Practice (Oxford University Press 2011);

"EPA Clean Power Plan and Impact on Texas and the Country," The 2015 Annual EOR Carbon Management Workshop, Midland, Texas, December 8, 2015;

"How Disruptive Technology Can Provide Money-Making Emissions Reductions," Texas Lawyer, November 5, 2015, http://www.texaslawyer.com/id=1202741691305/How-Disruptive-Technology-Can-Provide-MoneyMaking-Emissions-Reductions?slreturn=20160623093246;

"Wetlands Challenges and Use of Mitigation Bank Credits", Webinar, Lorman, May 17, 2013;

"View from the Defense, Shale Gas and Hydraulic Fracturing: Defending or Pursuing Private Tort Actions," Strafford Publishing Webinar, July 12, 2012;

"Managing Environmental Risk for Successful Oil and Gas Shale Investment," EUIC Webinar, February 23, 2012;

"Renewable Project Financing in a World of Reduced Government Assistance," American Bar Association Teleconference, June 14, 2012;

"Financing Shale Development: Managing Environmental Issues," Financier Worldwide, May 2012;

"New Trends in Environmental Credit Products," Environmental Market Association's 15th Annual Fall Meeting, November 3, 2011;

"Regulation of Hydraulic Fracturing and Shale Gas Drilling," Bureau of National Affairs Webinar, May 3, 2011;

"Environmental Factors in Oil and Gas Operations," 2010 Advanced International Program in Oil and Gas Financial Management, University of Texas at Dallas, May 2010;

"Environmental Regulation of Shale Gas Development," Ecology and Environment seminar on the Marcellus Shale, October 2009;

"Annual Survey of Texas Law, Environmental," 62 SMU L. Rev. 1119 (2009) (co-authored with Emily Miskel);

"Oil and Water: The Relationship of Groundwater and Oil and Gas Exploration and Production," Oil, Gas and Energy Resources Law (June 2008);

"Environmental Compliance and Financial Disclosure: Managing Internal Controls and Information Flow," Thompson & Knight LLP, Kestrel Management Services, and Frank Crystal & Company seminar, February 7, 2007;

"Value Transforming Potential: Municipal Setting Designations and Development of Contaminated Properties," Texas Association of Environmental Professionals Meeting, January 18, 2007 (co-authored with Brendan Lowrey).

Clearing the Air: Vapor Intrusion Regulation in Texas

Scott D. Deatherage[1]

Texas Environmental Superconference
State Bar of Texas
Austin, Texas
August 4-5, 2016

Introduction

The regulation of vapor intrusion in Texas by the Texas Commission on Environmental Quality (TCEQ) historically only occurred on a rare, case-by-case basis. The Agency has rarely addressed vapor intrusion in environmental remediation programs. In only a small number of cases, has the Agency imposed vapor testing and mitigation steps. However, over the last couple of years the TCEQ has begun to regulate vapor intrusion and indoor air exposure where that exposure originates from chemicals of concern (COC) from soil and groundwater below a building. In part, this recent regulatory focus intrusion appears to have resulted from pressure from the US Environmental Protection Agency (EPA) on the TCEQ to further develop and implement a vapor intrusion program.

If we look back, however, to the original promulgation of the Texas Risk Reduction Program regulations (TRRP Rules) in 1999, vapor issues were discussed or addressed to some extent in the preamble to and in the final regulations. One key provision of the TRRP Rules allows the TCEQ to require testing of indoor air. Another allows the use of worker exposure levels developed by the Occupational Health and Safety Administration (OSHA) or the American Conference of Governmental Industrial Hygienists (ACGIH), whichever is lower, as the Protective Concentration Level (PCL) for commercial or industrial settings.

Unfortunately, under its new vapor intrusion regulatory approach, while approving the use of occupational exposure levels at one site under the Texas Voluntary Cleanup Program (VCP), the TCEQ has attempted to side step those rules by a recommendation letter that asserts lower levels are needed to protect certain potentially exposed parties. The TCEQ's stated concern is an unborn fetus could be exposed to levels of trichloroethylene (TCE) while being carried by a pregnant mother. The levels of TCE established by EPA in indoor air for pregnant women or those who may become pregnant, which would include almost all women in the work force, are far below worker protection levels established by OSHA and ACGIH. The TCEQ's steps to impose levels beyond the occupational exposure levels should be addressed by the TCEQ in a notice and comment rulemaking procedure under state administrative law and the state and federal constitutions, rather than a recommendation letter that avoids these legal requirements. This would allow challenges and arguments against taking this step. Key to this debate would be the fact that if the TCEQ rules were changed, workers would have two different standards for exposure to certain chemicals such as TCE, one if the chemical originated inside the building and another if the chemical originated from environmental media outside the building. Such an inconsistency would not make sense. Moreover, the TCEQ and the EPA

[1] Scott D. Deatherage Attorney at Law, Dallas, Texas; scott@sdeatheragelaw.com; www.sdeatheragelaw.com; 214-345-0979.

should leave occupational exposure levels to those agencies that are charged with the jurisdiction to address worker exposure.

As the case studies discussed below will show, the TCEQ has initiated an approach to vapor issues and indoor air that in certain cases is very strict, and not all that well thought through. No recent guidance or rulemaking has occurred to guide both the regulated community and the TCEQ. The Agency is acting in an ad hoc fashion that creates uncertainty for the regulated community and buyers, sellers, and lenders transactions where vapor intrusion risk exists.

The development of guidance regarding vapor intrusion would be helpful to the regulated community and the Agency itself. The regulatory process for occupational exposure to COCs in indoor air would allow public participation in this important issue. All of this would contribute to developing a sound approach to vapor intrusion and indoor air issues in Texas, and to providing greater certainty for regulated parties and those engaged in property transactions.

Do the TRRP Rules Regulate Vapor Intrusion and Indoor Air?

The extent to which the TCEQ intended to regulate vapor intrusion or vapor in buildings from external environmental releases has been uncertain and a topic of some controversy. This has been true from the time of the proposal and final issuance of the TRRP Rules, and in the statements and guidance documents issued by the TCEQ over almost two decades since.

During this time period, the US Environmental Protection Agency ("EPA") has been attempting to convince the TCEQ to regulate vapor and indoor air. In 2015, the EPA has issued more definitive guidance as to how to identify and remedy vapor intrusion.[2]

To review the TCEQ's initial position on vapor intrusion we must turn to the preamble to the final rule discussing comments arguing that the TCEQ, then going by another name, should clarify that indoor air is not regulated by the Agency. However, at the time the TRRP Rules were proposed and issued, the TCEQ stated that it reserved the ability to regulate chemical concentrations in indoor air that could be affected by vapors from other media such as soil and groundwater. In one section of the rules, a provision states that the Agency may require testing of indoor and outdoor air.

To further confuse things, in a 2007 internal memorandum discussing a case where indoor air was actually tested but not necessarily required by the Agency, the TCEQ indicated indoor air was not a matter regulated in Texas:

> *The TCEQ does not typically evaluate indoor air, and the TRRP rule is not written to specifically address this exposure scenario*; however, since Weston collected indoor air data, the TS elected to evaluate it. Detected constituents in indoor air were evaluated by comparing results to TRRP risk based exposure levels (RBELs) for residential inhalation (AirRBELInh). The inhalation RBELs

[2] "OSWER Technical Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air," OSWER Publication 9200.2-154, June, 2015.

> are conservative health-based values which are protective of long-term or chronic inhalation over 30 years of exposure for 350 days per year, based on adult and child exposure scenarios. RBELs are not available for every chemical detected, so the TRRP guidance was followed to calculate RBELs for those chemicals where information was readily available to do so.[3]

In the TRRP Rules themselves, the rule requires that certain PCLs be determined by the regulated party. For groundwater, the inhalation PCL must be determined for volatile chemical emissions for *outdoor* air.[4] This same section of the TRRP Rules states that parties "shall reasonably evaluate other potentially applicable exposure pathways and identify the ones which are complete or are reasonably anticipated to be completed."[5] While this leaves open the question of whether the TCEQ meant this to allow indoor air regulation, the TCEQ has taken steps or issued statements indicating that it has such power.

An example is a guidance document revised and re-issued in 2010 that stated the TCEQ has the ability to control future development to avoid vapor intrusion into a building.

> As another example, if the undeveloped affected property contains COCs that are a common concern for potential indoor vapor intrusion, then indoor vapor intrusion could become a complete exposure pathway at the affected property if building development occurs in the future. [6]
>
> * * *
>
> If the indoor vapor intrusion exposure pathway is reasonably anticipated to be a completed exposure pathway, then unless the affected property is determined to be in compliance with indoor vapor intrusion soil and groundwater PCLs, an IC is required. For a deed notice, indicate that either future building development should be designed to preclude indoor vapor intrusion from the underlying soil or groundwater, or provide notice that the affected property should be re-evaluated for potential indoor vapor intrusion before developing buildings. For a restrictive covenant, prohibit future building development unless buildings are designed to preclude indoor vapor intrusion from the underlying soil or groundwater, or prohibit building development until a demonstration is approved by the TCEQ that the affected property is protective against indoor vapor intrusion. See §350.111(b)(6).[7]

---

[3] Health Effects Review of Soil and Air Samples Vista Chemical Site – Leander ISD Elementary School No. 19, Travis County Samples Collected February-April 2007 (April 1, 2007), at 3 (emphasis added).
[4] 30 Tex. Admin. Code § 350.71(c)(3).
[5] *Id.* at § 350.71(c)(8).
[6] TCEQ, Remediation Division, Institutional Controls under TRRP, RG-366/TRRP-16 (Revised May 2010), at 8.
[7] *Id.* at 18.

In the TRRP Rules, a specific provision states that the Agency may require testing of indoor and outdoor air.

> The person shall perform an affected property assessment through the collection and analysis of a sufficient number of samples from environmental media to reliably characterize the nature and degree of COCs in the source area(s), as well as the horizontal and vertical extent of COCs in soil and groundwater, which equals or exceeds the applicable concentration of COCs as specified in subsections (c), (d) and (e) of this section, unless the executive director determines on a site-specific basis that additional assessment of the extent of COCs is necessary to evaluate a potential threat to human health and the environment. Information obtained from attempts to attain Remedy Standard A may be submitted for this purpose. The person shall characterize the nature, degree and extent of COCs in other environmental media as required by the executive director in consideration of property-specific factors. *The executive director may require the person to determine the concentrations of COCs in outdoor or indoor air on a property-specific basis.*[8]

As will be discussed below, the TRRP Rules provide for worker exposure levels in air pursuant to the OSHA or ACGIH standards, whichever is lower.[9] This section does not specifically mention indoor air.

Over the last ten years or more, the TCEQ has taken an equivocal view on vapor intrusion and regulation of indoor air exposure. More recently, the TCEQ has exercised what it believes is its authority to request testing of indoor air, to require deed restrictions, to impose controls on heating and air conditioning (HVAC), and to require vapor barriers before construction of new buildings. Examples of the TCEQ's exercise of this perceived view of authority to regulate indoor air and vapor intrusion from environmental media are provided in the case studies discussed below.

What Notice Is Required to Potentially Exposed Parties to COCs in Air?

The TCEQ has prepared guidance to discuss notification requirements under TRRP.[10] The guidance cites an example of when notice must be submitted as, "exposure to vapors in excess of the Tier 1 human health PCL in the basement of a building overlying shallow groundwater containing a COC."[11] The guidance offers a further explanation of when a notice would not be required, where steps have been taken to avoid the exposure.

> Employees or contractors of the persons who are subject to OSHA Hazard Communication programs designed to inform and protect workers from harmful exposure at a facility to the COCs in the affected property would not be required to be provided this type of notice where it can be determined there is not actual or probable exposure. For example, if a worker at a chemical plant is required to

[8] 30 Tex. Admin. Code § 350.51(b).
[9] *Id.* at § 350.74(b).
[10] TCEQ, Remediation Division, Notification Requirements, RG-366/TRRP-17 (Revised March 2009).
[11] *Id.* at 8.

> wear personal protective equipment that precludes exposure to the COC in question at concentrations greater than Tier 1 commercial/industrial human health PCLs, then notification would not be triggered because there is no actual or probable exposure. It is up to the person to make such a determination; otherwise, notification to the party, that is the actually or probably exposed worker, would be required.[12]

The guidance document states that the notification requirement is triggered "upon the receipt of the laboratory analysis from the performing laboratory" containing the data that indicates "the concentration of the COC that someone is actually or probably exposed to exceeds a Tier 1 human health PCL applicable for the land use."[13]

How Is a PCL Determined for Inhalation of COCs in Indoor Air?

The TCEQ guidance document states that the Tier 1 PCLs that would require notice include those for inhalation. Tier 1 PCLs are the most conservative, and often used as a screening level for potential exposure or delineation of concentrations of constituents in environmental media. The Tier 2 and Tier 3 PCLs are determined using more site-specific data. For Air, the Tier 1 PCL is the risk based exposure level (RBEL).[14]

The TCEQ determined in response to a comment on the proposed rule to require notification for human exposure based on the Tier 1 PCL, rather than a Tier 2 or Tier 3 PCL developed for the site that better reflects site conditions.

For the Air PCL, the TRRP Rules allow the use of occupational standards in lieu of the TCEQ's RBEL, which is much more conservative than the levels developed for worker exposure.[15] However, this provision of the rule states that this process of substituting an occupational standard for the relevant RBEL would be through the Tier 2 or Tier 3 process.[16] It would appear that the Tier 1 PCL would be the RBEL, rather than the applicable standard.

The Protective Concentration Limit (PCL) for Air would be based on an environmental agency calculation or a worker protection calculation, either the Risk Based Exposure Level (RBEL), or for occupational exposures, the Occupational Safety and Health Administration (OSHA) or American Conference of Governmental Industrial Hygienists (ACGIH) levels, whichever is lower. The TRRP Rules allow concentrations for worker exposure to be substituted for the RBEL.

> Air inhalation RBEL. The air inhalation RBEL (Air RBELInh) is the protective concentration of a COC in air at the POE for human inhalation.

---

[12] *Id.* at 8-9.
[13] *Id.* at 10, which is also discussed in the Preamble to the TRRP Rule. *See* 24 Tex. Reg. 7436, 7611 (1999).
[14] 30 Tex. Admin. Code § 350.75(b)(1).
[15] *Id.* § 350.74(b).
[16] *Id.*

> Under Tiers 2 and 3 as described in §350.75 of this title (relating to Tiered Human Health Protective Concentration Level Evaluation), the person may use the lower of available eight hour time-weighted average occupational inhalation criteria; (i.e., Occupational Safety and Health Administration Permissible Exposure Limits, or American Conference of Governmental Industrial Hygienists Threshold Limit Values), as Air RBELInh for inhalation pathways for commercial/industrial workers within the limits of affected commercial/industrial properties which have a health and safety plan in place. The health and safety plan shall be designed to ensure compliance with the applicable occupational inhalation criteria and require the monitoring of COC levels in the working air environment, and specify actions that will be taken in the event of exceedance of the occupational inhalation criteria. When occupational inhalation criteria are used, the person shall provide documentation of the health and safety plan, certify that the plan is followed, and demonstrate that the off-site receptors are protected as required by §350.71(h) of this title (relating to General Requirements). The use of occupational inhalation criteria as RBELs shall require the person to comply with the institutional control requirements in §350.111(b) and (b)(14) of this title (relating to Use of Institutional Controls).[17]

The TCEQ allows the notifying party to cite the occupational standard to explain in the notice that the actual PCL for the property is not being exceeded.[18]

Is an Institutional Control Required If Worker Exposure Levels Are Used for the PCLs?

The TCEQ requires an institutional control where worker exposure levels are used and a health and safety plan is developed to institute the worker exposure protections.

> The use of occupational inhalation criteria as RBELs shall require the person to comply with the institutional control requirements in §350.111(b) and (b)(14) of this title (relating to Use of Institutional Controls).[19]

The requirement is more fully described in the Institutional Control section of the TRRP Rules.

> For on-site and off-site properties where an institutional control is required pursuant to §350.74(b)(1) and §350.31(g) of this title (relating to Development of Risk-Based Exposure Limits, and General Requirements for Remedy Standards, respectively) because occupational inhalation criteria are used as the basis for determining the protective concentration of COCs in the working air environment, the person shall note, in a deed notice or VCP certificate of completion, the fact that the response action taken in response to this chapter relies on monitoring air concentrations of COCs and compliance with occupational inhalation criteria and a required health and safety plan for the affected property.[20]

---

[17] *Id.* at § 350.74(b).
[18] *Id.* § 350.55(e)(2); *see also* 24 Tex. Reg. 7323, 7611.
[19] *Id.*
[20] *Id.* at § 350.111(b)(14).

Thus, the institutional control is designed to insure that notice is provided to relevant parties and that the safeguards in the health and safety plan are maintained.

Testing and Point of Exposure

The Air PCL applies at two meters above the surface. This is the point of exposure for Air.

Case Studies: What Has the TCEQ Been Requiring in the Last Several Years?

The short answer is that the TCEQ has decided to regulate indoor air and vapor intrusion. In many recent cases in which I have been involved, the TCEQ has required testing and actions to address vapor intrusion detected or that may arise in the future. A few of these cases are discussed below.

At present, the TCEQ vapor concern is focused largely on chlorinated solvents, particularly trichloroethylene (TCE). The review tends to focus on sites where soil or groundwater concentrations are significant.

All of the properties discussed in the case studies below were entered into the VCP, and were being reviewed by VCP staff.

Case Study No. 1: Property to Be Sold with Existing Building

The first case study involved a building where testing had been conducted below the slab, and vapor concentrations were detected below the slab, but not in the building itself.

The TCEQ requested a deed restriction that would require approval by the TCEQ of any changes to the heating and air conditioning (HVAC) of the building, to prevent vapors from entering the building from below the slab. We questioned the TCEQ's expertise in reviewing HVAC systems generally and specifically in terms of how changes would affect vapors that might enter the building. The TCEQ staff agreed they did not have the expertise to review HVAC systems or how their use or installation would affect existing or potential future vapor intrusion.

We refused to agree to this approach first because we did not believe the property could be sold with a requirement that the TCEQ approve any changes to the building's HVAC. A second concern was that we were asking for an unrestricted residential closure and a final VPC COC, and we did not want the HVAC to be restricted by the TCEQ. We argued that the TCEQ was on the one hand saying we were receiving a residential closure for unrestricted use, and on the other hand saying we or a subsequent owner would have to come back to the TCEQ in the future for review and approval of changes in the HVAC. This result did not appear to be a final closure, and would impact the value and ability to sell the property. A third concern is that this approach was not permitted under relevant statutes and TCEQ regulations.

Case Study No. 2: Property to Be Sold and Redeveloped

In the second case study, a property was under contract to be sold. We represented the seller. Significant concentrations of TCE were present in soil and groundwater at the property. The building was to be demolished after the sale and before redevelopment.

The TCEQ agreed to provide an unrestricted residential closure, but the staff proposed an engineering control that would be required for any new construction at the property. The engineering control would be in the form of a vapor barrier to be installed by any current or future owners in the course of construction of any new building. The TCEQ staff proposed that this requirement be included in a deed restriction to be filed in the county deed records for the property. The TCEQ further proposed that the deed restriction mandate TCEQ review and approval of the vapor barrier prior to installation and before starting construction.

The key dispute was the TCEQ staff review and approval of the vapor barrier. The Agency staff acknowledged that they did not have sufficient expertise to review vapor barrier plans in detail, and offer any educated advice as to the adequacy of the vapor barrier, materials used, or its installation. In addition, the TCEQ staff did not want to opine on whether the vapor barrier should include a passive or active venting system. The TCEQ staff has not from our discussions, developed this level of in-house expertise. It is not clear that the staff is planning to develop that expertise in the short-term, but the Agency may develop it over the longer-term.

As a result of these discussions, we asked that no further TCEQ review or approval of the vapor barrier be required in the deed restriction. We proposed that as an alternative the deed restriction require that a vapor barrier be installed that meets industry standards existing at the time of construction of a new building. We did not want to have a vapor barrier reviewed by the TCEQ because without adequate expertise, we were concerned about a prolonged process of review that would delay construction. In addition, we were concerned that such a deed restriction could impact the marketability and the value of the property. Finally, we were seeking, as in the first case study, an unrestricted residential closure and a final VPC COC, without having a deed restriction that would require further TCEQ review and approval in the future. The TCEQ staff proposal did not meet this objective.

Case Study No. 3: Vapors in Building—Worker Exposure Levels Allowed

The third case study involved an existing office building in which the owner housed its employees. The building was part of a larger campus that had served many purposes in the past, including industrial and manufacturing uses.

The company had detected historic TCE in groundwater at high concentrations around and under the building. The company decided to conduct indoor air testing. The testing was voluntary and had not been required by the TCEQ. The groundwater was located in a tight limestone, and little diffusion or migration was occurring. Upon testing of the indoor air in the

building, concentrations of TCEQ at low levels were identified. However, the TCE concentrations in the indoor air only exceeded the Tier 1 PCL in winter.

The client proceeded to take steps to reduce the vapor concentrations in the building through sealing floors, installing carbon filtering of air passing through the HVAC, adding more outdoor air to the HVAC, among other activities.

Despite all these actions, TCE was still detected in the building above the Tier 1 PCL during winter months. These levels were well below the ACGIH levels (and the higher OSHA levels), and thus met federal and TCEQ regulatory levels based on a worker-based PCL.

At the time, the TCEQ did not provide much guidance to us as to how to manage the vapor issue. As a result, I was tasked to review proposed TRRP Rules, preambles, and final rules, and to review TCEQ documents and guidance that could be identified.

We proposed the process outlined above to obtain a regulatory resolution of the vapor issues. The company followed the rules to provide notice to those employees working in or that otherwise came into the building on the company campus, as well as outside contractors. We then obtained approval from the TCEQ for a Tier 2 PCL for TCE, based on the ACGIH levels. A health and safety plan was prepared and submitted to the TCEQ. The TCEQ approved this approach for TCE vapors in the workplace.

Case Study No. 4: Vapors in Building—Worker Exposure Levels Allowed, or Not?

In another case, a manufacturing and office building similarly had significant TCE concentrations in groundwater under the building. In this case, the TCEQ sent a letter to the owner of the property in the VCP requesting that indoor air testing be performed. As in Case 3, despite all actions to seal floors and otherwise to prevent migration into the building, TCE was detected in the building above the TCEQ Tier 1 PCL, but only in the winter. Again, the concentrations were below ACGIH levels for TCE (and other chemicals detected).

The company followed the TRRP Rules and guidance to provide notice to its employees and other parties who may enter the areas that exceeded the Tier 1 PCL. The others steps taken were approved by the TCEQ and it approved the ACGIH level for TCEQ as a Tier 2 PCL, as in Case 3.

Several months later, however, the company received another letter from TCEQ regarding TCE concentrations in air in the building. The TCEQ letter stated that the company was in compliance with applicable regulations, and met the notification requirements for a Tier 1 PCL for TCE in indoor air in a commercial/industrial property. The letter acknowledge that the health and safety plan had been submitted and approved. It stated that the ACGIH level would be the exposure level for commercial/industrial workers in the form of a Tier 2 PCL.

Despite having acknowledged that the company had complied with all applicable regulatory requirements, the TCEQ letter raised issues beyond the applicable regulations and advised the company to take action. The TCEQ decided to "recommend" other actions beyond

the regulations. It recommended that actions be taken to address "short-term" exposure of certain workers to TCE. The letter recommended that "precautionary" notification be given to a subset of workers, namely "pregnant women (and those who may become pregnant)." The specific concern was potential exposure during the first eight weeks of pregnancy. The letter stated:

> It is important for workers to be made aware of this potential risk as well as suggesting ways for pregnant women (and those who may become pregnant) to immediately mitigate potential exposure, such as limiting time the parties are in the affected areas.

The letter further recommended that the health and safety plan, previously approved by the TCEQ, be revised to reflect actions to address short-term exposure, and to revise sampling methodology and frequency of sampling to address this concern.

The TCEQ recommendation relating to TCE is based on a study on the toxicity of the chemical conducted by Johnson et al. (2003) to develop the inhalation toxicity value (RfC) for TCE based on rat studies and extrapolation of that data to humans. The study concluded that offspring of female rats exposed through drinking water during pregnancy had a higher level of certain heart malformations.

That study was used by EPA to calculate very low exposure levels for TCE over a 24-hour period. However, the calculation of risk was based on only one study and a great deal of criticism has been leveled at EPA for reaching any conclusions and issuing any regulatory level for TCE based on the study. The criticisms of the Johnson et al. study include that the scientists have not been able to reproduce their results and that the study failed to comply with EPA guidelines.

The TCEQ apparently has adopted the EPA view of TCE that the chemical can cause developmental impacts on an unborn fetus, and that women who are or may become pregnant should not be exposed to TCE at extremely low concentrations even for very short periods. Reportedly, the EPA is advocating that states make recommendations to regulated parties regarding taking action where these low levels are detected in indoor air. The apparent intent is to put companies in a position where it is difficult to not follow those recommendations, in the event an female employee in fact has a child with some form of deformity, and that will make it difficult to use office or manufacturing space because it would potentially violate other laws to ban women from certain buildings or areas of buildings.

On the other hand, many in the regulated community believe they should be allowed to use worker exposure levels developed by OSHA or ACGIH, as they would if the source of the chemicals arose from within the building as opposed to from outside the building from environmental media. Otherwise you have two completely different risk levels depending on the source of the chemicals in indoor air. These same parties are also concerned that the alleged impact of TCE on unborn fetuses is not based on sound science and methods of calculating a regulatory level.

Ironically, in 1999, when the TCEQ under a prior name promulgated the TRRP Rules, the EPA objected to the use of OSHA standards for COCs because the EPA argued these standards were short term and not *chronic* exposure levels that were required by federal statutes and regulations.

> Concerning §350.74(b)(1), EPA Region 6 commented that OSHA exposure limits, numerically, in the EPA's opinion may be considered more representative of health standards under an immediate and short term scenario for workers. The EPA's RCRA and other waste programs try to insure human health protection in a long-term industrial exposure. Due to the differing assumptions and toxicity information utilized by OSHA the resulting risk-based values differ sometimes several orders of magnitude from what the EPA would consider protective for the same contaminant. For example, chloroform has an OHSA limit of 240 mg/m3 whereas the EPA utilizes an industrial screening value of 0.08 mg/m3. Due to these numerical differences, the EPA Region 6 stated that it cannot support the use of the OSHA standards for fulfilling the requirements of long-term protection in an industrial worker scenario.
>
> The proposed rule is predicated on the evaluation of chronic exposure and as such, the intent of the commission in §350.74(b)(1) was that only those occupational limits that are protective of long-term exposures could be used. However, the commission understands the commenter's confusion since the rule as proposed did not specify the occupational limits that would be appropriate for use as RBELs for commercial/industrial exposures. The rule has been amended to clarify the intent of the commission in this regard. Specifically, the rule has been amended to clarify that only eight-hour time-weighted average (TWA) OSHA Threshold Limit Values and American Conference of Governmental Industrial Hygienists Permissible Exposure Limits may be considered for use as the inhalation RBEL for commercial/industrial properties. TWA occupational exposure limits (OELs) represent the concentration for a conventional eight-hour workday and a 40-hour work week, to which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. Thus, by definition, TWA OELs do address exposures of greater than immediate or short-term durations.[21]

Notwithstanding the challenges to the short-term exposure to TCE and its adoption and defense of the use of occupational exposure levels for PCLs, the TCEQ has chosen to take a position regarding TCE exposure that puts companies with vapor intrusion of the chemical in a difficult position--a "damned if you do, damned if you don't" situation. The TCEQ, EPA, and other states taking this approach are well aware of the problems with not complying with the recommendations. Apparently, the agencies are intent on using these recommendation letters to pressure parties to take action. In some cases, such as in Texas, the environmental agency could not under applicable regulations impose such low concentrations, monitoring, and other actions for TCE because occupational levels can be used as established by OSHA or other relevant agency or entity. Thus, the recommendation to parties to use lower levels in effect allows an "end around" the administrative and constitutional laws governmental agencies should comply with to attempt to amend regulations.

---

[21] 24 Tex. Reg. at 7631.

What Practical Questions Do Owners or Tenants Face in Dealing with Their Tenants and Workers?

The issue of vapor intrusion and managing that risk presents significant uncertainty regardless of which state the property or facility is located. However, in Texas, that uncertainty is problematic. Some of the issues that arise with respect to vapor intrusion and resulting indoor air issues for the employees of building owners and building tenants include the following:

- What standard applies in Texas for commercial and industrial workers? This is unclear even though the regulations state worker levels can be used. The TCEQ has created uncertainty for the regulated community, building owners, and tenants whose workers are present where extremely low levels of TCE appear to arise from soil or groundwater under or near their buildings.
- Should an occupational level be pursued with the TCEQ? If so, is the Agency going to respect that request or "recommend" lower levels?
- Should soil vapor or indoor air sampling be conducted?
- Should employees be allowed access to an area exceeding a RBEL, particularly TCE or other chlorinated solvents?
- How should the vapor issues be discussed with employees?

These and other questions cannot be answered clearly in Texas, and raise uncertainty as to the regulatory program for vapor intrusion and indoor air in the state.

How Does the New TCEQ Approach to Vapor Intrusion Affect Property Transactions?

Vapor intrusion concerns have been arising in transactions for several years, and this is only intensifying. This was reflected with the recent revision of the ASTM standard for performing Phase I Environmental Site Assessments (ESAs) that included assessment of vapor issues in the process for performing ESAs.

In Texas, the rules provide for the use of OSHA or ACGIH levels for worker exposure. However, the TCEQ has put the use of these levels in question through its "recommendations letter." The process for addressing vapor intrusion in property transactions in Texas is currently problematic. Here are some of the questions that arise:

- Will the use of ACGIH levels be acceptable to a buyer of office buildings, shopping centers, manufacturing facilities, warehouses, and other buildings that qualify for commercial or industrial land use?
- What will be the view of lenders on this issue for financing or refinancing loans?
- With Municipal Setting Designations (MSD) being available in certain Texas cities, will vapor issues become more of an issue for consideration of MSD applications? Will an MSD be only the first step with respect to soil and water issues, with vapor issues remaining a critical problem with uncertain path to resolution?

- What will be the future outcome of TCEQ and EPA discussions and TCEQ development of vapor intrusion guidance, and how will the use and value of properties be affected?

These and other issues and questions will make environmental assessment and decision making more difficult in property transactions. In transactions over the last several years, vapor intrusion has been an area of concern and negotiation. In one transaction I was involved in, the relevant levels for testing and remediation of a property agreed upon by the buyer, seller, and lender were worker exposure levels. Where TCE is present, is this still a viable level to consider for commercial and industrial properties in a purchase and sale or lending transaction? The discussion of these issues and careful consideration will be critical in working through closing of transactions.

Conclusions

It is clear the TCEQ has begun to regulate vapor intrusion risk on a more regular basis. The focus at present is largely volatile chlorinated solvents where present at significant concentrations. Based on conversations with TCEQ staff, I understand that at this time the Agency is less concerned with vapor risk from petroleum releases from underground storage tanks.

While the TCEQ is somewhat late to the game in terms of vapor intrusion regulation among the states, it is apparent is that some of the positions taken by the TCEQ are in some ways as strict or stricter than other states that have been regulating vapor intrusion for several years. This stricter approach is demonstrated in some of the case studies discussed above.

What is of concern is the use by the TCEQ of letters to regulated parties that make "recommendations" as to notice, action levels, and removing persons from areas where the COCs in indoor air are far below occupational levels, which regulated parties can opt to use under existing TCEQ regulations. To attempt to pressure companies to do more than the applicable regulations require appears to avoid notice and comment rulemaking that is required by state administrative law and the state and federal constitutions.

The science behind the concern with TCE and the potential impact on women, or more specifically an unborn fetus, is apparently based on a single rat study. This study and the EPA use of it is under challenge as being arguably questionable science. EPA Region 9 began to require actions at very low levels of TCE. EPA may be pressuring states to send these recommendation letters based on the TCE limited study on impacts of TCE on rat fetuses as a means to impose an obligation on companies without appropriate scientific and toxicological analysis.

In order to clarify vapor intrusion regulation in Texas, I would advocate a set of steps be taken by the TCEQ. First, the Agency should engage in a more appropriate review of scientific data on potential risks of TCE impacts on unborn fetuses before addressing this issue in rules, guidance, or "recommendation letters." Second, I would advocate a full notice and comment rulemaking before taking any action to attempt to avoid the worker exposure standards currently allowed by the TRRP Rules. The issues related to TCE exposure could be fully vetted through

that rulemaking process. Otherwise, the Agency is usurping the laws that govern their regulatory activity. Third, the TCEQ needs to develop appropriate guidance that involves input from the regulated community and other interested parties. This would be a step to developing clearer policy on vapor intrusion and would allow interested parties the chance to discuss concerns and proposals with the TCEQ. The Agency has used this process in the past to develop policy and rules in new or evolving areas of environmental regulation. It is time this process be used to develop a more certain regulatory program regarding vapor intrusion.

Vapor intrusion is a difficult issue to manage with respect to testing, monitoring, and mitigation. The EPA has issued guidance documents that address their views of how to manage vapor intrusion under the federal programs. Other states have issued guidance documents to deal with vapor intrusion. In Texas, the process historically has been ad hoc, but rarely made an issue. Now the TCEQ is moving into vapor and indoor air regulation under its remediation programs, particularly under the VCP. The VCP program was designed to help owners of property to work through environmental issues to resolve environmental matters. It was also designed to help people re-develop contaminated properties after they have been addressed under cleanup regulations such as the TRRP Rules and to assist parties to close real estate transaction involving contaminated properties. To achieve these goals under a new vapor intrusion approach by the TCEQ, the issues raised in this paper and other questions and concerns need to be addressed to allow the redevelopment of properties with significant vapor concerns.

Mark L. Farley is co-head of the Environmental and Workplace Safety practice. He advises clients on a wide range of environmental, health and safety (EHS) issues, and focuses on internal investigations and crisis response. Mark routinely counsels companies in connection with major industrial accidents, whistleblowers, process safety incidents and workplace fatalities. He served in lead attorney roles for the most significant industrial accidents in the United States in the last 20 years.

Mark has helped clients respond to investigations by the Federal Bureau of Investigation (FBI), the US Environmental Protection Agency (EPA), the National Transportation Safety Board (NTSB), the US Chemical Safety Board (CSB), the Occupational Safety and Health Administration (OSHA) and state regulatory agencies. He was one of the lead partners supporting the work of the BP US Refineries Independent Safety Review Panel, which investigated the corporate safety culture and oversight at BP's North American refineries on behalf of an independent panel of experts chaired by former US Secretary of State James A. Baker III.

A significant part of Mark's practice involves counseling companies on EHS culture and the management of work place safety. He routinely advises energy companies, chemical manufacturers, utilities, and manufacturers on emerging regulatory requirements and systems for overseeing EHS performance.



GEORGE O. WILKINSON, JR.
PARTNER, ENVIRONMENTAL & NATURAL RESOURCES

1001 Fannin Street
Suite 2500
Houston, TX 77002

+1.713.758.4834
+1.713.615.5142
gwilkinson@velaw.com

George advises and represents clients on business-critical environmental matters. His broad environmental law practice includes environmental litigation, environmental enforcement defense, emergency response, and environmental compliance counseling.

As part of that practice, George counsels clients on responding to refinery, chemical plant, pipeline, and industrial accidents, including government investigations and enforcement actions, citizen suits, and tort litigation. He represents clients in state and federal courts, where litigation involves substantive environmental matters and toxic torts. He counsels clients on a range of environmental matters, including Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), Outer Continental Shelf Lands Act (OCSLA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and natural resource damage issues. He also counsels clients on process safety, OCSLA, and radiation issues.

George also advises clients on environmental enforcement and regulatory issues related to refineries, chemical plants, other process industries, oil and gas exploration and production, and pipelines. He defends corporations and individuals charged with, or investigated for, criminal violations of state and federal environmental laws. George also conducts internal evaluations and recommends appropriate responses and corrective measures.

Education

- The University of Texas School of Law, J.D. *with honors*, 1991
- The University of Texas, B.S., Mechanical Engineering, 1986
- Admitted to practice: Texas; U.S. District Courts for the Eastern and Southern Districts of Texas; U.S. Fifth Circuit Court of Appeals; all Texas state courts

Professional Background

- Structural Test Engineer, Major Defense Contractor, 1986–1988
- Judicial clerk to The Honorable Eugene A. Cook, Texas Supreme Court

Recognition

- *Chambers USA,* Recognized Practitioner in Environment (Texas), 2015 and 2016
- American Lawyer Media, Top Rated Lawyer for Energy, Environmental and Natural Resources, 2013
- *The Best Lawyers in America*© (Woodward/White, Inc.), Environmental Law, 2013—2016
- *Legal 500 U.S.*, Environmental Litigation, 2011

BAKER · WOTRING LLP



Earnest W. Wotring

Partner

Earnest W. Wotring is a founding partner of Baker · Wotring LLP. He was born and raised in Edmond, Oklahoma and attended Dartmouth College from 1984-88, graduating magna cum laude. He graduated from the University of Chicago The Law School in 1991 with honors. After leaving law school, he clerked for Justice Nathan L. Hecht at the Supreme Court of Texas. Mr. Wotring represents clients at trial and on appeal in cases involving personal injury, medical malpractice, railroad litigation, complex environmental litigation, environmental statutory construction and regulation and commercial contract disputes. As lead appellate attorney, Mr. Wotring has argued in front of the Supreme Court of Texas, the United States Court of Appeals for the Fifth Circuit, and the First, Ninth, Tenth and Fourteenth Courts of Appeal for the State of Texas. He has tried cases that included allegations of wrongful death, catastrophic injuries to children, employment discrimination, wrongful death at a railroad crossing, and breach of oil and gas contracts. Mr. Wotring has represented clients on the leading edge of such diverse areas of law as biomedical ethics and insurance coverage. Most recently, his pro bono work in the area of cutting-edge medical ethics was the feature story in *Texas Rising Stars Superlawyer Magazine* in an article entitled When Is It Right To Let a Baby Die?

Practice Areas

- Personal Injury Defense
- Healthcare, Medical, and Pharmaceutical Litigation
- Commercial Litigation
- Appellate Practice
- Environmental Litigation
- Railroad Liability
- Oil and Gas/Pipeline Practice

Contact Information

Baker · Wotring LLP
700 JPMorgan Chase Tower
600 Travis Street
Houston, Texas
(713) 980-1700 Main
(713) 980-1713 Direct
(713) 980-1701 Fax
ewotring@bakerwotring.com

Education

J.D., University of Chicago Law School, with honors, 1991

A.B., Dartmouth College, magna cum laude, 1988

Admissions

Texas
U.S. Supreme Court
U.S. Fifth Circuit Court of Appeals
Eastern District of Texas
Northern District of Texas
Southern District of Texas

Selected Publications

- *The First 24 Hours: Responding to a Crisis in Your Institution*, Greater Houston Society of Healthcare Risk Management, February 2007.
- *Issues Regarding the Withdrawal of Life-Sustaining Care*, 18th Annual Health Law Conference, April 2006.
- *Sexual Assault: Responding to a Crisis in Your Institution*, American Society of Healthcare Risk Management, October 2006.
- *Critical Response: The First 24 Hours*, American Society of Healthcare Risk Management, October 2005.
- *Issues Regarding the Withdrawal of Life-Sustaining Care*, Houston Bar Association, September 2005.
- *The Withdrawal of Care: Legal, Ethical, and Media Issues*, Greater Houston Society of Healthcare Risk Management, June 2005.
- *Nursing Malpractice Claims and Depositions*, Texas Nursing Association, April 2005.
- *Litigation and Trial Tactics*, University of Houston Law Foundation, December 2003.
- *Occurrence-Innocent Insured Pays Price for Guilty Third Party?*, State Bar of Texas Insurance Section Annual Meeting, June 2002.

Speeches and Presentations

- *Proper Remedies in Commercial Cases,* 30th Annual Advanced Civil Trial Course, State Bar of Texas CLE, Dallas, Austin and Houston, Texas, 2007.

Honors, Awards and Recognition

- Selected as a Top Lawyer for the People, *H Texas Magazine*, 2007.
- Selected as one of Houston's Top Lawyers, *H Texas Magazine*, 2005, 2006 and 2007.

28th ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

"How Can You Think and Hit at the Same Time?"

INSTITUTIONAL GOVERNANCE AND THE ENVIRONMENTAL CRISIS

Thursday-Friday, August 4-5, 2016
Four Seasons Hotel
Austin, Texas

George Wilkinson
Vinson & Elkins LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
(713) 758-4834
GWilkinson@velaw.com

Earnest W. Wotring
Baker • Wotring LLP
700 JPMorgan Chase Tower
600 Travis Street
Houston, Texas 77002
(713) 980-1713
ewotring@bakerwotring.com

For Authorized Use by 28th Annual Texas Environmental Superconference
Not for Publication or Dissemination by Others

I. Introduction.

A company cannot effectively think and hit at the same time if it is not prepared to play the game. Baseball batters do not take the plate without hours and hours of practice. Yogi Berra did not become a famous catcher without hard work and practice.

Companies and their institutional governance are no different. If they are to be prepared to handle an environmental crisis, they need to practice and prepare. Recent high-profile environmental incidents with potentially catastrophic effects on companies and individuals ("serious incidents") underscore the need for companies to have a plan to anticipate, handle and respond to such catastrophes. But having a plan is unlikely to be enough – it has to be tested, revised, and updated. Without practice, thinking and hitting at the same time is at best, a hit or miss proposition.

Corporate culture forms the basis for preparedness, responsibility, accountability and integrity -- concepts that impact how an organization responds to serious incidents as a whole. Institutional governance guides corporate culture and affects the ability of a company to perform and respond effectively in times of crisis. As has been seen in recent examples, corporate crises and scandal can bring great losses to companies – both financial and reputational. When such crises are coupled with a lack of readiness or training and support from the company's highest levels, the damage is magnified.

No business is immune from a crisis, and preparation and planning are key. Those who govern corporations -- Boards of Directors, CEOs, officers, directors, shareholders – have to face the reality that they will be under increased scrutiny regarding their ability and preparedness to handle serious incidents, protect the public and environment, minimize liability, and to address potential impacts of liability to the corporations. Preparation and planning are key. In fact, they are vital, given that many of the potential environmental crises that could impact a company are foreseeable. Accidents happen, products are released, natural disasters occur, media scandals, negative press and cyber attacks are in the paper every day. The challenge for those who aspire to effective corporate governance is to recognize and plan for potential incidents through crisis management planning and provide high-level support, accountability and empowerment to facilitate an effective response.

Some (including regulators) might take the position that if a company has to ask what to do when a serious incident takes place, it has not adequately prepared or practiced for such an event. Those responsible for corporate governance must ask themselves the question of whether they have prepared their companies to mobilize and address large-scale emergencies and the resulting consequences from serious incidents, before they are asked those questions by regulators and the public.

II. Institutional management roles in crisis management – before, during and after – an overview.

Before. The role of high-level corporate governance in crisis management starts before the crisis. Boards of Directors put the company's mission statement into place to ensure that the company has implemented an effective risk management and response system to evaluate and mitigate risks from serious incidents. Boards can ensure that management devotes the necessary time and resources to crisis planning and require periodic updates and reports regarding preparedness. A key component from the Board is to ensure that sufficient resources – both monetary and personnel – are devoted to crisis training, planning and management. Crises do not manage themselves, and people who have not been trained may not be able to manage crises effectively.

During. Those who govern at the highest level of corporations should have already evaluated and determined their proper role in a crisis. This will vary depending upon the nature and severity of the incident, but their leadership and support will drive the tone of how the response unfolds. Entities should have communication plans to ensure a Board stays informed and provides resources. Boards need to give careful consideration to whether directions to management during a response are distracting management from implementation of existing plans and whether communications during a response send conflicting instructions or guidance. High-level corporate governance requires the ability to focus on big picture issues and long-term resolutions.

After. Depending upon the significance of an event, a Board of Directors should consider evaluating the adequacy and effectiveness of management's response. The evaluation may consider lessons learned and identify items needing attention or improvement, and the Board may consider the adequacy of resources to implement any needed changes or refinements.

III. The On-The-Ground Perspective.

Once the highest levels of corporate management have committed to a mission statement or corporate policy of support, management can implement a robust emergency and crisis response program.

A. Pre-Incident Planning: The Emergency Response Plan and Policies and Procedures.

Many corporations have existing emergency response plans and mission statements. Some have emergency response plans already in notebooks with long lists of appendices that are on the shelf or contained in the company's internal or external website. While many companies have existing emergency response plans and accompanying policies, some of those plans and policies may not have been reviewed for years, may never have been tested, and may contain

out-of-date information or references to persons or affiliations that no longer exist. Those types of emergency response plans are unlikely to serve the company's bests interests, and are less likely to withstand scrutiny in the aftermath of a serious incident. No company wants to be in the difficult position of having to explain why the emergency response plan contained outdated contact personnel, vendors who are no longer in existence, or corporate resources that are no longer available. A robust plan is part of a living program that is updated, tested, and refined.

Every company and industry is different and the emergency response plan for each company has to be tailored to the company, its industry, and the unique set of challenges that the company faces in its own business. However, the following general guidance regarding the emergency response plan and any accompanying policies and procedures are instructive to consider:

- *Set Priorities Before Serious Incidents*: Prior to an incident, companies should consider enacting a policy for setting priorities for how the organization should address the multitude of challenges it may face in response to a serious incident. For example, a corporation could draft a policy statement that in the event of a serious incident, the officers and employees of the company should 1) protect human health and the environment; 2) assist governmental entities in responding to the incident; 3) provide reliable information to the public about the incident; and 4) address concerns about protecting the company's interests. By establishing broad policy guidelines setting priorities for responding to a serious incident at the board and corporate officer level, the company can provide sufficient guidance to the emergency response team without attempting to dictate tactics for handling an incident with all of the uncertainties of doing so in advance.

- *Emergency Response Team*: Because of the uncertainty of the challenges that a company will face in the aftermath of the serious incident, a company should consider establishing an emergency response team to handle the complex legal, safety, liability, corporate governance, and media issues arising out of a serious incident. The emergency response team should be organized and meet before a serious event; it should consider testing its response to a serious incident; and it should be provided the appropriate authority from the highest level of the corporation and sufficient access to corporate officers and Board, if necessary. A difficult question for a company to answer would be why, having identified the importance of responding to a serious incident and having set up the emergency response team in advance, the company did not see fit to test the company's emergency response team or corporate policies and procedures.

- *General v. Specific Policies and Procedures*: Because by their very nature serious incidents cannot be predicted, and usually involve a series of cascading unforeseen consequences, companies should consider setting general policies to

permit the emergency response team to operate with broad discretion and authority to implement the priorities that the company has already established. The emergency response plan should provide flexibility to the emergency response team to address unforeseen challenges consistent with the corporate policy.

- *Overly Ambitious Language*: Many emergency response policies and procedures contain language that may not apply to every situation and that may not be realistic or even feasible. One example of a statement that may be unattainable is a commitment that the company "will take every possible measure" to protect the company or the environment. Another category of potentially unrealistic statements includes setting requirements that the emergency response team *shall* take a specified action—there is very little in common between the serious incidents and prescribing a mandatory course of conduct for the emergency response team may not be the best approach. The company should carefully consider avoiding rigid time requirements in the emergency response plan. Requiring a certain action to take place within the first "24 hours" or "within the five business days" may or may not be realistic given the exigencies of the serious incident. Other terms such as "within a reasonable time period as determined by the emergency response team," or "after the initial phase of the emergency response, as determined by the emergency response team," can be substituted for rigid time periods to provide the emergency response team with sufficient flexibility

- Periodic *Review and Update*: Companies should set a period for review and updating of emergency response plans to ensure that it accounts for developments in the law, the company's business, and changing personnel. The emergency response plan could be set for automatic review in accordance with a fixed date such as each year or on an as-needed basis.

With the caveat that no one checklist will serve the needs of all companies or industries, companies should consider having emergency incident response policies and procedures that address the following areas and specific points:

Preselect and train the team: The company should identify a team to handle the responsibilities for responding to an emergency and should include:

- Senior management
- Business functions
- Risk management
- Legal
- Government Affairs/Communications

- Compliance
- Finance
- Customer Service
- Logistics/Business continuity
- Human Resources
- EHS
- Security
- Emergency responders
- Other experts

- *Law Department Policies and Procedures*: The legal department's role should include assessing legal issues, preserving privilege, and providing legal advice to the emergency response team. It can assist in the investigation and play a leadership role in evidence preservations, including sending out legal hold orders and providing evidence chain of custody forms. In many serious incidents, there is a legal action initiated against the company within the first few hours after the incident, and the legal department will be required to start defending the company in litigation thereafter. The legal department frequently will coordinate the company's response to regulators and governmental investigators and review contractual or other negotiations that might arise from the incident and response.

- *Corporate Communications/Governmental Relations Policies and Procedures:* The media relations and government affairs departments of the company will be responsible for immediate demands from the public and governments. They will be responsible for implementing media and communications plans, including the social media plan for the company. These departments will have to convey the company's message, select the company's spokesperson, understand the company's limitations on providing information (e.g., an investigation involving the N.T.S.B), handling communications with the company's vendors and customers, and coordinate with the other departments regarding the company's message.

- *Risk Management/Claims Policies and Procedures*: Risk management and claims will need to notify insurance companies and brokers and may establish a claims center or process for the immediate evaluation of claims and short-term relief in the appropriate cases. They may also want to establish a hotline and website to provide information regarding the company's plans for evaluating and paying claims. (Of course, not every serious incident requires that a company start the claims process, and there may be reasons why the company does not have any liability for which it owes compensation to anyone.) Claims and risk

management may also want to start gathering evidence to support an insurance casualty claim or business interruption claim.

- *Operations Policies and Procedures*: The operating division of the company most closely associated with the events will need to be involved in the first response. It will have to coordinate with the other departments, manage the first responders, and brief and manage personnel in the field and the company's vendors. The operating divisions should also stand ready to assist government officials and first responders in containment of any danger to public health or the environment and mitigating the impacts from the serious incident.

IV. Board and Management Oversight of the Response Team.

Some serious incidents may involve issues that pose material, if not existential, threats to the corporation. By their very nature, these incidents may affect the company's strategic plans and require fundamental changes at the corporation. For these reasons, the company should consider setting up a communication plan with the corporate offices and the board before they experience a serious incident to define how to communicate important information to the Board and how to respond to Board inquiries. The purpose of this communication plan is to ensure that management keeps the Board apprised of on-going events and to manage direct Board member involvement in the immediate handling of the incident response. A Board member inquiry to the emergency response team risks skewing the daily priorities for the emergency response team and creating confusion in the chain of command.

It is beyond the scope of this paper to discuss board member or corporate officer liability for serious incidents, if any. But, as with other aspects of managing serious incidents, the more advanced planning that can take place the better. The time to identify with whom and how the board members and corporate officers can address their legal concerns about a serious incident or their personal liability is before the incident happens.

V. Media and Social Media.

As part of an emergency response plan, the company must consider how it will respond to media inquiries and social media. In today's environment, it is entirely possible, if not probable, that the more serious the incident, the more likely that it will be carried via live streaming directly to the public. As a result, there may be no time between the reporting on an event and the company being asked to comment upon and react to the event. In the best of circumstances, serious incidents pose a challenge to providing a consistent, timely, and accurate response to a media inquiry. Adding to those challenges, the possibility of real time reporting and live streaming only multiplies the difficulties.

The company should consider as part of its emergency response plan how it will prepare, vet, and disseminate its media statements, what person it will use to be the company's spokesperson, how the company will respond to social media, and who will determine the company's media response. The company should also consider how it would use social media during response to a serious incident. Considerations for use of social media include: (1) how to communicate an affirmative message through social media (e.g., should the company already have a "dark" website prepared that it can bring up live during a serious incident?); (2) whether to engage in instantaneous or nearly instantaneous responses to social media comments on the incident or the company's response (e.g., should the company respond to various "tweets"?); (3) how it will determine what information to share via social media; and (4) whether to have outside media specialists on call to assist the company and how quickly those outside specialists can provide assistance.

A company faces one set of challenges in responding to any serious incident, but it faces a whole set of different challenges in addressing demands for information from the public, government officials, and the media. The failure to communicate the company's message and to present a caring and concerned spokesperson for the company can exponentially increase the company's liability exposure and the seriousness of the incident's aftermath.

VI. Reporting and Evidence Preservation.

In the immediate aftermath of a serious incident, a company may receive notices requiring preservation of evidence or even lawsuits seeking temporary injunctions requiring the company to do so. Companies must preserve physical evidence and electronic data even while the company is addressing the on-going crisis. The company should be prepared as part of its emergency response to implement evidence preservation plans. A company should have established a relationship with a law firm and e-discovery vendor to be able to take sufficient steps to preserve the necessary evidence while a serious incident is progressing. Many companies currently have processes and policies in place to alert their personnel about litigation holds and evidence preservation requirements, and they should review those policies to ensure that they can quickly be applied to the immediate aftermath of a serious incident.

VII. Government Focus on Individuals – the Yates Memorandum.

In September 2015, the Department of Justice further expanded its focus on individuals any time it investigates misconduct at a company. The DOJ announced the policies in a memorandum from Deputy Attorney General Sally Yates (the "Yates Memorandum"). In November 2015, DOJ incorporated the Yates Memorandum's policy directives into the US Attorney's Manual.

The Yates Memorandum justifies the policy change based on fighting corporate fraud and protection of the financial system. However, the policies announced in the Yates Memorandum

are not limited to investigations involving the financial system. Through the policy, DOJ seeks to force companies to conduct investigations to determine all relevant facts relating to individual responsibility for misconduct and then to provide those facts to the government. The Yates Memorandum acknowledges the difficulty of determining the culpability of high-level executives and seeks to force companies to do the work to "reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions" rather than leaving it for DOJ to perform that work. DOJ will not consider cooperation credit if a company does not undertake an investigation sufficient in DOJ's views to learn relevant facts.

In addition to requiring companies to perform investigations for DOJ to obtain cooperation credit, the Yates Memorandum also places additional requirements on line prosecutors to expand civil and criminal enforcement actions against individuals for their role in corporate misconduct.

The significance of the Yates Memorandum for individuals may be amplified by EPA's March 14, 2016, proposed revision to the Risk Management Plan ("RMP") Rules. The proposed revisions would require, in part, that companies conduct root cause analysis assessing how management failures lead to the incident. Under the Yates Memorandum, DOJ would then use those reports to consider criminal and civil actions against management.

The key points of the policy announced in the Yates Memorandum are:

1. Corporations must provide ALL relevant facts regarding involved individuals to be eligible for ANY cooperation credit.

DOJ will not consider cooperation credit in a criminal or civil matter unless the company identifies for the DOJ all individuals involved in or responsible for the misconduct, regardless of their position, status or seniority. DOJ will not provide cooperation credit if a company declines to conduct a sufficient investigation to learn such facts or to provide complete information.

The DOJ also will proactively investigate individuals and compare its own findings to information provided by the company to ensure the company is not minimizing the involvement of any individual and has provided full information.

The Yates Memorandum instructs DOJ attorneys to obtain from a company all information about individuals before corporate liability can be resolved. If the company's continued cooperation with an investigation is necessary after a resolution by the company, DOJ attorneys are instructed that the company's plea or settlement agreement should expressly require the company's continued cooperation.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

DOJ justifies its focus on individuals at the beginning of the investigation, in part, by observing that focusing on employees "can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy." Yates Memorandum p. 4.

3. Criminal and Civil DOJ Attorneys Should Coordinate Efforts From Inception of Investigation.

DOJ is expanding and formalizing the use of parallel proceedings to focus on maximizing individual liability. If DOJ declines to pursue criminal charges, the prosecutors should "report" this to their civil counterparts, so that DOJ Civil can consider whether civil claims are appropriate, and in the reverse, if DOJ Civil concludes that criminal charges are merited, that they "report" this to their criminal counterparts.

4. No corporate resolution will provide protection from liability for any individual absent extraordinary circumstances.

The Yates memo clarifies that corporate resolutions designed to shield individuals from liability will not be effective in the normal case.

5. DOJ Attorneys Must Resolve Corporate and Individual Cases Simultaneously or Delay Corporate Resolution Until There is a Plan for Resolution of Individual Cases.

The expanded requirements for timing and justification of decisions regarding prosecution of individuals increases scrutiny on DOJ line attorney declination decisions and may increase individual prosecutions.

6. DOJ Civil Attorneys Should Focus on Individuals and Consider the Deterrent Effect When Evaluating Whether to Bring Civil Claims.

When considering pursuit of civil actions against culpable individuals, DOJ Civil attorneys must consider a number of factors rather than just ability to pay a civil fine. The factors include the seriousness of the misconduct, the individual's past history, the weight of the evidence, whether pursuing the action reflects an important federal interest, and deterrence.

Consequences of the Yates Memorandum

The changes announced in the Yates Memorandum heighten ethical issues for attorneys including use and documentation of Upjohn (corporate Miranda) warnings and careful consideration of who the client is for representation of the company.

DOJ's application of the Yates Memorandum may also implicate privilege issues. In the past, as outlined in the McNulty Memorandum, DOJ sought, in some circumstances, to force companies to waive applicable privileges to obtain cooperation credit when there was a "legitimate need" for the privileged information. DOJ changed that policy in the face of broad criticism including by the leadership of the Senate Committee on the Judiciary. DOJ policy as expressed in the US Attorney's manual currently prohibits DOJ attorneys from requiring a waiver of applicable privileges for a company to receive cooperation credit. The McNulty Memorandum identified the following as factual material that may or may not be privileged: "witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." McNulty Memorandum p. 9. The Yates Memo approach is likely to create continuing issues with drawing lines between factual material and privileged attorney work product and attorney client communications.

The Yates Memorandum has potentially significant implications for how a company conducts an investigation, the scope of the investigation, the Company's approach to requiring employee cooperation with the investigation, and a determination of when work product from an investigation is privileged.

VIII. Conclusion

With each highly publicized serious incident and the catastrophic effects on some companies deemed responsible, it becomes ever more important, if not an absolute requirement, that companies have adequate plans to address serious incidents. The success of plans, emergency response programs and their successful implementation starts at the top of the corporate ladder with support, vision, planning, empowerment and training of representatives to handle corporate crises.

Management at the highest levels of corporate governance should envision how they would answer the following questions in a post-accident investigation or enforcement action in the wake of a serious incident:

- What did **you** do to prepare your company/department to handle a serious incident?
- How did you make sure they were prepared?
- What documents and policies demonstrate your instructions and guidance in handling this event?
- What protocols did you put in place?
- What did you do to anticipate this type of crisis? What did you do to identify, assess and mitigate potential risks through training?

- What did you do to prepare yourself to play your assigned role as part of the emergency response team?
- How did you ensure that your response action plan worked?
- How did the company expect the emergency response team to function effectively in a crisis if the emergency response team never met or the emergency response plan contained references to team members that were no longer at the company and contained other outdated information?
- Did you report your concerns about the emergency response plan to anyone at the company?

Phillip M. Goodwin, P.G., joined the City of Houston's Legal Department in March 2014 and is an Assistant City Attorney in the Real Estate Section, specializing in environmental law. He addresses regulatory and compliance matters concerning air pollution enforcement, water quality and quantity (drinking water, wastewater, storm water, flooding), soil and groundwater contamination (Brownfields, municipal setting designations), recycling, and sustainability initiatives.

Prior to joining the City, Mr. Goodwin was a litigator at the Texas Commission on Environmental Quality. While at TCEQ he handled more than 250 enforcement cases and provided counsel and regulatory assistance to the Enforcement and Field Operations Divisions. Prior to completing law school in 2008, he worked as an in-house consultant to the Environmental Remediation Division of El Paso Corporation, a major energy company focused on natural gas production and transportation.

Mr. Goodwin graduated from Albion College, B.A., and from South Texas College of Law, J.D., where he was president of its Environmental Law Society. He is a past Chairman of the Environmental Law Section of the Austin Bar Association and is a current Board Member of the Environmental Law Section of the Houston Bar Association. In addition to being an attorney, Mr. Goodwin is also a Geologist licensed by the Texas Board of Professional Geoscientists.

Gary Jonesi is a Senior Counsel in the EPA Headquarters Office of Civil Enforcement. His work focuses on developing favorable legal precedent and in developing national enforcement guidance. He has experience with cases across all major EPA statutory programs and at all levels of administrative and judicial litigation. He has worked on some of the largest and most significant environmental enforcement cases in the nation's history, including recently as the coordinator of EPA's defensive discovery efforts in the Deepwater Horizon Gulf of Mexico oil spill litigation, a case in which he also served as a member of the Department of Justice's Clean Water Act civil penalty trial team.

Gary has served as EPA's national administrative litigation coordinator, national e-discovery coordinator, Chair of EPA's Audit Policy "Quick Response Team" in the late 1990's, and he co-designed and developed the eDisclosure system that EPA launched in December 2015. He has been a RCRA enforcement branch chief, Department of Justice Special Trial Attorney, law school adjunct faculty member, author of environmental enforcement articles, and frequent speaker at internal and external conferences. He is a graduate of the Hofstra University School of Law and the University of Illinois.

Texas Environmental Superconference

Austin, Texas

ENVIRONMENTAL AUDIT POLICY

Penalties, Privilege, and Immunity: What's in it for me?

Gary A. Jonesi
Office of Civil Enforcement
August 5, 2016





Quotes from Another Catcher

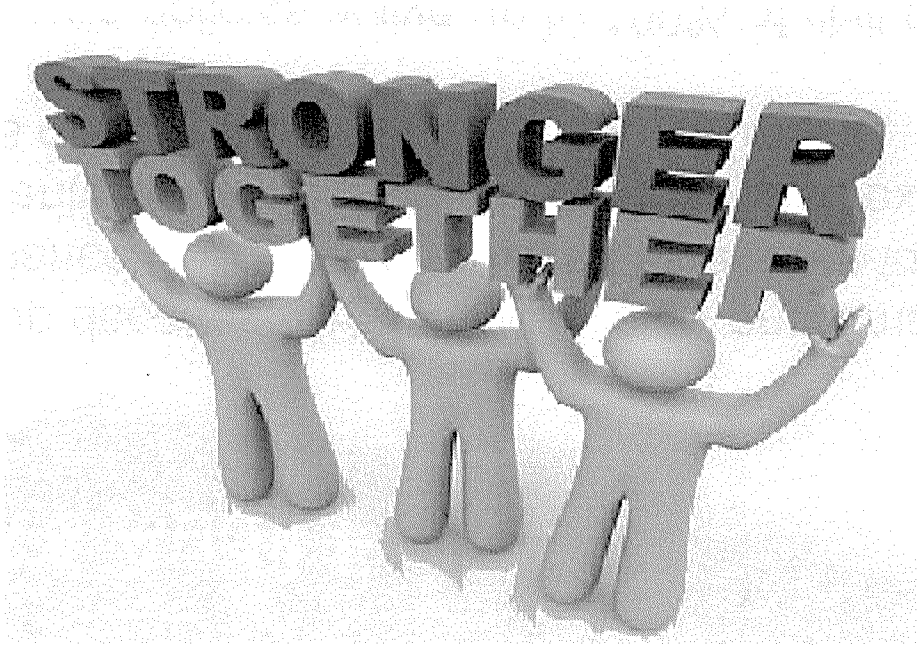


"This is going to hurt me more than you."

Why Have an Audit Policy?

- Some folks might think that EPA has unlimited resources and is behind every corner watching, waiting, and able to enforce every single environmental violation no matter how slight or nonobvious it may be. That is just not true.

- EPA has a very robust enforcement program (*see e.g.,* BP, VW) but the regulated community need to work together if we want to achieve maximum compliance.



What is EPA's Audit Policy?

- For more than two decades, EPA's Audit Policy and Small Business Compliance Policy have provided incentives for regulated entities to voluntarily discover, promptly disclose, and expeditiously correct violations of environmental law.

- These self-disclosure policies waive up to 100% of civil penalties that otherwise might apply if various conditions are met.

- EPA has received thousands of disclosures involving tens of thousands of facilities, and compliance has increased as a result.

. . . if it's going so well, why create eDisclosure?

Why Create eDisclosure?

We were a victim of our own success. So many people disclosed violations that we could not always provide excellent customer service in terms of response times. We could not keep up with the pace of disclosures.

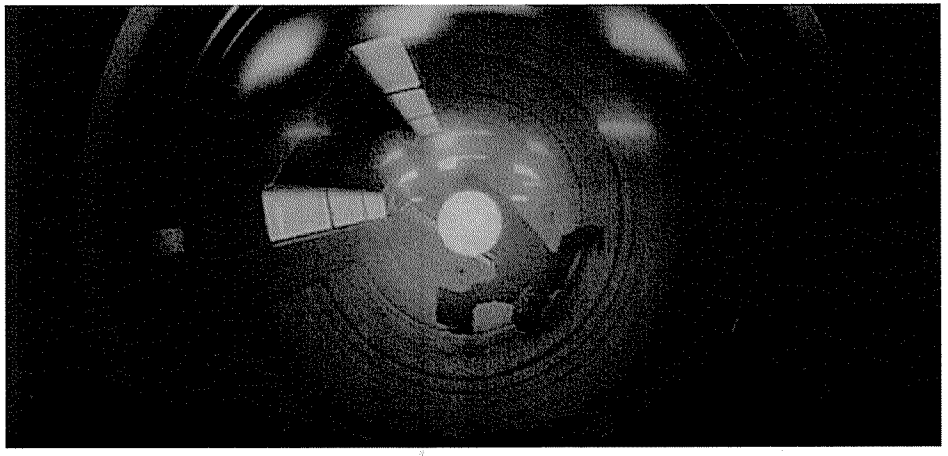


Key Points About eDisclosure

- EPA launched eDisclosure on December 9, 2015, to modernize implementation of its self-disclosure policies.

- eDisclosure is a web-based system for receiving and automatically processing violations disclosed to EPA pursuant to EPA's Audit Policy and Small Business Compliance Policy.

- Upon certification of compliance, it immediately and automatically issues an electronic Notice of Determination (eNOD) to EPCRA disclosers who meet longstanding criteria programmed into the system.



What's In It For Me?

- Such eNODs resolve the discloser's civil penalty liability with no assessment of civil penalties (subject to the completeness and accuracy of the disclosure and certification).

- Other regulated entities can obtain Acknowledgement Letters, which provide a useful record of EPA's receipt of the disclosure of non-EPCRA violations.

- Such letters state that EPA will make a determination as to eligibility for penalty mitigation if and when it considers taking enforcement action for environmental violations.

- eDisclosure provides for limited extensions of time to correct violations, and such extensions are automatically and immediately processed by the system.

More on Extensions

- What if more than 21 days is needed to disclose violations?
- Prior to eDisclosure, EPA often granted more time to disclose violations, usually through audit agreements. EPA is no longer entering into audit agreements outside the New Owner context.
- The automated eDisclosure system does not provide for extensions to the 21-day disclosure deadline. But, EPA has emphasized its longstanding interpretation that the 21-day clock does not begin until the discloser has an objectively reasonable basis for believing that a specific violation may have occurred.
- "Discovery" is not when the discloser has started or stated its intent to audit or otherwise look for violations, but instead when it has found that they likely occurred.

. . . so how is eDisclosure going so far?

Status of eDisclosure



Status of eDisclosure





Success of eDisclosure

- eDisclosure is already producing the benefits that EPA sought when it launched this Next Generation system.

- It is saving the regulated community and EPA significant time and money by automatically processing disclosures immediately upon a violator's certification of compliance, eliminating back-and-forth communications with EPA and sometimes lengthy delays.

- Industry reaction to the portal launch has been largely very favorable. Some in the regulated community would prefer that EPA make more types of violations eligible for eNODs.

- EPA does not foreclose the possibility of future expansions of eDisclosure, but for now the Agency is focused on making sure that this new Next Generation tool for quickly and efficiently resolving violations is working well, and it is.

Statistical Snapshot

- As of mid-July 2016, 340 disclosures have been submitted electronically. EPA is on pace to process approximately 550 disclosures in the first year, an increase of 83% over the average of roughly 300 disclosures annually in recent years.

- 393 eNODs have been issued thus far (some disclosures contain multiple violations and receive multiple eNODs).

- Historically, about 55% of disclosures involve EPCRA violations. Now, ~ 65% of disclosures are for EPCRA violations; the remainder involve violations of TSCA, CAA, CWA, RCRA, and FIFRA.

- The number of eNODs and the number and variety of disclosures shows that implementation of eDisclosure is effective in retaining EPA's longstanding incentives to voluntarily discover, promptly disclose, and expeditiously correct environmental violations.

Convinced Yet?



To Whom Should I Disclose?



To Whom Should I Disclose?



To Whom Should I Disclose?

Questions/Considerations:

- States and EPA communicate with each other
- When does EPA or a state "overfile?"
- Penalty Exposure – federal penalty authorities are often higher than in states, and just went up on August 1, 2016, pursuant to congressional mandate.



Special Deal for New Owners

- As EPA noted in the December 9 *Federal Register* notice launching eDisclosure, EPA has not changed its approach to resolving New Owner disclosures as outlined in the 2008 New Owner Policy.

- The policy is aimed at motivating new owners to audit newly acquired facilities and correct violations, hopefully yielding significant pollutant reductions and benefits to the environment.

- New Owner disclosures are not being resolved through the eDisclosure system, but instead EPA is resolving these manually.

- New owners can use the eDisclosure system to disclose future violations, but doing so will not provide New Owner treatment, *i.e.,* which allows more violations to be eligible for penalty mitigation and can waive some or all economic benefit of noncompliance.

State Audit Programs

- EPA has long opposed state audit and privilege immunity laws that do not reserve the right to bring enforcement action for violations that:
  - threaten human health or the environment;
  - reflect criminal conduct;
  - show repeated noncompliance; or
  - allow entities to gain an economic benefit over law-abiding competitors.
- EPA does support state programs that provide the above protections and is willing to work with states to modernize, automate, or otherwise improve their efforts to encourage auditing, self-disclosure, and compliance.

Contact Information

Gary A. Jonesi, Senior Counsel
Office of Civil Enforcement
U.S. Environmental Protection Agency
Washington, DC
202-564-4002
jonesi.gary@epa.gov

Philip L. Milton, National Audit Policy Coordinator
Office of Civil Enforcement
U.S. Environmental Protection Agency
Washington, DC
202-564-5029
milton.philip@epa.gov

James C. Morriss III
Thompson & Knight LLP

Jim Morriss is Thompson & Knight's Austin Office Leader and the Firm-wide Leader of the Government and Regulatory Practice Group. Mr. Morriss focuses his practice on environmental permitting; compliance counseling; facility siting, including wetlands and endangered species work; and administrative and judicial litigation before local, state, and federal environmental agencies and state and federal courts. He has extensive experience in counseling clients in environmental risk management, including the design and implementation of environmental auditing programs and environmental management systems, and in the investigation and disclosure of environmental liabilities and contingencies. Mr. Morriss also has significant experience in litigation involving the investigation and remedy of complex sites, including the development and presentation of risk based solutions to contamination. His work with clients in establishing programs for the use, reuse, and recovery of solid and hazardous waste and energy conservation has evolved into broader issues of sustainable development.

Mr. Morriss represents clients in a variety of industry and commercial sectors, including steel, metals recycling, organic and inorganic chemicals, petroleum refining, plastics, cement, transportation, and real estate development. A significant portion of his practice involves clients in the rapidly evolving oil and gas industry. Much of this work involves unconventional development employing horizontal drilling and hydraulic fracturing. He represents clients in both the upstream and midstream sectors engaged in off-shore development and on-shore activities in Texas, New Mexico, Oklahoma, Colorado, Wyoming, Montana, North Dakota, Ohio, Pennsylvania, Louisiana, and Arkansas.

Mr. Morriss received his J.D., with honors, from The University of Texas School of Law and his B.S. in Mechanical Engineering, with high honors, from Southern Methodist University. He is a Fellow of The American College of Environmental Lawyers and is actively involved in numerous other professional organizations, including the Austin Bar Association, American Bar Association, and State Bar of Texas. Mr. Morriss has been honored by numerous prestigious legal directories, including *The Best Lawyers in America*® by Woodward/White Inc., *Chambers USA* by Chambers & Partners, *Texas Super Lawyers*® by Thomson Reuters, and *Who's Who Legal*: Texas by Law Business Research Limited.

ENVIRONMENTAL AUDITING POLICY AND PERSPECTIVE:

Penalties, Privilege, and Immunity -
What's in it for me?

James C. Morriss III
Ashley T. K. Phillips
Leslie Reynolds*
Thompson & Knight LLP
98 San Jacinto, Suite 1900
Austin, Texas 78701

State Bar of Texas
28th Annual Texas Environmental Superconference
Austin, Texas
August 5, 2016

*2016 Thompson & Knight LLP Summer Associate

Table of Contents

1. Introduction 1
2. Auditing Myths and Concerns 1
3. History of Audit Programs 2
4. EPA's Auditing Policies 3
5. The Texas Environmental, Health, and Safety Audit Privilege Act 8
6. Perspective 11
7. Continuous Improvement – What next? 14

Environmental Auditing Policy and Perspective:
Penalties, Privilege, and Immunity -
What's in it for me?

1. Introduction

Through both laws and policies, the U. S. Environmental Protection Agency ("EPA") and state environmental agencies offer various incentives to perform environmental audits. While these incentives vary with form and substance, the primary incentive common to both state and federal programs is the reduction or elimination of penalties for violations of environmental laws which are discovered, disclosed, and corrected. State statutory programs may go further with respect to penalty relief providing outright immunity and establishing a self-evaluative privilege protecting the audit report from disclosure or use in litigation. The public policy argument in favor of audit programs is simple: the more one is encouraged to look, the more that can be found and corrected. If improved compliance is a worthy goal, auditing is a worthy tool, as the link between auditing and the goal of increased compliance with environmental laws is indisputable. For the corporation engaged in auditing, the audit is about managing risk by improving compliance while limiting exposure to penalties. There is, however, another benefit to both the public and to the company engaged in auditing—the possibility of a lasting change in a company's commitment to compliance and to continuous improvement in environmental programs.

In the environmental context, an audit is a systematic evaluation of a facility or operation during a defined period of time (a "snapshot in time") to determine compliance with environmental laws or to identify issues that could give rise to compliance problems. Environmental management practices are also frequently reviewed during an audit. The scope of an audit can be comprehensive, assessing multiple environmental media and the corresponding regulatory programs, or targeted to address specific issues or areas of concern involving a single media. For example, compliance with an air permit may be of paramount concern and, thus, the limited subject of an audit.

2. Auditing Myths and Concerns

A review of some common myths and concerns associated with auditing illustrates the value of auditing in managing risk. "What I don't know can't hurt me." This attitude was far more common twenty or thirty years ago than it is today and is truly a myth. In the past, clients first had to be convinced that they were better off knowing that a compliance issue existed. The correct response to this myth is simple: when the problem is discovered, you will be liable for it. Ignorance is not a defense in this area, and in fact, a corporation and/or its personnel can be criminally liable for environmental problems without actually having intended to violate the law.[1] Furthermore, these problems often get far worse with time.

---

[1] *See, e.g.*, 16 U.S.C. § 1540 (relating to criminal violations of the Endangered Species Act), 33 U.S.C. § 1319(c) (relating to criminal penalties under the Federal Water Pollution Control Act), and 42 U.S.C. §§ 7413(c) (relating to criminal penalties under the Clean Air Act) and 9603 (relating to criminal penalties under the Comprehensive Environmental Response, Compensation and Liability Act).

The next common concern related to auditing is, "If I discover something, then I'll have to do something about it, and that will cost big bucks." This could well be true. An audit should only be commissioned if the responsible party is prepared to address the findings through corrective action. To do otherwise is to document noncompliance and then create a record of conscious indifference or even intent to continue violating the law. Both state and federal governments typically have mechanisms for addressing issues requiring longer term solutions. Thus, should an issue identified during an audit require a complex, expensive solution, a company can usually secure the time it considers necessary to address it.

A third common reaction to auditing is, "I'll be worse off if I document it." A variation on this theme is: "If I'm sued, the plaintiffs will use the audit report against me." This concern can be addressed, in part, by how the audit is structured and conducted. The client can work with counsel and the consultant supporting the audit to develop an audit scope tailored to the client's operations and resources so that the company can commit to addressing all of the audit findings. Further, counsel working with the client and the consultant supporting the audit should ensure that the report does not contain unnecessary and inflammatory observations or hyperbole. Keep to the facts and avoid qualitative descriptions like: "It was the worst I've seen." In reality, in today's corporate environment, until a problem is described for decision makers, required corrective actions cannot be approved, budgeted, commenced, and completed.

Further, some state audit programs, such as that created by the Texas Environmental, Health, and Safety Audit Privilege Act ("Texas Audit Act") establish a self-evaluative privilege intended to shield the audit report from disclosure or introduction as evidence in a legal proceeding. The attorney-client privilege may also be employed to address confidentiality concerns with respect to certain communications related to the audit.

3. History of Audit Programs

Auditing is much more commonplace today than it was when environmental laws were new. Between 1970 when the Clean Air Act ("CAA") was passed and 1984 when the significant amendments to the Resource Conservation and Recovery Act were enacted, EPA was busy responding to new statutes and numerous court challenges and developing the basic fabric of environmental law through regulations. Eventually, EPA noted the potential benefits of auditing through a policy pronouncement in 1986.[2] The policy encouraged auditing by creating incentives. While the agency was not yet prepared to say much about what form the encouragement would take, it was a beginning. In this "carrot" approach, EPA indicated that it would be taking the voluntary disclosure of audit findings into account in enforcement. In 1995 the EPA elaborated on what the consequences of self-auditing and self-disclosure would be from an enforcement perspective.[3] EPA's audit policy has not only civil implications, but it also affects the agency's decisions on criminal case referrals. EPA further refined and clarified its audit policy in 2000, establishing what is currently the agency's general self-audit policy.[4]

---

[2] Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (Jul. 9, 1986).

[3] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995).

[4] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

In the mid-1990s there was a wave of legislative and regulatory action at the state level regarding environmental auditing. At that time, between twenty and thirty states adopted either policies or statutes that actually created audit and/or voluntary disclosure programs and associated incentives. For example, Arkansas has a statute and the Oklahoma Department of Environmental Quality has a regulation related to self-disclosures.[5] New Mexico has enforcement policies mirroring the 1995 federal policy related to voluntary disclosure.[6] The various state programs differ, and it is important to understand how a particular jurisdiction handles these self-audits and voluntary disclosures. For example, in Texas, pursuant to the Texas Audit Act, notice of the audit generally must be provided to the appropriate regulatory agency before the audit begins.[7] Other states model their programs after EPA's audit policy, which requires no advance notice of the audit.

4. EPA's Auditing Policies

Three of EPA's policies and pronouncements regarding audits and voluntary disclosures are important to an understanding of the current federal program: "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" ("EPA's Audit Policy," issued in 2000), "Interim Approach to Applying the Audit Policy to New Owners" ("EPA's New Owner Policy," issued in 2008), and "Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentives Policies" ("EPA's eDisclosure Policy," issued in 2015).[8]

a. EPA's Audit Policy

EPA's incentives for auditing are largely based on penalty avoidance. Compliance must still be achieved. EPA's civil penalty policy directs that penalties will consist of two components: a gravity-based component and an economic benefit component.[9] EPA's incentives for auditing include elimination or substantial reduction of the gravity component of civil penalties.[10] The other incentive is a determination not to recommend criminal prosecution of a

---

[5] ARK. CODE ANN. §§ 8-1-301 through 8-1-312 (2013); *see also* ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY, THE ENVIRONMENTAL SELF-DISCLOSURE INCENTIVE POLICY, available at http://www.adeq.state.ar.us/legal/pdfs/env_self_disclosure_incentive_policy.pdf; and OKLA. ADMIN. CODE § 252:4-9-5 (2013).

[6] NEW MEXICO ENVIRONMENT DEPARTMENT, AIR QUALITY BUREAU CIVIL PENALTY POLICY, APPENDIX D (VOLUNTARY ENVIRONMENTAL SELF-EVALUATION POLICY) (2005), available at http://www.nmenv.state.nm.us/aqb/enforce_compliance/Civil%20Penalty%20Policy%2010-20-05%20Version.pdf.

[7] TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(g) (West 2014) (pursuant to § 10(g-1), notice is not required if the audit commenced prior to acquisition of the regulated facility and the audit will not be continued following acquisition).

[8] 65 Fed. Reg. 19,618 (Apr. 11, 2000); 73 Fed. Reg. 44, 991 (Aug. 1, 2008), and 80 Fed. Reg. 76,476 (Dec. 9, 2015).

[9] *See, e.g.*, U.S. ENVIRONMENTAL PROTECTION AGENCY, POLICY ON CIVIL PENALTIES, EPA GENERAL ENFORCEMENT POLICY #GM -21 (1984), available at http://www2.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf.

[10] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,620 (Apr. 11, 2000).

disclosing entity.[11] The agency also has a policy of not routinely requesting copies of audit reports.[12]

EPA's Audit Policy has nine conditions for eligibility.[13] The first condition is systematic discovery, either by audit or compliance management system. However, if all of the other criteria are met, an entity remains eligible for at least a 75% reduction in the gravity-based component of the civil penalty even if the discovery fails to satisfy the first condition.[14] If the entity meets all nine conditions, it is eligible for 100% reduction in the gravity-based component.[15] If an issue is discovered through a compliance management system rather than as part of an audit, EPA may require documentation of that system, including copies of a company's written procedures and processes.[16]

Other conditions include voluntary discovery, prompt disclosure, discovery and disclosure independent of government inspection, correction and remediation, and prevention of recurrence. The violation at issue in the disclosure must not be a repeat violation, have resulted in serious actual harm, have presented an imminent and substantial endangerment, or violate terms of an order or consent agreement. Finally, the agency expects cooperation and prompt and comprehensive responses to its requests for any additional information surrounding the disclosure.[17]

The requirement of voluntary discovery can be confusing at times. To be eligible for the benefit, the compliance issue must be discovered as part of a voluntary self-look–something that is self-initiated and not required as part of either a permit or a consent order, enforcement order or judicial order. The CAA Title V program offers an example of how this criterion is applied. Title V imposes a standard of reasonable inquiry for the semi-annual deviation reports and annual compliance certification required by the program. If one discovers a violation of a Title V permit in the course of such reasonable inquiry, the discovery is typically not considered voluntary because the permit holder has a legal obligation under the Title V program to review the facility's compliance status. An exception may be applied where the violation is discovered prior to submittal of a permit holder's first annual compliance certification as the new owner of the facility.[18]

In conducting an audit, the audit team is often confronted with the question of how prompt is "prompt"? EPA requires that the disclosure be submitted within 21 days of discovery—21 calendar days, not business days.[19] This turn-around time can be extremely tight,

---

[11] *Id.* at 19,620.

[12] *Id.* at 19,620.

[13] *Id.* at 19,621-623.

[14] *Id.* at 19,620-621.

[15] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,620 (Apr. 11, 2000).

[16] *Id.* at 19,621.

[17] *Id.* at 19,621-623.

[18] Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44,991, 44,993 (Aug. 1, 2008).

[19] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,621-622 (Apr. 11, 2000).

particularly when the audit involves a large company and the analysis of findings and potential disclosures might require several levels of review before a disclosure can be made on behalf of the company. Advance planning and notice to those in the review process are helpful in reaching timely decisions on these matters. Prepare the client for the decision on voluntary disclosures and the deadlines imposed by the policy.

What constitutes a discovery? A violation is "discovered" when "any officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred."[20] The standard is what a prudent person would believe, having the same information at hand. Note the inclusion of any employee or agent in this list. The information need not reach a decision maker to constitute a discovery. Further, a discovery could be deemed to have occurred when only the consultant or outside counsel become aware of the violation as both could be deemed agents depending upon the nature of the engagement.

EPA's Audit Policy requires that the violation be corrected within sixty days, or sooner if possible. If the violation cannot be corrected within that sixty days, as is often the case where permitting, significant engineering, and equipment design and construction are involved, EPA requires notification prior to the expiration of that sixty days. The agency views this deadline for notice of an extended schedule as critical to eligibility. If the schedule for corrective action is protracted, EPA expects periodic updates.

b. EPA's New Owner Policy

Of particular importance in the context of a transaction is EPA's New Owner Policy, which specifically encourages new owners to examine facility operations, correct violations, and upgrade deficient equipment and practices following an acquisition.[21] A new owner must not have been responsible for environmental compliance prior to the acquisition, and neither the buyer nor the seller may have had the largest ownership share of the other party. The policy addresses situations where violations are discovered during the due diligence process by a prospective purchaser or by someone who has acquired a facility within the past nine months and the violation originated prior to acquisition. EPA offers enhanced incentives for eligible new owners. For example, a qualifying new owner can avoid both the gravity component the penalty and the economic benefit component of the penalty for the period prior to acquisition. This benefit is obviously of greater importance in either a merger in which the acquiring company would otherwise be liable for penalties arising prior to closing or in an asset deal where a buyer has agreed to indemnify a seller for pre-closing environmental violations.

Findings identified during due diligence prior to closing may be disclosed by a new owner within 45 days after closing without losing eligibility for penalty relief.[22] Further, an owner is considered a new owner for nine months after acquiring a facility or operation.[23] This means that a new owner may discover and disclose violations within the first nine months of ownership and remain eligible under EPA's New Owner Policy. As an alternative, a new owner

---

[20] *Id.* at 19,621.

[21] Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44,991, 44,993 (Aug. 1, 2008).

[22] *Id.* at 45,001.

[23] *Id.* at 44,996.

may enter into an audit agreement with EPA during the nine-month period that establishes the scope of the audit and a timeline for disclosure.[24] If an agreement is reached, the period for the audit, disclosures, and the schedule for corrective measures can be extended beyond the nine months. Note that the recent changes to the implementation of EPA's Audit Policy described below now limit the availability of audit agreements to audits conducted by "new owners."

c. 2015 Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies

i. Background to the 2015 Audit Policy Updates

In 2012, the EPA proposed to suspend the review of disclosures under the Audit Policy beginning in 2013. EPA justified this cost cutting measure by observing that auditing was now common place in regulated industry and that the disclosures being received by the agency were not high priority violations. This rationale was soundly rejected in the reactions by regulated industry. EPA was encouraged to retain the Audit Policy because of its critical role in encouraging compliance. By 2014, EPA's focus had changed from eliminating the Audit Policy to making the process more efficient. This effort led to the agency's announcement in December 2015 of its intention to continue the policy with certain changes in its implementation.

ii. 2015 Updates to EPA Audit Policy

On December 9, 2015, EPA announced an update to its Audit Policy.[25] The update did not modify the substantive provisions of the Audit Policy, but did establish an eDisclosure portal in order to streamline the disclosure process.[26] By doing so, EPA aims to save time and resources of both the agency and regulated entities.[27] The EPA also announced updates to its Small Business Compliance Policy, a voluntary disclosure policy which incentivizes prompt disclosure and correction of violations by businesses of 100 or fewer employees.[28]

iii. Components of EPA's Audit Policy Update

Entities that make voluntary disclosures online through eDisclosure will qualify for treatment either under Category 1 or Category 2. Two types of disclosures fall under Category 1: Emergency Preparedness and Community Right-to-Know Act ("EPCRA") violations which meet all nine Audit Policy conditions, and EPCRA violations that meet all Small Business Compliance Policy conditions.[29] Category 1 explicitly excludes violations of Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") section 103, as well as EPCRA section 304 chemical release-reporting violations and EPCRA violations with significant economic benefits. EPA noted that about half of the disclosures the agency receives involve

---

[24] *Id.* at 44,996-997.

[25] *See* Notice of eDisclosure Portal Launch, 80 Fed. Reg. 236, 76,476 (Dec. 9, 2015).

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *Id.* at 76,477.

EPCRA reporting violations, therefore EPA has significant experience with providing Notices of Decision ("NODs") for such disclosures.[30]

As long as disclosure is complete and accurate, the eDisclosure system will automatically issue an electronic Notice of Determination (eNOD) for Category 1 disclosures, confirming that the violations are resolved and that no civil penalties will be assessed.[31] These disclosures will be spot-checked by EPA.[32]

All other disclosures fall under Category 2.[33] For Category 2 disclosures, the eDisclosure system will automatically issue an electronic acknowledgement letter confirming that EPA has received the disclosure. EPA will determine whether the entity is eligible for Audit Policy penalty mitigation if and when it considers taking enforcement action against the entity. EPA will screen Category 2 disclosures for concerns such as potential imminent hazards and criminal conduct.

iv. eDisclosure Process

Parties seeking to disclose a potential violation must follow a three-step process. First, the party must register to file with the centralized web-based portal. Second, the party must submit a disclosure within 21 calendar days of discovery of the violation. The eDisclosure submittal should contain only sanitized information, no Confidential Business Information ("CBI"). Any follow-up CBI required to be submitted must be done so manually, outside of the eDisclosure submittal system. Finally, the party must certify compliance by submitting a compliance certification within 60 days of submitting the disclosure, or within 90 days of submitting a disclosure under EPA's Small Business Compliance Policy.[34]

v. Deadline Extensions

Under the original Audit Policy and Small Business Compliance Policy, EPA requires violations to be corrected within 60 or 90 days, respectively, from the date the violations are discovered.[35] The eDisclosure system includes an automated process for handling requests for extension of these deadlines. Note that Category 1 disclosures are not eligible for such extensions. For Category 2 disclosures, EPA will grant an automatic 30-day extension beyond the 60-day period. Further, entities that make Category 2 disclosures can request up to 180 days if justification is provided.[36] Category 2 violations disclosed under the Small Business Compliance policy may get up to 180 days for correction with no explanation provided, and up to 360 days if justification is provided and pollution prevention measures are required.[37]

---

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *See id.*
[34] *See Id.*
[35] *Id.* at 76,477-478.
[36] *Id.*
[37] *See id.*

vi. Freedom of Information Act (FOIA) Requests

EPA is eliminating the presumption in favor of withholding unresolved disclosures and replacing it with a presumption in favor of disclosure.[38] In response to FOIA requests for unresolved disclosures, EPA will "determine on a case-by-case basis whether it reasonably foresees that release would harm an interest protected by a FOIA exemption." EPA generally expects to make Category 1 and Category 2 disclosures publicly available shortly after their receipt.

5. The Texas Environmental, Health, and Safety Audit Privilege Act

The Texas Audit Act has been in place since 1995.[39] Agencies, industry, and the environmental community agree that it has been an excellent compliance tool. It has fundamentally changed the approach to identifying compliance issues and correcting them. Based upon the scope of their jurisdiction over environmental, health, and safety matters, the primary agencies involved in overseeing audits conducted pursuant to the Texas Audit Act include the Texas Commission on Environmental Quality ("TCEQ"), the Railroad Commission of Texas, the Texas Water Development Board, and the Texas Department of State Health Services. The Texas Audit Act also applies to any other agency in Texas that may have jurisdiction over environmental, health, or safety issues.

Under the Texas Audit Act, a limited privilege has been established.[40] This means that an audit report and other materials related to conducting an audit, including interviews with employees, field notes, photographs, other communications, draft findings, and draft reports are not admissible in civil or administrative proceedings in Texas. The Texas Audit Act also grants immunity from penalties to eligible participants for violations disclosed as a result of the audit and allows a participant to establish a timeline for correcting the violations discovered in the audit.

a. Time Frame under the Texas Audit Act

Audits conducted pursuant to the Texas Audit Act must be completed within six months, unless more time is requested in writing by the owner/operator and granted by the agency.[41] Extensions are not guaranteed. A request for an extension should be submitted well before the end of the audit period so the agency has time to respond before the expiration of the initial audit period. If there is a gap in coverage, the party seeking the extension must suspend the audit

---

[38] *Id.* at 76,480.

[39] Texas Environmental, Health, and Safety Audit Privilege Act, 74th Leg., R.S., ch. 219, §§ 1-13, 1995 Tex. Gen. Laws 1963-1969.

[40] TEX. REV. CIV. STAT. ANN. art. 4447cc, § 5 (West 2014).

[41] *Id.* § 4(e).

during that period. This can be very resource-intensive, not to mention inconvenient. Corrective action must be completed within a "reasonable time," which the TCEQ has interpreted to be within six months after the date of disclosure, but extended schedules can be arranged when justified by the nature and complexity of the corrective action.

b. Eligibility for Immunity

A company is generally eligible for the benefit of immunity from civil and administrative penalties under the Texas Audit Act if the company conducts a qualifying audit, makes a disclosure considered to be voluntary, follows the process for disclosure, commits to correct the issues, and diligently completes the necessary corrective measures.[42] As with EPA's audit policy, Texas is required to apply the voluntariness standard in its own state audit program. In doing so, Texas has acknowledged that the scope of an environmental audit can go beyond what is required by the "reasonable inquiry" standard under Title V of the CAA.[43] However, the burden is on the party making the disclosure to demonstrate that the audit exceeded that standard.

Advance notice of the audit to the relevant agency is also generally required for eligibility.[44] The notice must describe the scope of the audit and when it will commence. The notice should identify the site name and geographic location.[45] The written disclosure of the violations must be submitted by certified mail and include the anticipated date by which all corrective action will be completed. Regular updates to the relevant regulatory agency can also be expected until the corrective action associated with the audit is completed. The notice of completion of corrective action should be in writing.

c. Scope of Immunity

The immunity from civil and administrative penalties afforded by the Texas Audit Act does not affect an agency's ability to seek injunctive relief. Similar to EPA's audit policy, a party must meet certain criteria to be eligible.[46] TCEQ describes the eligibility criteria using the mnemonic device: PINNACLE.[47]

---

[42] *Id.* § 10.

[43] TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, TCEQ FIELD OPERATIONS GUIDANCE 2012: TITLE V DEVIATION REPORTING AND COMPLIANCE CERTIFICATION, 18-19 (2012), available at http://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/Title_V_Guidance_2012_November.pdf.

[44] TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(g) (West 2014).

[45] LITIGATION DIVISION, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, A GUIDE TO THE TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT (RG-173) (2013), available at http://www.tceq.texas.gov/publications/rg/rg-173.html.

[46] TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10 (West 2014).

[47] **P**–the disclosure was made *promptly* after the violation was discovered;
I –the disclosure was made *in writing by certified mail* to the TCEQ;
N—the violation was *not independently detected,* or an investigation of the violation was not initiated, before the disclosure was made in writing by certified mail;
N–the violation was *noted and disclosed as a result* of a voluntary environmental audit;
A–*appropriate efforts to correct* the noncompliance are initiated, pursued, and completed within a reasonable amount of time;
C–the disclosing person *cooperates in the investigation* of the issues identified in the disclosure;

A party making a disclosure must complete corrective actions necessary to address the violation. Immunity is also not available for violations that are intentionally or knowingly committed. There is no immunity from criminal violations. Immunity will not be afforded if the violation resulted in a substantial economic benefit providing the violator an unfair advantage over business competitors. The statute does contain a provision offering mitigating factors, such as how long an owner has owned the facility, to be considered by the agency in the event that a company does not meet all of the criteria for immunity.[48]

d. 2013 Amendments to the Texas Audit Act: SB 1300

As discussed above, EPA's New Owner Policy was designed to encourage participation in the voluntary self-policing and disclosure process both by buyers who find compliance problems during due diligence and then become owners and by new owners as they commence their operation of facilities. In Texas, audits and the associated protections are defined by statute, rather than policy. Texas law is prescriptive and, until September 1, 2013, did not afford immunity to a prospective purchaser who discovered a violation during due diligence, became the owner, and wished to address the issue after closing. New owners were not able to plug themselves into the protections of the Texas statute in the same manner allowed by EPA's New Owner Policy due to the requirements, such as prior notice of the audit, prescribed by the Texas statute.

In 2013, the Texas Audit Act was amended. In a manner consistent with EPA's 2008 New Owner Policy, SB 1300 accomplished three primary objectives. First, due diligence conducted prior to acquisition is now recognized under the Texas Audit Act as an audit.[49]

Second, the amendments eliminated the need for the notice of audit to be given in advance of that diligence in order to qualify for immunity.[50] This makes sense as sellers are naturally reluctant to allow the buyer to give notice to the agency that a comprehensive audit or any level of audit is being conducted before the buyer is actually the owner.

Finally, new owners may now obtain immunity for discoveries made during diligence and then disclosed within 45 days after closing.[51] This is consistent with EPA's New Owner Policy with respect to such discoveries and disclosures. By giving notice within 45 days after closing, a new owner can also enter the audit program and continue an audit that actually began as due diligence but that would benefit from a more in-depth evaluation that only an owner (as opposed to a prospective purchaser) with full access to the facility and relevant compliance records can obtain. The audit can then continue for up to six months from the closing date.[52]

There are numerous areas where EPA jurisdiction overlaps with state agency jurisdiction. Air and water permitting and waste management are examples. These overlaps create situations in which one must consider disclosing both to EPA and to the state. SB 1300 eliminated at least one aspect of that conundrum in Texas where the federal new owner policy afforded greater

---

L–the violation *lacks injury or imminent and substantial risk of injury*; and

E–the disclosure is not required by an *enforcement order or decree*.

A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act, revised November 2013.

[48] *Id.* § 10(e).

[49] *Id.* § 3(a)(4).

[50] *Id.* § 10(g).

[51] *Id.* § 10(b)(1)(B).

[52] TEX. REV. CIV. STAT. ANN. art. 4447cc, § (4)(e)(2) (West 2014).

protection than the state program. The legislation allows the state to approach the issue in a manner consistent with EPA's approach. The amendments also eliminated the situation in which the best opportunity to disclose and fix a problem is rejected due to a perceived risk of enforcement by the state.

6. Perspective

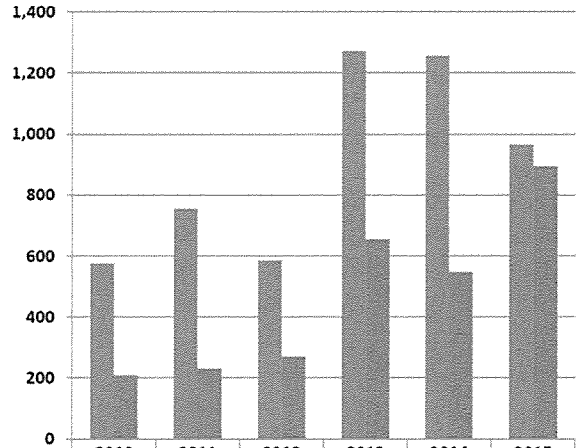
Offered below are some perspectives on various issues associated with auditing in the context of a comparison of how those issues are addressed by EPA under the agency's current Audit Policy and how they are addressed by TCEQ, the Texas agency with the most robust auditing program under the Texas Audit Act.

a. The Win-Win Equation

Environmental regulatory agencies, whether state or federal, are charged with enforcing environmental laws. The goal of enforcement is to ensure compliance. The scope of this responsibility has grown exponentially through the years with the scope and complexity of regulations, the addition of entirely new programs, and industrial growth. The primary benefit of an effective audit program from the agency's perspective and thus from the public perspective is substantially improved compliance achieved with limited use of enforcement resources. If more companies can be encouraged to look for violations and take corrective action, the compliance program of the agency is more effective. An audit program can be an extremely effective compliance tool if it incentivizes self-evaluation and assures that corrective measures are identified to the agency, progress toward implementation is tracked by the agency, and completion of corrective action is approved and documented by the agency. Texas has such a program.

The growth of the audit program in Texas over the past few years demonstrates the success of the program.

Summary of Texas Environmental Health and Safety Audit Privilege Act Statistics[53]



	2010	2011	2012	2013	2014	2015
Notices of Intent to Audit	576	756	586	1,271	1,256	966
Disclosures of Violation	209	231	270	655	548	895

53

For example, the rapid increase in participation in TCEQ's audit program in 2013 and 2014, evidenced by the number of audits commenced and the number of disclosures of violations submitted, reflects the acceptance of auditing by a rapidly growing industrial sector subject to a growing list of environmental requirements–upstream oil and gas operations. This trend continues into 2016. Between September 1, 2015 and July 15, 2016, a period of less than a year, the TCEQ received 2,608 Notices of Audit and 753 Disclosures of Violation ("DOV"). What is not reflected by these numbers is the significant number of individual violations identified and corrected through this process. A single DOV for a facility may list more than one violation at that facility. The TCEQ ensures that these violations are corrected.

Companies engage in auditing to manage risk by finding and addressing problems to achieve compliance. Some companies engaged in auditing see a benefit beyond the immediate objective. The process of reviewing existing practices, communicating with an agency about solutions, and working through issues in a more transparent fashion often transforms the company's approach to environmental issues. The audit serves to educate management and line or field employees about regulatory requirements.[54] Often in the course of the audit or the corrective action, companies establish procedures for evaluating compliance on an ongoing basis and for communicating with agency staff regarding regulatory issues in the future. A company's culture may evolve and, with that, may come a changed attitude toward compliance that values both "getting it right" and continuous improvement. These changes are fundamental to compliance and afford a significant additional benefit to the company, the agency, and the public.

---

[53] TCEQ Annual Enforcement Report, Fiscal Year 2015.

[54] One client even identified an audit as an "educational review" in order to avoid concerns on the part of employees that they were being criticized or graded on existing practices and to emphasize the company's objective of improving systems and procedures going forward.

The regulatory agency that accepts voluntary disclosures and works with a company to ensure appropriate corrective measures are taken gains an enhanced understanding of the particular facility and, more broadly, the industry sector. The agency may receive information through the disclosure process–a process intended to be proactive and cooperative–that can help shape its regulations and compliance and enforcement policies in the future.

b. Statutory Immunity vs. Enforcement Discretion

While the eligibility criteria under the Texas Audit Act and the EPA Audit Policy are essentially the same, the mechanism of relief is significantly different. The Texas Audit Act grants statutory immunity from civil penalties for violations disclosed through an eligible audit finding. In contrast, the EPA Audit Policy is just that–a policy of enforcement discretion. While TCEQ is responsible for administering the programs, the immunity comes from the statute, not from an exercise of discretion. This difference is magnified by the recent changes in EPA's approach to audit disclosures. When all corrective measures have been completed and reported to the agency, TCEQ acknowledges eligibility and confirms the statutory relief advising that no further action will be taken. Under the new guidelines for implementation, EPA does not intend to respond unless and until it considers enforcement associated with the disclosure. This lack of a path to closure creates significant uncertainty for a company considering the use of the federal program. A common question from management, from both officers and board members, is when will we know we are done and when will we know what penalty, if any, we must pay. The state's approach addresses this issue with a predictable process. EPA's program does not.

c. Economic Benefit vs. Competitive Advantage

Another significant difference between the programs is the scope of penalty abatement. EPA's policy provides relief from the gravity component of a penalty but not the "economic benefit." The Texas Audit Act authorizes the assessment of a penalty if the violation "has resulted in a substantial economic benefit which gives the violator a clear advantage over its business competitors."[55] Given the difficulty of making this showing, the exception from immunity is seldom an issue in disclosures to TCEQ. While EPA notes that the maintenance of a level playing field for competitors justifies recovering economic benefit, a review of whether such an advantage actually existed is not part of the economic benefit calculation. Of course, unless competitors are also engaged in auditing, finding violations, fixing problems and expending the funds to do so there may be little or no actual competitive advantage to the company conducting an audit. Is the threat of collecting economic benefit worth the chilling effect such penalties may have on auditing?

d. Timing for Disclosures and Corrective Action

[55] Texas Audit Act § 10(d)(5) (emphasis added).

The time allowed for both making disclosures and correcting violations is another significant distinction between the two programs. While the Texas Audit Act generally requires advance notice of the audit, participants have six months to complete the audit. TCEQ allows additional time to make disclosures and complete corrective actions. The TCEQ requires regular status reports after disclosures are made. This allows an audit to proceed without the need for multiple intermediate disclosures driven by EPA's 21-day clock or the initial 60-day deadline for completion of corrective action. While in the past, companies could propose audit agreements to EPA to establish a more reliable schedule, such agreements will now be limited to new owner audits.

e. Privilege

The Texas Audit Act creates a statutory self-evaluative privilege applicable to the audit report and materials generated in connection with the audit. While EPA opposes the establishment of such privileges in state law, the agency assures companies conducting audits that it will not "routinely" request audit reports. What does this mean? EPA clearly has reserved the option of seeking the report and, absent attorney-client privilege, they can probably obtain it. Before audit privilege legislation, a limited number of states recognized a self-evaluative privilege. The policy argument for such a privilege either in statute or in common law is the same. Companies should be encouraged to conduct critical reviews of their operations. Absent documentation of the findings, it is difficult to address problems. Just as immunity or forbearance on penalties is a necessary incentive, such a privilege is necessary to encourage companies to take the risk of documenting violations in order to manage the risk by correcting them. What purpose is served by reserving the right to obtain the audit report on a nonroutine basis? The underlying facts are not privileged in any event and can be fully explored through information requests, inspections, and discovery.

7. Continuous Improvement – What should come next?

The suggestion to modify EPA's Audit Policy to more closely track the Texas Audit Act might seem the obvious recommendation. However, significant revision of such a long-standing policy is impractical. Further, by virtue of their delegated authority and primary responsibility for most environmental programs, states are in the best position to encourage self-auditing and voluntary disclosures.

Our environmental laws are a product of our federalist system of dual sovereigns. Both have authority to adopt and enforce laws. By statutory mandate or enlightened policy, the EPA and state environmental agencies have found ways to work together (sometimes better than others). Often the goal is singular administration and efficient use of agency resources. There are memoranda of understanding ("MOUs") defining how the agencies will respect and even defer to the actions of the other in enforcement, voluntary cleanup, and Superfund programs. If compliance is a common goal and a state audit program is effective in achieving that goal for both state and delegated federal programs, why not encourage that success by deferral and "delegation" in the audit arena as well? Why not encourage the growth of effective state programs? This could be accomplished by expanding the EPA's Audit Policy to recognize state counterparts in conjunction with MOUs on collaborative enforcement. EPA could acknowledge

the success of the state programs and leverage its federal oversight authority by encouraging the broader use of such programs.

Such an approach would recognize audit programs at the state level as what they are—an effective and valuable enforcement tool which encourages compliance and that can be transformative in a company's approach to environmental management. Substantially more can be achieved through a well funded and responsive audit program than hit or miss inspections. As a consequence, there will be far more "inspectors" in the field finding and fixing issues than any agency, state or federal, can ever deploy. Compliance is the goal. The more individuals and companies involved in the evaluating and educating that occurs in an audit, the closer we come to achieving that goal. Surely, both state and federal agencies should agree to support that goal.

Shaun G. Clarke

Shaun Clarke practices environmental and white collar criminal defense in Texas and Louisiana as a partner in the law firm of Smyser, Kaplan & Veselka LLP. He has tried cases to verdict in areas ranging from corporate taxation to civil rights, from personal injury to complex criminal frauds. Shaun was lead trial counsel in the defense of BP rig supervisor Bob Kaluza who was charged with manslaughter and environmental crimes as a result of the *Deepwater Horizon* oil spill. Shaun teamed at trial with David Gerger and Dane Ball to obtain dismissal of many charges and a Not Guilty verdict for Mr. Kaluza from a New Orleans jury in February, 2016. Described by Chambers USA as a "master in handling government investigations on behalf of a nationwide clientele," Shaun has also been earned accolades from The Best Lawyers in America and other publications. Before entering private practice Shaun served as an Assistant United States Attorney in New Orleans. He is a graduate of Yale Law School where he was an Editor of *The Yale Law* Journal. Upon graduation he served as a law clerk to U.S. District Judge D. Lowell Jensen of the Northern District of California.

David Gerger

David is managing partner of Quinn Emanuel's Houston office and known nationally for handling investigations, trials, and appeals against the government. *Best Lawyers* named him *Best White Collar Lawyer in Houston* for 2015-2016. He is a member of the *American College of Trial Lawyers* and the *American Board of Criminal Lawyers*.

While the biggest victory is to stop a case from being brought, David is also known for his courtroom victories. Between 2012-2016, David and Shaun Clarke led the defense of Robert Kaluza – the BP engineer charged with manslaughter and pollution in the Deepwater Horizon oil spill. They won dismissal before trial of 22 felony counts and then acquittal of the sole remaining count which was tried before a jury in New Orleans. Other court victories include securities fraud, antitrust, commodities manipulation, immigration, mortgage fraud, money laundering, trade sanctions, government contracting, and others cases. Before starting the Houston office of Quinn Emanuel, David clerked for two federal judges; was a federal public defender; and had his own firm for many years. He graduated Yale College and the University of Texas Law School, where he was an Editor of the *Texas Law Review*.

Criminal Environmental Enforcement

Texas State Bar Environmental Super Conference

Austin, TX

August 5, 2016

Shaun Clarke
Smyser, Kaplan & Veselka, LLP
Louisiana Street, Suite 2300
Houston, TX 77005
713-221-2327
sclarke@skv.com

David Gerger
Quinn Emanuel Urquhart & Sullivan, LLP
711 Louisiana Street, Suite 500
Houston, TX 77005
713-221-7007
davidgerger@quinnemanuel.com

TABLE OF CONTENTS

INTRODUCTION 1

I. THE DEVELOPMENT OF CRIMINAL SANCTIONS FOR BUSINESS CRIMES 3

A. Federal Criminal Statutes 6

1. The Clean Water Act 7

2. Resource Conservation and Recovery Act 8

3. Comprehensive Environmental Response, Compensation and Liability Act 9

4. Rivers and Harbors Act of 1899 10

5. The Clean Air Act 10

6. Other Environmental Criminal Statutes 11

B. State Criminal Statutes 12

II. CRIMINAL SANCTIONS UNDER OTHER FEDERAL STATUTES 13

A. Outer Continental Shelf Lands Act 13

B. Federal Oil and Gas Royalty Management Act 14

C. False Statements To A Federal Agency 15

D. Other Title 18 Offenses 15

E. False Claims: Civil and Criminal Liability 16

F. Occupational Health and Safety Act 17

G. The Foreign Corrupt Practices Act 18

III. THE FEDERAL PROSECUTOR'S PERSPECTIVE: FACTORS IN THE DECISION TO PROSECUTE 18

A. Department of Justice Policy 18

B. Environmental Prosecution Policy 20

1. Voluntary Disclosure 20
2. Cooperation 21
3. Preventive Measures and Compliance Programs 21
4. Additional Factors 22
C. Charging the Corporation: The Evolving Directive of the Deputy Attorney General 22
1. General Principles 22
2. Courts Tend to View an Agent's Actions Expansively 23
3. Factors For Prosecutors to Consider in Deciding Whether to Charge a Corporation 23
IV. STATUS AND SCIENTER 28
A. Who is at Risk? 29
B. The Responsible Corporate Officer Doctrine 30
C. RCRA Felony Prosecutions: What Constitutes a "Knowing" Violation? 37
D. *United States v. Hanousek*: The Elusive Definition of Negligence 42
V. PROTECTIVE MEASURES FOR MINIMIZING CORPORATE LIABILITY: COMPLIANCE PROGRAMS 43
A. The Federal Sentencing Guidelines: Establishing an "Effective" Compliance Program 43
B. Elements of the "Effective" Program 44
C. Conclusion 48
VI. A DEFENSE PERSPECTIVE ON SEARCH WARRANT PREPARATION 48
A. Possible Scenario 49
B. Criminal Investigative Process 49
C. Preparing for a Search Warrant 51
D. The Checklist: What To Do When The Agents Arrive 53

1. Contact Liaison Management and Counsel 53
2. Review the Search Warrant 54
3. Identify the Agents 54
4. Advise Employees of Their Legal Rights 54
5. Request to Observe the Search 55
6. Identify Privileged Information 55
7. Obtain a Search Inventory 56
8. Request Copies of All Documents 56
9. Conduct Post-Search Interviews 56
10. Document the Search 57

VIII. CONCLUSION 57

INTRODUCTION

"Put your hands in the air where we can see them. Now!"

Twenty or thirty federal agents have arrived arrive at your plant to execute a search warrant. After requiring everyone to vacate their offices, the agents search file cabinets, desk drawers, storage closets, computer files, and every other place imaginable. The agents also interview employees at length and collect samples from tanks, laboratories, and discharge points. Two days later, they exit the premises with thousands of seized documents.

In the months that follow, your company receives numerous grand jury subpoenas. Directors, officers, and corporate attorneys begin to engage in lengthy discussions with prosecutors about cooperating with the investigation. The prosecutors "test" the company's willingness to cooperate by requesting waivers of privileged information, and the company complies. Nevertheless, the government declines to consider a civil resolution and decides instead to to indict the company and/or its executives. The discussions now revolve around repeated requests for guilty pleas to environmental or other statutes that carry severe criminal fines and possible incarceration. In the end, your company avoids prosecution, but several officers are convicted and sentenced to years in prison.

Nightmare or reality? The foregoing scenario has played out at legitimate businessess again and again. And individuals as well as companies are at risk. Following the *Deepwater* horizon tragedy, four individual BP employees were indicted on 50 separate felony charges. Ultimately, two were found Not Guilty at trials, and the other two each pled guilty to a single minor misdemeanor. But all of them had their lives and careers upended for over half a decade. And early in 2016 the U.S. Department of Justice issued a policy memorandum that requires prosecutors to emphasize indicting individuals in business crime cases. Increasingly, the

government has sought criminal sanctions for commercial activities that were previously regulated through civil or administrative action. This trend is particularly significant in environmentally regulated industries, where a large number of federal criminal statutes can be applied to daily business activity.

Criminal charges may be brought for failing to comply with regulatory obligations, reporting inaccurate information, and impeding or obstructing government investigations. In many cases, organizations are not aware of pending criminal investigations until a search warrant is executed. It is, therefore, important for businesses entities to implement policies and procedures that severely limit, or prevent, the possibility of criminal activity within the organization and to establish an action plan that limits adverse exposure should such activity occur.

To establish effective preventive and mitigating policies, it is important for corporate entities to understand the evolution of environmental and other criminal laws and the impact the criminal statutes have on businesses. This paper fosters such an understanding, as it discusses various criminal law issues that impact businesses. The paper focuses particularly on the evolution of environmental criminal law and recent developments in the areas of environmental law and government reporting. Yet the principles discussed in the environmental context apply with equal force to other areas of intense regulation. This paper further discusses the prosecutorial process and suggests preventative policies, as well as mitigating actions, that can be taken in the event that an organization becomes the target of a criminal investigation. Finally, it outlines a Search Warrant Response Plan for regulated businesses.

I. THE DEVELOPMENT OF CRIMINAL SANCTIONS FOR BUSINESS CRIMES

The impetus for the increased use of criminal sanctions in the business context began with passage of the Inspectors General Act of 1978 and continued with the fallout from the Wall Street excesses and savings and loan failures of the 1980s.

Prior to 1970, only one federal environmental statute, the Rivers and Harbors Act of 1899, provided criminal sanctions for violations.[1] The Rivers and Harbors Act criminalized the discharge of any refuse matter into a navigable water of the United States without a permit.[2] The statute was used sparingly prior to the 1960s; however, following *United States v. Republic Steel Corp.*[3] and *United States v. Standard Oil Co.*,[4] the government employed its provisions with ever increasing frequency to prosecute dischargers of industrial waste.

The increased use of the Rivers and Harbors Act arguably led directly to the birth of the Environmental Protection Agency ("EPA"), which Congress created in 1970. The EPA's formation marked the first time the majority of federal personnel responsible for environmental protection programs was consolidated into one agency. Then, in 1970 and in 1972, respectively,

---

1 33 U.S.C. §§ 407, 411.

2 *Id.*

3 362 U.S. 482 (1960).

4 384 U.S. 224 (1966).

Congress passed the Clean Air Act Amendments[5] and the Clean Water Act,[6] both of which contain criminal enforcement provisions.[7]

Despite the increased initiative to pursue criminal charges in environmental cases, such prosecutions in the 1970s were unusual, and only twenty-five cases were prosecuted.[8] In the 1980s, the criminal initiative gained momentum. On January 5, 1981, the EPA opened an Office of Criminal Enforcement and directed each of its regional offices to hire between one and three investigators.[9] By the spring of 1982, however, only six criminal investigators were on staff at the EPA, and the Department of Justice ("DOJ") continued to decline the majority of cases that were referred to it for prosecution.[10] The EPA subsequently hired sixteen additional criminal investigators, all of whom reported to EPA Regional Offices on October 4, 1982, a date that is often considered the commencement of the federal criminal environmental enforcement

---

5 42 U.S.C. § 7401 *et seq.*

6 33 U.S.C. § 1251 *et seq.*

7 *See* 42 U.S.C. § 7413(c); 33 U.S.C. § 1319(c). In *Tennessee Valley Authority v. Whitman*, however, the Eleventh Circuit concluded that parts of Section 7413, including Section (c), are unconstitutional. 336 F.3d 1236, 1258-60 (11th Cir. 2003). The court reasoned that these unconstitutional parts violated the Due Process Clause of the Fifth Amendment because violation of an administrative compliance order can trigger penalties, including imprisonment, and the determination of a violation is made on the basis of any information available to the Administrator – rather than after a full blown adjudication. *Id.*

8 Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251, 251 (1993).

9 Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. L. 1315, 1320 (1992).

10 *Id.* at 1321.

program.[11] Shortly thereafter, the DOJ established the Environmental Crimes Section and initially assigned four full-time prosecutors to handle environmental criminal cases.[12]

On November 16, 1990, Congress passed the Pollution Prosecution Act of 1990.[13] Since then, the federal criminal enforcement effort has increased substantially, if not exponentially. Currently, there are well over 100 full-time EPA Criminal Investigation Division Special Agents. In 2005, over 300 defendants were charged with environmental crimes, compared to just ninety-five in 1990 and fourteen in 1982.[14] The length of incarceration imposed for environmental crimes totaled 186 years in 2005, as opposed to just thirty years in 1989.[15] Theset trends have continued in the last decade.

The government's initiative to increase staffing and to focus on deterring harmful environmental acts is directly related to the trend in the aforementioned statistics. And, as discussed below, these government initiatives have also led to the inclusion of criminal enforcement provisions in many federal environmental statutes. The *Deepwater Horizon* led to the largest environmental criminal investigation in U.S. history.

---

11 *Id.* at 1322-23. Initially, the EPA investigators did not possess full law enforcement authority, and only on November 1, 1988, did Congress grant them such powers. *See* 18 U.S.C. § 3063. As of 1990, there were still only forty-seven EPA criminal investigative agents nationwide. Brunner, *supra* note 9, at 1324. Today they number in excess of 250

12 *Id.* at 1323. This unit was initially known as the Land and Natural Resources Division. *Id.*

13 42 U.S.C. § 4321 *et seq.*

14 *Compare* U.S. Envtl. Prot. Agency, Compliance and Enforcement Annual Results, Numbers at a Glance, Fiscal Year 2005, *with* U.S. Envtl. Prot. Agency, Enforcement Accomplishments Report: FY 1989.

15 *Id.*

A. Federal Criminal Statutes

Virtually all federal environmental statutes now contain their own criminal enforcement provisions. The statutes most commonly charged are the Clean Water Act,[16] the Resource Conservation and Recovery Act,[17] the Comprehensive Environmental Compensation Response and Liability Act,[18] and, more recently, the Clean Air Act.[19] Criminal sanctions are also available under the Rivers and Harbors Act of 1899,[20] the Toxic Substances Control Act,[21] the Federal Insecticide, Fungicide, and Rodenticide Act,[22] and the Safe Drinking Water Act.[23] Creative prosecutors have also brought environmental criminal charges against organizations and individuals pursuant to the Migratory Bird Treaty Act[24] and the federal false statements statute.[25]

As a general proposition, criminal exposure exists for "knowing" or "willful" violations. There are several caveats, however: (1) some statutes, most notably the Clean Water Act, create misdemeanor criminal liability for negligent violations, which violations have recently been

---

16 33 U.S.C. § 1251 *et seq.*

17 42 U.S.C. § 6901 *et seq.*

18 42 U.S.C. § 9601 *et seq.*

19 42 U.S.C. § 7413 *et seq.*; *but see* case cited *supra* note 7.

20 33 U.S.C. § 401 *et seq.*

21 15 U.S.C. § 2601 *et seq.*

22 7 U.S.C. § 136 *et seq.*

23 42 U.S.C. § 300 *et seq.*

24 16 U.S.C. § 703 *et seq.*

25 18 U.S.C. § 1001.

defined as requiring a showing of only "simple negligence;"[26] (2) courts have adopted differing, and in some respects, conflicting interpretations of the knowledge and intent requirements of the felony environmental statutes; and (3) a few statutes impose strict liability for misdemeanor violations.

1. The Clean Water Act

The Federal Water Pollution and Control Act, more commonly known as the Clean Water Act (the "CWA"), contains criminal provisions at 33 U.S.C. §§ 1311(a), 1317(d), 1319(c), and 1321(b). The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by minimizing the effects of water pollution.[27] Criminal penalties may be assessed against any person who fails to comply with the statutory requirements of the CWA.

The CWA establishes three levels of criminal liability: negligent violations, knowing violations, and knowing endangerment of others. A negligent violation is a misdemeanor punishable by up to one year of imprisonment and a fine of $25,000 for each day of violation.[28] A knowing violation of the statute may be penalized by up to three years of imprisonment and a fine of $50,000 per day of violation.[29] Where the violator knowingly endangers another person, the term of imprisonment may reach fifteen years, and the fine may total $250,000.[30]

---

26 33 U.S.C. § 1319(c).

27 33 U.S.C. § 1251(a).

28 33 U.S.C. §§ 1251(c)(1) and 1319(c)(1).

29 33 U.S.C. §§ 1251(c)(2) and 1319(c)(2).

30 33 U.S.C. §§ 1251(c)(3) and 1319(c)(3).

Corporations may be subject to even larger fines. Even misdemeanor offenses can result in lengthy sentences, as the punishment for separate misdemeanors can be "stacked" to run consecutively for a period of years.

2. Resource Conservation and Recovery Act

The Resource Conversation and Recovery Act (the "RCRA") sets forth a detailed scheme for federal regulation of all wastes, including hazardous ones. The RCRA is divided into several subtitles. Its hazardous waste provisions are contained in Subtitle III-Hazardous Waste Management. Because of the federal government's emphasis on hazardous waste prosecutions and the RCRA's relatively high penalties, this statute has proven a favorite of prosecutors. The RCRA provides criminal penalties for "knowing" violations.[31] RCRA's provisions are, as the D.C. Circuit has noted, of "mind-numbing" complexity.[32]

The knowing transportation of hazardous waste to a non-permitted facility or the knowing treatment, storage, or disposal of hazardous waste without a permit or in violation of a permit carries penalties under the RCRA of up to five years of imprisonment and a fine of $50,000 **per day** of violation.[33] If the violator is found to have knowingly placed another person in imminent danger of death or serious bodily injury, the maximum penalties increase to fifteen

---

31 42 U.S.C. §§ 6928(d), 6906(d).

32 *See Am. Mining Congress v. United States Envtl. Prot. Agency*, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

33 42 U.S.C. § 6928(d).

years of imprisonment and a $250,000 fine for an individual and a fine of up to one million dollars for a corporation.[34]

3. Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") was enacted in 1980 to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[35] Although primarily a remedial statute, CERCLA also imposes criminal sanctions for failing to report a release of a hazardous substance to the appropriate agency, failing to notify the EPA of the existence of an illegal hazardous waste disposal site, knowingly destroying or falsifying records, and submitting false claims for reimbursement from the Superfund.[36]

CERCLA imposes felony penalties for most violations, carrying a term of up to three years of imprisonment for a first offense and up to five years for a second offense.[37] A failure to notify the EPA of the existence of a non-permitted hazardous waste disposal site is a misdemeanor offense punishable by a fine of up to $10,000 and one year of imprisonment.[38]

---

34 42 U.S.C. § 6928(e).

35 *See* H.R. REP. No. 96-1016, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125.

36 *See* 42 U.S.C. §§ 9603, 9612.

37 *Id.* §§ 9603(b), 9612(b)(1).

38 42 U.S.C. § 9603(c).

4. Rivers and Harbors Act of 1899

The Rivers and Harbors Act of 1899 (also known as the Refuse Act) criminalizes the discharge of any refuse matter into a navigable water of the United States without a permit.[39] This statute imposes strict liability for misdemeanors, which are punishable by imprisonment of up to one year and a fine of up to $25,000 per day of violation.[40]

The government began to use the Rivers and Harbors Act aggressively in the early 1970s to prosecute dischargers of industrial waste. Since the *Exxon Valdez* oil spill, prosecutors have taken advantage of the statute's strict liability provision and have used it to prosecute oil spill cases. The government has also used a strict liability non-environmental statute – the Migratory Bird Treaty Act – for this purpose.[41] The marine transportation industry has pushed for congressional action to prevent the use of strict liability statutes to prosecute oil spill cases, but Congress has not obliged.[42]

5. The Clean Air Act

Until recently, prosecutions under the Clean Air Act were limited primarily to asbestos and CFC cases.[43] In the past decade, however, there have been some significant Clean Air Act developments in other factual contexts. For instance, in the Eastern District of Texas, the plant manager and the environmental manager of an aromatics and olefins production plant were

---

39 33 U.S.C. §§ 407, 411.

40 *Id.* § 411.

41 16 U.S.C. 703 *et seq.*

42 *Criminal Liability for Oil Pollution Before the Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 105th Cong. (1998).

43 42 U.S.C. §§ 7413(c)(4), 7602.

convicted of knowingly operating a defective and damaged wastewater tank in violation of the Clean Air Act.[44] The convictions were reversed on procedural grounds but remain significant nonetheless.[45] In *Atlantic States Cast Iron Pipe*, a company and two supervisory level employees were convicted of knowingly operating in violation of Clean Air Act permits by causing more than fifty-five gallons per day of waste paint to be burned.[46] And, *United States v. Fern* concerned a bogus asbestos abatement project that resulted in convictions for making false statements in documents filed pursuant to the Clean Air Act.[47] Whether Clean Air Act prosecutions will become more frequent remains to be seen.

6. Other Environmental Criminal Statutes

The Toxic Substances Control Act regulates the manufacture, processing, labeling, distribution, and disposal of chemical substances and mixtures.[48] Criminal penalties are imposed for refusing to comply with a rule or order; for using a chemical substance or mixture for commercial purposes if the substance or mixture was manufactured, processed, or distributed in violation of Section 2604 or 2605 of the statute; and for failing to comply with records and reporting requirements.[49] For knowing or willful violations of the Toxic Substances Control Act,

---

44 *See United States v. Peters*, 349 F.3d 842, 843-44 (5th Cir. 2003).

45 *Id.* at 848.

46 No. 03-852, 2007 WL 2282514, at *6 (D.N.J. Aug. 2, 2007).

47 155 F.3d 1318, 1327-29 (11th Cir. 1998).

48 15 U.S.C. §§ 2604, 2605.

49 *Id.* § 2614.

possible penalties include imprisonment for a term of not more than one year and a fine of up to $25,000 **per day** of violation.[50]

The Federal Insecticide, Fungicide, and Rodenticide Act criminalizes misrepresentation in the sale, distribution, or labeling of pesticides, as well as the misuse of pesticides.[51] A variety of possible penalties, including imprisonment and fines, exists.[52]

B. State Criminal Statutes

Virtually all states have adopted criminal provisions for environmental crimes. For example, the Texas Water Code provides for a wide range of criminal penalties.[53] A knowing or reckless violation of the Texas Hazardous Substances act is a Class "A" Misdemeanor,[54] which is punishable by a fine of up to $4,000 and/or imprisonment not to exceed one year.[55] The Louisiana the Environmental Quality Act provides both felony and misdemeanor penalties for any person who "willfully or knowingly" violates any provision of the Act.[56] Similarly, the Louisiana Water Control Law provides misdemeanor penalties for negligent violations and felony penalties for knowing violations.[57] The Louisiana Hazardous Waste Control Law imposes

---

50 *Id.* § 2615.

51 7 U.S.C. § 136j.

52 *Id.* § 136l.

53 Texas Water Code § 7.187. This provision authorizes sentences ranging from thirty days to thirty years of imprisonment.

54 Texas Health & Safety Code §501.035

55 Texas Penal Code §12.21.

56 La. Rev. Stat. § 30:2025(f).

57 La. Rev. Stat. § 30:2076.2.

felony penalties of up to ten years of imprisonment and a fine of $100,000 per day of violation for any person who willfully or knowingly discharges, emits, or disposes of any substance in violation of the law or regulations thereunder.[58] If the violator knowingly places another person in imminent danger of death or serious bodily harm by the violation, the penalties increase to up to fifteen years of imprisonment and a fine of $250,000 per day of violation.[59]

II. CRIMINAL SANCTIONS UNDER OTHER FEDERAL STATUTES

A. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act ("OCSLA") contains provisions that apply to both corporations and individuals.[60] Any knowing and willful violation of OCSLA can be prosecuted criminally, including: (1) violation of a lease, license, permit, or agency regulation or order; (2) any false statement in records or reports required by OCSLA; (3) tampering with any monitoring device; or (4) revealing any data or information required to be kept confidential by OCSLA.[61] Each violation is punishable by imprisonment of up to ten years and a fine of up to $100,000 **per day** of violation.[62]

Recently, the government has attempted to expand the reach of OCSLA criminal jurisdiction beyond lease-holders to contractors and sub-contractors. *United States v. Black Elk Energy Offshore, LLC, et al.*, Eastern District of Louisiana case no. 2:15-cr-00197-JTM-KWR

---

58 La. Rev. Stat. § 30:2183G.(1).

59 *Id.* § 30:2183G.(2).

60 43 U.S.C. § 1350(c), (d).

61 43 U.S.C. § 1350(c).

62 *Id.*

arose from the deaths of three offshore workers in a rig explosion in the Gulf of Mexico. The government indicted not only the lease-holder, Black Elk Energy, but also several contractors and sub-contractors. The Indictment charged three counts of Manslaughter and eight counts of alleged violations of OCSLA and its regulations. The defendants other than the lesse-holder moved to dismiss the OCSLA charges on the ground that OCSLA limits criminal liability to the lessee. The district court, Judge Jane Triche Milazzo, agreed and dismissed those counts. The government has filed an interlocutory appeal and the case is stayed pending a ruling from the Fifth Circuit.

B. Federal Oil and Gas Royalty Management Act

The Federal Oil and Gas Royalty Management Act ("FOGRMA") also subjects violators of its provisions to criminal sanctions. The statute provides that an act constituting a civil violation of FOGRMA may also be punished criminally.[63] Such civil violations include, among others: (1) failure to make timely royalty payments; (2) refusal to permit lawful entry or inspection; (3) submission of "false, inaccurate, or misleading" information; and (4) removal or diversion of oil or gas from a lease site without lawful authority.[64] Each violation is punishable by imprisonment of up to two years and a $50,000 fine.[65]

---

63 30 U.S.C. § 1720.

64 *Id.* § 1719.

65 *Id.* § 1720.

C. False Statements To A Federal Agency

Federal law prohibits any false statement to a federal agency.[66] The government has used this provision and imprisoned persons even in the absence of proof that an underlying crime was committed. This prohibition is particularly noteworthy in the heavily regulated oil and gas industry, where reports to the government are routinely submitted on issues ranging from environmental compliance to oil and gas production. Covering both written and oral statements, the statute is extremely broad in scope. In the words of one court, "Congress intentionally drafted section 1001 in an expansive fashion in order that it be accorded the broadest possible interpretation regarding the situations in which it would come into play."[67] Each violation of 18 U.S.C. § 1001 is punishable by up to five years of imprisonment and a fine.[68]

D. Other Title 18 Offenses

In cases involving any type of alleged false or inaccurate statement to the government, prosecutors often very creatively include charges under other provisions of the Federal Criminal Code, particularly 18 U.S.C. § 371 (conspiracy to commit an offense against or defraud the United States), 18 U.S.C. § 1341 (mail fraud), and 18 U.S.C. § 1343 (wire fraud). The conspiracy provision is a particularly powerful prosecutorial weapon. By its very nature, corporate reporting – whether environmental, royalty-related, or other – is carried out with input

---

66 18 U.S.C. § 1001.

67 *Moser v. United States*, 18 F.3d 469, 473 (7th Cir. 1994); *see also United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985) ("Section 1001 is a catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency,' but which are not prohibited by other statutes.") (internal citations omitted).

68 18 U.S.C. § 1001(a).

from a number of people within the entity. This can create an appearance of "conspiracy." All of these are felony offenses punishable by fines and substantial imprisonment.[69]

E. False Claims: Civil and Criminal Liability

Federal statutes impose both civil and criminal liability for the filing of false claims against the United States.[70] In recent years the government has aggressively employed the civil provisions of the False Claims Act ("FCA") against energy companies, particularly in the royalty context. DOJ policy is to coordinate civil and criminal enforcement, which "may include the simultaneous initiation of civil and criminal proceedings in cases in which the monetary recovery to the government and the deterrent effect will be enhanced, given due consideration to the risks to the criminal case and the availability of protective orders and stays."[71]

The civil FCA defendant faces treble damages *and* a penalty of up to $10,000 per claim.[72] Equally significant, a private plaintiff (called a relator) may bring a *qui tam* action on behalf of the government.[73] This Latin phrase means he "who brings the action as well as for the king as for himself."[74] The *qui tam* plaintiff may file the action under seal, serve the government with a copy, and notify it of all material information in his or her possession.[75] Thereafter, the

---

69 18 U.S.C. §§ 371, 1341, 1343.

70 18 U.S.C. § 287 (setting forth criminal sanctions); *see also* 31 U.S.C. § 3729 *et seq.* (setting forth civil sanctions).

71 *See United States Attorneys' Manual* § 9-42.0101.

72 31 U.S.C. § 3729(a).

73 *Id.* § 3730(b).

74 *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993).

75 31 U.S.C. § 3730(b)(2).

government may elect to prosecute the action, in which case the relator (if he meets certain requirements, including being an "original source" of the information) shall be awarded between fifteen and twenty-five percent of the government's recovery.[76] If the government does not intervene, the relator may prosecute the action himself and is entitled to twenty-five to thirty percent of any recovery.[77] He is also entitled to costs and attorneys' fees from the defendant.[78] Needless to say, the *qui tam* aspect of the FCA creates an extraordinary incentive for "whistleblowing."

F. Occupational Health and Safety Act

The Occupational Health and Safety Act imposes criminal liability when a willful violation of an OSHA standard results in a worker's death.[79] In cases of industrial accidents, both the employer and corporate officers may be found criminally liable.[80] Criminal penalties for first-time offenders include imprisonment of up to six months and a fine of up to $10,000; penalties double for repeat offenders.[81]

---

76 *Id.*; *see also* 31 U.S.C. § 3730(d)(1).

77 31 U.S.C. § 3730(d)(2).

78 *Id.*

79 29 U.S.C. § 666(e).

80 *See United States v. Cusack*, 806 F. Supp. 47, 51 (D.N.J. 1992).

81 29 U.S.C. § 666(e).

G. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act ("FCPA") has become the most powerful tool in the federal business crimes prosecutor's arsenal.[82] The Government's use of the FCPA is at an all-time high, driven by pressure throughout the world to address corruption. The FCPA was enacted by Congress in 1977 and prohibits the giving of anything of value to foreign government officials for the purpose of obtaining or retaining business with such a government.[83] The statute applies to both individuals and corporate entities.[84] Fines for a criminal violation by a corporate entity may not exceed $2,000,000, whereas the penalty for a willful violation by an officer, director, employee, or agent of a company may not exceed five years of imprisonment and a fine of $100,000.[85] The company is not permitted to pay a fine imposed on an officer, director, employee, or agent.[86]

III. THE FEDERAL PROSECUTOR'S PERSPECTIVE: FACTORS IN THE DECISION TO PROSECUTE

A. Department of Justice Policy

The varying language and judicial interpretations of criminal regulatory statutes give prosecutors substantial discretion in deciding which persons and corporations to charge. Recognizing the need for a consistent exercise of this discretion, the government has issued

---

82 15 U.S.C. § 78dd-1 *et seq.*

83 *Id.* § 78dd-2(a).

84 *Id.*; *see also* 15 U.S.C. § 78dd-2(h).

85 15 U.S.C. § 78dd-2(g).

86 *Id.*

several significant statements of policy. On July 1, 1991, a document entitled *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (the "Environmental Crimes Memorandum") was issued.[87] Although it specifically addresses environmental prosecutions, this document provides guidance that may be applied in other contexts as well. In June of 1999, the Deputy Attorney General issued *Federal Prosecution of Corporations.*[88] These guidelines were updated in 2003, when then Deputy Attorney General Larry Thompson issued a memorandum entitled *Principles of Federal Prosecution of Business Organizations* (the "Thompson Memorandum").[89] The Thompson Memorandum was subject to widespread criticism for its requirement that corporations waive the attorney-client privilege in order to establish that they were cooperating with the investigation. As a result of this criticism, Deputy Attorney General Paul McNulty issued another memorandum (the "McNulty Memorandum") in December of 2006.[90] The most notable aspect of that memorandum is that it requires line prosecutors to obtain approval from senior DOJ officials before demanding a waiver of privilege. In recent years Attorney General Eric Holder issued an update of these corporate prosecution

---

87 *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991), *available at* http://www.usdoj.gov/enrd/Electronic_Reading_Room/factors.htm (the "Environmental Crimes Memorandum").

88 Eric H. Holder, Jr., *Federal Prosecution of Corporations* (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.

89 Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate _guidelines.htm (the "Thompson Memorandum").

90 Paul J. McNulty, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (the "McNulty Memorandum").

policies. Early in 2016, DOJ issued guidance that instructs prosecutors to charge individual wrong-doers and to hold corporations accountable for any failure to disclose those individuals to prosecutors.

B. Environmental Prosecution Policy

In environmental as in other cases, the threshold issue that a prosecutor will examine is whether there is sufficient evidence to prove the commission of the crime by the defendant beyond a reasonable doubt. Assuming, however, that this threshold has been met, the Environmental Crimes Memorandum mandates that prosecutors consider a host of other factors before bringing criminal charges. The Memorandum notes that "[i]t is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion."[91] Accordingly, and so as not to "create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure," prosecutors are directed to consider the factors discussed below.[92]

1. Voluntary Disclosure

DOJ requires that prosecutors consider whether the potential defendant made "a voluntary, timely and complete disclosure of the matter under investigation."[93] Thus, a

---

91 Environmental Crimes Memorandum, *supra* note 84, § I.

92 *Id.*

93 *Id.* § II-A.

corporation that discovers criminal activity within its organization and voluntarily reports that activity to authorities is less likely to be charged.

2. Cooperation

Federal prosecutors are to evaluate whether the subject has given "full and prompt cooperation."[94] This consideration differs from voluntary disclosure in that it refers to the cooperation given *after* the crime is discovered, whether through voluntary disclosure or through the government's investigative agencies. Among other things, prosecutors are to consider whether the subject has made available the complete results of any internal investigations and the names of all potential witnesses.[95] Although waivers of privilege are no longer the mandatory policy of DOJ, it remains likely that prosecutors will consider such a waiver, whether they demand one or not, in evaluating the company's level of cooperation.

3. Preventive Measures and Compliance Programs

Prosecutors are to consider "the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit."[96] This consideration specifically addresses whether the company has in the past taken reasonable steps to prevent internal wrongdoing and whether a program is in place to prevent future noncompliance.[97]

---

94 *Id.* § II-B.

95 *Id.*

96 *Id.* § II-C.

97 *Id.*

4. Additional Factors

Several additional factors must be assessed in determining whether to prosecute. These include the pervasiveness of non-compliance, internal disciplinary action, and subsequent compliance efforts.[98]

C. Charging the Corporation: The Evolving Directive of the Deputy Attorney General

1. General Principles

Corporations are "legal persons" and should be treated like natural persons. Their artificial nature should not subject them to more lenient or harsher treatment. Indicting corporations for wrongdoing enables the government to effect a positive change of corporate culture, to alter corporate behavior, and to prevent, discover, and punish white collar crime. Further, corporations are likely to take remedial steps upon being indicted for conduct occurring industry-wide such that the prosecution of corporations offers a unique opportunity for deterrence on a large scale.[99]

Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents, if: (1) the corporate agent's actions were within the scope of his duties; and (2) the corporate agent's actions were intended (at least in part) to benefit the corporation.[100] An agent's actions are within the scope of his

---

98 *Id.* § II-D.

99 *Supra* note 87, at 2.

100 *Id.*

duties if they are of the sort that the agent is authorized to perform and they are motivated at least partially by an intent to benefit the corporation.[101]

2. Courts Tend to View an Agent's Actions Expansively

Two federal decisions demonstrate how readily a court will consider an agent's actions to fall within the scope of his duties and to be intended to benefit the corporation. In *United States v. Automated Medical Laboratories, Inc.*, a corporation was convicted for the acts of a subsidiary's employee, even though the employee clearly acted for his own benefit — namely, to climb the corporate ladder.[102] Additionally, in *United States v. Sun-Diamond Growers of California*, a corporation was convicted based on its vice president's use of company money to contribute illegally to a congressional campaign.[103] The benefit, in short, can be very indirect to the corporation.

3. Factors For Prosecutors to Consider in Deciding Whether to Charge a Corporation

a) Nature and Seriousness of the Offense, Including the Risk of Harm to the Public

The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are primary factors in determining whether to charge a corporation.[104]

---

101 *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006).

102 770 F.2d 399, 407 (4th Cir. 1985).

103 138 F.3d 961, 969-70 (D.C. Cir. 1998).

104 *Supra* note 87, at 5.

b) Pervasiveness of Wrongdoing Within the Corporation

A corporation can only act through natural persons, and it is, therefore, held responsible for the acts of such persons that are fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all of the employees in a particular role within the corporation. Conversely, prosecution of the corporation may not be appropriate where the violation stems from a single, isolated act of the wrongdoer employee.[105] As described in the United States Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.[106]

As the foregoing guidelines demonstrate, whether the wrongdoer employees are management-level is very important in assessing pervasiveness.[107]

---

105 *Id.* at 6.

106 U.S.S.G. § 8C2.5, cmt. (n.4).

107 *Supra* note 87, at 6.

c) The Corporation's Past History

Like a natural person, a corporation is expected to learn from its mistakes. Prosecutors will consider a corporation's past history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, the prohibited conduct, regardless of any compliance programs. Failure to take adequate action to prevent future unlawful conduct in spite of warnings by regulatory or enforcement personnel or agencies tends to be a red flag.[108]

d) Cooperation and Voluntary Disclosure

As mentioned above, a corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation are relevant factors in the decision whether to institute criminal charges. Regarding disclosure, the prosecutor will assess whether the potential defendant made "a voluntary and timely disclosure" of the matter under investigation. Cooperation may include identifying the culprits within the corporation, including senior executives, making witnesses available, and disclosing the complete results of any internal investigation.[109]

DOJ policy regarding requests for waivers counsels that prosecutors should seek the least intrusive waiver necessary to complete the investigation. DOJ policy identifies purely factual information as the least intrusive. Before requesting a waiver as to purely factual information regarding the alleged misconduct, prosecutors must obtain written authorization from the United

---

108 *Id.* at 6-7.

109 *Id.* at 7.

States Attorney, who must provide a copy to the Assistant Attorney General for the Criminal Division. A corporation's response to a request for such a waiver may be considered in determining whether the corporation has cooperated in the investigation. If the purely factual information does not provide a sufficient basis for a complete investigation, prosecutors are authorized to request disclosure of attorney-client communications or nonfactual work product. Before doing so, however, the United States Attorney must obtain written authorization from the Deputy Attorney General (which should only be sought in rare circumstances). [110]

e) Corporate Compliance Programs

Compliance programs are established by some corporations to prevent and to detect misconduct and ensure the corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. Corporate self-policing, including voluntary disclosures to the United States of any problems that a corporation discovers on its own, is encouraged.[111] Compliance programs alone, however, do not absolve the corporation from criminal liability under the doctrine of *respondeat superior*.[112]

In evaluating a corporation's compliance program, prosecutors will ask the following questions, among others: (1) is the program merely a "paper" program or is it effective; (2) does the corporation have sufficient staff to audit, document, analyze, and utilize the results of compliance efforts; (3) are the employees adequately informed of the program and convinced of corporation's commitment to it. A truly effective compliance program, coupled with compliance

---

110 *Id.* at 9-10.

111 *Id.* at 12-13.

112 *See United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir. 1983).

with other federal law enforcement policies, may prevent indictment of the corporation and result in indictment of its employees and agents instead.[113]

f) Restitution and Remediation

A prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so in deciding whether to seek an indictment. Other remedial actions, such a implementing an effective corporate compliance program, improving an existing one, and disciplining wrongdoers, are relevant in determining whether to charge the corporation.[114]

g) Collateral Consequences

Prosecutors may evaluate the collateral consequences of a conviction in determining whether to charge the corporation with a criminal offense. Specifically, the government will assess whether the likely punishment is appropriate in light of the nature and seriousness of the crime. Additionally, the consequences to the corporation's officer, directors, and shareholders (many of whom may have been unaware of the violation or unable to prevent the violation) are considered. Further, prosecutors will look at any non-penal sanctions imposed for the violation, such as a suspension or disbarment from eligibility for government contracts or federally funded programs.[115]

h) Non-Criminal Alternatives

Prosecutors may consider non-criminal alternatives that would adequately deter, punish, and rehabilitate a corporation that has engaged in criminal conduct. The adequacy of non-

---

113 *Supra* note 87, at 14.

114 *Id.* at 15.

115 *Id.* at 16.

criminal alternatives to prosecution, meaning civil or regulatory enforcement actions, will depend on: (1) the sanctions available under the alternative means of disposition; (2) the likelihood that an effective sanction will be imposed; and (3) and the effect of a non-criminal disposition on federal law enforcement interests. Prosecutors should evaluate the strength of the regulatory authority's interest, the regulatory authority's ability and willingness to take effective enforcement action, the probable sanction if the regulatory authority's enforcement action is upheld, and the effect of a non-criminal disposition on federal law enforcement interests.[116]

i) Plea Agreements with Corporations

Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. A plea agreement, thus, constitutes an admission of guilt and often is structured so that the corporation cannot later claim innocence or lack of culpability. The plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance. Generally speaking, individual criminal liability is not negotiated away in return for a corporate plea. A frequent condition of probation is that the corporation must implement a compliance program or reform an existing program.[117]

IV. STATUS AND SCIENTER

A chief issue to have emerged from recent caselaw is the lack of clarity between administrative/civil liability and criminal liability. The purported distinction between acts for which widely divergent administrative, civil, or criminal penalties may be imposed is the

---

116 *Id.* at 17.

117 *Id.* at 18-19.

requirement of a "knowing" violation. Yet, the government increasingly argues that it need **not** prove that (1) the defendant knew the regulatory requirements; (2) the defendant had actual intent to violate the law; or (3) there was any harm to the environment. Many courts have agreed to the government's interpretation; that the defendant need not know he is violating the rule or statute.[118]

A. Who is at Risk?

The potential targets of criminal enforcement are broadly defined and generally include "persons" who are identified in the various statutes to include individuals, corporations, partnerships, associations, trusts, states and their political subdivisions, municipalities, counties and parishes, commissions, interstate bodies, and agencies or instrumentalities of the United States.[119] The definition of "person" varies somewhat from statute to statute, but all descriptions are broad and inclusive.

Corporations are certainly a primary target of criminal prosecutions, but they are by no means the sole target. At an American Bar Association Environmental Enforcement Conference in 1996, the EPA's Director of Criminal Enforcement, Earl Devaney, explicitly noted the federal policy of prosecuting individual corporate employees. In 1991, 80 percent of environmental

---

118 *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-84 (9th Cir. 1993) (Clean Water Act's requirement of a knowing violation does not mean defendant must have knowingly violated the law but rather merely that defendant must have known of the conduct that violated the law); *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989) (prosecutor does not have to prove defendant knew of the absence of a permit to convict under RCRA).

119 *See, e.g.*, 33 U.S.C. §§ 1319(c), 1362(4) & (5) (Clean Water Act); 42 U.S.C. §§ 7413(c)(6) and 7602(d), (e) & (f) (Clean Air Act); 42 U.S.C. §§ 6928(d), 6903(15) (Solid Waste Disposal Act).

criminal defendants were corporations.[120] By 1995, however, 80 percent of the defendants were individuals, and only 20 percent were corporations.[121] This policy is based on the postulate "that the prosecution of individuals serves as a deterrent to corporate crime because the corporate officials are subject not only to fines, but imprisonment, and the social stigma attached to a criminal conviction."[122]

B. The Responsible Corporate Officer Doctrine

In the white-collar arena, the government increasingly urges the "Responsible Corporate Officer" theory of criminal liability for corporate officers, directors, and managers. Under the Responsible Corporate Officer theory, a corporate officer or other responsible person may be prosecuted for acts of the company that fall within his area of authority, knowledge, or control, *even in the absence of any knowledge of wrongdoing*.[123] This departure from the normal bounds of criminal law is based on the proposition that certain "public welfare" statutes make it appropriate to place the burden "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers . . . rather than [upon] the innocent public who are wholly helpless."[124]

---

120 Reid Page, *et al., Environmental Crimes*, 36 Am. Crim. La. Rev. 515 , 520 (1999) (citing *Government Indicting More Officials, Fewer Corporations, Legal Panel Says*, Nat'l Env't Daily (BNA) (Sept. 6, 1996)).

121 *Id.*

122 Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVTL. L. REP. 10,065, 10,072 (1985).

123 *United States v. Dotterweich*, 320 U.S. 277 (1954); *United States v. Park*, 421 U.S. 658 (1975).

124 *Dotterweich*, 320 U.S. at 285.

With respect to environmental crimes, the Responsible Corporate Officer Doctrine stems from two Supreme Court decisions: *United States v. Dotterweich* and *United States v. Park*. In *Dotterweich,* the president of a pharmaceutical company was convicted of a misdemeanor violation of the Federal Food, Drug and Cosmetic Act, despite the fact that he had no personal knowledge of the violation.[125] Notwithstanding the defendant's lack of culpability, the Supreme Court held that he could be held criminally liable because he was convicted under a statute that affected "public welfare."[126] The Supreme Court elaborated on the Responsible Corporate Officer theory in *Park*. There, the Court upheld the conviction of a company's chief executive officer for misdemeanor violations of the Food Act committed by his subordinates.[127] As the chief corporate officer, the court held, the defendant had an affirmative duty both to seek out and remedy violations that occur and also to put in place measures to prevent the violations from occurring at all.[128]

Although the government has argued that environmental criminal laws are "public welfare" statutes, the Responsible Corporate Officer theory has not been uniformly accepted by courts in that context. Most environmental criminal statutes, as set forth above, require a "knowing" or "willful" violation, and courts have been reluctant to impose strict criminal liability. Some courts, however, have reached the same end by instructing juries that they may

---

125 *Id.* at 280-81.

126 *Id.* at 284-85.

127 *Park*, 421 U.S. at 673-74.

128 *Id.* at 672.

infer the corporate officer's knowledge of the offense based on his position and responsibilities within the corporation, as well as other circumstantial evidence.[129]

In *United States v. Self*, the company president, was convicted of several violations of the hazardous waste handling provisions of the RCRA.[130] Self argued on appeal that, although there was evidence that he knew of past illegal activities, there was insufficient evidence regarding his knowledge of the specific twenty-nine drums of waste at issue in the case.[131] To support his argument, he relied on *United States v. MacDonald & Watson Waste Oil Co.*, in which the First Circuit noted that "[s]imply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged."[132] The *Self* court deemed Self's reliance to be misplaced, citing *MacDonald & Watson*'s more general pronouncement that "knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants . . . as well as information provided to those defendants on prior occasions."[133] In the end, the *Self* court concluded that the evidence was sufficient for the jury to infer that Self had knowledge of the violation at issue based on his knowledge of prior illegal storage.[134]

---

129 *United States v. Self*, 2 F.3d 1071, 1987-88 (10th Cir. 1993); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991); *United States v. Greer*, 850 F.2d 1447, 1451-52 (11th Cir. 1988).

130 2 F.3d 1071.

131 *Id.* at 1087.

132 *Id.*; *see also McDonald & Watson*, 933 F.2d at 55.

133 *Self*, 2 F.3d at 1088; *MacDonald & Watson*, 933 F.2d at 55.

134 *Self*, 2 F.3d at 1088.

In *United States v. Sinskey*, defendants Sinskey and Kumm were convicted of Clean Water Act violations.[135] On appeal, Kumm argued that the trial court erroneously allowed testimony that repeatedly identified his supervisory position, thus implying that he had a duty to find and report the violations.[136] The Eighth Circuit opined that it would have been appropriate to instruct the jury that Kumm had no affirmative duty to report the violations or to intervene to prevent them.[137] The court concluded, however, that reference to the supervisor's job duties (as opposed to legal duties) was acceptable and also appropriate to support the aiding and abetting charges.[138] It reasoned that "[p]resenting evidence that Kumm was a supervisor, that is, that he was in a position capable of giving rewards and reassurances, was but a necessary part of showing how he was able to encourage [illegal activity]."[139]

United States v. Greer concerned an RCRA conviction for dumping hazardous waste and failing to report the dumping.[140] There, evidence that Greer told an employee to "handle" the waste and that Greer had approved of unlawful dumping in the past was sufficient for the jury to infer the knowledge needed to support the conviction.[141]

---

135 119 F.3d 712 (8th Cir. 1997).

136 *Id.* at 718-19.

137 *Id.* at 719.

138 *Id.*

139 *Id.*

140 850 F.2d 1447.

141 *Id.* at 1451-52.

In *United States v. Wasserson*, the defendant was convicted under the RCRA for aiding and abetting the disposal of hazardous waste at a non-permitted facility.[142] Critical to the defendant's conviction were his knowledge that the warehouse contained hazardous waste, his knowledge of the requirements for handling hazardous waste, his failure to inquire as to the destination of hazardous waste, and his failure to provide a manifest as was required for all hazardous waste shipped for disposal.[143] According to the court, from the foregoing facts the jury could infer that the defendant knew hazardous waste would be disposed of at a non-permitted facility.[144] In short, knowledge may be inferred from an employee's position or authority in the company, from prior illegal activities, or from other circumstantial evidence.

Notably, in *United States v. Iverson*, the court upheld a defendant's Clean Water Act conviction based upon his position and actual duties within the corporation, although there was no evidence that he had actually participated in the illegal discharges.[145] In so holding, the Court revived the application of the Responsible Corporate Officer theory to environmental crimes:

> Under the CWA, a person is a "responsible corporate officer" if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that

---

142 418 F.3d 225 (3d Cir. 2005).

143 *Id.* at 237-38.

144 *Id.* at 239.

145 162 F.3d 1015 (9th Cir. 1998).

the officer in fact exercised such authority or that the corporation expressly vest the duty and the officer to oversee the activity.[146]

Similarly, in *United States v. Hansen*, three defendants were charged with conspiracy to commit environmental crimes and with substantive violations of the CWA, RCRA, and CERCLA.[147] The charges stemmed from the defendants' collective failure to contain and properly treat hazardous wastewater that accumulated from the manufacture of soda, hydrogen gas, hydrochloric acid, and chlor-alkali bleach.[148] All were convicted based on their managerial and executive positions at the manufacturing plant and based on their knowledge of the violations. Affirming the convictions, the Eleventh Circuit held that the convictions could be sustained even though they were, in part, based on acts that occurred *after* the defendants left their decision-making positions because the defendants continued to direct and authorize employee actions regarding the environment and safety.[149]

---

146 *Id.* at 1025. Conversely, in *United States v. Bestfoods*, the Supreme Court seems to have required that, to hold corporate officers *civilly* liable, a plaintiff must show that he *is* directly involved in the activity in question. 118 S. Ct. 1876 (1998); *see also Carter-Jones Lumber Co. v. Dixey Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999) (citing *Bestfoods* for proposition that corporate officer must be actively involved in illegal activity before civil liability may be imposed). Thus, synthesizing *Iverson* and *Bestfoods*, it is reasonable to conclude that a corporate officer may be held criminally liable under the Responsible Corporate Officer theory, even though that same corporate officer could not be held civilly liable on the same facts.

147 262 F.3d 1217 (11th Cir. 2001).

148 *Id.* at 1225-1231.

149 *Id.* at 1237-39.

In *United States v. Ming Hong*, defendant Hong acquired a wastewater treatment facility but purposefully avoided any formal association with the company.[150] Although he controlled the company's finances and played a substantial role in its operations, he was not identified as one of its officers.[151] Upon conviction under the Clean Water Act, Hong argued to the Fourth Circuit that the government failed to prove that he was a responsible corporate officer. Specifically, he urged that the government failed to prove that he was a designated officer of the company or that he exerted sufficient control over operations to be held liable for improper discharges.[152] The court disagreed, holding, "The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA."[153]

Thus, recent cases suggest that the Responsible Corporate Officer theory is being applied directly with increasing frequently. Moreover, DOJ's shift in focus from corporate defendants to individual defendants indicates an increased intention by prosecutors to place the burden on those who are employed within the regulated community to not only remedy violations that occur, but to also prevent them from occurring in the first instance.

In 2016, in a food contamination case, the Eighth Circuit affirmed the prison sentences of two executives based on their positions of authority in the corporation despite *no direct evidence*

---

150 242 F.3d 528, 529 (4th Cir. 2001).

151 *Id.*

152 *Id.* at 531.

153 *Id.*

that the executives knew of the crime. The President and COO of Quality Egg LLC, both pled guilty to violating the Federal Drug and Cosmetic Act after a salmonella outbreak at their facility. In April 2015, the trial judge sentenced each of them to three months in prison. *U.S. v. Quality Egg LLC* (N.D. Iowa 2015). The government and the defendants agreed that the Quality Egg executives "*did not have knowledge ... that eggs sold by Quality Egg were, in fact, contaminated with [salmonella].*" The judge focused on the allegations that the defendants *must have known* of their warehouses' unsanitary conditions. On July 6, 2016, the Eighth Circuit affirmed the judgment. Referencing the condition of Quality Egg's facilities and its "egregious" disregard of sanitary procedures, the court said, "When defining the statutory penalties in the FDCA, Congress recognized the importance of placing the burden on corporate officers to protect consumers 'who are wholly helpless' from purchasing adulterated food products which could make them ill." *U.S. v. DeCoster* (8th Cir. 2016).

C. RCRA Felony Prosecutions: What Constitutes a "Knowing" Violation?

A review of several cases construing the RCRA's criminal provisions illustrates the lack of clarity regarding what constitutes a "knowing" violation. The RCRA imposes criminal liability on any person who "knowingly" transports hazardous waste to, or treats, stores or disposes of hazardous waste at, a facility that does not have an RCRA permit.[154] The government has argued that it need not prove that the defendant knew the acts in question were violations of a regulation or permit requirement or that the materials in question met the intricate definition of "hazardous waste." Rather, the government must prove only that the defendant

---

154 42 U.S.C. § 6928(d), (e).

acted intentionally to transport, treat, store, or dispose of material that was a waste and that had "the potential for harm to others or to the environment."[155]

Many in the defense bar contend that, given the complexity of environmental laws and regulations, the government's argument creates a strict liability formula for prosecution. The prosecution's burden of proving evil or criminal intent – a burden common to virtually all other felony crimes – is diluted in the environmental arena. Further, this less stringent level of proof is applied in an extremely complex regulatory scheme that various federal courts have described as "a regulatory cuckoo land of definition,"[156] "mind-numbing"[157] and "worthy of *Alice in Wonderland*."[158]

As noted above, cases have held that the government is not required to prove that the defendant knew the material in question was actually a hazardous waste under EPA regulations. In *United States v. Hoflin*, the Public Works Director of a Washington town was convicted of an RCRA violation for disposing hazardous waste at a facility that did not have an RCRA permit.[159] The court held that the government was not required to prove that the defendant knew the

---

155 *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991) (rejecting defendant's argument that the government must prove defendant knew that the waste was an RCRA "hazardous waste"); *see also United States v. Sellers*, 926 F.2d 410, 417 (5th Cir. 1991) (government must prove only that defendant knew the material was paint waste).

156 Comments of Don R. Clay, former EPA Assistant Administrator, cited in *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991) (referring to RCRA).

157 *Am. Mining Congress v. United States Envtl. Prot. Agency*, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

158 *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (referring to wetlands provisions of the Clean Water Act).

159 880 F.2d 1033 (9th Cir. 1989).

material was regulated as a hazardous waste under the RCRA.[160] Additionally, the court upheld a jury instruction under which the defendant's knowledge of the absence of an RCRA permit was not necessary for the conviction.[161]

In *United States v. Speach*, however, the same court held that the government must prove the defendant knew of the facility's failure to obtain a hazardous waste disposal permit in order to obtain a conviction.[162] Additionally, *United States v. Ahmad,* concerned a conviction under the Clean Water Act for knowingly discharging gasoline into a water treatment system.[163] Ahmad argued on appeal that the trial court failed to instruct the jury that the knowledge requirement applied to *each* element of the offense.[164] In response, the government argued – as it has successfully done in other environmental cases – that, because environmental crimes are "public welfare" offenses, it was not required to prove knowledge as to each element.[165] The

---

160 *Id.* at 1039.

161 *Id.*

162 968 F.2d 795, 796-97 (9th Cir. 1992); *see also United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 669 (3d Cir. 1984) (in order to convict, the jury must find or at least infer that the defendant knew the organization was required to have a permit and knew that it did not have a permit); *United States v. Overholt*, 307 F.3d 1231, 1250-51 (10th Cir. 2002) (assuming, without deciding, that other circuits correctly held that the government must show that defendant knew the facility did not have a hazardous waste permit).

163 101 F.3d 386 (5th Cir. 1996).

164 *Id.* at 389; *see also United States v. Ho*, 311 F.3d 589, 605-06 (5th Cir. 2002) (general rule that government need only prove knowledge of the facts constituting the offense applies with equal force to laws regulating hazardous substances); *Overholt*, 307 F.3d at 1244-46 (government need not prove defendant knew of the regulation he was accused of violating); *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001) (the phrase "knowingly violates" requires knowledge of the facts and attendant circumstances that comprise a violation of the statute – not specific knowledge that one's conduct is illegal); *United States v. Fiorillo*, 186 F.3d 1136, 1156 (9th Cir. 1999) (same).

165 *Id.* at 390, 391.

Fifth Circuit disagreed, noting that "the public welfare offense exception is narrow."[166] Further, the court stated that, where a felony charge is at issue, the public welfare offense doctrine will not apply "absent a clear statement from Congress that *mens rea* is not required."[167] *Ahmad*'s primary significance is in the court's flat rejection of the application of the public welfare offense doctrine to felony environmental statutes.

To date, however, *Ahmad* seems to have had little visible impact. In *United States v. Kelley Technical Coatings, Inc.*, the Sixth Circuit disagreed with the *Ahmad* conclusion that the Clean Water Act does not fall under the public welfare offense doctrine.[168] It instead cited the *Hopkins* and *Weitzenhoff* opinions, which held that the Clean Water Act falls within this doctrine and that a decreased *mens rea* and presumption of awareness of regulations is appropriate.[169] In *United States v. Sinskey*, the court found that *Ahmad* represented a mistake-of-fact defense – not a question-of-law defense related to whether Ahmad knew the discharges violated a statutory or permit requirement.[170] The *Sinskey* court restated the principle that defendants need only know of the conduct that resulted in the violation.[171] This distinguishes the mistake-of-law defense from the mistake-of-fact defense that, under *Ahmad*, is viable. But, because of the ever-growing complexity of environmental statutes and regulations, the differentiation between issues of fact and issues of law is not always clear (or even discernible).

---

166 *Id.* at 391.

167 *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 618 (1994)).

168 157 F.3d 432, 439 n.4 (6th Cir. 1998).

169 *Id.* at 439.

170 119 F.3d 712, 716-17 (8th Cir. 1997).

171 *Id.* at 717.

This distinction between the knowledge of facts that the government must prove to convict and the knowledge of the law was also analyzed in *United States v. Wilson*.[172] The *Wilson* court held that, to convict under the Clean Water Act, the prosecution must prove that the defendant:

1. knew he was discharging a substance (thus no prosecution for accidental releases);

2. knew the correct identity of the substance discharged (thus no prosecution if mistaken for another substance);

3. knew how the substance was discharged (*i.e.*, knew the method or instrumentality of discharge);

4. knew the physical characteristics of the property into which the pollutant was discharged (in this case, the characteristics that identify the property as legally a wetland);

5. knew of the facts linking the wetland to waters of the United States; and

6. knew he did not have a permit (but not that he knew he had to have one).[173]

Thus, the prosecution must focus on knowledge of specific facts covering every element of the alleged crime. *Wilson* seems to extend *Ahmad* by adding to the government's burden the need to

---

172 133 F.3d 251 (4th Cir. 1997)

173 *Id.* at 264.

prove knowledge of "jurisdictional" facts – in that case, facts related to the definition of wetlands.[174]

D. *United States v. Hanousek*: The Elusive Definition of Negligence

United States v. Hanousek is the landmark case on the definition of negligence under the clean Water Act. Hanousek concerned a misdemeanor conviction under the Clean Water Act for negligent discharge of oil into a waterway.[175] Defendant Hanousek was the roadmaster of a section of railway along the Skagway River in Alaska. In that capacity he was responsible for supervising a rock quarrying project along the railway's right of way. A high pressure petroleum pipeline also ran along the track in the area of the project. Initially, the project was supervised and performed by a third-party contractor, employees of whom (1) covered a 300-foot section pipeline adjacent to the quarrying site with sand, ballast, and railroad ties and (2) used a work platform to protect the pipeline while a backhoe moved rocks above it. Later, Hanousek assumed supervisory responsibility. Although the work platform remained in use, the process of covering the pipeline with sand, ballast and railroad ties was discontinued. Thereafter, an employee of the contractor inadvertently struck the pipeline with a piece of equipment and ruptured it. Over one thousand gallons of oil flowed into the river.[176]

On appeal of his negligent discharge conviction, Hanousek argued that the district court erred in allowing the jury to convict on a finding of "ordinary negligence," rather than requiring

---

174 *Id.*

175 176 F.3d 1116 (9th Cir. 1999).

176 *Id.* at 1119.

a finding of "criminal negligence."[177] The Ninth Circuit rejected Hanousek's argument, holding that a showing of ordinary negligence is sufficient to sustain a Clean Water Act conviction.[178] Judge Tom Stagg of the Western District of Louisiana, sitting on the Ninth Circuit by designation, dissented.[179] More recently, the fifth circuit adopted *Hanousek*'s reasoning and conclusion.

V. PROTECTIVE MEASURES FOR MINIMIZING CORPORATE LIABILITY: COMPLIANCE PROGRAMS

A. The Federal Sentencing Guidelines: Establishing an "Effective" Compliance Program

The government's strategy for deterring corporate crime consists of, among other things, providing incentives for self-regulation. Chief among self-regulatory measures is the creation and maintenance of internal "compliance programs" – a concept that arose from the Federal Sentencing Guidelines mandated by the 1984 Sentencing Reform Act of 1984.[180] In 1991, the United States Sentencing Commission established "organizational sentencing guidelines," under which an organization or entity found in violation of federal law could significantly reduce its criminal fines and penalties if it had adopted an "effective program to prevent and detect violations of law."[181]

---

177 *Id.* at 1120.

178 *Id.* at 1121.

179 *Id.* at 1126 n.5.

180 28 U.S.C. § 994(a).

181 The compliance program guidelines are located in Chapter 8B2.1 of the Federal Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1.

Creating such a program may offer a wealth of legal and other benefits to the corporation. In the criminal law context alone, it may do the following: (1) dissuade the government from filing criminal charges against the organization in a case of employee wrongdoing' (2) result in the filing of lesser charges than might otherwise have been brought; (3) irrespective of the charges filed, may significantly reduce fines and penalties upon conviction; and (4) may avoid the forced imposition of a "Corporate Integrity Agreement" as part of a settlement. **In the current enforcement climate, it is likely unwise for any corporation to operate without some sort of internal compliance program.** The more difficult question is what the program should include.

B. Elements of the "Effective" Program

The key requirement under the Sentencing Guidelines is that the compliance program be "effective." What is "effective," however, lies in the eye of the regulator or prosecutor, and presently there is only limited guidance. While the compliance program should be creatively tailored to fit the needs of the particular organization, the Sentencing Guidelines set forth seven elements:

1. Establishment of Compliance Standards and Procedures

   Simply stated, "[t]he organization shall establish standards and procedures to prevent and detect criminal conduct."[182]

2. High-level Responsibility

---

182 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1).

With respect to high-level responsibility within the organization, the Sentencing Guidelines have evolved over the past few years and now provide:

> (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
>
> (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
>
> (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate

authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.[183]

3. Monitoring of Sanctioned Individuals

"The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program."[184]

4. Communication of Standards

With respect to the fourth factor, which deals with the communication of standards to persons within the organization, Part (A) provides that "[t]he organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities." Part (B) informs that "[t]he individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents."[185]

---

183 *Id.* § 8B2.1(b)(2)(A) – (C).

184 *Id.* § 8B2.1(b)(3).

185 *Id.* § 8B2.1(b)(4)(A) – (B).

5. Monitoring and Auditing

The Sentencing Guidelines impose on the organization the following monitoring and auditing guidelines:

> The organization shall take reasonable steps—
>
> (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
>
> (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
>
> (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.[186]

6. Consistent Enforcement Through Discipline

"The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate

---

186 *Id.* § 8B2.1(b)(5)(A) – (C).

disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."[187]

7. Flexibility to Ensure Effectiveness

"After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."[188]

C. Conclusion

The government has offered strong encouragement to corporations and institutions to establish internal compliance programs. While the specifics of what such a program should include must be tailored to fit the size, culture, and function of the entity, there is little doubt that significant advantages are to be gained by establishing *some type* of program. The government is likely to evaluate the effectiveness of such a program by reference to the Federal Organizational Sentencing Guidelines. But what is most critical is that the program create an institutional environment in which compliance is a high priority. In today's enforcement climate, corporations that fail to institute a compliance program are taking a significant risk.

VI. A DEFENSE PERSPECTIVE ON SEARCH WARRANT PREPARATION

As discussed above, from the defense perspective it is difficult to delineate specifically what acts or omissions may create criminal liability in the regulatory context. Given the current

187 *Id.* § 8B2.1(b)(6).

188 *Id.* § 8B2.1(b)(7).

state of the law, it is important to recognize and to prepare for the possibility of criminal enforcement. Refineries, manufacturing facilities, and numerous other businesses expend considerable resources on developing plans and procedures and on educating and training personnel to meet such emergencies as fires, hurricanes, spills, and other releases. These businesses should devote like energy to training personnel for response to an increasingly common environmental enforcement tool – the criminal search warrant.

A. Possible Scenario

Take a moment to review the hypothetical posed in the introductory remarks above. Although the facts presented represent a composite of several searches, all of them are events that *have* happened and are happening with increasing frequency to those in the regulated community. With proper training and preparation, many of the negative effects of a search can be mitigated.

B. Criminal Investigative Process

In general, the environmental managers and personnel at a refinery, manufacturing facility, or other operation will be accustomed to and comfortable in dealing with environmental regulatory agencies in such ordinary administrative processes as obtaining permits, reporting, and even handling notices of violations. A criminal investigation and search, however, are not like their administrative counterparts. An administrative inspection is typically a routine agency review of the compliance status of a facility or parts of a facility or operation. In contrast, for a search warrant to be issued an Assistant United States Attorney (or district attorney) and a state or federal magistrate must first conclude that there is probable cause to believe that evidence of a

crime is located on the premises to be searched.[189] Thus, in a criminal search, the agents are not looking to see if there is a problem; rather, they are already convinced one exists.

The initial step in obtaining a search warrant is the warrant application. A law enforcement officer, generally coupled with an Assistant United States Attorney, requests that a magistrate issue a search warrant. This application is supported by a sworn affidavit (by the officer or others) attesting to facts that support probable cause to believe that a crime has been committed and that evidence of it is located on the premises to be searched.[190]

If the magistrate finds probable cause, a search warrant is issued. The warrant itself is a form document that identifies specifically the place to be searched, the executing agent, and the allowed time frame within which the search must be completed (typically 10 days for a federal warrant). It will also generally include certain attachments providing a detailed description of the location and the premises to be searched. Most importantly, the attachments will also include a description of items to be searched for and seized. This latter listing may include document or record categories or topics (*e.g.*, laboratory records, invoices, accounting ledgers or files, etc.), as well as samples of materials (water, oil, soils, and the like).

The purpose of the search warrant process is surprise. There will be no warning that a search is imminent. Agents will arrive at the facility named on the warrant and seize control of it. In the business setting, the reason for quick action is to avoid record destruction. The agents will enter quickly and move people away from files, computers, and work areas.

---

189 *See* U.S. CONST. amend. IV (1789) ("no warrants shall issue, but upon probable cause"); FED. R. CRIM. P. 41(b).

190 *See generally* FED. R. CRIM. P. 41.

C. Preparing for a Search Warrant

Being prepared for a search in advance can greatly minimize the harm such a search can inflict on a business. Manufacturing facilities prepare response plans for spills, upsets, fires, and other emergency incidents. Execution of a search warrant is no less of an emergency. The key objectives of such a plan are as follows: (1) minimize workplace disruption; (2) limit the search to the scope of the warrant; and (3) prepare for the legal defense of anticipated prosecution.

Searches are generally very disruptive of normal business activities. They often occur during regular business hours, bringing normal activities to a halt for the duration of the search. Employees will be removed from their offices or other work areas. A search will last at least several hours and may continue for several days. In addition, the documents seized may be important accounting or other key business documents. Often, during the search the agents will not permit copying of even essential business records before they are taken, and the records may be held by the government indefinitely after the search.[191] Some approaches for minimizing disruption to business activities are described below.

Another objective in preparing for a search is to limit it to the scope of the warrant. The areas that may be searched, documents to be seized, and samples to be collected are limited by law to those defined in the search warrant and its attachments. Although expressed in broad terms, there are limits.[192] The scope of the search, however, can be inadvertently expanded if the limits are waived by granting agents permission to search other areas, to interview personnel, and

---

191 The party subject to a search may file a motion under Federal Rule of Criminal Procedure 41(e) for return of the property seized.

192 *In Re Solid State Devices, Inc.*, 130 F.3d 853 (9th Cir. 1997) (suppressing evidence seized under an overly broad warrant).

to pursue other activities not defined in the warrant. Accordingly, facility personnel should know their rights not to consent to a search of areas that are not described in the warrant.

A third objective is to gather information for the defense of the matter. In criminal investigations, there is no open pre-indictment discovery comparable to discovery in civil or administrative proceedings. Thus, any information that can be gleaned during the search will be helpful.

Training and preparation for a search should include the following actions:

1. designate liaison personnel to interact with the agents;

2. organize records;

3. organize and back up computer files;

4. prepare a checklist for response to a warrant; and

5. train liaison and other personnel.

Designate liaison personnel (and alternates) to interact directly with the agents on behalf of the company. These persons will include appropriate management personnel at the facility and those called in when a search occurs, such as in-house counsel, outside counsel, and other company management.

Records, including computer records, should be organized to clearly identify and isolate privileged documents (*e.g.*, attorney-client communications) and files. In addition, essential

business records (including environmental permits and recent monitoring records) should be duplicated or backed up to minimize disruption of business following the search.

As for any response action, checklists are beneficial and perhaps crucial. Such checklists are commonly used in emergency responses to ensure that all required notification is given and all appropriate responses are employed. Checklists define who does what when the agents arrive. Who contacts counsel? If the primary contact is not available, who gets contacted next? In addition, such a checklist identifies key actions to be taken in the event of a search. Again, companies should train for a search like any other emergency. Employees, from the gate guards and the receptionist who will first meet the agents to counsel and management, should know their duties and responsibilities. In addition, all personnel should be notified of their rights in the event of a search.

D. The Checklist: What To Do When The Agents Arrive

1. Contact Liaison Management and Counsel

The designated management at the facility should be the main point of contact with the agents until counsel is called and arrives. Counsel should be contacted *immediately* when the agents arrive and present the search warrant. Although the request will likely be denied, facilities should request a delay of the search until counsel can arrive.

Typically, the agents will move employees into a meeting room, cafeteria, or other central area away from files, computers, and work areas. In refineries and chemical plants, certain positions, such as the control room, cannot be safely abandoned by employees. Often, the agents will have expertise in refining and manufacturing processes. If they do not, control

room personnel should inform the agents of the safety consequences of their removal from the control room and should refer the matter for discussion by the lead agent and the company counsel or management liaison.

2. Review the Search Warrant

The warrant must be carefully reviewed immediately to identify the facilities and files that are subject to search.[193] Those areas that are within the scope of the search warrant, as well as those that are outside of it, should be identified to the agents. The affidavit supporting the warrant should be requested, although this request is likely to be declined.

3. Identify the Agents

The company liaison should request the identity of all agents and their agency affiliation. Law enforcement credentials and business cards should be requested from the agents.

4. Advise Employees of Their Legal Rights

A search warrant does not require anyone to be interviewed. Employees may speak with the agents if they wish, but they may also decline. Employees can also set conditions for any requested interviews, including stipulating the presence of counsel or a company representative. Also, even if an interview is granted, the employee may decline to answer specific questions and may terminate the interview at any time. Employees should know that these rights extend to subsequent contacts by agents away from the facility.

---

193 *See* FED. R. CRIM P. 41(d).

Normal business operations are disrupted and are not likely to resume until the search is completed. Agents have no legal right to detain employees or prevent them from leaving for home.

5. Request to Observe the Search

Request to observe the search to ensure that agents stay within the bounds defined by the warrant. If the agents collect samples of discharge streams, storage tank contents, or other materials, request split samples. If the agents at the scene decline the request, then the request should be formally made to the Assistant United States Attorney or other government attorney. An Assistant United States Attorney will often be in contact with agents and available by telephone during the search. As a backup measure, the facility should sample the same discharge streams, tanks, and the like as soon as possible after the agents have collected their samples. But even with this approach, split samples from the government laboratory should be requested.

In addition, the search should be followed by company liaison, noting the places searched. This may be important in developing defenses. For example, identifying via photographs, video or notes the locations where samples were collected by agents can be very important in supporting the representativeness of the company's samples.

6. Identify Privileged Information

Documents that are privileged as attorney-client communications or attorney work product should have been previously identified and stored separately in the facility files. Management liaison should request that such files not be searched until counsel can first review the files. If this request is declined, request that the files be sealed for future judicial review of

the claimed privilege. If the agents deny this request, counsel may request to speak with the Assistant United States Attorney.

7. Obtain a Search Inventory

An inventory of all documents seized and samples collected must be provided by the agents before departing the facility.[194] Liaison personnel should be certain that the inventory is sufficiently detailed to be of use. For example, if it merely states that "ten boxes of documents" were seized, the inventory offers little help in identifying the seized items.[195]

8. Request Copies of All Documents

Copies of all seized documents should be requested, especially key business documents and those useful for evaluating the criminal investigation and planning possible defenses. This is particularly true of key environmental management documents such as permit files and monitoring data that must soon be reported to regulatory agencies.

9. Conduct Post-Search Interviews

Interview employees that were present during the search. If they were interviewed by agents, determine what questions were asked. If they observed the search, ask them what they saw. Were samples taken? What areas were searched? Who was interviewed?

---

194 *See* FED. R. CRIM. P. 41(d).

195 *See In Re Searches of Sentex Indus. Corp.*, 876 F. Supp. 426, 429-30 (E.D.N.Y. 1995) (discussing level of specificity required of a search inventory).

10. Document the Search

From the reviews and post-search interviews, prepare a detailed summary of all events of the search. This will form the basis for subsequent contacts with the prosecutor and planning for the defense of the matter.

VII. CONCLUSION

The prosecution of business entities and their officers and directors for violations of environmental statutes is increasingly common in the current regulatory environment. Nearly all of the federal environmental statutes and a host of related, but non-environmental, laws contain criminal penalties. Such criminal penalties are typically incurred for knowing or willful violations only, but courts have interpreted these mens rea requirements loosely so as to impose a "strict liability," in a sense, on individual defendants. Corporations should have an effective compliance program in place to reduce the likelihood of being criminally charged and/or to mitigate the negative effects of being prosecuted. Finally, corporations should prepare for the possibility of a government-led searches and seizures by training personnel, backing up critical financial and environmental data, and preparing a checklist to implement upon execution of a search warrant.



Cynthia J. Bishop
(214) 893-5646
cbishop@cbishoplaw.com

For almost 30 years, Cindy has been assisting clients nationwide with resolving environmental problems through her experience as an attorney and chemical engineer. Before her legal career began over 20 years ago, she worked as an environmental consulting engineer, completing air permits, removing underground storage tanks, and conducting asbestos inspections, among other projects. Prior to founding C Bishop Law, she was a partner at Gardere Wynne Sewell, LLP in Dallas.

Ms. Bishop's legal and technical background enables her to effectively and efficiently understand and resolve her clients' environmental problems. She has a broad range of litigation experience, including litigating federal CERCLA contribution and cost recovery actions before the US Supreme Court as well as state statutory and common law claims involving property damage and personal injury allegedly caused by contamination. In two separate federal cost recovery actions, she received favorable summary judgment decisions within one thirty-day period. Ms. Bishop has also defended numerous clients in environmental enforcement actions initiated by municipalities, the Texas Commission on Environmental Quality, and the United States Environmental Protection Agency, reducing or eliminating penalties.

She has helped clients close impacted sites using innovative, risk-based approaches, saving one client over $4 million in estimated cleanup costs. She has assisted clients with obtaining closure on several properties using municipal setting designations (MSD). 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. She has reduced or eliminated state and federal penalties for clients through the Texas Audit Privilege Act and EPA's Self-Disclosure Policy. Ms. Bishop also has resolved a variety of issues involving leaking underground storage tanks at former service stations located in many states, including Arizona, Arkansas, Illinois, Indiana, Iowa, Massachusetts, Michigan, Pennsylvania, Tennessee, and Texas.

Ms. Bishop's clients range from Fortune 50 companies to small businesses, including energy companies, chemical manufacturers, commercial developers, and airlines.

Honors and Awards

Recognized, The Best Lawyers in America - Environmental Law (Steven Naifeh & Gregory White Smith eds., Woodward/White, Inc.) (2008 – 2016)

Ranked, Chambers USA (Environmental Law 2011 - 2016)

Texas Super Lawyer – 2014 - 2016

Distinguished Peer Review™ rating, Martindale-Hubbell® 4.4 out of 5

Professional Licenses

Admitted to practice before:

Texas State Courts

U.S. District Court for the Northern and Southern Districts of Texas

U.S. Court of Appeals for the Fifth Circuit

U.S. Supreme Court

Licensed Professional Engineer – Texas

Education

J.D. Southern Methodist University Dedman School of Law (1994)

B.S. Chemical Engineering, The Ohio State University (1986)

Publications

Author, The New ASTM Due Diligence Standard – More of the Same or Something Completely Different? 26th Annual State Bar of Texas Annual Environmental Superconference (August 2014)

Author, Getting It Right – A Guide to Environmental Due Diligence, *Commercial Real Estate Network* magazine (March 2012)

Author, Minimizing Environmental Liability in Bankruptcy and During Normal Business Operations, *Inside the Minds: Managing Environmental Liabilities in Bankruptcy* (Thomson Reuters/Aspatore 2010)

Author, Foraging Through the Jungle of Expert Discovery and Testimony, 4:4 Nat. Resources & Env't, Spring 2008.

Co-Author with Richard O. Faulk, Stacy Obenhaus and Jeff Gaba, *Cooper v. Aviall:*; Aviall's Brief to the U.S. Court of Appeals for the Fifth Circuit, 22:8 Toxic L. Rep. (BNA) 192 (Feb. 22, 2007).

Co-Author with Richard O. Faulk and Celeste Quiralte, Cost Recovery Under CERCLA Section 107 After *Cooper v. Aviall*, 37:12 Envtl. Rep. (BNA) 640 (Mar. 24, 2006).

Author, There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA, Tul. Envtl. L.J. (2005).

Co-Author with Richard O. Faulk, Disturbing Limitations on CERCLA Contribution Actions – *Aviall Services, Inc. v. Cooper Industries, Inc.*, ABA Envtl. Crimes & Enforcement Committee Newsl., Apr. 2002.

Author, Implementing Corrective Action Under RCRA: Past, Present and Future, Envtl. Permitting, 1994.

Speeches

North Texas Association of Environmental Professionals: "TRI Form Rs – The Sleeping Giant" (May 2016)

Denton County Bar Association, Real Estate Probate and Trust Section: "Environmental Due Diligence Update" (May 2016)

Society Texas Environmental Professional, Forth Worth Chapter: "What to Do When the Inspector Shows Up" (May 2016)

Webinar with W&M Environmental: "RCRA Compliance and EPA Data Mining" (May 2016)

Regulation Week webinar: "The Cost of EPA Compliance - Audits and Inspections" (September 2014)

State Bar of Texas Annual Environmental Superconference: "Due Diligence – Does the Song Remain the Same?" (August 2014)

The Auditing Roundtable, South Central Regional Meeting: "Due Diligence – Does the Song Remain the Same?" (August 2014)

Denton County Bar Association – Real Estate, Probate and Trust Law Section: "Environmental Pitfalls in Real Estate Transactions" (October 2013)

American Society of Safety Engineers 40th Annual Professional Development Conference: "The Cost of Environmental Compliance – Audits and Inspections" (February 2013)

State Bar of Texas Annual Environmental Superconference: "Trial – Battle of the Experts and Other Tips" (August 2012)

American Institute of Chemical Engineers – Dallas Chapter: "Impact of the New NESHAP/NSPS Regulations on the Oil & Gas Industry" (March 2012)

Society of Texas Environmental Professionals – Dallas Chapter: "Hydraulic Fracturing – Myths and Maneuvers" (January 2012)

Dallas Bar Environmental Law Section: "Experts and Preserving Privileged Information" (August 2011)

Lone Star Network: "Hydraulic Fracturing 101" (May 21, 2011)

Address to Confidential Client: "Expert Discovery and Testimony – Avoiding Disaster" (June 13, 2008) (authored paper for proceedings).

Address to Confidential Client: "Municipal Setting Designations" (June 13, 2008) (authored paper for proceedings).

Air & Waste Management Association Annual Conference: "Environmental Liabilities – New Risks and Solutions" (June 27, 2007) (authored paper for conference proceedings).

Dallas Bar Environmental Law Section: "The Inside Skinny on *Aviall*" (2005).

Legal Issues for Texas Civil Engineers and Land Surveyors: "Understanding Environmental Law" (2005).

Asbestos Forum: "Defense Strategies for Weathering the Storm of New Asbestos Claims" (2005) (authored paper for forum proceedings).

Law Conference for the International Council of Shopping Centers: "Environmental Issues in Letters of Intent" (2004).

Law Conference for the International Council of Shopping Centers: "Protecting Yourself from Environmental Liability: Does Insurance Help?" (2003).

Dallas/Fort Worth Real Estate Council: "Voluntary Cleanup Program and Innocent Operator Program Impact on Real Estate Transactions" (Mar. 1999).

Understanding Wetlands (1999).

Food Safety (1998).

International Petroleum Exploration Conference: "Developments in The Clean Water Act" (1997) (authored paper for conference proceedings).

Air & Waste Management Association Annual Conference: "Corrective Action Management Units" (1994).

Other Engagements

Panel Moderator, State Bar of Texas Natural Resource Law Section Environmental Superconference (2008, 2010, 2011, 2013, 2014 and 2015).

Panel Moderator, Dallas Bar Association Environmental Law Section Meeting: What's Up With Wetlands? (2001).

Panel Moderator, Dallas Bar Association Environmental Law Section Meeting: Impact of Recent Air Regulations on the Dallas/Fort Worth Area (1998).

Lecturer, Address to the Tarrant County Junior College Environmental Class: Hot Topics In Environmental Law (1997).

Community/Professional Involvement

State Bar of Texas

Environmental and Natural Resources Law Section (Past Chair)

Dallas Bar Association

Environmental Law Section (Past Chair)

Denton County Bar Association

Society of Texas Environmental Professionals

Women in the Environment

Scholarship Chairperson, Ohio State Alumni Club of Dallas

James Payne, Regional Counsel for EPA's South Central Region (Region 6)

Mr. James Payne has served as Regional Counsel for the U.S. Environmental Protection Agency's Region 6 office, located in Dallas, Texas, since February 2016. Mr. Payne's background as a senior executive and manager, and varied and extensive litigation, counseling and enforcement experience is a great addition to the EPA Region 6 team.

Before joining EPA, Mr. Payne served as the Deputy General Counsel for General Law at the U.S. Patent and Trademark Office, managing the law office and advising and representing the agency on fiscal, procurement, labor, employment, Freedom of Information Act, rulemaking, and legislation matters.

Mr. Payne spent 12 years in the U.S. Department of Justice's Environment and Natural Resources Division, first as a trial attorney, and later as Counsel for State and Local Affairs and Senior Counsel for Alternative Dispute Resolution. He played a key leadership role in several high-profile projects, including the response to the Gulf Deepwater Horizon oil spill, the response to the Japan Fukushima nuclear crisis, and development of the 2011 multi-agency Memorandum of Understanding on Environmental Justice and Executive Order 12898.

Mr. Payne also has considerable experience with environmental protection handled by state governments. As Counsel for State and Local Affairs at the U.S. Department of Justice, he led an initiative that developed joint environmental cases or projects with all 50 states. He previously served in the Ohio Attorney General's Office as Assistant Attorney General and Senior Projects Attorney in the Environmental Enforcement Section. He chaired three national workgroups of state litigators, including one that successfully litigated a series of federalism cases on behalf of States in the US Supreme Court. He also has served as lead air pollution counsel for the Ohio Environmental Protection Agency.

His Bachelor Degree is from Dartmouth College where he majored in Engineering Sciences. His Juris Doctor Degree is from The Ohio State University where he co-founded the Ohio State Journal on Dispute Resolution. He also completed the Senior Managers in Government program at Harvard University Kennedy School of Government. He has received numerous accolades and earned many special recognitions, including nine Department of Justice outstanding attorney awards and the Marvin Award from the National Association of Attorneys General.

Next Generation Compliance and Enforcement at U.S. EPA

1

Texas Environmental Superconference

Austin, TX

U.S. Environmental Protection Agency

August 5, 2016

EPA Enforcement Goals

2







- **Tough civil and criminal enforcement** for violations that threaten communities and the environment
- **Next Generation Compliance** – reduce pollution, increase compliance
- **Strong EPA/state/tribal environmental protection**

Tough Enforcement

3

- Protecting communities by reducing pollution and requiring compliance
- Deterring others from violating
- Level playing field for those who play by the rules
- Environmental Justice

The New York Times
Duke Energy Agrees to Pay $102 Million for Breaches

Tampa Bay Times
Editorial: The positives of the Mosaic settlement

CBSNEWS
Terminix fined $10M in Virgin Islands toxic pesticide case

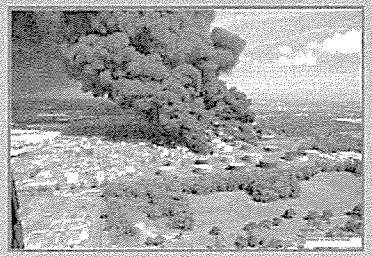
AP Associated Press
Simplot to Install $42 Million in Pollution Controls

New National Enforcement Initiatives

4

1. Keeping Industrial Pollutants Out of the Nation's Waters
2. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
3. Cutting Hazardous Air Pollutants (expanded initiative)





Continuing National Enforcement Initiatives

5

1. Reducing Air Pollution from the Largest Sources
2. Ensuring Energy Extraction Activities Comply with Environmental Laws
3. Keeping Raw Sewage and Contaminated Stormwater Out of the Nation's Waters
4. Preventing Animal Waste from Contaminating Surface and Ground Water

Enforcement: Air Pollution

6

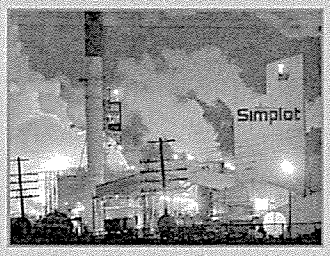
Berkshire Power Plant

- Plant owner & management company pleaded guilty to tampering with emissions equipment and submitting false information.
- $8.5 million in penalties + funding for an American Lung Association wood stove change-out program.



J.R. Simplot Company

- Illegal modifications made at Simplot's five sulfuric acid plants in three states.
- $42 million on pollution controls that will significantly cut SO2 emissions at all five plants; fund two wood stove change-out programs.



Enforcement: Water Pollution

7

City of Harrisburg, PA

- City required to conduct pilot study to evaluate flow activation technologies.
- Results will inform a new system to send an alert each time a monitored CSO outfall begins discharging.
- City must also consider green infrastructure alternatives.



BNSF Railway

- Four spills released 14,000+ gallons of oil/diesel from locomotives; inadequate plans to control oil spills at the rail yards in CO, ND, WY.
- BNSF came into compliance with the law, invested in spill response equipment, installed infrastructure at rail yards, paid $600k penalty.



Enforcement: Waste and Toxics

8

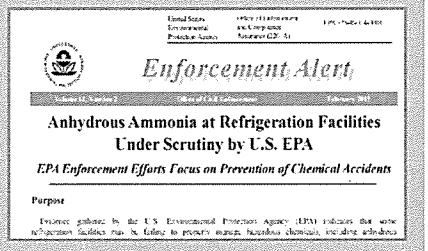
Mosaic Fertilizer, LLC

- 60 billion pounds of hazardous waste to be properly handled, stored & disposed of.
- $1.8 billion in financial assurance to treat waste & close 4 plants + $170 million for mitigation projects.
- $8 million in penalties; $2 million for local environmental projects.



Millard Refrigerated Services

- 32,000 pounds of anhydrous ammonia released into the air sickened workers responding to BP oil spill.
- Company will pay a $3 million penalty for violations of Clean Air Act, EPCRA and CERCLA.
- Recent Enforcement Alert highlights ammonia compliance issues.



Enforcement Alert

Anhydrous Ammonia at Refrigeration Facilities Under Scrutiny by U.S. EPA

EPA Enforcement Efforts Focus on Prevention of Chemical Accidents

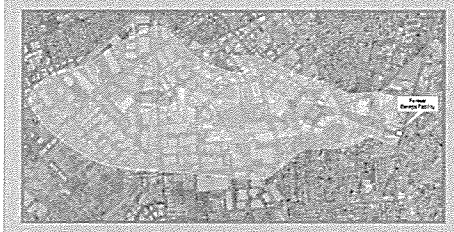
Purpose

Enforcement: Cleanups at Superfund Sites

9

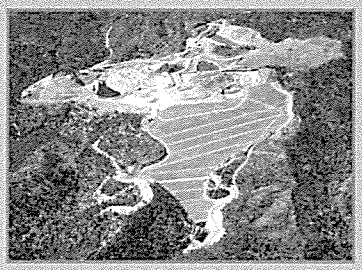
Omega Chemical Corp. site (CA)

- $70 million to clean up groundwater contamination.
- $8 million to reimburse EPA for past cleanup costs.



Gilt Edge Mine site (SD)

- Recovered $10 million for past cleanup of former mine site.
- EPA & state have secured $40 million from responsible parties for cleanup to date.



Next Generation Compliance – It's Here Today

10

1. More effective rules
2. Advanced monitoring technology
3. Electronic reporting
4. Increased transparency
5. Innovative enforcement



More Effective Rules and Permits

11

Rules and permits structured to promote compliance

- Applicability and simplicity
- Structural: compliance easier than noncompliance
- Self-monitoring and third-party monitoring
- E-reporting and transparency
- Market forces and incentives





Proposed Risk Management Program Rule

12

New independent third-party audits:

- Focuses on facilities with past accidents where required self-audits failed to prevent accidents
- Facilities with prior accidents required to do independent third party auditing to more effectively comply with accident prevention requirements.



New Rule for Petroleum Refineries

13

- Refineries must conduct fenceline monitoring to ensure neighboring communities are protected.
  - Action level/trigger
- Most recent annual average recalculated every two weeks so companies can keep emissions well below the annual standard.
- Focuses on prevention.

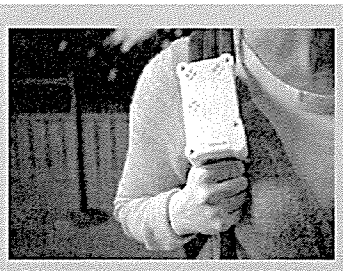


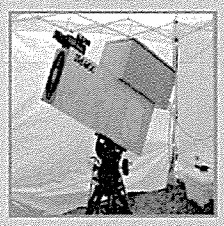
U.S. Environmental Protection Agency

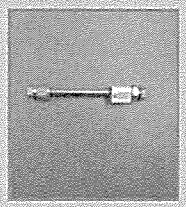
Advanced Monitoring Technologies

14

- Real-time monitoring – knowing about pollution as it's happening
- Facility feedback loops – preventing pollution before it happens
- Fence line monitoring
- Community monitoring
- Remote sensing







U.S. Environmental Protection Agency

Advanced Monitoring – Case Study

15

Tonawanda Coke

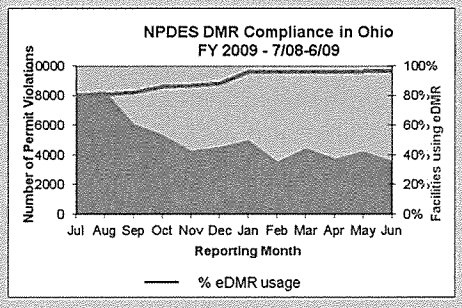
- Citizen monitoring detects emissions coming from local coke plant.
- EPA advanced monitoring found significant benzene releases in to the community.
- EPA civil and criminal cases: cut emissions, $15 million in penalties, $12 million in community service.



Electronic Reporting

16

- Information technologies make new solutions possible.
- Smart tools and two-way communication.
- Private sector reporting tools.
- NPDES e-reporting rule finalized.
- EPA policy.

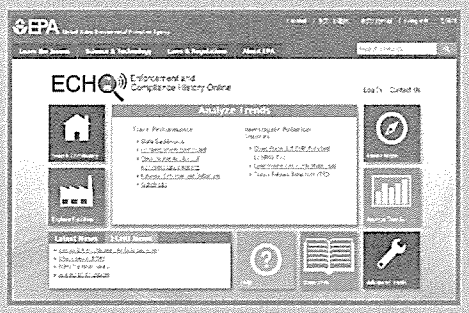


Transparency – Enforcement and Compliance History Online

17

Recent Enhancements

- New data
- Mapping feature allows users to create customized maps
- New services: e.g., loadings tool

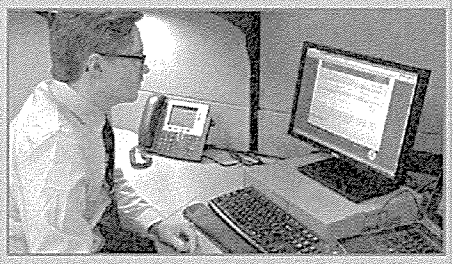


Transparency – New eDisclosure Web Portal

18

Modernized Self-Disclosure

- Next Gen web tool modernizes how entities self-report civil violations, saving time and money for businesses and EPA.
- Tool is already yielding faster and more efficient resolution of self-reported violations.
- 140+ disclosures since system launched in December 2015; on pace to increase self-disclosed violations 25% over recent years.



Innovative Enforcement

19

Include Next Gen Ideas in Settlements

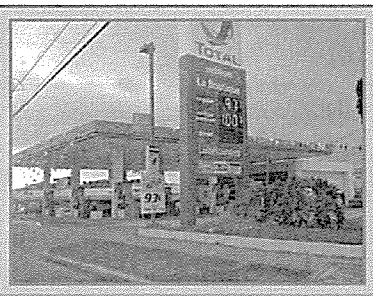
- Fence line monitors (advanced monitoring)
- Electronic reporting under consent decrees (e-reporting)
- Public posting of compliance and pollution data (transparency)

Data analytics

Puerto Rican Oil Co. Settles Suit Over Storage Tank Leaks

By John Kennedy

Law360, New York (March 9, 2015, 10:00 PM ET) -- A Puerto Rico oil company has agreed to pay a $426,000 penalty and implement other compliance measures for mishandling leaking underground gasoline storage tanks, according to an agreement filed Monday in Puerto Rico federal court.



Innovative Enforcement

20

Clean Air Act Settlement with Noble Energy

- Infrared camera inspections of vapor control systems and tanks
- Pressure monitors with continuous data reporting
- A third-party audit of the vapor control systems
- Engineering evaluations posted to the web

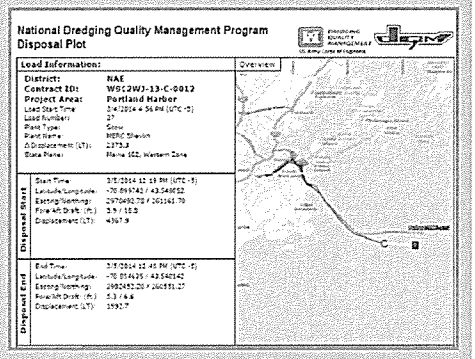


Innovative Enforcement

21

Settlement with Cashman Dredging & Marine

- Dredged material dumped at locations outside of authorized ocean disposal sites.
- Innovative Supplemental Environmental Project – GeoFence.
- GPS-enabled system that tracks position of the scow relative to permitted dump sites.
- GeoFence prevents dumping until the scow is inside the permitted dump site coordinates, eliminating the element of human error.

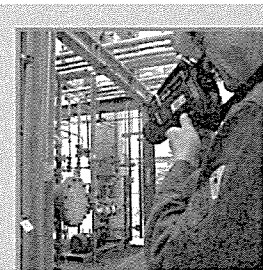


U.S. Environmental Protection Agency

Path Forward

22

- Use Next Generation Compliance to increase compliance and reduce pollution
- Pursue tough civil and criminal enforcement for violations that threaten communities and the environment
- Report a Violation: http://epa.gov/tips/





U.S. Environmental Protection Agency

JUSTICE JEFF BROWN

Justice Jeff Brown has served on the Supreme Court of Texas since the fall of 2013. He previously served six years each as a justice on Texas' Fourteenth Court of Appeals and as judge of the 55th District Court, both in Houston. Justice Brown holds a B.A. in English from the University of Texas at Austin and a law degree, *magna cum laude*, from the University of Houston. After law school, Justice Brown clerked on the Supreme Court of Texas for Justices Jack Hightower and Greg Abbott. He is just the fourth person to serve as a law clerk on the Supreme Court of Texas and later become a justice on the Court. Justice Brown has received three judge-of-the-year awards over the course of his career and was named Outstanding Young Lawyer of Texas by the Texas Young Lawyers Association and one of Five Outstanding Young Texans by the Jaycees. He is board-certified in civil trial law and is co-editor of the *Texas Rules of Evidence Handbook*. An Eagle Scout himself, Justice Brown is an active volunteer with the Boy Scouts of America and has received the Outstanding Eagle Scout Award from the National Eagle Scout Association. He serves on the boards of the Texas Historical Foundation and the Texas Supreme Court Historical Society, as chairman of the board of the Houston Law Review, and is a Life Member of the Houston Livestock Show & Rodeo. Justice Brown and his wife, Susannah, a schoolteacher, have been married for 24 years and have three children: Kathleen, 21, Rob, 18, and Gus, 15.

SUPREME COURT OF TEXAS UPDATE

Phil Johnson
Justice
Supreme Court of Texas

Heather Holmes
Staff Attorney

Robert Brailas
Staff Attorney

Nicole Sears
Law Clerk

Mike Duncan
Law Clerk

Georgie Gonzales
Executive Assistant

Special thanks to all the Staff Attorneys and Law Clerks at the Supreme Court of Texas for their substantial contributions.

February 1, 2016 – April 30, 2016

TABLE OF CONTENTS

I. SCOPE OF THIS ARTICLE 1

II. ADMINISTRATIVE LAW 1
A. Exhaustion of Administrative Remedies 1
1. Clint Indep. Sch. Dist. v. Marquez, S.W.3d , 59 Tex. Sup. Ct. J. 546 (Tex. Apr. 1, 2016) [14-0903] 1
B. Public Information 2
1. Paxton v. City of Dallas, 453 S.W.3d 580 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0073], *consolidated with* Paxton v. City of Dallas, 2015 WL 601974 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0238] 2
C. Public Utility Commission 2
1. Oncor Elec. Delivery Co. v. Pub. Util. Comm'n, 450 S.W.3d 615 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0005] 2

III. ARBITRATION 3
A. Judicial Review 3
1. Cardwell v. Whataburger Rests. LLC, S.W.3d , 59 Tex. Sup. Ct. J. 418 (Tex. Feb. 26, 2016) [14-1019] 3

IV. EMPLOYMENT LAW 3
A. Whistleblower Actions 3
1. McMillen v. Tex. Health & Human Servs. Comm'n, S.W.3d , 59 Tex. Sup. Ct. J. 421 (Tex. Feb. 26, 2016) [15-0147] 3

V. GOVERNMENTAL IMMUNITY 3
A. Contract Claims 3
1. Wasson Interests, Ltd. v. City of Jacksonville, S.W.3d , 59 Tex. Sup. Ct. J. 524 (Tex. Apr. 1, 2016) [14-0645] 3
2. Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, S.W.3d , 59 Tex. Sup. Ct. J. 662 (Tex. Apr. 15, 2016) [15-0029] 4
B. Ultra Vires Claims 4
1. Hous. Belt & Terminal Ry. Co. v. City of Houston, S.W.3d , 59 Tex. Sup. Ct. J. 512 (Tex. Apr. 1, 2016) [14-0459] 4

VI. INTENTIONAL TORTS 5
A. Assault 5
1. B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928 (Tex. App.—Dallas 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0404] 5
B. Defamation 5
1. Brady v. Klentzman, 456 S.W.3d 239 (Tex. App.—Houston [1st Dist.] 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0056] 5

VII. JURISDICTION 6
A. Injunctions 6
1. Campbell v. Wilder, S.W.3d , 59 Tex. Sup. Ct. J. 505 (Tex. Apr. 1, 2016) [14-0379] 6

B. Personal Jurisdiction 6
1. TV Azteca v. Ruiz, S.W.3d , 59 Tex. Sup. Ct. J. 391 (Tex. Feb. 26, 2016) [14-0186] 6

VIII. MEDICAL LIABILITY 7
A. Partnership Liability 7
1. Doctors Hosp. at Renaissance, Ltd. v. Andrade, 2015 WL 3799425 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0563] 7

IX. MUNICIPAL LAW 7
A. State Law Preemption 7
1. BCCA Appeal Grp., Inc. v. City of Houston, S.W.3d , 59 Tex. Sup. Ct. J. 692 (Tex. Apr. 29, 2016) [13-0768] 7

X. NEGLIGENCE 8
A. Premises Liability 8
1. UDR Tex. Props., L.P. v. Petrie, 2014 WL 7174242 (Tex. App.—Houston [14th Dist.] 2014), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0197] 8

XI. OIL AND GAS 8
A. Assignments 8
1. Apache Deepwater, LLC v. McDaniel Partners, Ltd., S.W.3d , 59 Tex. Sup. Ct. J. 411 (Tex. Feb. 26, 2016) [14-0546] 8

XII. PETS 9
A. Property Rights 9
1. Lira v. Greater Hous. German Shepherd Dog Rescue, Inc., S.W.3d , 59 Tex. Sup. Ct. J. 562 (Tex. Apr. 1, 2016) [14-0964] 9

XIII. PROBATE: WILLS, TRUSTS, ESTATES, & GUARDIANSHIPS 10
A. Will Construction 10
1. Stephens v. Beard, S.W.3d , 59 Tex. Sup. Ct. J. 446 (Tex. Mar. 18, 2016) [14-0406,14-0407] 10

XIV. PROCEDURE—APPELLATE 10
A. Dismissal 10
1. Ex Parte N.C., S.W.3d , 59 Tex. Sup. Ct. J. 585 (Tex. Apr. 1, 2016) [15-0184] 10
2. McLean v. Livingston, S.W.3d , 59 Tex. Sup. Ct. J. 578 (Tex. Apr. 1, 2016) [15-0100] 11
B. Judgments 11
1. Blair v. Atl. Indus., Inc., 482 S.W.3d 57 (Tex. Jan. 8, 2016) [14-1041] 11

XV. PROCEDURE—PRETRIAL 11
A. Venue 11
1. In re J.B. Hunt Transp., Inc., 2015 WL 4554624 (Tex. App.—Dallas 2015), *argument granted on pet. for writ of mandamus*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0631] 11

XVI. PROCEDURE—TRIAL AND POST-TRIAL 12
A. New Trial Orders 12
1. In re Bent, S.W.3d , 59 Tex. Sup. Ct. J. 566 (Tex. Apr. 1, 2016) [14-1006] 12
B. Post-Judgment Filing Deadlines 13
1. In re J.Z.P., S.W.3d , 59 Tex. Sup. Ct. J. 419 (Tex. Feb. 26, 2016) [14-1072] 13

XVII. REAL PROPERTY 13
A. Eminent Domain 13
1. Caffe Ribs, Inc. v. Texas, S.W.3d , 59 Tex. Sup. Ct. J. 499 (Tex. Apr. 1, 2016) [14-0193] 13
2. Denbury Green Pipeline–Tex., LLC v. Tex. Rice Land Partners, Ltd., 457 S.W.3d 115 (Tex. App.— Beaumont 2015), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0225] 13

XVIII. TAXES 14
A. Cigarette Tax 14
1. Hegar v. Tex. Small Tobacco Coal., S.W.3d , 59 Tex. Sup. Ct. J. 534 (Tex. Apr. 1, 2016) [14-0747] 14
B. Franchise Taxes 15
1. Hallmark Mktg. Co. v. Hegar, S.W.3d , 59 Tex. Sup. Ct. J. 657 (Tex. Apr. 15, 2016) [14-1075] 15

XIX. TEXAS CITIZENS PARTICIPATION ACT 16
A. Actual Malice 16
1. Greer v. Abraham, S.W.3d ,59 Tex. Sup. Ct. J. 645 (Tex. Apr. 15, 2016) [14-0669] 16
B. Attorney's Fees 16
1. Sullivan v. Abraham, S.W.3d , 59 Tex. Sup. Ct. J. 652 (Tex. Apr. 15, 2016) [14-0987] 16

XX. TEXAS UNIFORM FRAUDULENT TRANSFER ACT 17
A. Reasonably Equivalent Value 17
1. Janvey v. The Golf Channel, Inc., S.W.3d , 59 Tex. Sup. Ct. J. 587 (Tex. Apr. 1, 2016) [15-0489] 17

SUPREME COURT OF TEXAS UPDATE

Phil Johnson
Justice
Supreme Court of Texas

I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from February 1, 2016 through April 30, 2016. Petitions that have been granted but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Exhaustion of Administrative Remedies

1. Clint Indep. Sch. Dist. v. Marquez, S.W.3d , 59 Tex. Sup. Ct. J. 546 (Tex. Apr. 1, 2016) [14-0903].

At issue in this case was whether a group of parents was required to exhaust administrative remedies under the Texas Education Code before filing suit in a trial court seeking declaratory and injunctive relief to cure alleged inequalities in funding among individual schools in the Clint Independent School District.

Parents of students attending schools in Clint ISD filed suit against the school district, claiming it violated the Texas Education Code because it was inequitably funding the schools within the district. They also raised claims of a violation of the equal rights and education provisions of the Texas Constitution. Clint ISD responded by filing a motion to dismiss and a plea to the jurisdiction. The trial court granted Clint ISD's motions, explaining that the Parents failed to exhaust all administrative remedies prior to filing suit. The case was appealed to the court of appeals, which reversed the trial court's ruling. The court of appeals held that the Parents validly raised constitutional claims, which are exempt from the requirement that a party exhaust all administrative remedies prior to filing suit. Clint ISD appealed, arguing that the school district's obligation to fund schools arises from the Texas Education Code instead of the Constitution, thus the Parents failed to raise a valid constitutional claim.

The Court held that the Parents' claims necessarily involved violations of the "school laws of the state" and that the Parents were required to exhaust their administrative remedies. The Constitution provides that it is the Legislature's duty to provide for an efficient public school system. And through the Education Code, the Legislature, not the Constitution, imposed the legal obligations on the school district that the parents claimedhe district failed to meet.

The Court further held that the Parents were not excused from exhausting administrative remedies under any exceptions. Claims for purely constitutional violations do not require exhaustion of administrative remedies, but the Parents' constitutional claims necessarily resulted from alleged violations of the school laws of the state. The constitutional-claims exception did not therefore apply.

Section 7.057(a–1) of the Education Code excepts claims based on law "outside" of the Code. The Court held that this exception did not apply because the Parents' claims were based on provisions in the Education Code. The Court also held that the Parents' request for temporary injunctive relief did not except their claims from the exhaustion requirement because such relief was not appropriate in this case. Lastly, although "pure questions of law" are excepted from the exhaustion requirement, the Parents presented questions of historical fact, questions of law, and mixed questions of law and fact.

Although the Parents requested the the Court remand to the trial court so that they could amend their pleadings to cure the jurisdictional defect, the Court held that the Parents could not replead their claims in such a way as to eliminate their reliance on the school laws of the state. The Parents could also not use remand as a mechanism to plead new claims. The Court therefore dismissed the suit for lack of jurisdiction.

B. Public Information

1. Paxton v. City of Dallas, 453 S.W.3d 580 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0073], *consolidated with* Paxton v. City of Dallas, 2015 WL 601974 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0238].

The primary issue in these consolidated cases is whether attorney-client privilege permits a governmental entity to withhold privileged documents from public disclosure under the Texas Public Information Act (PIA). Subject to certain exceptions for confidential information, the PIA requires that public information be made available to the public upon request. If a governmental entity desires to withhold the requested information from disclosure, it must request an opinion from the Attorney General on the issue no later than 10 business after receiving the request. If the governmental entity fails to timely comply, the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

In two cases, the City of Dallas received information requests that allegedly would require disclosure of information protected by the attorney-client privilege. The City failed to ask the Attorney General for an opinion within 10 business days of receiving the requests. When the City finally requested an Attorney General opinion, the City asserted attorney-client privilege as the "compelling reason" that permits the City to nonetheless withhold the information from public disclosure. The Attorney General disagreed, concluding that the PIA required disclosure. The City sued the Attorney General, arguing that it had satisfied the compelling-reason standard. After the City won in one trial court and lost in another, the two courts of appeals in these cases held that the City's assertion of attorney-client privilege satisfied the compelling-reason standard, permitting the City to withhold the requested information.

The Attorney General appealed to the Supreme Court. The Attorney General's primary argument is that merely claiming attorney-client privilege without more is insufficient to satisfy the compelling-reason standard. The Supreme Court granted the Attorney General's petition for review but has not yet scheduled oral argument.

C. Public Utility Commission

1. Oncor Elec. Delivery Co. v. Pub. Util. Comm'n, 450 S.W.3d 615 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0005].

This case concerns an administrative appeal from a final order of the Public Utility Commission increasing rates for electric transmission and distribution services by Oncor Electric Delivery Company. Multiple parties appealed various issues to the district court and then to the court of appeals, which affirmed in part and reversed in part the district court's judgment. Three parties petitioned for review in the Supreme Court, raising three general issues.

First, the State of Texas' Agencies and Institutions of Higher Education assert that under section 36.351 of the Texas Utilities Code, Oncor must discount transmission and distribution charges for electricity delivered to them. The court of appeals held Oncor need not discount its rates, deferring to the Commission's most recent interpretation of the statute. According to the Commission, because Oncor merely transmits electricity (but does not provide retail electric service), Oncor is not covered by the Code's mandate that "each electric utility . . . shall discount charges for electric service provided to a facility of a four-year state university, upper-level institution, Texas State Technical College, or college."

Second, Oncor, as well as the Steering Committee of Cities Served by Oncor, asserts Oncor may pass certain franchise fees on to ratepayers. Oncor has franchise-fee agreements with municipalities for use of their streets, alleys, or public ways. When Oncor negotiated a 5% franchise-fee increase, the Commission determined Oncor could not pass these additional fees on to ratepayers, and the court of appeals agreed.

Third, Oncor disputes whether under section 36.060 of the Utilities Code it is "a member of an affiliated group eligible to file a consolidated income tax return." The court of appeals held Oncor was a member of such a group and

therefore had to pass certain federal income-tax savings on to ratepayers.

The Supreme Court granted Oncor's, the Steering Committee's, and the State Agencies' petitions for review but has not yet scheduled oral argument.

III. ARBITRATION

A. Judicial Review

1. Cardwell v. Whataburger Rests. LLC, S.W.3d , 59 Tex. Sup. Ct. J. 418 (Tex. Feb. 26, 2016) [14-1019].

At issue in this case was whether a court of appeals may order a case to arbitration without addressing all of a party's defenses against arbitration. Yvonne Cardwell was injured during her employment with Whataburger Restaurants. Whataburger moved to compel arbitration based on an agreement in the Employee Handbook. Cardwell raised multiple defenses against arbitration, including unconscionability and illusoriness. The trial court denied the motion, based partially on its own research and views about arbitration, and did not address all of Cardwell's arguments. The court of appeals reversed, addressing only the ground given by the trial court, and ordered arbitration.

In a per curiam opinion, the Supreme Court granted Cardwell's petition for review and reversed the judgment of the court of appeals. The Court held that the court of appeals cannot order arbitration without either addressing all of Cardwell's arguments or remanding the case to the trial court to address them.

IV. EMPLOYMENT LAW

A. Whistleblower Actions

1. McMillen v. Tex. Health & Human Servs. Comm'n, S.W.3d , 59 Tex. Sup. Ct. J. 421 (Tex. Feb. 26, 2016) [15-0147].

The issue in this Whistleblower Act case was whether a state employee's alleged report of a legal violation was made to an appropriate law-enforcement authority. Michael McMillen, an attorney, worked for the Office of the Inspector General in the Texas Health and Human Services Commission. McMillen concluded that one of the Commission's programs was illegal, and he claims he reported the violation to others in the Commission and the Office of the Inspector General. He was eventually terminated, and he sued the Commission under the Texas Whistleblower Act. The Commission filed a plea to the jurisdiction, which the trial court denied. The court of appeals, however, reversed, concluding the Act did not protect McMillen because he did not report to an appropriate law-enforcement authority.

The Supreme Court reversed and remanded to the court of appeals for further proceedings. The Court held that McMillen's report was to an appropriate law-enforcement authority as required by the Whistleblower Act. The Commission, through its Office of Inspector General, is responsible for investigating fraud and abuse and ensuring the enforcement of state laws regarding health and human services. McMillen alleged the Commission was violating a federal law, but state law specifically charged the Commission with implementing the federal statute. Because the Office of Inspector General had authority both within and without the Commission to enforce the law, it was an appropriate law-enforcement authority. The Court therefore remanded the case to the court of appeals to consider the remaining elements of McMillen's Whistleblower claim.

V. GOVERNMENTAL IMMUNITY

A. Contract Claims

1. Wasson Interests, Ltd. v. City of Jacksonville, S.W.3d , 59 Tex. Sup. Ct. J. 524 (Tex. Apr. 1, 2016) [14-0645].

At issue in this case was whether the proprietary-governmental dichotomy—which provides that while a municipality's governmental functions are protected by immunity, its proprietary functions are not—applies in the contract-claims context. Wasson Interests leased lakefront property from the City of Jacksonville. When the City terminated the lease for a supposed violation of its terms, Wasson brought suit for breach of contract, seeking both injunctive relief and a declaratory judgment that it did not violate the lease agreement. The City filed a motion for summary judgment arguing, among other things, that it was immune from suit. The trial court granted the City's motion, and the court of appeals affirmed, holding that the proprietary-governmental dichotomy did not apply in the

contract-claims context and therefore the City was immune. The Supreme Court reversed.

The Court focused its discussion on the common-law development and rationales of immunity and the proprietary-governmental dichotomy. Because a municipality's immunity is derivative of the State's sovereign immunity, the Court said, its immunity can only extend as far as the State's but no further. Noting that proprietary acts are by definition not performed as a branch of the State, the Court found that such acts were not, in principle, protected by derivative immunity. The Court held that this basic principle applied with equal force in the contract- and tort-claims contexts. The Court also addressed the City's arguments, and the court of appeals' conclusion, that Chapter 271 of the Local Government Code compelled the Court to find that the dichotomy did not apply to contract claims. Chapter 271, the Court said, neither abrogated nor altered the common-law dichotomy. Thus, the Court held that the dichotomy applied in the contract-claims context.

The Court did not address the parties' arguments about whether the City's lease was proprietary or governmental, instead remanding that issue to the court of appeals. However, the Court did note that in determining the boundaries of immunity as it relates to whether a function is proprietary or governmental, courts should be guided by the Texas Tort Claims Act's treatment of the distinction.

2. Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, S.W.3d , 59 Tex. Sup. Ct. J. 662 (Tex. Apr. 15, 2016) [15-0029].

At issue in this case was whether a claim for attorney's fees for breach of a contract to install pollution control equipment at a power plant was barred by governmental immunity. To resolve this dispute, the Court had to determine whether the subject matter of the contract was proprietary or governmental in nature.

In 2004, the City Public Service Board of San Antonio (CPS Energy) contracted with Wheelabrator Air Pollution Control, Inc. and Casey Industrial, Inc. to build additions to a coal-fired power station that was owned and operated by CPS Energy. CPS Energy is a municipally-owned electric and gas utility in San Antonio, Texas. CPS Energy agreed to pay $41,818,460 to Wheelabrator but would withhold 10% of the total contract price as retainage. After CPS Energy refused to pay the retainage due to a problem with the additions, Wheelabrator sued CPS Energy. CPS Energy filed a plea to the jurisdiction, claiming it had governmental immunity from Wheelabrator's contract claims. Wheelabrator responded by arguing that the proprietary-governmental dichotomy applies in contract claims, and that the contract was related to a proprietary function, thereby defeating CPS Energy's immunity from suit. The trial court granted the plea to the jurisdiction, ruling that the proprietary-governmental dichotomy does not apply to contract claims. The court of appeals affirmed.

The Court recently held in *Wasson Interests v. City of Jacksonville*, that the proprietary-governmental dichotomy applies in the contract-claims context. ___S.W.3d___, ___(Tex. 2016). Accordingly, in *Wheelabrator*, to determine whether governmental immunity applied, the Court first determined whether the performed function was proprietary or governmental. Using both common law classifications and the Texas Tort Claims Act as guidance, the Court determined that a municipality's operation of its own public utility was a proprietary function. Finally, because the attorney's fees claim stemmed directly from Wheelabrator's breach-of-contract action against CPS Energy, the subject matter of which was a proprietary function, the Court held that governmental immunity did not preclude the attorney's fees claim. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

B. Ultra Vires Claims

1. Hous. Belt & Terminal Ry. Co. v. City of Houston, S.W.3d , 59 Tex. Sup. Ct. J. 512 (Tex. Apr. 1, 2016) [14-0459].

At issue in this case was whether a suit complaining of a government officer's exercise of limited discretion by alleging that the officer acted without legal authority was a viable *ultra vires* claim.

The City of Houston enacted a drainage ordinance providing for charges on properties

within the City based on whether any given property was "benefitted" and, if so, whether that property's surface was "impervious." Three railroads sued the City of Houston and its Director of Public Works and Engineering, Daniel Krueger, alleging *ultra vires* claims for assessing such charges against their properties, which they alleged were neither benefitted nor impervious. The City filed a plea to the jurisdiction claiming governmental immunity, which the trial court granted. The court of appeals reversed in part, holding that the railroads pleaded a viable *ultra vires* claim challenging Krueger's determination that their properties were benefitted, but that they had not pleaded a viable *ultra vires* claim contesting Krueger's determination that the properties were impervious. The Supreme Court reversed in part and held that both of the railroads' claims were viable *ultra vires* claims.

After recounting its *ultra vires* jurisprudence, the Court noted that while the protections of governmental immunity remain robust, they are not absolute. It thus held that while governmental immunity bars suits complaining of an exercise of absolute discretion, it does not bar suits complaining of either an officer's failure to perform a ministerial act or an officer's exercise of judgment or limited discretion without reference to or in conflict with the constraints of the law authorizing the official to act. Applying that principle in this case, the Court found that the railroads properly alleged *ultra vires* claims as to both of Krueger's determinations because they alleged that he acted without reference to the definitions and constraints of the ordinance. The Court reversed and remanded the case to the trial court.

Justice Lehrmann concurred, joining the Court's opinion and judgment in full but writing separately to elaborate on the Court's characterization of governmental immunity as an issue implicating subject-matter jurisdiction. Justice Lehrmann noted that, although this case had not raised questions regarding the nature of governmental immunity, those questions remained unresolved and were suitable for further analysis in the proper case.

VI. INTENTIONAL TORTS

A. Assault

1. B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928 (Tex. App.—Dallas 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0404].

The primary issue in this case is whether a common-law sexual assault claim is preempted by the Texas Commission on Human Rights Act (TCHRA). B.C. alleges she was sexually assaulted in the course of her employment by the vice principal of her then-employer, Steak N Shake. B.C. sued Steak N Shake for assault, negligence, and intentional infliction of emotional distress. Steak N Shake moved for summary judgment on all causes of action, asserting that B.C.'s claims were preempted by the TCHRA. The trial court granted Steak N Shake's motion without stating the grounds for its ruling. B.C. appealed only the dismissal of her assault claim, arguing that the trial court erred in granting summary judgment because (1) the TCHRA does not preempt tort claims by victims of sexual assault and (2) a fact question remained as to whether the perpetrator of the alleged assault was Steak N Shake's vice principal. The court of appeals affirmed, holding that the claim was preempted by the TCHRA; consequently, it declined to decide if fact issues remained regarding whether B.C.'s alleged attacker was Steak N Shake's vice principal.

The Supreme Court granted B.C.'s petition for review but has not yet scheduled oral argument.

B. Defamation

1. Brady v. Klentzman, 456 S.W.3d 239 (Tex. App.—Houston [1st Dist.] 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0056].

In this defamation action, the main issue is whether an allegedly defamatory article addressed matters of public concern. Reporter LeaAnne Klentzman wrote an article in the Fort Bend Star alleging that Craig Brady, the Chief Deputy of the Fort Bend County Sheriff's Office, committed official misconduct by suppressing evidence to be used in his son's trial for minor in possession of alcohol. The article mentioned several other incidents involving Chief Deputy Brady's son, Wade. After the article was published, Wade

brought suit against Klentzman and the Star alleging that the article contained untrue and defamatory statements about him.

The jury found in Wade's favor and awarded him $30,000 in reputational damages, $20,000 in mental anguish damages, and $1,030,000 in punitive damages. On appeal, the court of appeals reversed the award of mental anguish damages and remanded the case for reevaluation of punitive damages. Klentzman and the Star filed a motion for rehearing. On rehearing, the court of appeals held that the article and the statements about Wade addressed a matter of public concern, that the jury charge was defective because it failed to properly instruct the jury on Wade's burden to prove actual malice and falsity of the statements, and that there was legally insufficient evidence to support an award of actual damages. The court then remanded the case to the trial court for a new trial. Both parties appealed, and the Supreme Court granted the petitions for review but has not yet scheduled oral argument.

VII. JURISDICTION

A. Injunctions

1. Campbell v. Wilder, S.W.3d , 59 Tex. Sup. Ct. J. 505 (Tex. Apr. 1, 2016) [14-0379].

At issue in this case was whether the Texas Civil Practice and Remedies Code requirement that injunctions must be brought in the court where judgment was rendered applied to an injunction sought by indigent divorce petitioners against the Tarrant County District Clerk. The Clerk sought to recover court costs from the petitioners in spite of uncontested affidavits of indigency, and petitioners filed for and received a temporary injunction in the District Court. The court of appeals reversed, holding that the District Court was without jurisdiction because each petitioner was required to file for injunction in the family court where the divorce decree had issued. The Supreme Court reversed and remanded.

The Court held that the Texas Civil Practice and Remedies Code requirement only applies when the court would be unable to grant injunctive relief independent of the judgment, overruling *Evans v. Pringle*, 643 S.W.2d 116 (Tex. 1982) (per curiam). The judgments at issue were the divorce decrees granted the petitioners. Despite language in the divorce decrees ordering each party to bear his or her own costs, there are no costs for indigent petitioners. Therefore the injunction challenging the Clerk's charging of costs can be granted independent from the divorce decree judgments, and the District Court had jurisdiction to grant the injunction. The Court continued on to determine that the temporary injunction was proper to avoid a multiplicity of suits and to prevent the Clerk from pursuing court costs from other similarly situated indigent litigants.

B. Personal Jurisdiction

1. TV Azteca v. Ruiz, S.W.3d , 59 Tex. Sup. Ct. J. 391 (Tex. Feb. 26, 2016) [14-0186].

The primary issue was whether the trial court had personal jurisdiction over Mexican citizens TV Azteca S.A.B. de C.V., Patricia Chapoy, and Publimax S.A. de C.V. (collectively, the Media Defendants). The Media Defendants are a television content producer, news anchor, and television broadcaster. Together, the Media Defendants created and broadcasted news programs that are popular in Mexico. Publimax broadcasts the new programs via terrestrial-based towers that use over-the-air signals to the northeastern Mexican states. The signals also reached certain parts of Texas.

In 2009, the Media Defendants created and aired a series of broadcasts that allegedly defamed the plaintiff, Gloria De Los Angeles Trevino Ruiz (Trevino). The broadcasts detailed Trevino's legal troubles in Mexico and Brazil. At the time of the broadcasts, Trevino was a Mexican citizen residing in Texas. Trevino sued the Media Defendants for defamation in Hidalgo County, Texas. The Media Defendants specially appeared. The trial court denied their special appearances, and the court of appeals affirmed.

The Supreme Court held that evidence that the Media Defendants exploited the Texas market to capitalize on the broadcasts that traveled into Texas established that they purposefully availed themselves of the benefits of conducting business in Texas. Because Trevino's claims against the Media Defendants arose from and were related to those broadcasts, the Media Defendants' contacts with Texas supported the exercise of specific jurisdiction over them. The Court affirmed the court of appeals' denial of the Media Defendants'

special appearances and remanded the case to the trial court.

VIII. MEDICAL LIABILITY

A. Partnership Liability

1. Doctors Hosp. at Renaissance, Ltd. v. Andrade, 2015 WL 3799425 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0563].

At issue in this case is (1) whether a limited partnership that owns a hospital may be vicariously liable for a physician's negligence when the physician is a limited partner and (2) whether the general partner of the limited partnership may be vicariously liable for the physician-partner's negligence. In this case, Jesus and Jessica Andrades sued an obstetrician for injuries they claimed he negligently caused to their daughter during her birth. They added as defendants the hospital limited partnership, Doctor's Hospital at Renaissance, Ltd., and the hospital's general partner, RGV Med, claiming that they were vicariously liable for the physician's negligence. The Andrades based that vicarious liability claim principally on Texas Business Organizations Code section 152.303(a), which makes a partnership responsible for injuries when a partner (the doctor in this case) acts in the partnership's ordinary business or with the partnership's authority. Both the hospital and its general partner argue that they did not control the physician's medical judgment and that their ordinary business was providing and operating the hospital, not obstetrical services. The trial court denied summary judgment for the hospital and general partner. The court of appeals affirmed on interlocutory review, holding summary judgment was precluded by an unresolved fact question: whether the doctor was acting within the scope of the partnership business or with its authority.

The Supreme Court granted the petition for review and heard oral argument on March 10, 2016.

IX. MUNICIPAL LAW

A. State Law Preemption

1. BCCA Appeal Grp., Inc. v. City of Houston, S.W.3d , 59 Tex. Sup. Ct. J. 692 (Tex. Apr. 29, 2016) [13-0768].

At issue in this case were (1) whether two Houston ordinances are preempted by state law, and (2) whether the ordinances unconstitutionally delegate lawmaking authority. The Texas Clean Air (Act) and the Texas Water Code grant the Texas Commission on Environmental Quality (TCEQ) the authority to promulgate and administer rules to protect the public health and the State's air resources. The City enacted two ordinances (collectively, the Ordinance) incorporating verbatim substantive portions of the TCEQ's rules making it unlawful to operate any facility within the City unless the facility registered with the City and paid proper fees. The Ordinance also provided that a violation of the incorporated TCEQ rules "shall be unlawful" and punishable in municipal court with fines between $250 and $2,000 per day of violation. The trial court granted BCCA Appeal Group's motion for summary judgment, declaring the Ordinance unenforceable and enjoining its enforcement. The court of appeals reversed and rendered judgment for the City. BCCA petitioned the Supreme Court for review.

Regarding the Ordinance's incorporation of TCEQ rules, the Court held that when a statute recognizes a city's authority to enact ordinances consistent with an authorizing statute as well as an agency's rules and orders promulgated under the authorizing statute, an ordinance that incorporates that agency's rules as they exist and as they may be amended does not violate the nondelegation doctrine of the Texas constitution. The Court explained that a municipality's incorporation of reenactments and amendments is constitutionally permissible if the delegation to that agency is permissible, and concluded that no statutory or constitutional provisions limit the City's incorporation of TCEQ rules. And the Act allows a city to enact an ordinance "not inconsistent" with the Act or TCEQ rules or orders. Therefore, when the City adopted the TCEQ rules, the Ordinance was in compliance with the Act's mandate.

As to the Ordinance's registration and corresponding fee requirement, the Court reasoned that because the Ordinance requires a facility to register to operate lawfully, the Ordinance effectively moots the effect of a TCEQ permit that has been issued and allows a facility to operate lawfully. The Act specifically prohibits an ordinance from making unlawful a condition or act approved or authorized under the Act or under the TCEQ's rules or orders. Therefore, the Court held the Ordinance's registration provisions were preempted.

Similarly, the Court concluded the Ordinance's enforcement provisions were preempted. The Court determined that the Legislature clearly intended to limit a home-rule municipality's power to enforce state air-quality standards by ordinance. The Court concluded the Act and the Water Code provisions enforcing the Act, contain specific requirements for criminal prosecution of a violation of the Act or TCEQ rules, orders, or permits and that the Ordinance impermissibly allowed the City to circumvent those requirements. Therefore, the Court held the Ordinance's enforcement provisions were preempted.

Justice Boyd dissented only as to preemption of the Ordinance's enforcement provisions. The dissent concluded that the Ordinance is presumptively valid, and the enforcement provisions of the Ordinance could be reasonably construed as consistent with the statutory provisions. Furthermore, if the Ordinance could not be reasonably construed to avoid inconsistency, the Ordinance should only be unenforceable to the extent of such inconsistency.

X. NEGLIGENCE

A. Premises Liability

1. UDR Tex. Props., L.P. v. Petrie, 2014 WL 7174242 (Tex. App.—Houston [14th Dist.] 2014), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0197].

This case concerns a property owner's duty, or lack thereof, to protect an invitee from a third-party criminal act. At 2:00 a.m., Alan Petrie was waiting in his car for a friend in the parking lot of an apartment complex owned by UDR Texas Properties, L.P. A car stopped behind his car, and two men stepped out, one of whom pointed a shotgun at Petrie and ordered him out of his car. The men took Petrie's wallet and shot him in the knee before taking his car. Petrie thereafter sued UDR, alleging that UDR was negligent in failing to make its premises safe.

The trial court held an evidentiary hearing in which both sides submitted evidence of criminal history surrounding the apartment complex. As relevant here, most of that evidence concerned crimes that occurred nearby at "the Richmond Strip," a home to clubs, bars, and a high crime rate. After the hearing, the trial court held that UDR owed no duty to protect Petrie from third-party criminal acts. The court of appeals reversed, holding that the attack on Petrie was unreasonable and foreseeable. The court cited evidence of violent crimes within a one-half mile radius of the complex, including crimes in the Richmond Strip, as support for its holding that UDR was on notice that crimes could occur on its premises.

UDR filed a petition for review in the Supreme Court raising two issues. First, UDR claims that the court of appeals and Petrie conflated the elements of unreasonableness and foreseeability, arguing that a premises owner may owe a duty to protect invitees from third-party criminal acts only when the crime risk is both unreasonable and foreseeable. UDR argues that the lower court impermissibly used the same elements to establish unreasonableness and foreseeability when, in fact, they require a separate analysis. Second, UDR claims that the crime risk in this case was not foreseeable. In particular, UDR claims that it should not be saddled with a duty to protect invitees from third-party criminal acts just because its apartment premises happen to be located close to a high-crime area like the Richmond Strip. In UDR's view, it would be absurd to impose such a duty on UDR, even though its premises may be perfectly safe.

The Court granted UDR's petition for review but has not yet scheduled oral argument.

XI. OIL AND GAS

A. Assignments

1. Apache Deepwater, LLC v. McDaniel Partners, Ltd., S.W.3d , 59 Tex. Sup. Ct. J. 411 (Tex. Feb. 26, 2016) [14-0546].

The dispute in this case concerned whether an oil-and-gas assignment covering four leases

permitted reduction of production payments to the assignor when one of the leases expired. In 1953, McDaniel Partners, Ltd.'s predecessor-in-interest assigned four oil and gas leases to Apache Deepwater LLC's predecessor-in-interest covering two land tracts in Upton County, Texas. At that time, the four assigned leases—two Cowden leases and the Peterman and Broudy leases—comprised more than half the total mineral estate, with the lion's share of interests being attributable to the Cowden leases.

In exchange for the interest conveyance, McDaniel's predecessor received $10.00 and reserved a fractional production-payment interest. The production-payment interest was to remain in effect until payments totaled $3.55 million and 1.42 million barrels had been produced. In 1994, both Cowden leases expired due to lack of production, while the Peterman and Broudy leases endured.

Apache acquired the assignment in 2009, and after wells on the two tracts started producing, Apache sent a division order to McDaniel disclosing that production payments were reduced to correspond only to the interests attributable to the Peterman and Broudy leases. Because McDaniel maintained that the production payment should be calculated by using the original formula, it sued for breach of contract, conversion, a court-ordered accounting, and attorney's fees.

The trial court concluded that production payment could be adjusted to account for the loss of an underlying lease because the payment was carved respectively from the four leases. The court of appeals, however, disagreed, concluding that the assignment fixed the production payment at a stated percentage of the cumulative working interest assigned under the four leases, that the assignment provided no mechanism for reducing that payment in the event one or more of the underlying leases expired, and that the fixed payment endured so long as production continued under at least one of the assigned leases.

The Supreme Court agreed with the trial court's reading of the assignment. The Court concluded that neither the inclusion of the four leases in a single instrument nor the instrument's statement of the leases' cumulative working interest as a single fraction demonstrated that the parties intended the production payment to be carved out of something other than the estates conveyed. Nor did the assignment indicate agreement that any portion of the production payment would survive the termination of the leasehold from which it was carved or shift its allocable burden to one or more of the remaining leases. Citing the general rule that an overriding royalty or similar production payment does not ordinarily survive the termination of the lease from which it is carved, and observing further that the parties had not agreed that it should survive, the Court reversed and rendered.

XII. PETS

A. Property Rights

1. Lira v. Greater Hous. German Shepherd Dog Rescue, Inc., S.W.3d , 59 Tex. Sup. Ct. J. 562 (Tex. Apr. 1, 2016) [14-0964].

In this case, Alfonso and Lydia Lira, brother and sister, owned a German Shepherd named Monte Carlo. The Liras had raised Monte from a puppy and had owned him as a family pet for seven years. On January 1, 2013, Monte escaped from Lydia's property in Houston through an open garage door. Lydia searched for him, posting signs in the neighborhood offering a reward, and making inquiries on several websites. Meanwhile, the City of Houston's Bureau of Animal Regulation and Care (BARC), picked up Monte on January 2. He had no identifying tags or microchip. BARC listed him online as a Belgian Malinois, and provided a photograph, but Lydia had been searching for him under the German Shepherd listing.

BARC scheduled Monte to be euthanized on January 7. On January 5, BARC sent a request to local dog rescue organizations to see if any would accept Monte. On January 6, Greater Houston German Shepherd Dog Rescue (GHGSDR) responded. On January 7, BARC gave Monte to a GHGSDR volunteer, Cindy Milstead, who agreed to foster the dog. On January 9, Lydia saw a message on a website stating that her dog might be at BARC. Lydia went to BARC and identified Monte from a photograph. BARC told Lydia that Monte had been transferred to GHGSDR. Lydia contacted Milstead that day and asked for Monte's return, but Milstead refused. The Liras and their attorney made additional requests for Monte's

return, and offered to reimburse GHGSDR for all of its expenses, but GHGSDR continued to refuse.

The Liras sued GHGSDR, asserting a claim for conversion and other claims, seeking an injunction ordering his return. After a bench trial, the trial court sided with the Liras. The trial court judgment enjoined GHGSDR to return Monte to the Liras. The court of appeals reversed, concluding that the Liras had lost their right to recover possession of Monte from GHGSDR.

The Supreme Court reversed the court of appeals' judgment. The Court reasoned that under common law, pets are personal property. There was no evidence that the Liras had abandoned their pet. One who finds lost property cannot retain it against a claim by the true owner. The Court assumed that the City had the authority to enact ordinances that sometimes divest the owners of their property interest. *See* TEX. HEALTH & SAFETY CODE § 826.033. Assuming further that the City's ordinances comported with all constitutional and other legal requirements, the Court held that nothing in Houston's ordinances purported to divest the Liras of their property rights to Monte Carlo. The Court relied on the plain wording of the ordinances at issue, along with the recognized principle under Texas law that a forfeiture of property rights is disfavored, and laws will be construed against a forfeiture. Therefore, the Liras retained ownership of Monte.

XIII. PROBATE: WILLS, TRUSTS, ESTATES, & GUARDIANSHIPS

A. Will Construction

1. Stephens v. Beard, S.W.3d , 59 Tex. Sup. Ct. J. 446 (Tex. Mar. 18, 2016) [14-0406,14-0407].

At issue in this case was whether the "common-disaster provisions," as used in the nearly identical wills of Vencie and Melba Beard, were triggered when Vencie shot and killed Melba over an hour before taking his own life. Elaine Stephens, the executrix for both estates, sought a declaratory judgment that the provisions were not triggered by the homicide-suicide. The trial court disagreed with Stephens and found that the couple died in a "common disaster." The court of appeals affirmed. The Supreme Court reversed.

The Court held that the court of appeals erred by ignoring the well-recognized legal meaning of "common disaster": "[a]n event that causes two or more persons [with related property interests] . . . to die at very nearly the same time, with no way of determining the order of their deaths." Therefore, absent contrary language in the wills, the order of death *must* be uncertain for a common-disaster provision to become effective. There was no contrary language in the Beards' wills. Because Vencie died nearly two hours after Melba, their deaths did not trigger the common-disaster provision in their wills. Accordingly, the Court rendered judgment that the Beards did not die in a "common disaster."

XIV. PROCEDURE—APPELLATE

A. Dismissal

1. Ex Parte N.C., S.W.3d , 59 Tex. Sup. Ct. J. 585 (Tex. Apr. 1, 2016) [15-0184].

At issue in this case is whether the court of appeals must give an inmate an opportunity to cure a Texas Civil Practice and Remedies Code Chapter 14 filing defect in an appellate proceeding before the court may dismiss the appeal.

N.C., a state-prison inmate, filed a petition to expunge his criminal records. The trial court denied the petition, and N.C. appealed. With his appeal, N.C. failed to include a declaration of previous filings and a certified copy of his inmate trust account statement as required by Chapter 14 for appeals brought by an inmate. The court of appeals dismissed the action without notice or an opportunity for N.C. to cure the Chapter 14 filing defects. N.C. filed a timely motion for rehearing asking the court of appeals to reinstate his appeal. Despite N.C. having complied with the court's instructions regarding his defective Chapter 14 filings and having corrected both Chapter 14 filing defects, the court of appeals denied N.C.'s motion for rehearing.

The Supreme Court, relying on *McLean v. Livingston*, ___ S.W.3d ___ (Tex. 2016) (per curiam), issued the same day, held that the court of appeals must give an inmate an opportunity to cure a Chapter 14 filing defect in an appellate proceeding, through an amended filing, before the court can dismiss the appeal. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the court of appeals for consideration of the merits.

2. McLean v. Livingston, S.W.3d , 59 Tex. Sup. Ct. J. 578 (Tex. Apr. 1, 2016) [15-0100].

At issue in this case is whether the court of appeals must give an inmate an opportunity to cure a Civil Practice and Remedies Code Chapter 14 filing defect in an appellate proceeding before the court may dismiss the appeal.

Brent McLean, a state-prison inmate, filed suit seeking a declaratory judgment that he was eligible for mandatory release under section 42.18 of the Texas Code of Criminal Procedure and that three Texas Department of Criminal Justice (TDCJ) officials failed to discharge their duty to release him. The TDCJ officials filed a plea to the jurisdiction. The trial court granted the TDCJ officials' plea. McLean appealed and filed an affidavit of inability to pay costs with his notice of appeal. The court of appeals dismissed McLean's appeal as frivolous for failure to file a declaration of previous filings and a certified copy of his inmate trust account statement as required by Chapter 14 for appeals brought by an inmate. McLean filed an "amended notice of appeal," which included the required filings. McLean then filed a motion for rehearing arguing that the deficiency in his notice of appeal could be cured by the amended notice of appeal. In a consolidated opinion, the court of appeals denied McLean's motion for rehearing as frivolous. McLean petitioned the Supreme Court for review.

The Court relied on an earlier case in which it addressed trial court Chapter 14 filing requirements and concluded that a failure to comply with the filing requirements in Chapter 14 may be corrected through an amended pleading. Furthermore, the Court reasoned that the Rules of Appellate Procedure clearly express that Texas favors a policy allowing an appellant the opportunity to cure a procedural defect so that a case may be decided on its merits.

The Court held that the court of appeals must give an inmate an opportunity to cure a Chapter 14 filing defect in an appellate proceeding, through an amended filing, before the court can dismiss the appeal. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the court of appeals for consideration of the merits.

B. Judgments

1. Blair v. Atl. Indus., Inc., 482 S.W.3d 57 (Tex. Jan. 8, 2016) [14-1041].

Eugene Blair sued Faustino Murillo and his employer, Atlantic Industrial, Inc., after an automobile accident in which Blair was injured. Murillo stipulated that he was the sole cause of the accident. The trial court submitted three questions to the jury regarding Atlantic: *respondeat superior*, negligent entrustment, and proportionate responsibility. The jury answered the first two questions affirmatively and apportioned fault between Atlantic and Murillo at 60% and 40%, respectively. The trial court disregarded the apportionment answer and rendered a joint and several judgment for Blair's damages against both defendants. Atlantic and Murillo appealed.

The court of appeals reversed both liability findings as to Atlantic. However, the court's holding in its opinion and the language in its judgment were inconsistent—the judgment stated that Blair take nothing from both defendants, rather than just Atlantic. Murillo moved for rehearing, and Blair filed a responded by requesting that the court reform its judgment. The court of appeals denied rehearing and did not modify its judgment. The Supreme Court reversed and remanded the case to the court of appeals, finding that the opinion and the judgment were inconsistent. The Court remanded the case with instructions to the court of appeals to modify its judgment and render judgment consistent with its opinion.

XV. PROCEDURE—PRETRIAL

A. Venue

1. In re J.B. Hunt Transp., Inc., 2015 WL 4554624 (Tex. App.—Dallas 2015), *argument granted on pet. for writ of mandamus*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0631].

The issues in this case are (1) whether a Dallas County trial court abused its discretion by denying a plea in abatement when a related suit was filed in Waller County first; if so, (2) whether the Dallas County trial court actively interfered with the Waller County court's jurisdiction to justify mandamus relief; and (3) whether a balancing test has superseded the active-interference test for determining whether

mandamus relief is appropriate when a trial court improperly denies abatement.

When a vehicle traveling on Interstate 10 began experiencing engine failure, its driver pulled over into the right lane of traffic and was rear-ended by a J.B. Hunt truck. Property damage and severe personal injuries resulted. On December 12, 2014, J.B. Hunt filed suit in Waller County, the location of the accident, alleging the negligence of the vehicle driver, passenger, and vehicle owners caused J.B. Hunt to incur economic damages. Prior to J.B. Hunt completing service of process, the vehicle driver and passenger sued J.B. Hunt and the individual truck driver on December 22, 2014 in Dallas County, asserting negligence claims against the truck driver and vicarious liability theories against J.B. Hunt. On January 7, 2015, J.B. Hunt perfected service in the Waller County action. J.B. Hunt then filed a plea in abatement in the Dallas court, arguing the Waller court had acquired dominant jurisdiction under the first-filed rule. The Dallas court denied the plea, assuming dominant jurisdiction over the suit. J.B. Hunt filed a mandamus petition in the court of appeals, which was denied.

J.B. Hunt filed a mandamus petition in the Supreme Court, arguing the Dallas court abused its discretion by denying the plea in abatement, because the Waller suit was filed first, remains pending, and is inherently interrelated to the Dallas suit. The vehicle driver and passenger counter that the suits are not inherently interrelated and exceptions to the first-filed rule apply. The parties also dispute when mandamus relief is appropriate when a trial court wrongly denies a plea in abatement; they disagree about what constitutes active interference and whether a balancing test has replaced the active-interference test. The Supreme Court granted J.B. Hunt's petition for writ of mandamus and heard oral argument on March 9, 2016.

XVI. PROCEDURE—TRIAL AND POST-TRIAL

A. New Trial Orders

1. In re Bent, S.W.3d , 59 Tex. Sup. Ct. J. 566 (Tex. Apr. 1, 2016) [14-1006].

At issue in this case was whether the trial court abused its discretion in ordering a new trial. Mark and Stacey Bent sued USAA for breach of their homeowner's insurance policy and Insurance Code violations. The jury found USAA did not breach the policy but did violate the Insurance Code and awarded the Bents damages. The trial court ordered a new trial because it concluded (1) the jury's breach-of-contract finding was against the great weight and preponderance of the evidence; (2) USAA violated the court's order in limine; (3) the Bents' award for diminished value of their home was unsupported by the evidence; and (4) the jury improperly failed to award the Bents attorney's fees on appeal.

USAA petitioned the court of appeals for a writ of mandamus directing the trial court to vacate its order. The court of appeals conducted a merits review of the bases for ordering a new trial and concluded there was no evidence USAA failed to meet its contractual obligations and, contrary to the trial court's contentions, USAA offered evidence showing it complied with the provisions at issue. The court of appeals further concluded the record demonstrated USAA did not violate the court's limine order and that the jury could have reasonably declined to award the Bents appellate attorney's fees. The trial court's diminished-value-award basis, the court of appeals concluded, was facially insufficient due to its lack of specificity. The Bents sought mandamus relief from the Supreme Court.

The Court agreed that the diminished-value-award basis was facially insufficient and that the record clearly demonstrated USAA did not violate the court's limine order. However, it disagreed with the court of appeals that the remaining new-trial bases for the trial court's order implicating factual-sufficiency analyses were facially sufficient, holding instead that they failed to comply with the requirements imposed by the Court's precedents. Accordingly, the Court did not address the scope of merits review of new-trial orders in the factual sufficiency context, but reiterated that such review is routinely exercised by federal courts. Furthermore, the Court reiterated that a merits review should be conducted under the familiar abuse-of-discretion standard of review. Because the Court concluded the trial court abused its discretion, it denied mandamus relief.

B. Post-Judgment Filing Deadlines

1. In re J.Z.P., S.W.3d , 59 Tex. Sup. Ct. J. 419 (Tex. Feb. 26, 2016) [14-1072].

At issue in this case was whether a post-judgment motion that sought to extend a trial court's plenary jurisdiction under Texas Rule of Civil Procedure 306a must be captioned as a Rule 306a motion.

A father filed a petition to modify his divorce decree to obtain the right to determine his children's residence and reduce his child-support payments. When the mother did not appear at the modification hearing, the trial court entered a default judgment granting the father's requested modifications. After the trial court's plenary jurisdiction expired, the mother filed a "Motion to Reopen and to Vacate Order," in which the mother alleged that she was never served with the father's modification petition. The trial court denied the mother's motion. The court of appeals dismissed the mother's appeal for want of jurisdiction on grounds that the mother's motion did not extend the trial court's plenary jurisdiction under Rule 306a because the motion was not properly captioned as a Rule 306a motion.

The Supreme Court reversed the court of appeals' judgment. The Court held that justice required the court of appeals to treat the mother's motion as extending the trial court's plenary jurisdiction despite the motion's caption. Under Texas Rule of Civil Procedure 71, a court must consider the substance of a pleading despite the formal styling. The substance of the mother's motion plainly requested relief from the default judgment on grounds that she was not properly served which is a proper basis to extend the trial court's plenary jurisdiction under Rule 306a. The Court remanded the case to the court of appeals for further proceedings.

XVII. REAL PROPERTY

A. Eminent Domain

1. Caffe Ribs, Inc. v. Texas, S.W.3d , 59 Tex. Sup. Ct. J. 499 (Tex. Apr. 1, 2016) [14-0193].

At issue in this case was whether the trial court abused its discretion in excluding evidence of the government's role in delaying the condemned property's environmental cleanup prior to the condemnation. Caffe Ribs, Inc. purchased the condemned property in 1995 even though soil and groundwater sampling indicated the property was contaminated. The prior owners agreed to remediate the contamination after closing and eventually placed the property into the Texas Commission on Environmental Quality's Voluntary Cleanup Program. In 2003, the State notified Caffe Ribs that it intended to condemn the property. At trial, the government presented expert testimony that it wold take eight years of cleanup to render the property marketable and that the condemned property's value should be substantially discounted on that basis. In rebuttal, Caffe Ribs offered testimony from two experts that the government's condemnation project delayed the property's cleanup. However, at the government's request, the trial court excluded that testimony. The court of appeals affirmed the exclusion.

The Supreme Court held that the trial court's exclusion was an abuse of discretion. The Court explained that the "project-influence rule"—which states that any change in property value that results from the government manifesting a definite purpose to take property as part of a governmental project must be excluded from an award of adequate compensation—required the trial court to allow the jury to account for the role the government's condemnation project played in the eight-year holding period the government used to devalue its property. The Court reversed the court of appeals' judgment and remanded the case for a new trial.

2. Denbury Green Pipeline–Tex., LLC v. Tex. Rice Land Partners, Ltd., 457 S.W.3d 115 (Tex. App.— Beaumont 2015), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0225].

This case concerns the appropriate standard to apply in determining whether a pipeline operator has common carrier status—a status which would render it able to exercise the power of eminent domain. In particular, the questions presented are: (1) whether a court may consider transportation agreements that came into existence after the pipeline was initially contemplated in analyzing whether there is a reasonable probability that the pipeline will be used to transport the gas of a non-affiliated entity; (2) whether or not the character, degree, or extensiveness such transportation is relevant; and

(3) whether the reasonable probability of transporting non-affiliates' gas is an issue that can be summarily resolved.

Denbury Green Pipeline–Texas, LLC (Denbury Green) owns a carbon dioxide pipeline (Green Line) that runs between Texas, Louisiana, and Mississippi. The pipeline's route is designed to approach various industrial sources of carbon dioxide, certain destinations where the gas was to be sequestered or permanently stored as part of the federal government's cap-and-trade focus, and oil fields with tertiary-recovery operations that inject the gas in order to increase yields of crude. At the start of 2008, Denbury Green applied for and received a T-4 permit from the Railroad Commission to operate the Green Line as a common carrier pipeline in part for the transportation of carbon dioxide owned by others. Thinking it had thereby acquired powers to condemn the property of Texas Rice Land Partners, James Holland, and David Holland (Texas Rice) which is along the pipeline route, it attempted to access their property. Texas Rice, however, denied Denbury Green entry, and so the pipeline company attempted to enjoin this blockage. The trial court granted summary judgment, holding that the mere fact that Denbury Green had obtained a T-4 permit from the Railroad Commission meant that it was, as a matter of law, a common carrier with powers of condemnation. The court of appeals affirmed. The Supreme Court reversed, remanding the case to the trial court for proceedings consistent with its articulation of a test governing common carrier status: "for a person intending to build a [carbon dioxide] pipeline to [be] a common carrier . . . , a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers," other than the pipeline owner or its affiliates. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 201 (Tex. 2012).

On remand, Denbury Green submitted new evidence to the trial court of various contracts to transport carbon dioxide for certain other entities. Denbury Green moved for summary judgment, contending that in light of the undisputed facts, including the existence of these transportation agreements, Denbury Green is a common carrier as a matter of law and has the power to exercise eminent domain. The trial court granted the motion. The court of appeals reversed and remanded, holding that the fact-intensive nature of the reasonable probability test meant that summary judgment was inappropriate. The court of appeals also held that the trial court was not free to consider the transportation agreements when conducting the reasonable probability inquiry, since they were not in existence at the time when Denbury Green planned the Green Line. Additionally, the court stated that the reasonable probability test requires that the "taking serves a *substantial* public interest"—language which was not in the Court's opinion in *Texas Rice I*.

The Supreme Court granted Denbury Green's petition for review but has not yet scheduled oral argument.

XVIII. TAXES

A. Cigarette Tax

1. Hegar v. Tex. Small Tobacco Coal., S.W.3d , 59 Tex. Sup. Ct. J. 534 (Tex. Apr. 1, 2016) [14-0747].

The case concerns whether a tax on tobacco manufacturers who were not part of a 1998 settlement with the State of Texas is constitutional under the Equal and Uniform Clause of the Texas Constitution. In the 1990s, Texas, among many other states, sued the largest tobacco manufacturers, alleging that the manufacturers had falsely marketed their products as safe and targeted minors in their advertisements. Texas later settled with those manufacturers. Under that settlement, the manufacturers agreed to alter their advertising and marketing and pay Texas a portion of their revenue each year in perpetuity. Those payments result in approximately $500 million per year to the State. In return, the State waived, among other things, "any future claims for reimbursement of health care costs allegedly associated with use of or exposure to Tobacco Products."

In 2013, the Legislature passed a tax on non-settling manufacturers that roughly equates to the amount the settling manufacturers pay the State per cigarette. The Legislature statutorily articulated various purposes for the tax, including recovering health care costs imposed by non-

settling manufacturers' products and reducing underage smoking. The non-settling manufacturers sued the Comptroller and Attorney General, asserting various state and federal constitutional violations. As relevant in this case, they claimed that the tax violated the Equal and Uniform Clause of the Texas Constitution. Specifically, they claimed that the tax unconstitutionally discriminated against them by not covering settling manufacturers as well. The trial court and court of appeals agreed, finding that the tax violated the Equal and Uniform Clause.

The Supreme Court reversed and remanded the case. The Court emphasized that the Equal and Uniform Clause's requirement that "[t]axation shall be equal and uniform" applies only within classes of taxpayers, not between classes. Therefore, this issue came down to whether the challenged tax classification—non-settling manufacturers—was rational and reasonably related to the purposes of the tax. The Court answered "yes" to both questions. As to rationality, the Court held that there was a clear distinction between non-settling and settling manufacturers: The latter pay $500 million to the State annually and function under operating restrictions, whereas the former do not. As to whether the classification was reasonably related to the purposes of the tax, the Court first held that recovering health care costs and reducing underage smoking were legitimate purposes. The Court then held that the classification was reasonably related to these purposes because, although settling manufacturers currently reimburse the State for the health care costs of their products (at least in part), there was no similar reimbursement mechanism for health care costs vis-a-vis non-settling manufacturers. In the same way, the Court reasoned, the Legislature could have concluded that, absent this tax, non-settling manufacturers would be able to sell their products at lower prices designed to entice youth. Thus, the Court held that the tax on non-settling manufacturers was rational and reasonably related to the purposes of the tax, and thus, did not violate the Equal and Uniform Clause.

B. Franchise Taxes

1. Hallmark Mktg. Co. v. Hegar, S.W.3d , 59 Tex. Sup. Ct. J. 657 (Tex. Apr. 15, 2016) [14-1075].

This franchise-tax protest suit involved the interpretation of a key component of the statutory franchise-tax formula. Hallmark Marketing Co. incurred a net loss of more than $628 million from the sale of investments but did not include this loss when calculating its apportionment factor, a calculation designed to determine how much of a business's revenue is attributable to its business in Texas. This resulted in a lower franchise tax bill because the failure to include the loss did not reduce Hallmark's gross receipts in proportion to its Texas receipts.

After auditing Hallmark's 2008 tax report, the comptroller determined Hallmark should have included the loss, which would have increased Hallmark's tax bill by more than $200,000. Hallmark paid under protest and sued for a refund. The comptroller relied on an agency rule requiring net gains or losses to be included in the apportionment factor. Hallmark argued that this rule conflicted with the Tax Code, which provides that "only the net gain" from the sale of investments should be included.

The trial court and court of appeals sided with the comptroller, with the latter deferring to the agency rule because it found "net gain" ambiguous. The Supreme Court concluded the ambiguity perceived by the court of appeals, if it exists at all, was immaterial to the question presented in this case. In this case, the parties agreed on how to calculate net gain and agreed Hallmark suffered a net loss. Therefore, the only question was whether "net gain" could be fairly read to include a net loss. The Court held it could not and that the comptroller's agency rule was not entitled to deference because it conflicts with the Tax Code. The Court reversed the court of appeals' judgment and remanded the case to the trial court.

XIX. TEXAS CITIZENS PARTICIPATION ACT

A. Actual Malice

1. Greer v. Abraham, S.W.3d ,59 Tex. Sup. Ct. J. 645 (Tex. Apr. 15, 2016) [14-0669].

At issue in this case was whether actual malice was an element of a plaintiff's defamation claim. Salem Abraham, is a member of a school board of trustees in Canadian, Texas. Concerned about comments State Representative Jim Landtroop made about the school district, Abraham attended a Landtroop event to ask questions about those comments. Though the exact circumstances of his exit are unclear, Abraham left the event. Daniel Greer published a post on his blog, AgendaWise, that said Abraham was forcefully removed from the event by Governor Perry's security detail. Abraham complained and AgendaWise revised its account to say that Abraham was asked to leave for heckling. Abraham again complained and AgendaWise again revised its post to say that Abraham was asked to leave and voluntarily cooperated.

Abraham sued Greer and AgendaWise for defamation. They in turn filed a motion to dismiss under the Texas Citizens Participation Act, which provides an expedited procedure for the early dismissal of groundless legal actions that impinge on First Amendment rights. The trial court granted the motion, stating that Abraham was a public official and he could not establish that Greer and AgendaWise acted with actual malice, which is an essential element of a defamation claim brought by a public official. The court of appeals reversed, holding that the actual-malice standard did not apply because the blog article did not relate to Abraham's official conduct.

The Supreme Court addressed whether a libel plaintiff's status as a public official alleging harm from an online publication should be according to his notoriety in his community or assessed by the Internet's worldwide reach. The Court concluded that the online post, which according to Abraham's pleadings alleged criminal conduct related to Abraham's fitness for office and thus implicated his status as a public official. Moreover, the Court held that such status was not constrained by the publication's worldwide availability or its failure to mention Abraham's public office. That the offending publication may circulate beyond the public official's own community does not diminish its effect within the official's community. As long as the circulation includes the community in which the general public associates him with his official position, the plaintiff's claim necessarily rests on reputational harm in that community, and the constitutional burden to show actual malice must apply. Although the constitutional actual-malice rule speaks in terms of "public officials" and defamatory statements relating to their "official conduct," such official conduct includes not only official acts or omissions but also statements that relate to or touch on the person's fitness for office. The Supreme Court reversed and remanded the case to the court of appeals for its review of additional issues raised below but not previously considered.

B. Attorney's Fees

1. Sullivan v. Abraham, S.W.3d , 59 Tex. Sup. Ct. J. 652 (Tex. Apr. 15, 2016) [14-0987].

The Texas Citizens Participation Act (TCPA) provides for the expedited dismissal of a legal action that implicates a defendant's First Amendments rights when the party filing the action cannot establish the Act's threshold requirement of a prima facie case. A successful motion entitles the moving party to an award of "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." At issue in this case was the extent of the trial court's discretion when determining the moving party's "reasonable attorney's fees."

Salem Abraham sued Michael Quinn Sullivan for defamation. Sullivan generally denied the claim and moved to dismiss the suit under the TCPA. The trial court granted the motion but awarded roughly a tenth of the attorney's fees requested, noting that considerations of justice and equity controlled the award. The court of appeals affirmed, reasoning that, although the TCPA required an award of "reasonable attorney's fees," it also conferred on the trial court discretion to award a lesser amount if "justice and equity" required.

The Supreme Court reversed. Sullivan argued that the phrase "as justice and equity may

require" modified only the last item in the series, "other expenses." Abraham, on the other hand, argued that the phrase "incurred in defending the legal action" must apply to all three items in the series, because construing the statute to allow awards of "court costs" and "reasonable attorney's fees" that were not "incurred in defending the legal action" would be senseless. He also contended that, if "incurred in defending the legal action" modifies all items in the series, then the phrase "as justice and equity may require" must similarly modify all three, because both phrases appear together after the third item in the series and are not separated by a comma.

The Court disagreed with Abraham's reading of the statute, observing that it overlooked the inclusion of the word "other." By referring to court costs, reasonable attorney's fees, and "other expenses incurred," the statute reflected both that costs and attorney's fees were "expenses" and that they must all be "incurred in defending the legal action." In other words, "court costs" and "reasonable attorney's fees" were "expenses incurred in defending the legal action" and were thus recoverable, and "other expenses incurred in defending the legal action" were also recoverable, but only "as justice and equity may require." The Court further noted that, had the Legislature intended for justice and equity to modify all three items in the series, it would have inserted a comma after "other expenses," or alternatively after "legal action," to indicate the phrase's application to all three items in the series.

Based on the statute's language and punctuation, the Court concluded that an award of "reasonable attorney's fees" to the successful movant was mandatory under the TCPA, but the determination of those fees did not also specifically include considerations of justice and equity. The Court accordingly held the trial court erred by including these considerations in its attorney's fee award, and the appellate court likewise erred in recognizing them as part of its standard of review.

XX. TEXAS UNIFORM FRAUDULENT TRANSFER ACT

A. Reasonably Equivalent Value

1. Janvey v. The Golf Channel, Inc., S.W.3d , 59 Tex. Sup. Ct. J. 587 (Tex. Apr. 1, 2016) [15-0489].

At issue in this certified question case was what showing of "value" is sufficient to prove the "reasonably equivalent value" requirement of the affirmative defense under section 24.009(a) of the Texas Uniform Fraudulent Transfer Act (TUFTA). In this case, R. Allen Stanford operated a large-scale Ponzi scheme for nearly two decades through Stanford International Bank Limited and affiliated entities. Stanford purchased media-advertising services from The Golf Channel. Once the Securities and Exchange Commission discovered the Ponzi scheme, Stanford's assets were seized and placed into receivership, and a court-appointed receiver began recovering voidable transfers made by Stanford prior to entering receivership. The Receiver filed suit against The Golf Channel, seeking to recover the money Stanford paid to The Golf Channel for its media-advertising services. The parties filed competing motions for summary judgment.

The district court granted summary judgment for The Golf Channel, concluding it established an affirmative defense by demonstrating it received the payments in good faith in return for something of reasonably equivalent value. The Fifth Circuit initially reversed and rendered judgment in favor of the Receiver. Reasoning that value must be determined from the perspective of the creditors, the Fifth Circuit determined that The Golf Channel's services were essentially worthless to the creditors because they simply furthered the pyramid scheme and contributed to the depletion of the debtor's estate. The Fifth Circuit therefore concluded that proof of the market value of The Golf Channel's services was insufficient to establish the "reasonably equivalent value" element of the affirmative defense. On petition for rehearing, the Fifth Circuit vacated its opinion and certified a question to the Supreme Court of Texas regarding the meaning of "value" and "reasonably equivalent value" under Texas law.

Construing the relevant provisions, the Court determined that value must be assessed at the time

of the exchange, not in hindsight. The Court also noted the absence of any statutory directive to evaluate the impact a transaction had on the debtor's estate as a whole or to apply a separate standard for assessing value depending on whether the debtor was operating a Ponzi scheme. Therefore, the Court concluded that value must be determined objectively at the time of the exchange and in relation to the individual transaction, rather than based on a retrospective evaluation of the overall effect on the debtor's estate. The Court held TUFTA's "reasonably equivalent value" requirement is satisfied when the transferee fully performed an arm's-length transaction in the ordinary course of its business at market value rates.

Index

Apache Deepwater, LLC v. McDaniel Partners, Ltd.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 411 (Tex. Feb. 26, 2016) [14-0546]... 8

B.C. v. Steak N Shake Operations, Inc.
461 S.W.3d 928 (Tex. App.—Dallas 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0404]. .5

BCCA Appeal Grp., Inc. v. City of Houston
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 692 (Tex. Apr. 29, 2016) [13-0768]... 7

Brady v. Klentzman
456 S.W.3d 239 (Tex. App.—Houston [1st Dist.] 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0056]... 5

Caffe Ribs, Inc. v. Texas
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 499 (Tex. Apr. 1, 2016) [14-0193]... 13

Campbell v. Wilder
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 505 (Tex. Apr. 1, 2016) [14-0379]... 6

Cardwell v. Whataburger Rests. LLC
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 418 (Tex. Feb. 26, 2016) [14-1019]... 3

Clint Indep. Sch. Dist. v. Marquez
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 546 (Tex. Apr. 1, 2016) [14-0903]... 1

Denbury Green Pipeline–Tex., LLC v. Tex. Rice Land Partners, Ltd.
457 S.W.3d 115 (Tex. App.— Beaumont 2015), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0225]... 13

Doctors Hosp. at Renaissance, Ltd. v. Andrade
2015 WL 3799425 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0563]... 7

Ex Parte N.C.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 585 (Tex. Apr. 1, 2016) [15-0184]... 10

Greer v. Abraham
___ S.W.3d ___,59 Tex. Sup. Ct. J. 645 (Tex. Apr. 15, 2016) [14-0669].. 16

Hallmark Mktg. Co. v. Hegar
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 657 (Tex. Apr. 15, 2016) [14-1075]... 15

Hegar v. Tex. Small Tobacco Coal.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 534 (Tex. Apr. 1, 2016) [14-0747]... 14

Hous. Belt & Terminal Ry. Co. v. City of Houston
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 512 (Tex. Apr. 1, 2016) [14-0459]... 4

In re Bent
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 566 (Tex. Apr. 1, 2016) [14-1006]... 12

In re J.B. Hunt Transp., Inc.
2015 WL 4554624 (Tex. App.—Dallas 2015), *argument granted on pet. for writ of mandamus*, 59 Tex. Sup. Ct. J. 358 (Feb. 16, 2016) [15-0631].. 11

In re J.Z.P.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 419 (Tex. Feb. 26, 2016) [14-1072]... 13

Janvey v. The Golf Channel, Inc.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 587 (Tex. Apr. 1, 2016) [15-0489]... 17

Lira v. Greater Hous. German Shepherd Dog Rescue, Inc.
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 562 (Tex. Apr. 1, 2016) [14-0964]... 9

McLean v. Livingston
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 578 (Tex. Apr. 1, 2016) [15-0100]... 11

McMillen v. Tex. Health & Human Servs. Comm'n
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 421 (Tex. Feb. 26, 2016) [15-0147]... 3

Oncor Elec. Delivery Co. v. Pub. Util. Comm'n
450 S.W.3d 615 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0005]... 2

Paxton v. City of Dallas
453 S.W.3d 580 (Tex. App.—Austin 2014), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0073], *consolidated with* Paxton v. City of Dallas, 2015 WL 601974 (Tex. App.—Corpus Christi 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 359 (Feb. 19, 2016) [15-0238]... 2

Stephens v. Beard
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 446 (Tex. Mar. 18, 2016) [14-0406,14-0407].. 10

Sullivan v. Abraham
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 652 (Tex. Apr. 15, 2016) [14-0987]... 16

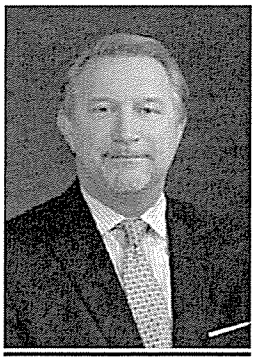
TV Azteca v. Ruiz
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 391 (Tex. Feb. 26, 2016) [14-0186]... 6

TV Azteca v. Ruiz
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 391 (Tex. Feb. 26, 2016) [14-0186]... 6

UDR Tex. Props., L.P. v. Petrie
2014 WL 7174242 (Tex. App.—Houston [14th Dist.] 2014), 59 Tex. Sup. Ct. J. 464 (Apr. 1, 2016) [15-0197]... 8

Wasson Interests, Ltd. v. City of Jacksonville
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 524 (Tex. Apr. 1, 2016) [14-0645]... 3

Wheelabrator Air Pollution Control, Inc. v. City of San Antonio
___ S.W.3d ___, 59 Tex. Sup. Ct. J. 662 (Tex. Apr. 15, 2016) [15-0029]..... 4



JOSEPH J. WIELEBINSKI

Shareholder

jwielebinski@munsch.com

EXPERIENCE

Joe has significant experience with bankruptcy, creditors' rights and financial restructuring and he is active in a variety of complex restructuring, insolvency and bankruptcy cases. As part of the Firm's Fraud & Asset Recovery group, Joe has represented numerous victims in matters involving complex financial fraud, theft, money laundering and other white collar crimes. Joe has served as a Federal District Court receiver at the request of the SEC in cases involving national and cross-border fraud schemes.

Joe is the Executive Director *Emeritus* of ICC-FraudNet, a London based invitation-only organization, consisting of lawyers throughout the world who have significant experience in complex commercial fraud and offshore asset identification and recovery. Joe is a member of the: International Bar Association, International Association for Asset Recovery, American Bankruptcy Institute, Turnaround Management Association and recently served on the Law360 Editorial Advisory Board.

MEMBERSHIPS & AFFILIATIONS

- FraudNet, U.S. Member and Executive Director (Emeritus)
- International Bar Association, Creditors' Rights and Insolvency Section
- American Bankruptcy Institute
- Dallas Bar Association, Bankruptcy and Commercial Law Section (Past President)
- State Bar of Texas, Bankruptcy Law Section
- Turnaround Management Association, Past President of the Dallas/Fort Worth Chapter and Former National Board of Directors Member

AWARDS & HONORS

- Bankruptcy & Creditor/Debtor Rights Super Lawyers—Business Edition and Corporate Counsel Edition - Thomson Reuters 2009/2013
- Best Lawyers in America in Bankruptcy and Creditor-Debtor Rights Law, Woodward/White, Inc., 2008-2015
- Best Lawyers in America, Texas' Best Lawyers, Woodward/White, Inc., 2013-2015
- International Who's Who of Asset Recovery Lawyers, 2012-2013
- Law Awards for Achievement, Finance Monthly, 2010
- Leaders in Their Field, Chambers USA, 2005-2015
- Leading Insolvency and Restructuring Lawyer, Euromoney Institutional Investor PLC's Expert Guide to the World's Leading Insolvency and Restructuring Lawyers, 2001-2009
- Super Lawyers, Thomson Reuters, 2003-2012
- Who's Who Legal: Texas, Law Business Research Limited, 2007-2008
- Selected by Expert Guides, Legal Media Group: Guide to the World's Leading Banking Finance and Transactional Lawyers in Insolvency and Restructuring 2013-2015, United States
- AV® Peer Rating, Martindale-Hubbell

ADMISSIONS

- Supreme Court of Texas;
- United States Courts of Appeals for the Fourth, Fifth and District of Columbia Circuits;
- United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas;
- Various Federal Courts throughout the Country

EDUCATION

Bachelor of Arts (*magna cum laude*), Temple University, 1980
Master of Public Administration, Maxwell School of Syracuse University, 1983
Juris Doctorate, Syracuse University College of Law, 1983

REPRESENTATIVE DEALS & SUITS

- Representation of the Official Unsecured Creditors' Committee in the Life Partners ('Life Partners") bankruptcy proceeding in Texas. LPI manages a "life settlement" portfolio with a face value of $2.4 billion and over 22,000 investor/creditors throughout the US. The SEC recovered a $40 million judgment against LPI, the enforcement of which led to the bankruptcy filing. Munsch Hardt joined the SEC to remove management and after a 6 day trial, a Chapter 11 Trustee was appointed. Together with the Trustee, the Committee recently filed a Joint Second Amended Plan and Disclosure Statement to deal with the complex issues surrounding the treatment of more than $1.4 billion in claims. The Plan will liquidate the portfolio over 20+ years and authorize the pursuit of litigation claims against numerous targets.
- Representation of the Joint Liquidators of Stanford International Bank ("SIB") in SIB's liquidation proceeding pending before the High Court of Antigua and Barbuda in Antigua. SIB is an international bank chartered under the laws of Antigua and Barbuda and domiciled in St. John's, Antigua, West Indies. SIB was allegedly a key participant in the multi-billion dollar Ponzi scheme of R. Allen Stanford. SIB's Joint Liquidators recently reached a global agreement with the U.S. Department of Justice and the SEC Receiver in the proceeding commenced in Texas regarding $300 million in assets located in Switzerland, Canada and the UK.
- Representation of the Receiver appointed in a proceeding commenced by the Securities and Exchange Commission, involving 63 separate defendants, in connection with an alleged oil and gas Ponzi scheme involving in excess of $700 million raised from over 8,000 investors. The Receiver was also appointed the Chapter 11 Trustee for 27 of the corporate defendants in the SEC proceeding. A joint plan of reorganization was confirmed within a year of filing and will pay creditors 100% plus interest.
- Representation of Quality One Wireless, LLC in the successful acquisition of the assets of Personal Communications Devices, LLC, a leading provider of wireless devices to service providers in the U.S., for approximately $125 million, in a New York Chapter 11 bankruptcy proceeding.
- Representation of CSD, LLC, a Nevada limited liability company, in a Chapter 11 reorganization in the District of Nevada. CSD was formed in 2010 to acquire a 40 acre estate located in Las Vegas and to develop a museum honoring the life and career of "Mr. Las Vegas", Wayne Newton. The bankruptcy was initiated in order to manage contentious and prolonged state court litigation and facilitate a prompt sale of the assets and a restructuring of the liabilities. The successful plan of reorganization was confirmed in nine (9) months and paid 100% of allowed creditors' claims.
- Representation of New York Yankees' third baseman, Alex Rodriguez, the largest unsecured creditor in the Texas Rangers Baseball Partners bankruptcy, as a result of unpaid deferred compensation resulting from his 2001 record breaking $252 million contract, and a member of the Unsecured Creditors' Committee.

PUBLICATIONS

- "Bankruptcy" a chapter to be published on the SMU Law Review website, co-authored by Davor Rukavina, Spring 2014.
- "Meeting the Challenge of Fraud with an Arsenal of Effective Legal Weapons in the Right Hands", published in the *ICC FraudNet newsletter*, October, 2013.
- "Utilizing Chapter 15 of the United States Bankruptcy Code to Combat Fraud," a chapter in the *Asset Tracing & Recovery, the FraudNet World Compendium* published 2013, co-authored by Jonathan L. Howell.
- "From Ponzi Schemes to the Libor Scandal to Lance Armstrong: Pervasive Fraud Takes Its Toll", article published in the *ICC FraudNet newsletter*, April 2013.
- "Strategies, Considerations and Challenges in Obtaining Recognition in a Contested Chapter 15" published in *Inside the Minds: Chapter 15 Bankruptcy Strategies* 2012
- "Bankruptcy," *SMU Law Review Annual Survey*, Volume 65, Number 2, co-authored by Davor Rukavina, 280-313, Spring 2012.

SPEECHES AND PRESENTATIONS

- "Coordinating International Asset Recovery – Practical Approaches and Case Studies", presented at the ICC FraudNet Spring Conference
- "Getting to Hidden Assets in North America and Foreign Jurisdictions", presented at the AICPA Forensic & Valuation Services Conference, November 9-11, 2014 – New Orleans, LA.
- "Proper Cramdown Interest" presentation to the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 – Debates at the National Conference of Bankruptcy Judges Annual Meeting, October 10, 2014 – Chicago, IL.
- "The Evolving World of Cross-Border Frauds: Predicting What the Future Holds and How to Prepare for Same", presented at the 10th Annual Financial Crime Forum of the ICC Financial Investigation Bureau held in Limassol, Cyprus, July 9-10, 2014.
- "International Bankruptcy Law and Practice" presented with The Honorable Alan S. Trust, US Bankruptcy Judge for the Eastern District of New York; Richard Schmidt, US Bankruptcy Judge for the Southern District of Texas; Harlin D. Hale, US Bankruptcy Judge for the Northern District of Texas; Stacy Jernigan US Bankruptcy Judge for the Northern District of Texas; Leif Clark, US Bankruptcy Judge for the Western District of Texas (retired); Franco Gianni of Gianni Origoni (Rome, Italy), and Roberto Kampfner of White & Case (Los Angeles, CA), June 6, 2014.
- "Can't We All Just Get Along? Adventures in Cross-Border Insolvency Proceedings", presented at the TAGLaw Spring 2014 Conference – Miami, co-presented with Christopher Jarvinen of Berger Singerman, Laura Hatfield of Solomon Harris, and Andrew Turner of Conner & Winters, May 5 – 7, 2014
- "The Evolving World of Cross-Border Frauds: Predicting What the Future Holds and How to Prepare for Same", presented at the 2014 BVI - ICC FraudNet Spring Meeting. Co-presented with Kevin Hellard of Grant Thornton, Kenneth M. Krys of KRyS-Global, Rodrigo Callejas of Carrillo & Asociados, Guatemala, and Kees van de Meent of Hocker Advocaten in the Netherlands, April 24 – 25, 2014.
- "Plan Confirmation and Related Issues in the Fifth Circuit: Reorganizing in the Fifth Continues to Look Attractive", presented at the 5th Circuit Bankruptcy Bench-Bar Conference - New Orleans, LA, co-presented with The Honorable Katharine M. Samson, U.S. Bankruptcy Judge for the Southern District of Mississippi, Clifton R. Jessup of Greenberg Traurig, LLP and William E. Steffes of Steffes, Vingiello & McKenzie, LLC, February 12 – 14, 2014.
- "Chapter 15 and the Vitro Decision", presented at *The University of Texas 32nd Annual Jay L. Westbrook Bankruptcy Conference*, co-presented with Berry D. Spears of Norton Rose Fulbright, November 22, 2013.
- "Fraud Investigation, Forensic Accounting & Asset Recovery", panel presentation at the 3rd Annual Conference on Fraud, Asset Recovery & Cross-Border Insolvency Cooperation, November 6-8, 2013.
- "The Pervasiveness of Fraud and Corruption and How It's Been (and is Being) Addressed", presented at the ICC FraudNet conference in Oslo, Norway, April 27, 2013.
- "Locating and Seizing Assets in Foreign Jurisdictions" presented at the NAFER conference September 14, 2012 co-presented with Dennis Roossien.
- "FraudNet" presentation on Overview to The International Criminal Court – the Hague on February 22, 2012.
- "Circumventing Attorney/Client Privilege in Fraud Cases – Insights and Developments." Presented at the FraudNet conference in Dubai, co-presented with Ed Davis of Astigarraga Davis-USA; Bettina Knoetzl of Wolf Theiss-Austria; Steve Baker of Baker and Partners-Jersey CI, October 27, 2011.
- "Dueling Proceedings Between Bankruptcy and Receiverships." Presented at The University of Texas 29th Annual Jay L. Westbrook Bankruptcy Conference, co-presented by Judge H. DeWayne Hale, Holland O'Neil and William F. Stutts, November 19, 2010.

MUNSCH HARDT



MARY W. KOKS

Shareholder / Houston

P: 713.222.4030
E: mkoks@munsch.com

Mary has more than 26 years of experience in a practice focusing on environmental compliance and litigation.

Her experience includes:

- Representation of potentially responsible parties and landowners in environmental lawsuits including bankruptcy matters, toxic tort, property claims and suits brought under various environmental acts including Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), Oil Pollution Act (OPA), Clean Water Act (CWA), Clean Air Act (CAA) and comparable state statutes.
- Representation of clients in administrative and civil enforcement cases before the Environmental Protection Agency (EPA), Texas Commission on Environmental Quality (TCEQ) and State Office of Administrative Hearings (SOAH).
- Assisting and advising clients on environmental issues in real estate related transactions, corporate acquisitions and mergers, insurance claims as well as regulatory compliance, supervision of environmental compliance audits and the Spill Prevention Control and Countermeasures (SPCC) plans.

PRACTICES

- Energy
- Energy Litigation
- Environmental
- Environmental Litigation

EDUCATION

- South Texas College of Law, J.D.
- University of South Carolina, M.A. in Government
- University of Houston Law Center, Master of Law in Energy, Environment, and Natural Resources Law
- University of South Carolina, B.A. in Political Science

ADMISSIONS

- Texas
- United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas
- United States Supreme Court

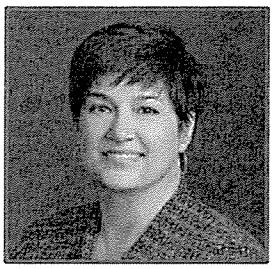
MEMBERSHIPS

- American Bar Association, Environment, Energy and Resources Section and Environmental Transactions and Brownfields Committee
- Houston Bar Association, Environmental Section (Past Chair)

- Houston Society for the Prevention of Cruelty to Animals, Board of Directors
- Spondylitis Association of America, Member and Volunteer
- State Bar of Texas, Environmental and Natural Resources Section (Past Chair)
- Texas Board of Legal Specialization, Business Bankruptcy
- University of St. Thomas — Center for Irish Studies, Board Member
- Women's Energy Network, Houston Chapter

ACHIEVEMENTS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Best Lawyers in America in Environmental Law, Woodward/White, Inc., 2007-2013
- Best Lawyers in America, Texas' Best Lawyers, Woodward/White, Inc., 2013-2016
- Environmental Super Lawyers — Business Edition and Corporate Counsel Edition, Thomson Reuters, 2009
- Leaders in Their Field, Chambers USA, 2010-2012
- Super Lawyers, Thomson Reuters, 2006-2015
- Top Lawyers, H Texas, 2009-2011, 2014-2015
- 2013 Top Rated Lawyer for Energy, Environmental and Natural Resources by American Lawyer Media and Martindale-Hubbell



MUNSCH HARDT

RUTH A. BRENTON

Senior Attorney / Houston

P: 713.222.4077
E: rbrenton@munsch.com

Ruth Brenton is a Senior Attorney in the Litigation section of the Houston office of Munsch Hardt Kopf & Harr, P.C. Her practice focuses primarily on commercial litigation and environmental matters. Ruth's commercial litigation representation includes motion practice, trial briefing and all phases of trial preparation. Subject matter areas include contract and other commercial disputes, real estate, and oil field disputes. She represents clients in complex litigation involving oil and gas royalty and development claims, environmental damage claims and commercial litigation. Ruth also represents clients in similar subject matters on appeal in state and federal courts of appeal, where she shepherds matters from post-trial motions and notice of appeal, through briefing, and to ultimate resolution in the intermediate and final courts of appeal.

Ruth's environmental practice includes representation of potentially responsible parties and landowners in environmental lawsuits, including bankruptcy matters, toxic tort, and property damage claims. Her practice includes suits brought under various environmental statutes, including Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), Oil Pollution Act (OPA), Clean Water Act (CWA), Clean Air Act (CAA) and comparable state statutes.

Prior to joining Munsch Hardt in 2005, Ruth practiced law at two separate private Texas-based law firms, where she focused on appellate and litigation matters in all state and federal courts. In 2009, Ruth started a solo practice, where she served as general counsel for several clients, provided representation in litigation and regulatory matters, and served as local counsel for out of state practitioners. She then served as Of Counsel for a Texas litigation boutique, focusing on her appellate and litigation practice.

Ruth rejoined Munsch Hardt in late 2015. Throughout her legal career, Ruth has gained invaluable experience that gives her insight into her clients' needs and provides them with more knowledgeable, well-rounded counsel.

PRACTICES

- Appellate
- Energy Litigation
- Environmental Litigation

EDUCATION

- St. Mary's University School of Law, J.D.
- University of Texas at Austin, B.B.A.

ADMISSIONS

- Texas
- U.S Court of Appeals, Fifth Circuit
- U.S. District Court for the Southern District of Texas

NEWS & INSIGHTS

SPEECHES

- *Environmental Claims in Bankruptcy* — April 2005
  Mealy's Environmental Litigation Conference

JOHN SLAVICH

E-mail: slavich@gsfpc.com

John Slavich is a shareholder/principal in the law firm of Guida, Slavich & Flores, P.C. He has a diversified environmental law practice where he provides strategic advice to clients on a broad range of environmental issues, including the environmental aspects of transactions, remediation matters, brownfields redevelopment, environmental risk management, compliance and sustainability matters. His clients have included public and private property owners, tenants, property purchasers, developers, investors, and lenders. Mr. Slavich's environmental practice is complemented by more than a decade of prior experience practicing corporate finance and transactional law.

Mr. Slavich is a member of the State Bar of Texas and received his law degree from Washington University in St. Louis, where he was a member of the Board of Editors of the *Washington University Law Quarterly*. He earned his master of business administration degree from Southern Methodist University and his undergraduate degree from Earlham College.

Texas Monthly magazine named him as a Texas Super Lawyer in their inaugural listing in 2003 and in each subsequent listing. He is also listed in *The Best Lawyers in America*, *Chambers USA – Guide to America's Leading Business Lawyers*, and *Who's Who Legal: Environment.*

Guida, Slavich & Flores, P.C.
Website: www.gsfpc.com

750 N. St. Paul Street
Suite 200
Dallas, Texas 75201
Ph: 214.692.0009
Fax: 214.692.6610

816 Congress Avenue
Suite 1500
Austin, Texas 78701
Ph: 512.476.6300
Fax: 512.476.6331

ADDRESSING ENVIRONMENTAL ISSUES IN THE ACQUISITION OF OPERATING ASSETS FROM FINANCIALLY DISTRESSED SELLERS

JOHN SLAVICH
Guida, Slavich & Flores, P.C.
Slavich@gsfpc.com

State Bar of Texas
28th ANNUAL TEXAS ENVIRONMENTAL CONFERENCE
August 4-5, 2016
Austin, Texas

Copyright 2016 by John Slavich
All rights reserved

ADDRESSING ENVIRONMENTAL ISSUES IN THE ACQUISITION OF OPERATING ASSETS FROM FINANCIALLY DISTRESSED SELLERS

John Slavich

Over the past two years in Texas, we have had a front row seat watching oil companies get hammered by the rapid fall and subsequent instability of crude oil prices. More recently, coal companies are feeling the dual effect of losing market share as a result of lower natural gas prices and the regulatory assault on coal-fired power plants. Companies are facing significant financial pressures from, among other things, over-leveraged balance sheets, shrinking asset valuations that reduce their borrowing base, and depressed commodity prices. As a result, the energy industry is undergoing restructuring, and opportunistic buyers with available cash reserves, or access to capital markets to borrow funds, are looking to purchase operating assets at fire sale prices.

Given the speed at which a company's financial outlook can change in today's market place, a buyer of operating assets in any industrial or commercial sector is well advised to consider the seller's financial ability to meet contractual obligations that the seller undertakes in selling assets, even if there is not a current concern about the seller's financial wherewithal.

This paper was prepared in connection with an interactive presentation at the 28th Annual Texas Environmental Superconference by the author and Joe Wielebinski. The outline below summarizes various matters relating to potential environmental liabilities and risks that a buyer should keep in mind when planning to acquire operating assets. It also highlights strategies a buyer should consider when making an acquisition from a financially distressed seller. Issues and considerations arising out of a seller's insolvency and bankruptcy are addressed in the companion paper to this outline included in conference materials entitled *"Distressed Asset Sales in Bankruptcy,"* co-authored by Mary Koks, Joseph J. Wielebinski and Ruth Brenton.

I. OVERVIEW OF ENVIRONMENTAL OBLIGATIONS.

A. Buyers of operating assets will have concerns due to the broad coverage and complexity of environmental, health, and safety laws and regulations at federal, state and local levels. Obligations can arise from historic operations and property use and from future operations.

1. *Remedial liabilities* impose cleanup obligations based on "status" without regard to fault. Categories of "responsible parties" can include current owners and operators of property, former owners and operators of property (including previously divested property), and parties that generate or arrange for disposal of waste materials. Remedial liabilities can have the potential of exceeding the value of the assets acquired.

Copyright 2016 by John Slavich
All rights reserved

2. *Operating requirements* can impact a buyer's ability to operate the assets it purchases. Continued operations usually require permits or other approvals of governmental authorities or third parties that need to be transferred or otherwise obtained. Regulatory requirements may also restrict expansion of current operations.

3. *Tort liabilities* for property damage to third parties can arise from migrating contamination. Third party claims may also be asserted for injury caused by exposure to chemicals or from operations at the sites to be acquired.

4. *Other liabilities* can arise out of noncompliance with applicable statutes and regulations. Depending upon how a transaction has been structured, a buyer may be subject to fines or penalties for its predecessor's noncompliance with operating, monitoring, reporting and recordkeeping requirements. Noncompliance with permitting or other regulatory requirements can also result in forced shutdown or curtailment of noncomplying operations.

B. Buyers deal with potential environmental concerns primarily using two approaches :

1. *Prepurchase due diligence investigation* is used by a buyer to understand historical operations and property conditions at the assets. This investigation process will help the buyer identify liabilities and risks and assess compliance with operating requirements relating to the assets. That process can also serve to develop information that buyer can use to support its request for price concessions from seller.

2. *Contractual allocation* provisions specify the responsibility of seller and buyer for various known and unknown environmental liabilities and risks. Note that the contractual allocation is between buyer and seller and does not bind a third party, including governmental entities, that may have claims, unless the third party agrees to that allocation.

II. IDENTIFYING ENVIRONMENTAL OBLIGATIONS.

A. The environmental assessment process used for *pre-acquisition due diligence* involves a series of steps to identify *environmental liabilities* (that is, known or expected obligations or expenses based on known conditions) and to attempt to determine *environmental risks* (that is, potential exposures based on known or unknown conditions) arising out of current and historic site conditions and operations. Data gaps, where historical information is not available, can present a challenge.

Copyright 2016 by John Slavich
All rights reserved

B. Scoping the assessment is a deal-critical task. The scoping process for pre-acquisition due diligence will take into consideration the following:

1. What documentation is to be reviewed and what sites are to be visited.
2. The issues to be covered in consultant's report.
3. Interface between consultant and representatives of seller and buyer.
4. The staffing and timetable for the component parts of the assessment.
5. Whether subsurface or other sampling will be performed.
6. Concerns involving confidentiality issues and seller's sensitivities to discussion with governmental authorities.
7. Availability of existing information in seller's files and buyer's access to and ability to rely on those materials.

C. The goal of the assessment is to determine existing or potential problems that provide information from which buyer can assess potential liabilities and risks, establish ranges for any remediation it deems necessary or appropriate, and negotiate the deal. It involves legal, technical, financial, and business risk judgments and involves balancing the up-front time and investigative costs against the potential later expense arising out of undiscovered conditions.

D. Two types of environmental assessments are commonly used to investigate property.

1. *Phase I site assessments* involve a review of aerial photos, documentary review, interviews, and site visits to evaluate the potential for environmental conditions. A Phase I site assessment is a qualitative, not a quantitative, exercise.

2. *Phase II site investigations* involve physical testing, including subsurface sampling of soil and groundwater, to determine if property has been environmentally impacted. A Phase II site investigation provides quantitative information, but its ability to adequately quantify environmental costs is highly dependent on its scope.

E. *Operations assessments* are also used to determine compliance of existing operations with applicable environmental, health, and safety laws and regulations, including permitting requirements.

F. *Property condition assessments* are performed to identify the physical condition of buildings and building systems (such as heating and air conditioning, electrical and plumbing) along with other improvements. These types of assessments are separate from the environmentally-related assessments, but may also involve health and safety components as well as analysis of building code compliance.

Copyright 2016 by John Slavich
All rights reserved

G. The results of the assessments are set forth in reports prepared by the consultant that performed the work and best practice is to have the reports reviewed by the environmental attorney in draft form before the reports are finalized. The assessment process may also identify what data and other information are not available.

H. The assessment process can provide a basis for negotiating the structure and the price of the transaction. It can also provide a baseline analysis of existing property conditions and operating status where the contractual agreement provides those conditions to determine the post-closing obligations of seller or buyer.

III. ALLOCATING ENVIRONMENTAL LIABILITIES AND RISKS.

A. Information from environmental assessments can be used to determine how to negotiate the allocation, by contract, of environmental liabilities and risks between buyer and seller. Among the matters considered are the following:

1. What are the actual liabilities identified (such as identified contamination or exposure to third party claims)? What are the real risks of exposure to liability?

2. Can a dollar value or possible range of dollar values be assigned to potential exposure? What kind of valuation adjustments should be made for assets with known contamination?

3. Will seller retain liability for pre-purchase environmental issues? If so, will seller be liable if buyer undertakes a voluntary response to avoid potential liabilities that may arise from the presence of a substance on property or only if there is a legally mandated clean-up requirement?

B. The *deal structure* can help reduce the potential for environmental exposure of buyer.

1. An *asset deal* involving the acquisition of specified assets, without the assumption of seller's liabilities, is usually the best method of shielding buyer from environmental liabilities and risk.

   a. The protection may be enhanced when buyer forms an adequately-capitalized single purpose entity that is separately operated to make the acquisition, so that if environmental obligations are later deemed to have followed the assets, those obligations are at a subsidiary, not parent, level.

Copyright 2016 by John Slavich
All rights reserved

b. In a multi-property asset deal, the parties may agree to exclude properties with environmental problems from the assets to be transferred.

2. In a *merger*, two entities are combined into one. As a result, the assets of the acquired entity as well as the liabilities and obligations of the acquired entity become those of the surviving entity.

3. In a *stock purchase*, buyer becomes the parent of the newly acquired subsidiary entity. Note that there are various legal theories, referred to as indirect liability and direct liability under existing case law, under which a parent entity may be found liable for the liabilities of the subsidiary entity.

4. No particular deal structure should be assumed to provide buyer with bulletproof protection from environmental issues.

5. Structure issues need to be considered as part of the deal as a whole, and tax and other considerations, rather than environmental concerns, will ultimately determine the form in which the transaction is structured.

C. There are a number of *contractual provisions* a buyer may use to protect itself from loss in a transaction.

1. The *representations and warranties* (with related disclosure schedules) in the acquisition agreement are intended to provide additional information to buyer about environmental issues.

   a. Representations and warranties may be considered to serve a dual purpose:

      (i) providing disclosure from seller to buyer about the operations being acquired, and,

      (ii) acting as an additional risk allocation mechanism by providing remedies to buyer if the disclosure is incorrect.

   b. Some buyers may choose to minimize the prepurchase due diligence process and rely upon the seller's representations and warranties instead. The success of that approach will depend upon both adequate contractual remedies for buyer if seller's representations and warranties later prove to be false or misleading, and seller's financial wherewithal to meet monetary obligations under the remedies to which it has agreed in the acquisition documents.

Copyright 2016 by John Slavich
All rights reserved

2. *Indemnification* provisions in the acquisition documents can be used to provide buyer with financial protection with respect to specified conditions or events.

   a. Indemnification provisions can clarify which party is responsible for conditions impacting the operations acquired and claims or losses relating to those conditions or for the operations generally, particularly with regard to pre-existing environmental conditions and obligations arising therefrom

   b. There is no "standard" form of indemnification. Contractual indemnity provisions are typically highly negotiated. They can work in a complimentary fashion with the representations, warranties and covenants sections of the acquisition documents, or they can stand alone.

   c. Buyer should identify and quantify (to the extent possible) the environmental liabilities and risks to determine the potential costs associated with those liabilities and risks before negotiating the scope of the indemnification.

   d. An environmental consultant may be able to provide a range of costs associated with remediation of particular site conditions, but recognize that this estimation process will generally be based on a set of assumptions which, if incorrect, could result in material underestimation of the actual costs of remediation.

3. In a *remediation agreement*, one of the transactional parties, often seller, can agree to perform specified post-closing obligations.

   a. This is particularly useful in addressing the remediation of known pre-closing environmental conditions.

   b. Among the provisions commonly found in a remediation agreement where seller is performing the obligations are the following:

      (i) access (since seller will no longer control the asset being remediated).
      (ii) required clean-up standards and regulatory closure program acceptable to buyer.
      (iii) contractor qualifications.

Copyright 2016 by John Slavich
All rights reserved

(iv) schedule for completion of work and damages in case of delay.
(v) a definition of seller's remediation default under the remediation agreement and a mechanism for buyer's remedies in such an event.
(vi) insurance.
(vii) indemnity against claims or damages arising out of the remedial work.

c. Escrow arrangements are many times used to fund the remediation obligations.

(i) Seller can draw on the escrowed funds to reimburse it for the cost of performing the work.
(ii) Buyer will want to also have access to the escrowed funds in the event of seller defaults in performing the obligations required in the remediation agreement.

D. The protection provided by the contractual risk allocation provisions described above will depend on the financial ability of the obligor to perform its contractual obligation.

1. If seller provides buyer with an indemnity, buyer is only protected if seller has the financial wherewithal to satisfy that obligation at the time that buyer, as the indemnified party, makes a claim.

2. Consequently, a buyer making an acquisition from a distressed seller should consider strategies that will allow a response to the contractual obligation irrespective of the indemnitor's financial position at the time the indemnification claim is made.

3. Strategies that may be used to address concerns about the seller's future ability to fulfill any contractual obligation include the following:

a. *Escrow arrangements* set aside monies (usually a portion of the purchase price seller would otherwise receive) with a third party, which will then disburse those monies when certain milestones are met, in the case of seller performing contractual remediation obligations, or if claims are made, in the case of indemnification obligations.

b. *Purchase price holdbacks* by buyer allow buyer to effectively act as the escrow agent and retain monies if milestones are not met or to satisfy indemnity and other post-closing claims.

Copyright 2016 by John Slavich
All rights reserved

c. *Pledges of additional collateral* by seller give buyer a security interest in assets other than the assets it is purchasing in order to secure seller's contractual obligations.

d. *Guarantees* by seller's principals or other affiliates allow buyer to look to the assets of affiliates of seller in the event seller does not have the financial wherewithal to perform its contractual obligations.

4. The post-closing insolvency or bankruptcy of seller or affiliated parties can jeopardize the protections provided under the strategies noted above.

E. Buyer can also use third party obligations to provide primary or supplemental protection from environmental liabilities and risks.

1. *Letters of credit* and other third party financial guarantees of payment can be used to secure seller's contractual obligations with a third party agreeing to assume the risk, for a fee, of seller not performing its contractual obligations.

2. *Environmental insurance* can also be used to protect buyer since an insurance company would be expected to have the financial wherewithal to fulfill its policy obligations.

a. *Pollution liability policies* can provide coverage for investigation and cleanup costs, bodily injury, property damage, natural resource damages assessments, and loss of business income.

(i) Coverage usually will not extend to cleanup of certain "known" conditions, thus not providing coverage for remediation of the issues that are the primary concern to buyer. Coverage may not be available at all where the contamination has not been fully delineated or the government has not approved a remedial plan. Coverage for third party claims for bodily injury or property damage may be available even for "known" conditions. Where "known" conditions exist, it is sometimes easier to quantify the potential costs of cleanup than the potential costs of tort liability. In these situations, pollution liability insurance may be paired with remediation agreements, escrows, letters of credit or purchase price holdbacks and possibly cost cap insurance to effectively manage "known" conditions risks.

(ii) While buyer may consider insurance as an alternate to a seller indemnification obligation, it needs to keep in mind that an insurance policy is written with limits on the duration and dollar amount of coverage provided, has certain significant exclusions,

Copyright 2016 by John Slavich
All rights reserved

and may not be renewable at the end of its stated term. Also multi-year policies do not reinstate limits annually.

(iii) Some environmental insurers will write policies on an "excess of indemnity" basis, where the policy is structured to respond to certain situations where seller's indemnification obligation has been exhausted.

b. *Cost cap policies* provide coverage to protect against cost overruns in remedial projects.

(i) Policies are underwritten based upon an expected budget for cleanup work, usually once a remediation plan has been approved by regulators.

(ii) Policies are to pay out, up to the policy limits purchased, if the actual costs exceed the budgeted costs plus a negotiated buffer amount (expressed as a percentage of budgeted costs or specific dollar amount). When the policy begins paying in excess of the buffer amount, the insured will also have a co-payment obligation up to the limits purchased.

(iii) There is a very limited market of underwriters willing to write cost cap insurance, and policies are available only for larger remediation projects. The few insurers remaining in the market generally have minimum premiums at or above $200,000 and limits available tend to be less than $5 million.

3. *Environmental liability buyouts* may be utilized where buyer is unwilling to assume full financial responsibility for cleanup of specified known environmental liabilities and related liabilities and risks.

a. Buyouts utilize a third party company that agrees to complete the cleanup and assume certain defined liabilities and risks, generally in exchange for an upfront lump sum payment.

b. The buyout company may utilize a variety of mechanisms to assure performance, including segregated escrow or trust funds, pollution liability and cost cap insurance, indemnities, corporate guarantees, cost-sharing agreements, and performance bonds.

c. In a true environmental liability buy-out, the obligations assumed by the buyout company are unlimited as to amount, duration, and scope of

Copyright 2016 by John Slavich
All rights reserved

environmental remediation obligations and backed by the balance sheet of the buyout company's parent corporation.

d. Where sellers have no buyer for the asset being disposed of, a buyout firm may take title to the real estate and use its value as part of the consideration for the transaction, generally where the asset has some commercial real estate value.

4. *Guaranteed fixed-price remediation (GFPR) contracts* operate similarly to environmental liability buy-outs, where a party transfers its remediation obligations to an environmental remediation firm for a single, lump-sum payment.

   a. In a GFPR, the remediation obligations assumed by the environmental firm are often capped at a specific dollar amount and may be limited to the specific scope of work agreed between the parties.

   b. The environmental firm assuming the remediation obligations under a GFPR may use some or all of the same risk transfer mechanisms to assure performance as environmental liability buy-out firms.

IV. WRAP UP

In a deal involving a financially distressed seller, contractual provisions typically used to allocate environmental liabilities and risk, namely contractual indemnification obligations and representations and warranties, may not provide adequate protection to a buyer. That will put more emphasis on buyer's performing pre-acquisition due diligence assessment that is thorough enough to identify the material environmental liabilities and risks arising out of a proposed transaction. A buyer should consider strategies that can protect it without regard to seller's financial position post-closing, such as using escrows, guarantees and pledges of collateral for protection against the risk of seller's inability to perform post-acquisition contractual obligations. Buyers may also be able to utilize the financial wherewithal of third parties to provide additional protection to buyer against such risks. But a buyer needs to keep in mind that even the best laid plans may be upset by the later insolvency or bankruptcy of seller or affiliated parties.

This paper was prepared in July 2016 as a general discussion of the issues presented. It is not to serve as, or to be relied upon as, legal advice. The views expressed in the paper are those of the author, and not of my law firm or its clients.

Copyright 2016 by John Slavich
All rights reserved

28TH ANNUAL
TEXAS ENVIRONMENTAL SUPERCONFERENCE

CONTAMINATED PROPERTY AND BANKRUPTCY

Mary W. Koks
Ruth Brenton
Munsch Hardt Kopf & Harr, P.C.
700 Milam, Suite 2700
Houston, TX 77002

Joseph J. Wielebinski
Munsch Hardt Kopf & Harr, P.C.
500 N. Akard Street, Suite 3800
Dallas, TX 75201

Contaminated Property and Bankruptcy

I. INTRODUCTION

The current Bankruptcy Code was enacted in 1978 and took effect late in 1979. Many of the federal environmental statutes were enacted soon thereafter – e.g., the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*, was enacted in 1980. While drafts of these two statutory schemes probably passed one another in the halls of the Capitol building, Congress did not consider environmental liabilities when it enacted the Bankruptcy Code.

Many of the environmental liabilities arose for the first time with the enactment of the new environmental statutes. Since they were not considered by Congress in drafting the Bankruptcy Code, these environmental liabilities cause confusion and conflict because they do not fit readily into the Bankruptcy Code's framework. Obligations created by environmental laws directly conflict with the bankruptcy goal of a "fresh start" for the debtors because they create liabilities that bankruptcy laws might otherwise discharge. For instance, the concept of obligations under the environmental schemes do not necessarily fit into the Bankruptcy Code's definition of a "claim". An environmental liability can be reduced to an obligation to conduct remediation under a consent order or injunction (which may not give rise to a bankruptcy "claim"), or an obligation to reimburse a third party or the government for remediation already conducted (which *can* give rise to a "claim"). It can also be difficult to properly assess when an environmental claim "arises", which directly impacts whether it will be included in the debtor's reorganization plan or whether the debtor will have post-petition environmental liability regardless of the success of the bankruptcy proceeding.

The Bankruptcy Code's "fresh start" concept contemplates that a debtor be discharged of debts where insufficient assets exist to pay all claims in a Chapter 7 liquidation, or insufficient assets and income exist to pay debts through a Chapter 13 reorganization. For corporate entities, Chapter 11 allows a "fresh start" by systematically dividing claims into different classes each of which has a priority ranking vis-à-vis other types of claims. For instance, "administrative claims," those "actual and necessary" to preserve the bankruptcy estate, receive the highest priority in payment. Administrative claims include the debtor's current operating expenses. Secured creditors receive payments based on the value of their collateral, and unsecured creditors receive a percentage payment of their indebtedness. Finally, equity holders are paid last and will receive a distribution only if all creditors with higher priority are paid in full. The rationale is to provide equality within classes of creditors such that each creditor in a class is treated equally.

In contrast, the primary purpose of environmental statutes is to provide for the remediation of contaminated property, especially in instances of imminent and substantial endangerment to health and the environment. The statutes hold a broad group of entities and individuals responsible for the remediation – including, in some instances, through joint and several liability. The primary statute under which such liability is customarily assessed is CERCLA, which is typically utilized for abandoned properties or those in which the owner cannot fund the costs for remediation of the property. 42 U.S.C. §9601 *et. seq.* Under CERCLA, responsibility for remediation often falls to those parties who: 1) arranged to have hazardous substances disposed of; 2) generators of the waste; 3) transporters of the waste to the site: 4) current owners and/or historic owners whose ownership of the site was at the time of "disposal"; and 5) "operators" of the site. 42 U.S.C. §9607(a). Liability under CERCLA can also be "joint and several".

Environmental liability can be assessed under a number of other environmental statutes including:

- Resource Conservation and Recovery Act, 42 U.S.C §6901, *et seq.*, designed to reduce the generation of hazardous waste from existing facilities and to provide a comprehensive scheme for disposal of hazardous substances;
- Clean Water Act, 33 U.S.C. §1251, *et seq.*, which sets effluent limitations for different types of pollution sources; and
- Clean Air Act, 42 U.S.C. §7401, *et seq.*, which sets the ambient air quality standards that must be achieved by each point source for specified pollutants.

There are other federal statutes imposing liability for cleanup of contaminated property, as well as comparable state statutes and common law liability for property damage. Each of these mechanisms present unique challenges to the transfer of contaminated properties within the bankruptcy context. This paper aims to outline how the two apparently conflicting bodies of law treat environmental liabilities when the bankruptcy of a responsible party is at issue.

II. DOES THE BANKRUPTCY CODE INSULATE SALES OF CONTAMINATED PROPERTY FROM ENVIRONMENTAL LIABILITY?

A. A Prior Bankruptcy Does not Shield the Current Owner From Liability.

The seminal case on environmental liabilities surviving bankruptcy was decided in the Seventh Circuit in 1992. In *CMC Heartland Partners*, the appellate court considered an argument that CMC's 1977 bankruptcy relieved it of obligations to clean up the Wheeler Pit, a waste dump site CMC's pre-bankruptcy entity leased to GM for disposal of paint sludge and coal ash. *Matter of CMC Heartland Partners*, 966 F.2d 1143, 1145 (7th Cir. 1992).

The Environmental Protection Agency ("EPA") listed the Wheeler Pit on the National Priorities List in 1984, a year before the deadline for filing claims in the bankruptcy case. *Id.* The EPA, however, waited until after the claims bar date to issue an order under CERCLA §106(a). CMC sought protection from the bankruptcy court by filing an emergency motion requesting a show-cause order directing the EPA to demonstrate why it should not be held in

contempt for failing to obey the bankruptcy court's permanent injunction issued at the end of the company's reorganization. *Id.* at 1145-46; *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 130 B.R. 521 (N.D. Ill. 1991).

CMC argued that its entire liability for the site was cut off by the finalization of the bankruptcy reorganization. On review of the denial of CMC's application in the lower courts, the Seventh Circuit stated:

> The EPA knew about Wheeler Pit, and even put it on the National Priorities List, while the reorganization was ongoing, yet the United States did not file a claim in the bankruptcy. Having slept through the reorganization, the United States is barred like any other creditor, CMC concludes. The court denied CMC's application, distinguishing its liability as owner at the time of the dumping from its liability as an owner at the time of the EPA's order. 130 B.R. 521 (N.D.Ill. 1991). The former is covered by the injunction but the latter is not, for the costs of current ownership are not an "obligation ... incurred by the Debtor or the Trustee." We agree with that conclusion.

966 F.2d at 1146.

The court further held that because the EPA did not file a claim in the bankruptcy, "CMC's liability as the operator or manager of Wheeler Pit before the bar date in 1985 is extinguished." *Id.* However, the court distinguished the liability arising under the post-bar date order:

> Liability under §106 in conjunction with §107(a)(1) is a different matter. By authorizing the President to direct the current owner to clean up a dump, *CERCLA creates a claim running with the land.* Such claims depend not at all on the debtor's actions before or during the reorganization ... *Having been a debtor in bankruptcy does not authorize a firm to operate a nuisance today, or otherwise excuse it from complying with laws of general application.*"

Id. (emphasis added) (internal citations omitted).

B. Effect of Sales Pursuant to Section 363 of the Bankruptcy Code on Contribution Claims.

A trustee or debtor-in-possession may use, sell, or lease property of the bankruptcy estate in the ordinary course of the debtor's business. 11 U.S.C. §363. Section 363 provides:

> The trustee may sell property under subsection (b) or (c) of this section *free and clear of any interest in such property* of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363 (emphasis added).

2. The Meaning of "Any Interest" in Section 363(f).

Although section 363(f) provides for the sale of assets "free and clear of any interests," the term "any interest" is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor JV*, 209 F.3d 252, 257 (3d Cir.2000). In dealing with the sale of contaminated property, the question then arises whether under CERCLA, RCRA, other federal statutes or relevant state environmental laws, the "applicable non-bankruptcy law," permits a sale free and clear of environmental liabilities.

3. Cases Examining Section 363 and Environmental Liability.

Surprisingly few cases have addressed the intersection of Section 363 of the Bankruptcy Code and liabilities created by environmental statutes.

a. *Ninth Avenue*.

The *Ninth Avenue* case concerned a 1970's area waste disposal site which became a Superfund site. *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 720 (N.D.Ind. 1996). In 1987, an entity later alleged to be a waste arranger at the site, filed for

Chapter 11 protection. *Id.* The site Potentially Responsible Parties ("PRP") group brought suit against a number defendants for contribution, including Clark Refining & Marketing ("New Clark"), who had obtained "Old Clark" assets pursuant to a Section 363 sale in the 1987 bankruptcy. *Id.*

The *Ninth Avenue* court side-stepped the "any interest" question, stating:

> In deciding whether the sale to Clark precludes successor liability for Plaintiffs' CERCLA claims, the Court does not have to decide what type of interests are covered by the section 363(f) language, because the Court can decide on other grounds ... if the CERCLA claim could have been a claim in bankruptcy against Old Clark, the bankruptcy court had the equitable power to discharge the claim against the asset purchaser independently of section 363(f). If the claim arose after the consummation of the bankruptcy proceedings, the bankruptcy court did not have the power to discharge that claim.

Id. at 731 (citing *In re Fairchild Aircraft Corp.*, 184 B.R. 910 (Bankr. W.D.Tex. 1995)). The court concluded that a free and clear sale under Section 363 "does not include future claims that did not arise until after the bankruptcy proceedings concluded ... if the CERCLA claim did not arise until after the bankruptcy proceedings concluded, the bankruptcy court could not have discharged a claim which did not even exist at the time." *Id.* at 732-33.

The court further held that although language in the asset purchase agreement stated New Clark would not assume any environmental liabilities arising prior to the sale, the agreement "did not affect a determination of liability under CERCLA." *Id.* at 733. Citing Seventh Circuit precedent, the court further held "it becomes important to determine whether Plaintiffs had a CERCLA claim against Old Clark which they should have brought against it during the bankruptcy proceedings." *Id.* (citing *Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 3 F.3d 200, 201 (7th Cir.1993) (*"Matter of Chicago II"*); *Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 974 F.2d 775, 779 (7th Cir.1992) (*"Matter of Chicago I"*). As to the discharge of a particular environmental claim, the court stated:

> Whether a prior bankruptcy discharged the debtor of these [environmental] claims becomes an issue when hazardous wastes have contaminated a site prior to bankruptcy but are not discovered until later, or when claimants have not been able to identify the debtor as a potential responsible party until after the bankruptcy proceedings concluded.
>
> In the Seventh Circuit, a creditor has a contingent CERCLA claim for purposes of bankruptcy when the potential claimant "can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs." *Matter of Chicago I,* 974 F.2d at 786. The key in determining whether a CERCLA claim exists is the knowledge or foreseeability by the potential CERCLA claimant. "[T]he inquiry must center on whether the potential CERCLA claimant has 'sufficient information to give rise to a claim or contingent CERCLA claim' before the consummation date of the bankruptcy."

Id. at 733-34.

Applying that standard to the case before it, the *Ninth Avenue* court held the Old Clark bankruptcy (which led to the sale of the Old Clark assets) discharged the environmental claims at issue if prior to the bankruptcy confirmation the plaintiffs had actual or constructive knowledge that a release or threatened release had occurred and could have tied Old Clark to the release. *Id.* at 734.

The Fifth Circuit adopted the *Chicago I* rationale, and held "a regulatory environmental claim will be held to arise when 'a potential ... claimant can tie the bankruptcy debtor to a known release of a hazardous substance.'" *In re Crystal Oil Co.*, 158 F.3d 291, 296 (5th Cir. 1998).

b. *Old Carco.*

As part of Chrysler Corporation's Chapter 11 proceeding in 2009, "Old Chrysler" sought "to sell substantially all of the debtors' operating assets, free and clear of liens, claims, interests and encumbrances to a successful bidder ..." *In re Chrysler LLC*, 405 B.R. 84, 87 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *cert. granted, judgment vacated sub nom. Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009) and *vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010).

There is substantial discussion on the reach of Section 363 in the decision, but the discussion of environmental liabilities in relation to Section 363 occurs in a later, related order. *See Id.* at *96-101.

That later order addressed tax obligations of the reorganized "New Chrysler" under Indiana state law. *In re: Old Carco LLC*, 2016 WL 2616630 (S.D.N.Y. May 4, 2016) (slip op.). The bankruptcy court for the Southern District of New York considered language in the sale order that transferred the assets of "Old Chrysler" pursuant to Section 363, and analogized to CERCLA liability. *Id.* at *2. The sale order effecting the transfer of assets contained the following provision:

> Nothing in this Sale Order or in the Purchase Agreement releases, nullifies or enjoins the enforcement of any liability to a governmental unit under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Sale Order.

Id. While the precise issue to be determined by the bankruptcy court was the application of state employment tax rates, the court looked to CERCLA to explain the reach of the "police and regulatory" exception written into the order.[1] The court agreed with testimony from counsel for New Chrysler, who stated that although the parties did not discuss the meaning of the paragraph during the drafting phase, he used the example of CERCLA to illustrate its meaning to the court. As the decision recounted, in a CERCLA case, "[t]he seller may have contaminated the property, but the buyer is still responsible for cleaning it up, and the 'free and clear' language does not free the buyer from that obligation." *Id.*

Calling the purpose of the exception "self-evident," the court stated "a buyer of property under a 'free and clear' sale order *cannot escape the responsibility to remediate* a condition that violates safety or similar laws *even if the condition pre-existed the sale*." *Id.* at *4 (emphasis

[1] The court previously determined that the paragraph was ambiguous, and held a hearing on the parties' intent in drafting it. Accordingly, the court heard testimony from counsel involved in the negotiation of the Purchase Agreement and Sale Order.

added). The court further stated that the exemption provision's limiting the reach to the "owner or operator" of the property after the date of the Sale Order was "consistent with its purpose – to insure the remediation of unsafe or non-compliant pre-existing conditions on physical property acquired through a bankruptcy sale." *Id.* at *5.

c. *Pintlar.*

In *Pintlar*, the debtor attempted to convey contaminated property to certain of its environmental creditors, including the Environmental Protection Agency, under Section 363's "free and clear" provision. *In re Pintlar Corp.*, 187 B.R. 680 (Bankr. D. Idaho 1995).

The debtor's predecessor granted mining companies, including the predecessor to ASARCO, the right to dump mine tailings on the debtor's property in 1959 through reservation in a quitclaim deed. *Id.* The debtor's predecessor also agreed by a release that it would not hold the mining companies liable for future claims for damages as a result of the dumping. *Id.* ASARCO characterized its interest as an easement, and argued any transfer of the property must be made subject to that right. *Id.* The EPA argued that the dumping rights did not run with the land but rather was personal in nature. Therefore, the EPA asserted, CERCLA did not prevent transfer of the property free and clear of ASARCO's interest. *Id.* at 682.

The court agreed with the EPA as to the release – it was personal to ASARCO's predecessor, "did not run with the land," and therefore was not an impediment to the transfer of the property under Section 363 and CERCLA. However, the court recognized that as to the rights created in the deed reservation, under current environmental laws, "the exercise of such a right within the context of legality would seem impossible. Unlike ASARCO, I would conclude it is a worthless property right, and would feel the Environmental Creditors would look at the issue in the same way." *Id.* at 682. Although seemingly a "worthless" right, the court stated it

could not "conclude that nonbankruptcy law permits the transfer of property free and clear of such interest." *Id.*

C. Contaminated Property Spun Off Into a Separate Entity May Later Be Challenged by Creditors if the Spinoff Declares Bankruptcy.

Over time, Kerr-McGee Corporation acquired businesses including uranium mining, wood treatment plants, and titanium dioxide production. These historic operations burdened its oil and gas operations with heavy legacy environmental and tort liabilities. In an attempt to free its profitable oil and gas related businesses from these liabilities, beginning in 2000, Kerr-McGee sought to spin off the oil and gas assets into a separate company with the intent that the "New Kerr-McGee," the oil and gas related businesses, would be able to disclaim the legacy liabilities. *In re Tronox Inc.*, 503 B.R. 239, 249-52 (Bankr. S.D.N.Y. 2013). The "Old Kerr-McGee" businesses eventually became the Tronox entities. *Id.* at 253-55. With limited cash flow, mounting losses, saddled with the legacy liabilities, and unable to obtain financing in the credit crunch of 2008-2009, Tronox filed for Chapter 11 in January 2009. *Id.* at 262.

Tronox brought a "strong arm" proceeding pursuant to 11 U.S.C.A. § 544.[2] Tronox alleged Kerr-McGee made actual and constructive fraudulent transfers under Oklahoma state law, and fraudulent transfers under §§ 548 and 550(a) of the Bankruptcy Code, as the spinoff transactions "'liberated' what Defendants had represented were 'substantially all' of Old Kerr–McGee's assets from 85 years of legacy liabilities." *Id.* at 266.

After hearing extensive evidence at trial, the court agreed, stating:

> In the present case, there can be no dispute that Kerr–McGee acted to free substantially all its assets—certainly its most valuable assets—from 85 years of environmental and tort liabilities. The obvious consequence of this act was that the legacy creditors would not be able to claim against "substantially all of the

[2] This section of the Bankruptcy Code permits the trustee (or debtor-in-possession) to avoid any voidable transfer of property of the debtor or any obligation incurred by the debtor. 11 U.S.C.A. § 544.

> Kerr–McGee assets," and with a minimal asset base against which to recover in the future, would accordingly be "hindered or delayed" as the direct consequence of the scheme. This was the clear and intended consequence of the act, substantially certain to result from it. ...
>
> ...
>
> The record supports the finding that a principal goal of the separation of the E & P assets from the chemical business was to cleanse the E & P assets of every legacy liability resulting from the 85–year history of the company and to make the cleansed company more attractive as a target of an acquisition.
>
> ...
>
> On the basis of the record as a whole, even without the badges of fraud which will be considered next, Plaintiffs established by clear and convincing evidence that Defendants acted to hinder or delay creditors when they imposed all the legacy liabilities on Tronox.

Id. at 280-82. The court found in favor of the debtor-plaintiff that the transfers would be voided as fraudulent. The court left for another day the precise measure of damages, but stated, "[t]here has never been any question that the Plaintiffs' remedy in this case would be recovery of the value of the property transferred, rather than a physical reconveyance of the property itself." *Id.* at 328. Tronox "established that the net value of the property transferred out was $14.459 billion, or stated differently, Tronox on a consolidated basis suffered a diminution in value of $14.459 billion." *Id.*

Tronox demonstrates that spinning off properties burdened by legacy liabilities does not successfully insulate a transferee. Rather, the transfers remain subject to unwinding, and a significant adverse judgment, through state fraudulent transfer statutes and the avoidance provisions of the Bankruptcy Code.

III. ENVIRONMENTAL LIENS

A. Lien Treatment Under the Bankruptcy Code.

Regardless of whether they arise under federal, state, or local law, liens are typically recognized in bankruptcy proceedings. *See e.g.*, 11 U.S.C. §§ 101(37), 101(50), 101(51), 506, 544, and 546; *see also* Lawrence R. Ahern, III & Darlene T. Marsh, Environmental Obligations in Bankruptcy § 7:1 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2009). Under the Bankruptcy Code, parties that hold valid liens against property of the bankruptcy estate are considered to be holders of "secured claims." 11 U.S.C. § 506. As noted above, secured claims receive priority in payment second only to administrative claims. *See*, Section I, *supra.*

Section 101(37) of the Bankruptcy Code defines a lien as a "charge against or interest in property to secure the payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). Section 506(a)(1) of the Bankruptcy Code provides that:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. . . .

11 U.S.C. § 506(a)(1).

The holder of a lien against property of a debtor's bankruptcy estate will have a secured claim to the extent that the amounts owed do not exceed the value of the property which secures the lien. However, the Bankruptcy Code does not govern the creation of liens. Rather whether a creditor holds a valid lien is governed by non-bankruptcy law. Lawrence R. Ahern, III & Darlene T. Marsh, Environmental Obligations in Bankruptcy § 7:7 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2009).

While liens are generally recognized by the Bankruptcy Code, in certain instances a trustee or debtor-in-possession has the ability to avoid such security interests. *See* 11 U.S.C. § 544, 545, 547, and 548. Pursuant to section 544, an unperfected security interest may be avoided by a trustee or debtor-in-possession, who is granted the rights of a hypothetical lien creditor and a bona fide purchaser for value of real property as of the commencement date of the bankruptcy case. 11 U.S.C. § 544. Similarly, section 545 allows a trustee or debtor-in-possession to avoid the statutory lien of a government, if its lien has not been fully perfected prior to the filing of the bankruptcy case. 11 U.S.C. § 545. Even if a lien has been fully perfected prior to the bankruptcy filing, a trustee or debtor-in-possession may avoid the lien pursuant to section 547 if the act of perfection is determined to have been a preference. 11 U.S.C. § 547.

In order for a lien to be avoided as a preference, certain conditions must be met, including, *inter alia*, that the lienholder has acquired the lien within ninety (90) days of the bankruptcy filing and that the lien was granted on account of antecedent debt.[3] 11 U.S.C. § 547. Thus, while the holder of a lien is typically afforded priority treatment under the Bankruptcy Code, there are instances in which the Bankruptcy Code transforms the holder of a lien, who believed that they hold a secured claim, to the lowly status of a general unsecured creditor.

Finally, a lien may be avoided as a fraudulent transfer under section 548. 11 U.S.C § 548. The transfer may either be the subject of actual or constructive fraud. Under the former, there must be proof of actual intent to hinder, delay or defraud an entity to which the debtor became indebted. Under the latter, the debtor must have received less than reasonably equivalent value. *Id.*

[3] The time is expanded to one year for "insiders." 11 U.S.C. § 547.

B. **Statutory Environmental Liens.**

The federal government and several states have enacted laws that create nonconsensual liens on account of environmental obligations. Lawrence R. Ahern, III & Darlene T. Marsh, Environmental Obligations in Bankruptcy § 7:1 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2009).

1. Federal Environmental Liens.

CERCLA provides the EPA with the ability to obtain a lien on property to secure the satisfaction of environmental liabilities to the federal government. 42 U.S.C. § 9607(1). Section 9607(1) provides that:

> All costs and damages for which a person is liable to the United States under subsection (a) of this section . . . shall constitute a lien in favor of the United States upon all real property and rights to such property which -- (A) belong to such person; and (B) are subject to or affected by a removal or remedial action.

42 U.S.C. § 9607(1). The time at which such a lien arises is:

> (A) The time costs are first incurred by the United States with respect to a response action under this chapter.
>
> (B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability. Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in § 9613 of this title.

42 U.S.C. § 9607(2).

The EPA is therefore authorized to impose a non-priority lien on property for the full amount of response costs that it has incurred at a site and for damage to natural resources against the property of the PRP that is subject to the cleanup. 42 U.S.C. 9607(l) (the "CERCLA Non-Priority Lien"). The lien applies to all of the property owned by the PRP on which Response Costs have been expended (which can be removal or remedial actions). However, the lien is

subject to the rights of bona fide purchasers and previously perfected interests in the property, so it does not act as a "windfall" lien or "superlien." 42 U.S.C. 9607(1)(3).

The lien becomes effective when the EPA incurs response costs or notifies the property owner of its potential liability, whichever is later. Although the lien authorization was enacted as part of the 1986 Superfund Amendments and Reauthorization Act (SARA) to CERCLA, it applies to costs incurred prior to 1986. The lien continues until the PRP resolves its liability or it becomes unenforceable though operation of the CERCLA statute of limitations. 42 U.S.C. 9607(l)(2).

The EPA guidance documents indicate that the EPA should perfect its lien when the property is the chief or substantial asset of a PRP, it has substantial monetary value, the PRP will likely file for bankruptcy, the value of the property will significantly increase as a result of the cleanup, or the PRP plans to sell the property. "*Guidance on Federal Superfund Liens*", Memorandum from Thomas L. Adams, Jr., Asst. Administrator, Office of Enforcement and Compliance Monitoring (Sept 22, 1987), found at www.epa.gov/sites/production/files/2013-09/documents/fed-sflien-mem.pdf. If the cleanup costs equal or exceed the value of the property, the EPA will not normally file a notice of the lien unless it appears that a secured creditor may foreclose on the property and is not eligible for the secured creditor exemption. The guidance also states that the EPA should not file a notice of a lien where it appears that the defendant satisfies the innocent purchaser defense. *Id.*

The EPA amended the lien guidance in 1993. The amended guidance sets forth the factors that a regional judicial officer should consider when determining if the EPA has a reasonable basis to believe that the statutory criteria for perfecting a lien exists. These factors include whether the property owner was sent notice of the potential lien by certified mail, the

property is owned by a PRP, the property was subject to a response action, the EPA incurred response costs, and any other information that shows that the lien should not be filed. "*Supplemental Guidance on Federal Superfund Liens*", Memorandum from William A. White, Enforcement Counsel, Office of Enforcement/Superfund, and Bruce M. Diamond, Director, Office of Waste Programs Enforcement (July 29, 1993), found at www.epa.gov/sites/production/files/2013-09/documents/guide-liens-rpt.pdf. The EPA is not required to file a cost recovery action prior to perfecting a CERCLA non-priority lien and has been allowed to perfect a lien even where a cost recovery proceeding is pending. *See, In the Matter of Iron Mountain Mines, Inc.*, Determination of Probable Cause (Region 9, May 4, 2000), found at: https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/rjo%20archive/ab38de1cdc442ac18525766a 0051aabd/$file/iron-mount-rpt.pdf.

2. Windfall Liens Under CERCLA.

In 2002, the federal Brownfield Amendments added a second lien provision to make sure that a bona fide purchaser of a Superfund Site does not become unjustly enriched at the taxpayers' expense. Section 107(r) of CERCLA authorizes the EPA to impose a *windfall lien* on property owned by a bona fide purchaser under certain circumstances. 42 U.S.C. 9607(r). To perfect a windfall lien, the EPA must prove that it has conducted a response action, has not recovered its response costs, and that the response action has increased the fair market value of the property above the fair market value of the facility before the response action was initiated. *Id.* The windfall lien cannot exceed the amount of unrecovered response costs, and will not exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. *Id.* This is distinct from the CERCLA non-

priority lien, where the EPA may file a lien for all of its response costs for a particular site. *Compare*, 42 U.S.C. 9607(l) *with* 42 U.S.C. 9607(r).

The windfall lien presents many traps for the unwary bona fide purchaser. For example, the EPA is not required to notify a property owner when it incurs costs that may be eligible for a windfall lien because it becomes effective "at the time at which costs are first incurred by the United States." 42 U.S.C. 9607(r)(4)(b).

Because the windfall lien provision does not contain a statute of limitations, the bona fide purchaser may not know the extent of the EPA's past response costs at the time of acquisition. Consequently, the bona fide purchaser may not know how much of the current property value may be attributable to EPA response costs. Moreover, a bona fide purchaser may not know if he even qualifies as a bona fide purchaser at the time of the closing and, therefore, may not know if he is potentially vulnerable to a windfall lien. *See*, 42 U.S.C. § 9601(40) (bona fide prospective purchaser defined).

In 2003, the EPA issued windfall lien guidance which clarified when the agency will impose a windfall lien, and how it will calculate the amount of the windfall lien. "*Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA,*" Memorandum from Susan E. Bromm, Director of Site Remediation Enforcement, U.S. EPA, July 16, 2003, found at www.epa.gov/sites/production/files/2015-09/documents/interim-windfall-lien-ed2015.pdf. However, unlike the guidance for the CERCLA Non-Priority Lien, the Windfall Lien Guidance does not discuss how or if the agency intends to notify a bona fide purchaser of the existence of a potential Windfall Lien. *Id.*

Thus, if a lender qualifying for the secured creditor exemption foreclosed on contaminated property while the EPA performed a response action that substantially increased

the property's fair market value, then the EPA could file a windfall lien, particularly if the lender received sales proceeds that exceeded the value of its security interest.

3. State Environmental Superliens.

Some environmental laws have been drafted to provide the government with a lien that takes priority over all other liens, regardless of when the other liens came into existence. These liens are commonly referred to as "superliens." These liens allow the government's lien to be prioritized over pre-existing liens. Six states, including Illinois, Louisiana, Michigan, Massachusetts, New Hampshire, and New Jersey have enacted superlien laws. *See*, *e.g.*, Mass. Gen. Laws Ann. Ch. 21E §§ 2 and 13 (West Supp. 1993); NH Stat. Ann. § 147-B:10-b (1991); NJ Stat. Ann. 58:10-23.11f(f) (West 1992); *see also*, Managing Environmental Liability in Business Transactions and Brownfield Redevelopment § 11.07, Larry Schnapf (Juris Publishing 2007). The federal environmental laws do not provide for superliens.

Two additional states, Connecticut and Maine, passed superlien statutes narrower in scope. These statutes provide the state government with a priority lien, but only as to third party liens that were filed after the date on which the environmental superlien statute took effect. *See* Conn. Gen Stat. Ann. § 22a-452(a) (West Supp. 1993); Me. Rev. Stat. Ann. tit. 38, § 1371 (West 1993 Supp.); *see also*, Managing Environmental Liability in Business Transactions and Brownfield Redevelopment § 11.07.

It is worth noting, however, that the majority of the environmental lien statutes that have been enacted are not superliens. Lawrence R. Ahern, III & Darlene T. Marsh, Environmental Obligations in Bankruptcy § 7:25 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2009).

4. Environmental Liens Under Texas Law.

Texas environmental lien laws provide that "all remediation costs for which a person is liable to the state constitute a lien in favor of the state on the real property and the rights to the real property that are subject to or affected by a remedial action." TEX. HEALTH & SAFETY CODE ANN. §361.194(a) (2002). However, under Texas law, the lien does not arise until such time as a lien affidavit is recorded. TEX. HEALTH & SAFETY CODE ANN. §361.194(b) (1996). Moreover, the priority of the lien "does not relate back to a time before the date on which the affidavit is recorded, which date is the lien inception date." *Id.* In fact, the statue specifically provides that the environmental lien is "not valid or enforceable against real property, an interest in real property, or a mortgage, lien or other encumbrance on or against real property is acquired before the affidavit is recorded." TEX. HEALTH & SAFETY CODE ANN. §361.194(g) (1996).

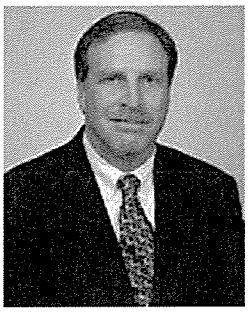
However, there is an unusual exception found only in Texas environmental laws whereby the environmental lien would be enforceable against pre-existing lien holders. The statute provides that the environmental lien is valid and enforceable against a mortgagee or lienholder, if they "had or reasonably should have had actual notice or knowledge that the real property is subject to or affected by a clean-up action or has knowledge that this state has incurred clean-up costs." TEX. HEALTH & SAFETY CODE ANN. §361.194(g) (1996). This provision imposes on a transferee of the lien an obligation to conduct some environmental due diligence about the property prior to acquiring the lien from the original lienholder.

IV. CONCLUSION

A responsible party can satisfy and discharge most obligations through a bankruptcy proceeding. However, the discharge of environmental liabilities is not as simple and it often depends on whether the obligation constitutes a "claim" for bankruptcy purposes, which depends on when the claim for environmental liability arose. Even the use of a Section 363 sale 'free and clear" is not trouble-free and the breadth of the protection given a purchaser is often uncertain.

Moreover, transactions undertaken to transfer environmental liabilities are subject to attack and potential avoidance in a bankruptcy proceeding. Therefore, the old adage of buyer beware is clearly appropriate when dealing with contaminated property in bankruptcy.

K&L GATES



Barry M. Hartman

Partner

Washington
T 202.778.9338
F 202.778.9100
barry.hartman@klgates.com

1601 K Street, N.W.
Washington, D.C. 20006

Mr. Hartman represents companies and individuals in criminal and civil investigations, trials, and appeals primarily involving complex federal regulatory programs, with an emphasis on environmental matters. He also conducts independent internal investigations, counsels clients regarding corporate compliance programs, and homeland security matters, and represents clients in Congressional investigations regarding lobbying, ethics, and related issues.

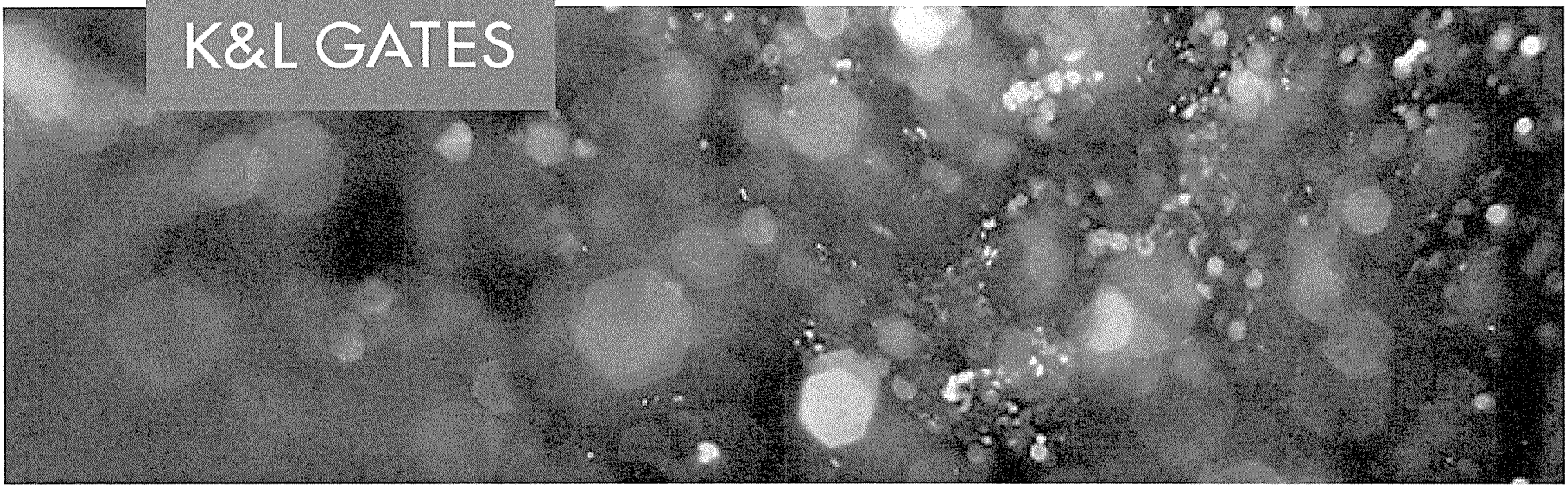
Prior to joining K&L Gates in 1992, Mr. Hartman served in a number of positions in the United States Department of Justice, including Acting Assistant Attorney General for the Environment and Natural Resource Division (1991-92), Deputy Assistant Attorney General (1989-91) and Deputy Assistant to the Attorney General (1989). As Acting Assistant Attorney General, Mr. Hartman was responsible for overseeing U.S. government litigation under federal environmental, natural resource, energy and related laws, including the civil and criminal prosecutions arising from the *Exxon Valdez* oil spill. He also represented President George H.W. Bush in a challenge to the President's authority to conduct negotiations for the North American Free Trade Agreement under the National Environmental Policy Act (NEPA). Mr. Hartman was responsible for directing a wide variety of other environmental litigation, including the defense of regulations issued by federal agencies such as the Environmental Protection Agency and the Department of Interior, Fifth Amendment "takings" cases, Endangered Species Act matters, and was responsible for eleven cases in the United States Supreme Court. He also served on several senior-level administration policy groups, including the Domestic Policy Council Wetlands Task Force.

Mr. Hartman has testified before Congressional committees regarding the 1990 Clean Air Act Amendments and, most recently, proposed changes to the Oil Pollution Act. Mr. Hartman was a member of the Attorney General's Judicial Selection Committee. In 1992 he received the Edmund J. Randolph Award for outstanding service.

Mr. Hartman served in state government, as Chief Counsel to the Pennsylvania Department of Labor and Industry, and Deputy General Counsel to the Governor of Pennsylvania.

He was the Editor-in-Chief of *The EPA Enforcement Manual* (Thompson Publishing Company) and has published and lectured for numerous organizations, including the National Legal Center for the Public Interest, the Washington Legal Foundation, *Corporate Legal Times*, the *National Law Journal*, the Environmental Law Institute, and the American Bar Association. He has also been interviewed by CBS Evening News, *Frontline*, Fox News, PBS *Nightly Business Report*, and *The Wall Street Journal*. He currently serves on the Editorial Advisory Board for Environmental Law 360.

K&L GATES



ETHICAL ISSUES INVOLVING PARALLEL PROCEEDINGS

"When you come to a fork in the road, take it"

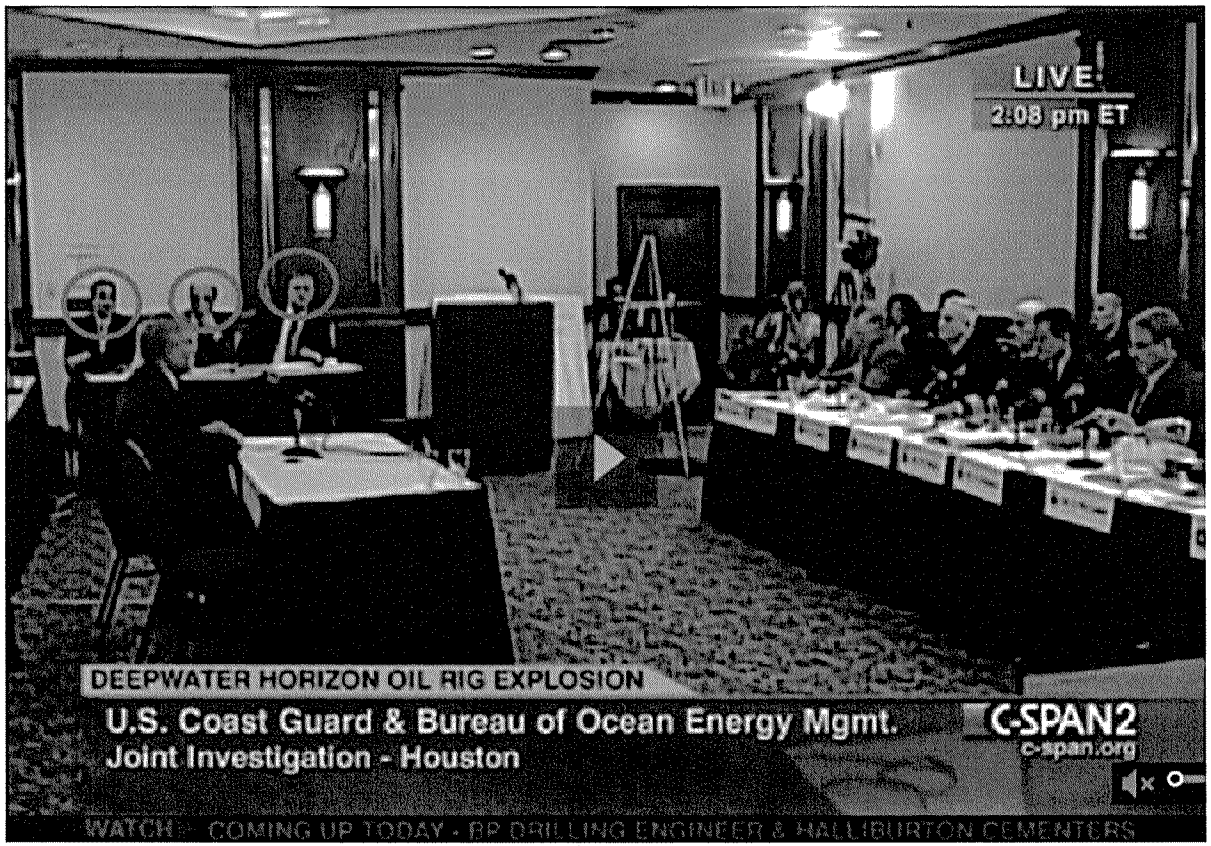
August 5, 2016

Barry Hartman
K&L Gates LLP
1601 K St. N.W.
Washington, D.C.
Barry.Hartman@klgates.com

28th Annual Texas Environmental Superconference

© Copyright 2016 by K&L Gates LLP. All rights reserved.

PARALLEL PROCEEDINGS BECOME PERPENDICULAR



http://www.c-span.org/video/?c4608631/brian-morel-invokes-fifth

HYPOTHETICAL 1

- Company receives a grand jury subpoena calling for the production of documents related to an oil spill.
- The prosecutor who issued the subpoena will not give any assurances about the scope of the investigation, its subjects, or likely targets.
- You, as GC need to get your arms around the facts ASAP.
- You and your staff sit down and interview all of the key employees.
- Is this ok?

HYPOTHETICAL 2

- EPA issues simultaneous administrative information requests to the company asking about the spill. The language is almost identical to the grand jury subpoena.
- Unbeknownst to you, the prosecutor and EPA lawyer are working together and the prosecutor asks EPA to issue the request using the same language so the agencies are not inconsistent?
- Can the government prosecutors do that?

HYPOTHETICAL 3

- A congressional committee sends a subpoena demanding that several officers and employees appear before a subcommittee to talk about the spill and whether legislation is needed to fill gaps in current laws.
  - The company lobbyist tells you to be there.
  - One of the officials calls you as company counsel and asks if he should testify and whether doing so would waive his fifth amendment rights?

BACKGROUND

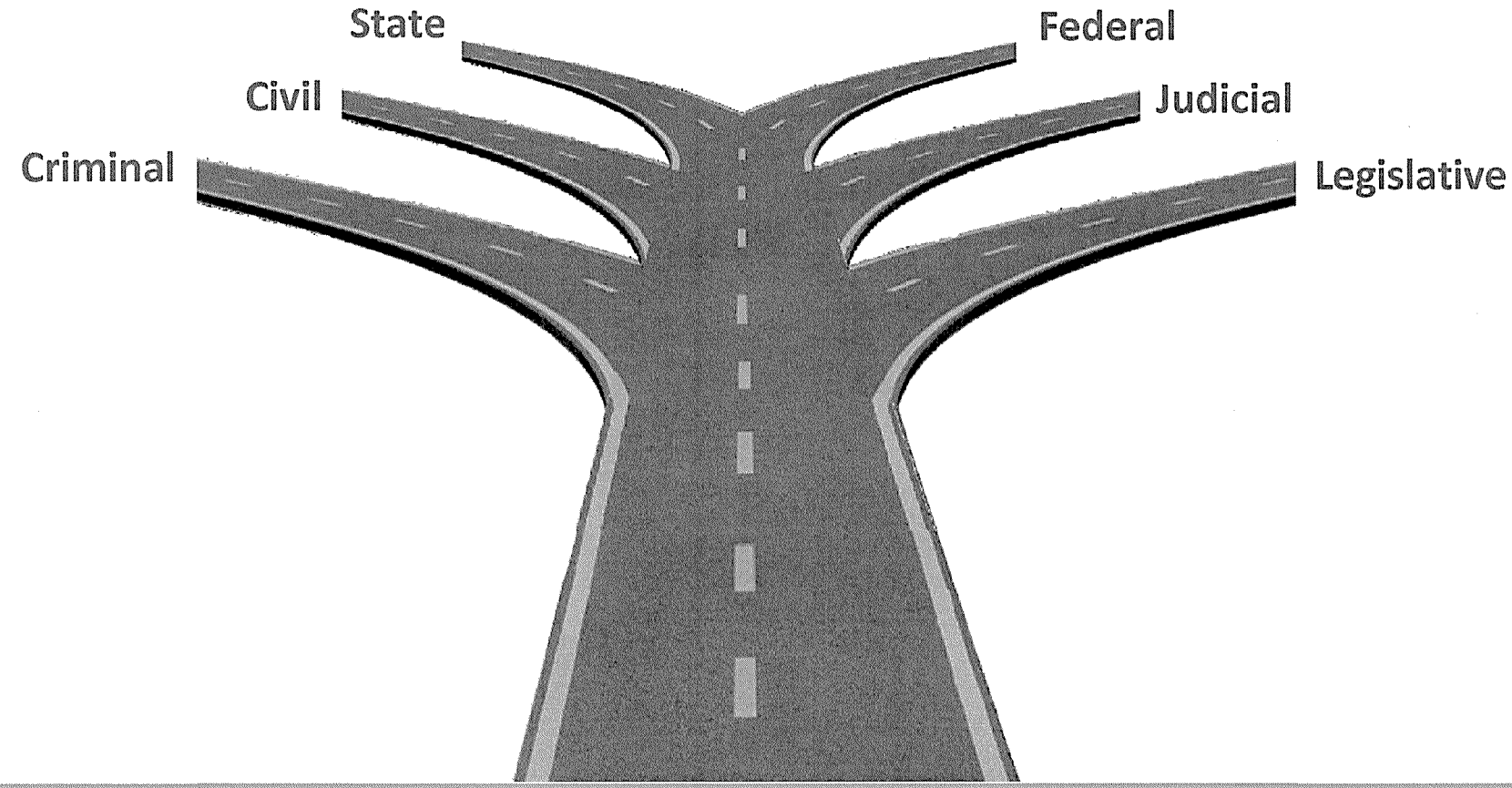
- Federal, state and local agencies cooperate when enforcing the law.[1]
- Agencies are allowed to run joint civil and criminal investigations without informing the defendant.[2]
- But they cannot lie about it.

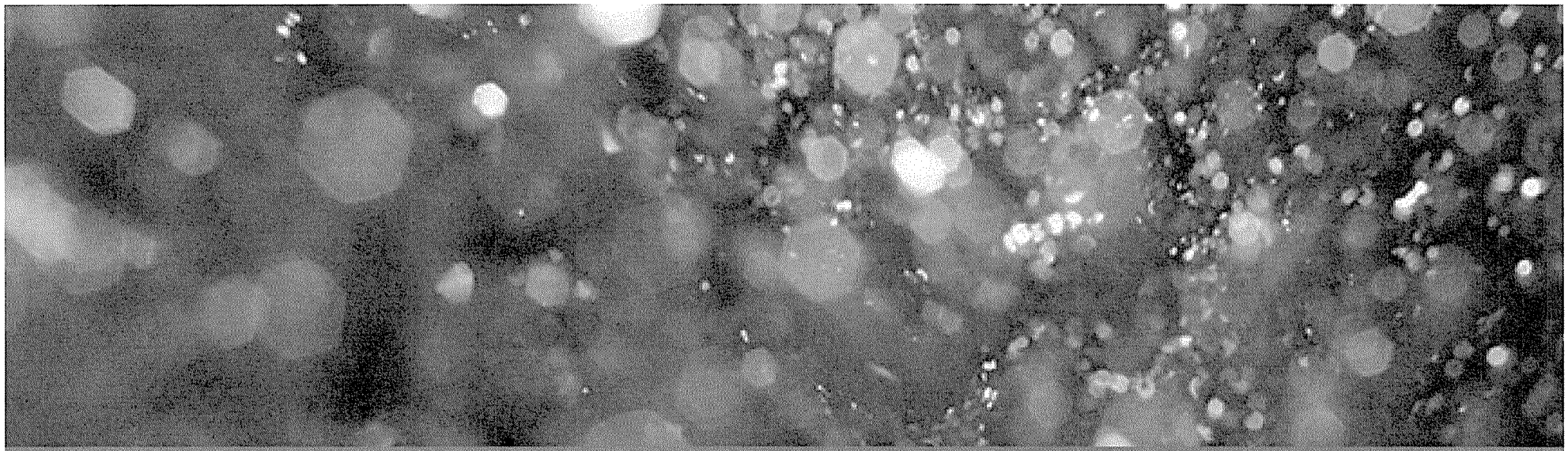
[1] *United States v. Kordel*, 397 U.S. 1 (1970).
[2] *United States v. Stringer*, 535 F.3d 929, 934 (9th Cir. 2008).

BACKGROUND (CONT.)

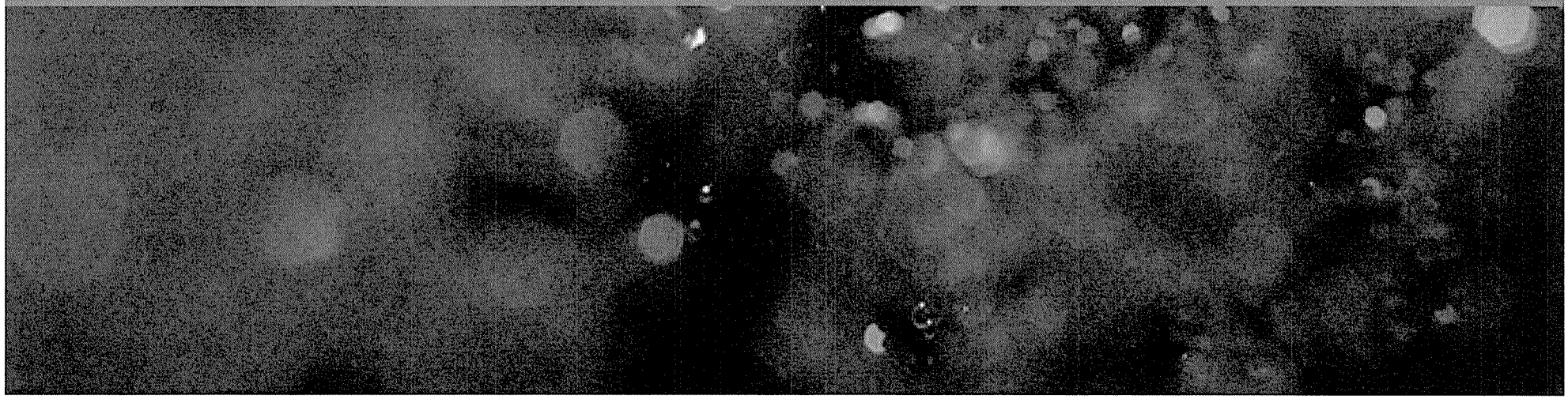
- Courts have held it efficient and legal for agencies to pursue criminal and civil charges against a defendant.[3]
- If it is a civil proceeding with potential criminal charges, the civil case must be brought in good faith: have a purpose independent of assisting the criminal case.[4]

[3] See United States v. Stringer, III, 535 F.3d 929, 933 (9th Cir. 2008)
[4] SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1387, (D.C. Cir. 1980), United States v. Kordel, 397 U.S. 1, 11-12 (1970).


State
Federal
Civil
Judicial
Criminal
Legislative



Modern Rules of Professional Responsibility



MODERN RULES OF PROFESSIONAL RESPONSIBILITY

Client-Lawyer Relationship

- **Rule 1.6: Confidentiality Of Information [5]**
  - Lawyers shall ***not*** reveal information about a representation unless the client gives informed consent.
  - Lawyers shall make reasonable efforts to avoid disclosure.

[5] Model Code of Prof'l Responsibility r. 1.6 (Am. Bar Ass'n 2016).

MODERN RULES OF PROFESSIONAL RESPONSIBILITY
Client-Lawyer Relationship

- **Rule 1.7: Conflict Of Interest – Current Clients** [6]
  - A lawyer shall ***not*** represent a client if the representation creates a concurrent conflict of interest.

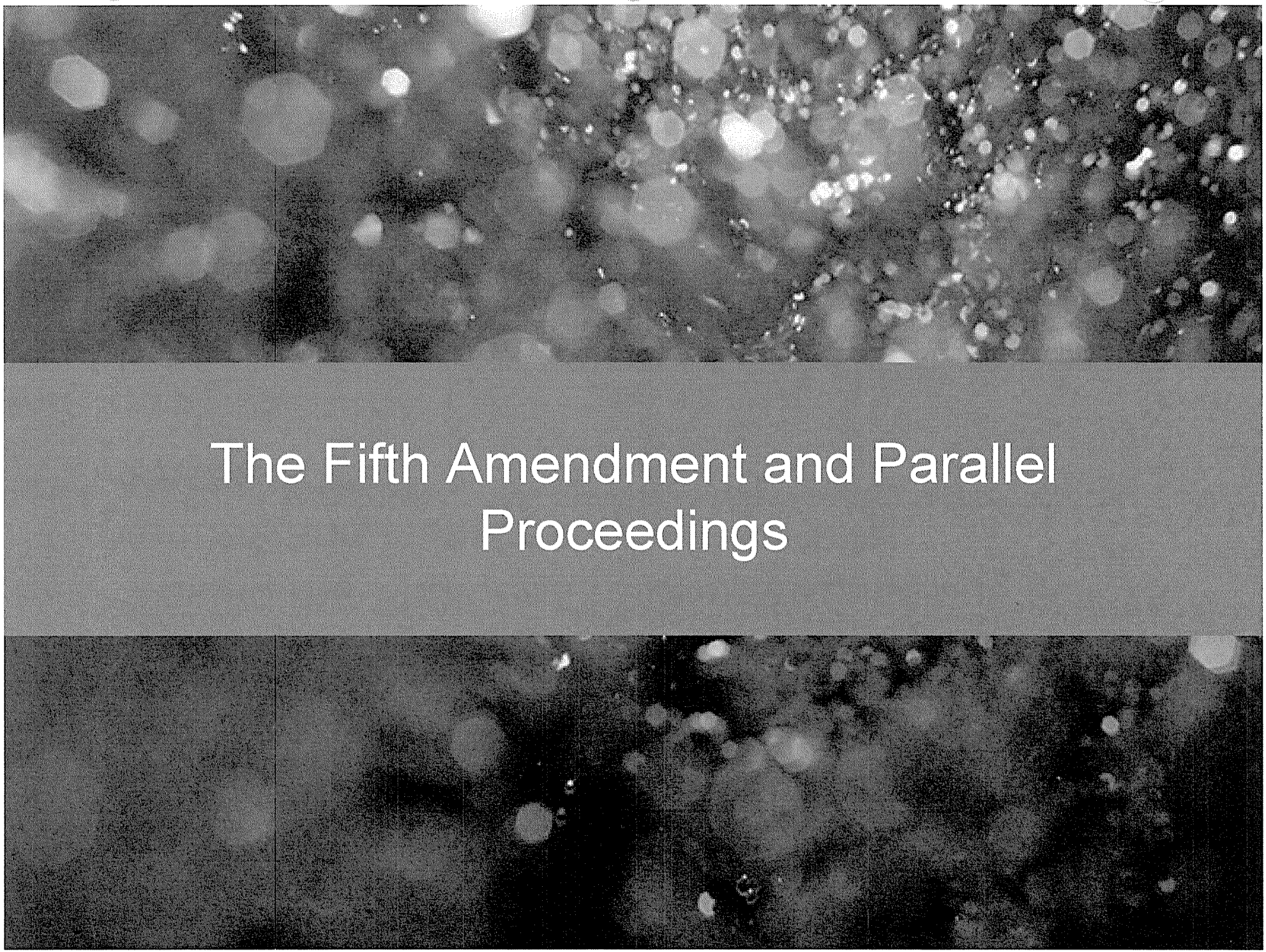
[6] Model Code of Prof'l Responsibility r. 1.7 (Am. Bar Ass'n 2016).

MODEL RULES OF PROFESSIONAL RESPONSIBILITY

Client-Lawyer Relationship

- **Rule 1.13: Organization As Client** [7]
  - A lawyer represents the organization through its duly authorized constituents.
  - A lawyer must explain the identity of the client when he knows or reasonably should know the organization's interest are adverse to others.

[7] Model Code of Prof'l Responsibility r. 1.13 (Am. Bar Ass'n 2016).



The Fifth Amendment and Parallel Proceedings

THE FIFTH AMENDMENT

- If "the specter of individual liability exists," then an employee can invoke privilege.[8]
- "Taking the Fifth" can have repercussions across venues and investigations in parallel proceedings.[9]

[8] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html
[9] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html

THE FIFTH AMENDMENT (CONT.)

- Corporations have no Fifth amendment rights.[10]

- But: a custodian of corporate records may invoke the Fifth Amendment personally, and not answer questions about corporate records.[11]

[10] See *Curcio v. United States*, 354 U.S. 118, 122 (1957); *United States v. White*, 322 U.S. 694 (1944).
[11] *Brasswell v. United States*, 487 U.S. 99 (1988).

ASSERTING PRIVILEGE (CONT.)

- The Fifth cannot be asserted to protect against perjury or similar charges.[12]
- Inconsistent statements could result in the case being referred for criminal prosecution.
  - Inconsistent statements could be used for impeachment or perjury and obstruction of justice charges.[13]

[12] *United States v. Wong*, 431 U.S. 174 (1977).
[13] *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008).

THE FIFTH AMENDMENT (CONT.)

- In civil proceedings, the judge and jury **MAY** draw adverse inferences.[14]

- In criminal proceedings, the judge and jury **MAY** **NOT** draw adverse inferences.[15]

[14] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-ls-parallel-proceedings.html
[15] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-ls-parallel-proceedings.html


The Privilege in Parallel Proceedings

WAIVING THE PRIVILEGE

- Federal agencies value and reward cooperation.[16]
- Government considers "disclosure of relevant facts" when determining cooperation credit; but when is that waiving of privilege?[18]
- Is waiving the privilege a sign of cooperation?[17]
- The Department of Justice/SEC have said they limit when they ask companies to waive privilege.[18]

[16] Sally Quillian Yates, U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (2015).
[17] Sally Quillian Yates, Deputy Attorney General, Remarks at the New York University Program on Corporate Compliance and Enforcement (September 10, 2015).
[18] Yates Memo: Increasing the Perils of Parallel Proceedings, SULLIVAN, WILLIAM and JOHN DURRANT, http://www.law360.com/articles/720868/yates-memo-increasing-the-perils-of-parallel-proceedings (Nov. 3, 2015)(last visited Jun. 30, 2016).

ASSERTING PRIVILEGE

- Conversely, choosing not to waive privilege may be used against your client.[19]

[19] Office of Chief Counsel Securities and Exchange Commission, Enforcement Manual, https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (Jun. 4, 2016)(last visited: Jul. 18, 2016).

SELECTIVE WAIVER

- If privilege is waived by your client, ensure the scope is limited and in accordance with the rules of your respective jurisdictions.[20]

[20] See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (*en banc*) (recognizing selective waiver of attorney-client privilege); *But See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) (rejecting the concept of selective waiver for both attorney-client privilege and work product).


Stay of Proceedings

STAYING CIVIL PROCEEDINGS

- Courts are constitutionally required to stay civil proceedings if it would result in prejudice to the parties in a criminal case.[21]
- Courts are more likely to issue a stay if the criminal proceedings are ongoing rather than pre-indictment.[22]

[21] Keating v. Office of Thrift Supervision, 45 F.3d 322, 324–25 (9th Cir. 1995).

[22] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html

STAYING CIVIL PROCEEDINGS (CONT.)

- A stay may be beneficial to protect the individual's right against self-incrimination.[23]
- Discovery in civil proceedings is broader than in criminal proceedings and could be prejudicial to the defendant.[24]
- A stay may be beneficial to the Government because of the many pretrial obligations placed on the Government.[25]

[23] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html

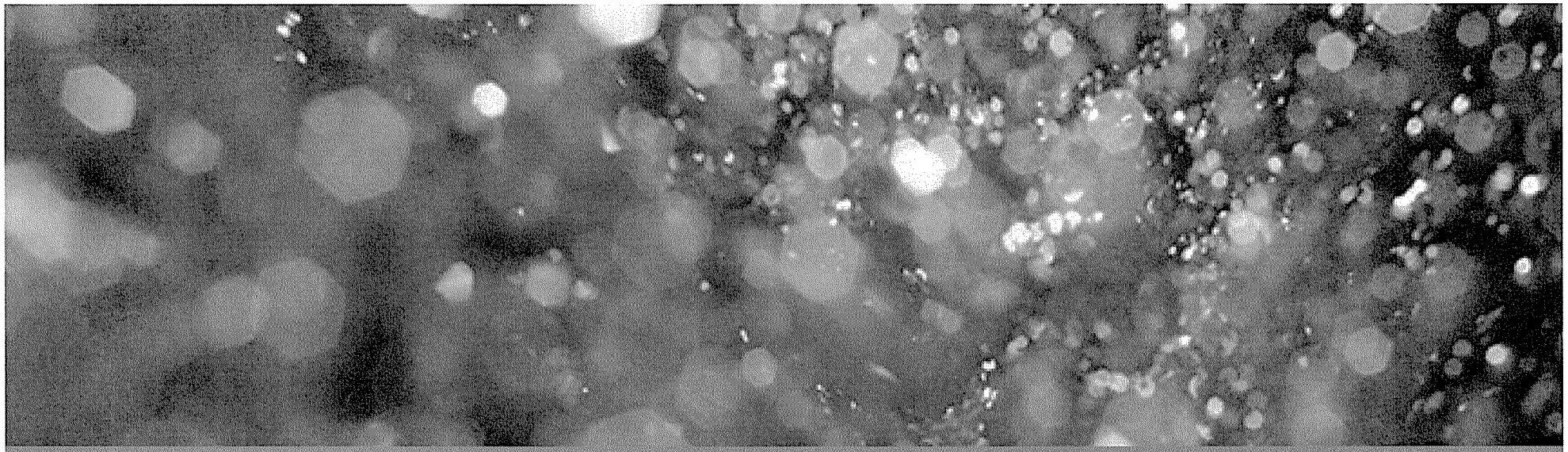
[24] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html

[25] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html

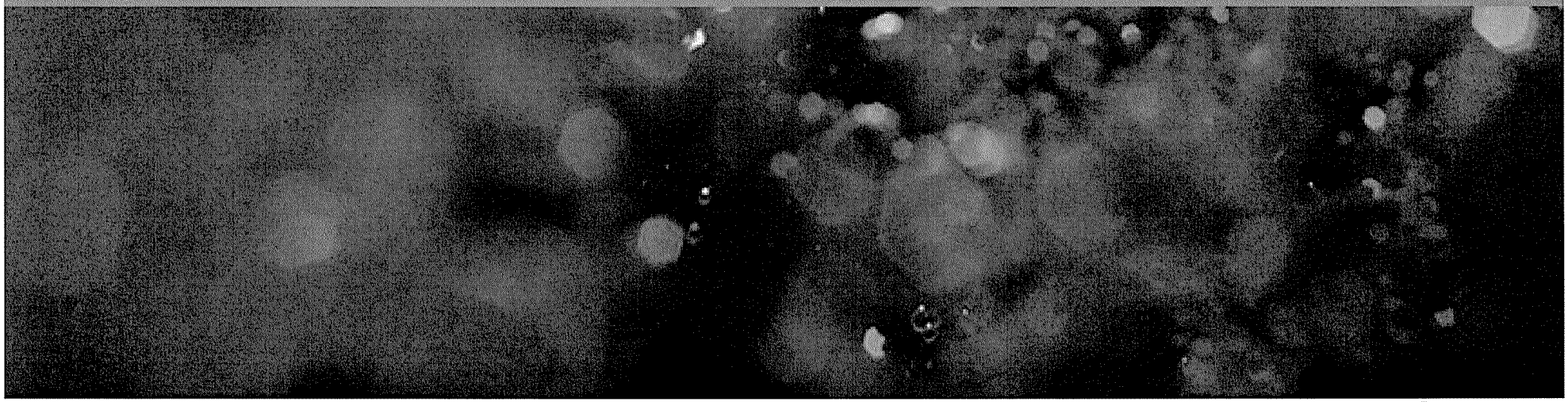
STAYING CIVIL PROCEEDINGS (CONT.)

- A stay may be beneficial to the Government because of the many pretrial obligations placed on the Government.[26]

[26] http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html



Representing an Organization in Parallel Proceedings



REPRESENTING AN ORGANIZATION

- When a lawyer is representing an organization, the general rule is that the client is the organization itself. [27]
- In certain cases, it is the lawyer's responsibility to make sure the constituents of the entity client understand.[28]

27 http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/who_is_client.html

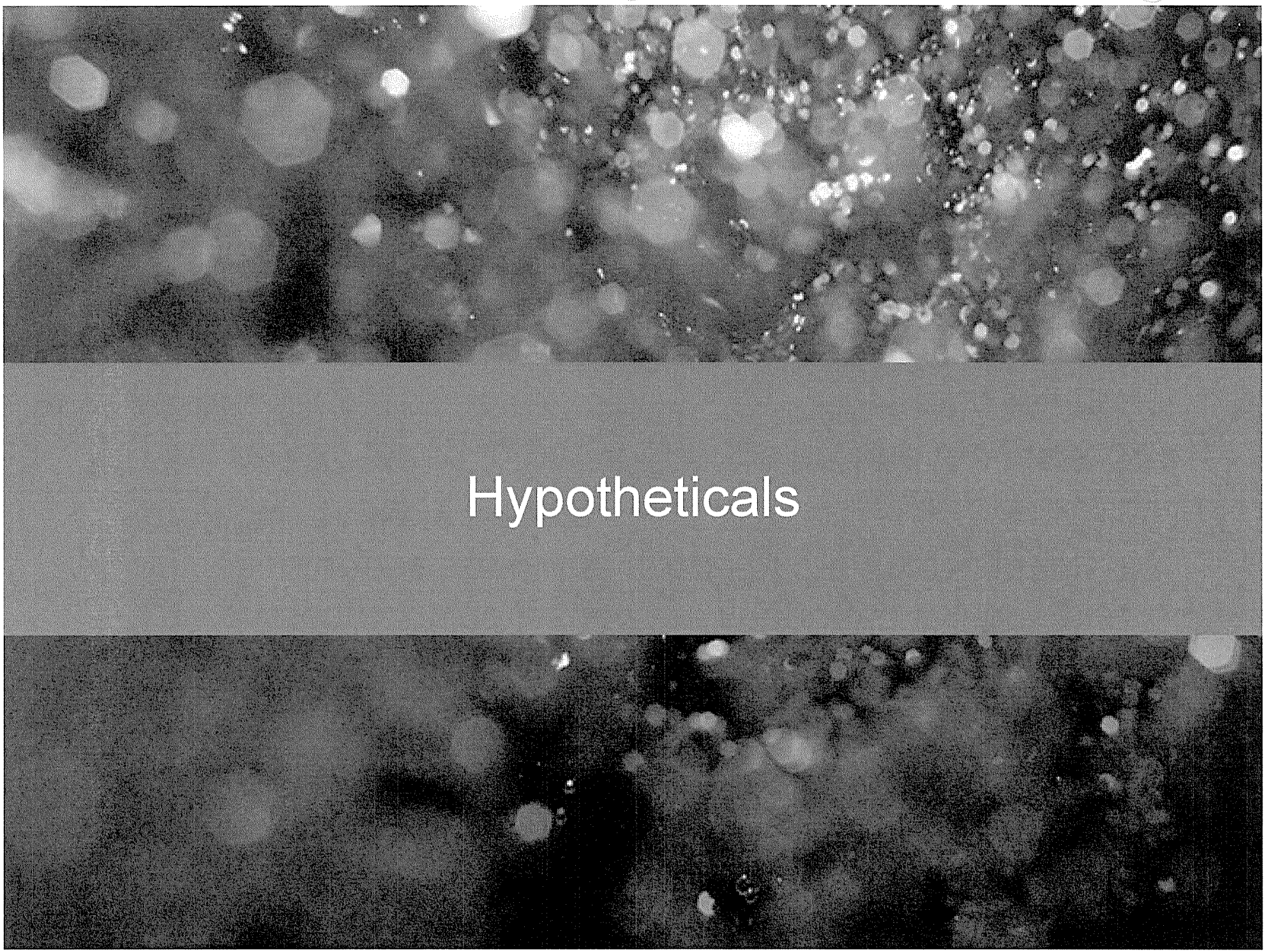
28 http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/who_is_client.html

REPRESENTING AN ORGANIZATION

- A lawyer is cautioned against confusing the interests of the entity client with those of the individuals with whom he or she interacts on behalf of the entity this issue.[29]

29

http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/who_is_client.html


Hypotheticals

HYPOTHETICAL 1

- Company receives a grand jury subpoena calling for the production of documents related to an oil spill.
- The prosecutor who issued the subpoena will not give any assurances about the scope of the investigation, its subjects, or likely targets.
- You, as GC need to get your arms around the facts ASAP.
- You and your staff sit down and interview all of the key employees.
- Is this ok?

QUESTION

Who do you represent?

1.13

What must you tell the employees?

1.17

Whose privilege is it?

ANSWER

- The corporation is your client and the lawyer is required not to share information without the client's consent.
- If the interests of the company are adverse to an employee, you should warn the employee that you represent the company.
  - How adverse???

REPRESENTING AN ORGANIZATION

- A lawyer is cautioned against confusing the interests of the entity client with those of the individuals with whom he or she interacts on behalf of the entity this issue.[30]

30

http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/who_is_client.html

HYPOTHETICAL 2

- EPA issues simultaneous administrative information requests to the company asking about the spill. The language is almost identical to the grand jury subpoena.
- Unbeknownst to you, the prosecutor and EPA lawyer are working together and the prosecutor asks EPA to issue the request using the same language so the agencies are not inconsistent?
- Can the government prosecutors do that?

QUESTION

No one thinks there is a realistic possibility of criminal liability; Can the company lawyer insist that the employees assist in answer the questions, because otherwise the failure to answer is a violation of law?

ANSWER

- If an employee asserts the privilege in a civil proceeding, it creates a risk of adverse inference.[31]

- Those inferences may extend to the company.[32]

[31] *Curcio v. United States*, 354 U.S. 118 (1957).
[32] See *LiButti v. U.S.*, 107 F.3d 110, 123–24 (2nd Cir. 1997).

K&L GATES

Answer (CONT.)

- In *LiButti*, the court held that four factors should be evaluated:[33]
  - the nature of the relationship between the non-party witness and the defendant;
  - the degree of control of the party over the non-party witness;
  - the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and
  - the role of the non-party witness in the litigation.
- No court has applied those factors.[34]

[33] See *LiButti v. U.S.*, 107 F.3d 110, 123–24 (2nd Cir. 1997).

[34] *But See Cotton v. City of Eureka*, 2010 U.S. Dist. LEXIS 79649, at *11-12 (N.D. Cal. Jul. 21, 2010), *Kontos v. Kontos*, 968 F. Supp. 400, 406 (S.D. Ind. 1997).

ANSWER

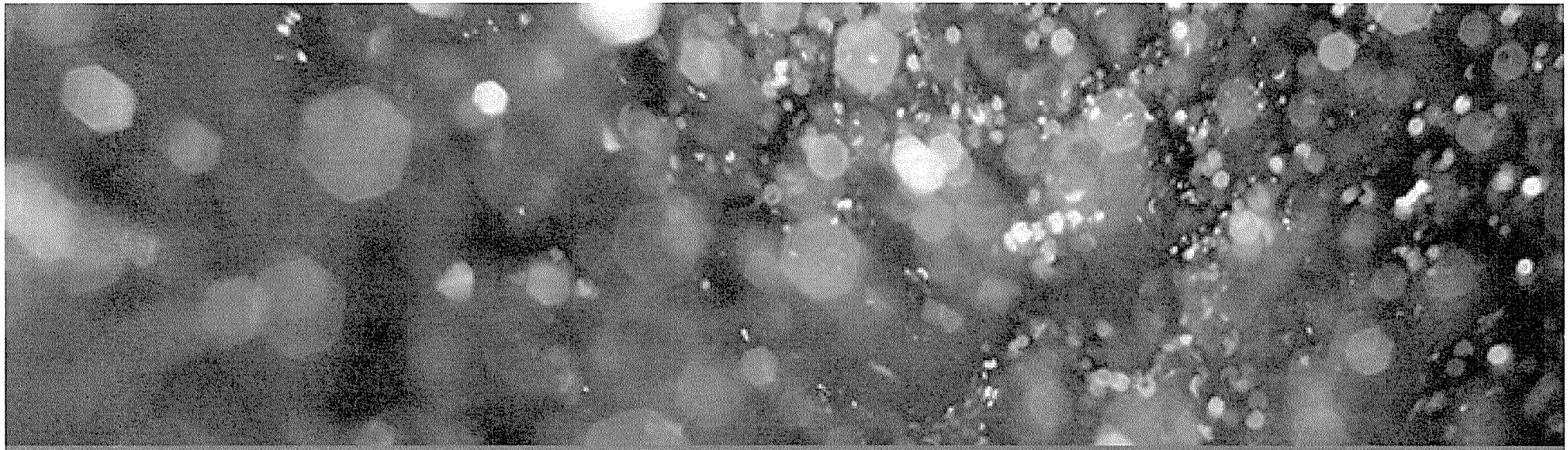
- While the company, which has no Fifth Amendment privilege, will produce its documents, the individuals may decline to testify before the grand jury if doing so risks self-incrimination.

HYPOTHETICAL 3

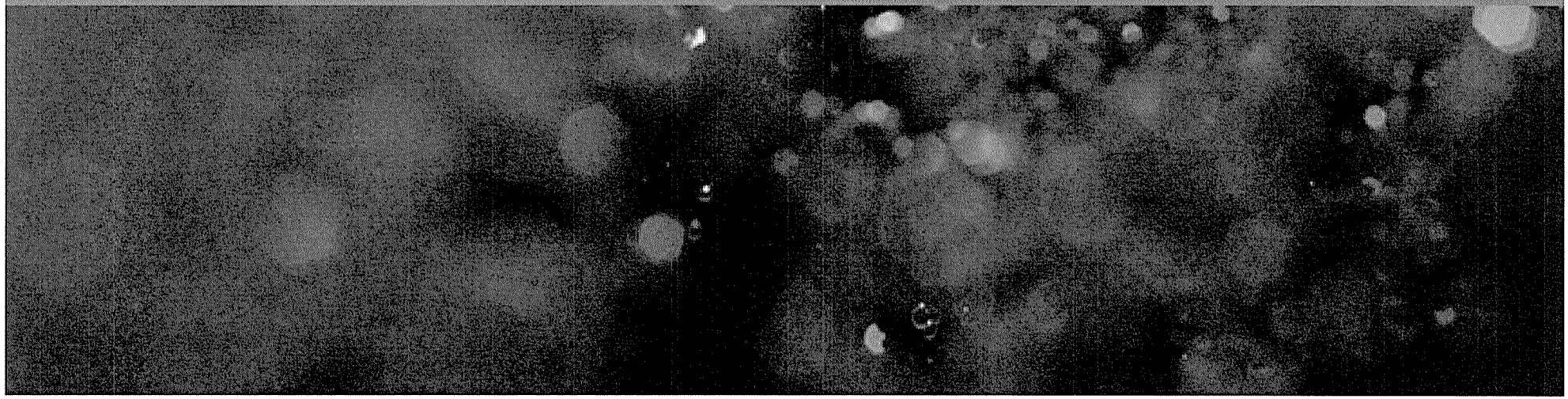
- A congressional committee sends a subpoena demanding that several officers and employees appear before a subcommittee to talk about the spill and whether legislation is needed to fill gaps in current laws.
  - The company lobbyist tells you to be there.
  - One of the officials calls you as company counsel and asks if he should testify and whether doing so would waive his fifth amendment rights?

ANSWER

- Selective waiver of the Privilege?



Questions



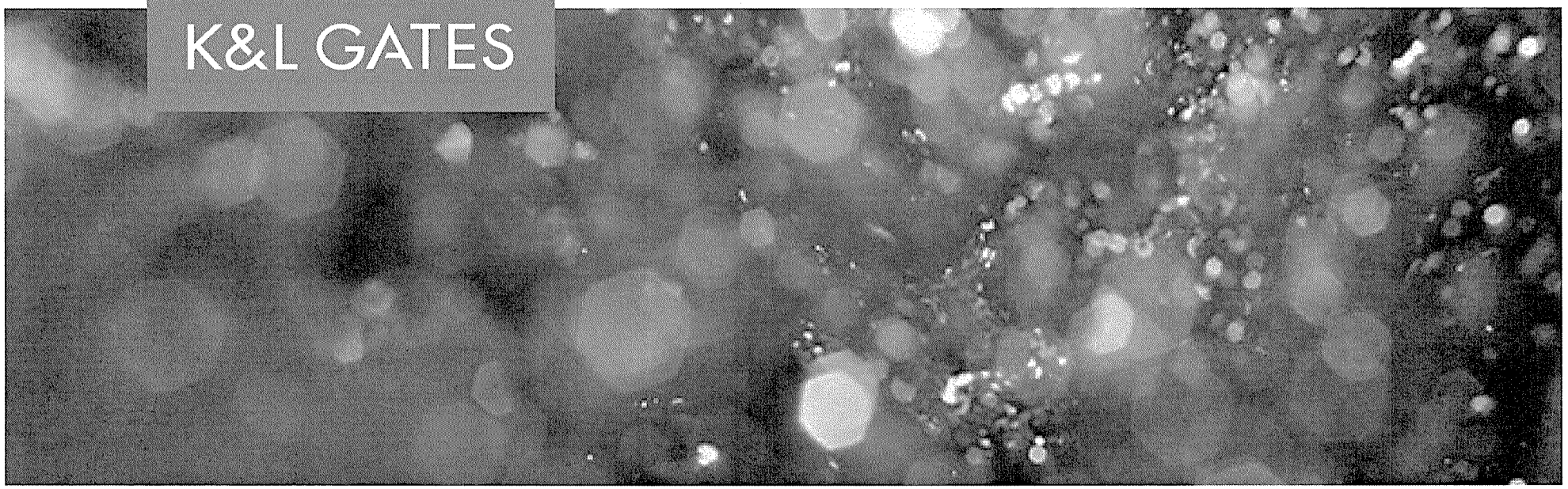
REFERENCES

- Yates Memo: Increasing the Perils of Parallel Proceedings, SULLIVAN, WILLIAM AND JOHN DURRANT, http://www.law360.com/articles/720868/yates-memo-increasing-the-perils-of-parallel-proceedings (Nov. 3, 2015)(last visited Jun. 30, 2016).
- Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, DEP'T OF JUSTICE, https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings (Jan. 30, 2012)(last visited Jun. 30, 2016).
- Rule 1.13: Organization as a Client, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client.html (last visited Jun. 30, 2016).
- Rule 1.6: Confidentiality of Information, The Client-Lawyer Relationship, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (last visited Jun. 30, 2016).
- Rule 1.7: Conflict of Interest: Current Clients, AMERICAN BAR ASSOCIATION http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html (last visited Jun. 30, 2016).

REFERENCES (CONT.)

- The Pitfalls of Parallel Proceedings, YEAGIN, GRAYSON D. and LINDSEY M. NELSON, Section of Litigation - Criminal Litigation, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-pitfalls-parallel-proceedings.html (Apr. 4, 2012)(last visited Jun. 30, 2016).
- Transmittal of Final OECA Parallel Proceedings Policy, Environmental Protection Agency, https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf (Sept. 24, 2007)(last visited Jun. 30, 2016).
- Who Is the Client? Confidentiality When Representing Organizations, SERWIN, ANDREW B. and JESICA N. PANDIKA, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/who_is_client.html (Jul./Aug. 2007) (last visited Jun. 30, 2016).
- Fighting on Two Fronts: Parallel Proceedings and Challenges at the Intersection of Criminal and Civil Law, LOUGHLIN, WALTER P., http://www.metrocorpcounsel.com/articles/7442/fighting-two-fronts-parallel-proceedings-and-challenges-intersection-criminal-and-civi (Oct. 1, 2006)(last visited Jun. 30, 2016).
- Environment and Natural Resources Division Directive 2008-02: Parallel Proceedings Policy, DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/Directive_No_2008-02_Parallel_Proceedings_Policy_508.pdf (Dec. 12, 2000)(last visited Jun. 30, 2016).

K&L GATES



ETHICAL ISSUES INVOLVING PARALLEL PROCEEDINGS

"When you come to a fork in the road, take it"

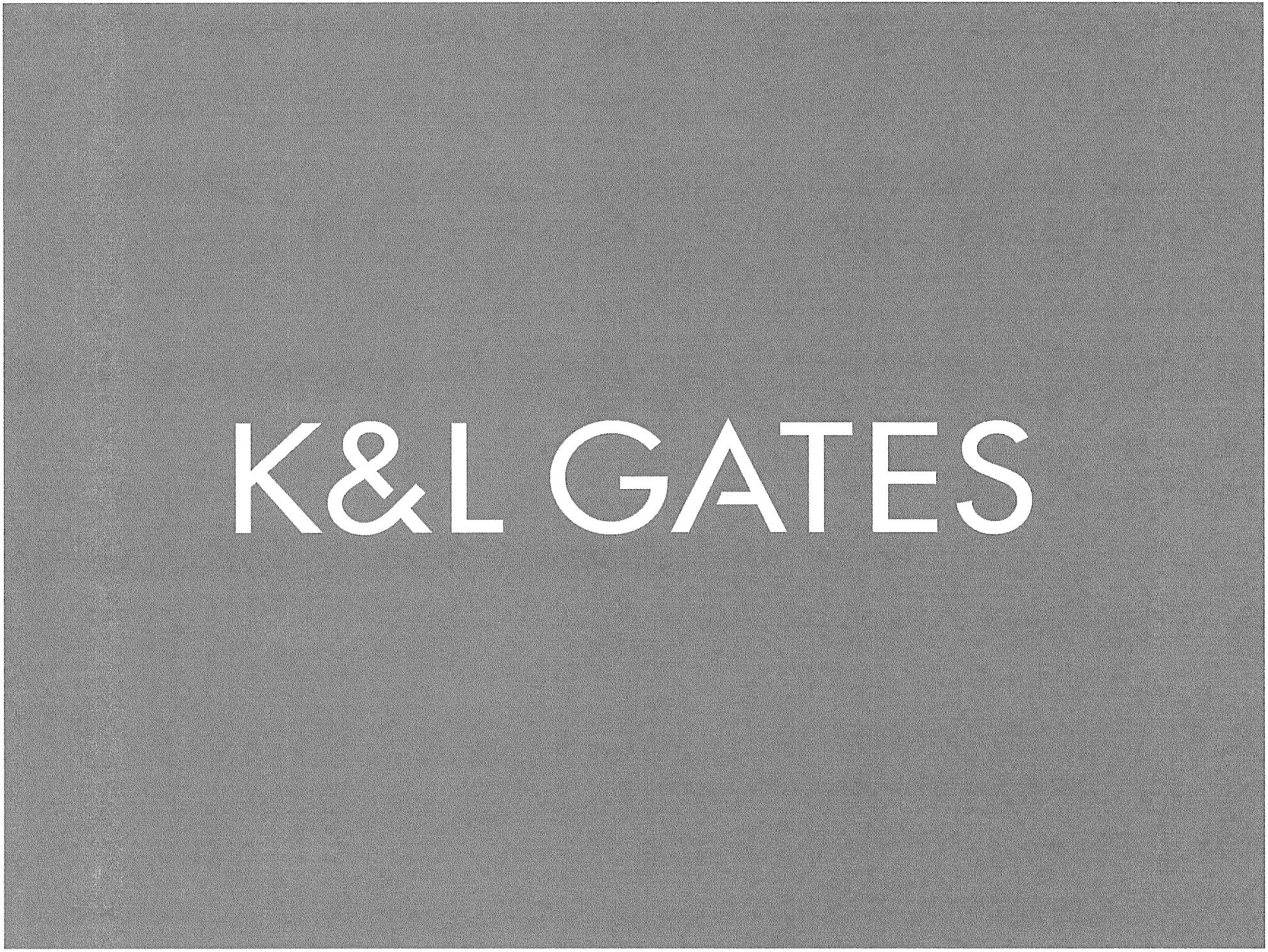
August 5, 2016

28th Annual Texas Environmental Superconference

© Copyright 2016 by K&L Gates LLP. All rights reserved.

Barry Hartman
K&L Gates LLP
1601 K St. N.W.
Washington, D.C.
202 778 9100

Barry.Hartman@klgates.com


K&L GATES