**Texas Environmental Superconference 2021**
**Case Law Update**

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## Introduction

Below are summaries highlighting notable cases and developments in environmental jurisprudence over the past year. Though the updates provided here are not an exhaustive list of all opinions issued, it captures many of the chief impacts on the practice of environmental law.

## Federal Courts

United States Supreme Court

- **United States Supreme Court Decides Interstate Water Contract Dispute**
  - In 2014, Tropical Storm Odile caused the Pecos River to overflow the Red Bluff Reservoir in Texas. The Brantley reservoir upstream in New Mexico was used to capture water and control flooding at the request of Texas. While New Mexico was holding the water, approximately 21,000 acre-feet of the water captured evaporated before being released to Texas in August 2015. New Mexico requested a credit for the evaporated water, citing the Pecos River Compact which said that when New Mexico stored water at the request of Texas in New Mexico, then the delivery obligation would be "reduced by the amount of reservoir losses attributable to its storage." The states disagreed over how to account for the evaporated water. The River Master, who annually must make a calculation of New Mexico's delivery obligation, found in favor of New Mexico in 2018 after several years of negotiations between the states over the issue. Texas filed a motion for review of that decision.
  - New Mexico argued that it should receive credit for the water that evaporated while in storage in the state, even though the water was not delivered to Texas. Texas disagreed on the merits, also contending that New Mexico waited too long to file a motion for the credit, making its request for credit for evaporated loss untimely. Texas argued that it should instead receive credit for the water. In support of its position, Texas raised three points: (1) the stored water was not actually part of its allocation; (2) New Mexico did not "store" the water for the purposes of the compact; and (3) Texas did not request the water be stored by New Mexico after March 2015.
  - The Court ruled in favor of New Mexico, holding that New Mexico should be given credit for water that was in its possession but could not be delivered to Texas as a result of evaporation The court determined that New Mexico was not untimely in requesting the credit, because both states had agreed to postpone resolution of the evaporated water issue while negotiating agreement, and Texas could not ignore its own agreement to postpone deadlines.

- The court also rejected Texas's arguments on the merits. The court explained that the water in question fell within the definition of the "Texas allocation" as defined by the terms of the Compact. As to Texas's second point, the court determined again that "store" as used in the Compact was not afforded some special meaning or did not indicate long-term beneficial use, but rather that the ordinary definition of the word. Finally, the court found that because Texas requested the water be stored in late 2014, and failed to rescind its request prior to the release in 2015, the River Master did not err in crediting New Mexico for the evaporation.

- **United States Supreme Court Renders CERCLA Settlement And Liability Decision**
  - In Territory of Guam v. United States, 141 S.Ct. 1608 (2021)Territory of Guam brought action against the United States to recover costs to clean up a landfill, the Ordot Dump. Prior to the suit, Guam and the United States were engaged in a longstanding dispute over liability of hazardous waste at the site. Both parties had ownership of and used Ordot Dump at various times beginning in the 1940s. The EPA sued Guam under the Clean Water Act ("CWA") for "discharging pollutants. . . into waters of the United States without obtaining a permit." The EPA and Guam entered into a consent decree in 2004 over the CWA violations at the site. The decree required Guam to pay a civil penalty and close the dump, and in return for compliance Guam would be in full settlement and satisfaction of claims under the CWA. More than a decade later, Guam sued the U.S. under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") for both a cost-recovery and a § 113(f) contribution action. The D.C. Circuit dismissed Guam's suit, finding (1) that if a party can § 113(f) claim, it cannot assert a cost-recovery claim, and (2) that Guam's CERCLA "contribution" action was time barred because it settled the CWA suit with the EPA in 2004. Guam appealed, arguing that it did not have a viable contribution action because a contribution claim only arises if settlement resolves liability under CERCLA, and that the decree did not resolve any liability because there was no formal admission of responsibility. The court disagreed with
  - The court held that a settlement of environmental liabilities must resolve a CERCLA-specific liability to give rise to a CERCLA contribution action. The phrasing and context of the statute, § 113(f), presumes that a CERCLA liability is necessary to trigger contribution. The court determined that it would not make sense to decide a party has "resolved its liability" if the party remains vulnerable to a CERCLA suit. In a unanimous opinion, the Court ruled in favor of Guam, holding that the most natural reading of the provision of CERCLA is that a party may seek contribution only after settling a CERCLA-specific liability.
  - Accordingly, the D.C. Circuit's prior opinion was vacated and the case was remanded to the district court in light of the Supreme Court's ruling.

- **Fifth Circuit Issue Decision on Contract Interpretation and Liability**
  - This case, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp. Tex.*, 20-40575, 2021 WL 1726813 (5th Cir. Apr. 30, 2021), involved a dispute between Formosa Plastics and San Antonio Bay Estuarine Waterkeeper over the interpretation of the Consent Decree the parties entered into to settle San Antonio Bay's Clean Water Act claims. San Antonio Bay contended that the "mere presence" of plastics triggered Formosa's obligations under the decree, while Formosa argued that it was triggered by new, post-Consent Decree discharges.
  - The District Court determined that Formosa's obligations were triggered by the presence of plastics, regardless of when they were discharged. The original suit was filed under the Clean Water Act for plastics discharge into local bodies of water. The initial settlement of $50 million was the largest in US history involving a private citizen's lawsuit against a company for an environmental action.
  - The three-judge panel of the Fifth Circuit held that the District Judge misconstrued the consent decree, reading the consent decree in a way that failed to distinguish between previous releases of plastic pellets and future releases. The consent decree as interpreted by the district court would allow Formosa to remain liabile for past discharges of plastics even though the past charges were the subject of the settlement. The Court determined that the consent decree unambiguously contemplated only post-Consent Decree discharges, and only those would trigger payment and reporting obligations on Formosa's part. The district court's holding was reversed and remanded.
- **Fifth Circuit Issues Decisions Regarding Challenges To Ccns And Decertification**
  - In *Green Valley Special Utility District v. City of Schertz, Tex.*, 969 F.3d 460 (5th Cir. 2020), Green Valley Special Utility District obtained a federal loan from the U.S. Department of Agriculture for its system. Guadalupe Valley Development Corporation and the City of Schertz separately petitioned the PUC for decertification of territory from Green Valley's CCN, GVDC pursuant to Section 13.254(a-5) of the Texas Water Code and the City of Schertz under Section 13.255. Both petitions stated that the territory to be released was not receiving water. The PUC issued orders approving both petitions. Green Valley challenged the PUC's orders in federal district court, arguing that the PUC's orders violated 7 U.S.C. § 1926(b) because it had already "provided or made available" sewer service. Under 7 U.S.C. § 1926(b), recipients of federal loans are protected from encroachment if they have "provided or made available" water or sewer service in the service area at issue. Green Valley argued that the PUC unlawfully allowed encroachment by approving the two petitions to decertify portions of its CCN. Green Valley ultimately settled with GVDC, leaving the Fifth Circuit to consider only the decertification issue involving the City of Schertz.
  - The Fifth Circuit did not decide whether Green Valley had "provided or made available" sewer service, but instead articulated a new test for what protects a

utility from encroachment under 7 U.S.C. § 1926(b). Previously, the standard in Texas was governed by the court's decision in *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996), which held that the state law obligation to serve under a CCN met the standard of "making service available." Looking instead to similar standards adopted in other circuits, the court determined that a "physical capability" test better satisfied the "provided or made available" standard in the federal statute. Under this test, a utility can be protected by 7 U.S.C. § 1926(b) only if it shows that it has: (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made, and (2) the legal right to provide service. The court noted that a utility cannot satisfy the test if "it has no nearby infrastructure," but that the "pipes in the ground" idea is "not a strict requirement." The court in *Green Valley* explicitly overruled *North Alamo*. The Fifth Circuit remanded the case to district court to determine if Green Valley had satisfied the "physical capability" test with regard to the City of Schertz's tract.

    - Relatedly, in *Crystal Clear Special Utility District v Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam), the Fifth Circuit vacated two decisions which held that the Texas Water Code provisions for streamlined expedited release, specifically regarding CCN holders with federal indebtedness, were preempted. In 2018, the federal district court determined that portions of Section 13.254 of the Texas Water Code was preempted by 7.U.S.C. § 1926(b). Specifically, subsection (a-6) prohibited the PUC from considering whether a CCN holder was federally indebted in reviewing and considering a petition for streamlined expedited release. These rulings prohibited the PUC from taking up petitions to decertify property from the holder of a certificate of convenience and necessity that borrowed money under a federal-loan program. The PUC appealed those decisions, which were consolidated before the Fifth Circuit.
    - While the Fifth Circuit did not directly address preemption in *Green Valley*, The rationale regarding preemption was premised on *North Alamo's* holding that if a utility had an exclusive service territory, then it was "providing or making service available" as required for protection under Section 1926(b). With the overruling of *North Alamo* and establishment of the physical ability test, the underlying rationale for the decision in *Crystal Clear* was no longer good law.
    - Three months after the court's opinion in *Green Valley*, the Fifth Circuit vacated the district court's *Crystal Clear* decisions and remanded the cases back to district court for decision in line with *Green Valley*.
- **Fifth Circuit Upholds Agency Decision in Administrative Review Actions**
    - In a pair of companion cases, *Sierra Club v. Department of Interior*, the Fifth Circuit affirmed federal agency's opinion permitting construction and operation of natural gas pipeline. 990 F.3d 898 and 990 F.3d 909 (5th Cir. Mar. 10, 2021.) Both cases involved denial of petitions to review a biological opinion and incidental take statement regarding endangered cats. The statements were issued by the United States Fish and Wildlife Service pursuant to the Endangered Species Act ("ESA") in connection with proposed construction and operation of a liquefied natural gas terminal in South Texas. The cases were split between the Annova project and the Rio Grande Project.
    - In both cases the district court denied the petition for review, finding that the U.S. Fish and Wildlife Service's biological opinion was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.
- **Fifth Circuit Denied Petition for Review Under Clean Air Act**

- In *Environmental Integrity Project v. United States Environmental Protection Agency*, 969 F.3d 529 (5th Cir. 2020), the Fifth Circuit Court of Appeals held that *Skidmore* deference applied to EPA's review role in permitting determination.
- ExxonMobil sought to revise its permit granted under Title V of the Clean Air Act ("CAA") that was issued by TCEQ for pre-construction amendments to accommodate expansion. A group of environmental organizations petitioned the EPA to object to the revision based on claims that the original permit was invalid. When EPA did not object, the citizen groups sought judicial review.
- The court explained that in order to prevail, the Environmental Integrity Project would need to demonstrate that the permit is not in compliance with the requirements of Title V of the CAA. EPA's position that Title V lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits was persuasive. Accordingly, the court denied the petition for review.

Federal District Courts

- **Southern District Of Texas Renders River Authority Antitrust Ruling**
  - In *Quadvest, L.P. v. San Jacinto River Authority*, No. 4:19-CV-4508, 2020 WL 5034155 (S.D. Tex. Aug. 14, 2020), the federal district court for the Southern District of Texas denied a motion to dismiss a brought by the San Jacinto River Authority ("SJRA") in a case where several private utility companies alleged violations of federal antitrust law. SJRA had a groundwater reduction plan that involved contracts with large volume groundwater users that imposed withdrawal fees in exchange for SJRA's financing of a surface water treatment plant on Lake Conroe. The utility companies claimed that SJRA's groundwater reduction plan created a monopoly and artificially inflated the price of wholesale raw water.
  - The utility companies brought an action for declaratory and injunctive relief. The companies asserted that SJRA's plan violated Section 1 Sherman Act, and accordingly sought a declaration that the contracts were illegal and unenforceable. The companies also asked the court to enjoin SJRA from enforcing the contracts. Defendants filed a motion to dismiss, arguing Plaintiff's claims are barred by statute of limitations and laches, fail to state a claim for violations of the Sherman Act, and are barred by state-action immunity
  - SJRA filed a motion to dismiss, and the court denied the motion to dismiss. In addition to denying the motion as to statute of limitations and laches. The court held that the Sherman Act claims should not be dismissed for failure to state a claim because the utility providers alleged sufficient facts. The court held that SJRA was not shielded by immunity because its enabling statute does not authorize it to "displace or regulate competition in the wholesale raw water market." The court also determined that Plaintiffs alleged sufficient facts to satisfy their antitrust claim.
  - SJRA appealed to the Fifth Circuit and that decision is still pending.
- **Western District of Texas Denies Preliminary Injunction in Endangered Species Action**
  - In *Sierra Club v. United States Army Corps of Engineers*, 482 F.Supp.3d 543 (W.D. Tex Aug. 28, 2020). The district court held that the Sierra Club failed to show irreparable harm and denied a preliminary injunction. The Sierra Club sought

to prevent Kinder Morgan's construction of natural gas pipeline. The Corps provided the U.S. Fish and Wildlife Service with a biological assessment that concluded the pipeline may adversely affect protected species and then initiated the formal consultation process. The Service conducted an analysis to determine whether the pipeline was likely to jeopardize the continued existence of any endangered species or adversely affect their habitats. The Service then issued a Biological Opinion and incidental taking statement.

- The court found that the Sierra Club failed to show irreparable harm with regards to the injunction analysis. Clearing along the pipeline was 98 percent complete already and none of the Sierra Club members lived near the remaining areas where there may be additional clearing and trenching activity. Furthermore, the clearing activities of the endangered species' habitats are already complete. The clearing that remains will happen after the endangered species have left those particular breading grounds resulting in only a temporary impact to the species. Finally, Sierra Club is unable to show that the impact of the pipeline is more than minimal or that the alleged harms are not offset by the conservation measures undertaken by Kinder Morgan at the direction of the Corps.
- The court did note that Sierra Club came close, but ultimately failed to show that the impact would be more than minimal. Further, an injunction at this stage of the Pipeline's completion would not "unring the bell," concluding that Sierra Club failed to establish a definitive threat of future harm.

- **Eastern District of Texas Denies Preliminary Injunction in Pipeline Easement Action**
  - In *Optimus Steel, LLC v. U.S. Army Corps of Engineers*, 1:20-CV-00374, 2020 WL 5881828 (E.D. Tex. Oct. 4, 2020), the district court for the Eastern District of Texas, found that there was not irreparable harm to support preliminary injunction to halt pipeline construction easement. The dispute before the court concerned a permit issued by the U.S. Army Corps of Engineers for the construction of JSSP's Southern Star Pipeline, a proposed fourteen-mile gas pipeline between Beaumont and Port Neches, Texas. After failed negotiations between JSSP and Optimus Steel, JSSP filed a condemnation suit and was awarded an easement over Optimus's property. The USACE issued a Finding of No Significant Impact ("FONSI") and a "no effect" determination, and accordingly issued JSSP a Nationwide Permit 12, a generalized CWA permit that authorizes the discharge of dredged or fill material during construction.
  - Optimus sued the USACE and JSSP in the United States District Court for the Eastern District of Texas seeking a preliminary injunction to stop the construction of the pipeline on its property. The Court found that Optimus's loss would be purely economic and, therefore, did not fall within the "zone of interest" of either Act, which both only cover environmental injuries. Additionally the court found that it did have standing under the CWA
  - The Court then held that, because the Corps already issued a FONSI and "no effect" regarding the Pipeline's environmental impact, there was not a substantial threat of irreparable harm. Additionally, the court determined that because Optimus received monetary compensation for the pipeline easement, it did not suffer irreparable economic harm either. Finally, the Court found that the balance of harm and public interest weighed in favor of JSSP.

- **Southern District of Texas Ruled In Favor Of ExxonMobil for Wartime Contamination**
    - On August 19, 2020, the U.S. District Court for the Southern District of Texas issued its opinion in *Exxon Mobil Corporation v. U.S.*, No. 10-2386 (Tex. S.D. 2020)**,** concerning the decade-long dispute between the U.S. government and ExxonMobil regarding which party would be responsible for remediation costs incurred to clean up contamination caused by ExxonMobil's Baytown and Baton Rouge refineries, used during World War II and the Korean War to produce aviation fuel and rubber under government control.
    - ExxonMobil originally sued the U.S. government in 2010 for damages associated with groundwater contamination at the Baytown refinery. A year later, the company filed another lawsuit seeking costs associated with cleanup for the Baton Rouge refinery. The cases were consolidated and ExxonMobil argued that the federal government was liable under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") as a past operator of the plants due to the government's level of control and involvement.
    - The U.S. District Court for the Southern District of Texas ruled in favor of ExxonMobil, determining that the federal government was responsible under CERCLA for an allocated share of past response costs incurred for cleanup measures at both of the plants. The court reasoned that (1) the government's knowledge and acquiescence in the contamination-causing activities at the plants, (2) the value of the war materials produced at the plants to support national defense, (3) certain cost reimbursement provisions in wartime contracts, and (4) the plants' substantial post-war waste handling improvements all supported a "substantial" or "increased" allocation of the response costs to the government. Accordingly, the court awarded ExxonMobil over $20 million in damages and allocated a portion of future response costs to the government.

## Texas Courts

<u>Texas Supreme Court</u>

- **Texas Supreme Court to Hear Challenge to Appellate Court Mishandling of Administrative Procedure**
    - In *Texas Commission on Environmental Quality v. Maverick County et al.*, 2019 Tex., 2019 WL 6042276, (Tex. App.—Austin 2019, rev. granted), the Texas Commission on Environmental Quality ("TCEQ") asserts that the appeals court incorrectly vacated district court rulings that upheld the TCEQ's findings regarding a permit application for a wastewater discharge permit renewal for a coal mine in Eagle Pass, Texas.
    - Eagle Pass and Maverick County challenged the permit because the operator was not listed on the application and therefore the application was incomplete. The appeals court agreed.
    - The TCEQ claimed it handled the operator matter properly and the court was wrong to vacate additional rulings on the other challenges that are questions of statutory construction and substantial evidence.

- **Texas Supreme Court Grants Multidistrict Litigation for Winter Storm Uri Litigation**
    - In Re: Winter Storm Uri Litigation, 2021 WL 1703938 (Tex. 2021), the Texas Supreme Court's Judicial Panel granted a Multidistrict Litigation request that will consolidate 157 related cases against ERCOT, certain energy companies, and cities.
    - These cases seek damages for negligence, gross negligence, and wrongful death resulting from failure to adequately assess electricity needs ahead of the winter storm. Claims total hundreds of millions of dollars.
    - ERCOT stated in its motion requesting multidistrict litigation, that it plans to assert governmental immunity in the winter storm cases. Under a 2018 ruling from the Fifth Court of Appeals in Dallas ruling, ERCOT is entitled to governmental immunity from suit because it acts at the behest of state lawmakers and utility regulators.
- **Texas Supreme Court Punts on ERCOT Immunity Issue**
    - In the consolidated case of *ERCOT v. Panda Power Generation Infrastructure Fund, LLC, et al.*, 619 S.W.3d. 628 (Tex. 2021), a divided Texas Supreme Court declined to determine whether the Electric Reliability Council of Texas Inc. ("ERCOT") is entitled to the protection of sovereign immunity. Four justices issued dissents.
    - Panda Power sued ERCOT in 2016 for publishing allegedly misleading reports about the scarcity of power in Texas. Panda Power argued that ERCOT is a private corporation and thus is not entitled to sovereign immunity protection. ERCOT argued it was immune from suit as a governmental entity.
    - The trial court dismissed ERCOT's argument, and ERCOT swiftly appealed the interlocutory order. The Fifth Court of Appeals in Dallas determined ERCOT had sovereign immunity. Panda Power swiftly filed a writ of mandamus, bringing the matter to the Texas Supreme Court. Based on the appellate court's ruling, the district court entered a judgment against Panda Power. Panda Power appealed and that appeal is pending before the court of appeals.
    - The Texas Supreme Court dismissed the case for procedural reasons. A five-justice majority held that the Texas Constitution prohibited them from ruling on the case because Panda Power had not exhausted its appeals in the lower courts: a trial court had already entered a judgment against Panda Power. That judgment has been appealed and that appeal is still pending.
    - The four dissenting justices argued that the Court could still consider the issue of sovereign immunity because of the public's great interest in the matter.
- **Texas Supreme Court Addresses Arbitration with Governmental Entities**
    - In *San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 581 S.W.3d 245 (Tex. App.—San Antonio 2017), aff'd, No. 17-0905, 2020 WL 2097347 (Tex. May 1, 2020), after construction companies initiated an arbitration proceeding against San Antonio River Authority ("SARA"), alleging breach of construction contract, SARA filed an action for declaratory judgment, seeking declaration that claim was barred by governmental immunity.

- The Court of Appeals in San Antonio held that local governmental entities that have agreed to arbitration clauses can be required to arbitrate. SARA hired Austin Bridge & Road, L.P. ("Austin Bridge") to help make repairs on the Medina Lake Dam. The parties signed a written agreement including a provision requiring disputes arising under the contract to be decided by binding arbitration.
- When costs of the project exceeded initial expectations, a dispute arose as to who was obligated to pay the additional costs and Austin Bridge invoked the contract's arbitration provisions. SARA sought dismissal of the claims, citing governmental immunity in a plea to the jurisdiction submitted to the arbitrator. After the arbitrator denied SARA's motion, SARA filed suit in district court to enjoin the arbitration and sought a determination of whether governmental immunity barred the claims against it.
- The Supreme Court took up three questions: (1) whether the agreement to arbitrate is enforceable, (2) if so, whether the courts must decide matters of governmental immunity, notwithstanding the agreement of the parties, and (3) whether immunity bars the breach-of-contract claim against SARA. Citing local governmental entities' authority to enter into contracts and waive immunity to suit under Chapter 271 of the Local Government Code, the Court reasoned that Chapter 271 authorized SARA to agree to arbitrate disputes arising from its construction contract with Austin Bridge because SARA properly entered into a contract under Chapter 271 that contained an enforceable arbitration provision, it waived its immunity to suit and could not later assert that it did not have the power to bind itself to resolving a dispute under the contract through arbitration. However, the Court emphasized that a court must decide a local government's immunity from suit and liability, notwithstanding a contractual agreement to the contrary.
- Therefore, SARA could not agree to permit an arbitrator to decide questions of governmental immunity. Governmental entities should therefore be aware when contracting under Chapter 271 with third parties that the entity may be bound by an arbitration provision should there be a dispute under the contract.

<u>Texas Appellate Courts</u>

- **Texas Legislature Waived Governmental Immunity for Administrative Penalties under Texas Water Code**
  - In *Hyde v. Harrison County, Texas*, 607 S.W.3d 106 (Tex. App.--Houston [14th Dist.] 2020), the Texas Commission on Environmental Quality ("TCEQ") determined that Harrison County had failed to provide release detection for certain underground fuel storage tanks and TCEQ initiated an enforcement action seeking an administrative penalty of $5,626. Harrison County challenged this penalty in state district court, arguing that it was shielded by governmental immunity. The Fourteenth Court of Appeals held that the Texas Legislature

waived governmental immunity for administrative penalties under the Texas Water Code.

- The Fourteenth Court of Appeals looked to the Texas Government Code's definition of "person," which includes any "government or governmental subdivision or agency." The Court pointed to Texas Water Code § 7.067, which provides for projects when a "local government" faces an administrative penalty. Due to this provision, the court held that the Texas Legislature clearly waived governmental immunity for administrative penalties under the Texas Water Code, and thus a local government could be held liable for TCEQ's administrative penalty.

- **Texas Citizens Participation Act and the Texas Water Code**
  - In *Davis v. Gulf Coast Authority*, No. 11-19-00309-CV, 2020 WL 5491201 (Tex. App. - Eastland Sept. 11, 2020, no pet.) (mem. op.), the City of Odessa has an easement for a wastewater pipeline through a property owned by Motley Capital, LLC ("Motley"). The City granted a license to the Gulf Coast Authority (the "GCA") to operate, maintain, and repair the pipeline. In April 2018, the pipeline was shut down for twenty days due to damage that was on Motley's property. The GCA alleged that it suffered lost income while the pipeline was shut down and that it incurred costs to repair the damage and sued Motley for negligence and tortious interference. The GCA also sought a declaration that it had the right to install steel bollards around the manholes on the easement. Motley filed a motion to dismiss the GCA's claims pursuant to the Texas Citizens Participation Act ("TCPA"). The trial court denied the motion.
  - The Eastland Court of Appeals held that the trial court had jurisdiction to rule on the motion to dismiss and affirmed the trial court's order denying Motley's motion to dismiss because the TCPA does not apply to the GCA's claims for negligence and for the Texas Water Code violations; the GCA established by prima facie case for each essential element of those claims; and Motley's claimed defenses, even if preserved, either relate to the claims to which the TCPA does not apply, were not established by a preponderance of the evidence, or require a merits determination more appropriately made after a trial or in a summary judgment procedure.
- **Battle Over Texas Oysters**
  - In *Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc.*, 01-18-00088-CV, 2020 WL 7502493 (Tex. App.—Houston [1st Dist.] Dec. 22, 2020, no pet. h.), a dispute involved the issuance of a lease from the Chambers–Liberty Counties Navigation District (the "District") to Sustainable Texas Oyster Resource Management, L.L.C. ("STORM") in 2014. The lease authorized STORM to cultivate, harvest, and produce oysters on certain submerged land in Galveston and Trinity Bays and protect said land from trespassers.
  - However, some of the land covered under the lease included land under separate leases that were issued by the Texas Parks and Wildlife Department ("TPWD")

to several oystermen ("the Oystermen"). The Oystermen were authorized to plant and construct private oyster beds and harvest oysters.
    - The Oystermen were treated as trespassers by STORM. This case ensued and the Oystermen argued that the STORM lease was invalid because the Texas Wildlife Conservation Act gave the TPWD exclusive authority to regulate oyster-production activities in Texas. The trial court granted declaratory relief to the Oystermen.
    - On appeal to the Houston Court of Appeals, STORM argued that the trial court erred in its declarations, and asserted that the Oystermen improperly prosecuted their case under the Uniform Declaratory Judgment Act ("UDJA"). The 1st Court of Appeals held that the trial court properly determined STORM's lease's validity under the UDJA, and that such declarations were correct as a matter of law.
- **Groundwater Lease Disagreement**
    - *In re Plains Pipeline, L.P.*, 618 S.W.3d. 780 (Tex. App.--El Paso 2020), Winkler (a groundwater exploration company) sued Plains (a petroleum tank farm) hoping to establish its right to use the surface estate of Plains. Plains holds a lease on a 160-acre surface estate (the "Property"), which gives Plains the right to store, handle, treat, and transport oil, gas, and other minerals, including the right to construct, maintain, and operate oil tanks and pipelines on the premises.
    - The district court ordered that Winkler be permitted to drill seven test holes. Plains filed a motion for writ of mandamus arguing that the district court abused its discretion in granting Winkler the right to drill its test wells.
    - At the court of appeals, Plains argued that the Texas Water Code gives the surface lessee the exclusive right to possess and use the groundwater beneath the property. Winkler claimed that the groundwater rights had previously been severed from the surface estate under a 2014 groundwater lease. Additionally, Winkler argued that it has an implied easement in the surface estate that requires Plains to reasonably accommodate its interests.
    - The El Paso Court of Appeals held that a Texas Rule of Civil Procedure 196.7 order by a district court is not an abuse of discretion if the request is relevant; the discovery sought cannot be obtained from a more convenient, less burdensome, or less expensive source; and if the burden of the proposed inspection does not outweigh its likely benefits. The district court did not abuse its discretion in granting the seven test wells to Winkler.
- **Utility Dispute: Moot?**
    - In *MSC Gleannloch LLC v. Harris Cnty. Water Control and Improvement Dist.* No. 119, 14-19-00157-CV, 2020 WL 6278477 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020 (mem. op.), involves a utility dispute concerning a water and waste disposal agreement between MSC Gleannloch LLC ("MSC") and Harris County Water Control and Improvement District No. 119 ("District"). In 2008, Gleannloch Stroage and the District entered into a five year contract, which included language that said the contract could not be assigned.

- In 2012, the parties entered into a new 20 year term agreement and struck the ban on assignment from the agreement.
- In 2018, Gleannloch Storage sold the property to MSC and assigned all its rights under the 2012 agreement. Later, the DIstrict notified MSC it would terminate service unless it agreed to new terms. MSC sued the District for breach of contract and sought a temporary injunction.
- The district court denied MSC's request for temporary injunction. After the hearing, the parties entered into an agreement to abide by the 2012 agreement. However, MSC believed the district was still violating some provisions of the 2012 agreement, so it filed an appeal.
- MSC believed the district court was wrong to deny the temporary injunction without holding an evidentiary hearing.
- The 14th Court of Appeals held that the issue was moot. It looked to the most recent agreement and found that the DIstrict would continue to provide services to MSC, so no live controversy existed. So, MSC's claim was dismissed.

- **Class Action Involving Unrelated Water/Service Fees**
  - In *Mosaic Baybrook One, L.P. v. Simien*, 01-18-01049-CV, 2020 WL 5637499 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020 (mem. op.), this case involves the certification of a class action regarding a landowner's water and sewer service rates. Simien leased an apartment managed by Mosaic Residential, Inc. ("Mosaic"). Mosaic regularly incorporated unrelated fees associated with various other services not related to water/sewer rates. Simien sued Mosaic alleging a violation of Public Utility Commission ("PUC") rules by incorporating unrelated charges into the water/sewer base fee.
  - Mosaic filed an interlocutory appeal asserting that the trial court abused its discretion by certifying the class and that the trial court erroneously granted a partial summary judgment that Mosaic violated PUC rules; the amendments to section 13.505 retroactively apply; the trial court failed to address the elements of Mosaic's defense to Simien's section 13.505 claim; and the trial court erroneously concluded that Simien was an adequate class representative.
  - The 1st Court of Appeals found that the trial court addressed Mosaic's defenses in the partial summary judgment ruling and, therefore, the record reflected that the trial court considered the defenses in deciding whether to certify the class. Finally, the Court dismissed Mosaic's assertion that Simien was not an adequate class representative due to previous false testimony.
- **New Water Fee Scheme for Tax-Exempt Entities**
  - In *City of Magnolia v. Magnolia Bible Church*, No. 03-19-00631-CV, 2020 WL 7414730 (Tex. App.—Austin Dec. 18, 2020) (mem. op.), the City of Magnolia imposed a new water fee scheme on institutional and tax-exempt entities.
  - Under the ordinance from March 2018, churches, schools, parks, and certain governmental facilities were placed in the newly established category and were responsible for a fifty percent surcharge to the in-city water rate and other fees.
  - Following a trial held pursuant to the Expedited Declaratory Judgment Act ("EDJA"), the district court found the city's new system valid and issued a final

judgment validating the city's rate structure and public securities. Three churches filed a motion for new trial which the district court granted in August 2019. The city appealed the district court's decision on jurisdictional grounds. In December 2020, the Third Court of Appeals ruled in favor of the churches.

- The motion for new trial issue focused on two separate statutes: Texas Rule of Civil Procedure 329 ("TRCP 329") and the EDJA, and the interplay regarding finality and notice between the two provisions.
- The three-judge panel issued three separate opinions, but ultimately affirmed the district court's grant of new trial. In her concurring opinion, Justice Triana stated that the only issue on appeal was the district court's jurisdiction. She found that the EDJA did not conflict with TRCP 329, holding that the district court had jurisdiction and did not address any other issues. In Justice Rose's concurrence, he recognized that notice by publication required by the EDJA ordinarily satisfies due process in an EDJA suit; however, determined that due to the "particular and unique circumstances of [the] case," he held that notice by publication was insufficient as to the churches. He found that the churches' due process rights were violated and affirmed the district court's ruling. Justice Baker dissented, finding that service by publication did not violate the churches' due process rights.

- **Homeowners and Flood Damage Due to "Misuse of Motor-Driven Equipment"**
  - In *City of Brownsville v. Rattray*, No. 13-19-00556-CV, 2020 WL 6118473 (Tex. App.—Corpus Christi Oct. 15, 2020) (mem. op.), homeowners in the Quail Hollow subdivision ("homeowners") located in Brownsville, Texas sued the City of Brownsville ("City") for flood damages resulting from the City's stormwater system consisting of a series of drainage ditches, resacas, and other bodies of water, which are controlled by multiple motor-driven gates and pumps. To prevent water flow towards the Quail Hollow subdivision after heavy rainfall, the City closed one of its stormwater gates. The homeowners experienced flooding and alleged it was because the gate was closed.
  - In its plea to the jurisdiction, the City argued, among other things, that it was immune from suit because the "misuse of motor-driven equipment" immunity waiver provided by Texas Civil Practice and Remedies Code section 101.021(1) did not apply. The trial court denied the City's plea to the jurisdiction and the City appealed.
  - The court of appeals reversed the trial court's decision, finding that the city's actions constituted nonuse of property that does not invoke the Texas Tort Claims Act's waiver of immunity.

<u>Texas District Courts</u>

- **Arkema Fully Cleared in Criminal Environmental Trial**
  - In October 2020, a Texas state judge threw out the remaining criminal charges against Arkema Inc. and a former plant manager who was accused of failing to

appropriately prepare for Hurricane Harvey. The flood waters caused the refrigeration systems to fail which caused the organic peroxides to decompose and ignite. Toxic smoke billowed into the air for several days.

- Four cases were filed and joined into a single trial. The cases were *Texas v. Arkema*, Cause Nos. 1600310 and 1627625; *Texas v. Richard P. Rowe*, Cause No. 1600311; *Texas v. Leslie Comardelle*, Cause No. 1600312; and *Texas v. Michael P. Keough*, Cause No. 1627626, in the 339th District Court of Harris County, Texas.
- Judge Belinda Hill granted a motion for directed verdict for Arkema and the former plant manager, finding no direct evidence existed showing that the defendants made a deliberate decision to leave the organic peroxides at the site before Hurricane Harvey made landfall.