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## Environmental Law

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# ENVIRONMENTAL LAW

*Scott D. Deatherage\**

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## I. INTRODUCTION

During the Survey period, one of the most interesting, if not alarming, cases in terms of its underlying facts involved a plaintiff spiking groundwater monitoring wells with diesel fuel. Another case involved the issue of standing under the Open Meetings Act for both an organization and an individual. The last case discussed held that the deadline for filing an appeal of a trial court's review of an agency decision regarding the grant or denial of an environmental permit is not extended by requesting findings of fact if the court did not hear any evidence.

In addition, many new amendments in environmental statutes are discussed. Perhaps two of the most notable are the rewriting of Texas water policy in Senate Bill 1 and the creation of the Innocent Owner and Operator defense to claims for liability for investigating, monitoring, or remediating contamination under Texas environmental statutes. A significant number of other bills were also passed and signed into law.

## II. JUDICIAL DEVELOPMENTS

### A. PLAINTIFFS SUSPECTED OF SPIKING MONITORING WELLS WITH DIESEL GIVEN "DEATH PENALTY" SANCTION FOR ASSERTING FIFTH AMENDMENT AND REFUSING TO ANSWER DISCOVERY

The Houston Court of Appeals, Fourteenth District, upheld the "death penalty" sanction in a case where plaintiffs refused to answer discovery regarding their alleged spiking of groundwater monitoring wells used to monitor remediation being performed by a defendant.<sup>1</sup> In a rather unusual case, one of the plaintiffs, Harold Marshall, was observed dumping liquid, which police later determined was diesel fuel, into a groundwater monitoring well. The criminal charges filed against Marshall were later dropped because the prosecution determined that Marshall was incompe-

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1. See *Marshall v. Ryder System, Inc.*, 928 S.W.2d 190 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

tent to stand trial.<sup>2</sup> Marshall and his wife had leased the property to a company from 1981 to 1987, when an underground petroleum storage tank was determined to have leaked diesel fuel. In 1989, a groundwater remediation system was installed by an environmental consulting firm hired by the tenant.

Representatives of the environmental consulting firm became suspicious when wells that contained little or no diesel fuel one day were found to contain pure diesel fuel the next day and the remediation system continued to be vandalized. In 1992, the Marshalls filed suit, claiming that the cleanup effort was unsuccessful. In 1993, representatives of the defendant's consulting firm watched the property from a concealed location. Marshall arrived at the property a short time later and was observed opening the caps of the groundwater monitoring wells and pouring a liquid down the wells. A week later he was observed engaging in the same activity. Subsequently, a private investigator and a representative of the City of Houston Pollution Control Department watched him again perform these actions. Marshall continued on to adjacent property and committed the same act, after which he was arrested.

As their first response to discovery of Marshall's activity, the defendants filed a motion to dismiss plaintiffs' claims because at least part of their suit was based upon fabricated evidence. The court denied this motion. The Marshalls then attempted to avoid responding to all discovery relating to Harold Marshall's alleged dumping of diesel down the monitoring wells by asserting the Fifth Amendment privilege against self-incrimination.<sup>3</sup> The trial court granted defendants' motion to compel and ordered the Marshalls to respond to deposition questions regarding the alleged dumping. The Marshalls filed unsuccessful writs of mandamus with the Houston Court of Appeals and the Texas Supreme Court. They then filed unsuccessful motions with the trial court to quash deposition notices and refused to attend depositions.<sup>4</sup>

The defendants filed another motion to dismiss plaintiffs' claims. The trial court granted this motion twelve days before trial. The court based its decision on the following three factors: (1) tampering with evidence; (2) refusal to comply with the court's discovery order; and (3) the conclusion that abatement of the suit would neither achieve compliance by plaintiffs nor punish them for failure to comply.<sup>5</sup>

The Houston Court of Appeals upheld the trial court's death penalty sanction. The appellate court based its review of the sanction on a standard of clear abuse of discretion—essentially a test of arbitrary or unreasonable exercise of discretion.<sup>6</sup> With respect to the exercise of the Fifth Amendment privilege, the court determined that the punishment must fit

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2. *See id.* at 194 & n.1.

3. *See id.* at 194.

4. *See id.*

5. *See id.*

6. *See id.*

the crime, but it may not be excessive.<sup>7</sup>

Ordinarily, the court stated, a person may not be penalized for asserting the privilege against self-incrimination.<sup>8</sup> However, a party cannot hide behind this privilege in such a way that makes the proceeding unfair to the other party or parties to the lawsuit.<sup>9</sup> In the case of the Marshalls, the court concluded that plaintiffs had transformed the Fifth Amendment from shield to sword.<sup>10</sup> Plaintiffs sought damages from defendants but refused to respond to discovery on an affirmative defense, thereby denying defendants the ability to defend themselves in the lawsuit. The court identified three factors in deciding whether sanctions were appropriate in such a case: "(1) whether the party asserting the privilege is seeking affirmative relief; (2) whether the party is using the privilege to protect outcome determinative information; and (3) whether the protected information is not otherwise available to the defendant."<sup>11</sup> The first test was easily met because the Marshalls were seeking millions of dollars in actual and punitive damages.<sup>12</sup> Second, the information on Harold Marshall's dumping of diesel was directly relevant to plaintiffs' claims that the cleanup efforts were ineffective and that well contamination continued.<sup>13</sup> Third, the court ruled that the only complete means of determining Harold Marshall's activities were through discovery addressed to him and his wife.<sup>14</sup> His "covert" activity meant that only Harold or his wife would have complete information about his activity.

In selecting the appropriate remedy for the abuse of the Fifth Amendment privilege, the court focused first on the relationship between the offensive conduct and the sanction, and second on whether the sanction was excessive.<sup>15</sup> When invoking the privilege, due process concerns arise. First, the court looked at whether the questions directly required incriminating answers and whether a narrower set of questions would have sufficed.<sup>16</sup> Second, the court looked at the resulting unfairness to the defendant if the trial continued without disclosure of the information.<sup>17</sup> Narrower remedies than dismissal may be considered. Third, the court can consider the option of delaying the proceedings, taking into account the relevant statute of limitations for the potentially criminal conduct.<sup>18</sup> Fourth, the court must consider whether delaying sanctions until a later date would result in any unanticipated or extraordinary hardships to the other parties to the suit.<sup>19</sup>

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7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *Id.* at 195.

12. *See id.*

13. *See id.*

14. *See id.* at 197.

15. *See id.* at 196.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

Based upon this set of factors, the appellate court ruled that the death penalty sanction was appropriate.<sup>20</sup> The court ruled that this sanction should not be imposed except for flagrant bad faith.<sup>21</sup> The court concluded that tampering with the only evidence in this case during litigation and refusing to comply with discovery orders regarding the tampering was flagrant bad faith.<sup>22</sup> The court did not believe that discovery could be narrowed because the information the plaintiffs refused to divulge was the information the defendants needed to defend their case.<sup>23</sup> Moreover, with respect to a threat of prosecution, the State had dismissed the criminal proceedings because of Harold Marshall's mental incapacity and because the statute of limitations may have run on the criminal offense.

Finally, the court considered whether a lesser sanction would have initially sufficed. The court concluded that the plaintiffs lost two appeals on mandamus to two appellate courts after rejection by the trial court. After exhaustion of legal remedies the Marshalls still refused to comply with discovery. Because the court considered the Marshalls' conduct "extraordinary," it upheld the sanction since there was no expectation that the Marshalls would comply with the trial court's orders.<sup>24</sup>

B. ENVIRONMENTAL GROUP AND AN INDIVIDUAL CITIZEN HAVE  
STANDING UNDER THE OPEN MEETINGS ACT TO  
CHALLENGE A COMMUNITY COLLEGE'S DECISION  
TO PURCHASE REAL ESTATE OVER THE  
EDWARDS AQUIFER AND BARTON SPRINGS WATERSHED

The ability of organizations and individuals to challenge governmental actions has significantly increased during the twentieth century by virtue of developments in constitutional and administrative law. Much of the development of the legal standards and doctrines in these suits has taken place in lawsuits over environmental protection. The initial legal issue in these cases involves whether the group or person filing the lawsuit has standing—that is, what if any justiciable interest does the group or individual have to challenge governmental action? Concern about the governmental decision or action or the consequences that derive therefrom is not necessarily sufficient. The party seeking judicial relief must have an interest for which the courts have jurisdiction to hear the dispute; in other words, the court house doors must be open to both the party seeking redress and the wrong to be redressed.

A recent case involving an environmental group and an individual's challenge of a community college's decision to purchase real estate elucidates that not only is it necessary to consider general standing requirements, but also to consider those that may apply to particular statutes.

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20. *See id.* at 197.

21. *See id.*

22. *See id.*

23. *See id.*

24. *Id.*

The two may not necessarily be entirely consistent. In *Save Our Springs Alliance, Inc. v. Lowry*,<sup>25</sup> the Austin Court of Appeals reviewed a petition for writ of mandamus that would have required the district court to reinstate the environmental group and individual's suits that had been dismissed for lack of standing.

The controversy in this case was the manner in which the Austin Community College (ACC) decided to purchase property for a new campus which overlies the Barton Springs watershed. The ACC Board of Trustees' public notice for the meeting simply stated "Real Estate Matters." On the day of the meeting, the Board met in closed session first, and then during a public meeting voted to purchase the Barton Springs tract.

The Save Our Springs (SOS) Alliance and the president of a nearby neighborhood association, Erin Foster, filed suit alleging that the Board had violated the Texas Open Meetings Act by improperly providing notice to the public concerning the nature of the meeting to be held by the Board. The plaintiffs sought an injunction barring the ACC from purchasing the tract the Board had voted to acquire. The district court dismissed both the group's and the individual's suits. The plaintiffs filed a petition for writ of mandamus or for accelerated appeal and immediate temporary relief.

The Austin Court of Appeals reviewed the plaintiffs' petition for writ of mandamus. The sole issue the court decided was the question of standing of both the group and the individual. The test for standing is found in the Open Meetings Act itself: "An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."<sup>26</sup> The court cited the policy of the act "to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny."<sup>27</sup> Injunctive relief is the means of ensuring governmental bodies abide by the Act.<sup>28</sup>

Standing under this Act, according to the Austin Court of Appeals, has been interpreted broadly.<sup>29</sup> In a similar case in 1988, the Fort Worth Court of Appeals held that a citizen and resident of the City of Arlington could sue the county to prevent it from leasing its convention center to

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25. 934 S.W.2d 161 (Tex. App.—Austin 1996, orig. proceeding [leave denied]).

26. TEX. GOV'T CODE ANN. § 551.142(a) (Vernon 1994).

27. *Save Our Springs*, 934 S.W.2d at 162 (citing *Cox Enters., Inc. v. Board of Trustees of the Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986) ("The Act is intended to safeguard the public's interest in knowing the workings of its governmental bodies.")).

28. *See id.*

29. *See id.* (citing *Cameron County Good Gov't League v. Ramon*, 619 S.W.2d 224 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (holding that the Good Government League and various individuals had standing to challenge the county commissioners' alleged violations of the Act); *City of Fort Worth v. Groves*, 746 S.W.2d 907 (Tex. App.—Fort Worth 1988, no writ) (finding standing for a citizen and resident of the county who lived in the city of Arlington to challenge the county's agreement to lease its convention center to the City of Fort Worth for \$30)).

the City of Forth Worth for thirty dollars.<sup>30</sup> In another case, a federal court ruled that taxpayer citizens could challenge under section 551.142 of the Open Meetings Act the decision of a downtown development committee.<sup>31</sup> Both of these cases appear to have involved similar persons (local citizens and taxpayers) and controversies (real estate management decisions by governmental bodies) to those at issue in *Save Our Springs*.

Having examined these cases, the Austin Court first looked to the question of the standing of the group plaintiff. The test for group or associational standing, was elucidated by the Texas Supreme Court in a recent case. In *Texas Ass'n of Business v. Texas Air Control Bd.*,<sup>32</sup> the Supreme Court enunciated a three-prong test: (1) the members of the association must have "standing to sue in their own right;" (2) the interests the association seeks to protect must be "germane to the association's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of the association's individual members."<sup>33</sup>

Applying the Texas Supreme Court's three-part test, the Austin Court had little difficulty concluding that the SOS Alliance had standing to challenge the ACC's action. First, the court reviewed the nature of the claim and the ability of the court to hear the dispute. The court described the SOS Alliance as a "loosely-knit group of approximately 1,100 persons, including some who live in Travis and Hays counties, concerned with preserving the environmental and recreational quality of the Edwards Aquifer and Barton Springs Watershed."<sup>34</sup> The petition stated that the members of the association were residents of Travis and Hays counties and that they were "concerned with the water quality in the Edwards Aquifer and Barton Springs Watershed."<sup>35</sup> The court relied upon the Groves case to conclude that the individual members had the legal right to challenge the ACC's decision under the Open Meetings Act.<sup>36</sup> In effect, the court concluded that these persons had a justiciable "interest" under section 551.142(a) of the Open Meetings Act. The interest of a local citizen and taxpayer in the decision of a county to lease its convention center was deemed similar to a citizen and taxpayer's concern with a community college's decision to purchase real estate. Although not discussed in any detail, it appears that courts in Texas consider a local citizen and taxpayer to have a direct interest in how their tax money is spent and how real estate owned by their local governmental body is acquired and managed.

The second question under the associational standing test involved the relationship between the purpose of the association and the interests it is

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30. See *Groves*, 746 S.W.2d, at 909.

31. See *Finlan v. City of Dallas*, 888 F. Supp. 779, 784 (N.D. Tex. 1995).

32. 852 S.W.2d 440 (Tex. 1993).

33. *Save Our Springs*, 934 S.W.2d at 163 (citing *Texas Ass'n of Business* 852 S.W.2d at 447-48).

34. *Id.*

35. *Id.*

36. See *id.* at 164.



seeking to protect in the lawsuit. The court had little difficulty linking the organization's specific stated purpose—protection of the Edwards Aquifer—to the Barton Springs Watershed and the basis for challenging the ACC's decision to purchase real estate in these areas—that it might adversely affect water quality in the Edwards Aquifer.<sup>37</sup>

The third question was whether the individual members of the group were necessary parties to the lawsuit. An example might be where individual damages to property or personal injury were claimed. Here the court ruled that individual members need not be parties to the suit.<sup>38</sup> Apparently, the court concluded that individual relief was not being requested, but the broader public interest was really at issue.<sup>39</sup>

The court then reviewed individual standing. The individual who had brought the suit did not live in the community college district. This presented a different situation than the three cases cited by the Austin court in which the plaintiffs were not only local citizens in the relevant political or voting districts of the governmental body but were also taxpayers whose money was involved in the decision. The ACC challenged Ms. Foster's standing to sue them because she was not a local citizen or taxpayer within their "political turf."

The Austin court ruled that individual standing under the Open Meetings Act is not merely or necessarily a geographic question bounded by political borders.<sup>40</sup> The court concluded that the potential adverse effect on the party is what allows the person into the courthouse, apparently recognizing that a governmental body's decisions can have extra-territorial effects.<sup>41</sup> Pollution or environmental degradation, as we all know, does not necessarily obey political, property, or geographic boundaries. Moreover, the court held that risk of adverse effect was sufficient; proof of adverse effect was not necessary to gain admission to the courtroom for an Open Meetings Act challenge.<sup>42</sup>

The ACC had contended that the party filing an Open Meetings Act suit must show that its interest is distinct from that of the general public's.<sup>43</sup> However, the Austin court responded that the "interest protected by the Open Meetings Act is the interest of the general public."<sup>44</sup> The Texas Supreme Court had ruled that "the intended beneficiaries of the Open Meetings Act are 'members of the interested public.'"<sup>45</sup> The court rejected two cases cited by the ACC<sup>46</sup> because the court considered them

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37. *See id.*

38. *See id.* at 163-64.

39. *See id.* at 162.

40. *See id.* at 165.

41. *See id.*

42. *See id.*

43. *See id.* at 163.

44. *Id.*

45. *Id.* (citing *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991)).

46. *See Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966); *Hardy v. Hannah*, 849 S.W.2d 355 (Tex. App.—Austin 1992, writ denied).

distinguishable. Neither of the cases involved the Open Meetings Act, which the court concluded had been designed by the Texas Legislature to provide broader standing to citizens than the typical standing rule. In general, standing to file suit may require a citizen to show some effect distinct from the general citizenry.<sup>47</sup> The court found one senator's statement to the contrary in the Senate Jurisprudence Committee's discussion of 1979 amendments to the statute unpersuasive.<sup>48</sup>

Ultimately, the court granted the writ of mandamus requiring the district court to hear the plaintiffs' claims under the Open Meetings Act. Because the trial court's record was not well developed, the court did not reach the substantive issue of whether the Open Meetings Act was violated.<sup>49</sup>

C. PARTY SEEKING APPEAL OF COURT REVIEW OF AGENCY ACTION  
CANNOT RELY UPON EXTENSION OF TIME TO APPEAL  
BASED ON REQUEST FOR FINDINGS OF FACT AND  
CONCLUSIONS OF LAW WHEN THE  
COURT DID NOT RECEIVE ANY EVIDENCE

In a lesson in appellate procedure, parties challenging a decision by the Texas Natural Resource Conservation Commission (TNRCC) to grant a permit amendment under the Texas Solid Waste Disposal Act were denied the appeal for failure to timely file their appeal.<sup>50</sup> The question focused on whether the filing for findings of fact and conclusions of law extended the time to file an appeal and, thus, whether the motion for additional time to file the appeal itself was timely.

The City of Lancaster, the City of Dallas, the City of Welmer, a citizens group, and several other parties filed suit against the TNRCC challenging an order granting a solid waste disposal permit amendment. Following a hearing, the trial court upheld the TNRCC's decision.

The Austin Court of Appeals ruled that the salient issue was whether the motion for an extension of time to file an appeal was filed within fifteen days after the filing date had passed in accordance with Texas Rule of Appellate Procedure 41(a)(2). The normal deadline for filing for an appeal is extended to ninety days if a party timely filed for findings of fact and conclusions of law with the trial court after a non-jury trial in accordance with Texas Rule of Appellate Procedure 41(a)(1). While the cities had apparently complied with the timing requirement for the latter rule, the appellate court concluded that no findings of fact were appropriate. Thus, the thirty-day period, rather than the ninety-day filing period for an appeal applied. The plaintiffs filed after ninety days had passed.

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47. See *Save Our Springs*, 934 S.W.2d at 163.

48. The court relied upon *Commissioners' Court of El Paso County v. El Paso County Sheriff's Deputies Ass'n*, 620 S.W.2d 900, 902 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).

49. See *Save Our Springs*, 934 S.W.2d at 164.

50. See *City of Lancaster v. Texas Natural Resource Conservation Comm'n*, 935 S.W.2d 226 (Tex. App.—Austin 1996, writ denied).

The court concluded that when a trial court's decision is not based upon evidence it has heard, a request for findings of fact does not extend the filing date.<sup>51</sup> The court's order stated that it had reached its decision based upon the pleadings, the administrative record, briefs, and arguments of counsel.<sup>52</sup>

The court made a rather odd conclusion about the standard of review. It concluded that the agency's decision was reviewable under section 361.321(a) of the Texas Solid Waste Disposal Act.<sup>53</sup> But the court concluded that this provision did not define the scope of judicial review. The oddity of this conclusion is that subsection (e) of this section provides that the "issue is whether the action is invalid, arbitrary, or unreasonable."<sup>54</sup> In a prior decision, *Smith v. Houston Chemical Services, Inc.*,<sup>55</sup> the Austin Court of Appeals had concluded that subsection (e) provided the scope of review.<sup>56</sup> However, it construed subsection (e) to incorporate the entire scope of review allowed by section 2000.171-174 of the Administrative Procedures Act (APA) based on the terms "invalid" and "unreasonable."<sup>57</sup> Specifically, the court previously ruled in *Houston Chemical Services* that sections 2001.174(2)(A)-(E) and 2001.174(2)(F) were included.<sup>58</sup> The same court in *City of Lancaster* concluded that only section 2001.174(2)(A)-(E) applied.<sup>59</sup>

Even more strange was the court's ruling that the administrative record was not "actual evidence" and that "the trial court did not infer facts from it in rendering judgment."<sup>60</sup> Thus, the court concluded that review of the agency record "did not entail receiving evidence."<sup>61</sup> In contradiction of this view is subsection 2001.175(d) that states "[t]he party seeking review shall offer, and the reviewing court shall admit, the state agency record *into evidence* as an exhibit."<sup>62</sup> In order to consider the agency's decision, it appears that the reviewing court would have to admit the agency record as evidence to determine whether substantial evidence existed to support the agency's decision. It is this "evidentiary review" that subsection 2001.174(2)(e) appears to provide: "not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole."<sup>63</sup>

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51. *See id.* at 228.

52. *See id.* at 227.

53. *See id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 361.321(a) (Vernon Supp. 1996)).

54. TEX. HEALTH & SAFETY CODE ANN. § 361.321(e) (Vernon Supp. 1996).

55. 872 S.W.2d 252 (Tex. App.—Austin 1994, writ denied).

56. *See id.* at 257 n.2.

57. *See id.*

58. *See id.*

59. *City of Lancaster*, 935 S.W.2d at 228.

60. *Id.*

61. *Id.*

62. Administrative Procedures Act, TEX. GOV'T CODE ANN. § 2001.175(d) (Vernon Supp. 1996) (emphasis added).

63. *Id.* § 2001.174(2)(e).

Perhaps the court did not believe that the district court admitted the agency record and therefore no evidence was before it. In a footnote, the court questioned whether the record was admitted into evidence.<sup>64</sup>

Trying another tack, plaintiffs argued that they had claimed procedural irregularities by the commission. The court responded that the cities failed to tender a statement of facts to the appellate court, which precludes them from demonstrating that any evidence on this issue was presented to the trial court.<sup>65</sup> According to the court of appeals, the trial court did not state in its judgment that it considered any evidence.<sup>66</sup>

Based upon its assumption that the judgment of the trial court was not based upon evidentiary review, the Austin court ruled that the deadline for filing an appeal had not been extended and, therefore, the time period for filing for an extension of that deadline had not been extended.<sup>67</sup> On these grounds, the court ruled that the deadlines had been missed and that the appellate court was without jurisdiction to hear the case.<sup>68</sup> Accordingly, the appeal was dismissed.

### III. LEGISLATIVE DEVELOPMENTS<sup>69</sup>

The 75th Texas Legislature met in regular session during the Survey period. Without a doubt, the single most comprehensive environmental law this session was Senate Bill 1.<sup>70</sup> That legislation rewrote Texas water policy in such areas as water planning, water rights, and water data collection/distribution. Other than Senate Bill 1, the emphasis this session was on fine-tuning major environmental programs already existing, rather than introducing new programs. For example, the Legislature revised the state's Voluntary Cleanup Program, Clean Rivers Program, and Vehicle Emissions Testing Program. In addition, there were changes to the state superfund program inspired by either EPA policy or recent amendments to the Comprehensive Environmental Recovery and Conservation Act (CERCLA) at the federal level. The Legislature also amended the Texas Environmental, Health, and Safety Audit Privilege Act. Other environmental laws passed this session affect agency permitting, rulemaking and delegation. Also noteworthy was the Legislature's failure to reauthorize the Waste Tire Recycling Program, which expired December 31, 1997.

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64. See *City of Lancaster*, 935 S.W.2d at 227 n.1 (citing *Nueces Canyon Consol. Indep. Sch. Dist. v. Central Educ. Agency*, 917 S.W.2d 773, 776 (Tex. 1996) (to be included in the record on appeal, the administrative record must have been admitted in evidence before the trial court); *Texas Health Enters., Inc. v. Texas Dept. of Health*, 925 S.W.2d 750, 755 (Tex. App.—Austin 1996) *rev'd*, 949 S.W.2d 313 (Tex. 1997)).

65. See *City of Lancaster*, 935 S.W.2d at 228.

66. See *id.*

67. See *id.* at 228.

68. See *id.*

69. The authors would like to thank the House Research Organization, the Senate Research Center, and the Texas Natural Resource Conservation Commission. All three produced excellent legislative analyses, which they generously provided as resources for this Article.

70. Tex. S.B. 1, 75th Leg., R.S., ch. 1010, 1997 Tex. Sess. Law Serv. 3610 (now codified in scattered sections of TEX. WATER CODE ANN. (Vernon Supp. 1998)).

The following summary highlights the major environmental legislation enacted during the 75th Texas legislative session. Unless otherwise noted, all statutes became effective on September 1, 1997.

## A. SOLID WASTE

### 1. *Voluntary Cleanup Program*

This session the Legislature passed several amendments to the statutory provisions authorizing the Texas Voluntary Cleanup Program (VCP).<sup>71</sup> The VCP, created last session, encourages economic development of remediated property by establishing incentives for landowners to clean contaminated sites voluntarily. Once a site is remediated under the TNRCC risk reduction rules or other applicable cleanup standard,<sup>72</sup> the agency gives the site owner a certificate of completion certifying that remediation is complete.<sup>73</sup> This certificate releases future landowners and lenders from liability to the state for cleanup of the remediated area.<sup>74</sup> The certificate may also release any non-responsible party that cleans up a site.<sup>75</sup> In addition, a landowner that cleans up a site according to program requirements receives protection from TNRCC fines and penalties for the contamination or release and the activity that caused it.<sup>76</sup> A potentially liable party is not eligible for release from future cleanup liability.<sup>77</sup>

The most substantial amendments to the VCP are contained in House Bill 1239.<sup>78</sup> The Bill clarifies that a certificate of completion releases any person who is not already a responsible party at the time of issuance from all liability to the state for that site's cleanup.<sup>79</sup> At the same time, the bill establishes exceptions to this protection. A certificate of completion does not shield anyone from cleanup liability for releases caused by that person.<sup>80</sup> Nor does a certificate of completion protect anyone who acquires the certificate by fraud, misrepresentation, or knowing omission.<sup>81</sup> Similarly, a certificate of completion does not protect anyone acquiring property knowing the certificate was acquired by fraud, misrepresentation, or knowing omission.<sup>82</sup>

Beyond these amendments, the Legislature enacted two other VCP

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71. See TEX. HEALTH & SAFETY CODE ANN. §§ 361.601-.613 (Vernon Supp. 1996).

72. See *id.* § 361.609.

73. See *id.* § 361.610.

74. See *id.* § 361.610(c).

75. See *id.* § 361.610(a).

76. See *id.* § 361.606(e).

77. See *id.* § 361.610(c).

78. See Tex. H.B. 1239, 75th Leg., R.S., ch. 855, 1997 Tex. Sess. Law Serv. 2726 (now codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.133-.610 and TEX. TAX CODE ANN. §§ 312.002-.402 (Vernon Supp. 1998)).

79. See *id.* § 361.610(b).

80. See *id.*

81. See *id.* § 361.610(c).

82. See *id.*

laws—House Bill 2705 and Senate Bill 1596.<sup>83</sup> Generally, permitted sites are not eligible for participation in the VCP.<sup>84</sup> House Bill 2705, which becomes effective upon agreement with the EPA, provides that a site subject to a TNRCC permit or order is “eligible for participation in the [VCP] on dismissal of the permit or order.”<sup>85</sup> But any “administrative penalty paid to the general revenue fund under the permit or order is nonrefundable.”<sup>86</sup> Moreover, House Bill 2705 provides that upon certification of completion, anyone who purchased the site before September 1, 1995, is released from all state cleanup liability for releases at the site before the purchase date provided the person did not operate the site before purchasing it.<sup>87</sup> Under House Bill 2705, a responsible party that successfully completes a voluntary cleanup remains liable to the state for contamination released before the certificate is issued. But the party is not liable for any contamination released at the site after the date the TNRCC issues the certificate, unless the person: (1) contributed to or caused the subsequent release of contamination; or (2) changed the land use from that specified in the certificate of completion to a use that could result in increased risk to human health or the environment.<sup>88</sup>

Senate Bill 1596 provides tax incentives for VCP participation by allowing a municipality to enter into a tax abatement agreement with the owners of a VCP cleanup site.<sup>89</sup> The agreement may exempt part of the site’s value from property tax for up to four years. The property’s full value may be exempt the first year, up to seventy-five percent the second year, up to fifty percent the third year, and up to twenty-five percent the fourth year.<sup>90</sup> The municipality may cancel the agreement if the landowner changes the land use specified in the certificate of completion to a use with a greater risk to human health or the environment.<sup>91</sup>

## 2. *Texas Superfund Program*

This Legislature also enacted amendments to the state superfund provisions of the Solid Waste Disposal Act. House Bill 2776, which contains three major parts, began as a TNRCC bill designed to amend various

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83. See Tex. H.B. 2705, 75th Leg., R.S., ch. 1418, 1997 Tex. Sess. Law Serv. 5313 (now codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.603-.604 (Vernon Supp. 1998)); Tex. S.B. 1596, 75th Leg., R.S., ch. 1333, 1997 Tex. Sess. Law Serv. 5044 (now codified at TEX. TAX CODE ANN. §§ 312.002-.402 (Vernon Supp. 1998)). Although this article discusses these bills individually, House Bill 1239 includes all of the provisions in both House Bill 2705 and Senate Bill 1596.

84. See TEX. HEALTH & SAFETY CODE ANN. § 361.603(a) (Vernon Supp. 1996).

85. TEX. HEALTH & SAFETY CODE ANN. § 361.603(c) (Vernon Supp. 1998).

86. *Id.* § 361.603(c).

87. See *id.* § 361.6035(a).

88. See *id.* § 361.6035(b)(2).

89. TEX. TAX CODE ANN. § 312.211(b) (Vernon Supp. 1998).

90. See *id.*

91. See *id.* § 312.211(f).

provisions regarding the state's superfund.<sup>92</sup> Several banking associations successfully led an effort to amend the Bill by adding a second major part offering various protections for lenders and fiduciaries dealing with contaminated properties. These lender and fiduciary provisions mirror similar protections recently added to the federal superfund statute, CERCLA.<sup>93</sup> Finally, legislators added a third major part to House Bill 2776 regarding innocent landowners.<sup>94</sup> That part codifies at the state level an EPA policy protecting landowners from liability for government cleanups if their land is contaminated from off-site sources.

a. Superfund

The first part of the Bill contains several provisions amending the state superfund program. Several of these provisions concern the relationship between the state superfund program and the VCP. For example, House Bill 2776 recognizes participation in the VCP as an alternative to state registry listing.<sup>95</sup> And a facility deleted from the state registry based on VCP participation automatically reverts to the state registry if the TNRCC subsequently determines that the cleanup is not adequate.<sup>96</sup>

House Bill 2776 also expands the TNRCC's settlement options. In addition to the de minimis settlements previously authorized, the agency may now settle using covenants not to sue, mixed public and private funding for cleanups, and partial settlements.<sup>97</sup> In addition, a settlement agreement resolving all state cleanup liability absolves the party from liability to third parties for cost recovery, contribution, or indemnity regarding the settled matter.<sup>98</sup> A settlement agreement may not, however, discharge the liability of a nonsettling person to the state unless expressly provided in the agreement.<sup>99</sup>

House Bill 2776 also contains provisions regarding cleanup cost recovery and apportionment. Now anyone who conducts a removal or remedial action may sue to recover the reasonable and necessary costs of that action.<sup>100</sup> The bill also directs a court apportioning costs between responsible parties to credit a party's approved costs against their share and, if equitable, a party's unapproved cleanup costs.<sup>101</sup>

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92. See Tex. H.B. 2776, R.S. (1997) (now codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.133-.754 (Vernon Supp. 1998); TEX. GOV'T CODE ANN. §§ 2155.145-2253.002 (Vernon Supp. 1998); TEX. WATER CODE ANN. § 26.265 (Vernon Supp. 1998)).

93. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601(20)(E)-(G), 9607(h) (1980).

94. See TEX. HEALTH & SAFETY CODE ANN. §§ 361.751-.754 (Vernon Supp. 1998).

95. See *id.* § 361.183(a)(3).

96. See *id.* § 361.189(c).

97. See *id.* § 361.200.

98. See *id.* § 361.277(b).

99. See *id.* § 361.277(c).

100. See *id.* § 361.344(a).

101. See *id.* § 361.343(b).

### b. Lender and Fiduciary Protections

The second part of House Bill 2776 contains lender and fiduciary provisions patterned after Congress' recent amendments to CERCLA. Under those provisions, a lender that holds a security interest in a solid waste facility may now foreclose without assuming cleanup responsibility stemming from pre-foreclosure conditions if: (1) the lender did not participate in the facility's management before foreclosure; and (2) the lender divests itself of the facility at the earliest practicable, commercially reasonable time.<sup>102</sup> Similarly, the liability of a fiduciary for actual or threatened waste releases at a facility held in a fiduciary capacity may not exceed the assets held in the fiduciary capacity. This protection does not apply, however, to the extent the fiduciary is liable: (1) independent of his fiduciary capacity; or (2) because his negligence, gross negligence, or wilful misconduct causes or contributes to the release or threatened release.<sup>103</sup>

### c. Innocent Owner and Operator Protection

The third part of House Bill 2776 contains the Innocent Owner/Operator Program created through this Bill. This Program was designed to address the TNRCC's interpretation of the liability provisions of the Texas Solid Waste Disposal Act and chapter 26 of the Texas Water Code allowing the State to impose on innocent landowners or operators liability for contamination that migrated onto their property from another person's property. This rather strained, if not strange, interpretation of the statutes potentially could have created difficulty in selling or obtaining financing for properties contaminated by off-site sources. The U.S. EPA had adopted a policy by which the Agency stated that it would not impose liability on innocent owners or operators for contamination arising from another person's property. After various attempts to convince the TNRCC to adopt a similar policy, one of the authors of this article and three other environmental attorneys worked with one of the Commissioners' attorneys and the staff of the TNRCC to develop an amendment to House Bill 2776 to protect innocent owners and operators.<sup>104</sup> This legislation is truly landmark legislation. It appears Texas is the first state to adopt such legislation.

The Innocent Owner/Operator Program has two elements: first, a defense to liability, and second, a certification program by which an innocent owner or operator may obtain from the TNRCC a certificate demonstrating that the contaminants on the property arose from an off-

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102. *See id.* § 361.271(a).

103. *See id.* § 361.652.

104. Scott Deatherage would like to acknowledge the foresight of the Chairman of the Commission, Barry McBee, in advising his staff to work on the Innocent Owner/Operator legislation and to Scott A. Sherman, Assistant General Counsel to the Commission, who spent many hours working with us and the TNRCC staff to develop this legislation. I would also like to acknowledge the work of the TNRCC staff members who helped develop the language, particularly Charles Epperson, whose group at the TNRCC is implementing the program.



site property and that the owner or operator is not liable for addressing those contaminants.<sup>105</sup> The first aspect of the legislation provides that an innocent owner or operator is a person that owns or operates property that has become contaminated because of a release or migration of contaminants from a source or sources not located on the owner or operator's property, and that party did not cause or contribute to that source.<sup>106</sup> Certain additional requirements apply when a person acquires the property that has become contaminated by an off-site source (1) from the person that caused the release of contamination and (2) the property was formerly a portion of the tract of land on which the source of contamination is found.<sup>107</sup> In this situation, the person is eligible for immunity "only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property."<sup>108</sup> It is important to keep in mind that this limitation only applies if the owner or operator of the property acquired the property from the *person that caused the release*. If the property is acquired from a subsequent landowner or other person, then the limitation on liability or additional burden to meet the defense does not apply.

In order to be eligible for immunity under this legislation, the TNRCC staff insisted in the drafting of the legislation that the owner or operator provide reasonable access to the property to persons designated by the Executive Director of the TNRCC.<sup>109</sup> As the authors of this article, we decided that what constitutes reasonable access is often a case-by-case, site-specific issue, and that the exact terms of any access agreement should be left to the party seeking access and the owner or operator of the property. A few issues we listed in the legislation that are not meant to be exclusive are: (1) the designated person may not unreasonably interfere with the use of the property; (2) payment of reasonable compensation may be required for access; and (3) the owner or operator may require indemnification for intentional or negligent acts of the designated person arising from access.<sup>110</sup>

The second aspect of this new legislation and program, is that it provides for a certification program for innocent owners and operators.<sup>111</sup> The first step in this process is the submission of an application to the TNRCC for an Innocent Owner/Operator Certificate that requires a site investigation report that demonstrates eligibility for the program.<sup>112</sup> The commission may charge a fee to cover the costs of reviewing the application.<sup>113</sup> The TNRCC is required to meet certain deadlines set out in the

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105. See TEX. HEALTH & SAFETY CODE ANN. §§ 361.752(a), .753 (Vernon Supp. 1998).

106. See *id.* § 361.751(2)(A)-(B).

107. See *id.* § 361.752(b).

108. *Id.*

109. See *id.* § 361.752(c).

110. See *id.*

111. See *id.* § 361.753.

112. See *id.* § 361.753(a).

113. See *id.* § 361.753(b).

statute in reviewing the application for completeness, issuing or denying the certificate, and reviewing any additional information requested and then issuing or denying the certificate.<sup>114</sup> The certificate when issued confirms the immunity from liability.<sup>115</sup> The TNRCC is allowed under the statute to condition issuance of the certificate on placement of certain restrictions on the use of the property that are reasonably necessary to protect the public health.<sup>116</sup> These restrictions may include institutional controls such as deed restrictions or municipal zoning restrictions.<sup>117</sup> Other control measures may be required, but only at the owner or operator's option.<sup>118</sup> The most typical restriction may be on the use of contaminated groundwater that has migrated under the property.

### 3. *Other New Solid Waste Laws*

In addition to the VCP and superfund amendments discussed above, the Legislature enacted some less-sweeping laws regarding solid waste. Senate Bill 1910, effective March 1, 1998, provides guidelines for the disposal and handling of poultry and poultry litter. Under Senate Bill 1910, an owner or operator of a poultry facility must adequately equip the facility for handling and disposing of poultry carcasses, poultry litter, and other poultry waste.<sup>119</sup> Furthermore, the TNRCC is directed to promulgate rules regarding the safe and adequate handling, storage, transportation, and disposal of poultry carcasses.<sup>120</sup>

House Bill 717, which became effective May 26, 1997, closes a loophole in the law prohibiting illegal dumping. Previously, that prohibition did not apply to the "disposal of, or temporary storage for future disposal of litter or other solid waste by a person on land owned by that person, or by that person's agent."<sup>121</sup> That language left a loophole for unauthorized dumping of commercial waste imported to a person's land. House Bill 717 creates a two-part solution to that problem. First, the legislation directs the TNRCC to promulgate rules regulating the "temporary storage for future disposal" exception mentioned above.<sup>122</sup> Second, a landowner may now only dispose of litter or other solid waste on his own land if: (1) the litter or waste is generated on land the individual owns; and (2) the disposal is not for or resulting from a "commercial purpose,"<sup>123</sup> which

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114. *See id.* § 361.753(c)-(e).

115. *See id.* § 361.753(f). Scott Deatherage obtained the first such certificate which included the contaminants for which the certificate was issued and that the holder was not liable for investigating, monitoring, remediating, or corrective or other response action regarding the conditions attributable to those contaminants or otherwise liable for those conditions.

116. *See id.* § 361.753(g).

117. *See id.* § 361.753(g)(1).

118. *See id.* § 361.753(g)(2).

119. *See* TEX. WATER CODE ANN. § 26.302 (Vernon Supp. 1998).

120. *See id.* § 26.303(a).

121. TEX. HEALTH & SAFETY CODE ANN. § 365.012(j) (Vernon 1996).

122. TEX. HEALTH & SAFETY CODE ANN. § 365.012(j) (Vernon Supp. 1998).

123. *Id.* § 365.012(k).

is defined as “the purpose of economic gain.”<sup>124</sup>

## B. WATER

### 1. *Senate Bill 1*

Perhaps the most comprehensive change in environmental law this session occurred in the area of water law. Senate Bill 1 authorizes comprehensive reform of Texas water policy in several general areas including water planning, water management, water marketing/transfers, emergency authorizations and enforcement.

Senate Bill 1 contains significant changes regarding water planning—both at the state and local level. Senate Bill 1 authorizes the Texas Water Development Board to adopt a comprehensive state water plan by September 1, 2001, and every five years after that, incorporating regional water plans.<sup>125</sup> The state plan must also contain a drought response component coordinated by the Division of Emergency Management, which will also provide administrative support for such activities.<sup>126</sup> At the local level, the Bill directs the TNRCC to require water right holders with appropriations of 1,000 acre-feet a year or more of surface water to implement a water conservation plan consistent with the appropriate regional water plan.<sup>127</sup>

This legislation contains many water management, marketing and transfer provisions. For example, there are extensive amendments to the guidelines for the TNRCC’s authorization of water rights, temporary sales of water, review of interbasin transfers, and the cancellation of water rights. The Bill also enhances the Texas Water Bank’s authority in the area water transactions by defining its role as a clearinghouse for water marketing transactions.<sup>128</sup> Among the tasks delegated to the Texas Water Bank are the publication of a manual on structuring water transactions, and the banking of water right donations for environmental purposes.<sup>129</sup> Senate Bill 1 also creates the Texas Water Trust to hold water rights dedicated to environmental needs.<sup>130</sup>

The Bill also contains several emergency authorization provisions that improve the TNRCC’s flexibility with regard to its water permitting procedures. The TNRCC’s executive director may now allow emergency water permits and temporary water transfers without public notice or hearing.<sup>131</sup> To address emergency conditions, the executive director may issue an emergency permit or suspend or amend a permit condition for a limited period of not more than 120 days without public notice or hear-

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124. *Id.* § 365.011(3).

125. *See* TEX. WATER CODE ANN. § 16.051 (Vernon Supp. 1998).

126. *See id.* § 16.055.

127. *See id.* § 11.1271.

128. *See id.* § 15.702.

129. *See id.*

130. *See id.* § 15.7031.

131. *See id.* § 3.03(c).

ing.<sup>132</sup> The TNRCC must provide for notice and hearing to determine whether the agency should ratify, continue, or set aside the emergency action as soon as practicable, but no later than twenty days after granting the authorization.<sup>133</sup> The TNRCC may also authorize, without notice or hearing, temporary water transfers for up to 120 days if there is an imminent threat to public health or safety and no feasible alternatives exist.<sup>134</sup>

Finally, Senate Bill 1 bolsters the TNRCC's water law enforcement powers. For example, the Water Code now caps administrative penalties at \$1,000 per day for violations of levee construction and maintenance provisions, and \$5,000 per day for violations of surface water rights.<sup>135</sup> In addition, Senate Bill 1 strengthens the watermaster program—watermasters or their deputies may now issue field citations for violations.<sup>136</sup>

## 2. *Clean Rivers Program*

Another significant development this session was the reauthorization of the Clean Rivers Program, which would have otherwise sunset on January 1, 1999.<sup>137</sup> As originally enacted in 1991, the Clean Rivers Act directed the TNRCC in conjunction with river local authorities to conduct regional water assessments and develop reports for each watershed and river basin in Texas.<sup>138</sup> The Act also called for the integration of all water quality issues within a river basin or watershed, and the organization of basin-wide steering committees to assist in coordinating assessments and developing reports.<sup>139</sup>

The provisions in House Bill 1190 embody the recommendations of the Clean Rivers Stakeholders Workgroup, a group of interested parties assembled to develop a revised Clean Rivers Program. The Bill authorizes continuing funding for the Clean Rivers Program at present levels.<sup>140</sup> As before, fees for water use and wastewater discharge permits provide funding.<sup>141</sup> Unlike the original program, however, House Bill 1190 requires river authorities to conduct watershed, rather than regional, water quality monitoring and assessments.<sup>142</sup> Originally, the Program required cities with populations exceeding 5,000 to develop water pollution control and abatement programs.<sup>143</sup> Now that requirement only applies to cities with populations exceeding 10,000 when the applicable watershed water quality assessment report or other TNRCC study shows a water pollution

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132. *See id.* § 3.03(a).

133. *See id.* § 3.03(d).

134. *See id.* § 3.03(h).

135. *See id.* § 11.0842(b).

136. *See id.* § 11.0843.

137. *See* TEX. WATER CODE ANN. § 26.0135 (Vernon Supp. 1996).

138. *See id.* § 26.0135(a).

139. *See id.* § 26.0135(b).

140. *See* TEX. WATER CODE ANN. § 26.0135(h) (Vernon Supp. 1998).

141. *See id.*

142. *See id.* § 26.0135(a).

143. *See* TEX. WATER CODE ANN. § 26.177(a) (Vernon Supp. 1996).

impact not associated with permitted sources.<sup>144</sup> Another program change included in House Bill 1190 is the requisite that basin-wide steering committees include persons paying fees, interested private citizens, and interested governmental bodies.<sup>145</sup>

### C. AIR

#### 1. *Vehicle Emissions Testing Program*

Last session, the Texas Legislature enacted Senate Bill 178, which authorized a revised vehicle emissions testing program. The product of that effort was Governor Bush's "Texas Motorist's Choice Program,"<sup>146</sup> which began on July 1, 1996, in Dallas and Tarrant counties and on January 1, 1997, in Harris and El Paso counties. Any vehicle up to twenty-five years old registered in one of those counties must now be emissions tested. The EPA proposed conditional interim approval of the Texas Motorist's Choice Program because of a lack of legislative authority to implement several program components. Senate Bill 1856, which became effective June 19, 1997, amends the state's vehicle inspection and maintenance statutory provisions to provide the necessary authority to fully implement the Texas Motorist's Choice Program.

The Bill's key components are a remote sensing program for identifying violators on the roads, and an enhanced enforcement program. New offenses under the program include operating a vehicle registered in a nonattainment area with emissions higher than established pollutant levels, and failing to respond to a notice of violation detected by remote sensing.<sup>147</sup> Motorists that receive a notice of violation face a penalty of up to \$350 for the first violation and \$200 to \$1,000 for repeat violations.<sup>148</sup> An affirmative defense is available if the vehicle is repaired, passes an emissions test within thirty days of receiving notice, and otherwise complies with agency rules.<sup>149</sup> In addition, the Bill directs the Public Safety Commission to administer the emissions inspection program<sup>150</sup> and prohibits the Texas Department of Transportation and county tax collectors from safety-testing or registering vehicles that have not passed the required emissions inspection.<sup>151</sup>

#### 2. *Standard Exemptions at Grandfathered Facilities*

House Bill 3019 codifies the TNRCC's longstanding interpretation regarding the Texas Clean Air Act standard exemptions and grandfathered

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144. See TEX. WATER CODE ANN. § 26.177(a) (Vernon Supp. 1998).

145. See *id.* § 26.0135(b).

146. Executive Order GWB-96-1.

147. See TEX. TRANSP. CODE ANN. § 548.306(a)-(d) (Vernon Supp. 1998).

148. See *id.* § 548.306(e).

149. See *id.* § 548.306(f).

150. See *id.*

151. See *id.* §§ 502.009(b), (c).

facilities.<sup>152</sup> The bill clarifies that such exemptions may be available for changes to grandfathered facilities provided that no significant contribution of air contaminants to the atmosphere results.<sup>153</sup> House Bill 3019 also requires the TNRCC to develop a voluntary emissions reduction plan by December 1, 1998, for the permitting of existing significant sources.<sup>154</sup>

#### D. ENFORCEMENT

##### 1. *Texas Environmental, Health, and Safety Audit Privilege Act*

Last session, the Texas Legislature passed the Texas Environmental, Health, and Safety Audit Privilege Act (the "Audit Privilege Act") to encourage self-auditing.<sup>155</sup> The Audit Privilege Act created a legal privilege protecting voluntary environmental and occupational health and safety audits from discovery and admissibility in legal actions. Since its enactment, however, the EPA expressed reservations about the Audit Privilege Act, which Texas officials feared could prevent delegation of federal environmental programs to Texas. To address EPA concerns, the 75th Texas Legislature enacted House Bill 3459, which limits some of the privileges and immunities established by the original Audit Privilege Act.<sup>156</sup>

Many of these limitations pertain to legal immunity. Originally, the Audit Privilege Act provided a person who made a voluntary disclosure of an environmental or health and safety law violation with immunity from administrative, civil, or criminal penalties stemming from the disclosed violation.<sup>157</sup> Under House Bill 3459, voluntary disclosure of such a violation still provides immunity from administrative or civil penalties, but not from criminal penalties.<sup>158</sup> Moreover, audit reports are no longer privileged or inadmissible in criminal proceedings;<sup>159</sup> however, House Bill 3459 provides that where an audit report is obtained, reviewed, or used in a criminal proceeding, the evidentiary privilege is not waived for administrative or civil proceedings.<sup>160</sup> Besides the abolition of criminal immunity, House Bill 3459 repeals immunity for violations that result in "a substantial economic benefit which gives the violator a clear advantage over its business competitors."<sup>161</sup>

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152. A "grandfathered facility" is one that existed before September 1, 1971, or began construction by February 29, 1972, and whose operations have not increased air contamination.

153. See TEX. HEALTH & SAFETY CODE ANN. § 382.057(a) (Vernon Supp. 1998).

154. See *id.*

155. See TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon Supp. 1997).

156. See Tex. H.B. 3459, 75th Leg., R.S. (1997) (now codified at TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon Supp. 1998)).

157. See *id.* § 10(a).

158. See TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(a) (Vernon Supp. 1998).

159. See *id.* § 10(b).

160. See *id.* § 9(a).

161. *Id.* § 10(d)(5).

House Bill 3459 also contains several enforcement provisions. Formerly, any public entity, employee, or official who disclosed information in violation of the Audit Privilege Act committed a Class B misdemeanor.<sup>162</sup> Now such an offense is punishable by any penalty provided in Chapter 552 of the Government Code, which can include a fine of \$1,000 and six months imprisonment.<sup>163</sup> A person who intentionally or knowingly claims the privilege for unprotected information is now subject to sanctions or to a fine of up to \$10,000.<sup>164</sup>

Finally, House Bill 3459 contains a number of provisions limiting the Audit Privilege Act's scope regarding other state and federal laws. For example, one provision protects "whistle-blowers" so that nothing in the Audit Privilege Act is construed to bypass the protections provided by federal or state law for individuals who reveal information to law enforcement authorities.<sup>165</sup> And notwithstanding the Audit Privilege Act's privilege, regulatory agencies may review information required to be available under other state or federal statutes.<sup>166</sup> House Bill 3459 also removes federal employees from the list of government officials who may receive privileged information without waiving the privilege.<sup>167</sup>

## 2. *Enforcement Consolidation*

This session also saw the passage of Senate Bill 1876, which consolidates the TNRCC's enforcement authority into chapters 5 and 7 of the Texas Water Code. Before this Bill's enactment, the statutory authority for the programs administered and enforced by the TNRCC was codified in various chapters of the Texas Water Code and the Texas Health and Safety Code. Moreover, the enforcement provisions in these chapters contained many differences, which some observers believe resulted in inequitable agency enforcement actions.

The Legislature designed Senate Bill 1876 to address those perceived inconsistencies by providing uniformity in enforcement. The Bill establishes a single set of criteria for the assessment of administrative penalties.<sup>168</sup> In addition, it consolidates the TNRCC's authority regarding supplemental environmental projects,<sup>169</sup> criminal penalties,<sup>170</sup> civil penalties,<sup>171</sup> affirmative defenses,<sup>172</sup> permit revocation,<sup>173</sup> and emergency and temporary orders.<sup>174</sup>

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162. *See id.* § 6(d) (Vernon Supp. 1997).

163. *See* TEX. GOV'T CODE ANN. § 552.352 (Vernon 1994).

164. *See* TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(d) (Vernon Supp. 1998).

165. *See id.* § 6(e).

166. *See id.* § 9(b).

167. *See id.* § 6(b)(2)(D).

168. *See* TEX. WATER CODE ANN. § 7.053.

169. *See* TEX. WATER CODE ANN. § 7.067 (Vernon Supp. 1998).

170. *See id.* §§ 7.141-7.202.

171. *See id.* §§ 7.101-7.111.

172. *See id.* §§ 7.251-7.2505.

173. *See id.* §§ 7.301-7.310.

174. *See id.* §§ 5.501-5.517.

## E. AGENCY RULEMAKING AND DELEGATION

1. *Regulatory Analysis*

Regarding environmental rulemaking, Senate Bill 633 now requires state agencies to conduct a detailed regulatory analysis when adopting major environmental rules.<sup>175</sup> This mandatory analysis focuses on the full disclosure of information, assumptions, and data relied on by the agency in drafting the rule. This new set of requirements only applies to a “major” environmental rule that: (1) exceeds federal standards, unless state law requires the rule; (2) exceeds an express requirement of state law, unless federal law requires the rule; (3) exceeds standards in a delegation agreement; or (4) is adopted under the general powers of the agency rather than a specific state law.<sup>176</sup>

The regulatory analysis required by Senate Bill 1633 contains three major steps. First, a state agency must conduct a “regulatory analysis” before adopting a major environmental rule.<sup>177</sup> The regulatory analysis must: (1) identify the problem the agency intends the rule to address; (2) determine whether the rule is necessary; and (3) consider the benefits and costs of the proposed rule in relation to state agencies, local governments, the public, the regulated community, and the environment.<sup>178</sup> Second, the agency must include in its rule notice a fiscal note incorporating a “draft impact analysis” describing the anticipated effects of the proposed rule.<sup>179</sup> Besides allowing for public comments, the draft impact analysis must identify and describe the anticipated costs and benefits of the rule, alternate methods, and the data and methodology used in the analysis.<sup>180</sup> Finally, after considering submitted public comments and deciding to adopt the proposed rule, the agency must prepare a “final regulatory analysis” for the agency order adopting the rule.<sup>181</sup> The agency must conclude that compared to alternate proposals, the rule will result in “the best combination of effectiveness in obtaining desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered.”<sup>182</sup>

Anyone who submitted public comment may challenge a major environmental rule not proposed and adopted in accordance with these procedural requirements. Challengers must file an action for declaratory judgment within thirty days after the rule’s effective date.<sup>183</sup> Major envi-

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175. The term “major environmental rule” means a rule that is specifically intended “to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competitive jobs, the environment, or the public health and safety of the state.” TEX. GOV’T CODE ANN. § 2001.0225(g) (Vernon Supp. 1998).

176. *See id.* § 2001.0225(a).

177. *See id.* § 2001.0225(b).

178. *See id.*

179. *See id.* § 2001.0225(c).

180. *See id.*

181. *See id.* § 2001.0225(d).

182. *Id.*

183. *See id.* § 2001.0225(f).



ronmental rules that are not proposed and adopted following the procedural requirements of this legislation are invalid.<sup>184</sup>

## 2. *Executive Director Delegation*

House Bill 1298, which became effective upon passage, clarifies what role the staff of the TNRCC's executive director may play in processing various agency authorizations. Since last session, the law has allowed the TNRCC to delegate certain matters to its executive director regarding applications, renewals, and other actions relating to permits, licenses, registrations, and other authorizations. House Bill 1298 allows the executive director to delegate any of his duties to his staff unless the statute, rule, or order assigning or delegating the duty specifies otherwise.<sup>185</sup>

House Bill 1298 also clarifies when an executive director's decision may be appealed to the TNRCC, and when it must be appealed directly to district court. An affected person may now appeal an executive director's decision to the TNRCC unless the agency specifies in the delegating rule that the decision is final and appealable.<sup>186</sup> Then an appeal can only be made to the district court.

## F. AGENCY PERMITTING

### 1. *Consolidated Permitting*

This session the Texas Legislature passed a bill designed to streamline the permitting process by allowing regulated entities to consolidate their environmental permits. Under House Bill 1228, a plant, facility, or site requiring multiple TNRCC permits may request a consolidated application review, permit hearing, and permit for all permit applications filed within a thirty-day period.<sup>187</sup> Federal operating permits under Title IV of the federal Clean Air Act are not eligible for consolidation.<sup>188</sup> The renewal period for a consolidated permit is based on the authorization in the permit that would otherwise have the shortest permit term.<sup>189</sup> Moreover, a consolidated permit may be renewed as a consolidated permit or as separate permits.<sup>190</sup>

House Bill 1228 also provides opportunities for an applicant to "opt-out" of the consolidated permit process. The applicant may request that consolidated applications be processed separately anytime before the TNRCC gives public notice of the opportunity to request a hearing on the permit application.<sup>191</sup> After public notice, the applicant may separate the applications for processing on a showing of "good cause," until refer-

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184. *See id.*

185. *See* TEX. WATER CODE ANN. § 5.238 (Vernon Supp. 1998).

186. *See id.* § 5.122(b)(2).

187. *See* TEX. WATER CODE ANN. § 5.401(a) (Vernon's 1998).

188. *See id.*

189. *See id.* § 5.403.

190. *See id.* § 5.404.

191. *See id.* § 5.402(a).

ral of the matter to SOAH. Changes in a rule, a statute, or factual circumstances all constitute "good cause."<sup>192</sup> Once an application has been referred to SOAH, the applicant may have the applications processed separately only by withdrawing them.<sup>193</sup>

## 2. General Permitting

Another new permitting law, House Bill 1542, allows the TNRCC to issue general permits authorizing the discharge of waste into or adjacent to state waters for similarly situated dischargers in a particular location.<sup>194</sup> This general permitting process closely parallels the EPA's procedures for controlling waste discharges. Under the new law, nonpermitted dischargers may obtain authorization to discharge under a general permit, subject to TNRCC approval, by submitting written notice to the agency.<sup>195</sup> General permits are not available for dischargers that release pollutants that will cause significant adverse effects to water quality, or that release more than 500,000 gallons into surface water during any twenty-four hour period.<sup>196</sup>

The TNRCC must publish notice of a proposed general permit at least thirty days before adoption, and respond to all written comments.<sup>197</sup> The TNRCC may issue a general permit for up to five years, during which time the agency may amend, revoke, cancel or renew the general permit.<sup>198</sup>

## G. REGULATORY FLEXIBILITY

In 1995, the EPA proposed "Project XL," a set of pilot programs designed to encourage companies to seek and test alternatives to current environmental laws and regulations in exchange for a higher standard of environmental performance. One major problem with Project XL, however, was a lack of statutory authority allowing the EPA to waive existing laws. Instead, the EPA offers to companies "final project agreements," under which the EPA agrees not to bring enforcement actions provided the participant meets certain criteria. Understandably, many companies are uncomfortable with the lack of legislative authority for the program. Senate Bill 1591 partly addresses these concerns in Texas by providing statutory authorization for regulatory flexibility in all pollution control programs.

Senate Bill 1591, which became effective upon passage, authorizes the TNRCC to exempt an applicant from a statutory or regulatory requirement regarding the control of pollution if the applicant proposes to con-

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192. *See id.* § 5.402(b).

193. *See id.* § 5.402(c).

194. *See id.* § 26.040(a).

195. *See id.* § 26.040(e).

196. *See id.* § 26.040(a)(5)(B).

197. *See id.* § 26.040(b).

198. *See id.* § 26.040(a).

trol pollution by an alternative method or standard.<sup>199</sup> To qualify, the alternative method or standard must be at least as protective of the environment and the public health as the method or standard being waived. The alternative method or standard, however, may not be inconsistent with federal law.<sup>200</sup> In addition, Senate Bill 1591 authorizes the TNRCC to promulgate procedural rules for obtaining an exemption, including provisions for public notice and public participation in an exemption application proceeding.<sup>201</sup> The TNRCC's order must provide a specific description of the alternative method or standard and condition the exemption on compliance with the method or standard as the order prescribes.<sup>202</sup> Violation of an exemption order issued under this statute is punishable as if it were a violation of the statute or rule from which the order grants an exemption.<sup>203</sup> Finally, no exemptions are available from statutes or regulations for storing, handling, processing, or disposing of low-level radioactive materials.<sup>204</sup>

Although the regulated community would welcome the flexibility provided by Senate Bill 1591, questions remain about the constitutionality of the "statutory waiver." In implementing Senate Bill 1591, the TNRCC has requested an opinion from the Attorney General's office on the bill's constitutionality. Specifically, the agency has questioned whether the bill's provision allowing the TNRCC to "exempt" an applicant from a statutory requirement is an unconstitutional suspension of law under Article I, Section 28 of the Texas Constitution.<sup>205</sup> The agency has also queried whether the statutory waiver violates the "division of powers" provision found in Article II, Section 1 of the Texas Constitution.<sup>206</sup> The Attorney General acknowledged the TNRCC's request on September 22, 1997. Thus, the Attorney General must provide his opinion by March 22, 1998.

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199. See TEX. WATER CODE ANN. § 5.123(a) (Vernon Supp. 1998).

200. See *id.*

201. See *id.* § 5.123(b).

202. See *id.* § 5.123(c).

203. See *id.* § 5.123(e).

204. See *id.* § 5.123(g).

205. "No power of suspending laws in this State shall be exercised except by the Legislature." TEX. CONST. art. I, § 28.

206.

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person or collection of persons, being one of those departments, shall exercise any power attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.