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Environmental Law

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ENVIRONMENTAL LAW

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I. INTRODUCTION

THIS Article reviews judicial developments in Texas environmental law between October 1, 1998 and September 31, 1999, as well as the new environmental legislation enacted in Texas during this same Survey period.

II. JUDICIAL DEVELOPMENTS

During the Survey period, Texas appellate courts and a federal district court heard several environmental cases both under Texas environmental statutes and Texas common law. The first case involved a challenge to the Texas Natural Resource Conservation Commission's ("TNRCC") power to utilize a registration process for management of municipal waste in lieu of a formal permitting process. The second case arose in a lakeside resident's challenge of a TNRCC order allowing increased withdrawal of water from a lake and addressed the citizens' standing and the requirements of the TNRCC to hear new evidence on remand from the district court. Two cases arose in landowner suits against parties who were allegedly liable for contamination of land and addressed the defenses of lack of transfer of claims between a seller and current owner of property and the application of the discovery rule to statutes of limitations. Finally, two cases addressed the ability of contractors or subcontractors to recover against the TNRCC for alleged breach of contract. These cases address situations in which sovereign immunity is waived or not waived for purposes of contract claims against the state.

A. TNRCC AUTHORITY TO ALLOW REGULATED ACTIVITY WITHOUT A PERMIT

1. *The TNRCC Has the Authority under the Texas Solid Waste Disposal Act to Allow the Disposal of Sewage Sludge Wastes Without Implementing a General Permitting Process*

"Not in my backyard" (sometimes known by the acronym "NIMBY")¹

1. Whether the expression "not in my backyard" or NIMBY has positive or negative connotations may depend on who is using it. *See, e.g.,* Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989) ("[M]any who speak out against [a waste disposal site] will do so because of self-interest, bias, or ignorance. These are but a few of the less than noble motivations commonly referred to as the 'Not-in-My-Backyard' syndrome."); *but cf.* SDDS, Inc. v. South Dakota, 47 F.3d 263, 266 (8th Cir. 1995) ("NIMBY (not in my backyard) exists because people do not want their soil, air and water contaminated.") (quoting the state attorney general's explanatory pamphlet to a waste dump referendum).

is a frequently-heard cry from residents who live near proposed waste disposal sites. Those who protest against such sites typically invoke social, technical, and/or legal arguments, with the latter sometimes hinging on procedural technicalities. Such procedural issues were central to *McDaniel v. Texas Natural Resource Conservation Commission*,² in which a landowner, Elton McDaniel, protested the TNRCC's approval of a sewage sludge disposal site on land owned by Cary Juby which was adjacent to McDaniel's land. Juby had applied to the TNRCC to register the site, and the TNRCC—after sending notice of the application to the local county judge and to McDaniel and other adjacent landowners—approved the application and issued the registration to Juby.

In seeking to set aside the decision of the TNRCC to issue the registration to Juby, McDaniel raised two basic arguments. First, McDaniel argued that under the Texas Solid Waste Disposal Act (TSWDA),³ the TNRCC was required to utilize the more restrictive and time-consuming general permitting process, as opposed to merely the notice and registration process, before deciding whether to allow the sludge disposal. Second, McDaniel argued that the notice that he and the other adjacent landowners received was insufficient because Juby did not state his business affiliation clearly enough, even though a reference was made to a similar name. The court's analysis reflects an interesting consideration of the actual and implied powers of the TNRCC or any other Texas administrative agency.

a. The TNRCC May Allow Sewage Sludge Disposal by Registration-Specific and Implied Statutory Powers of an Administrative Agency

The first issue raised by McDaniel was whether the TNRCC was obligated under the TSWDA to invoke a general permitting procedure for issuing authorization for the spreading of sewage sludge. Under the statute, the sewage sludge was classified as municipal solid waste. The statutory language was fairly broad as to the agency's powers related to municipal solid waste. In reviewing the statutory powers of the TNRCC under these provisions of the TSWDA, the court stated that "[a]gencies may only exercise those powers that are specifically given them by statute. However, agencies also have implied powers to do that which is necessary to carry out the specific powers delegated, for the legislature intended a workable and effective exercise of the powers expressly and specifically granted the agency."⁴ The analysis then appears to be two-fold. First, the court must determine whether specific powers are granted to the administrative agency. Second, the court must determine whether

2. 982 S.W.2d 650 (Tex. App.—Austin 1998, pet. denied).

3. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001 - .754 (Vernon 1992 & Supp. 2000).

4. *McDaniel*, 982 S.W.2d at 651-52 (citing *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-39 (Tex. App.—Austin 1986, writ ref'd n.r.e.)).

there are certain powers needed to carry out the specific statutory powers. In other words, what must the agency be allowed to do in order to carry out its legislatively delegated authority and duty?

In carrying out this review of statutory authority, the first step requires determining legislative intent. The court determined, based on prior precedent, that in carrying out such review it must look to the statute as a whole to ascertain legislative intent.⁵ Reviewing the provisions governing the regulation of municipal solid waste, the *McDaniel* court concluded that the legislative grant of jurisdiction was broad enough to control all aspects of the management of municipal solid waste, including sewage sludge.⁶ One of the provisions provided that the TNRCC could issue permits for management of municipal solid waste. The court concluded, however, that the grant uses permissive language: "Except as provided by 361.090 with regard to certain industrial solid waste, the commission *may* require and issue permits authorizing and governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste."⁷

Concluding that the provision was permissive and not mandatory, the court decided that a formal permitting process was not mandated by this statutory language. The *McDaniel* court reasoned that "if the legislature intended the TNRCC to *only* issue permits when regulating municipal solid waste, it could have so mandated, as it has done in other areas."⁸ The court concluded that the procedures the TNRCC followed fulfilled its obligation under the statute.⁹

The TNRCC is given general authority over municipal solid waste, allowing it "to control and manage all aspects of municipal solid waste by all practical means as long as such methods are consistent with its powers and duties" under the TSWDA.¹⁰ The registration process was deemed sufficient to control and manage the sewage sludge. The registration process was conducted using a process established pursuant to TNRCC's properly promulgated rules. The process consists of the following steps: written notice to the TNRCC from the applicant of the planned land application for beneficial use and submission of information enabling the TNRCC to determine whether such activities comply with its rules.¹¹ The TNRCC may approve a request for registration only after reviewing the request to ensure that it complies with the applicable TNRCC rules governing sewage sludge. These rules include limits on the concentration of

5. *See id.* at 651-52.

6. *See id.* at 652.

7. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 361.061 (Vernon Supp. 1999) (emphasis added by the *McDaniel* court)).

8. *Id.* at 653 (emphasis added). As noted by the *McDaniel* court, TSWDA does require a permitting process for hazardous, as opposed to non-hazardous municipal waste. *See id.*; TEX. HEALTH & SAFETY CODE ANN. § 361.002(b) (Vernon 1992).

9. *See McDaniel*, 982 S.W.2d at 653.

10. *Id.* at 653 (citing TEX. HEALTH & SAFETY CODE ANN. § 361.011 (Vernon Supp. 2000)).

11. *See* 30 TEX. ADMIN. CODE § 312.12(a) (1999).

metals, restrictions on available sites, and several specific actions for bulk sewage sludge treatment.¹² Based upon this review, if the TNRCC approves the request, notice must be mailed to the county judge in the county of the proposed disposal site and to adjacent landowners.¹³ Any dissatisfied person can provide written comments to the TNRCC and file a motion for reconsideration of the decision.¹⁴

While noting that the registration is not as stringent as a permitting process, the court concluded that the agency's decision to implement a registration process rather than a permitting process was reasonable and consistent with both its powers and duties under the relevant statutory provisions.¹⁵ The operative issue here apparently turned on the language governing the promulgation of rules requiring permits for municipal sludge land spreading facilities. The language contains the term "may" rather than "shall."¹⁶ Thus, the court clearly did not believe that the statute mandated a permitting system. Without such a mandate, the court considered the registration adequate to address the sewage sludge process and protect human health and the environment.

b. Notice to Adjacent Landowners That Merely Listed the Waste Registration Applicant's Name Was Sufficient

TNRCC rules require that notices to adjacent landowners of a solid waste registration application specify both the name and affiliation of the applicant.¹⁷ While the application reflected the applicant's affiliation, the notice issued to McDaniel and to the other adjacent landowners omitted the reference in the application to the TNRCC that it "did business as" Cap. Tex. Waste Service.¹⁸ McDaniel claimed that this omission violated the notice rules and that the violation invalidated the TNRCC's decision to grant the registration.

The *McDaniel* court found it unnecessary to determine whether the omission of the reference to Cap. Tex. Waste Service constituted an omission of an applicant's affiliation under the TNRCC rules, since even if it did constitute such an omission, the court could only reverse and remand the TNRCC's decision if a showing was made that prejudice or harm resulted from the omission.¹⁹ With respect to McDaniel himself, no such harm was shown; indeed, McDaniel admitted that he had actual knowledge of the affiliation between Juby and Tex. Cap. Waste Service.²⁰

12. See *id.* §§ 312.12(b), .42.

13. See *id.* § 312.13(c).

14. See *id.* § 312.13(d)-(e).

15. See *McDaniel*, 982 S.W.2d at 653.

16. See TEX. HEALTH & SAFETY CODE ANN. § 361.061 (Vernon Supp. 2000).

17. See 30 TEX. ADMIN. CODE § 312.13(c)(4) (1999).

18. See *McDaniel*, 982 S.W.2d at 653.

19. See *id.* at 654 (citing *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 288 (Tex. 1977)).

20. See *id.*

McDaniel further argued, however, that other adjacent landowners were harmed since, had they received notice that Juby was associated with Tex. Cap. Waste Service, they would have expressed their own concerns. The court declined to address this issue because even if such harm were present McDaniel did not have standing to assert prejudice to a third party for alleged notification defects.²¹

The *McDaniel* court affirmed the trial court's granting summary judgment and rendering a final judgement in favor of the TNRCC.²² In doing so, the *McDaniel* court in effect affirmed that a person objecting to a waste disposal site should not necessarily rely upon a court to use administrative technicalities to halt the operation.

B. CITIZEN STANDING

1. *A Conservation Organization Has Standing to Maintain an Action Against the TNRCC Based on the Effect on the Organization's Members of the TNRCC's Order Amending a Water District's Authority to Divert Water from a Lake; However, the Agency May Reconsider an Erroneously Issued Order Based upon the Existing Record*

An environmental group's standing to protest agency action and the TNRCC's ability to reconsider erroneously issued orders were at issue in *Lake Medina Conservation Society, Inc. v. Texas Natural Resource Conservation Commission*.²³ In *Lake Medina*, a local environmental group opposed a water control and improvement district's application to expand its use of the water it diverted from Lake Medina. The certificate of adjudication issued to the Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1 ("BMA") allowed it to divert 65,830 acre-feet of water from the lake, but limited the use of that water to irrigation purposes. The BMA applied to the TNRCC for an amendment to expand the permitted uses to include municipal and industrial purposes.

The environmental group was made up of lakefront property or business owners and those with water wells near the lake and was known as the Lake Medina Conservation Society, Inc. (LAMCOS). LAMCOS feared that, although the amendment neither increased the total authorized volume nor added any additional diversion points, the additional authorized uses would "result in BMA's consistently taking the entire volume of water it is authorized to use" and thus would adversely affect their own recreational and other uses of the lake.²⁴ LAMCOS, among other interested groups, opposed BMA's requested amendment during public hearings. While the TNRCC agreed with LAMCOS that the

21. See *id.* (citing *Smith v. Houston Chem. Serv., Inc.*, 872 S.W.2d 252, 273 (Tex. App.—Austin 1994, writ denied)).

22. See *McDaniel*, 982 S.W.2d at 654.

23. 980 S.W.2d 511 (Tex. App.—Austin 1998, pet. denied).

24. *Id.* at 514. While not explicitly stated, the court implied that the demand for water for irrigation uses was such that the BMA historically had not utilized its entire allotment.

amendment would likely result in increased water diversion, the agency granted BMA's request. TNRCC concluded that BMA's water resources were a part of limited water resources in the region and, because of increased urbanization and reduced agricultural activity in the area, the TNRCC would allow a portion of BMA's water to be used beneficially to supplement limited municipal and industrial groundwater supplies in the region.²⁵

A district court battle ensued in which LAMCOS won at least a partial victory.²⁶ In an initial holding, the district court agreed that the law required that BMA's certificate set forth a specific volume of water for each authorized use and remanded.²⁷ Upon remand, the TNRCC, considering only the existing record, allowed BMA to divert up to 19,974 acre-feet of water for municipal use and the remaining 45,856 acre-feet for irrigation.²⁸ LAMCOS sued for judicial review again, claiming that, because BMA had not filed a completely new application and the TNRCC had not held a new evidentiary hearing, the TNRCC's new order was void. In response, BMA challenged LAMCOS's standing to contest the TNRCC's new order. The district court rejected BMA's standing challenge, but upheld the TNRCC's order.²⁹

a. Standing to Challenge the TNRCC Order

BMA, joined by the Canyon Regional Water Authority as intervenor, argued that LAMCOS's interests were "insufficient to show any specific or peculiar injury to itself or its members as a result of the [TNRCC's] amending BMA's certificate."³⁰ Disagreeing with BMA, the appeals court recited Texas law on standing and applied it to LAMCOS. The court relied upon the Texas Supreme Court case *Hunt v. Bass* for the general rule on standing that the ability to bring suit "consists of some interest peculiar to the person individually and not as a member of the general public."³¹ The Houston Court of Appeals recited the circumstances in which a plaintiff has standing to sue:

- (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains;
- (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated;
- (3) he has a personal stake in the controversy;
- (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise;
- or (5) he is an appropriate party to assert the public's interest in the

25. *See id.*

26. *See id.*

27. *See id.* (citing Act of June 16, 1977, 65th Leg., R.S., ch. 870, § 1, 1977 Tex. Gen. Laws 2217 (codified as amended at TEX. WATER CODE ANN. § 11.023(e) (Vernon Supp. 2000)).

28. *See id.* at 515. After the remand, BMA withdrew its request for industrial use of the water.

29. *See Lake Medina*, 980 S.W.2d at 515.

30. *Id.*

31. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

matter, as well as his own interest.³²

In applying this standard to the LAMCOS standing question, the court concluded that the members of that group had demonstrated interests in the lake, not the least of which was ownership interest in lakefront property, that would be affected by the amendment to the certificate of adjudication governing water use. The court's analysis was simple: "[t]he impact of lower lake levels on owners of waterfront property, waterfront businesses, and private wells in the area constitutes a sufficiently particularized injury to distinguish the members' injury from that of the public at large."³³ The appeals court thus overruled BMA's and intervenor Canyon Regional Water Authority's challenges to LAMCOS's standing.³⁴

b. Reconsideration of the Previous Application Based upon the Existing Record

Another challenge brought by the landowners group was that the TNRCC improperly reconsidered BMA's application to expand the use of its diverted water. This claim was supported by four arguments: first, that an administrative agency lacks the jurisdiction to modify its previous orders absent a statute conferring that authority; second, that the TNRCC did not follow its procedural rules that govern how an applicant must amend water-use authorizations; third, that in relying on the existing record after remand, the TNRCC denied LAMCOS a full and fair hearing and improperly based its decision on outdated evidence; and fourth, that the TNRCC had failed to determine the impact that a reduction in water levels would have on fish and wildlife habitat.

(i) *The TNRCC's Authority to Modify a Previous Order*

LAMCOS cited *Sexton v. Mount Olivet Cemetery Ass'n*³⁵ for the proposition that an administrative agency lacks the authority to modify its previous final orders absent a statute conferring that authority.³⁶ However, the *Lake Medina* court found *Sexton* to be inapplicable, since, due to an embedded error in the original order (*i.e.*, a failure to set forth a specific volume of water for each authorized use), the order was never final or legally effective. Thus, the TNRCC not only had the authority but also had the statutory duty to reassess BMA's application.³⁷

32. *Billy B., Inc. v. Board of Trustees of Galveston Wharves*, 717 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ); *see also* *Housing Auth. v. Texas ex rel. Velasquez*, 539 S.W.2d 911, 913-14 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

33. *Lake Medina*, 980 S.W.2d at 516 (citing *Hooks v. Texas Dep't Water Resources*, 611 S.W.2d 417, 419 (Tex. 1981); *Texas Rivers Protection Ass'n v. Texas Natural Resource Conservation Comm'n*, 910 S.W.2d 147, 151 (Tex. App.—Austin 1995, writ denied)).

34. *See id.*

35. 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

36. *See Lake Medina*, 980 S.W.2d at 516.

37. *See id.*

(ii) *The TNRCC's Procedural Rules Governing Amendments to Water Use Authorizations*

LAMCOS argued that the TNRCC violated two agency rules governing procedures for amending water use permits. The first, rule 295.2, provides that "substantive changes" to an application to amend a water use authorization must be "in the form of a written, notarized amendment . . . , provided, however, that no substantive changes may be made after an application has been filed with the chief clerk" ³⁸ The second, rule 295.201, provides that "[n]o substantive changes may be made [to an application] after an application has been filed with the chief clerk." ³⁹ LAMCOS argued that these rules required BMA to "withdraw its application and submit a new, amended application." ⁴⁰

The *Lake Medina* court did not disagree that these two rules may not have been followed by the TNRCC. It concluded, however, that the rules were not designed primarily to confer procedural benefits upon or protections to a party to the case. ⁴¹ Instead, the intent of the rules was to assist the agency itself in the efficient processing of the applications. The TNRCC was "therefore free to relax the requirements of the rules, and the agency's doing so in a particular case is 'not reviewable except upon a showing of substantial prejudice to the complaining party.'" ⁴² The court concluded that LAMCOS had shown no prejudice. ⁴³

(iii) *The TNRCC's Reliance upon the Existing Record*

LAMCOS next argued that it was deprived of a "full and fair hearing" since the TNRCC, in reviewing BMA's amended application, relied merely upon the existing record. ⁴⁴ Most specifically, LAMCOS argued that the findings of fact and conclusions of law as found in the original order were deficient because they "do not take into consideration the changes that have taken place in the watershed in question since [the order was originally considered], with respect to the water level in Lake Medina, the drought in the area, increased knowledge of the relationship between Lake Medina and the Edwards Aquifer, or the changes in demands for the water." ⁴⁵ The court concluded, however, that the TNRCC did not abuse its discretion in not considering such new evidence.

In applying its view of the law on this subject, the Austin Court of Appeals stated that a decision whether to reopen evidence in an administrative proceeding is within that agency's discretion, and that ability is

38. *Id.* at 517 (citing 30 TEX. ADMIN. CODE § 295.2 (1999)).

39. 30 TEX. ADMIN. CODE § 295.201 (1999).

40. *Lake Medina*, 980 S.W.2d at 517.

41. *See id.*

42. *Id.* (quoting *Smith v. Houston Chem. Servs., Inc.*, 872 S.W.2d 252, 259 (Tex. App.—Austin 1994, writ denied)).

43. *See id.*

44. *Id.*

45. *Id.* at 518.

reserved for a variety of “extraordinary circumstances.”⁴⁶ Applying this concept to the case at hand, the court held that where re-opening the evidence is urged by a party who was successful on appeal in gaining a judicial remand to an agency, “the agency need consider only those parts of its decision which were rejected by the reviewing court.”⁴⁷

The [TNRCC], on remand, complied in its [new] order with the reviewing court’s decision that specific volumes of water for each use must be set out in the final order. Moreover, the [TNRCC] could reasonably conclude from the record that the changed circumstances urged by LAMCOS did not affect the fundamental ground of decision reflected in the findings of fact and conclusions of law stated in the [original] order: that in the circumstances shown municipal and irrigation uses must have priority, as a matter of policy, over recreational use and well-water availability—a basis of the agency decision not rejected by any court.⁴⁸

(iv) *Consideration of the Impact on Fish and Wildlife Habitats*

As a final argument, LAMCOS argued that the TNRCC did not, in considering BMA’s amended application, follow its rule which required that it “assess the effects, if any, of the issuance of the permit on fish and wildlife habitats.”⁴⁹ However, since the TNRCC had found that the *original* application would have no significant impact on fish and wildlife habitat, this argument fell to the court’s logic: “LAMCOS does not suggest how BMA’s new application, which gives BMA *less flexibility* in its diversion of water, could result in a different or more severe impact upon fish and wildlife habitats.”⁵⁰

Thus, the *Lake Medina* court, in considering this final procedural issue as well as the others, did not necessarily dispute that a given administrative procedure was not strictly followed by the TNRCC in reconsidering BMA’s application. However, the court was not inclined to allow such legal technicalities to interfere with the agency’s action, absent a strong showing that the environmental group had suffered prejudice from such omissions.

46. *Lake Medina*, 980 S.W.2d at 518-19 (citing KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 5.71[1] at 273 (1998)).

47. *Id.* at 519 (quoting KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 5.71[1] at 276 (1998)).

48. *Id.* (citing *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 332 (D.C. Cir. 1991); *Alvarez-Madrigo v. INS*, 808 F.2d 705, 707 (9th Cir. 1987); *Sunset Square Ltd. v. Miami County Bd. of Revision*, 552 N.E.2d 632, 635 (Ohio 1990)).

49. *Id.* (quoting 30 TEX. ADMIN. CODE § 297.49 (1997)).

50. *Lake Medina*, 980 S.W.2d at 519 (emphasis in original).

C. TORT CLAIMS FOR CONTAMINATION OF LAND

1. *Texas Law Bars a Purchaser of Real Property from Asserting a Claim for Property Damage If That Damage Occurred Before the Purchaser Owned the Property and the Cause of Action Was Not Transferred to the Purchaser*

In *Koehn v. Ayers*,⁵¹ the United States District Court for the Southern District of Texas granted summary judgment against personal injury and property damage claims brought by individuals who bought land in 1992. The claims were based upon disposal of material into a saltwater disposal pit on the land which was in operation from the mid-1930s through the 1960s. District Judge Kent⁵² dismissed all claims against the oil company defendants with prejudice.⁵³ In doing so, he articulated aspects of Texas law that relate to issues of environmental liability associated with oil and gas activities and real estate transactions.

The defendants in *Koehn* included (a) Texaco, which executed a lease of the property for oil and gas operations in 1933, and in 1936 placed, with the then-owners' consent, a disposal pit on the property to dispose of waste saltwater from those operations, (b) North Central Oil Company (NCOC), which purchased the lease in 1994 from Texaco and assumed Texaco's liabilities in connection with the lease, and (c) the "sellers," who bought the property in 1950 from the original owners and later sold the property to the plaintiffs.

With respect to the plaintiffs' personal injury claims, the court pointed out that the plaintiffs had presented no evidence of groundwater contamination and no evidence of dangerous levels of hydrocarbons in surface water on the property. With respect to medical causation, expert reports submitted by the plaintiffs contained only "generalized statements about

51. 26 F. Supp. 2d 953 (S.D. Tex. 1998), *aff'd*, 194 F.3d 1309 (5th Cir. 1999) (unpublished table decision).

52. Perhaps because of his court's location near industrial centers and near environmentally sensitive coastal areas, Judge Kent has decided a large number of substantive environmental cases. *See, e.g.*, Galveston Bay Conservation and Preservation Ass'n v. U.S. Army Corps of Eng'rs, 55 F. Supp. 2d 658 (S.D. Tex. 1999) (wetlands permits); Informed Citizens United, Inc. v. USX Corp., 36 F. Supp. 2d 375 (S.D. Tex. 1999) (Clean Water Act discharge permit); Blue Gulf Seafood, Inc. v. TransTexas Gas Corp., 24 F. Supp. 2d 732 (S.D. Tex. 1998) (damage to oyster beds from oil and gas operations); Stewart v. Potts, 996 F. Supp. 668 (S.D. Tex. 1998) (Clean Water Act discharge permit); Texas Shrimp Ass'n v. Daley, 984 F. Supp. 1023 (S.D. Tex. 1997) (endangered sea turtles); Stewart v. Potts, 983 F. Supp. 678 (S.D. Tex. 1997) (wetlands permits); Clear Lake Properties v. Rockwell Int'l Corp., 959 F. Supp. 763 (S.D. Tex. 1997) (Superfund liability); Amoco Chem. Co. v. Tex Tin Corp., 925 F. Supp. 1192 (S.D. Tex. 1996) (Superfund liability); Center for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996) (endangered sea turtles); Amoco Chem. Co. v. Tex Tin Corp., 902 F. Supp. 730 (S.D. Tex. 1995) (Superfund liability); United States v. Lowe, 864 F. Supp. 628 (S.D. Tex. 1994), *aff'd*, 118 F.3d 399 (5th Cir. 1997) (Superfund liability); Avitts v. Amoco Prod. Co., 840 F. Supp. 1116 (S.D. Tex. 1994), *vacated*, 1995 WL 258347 (5th Cir. May 3, 1995) (oilfield contamination); United States v. Van Leuzen, 816 F. Supp. 1171 (S.D. Tex. 1993) (wetlands); United States v. Alexander, 771 F. Supp. 830 (S.D. Tex. 1991), *vacated*, 981 F.2d 250 (5th Cir. 1993) (Superfund liability).

53. *See Koehn*, 26 F. Supp. 2d at 958.

the link between some toxins allegedly in the pit” and the complained-of illnesses.⁵⁴ Indeed, Judge Kent viewed the plaintiffs’ evidence on this point as particularly weak:

Neither expert appears to have actually examined the individual Plaintiffs, considered their medical history, or offered any substantiated conclusions about the medical probability that these Plaintiffs’ injuries were caused in whole or even in part by exposure to environmental toxins. None of the reports submitted by the [Plaintiffs] even suggest that they are a statistical anomaly representing a higher than normal incidence of the various conditions they complain of.⁵⁵

What would have been required at a minimum under the Federal Rules of Civil Procedure with respect to medical causation, and what the plaintiffs had not shown, was an opinion from at least one doctor that there was “a reasonable medical probability that the specific illnesses complained of by the individual Plaintiffs resulted from exposure to toxins associated with the pit.”⁵⁶

Consideration of plaintiffs’ property damage claims focused on Texas law. The court agreed with the defendants’ argument that, unless a deed expressly transfers a cause of action to a purchaser, Texas law bars that purchaser from asserting claims for property damage that occurred before the purchaser owned the property.⁵⁷ Furthermore, even if such a transfer of rights had been effected by the deed, a two-year statute of limitations barred the property damage claims.⁵⁸ The evidence suggested that the pit was open and operating in the 1950s when the property was owned by the Sellers, but that it was closed by 1965 and subsequently was covered over by vegetation. Characterizing any injury caused by the pit as permanent, not temporary, in nature, the court noted that a right of action for such permanent injury under Texas law would have accrued to the Sellers when the injury first affected the land.⁵⁹ According to the court, the Sellers, having owned the property in the 1950s, would undoubtedly have been aware of the pit’s presence. Interestingly, the court viewed the fact that the plaintiffs had not discovered the pit until three years after they purchased the property in 1992 as evidence that the pit had lain idle for decades. The delayed discovery was thus evidence that

54. *Id.* at 956.

55. *Id.*

56. *Id.* at 955-56 (citing FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Allen v. Pennsylvania Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996) (stating that “[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs’ burden in a toxic tort case.”)).

57. *See id.* at 957 (citing *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.) (“A cause of action for injury to real property . . . is a personal right which belongs to the person who owns the property at the time of injury and . . . [w]ithout express provision, the right does not pass to a subsequent purchaser of the property.”)).

58. *See id.*

59. *See Koehn*, 26 F. Supp. 2d at 957 (citing *Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562 (Tex. Comm’n App. 1936)).

the limitations period had expired and did not provide grounds to invoke the discovery rule.⁶⁰ Due to the “hidden” nature of the property damage at issue, limitations periods are frequently tolled in environmental cases. But the court here did not toll the limitations period and instead focused on the evidence that the pit was, in the 1950s at least, of an open and obvious nature.

Finally, the plaintiffs had also alleged—at least in a general way—that Texaco and NCOC had violated environmental statutes. These allegations, however, merely consisted of a statement in the plaintiffs’ pleadings that “there exists the possibility that [Texaco and NCOC] are an operator of a facility in which a chemical spill occurred for which they will be responsible for conducting a clean up.”⁶¹ Such a general statement, in the absence of any credible evidence that a spill had occurred, was insufficient as a matter of law to raise any factual dispute over violations of environmental statutes.⁶²

In addition to dismissing with prejudice the plaintiffs’ claims against the corporate defendants, Judge Kent ordered the parties “to file no further pleadings before this Court regarding these Defendants, particularly including motions to reconsider and the like, unless supported by *compelling* new evidence. . . .”⁶³ With the plaintiffs’ claims being so strongly dismissed, the written decision in *Koehn*, besides articulating concepts of Texas property law, also stands as an admonition to others who may bring environmental claims that are not well grounded or well pled.

2. *The Presence of Industrial Waste at a Landfill was Discoverable by the Exercise of Reasonable Diligence; Thus, Absent Fraudulent Concealment, the Statute of Limitations Barred a Claim by a Lessor Against a Landfill Operator-Tenant*

In *Texas Industries, Inc. v. City of Dallas*,⁶⁴ the Court of Appeals for the Eleventh District (Eastland), considered a breach of contract action between Texas Industries, Inc. (TXI), and its lessee, the city of Dallas (“City”). The City had leased TXI’s land for use as a municipal solid waste landfill in 1973. Sometime after 1973, but before the City renewed its lease in 1977, the City disposed of waste, including battery casing chips and lead slag, generated by RSR Corporation (RSR) at its nearby lead smelter.⁶⁵

In 1994, contamination from the disposal of lead smelting waste was discovered and in 1995, the United States Environmental Protection Agency placed the property on the National Priorities List. Within a

60. *See id.*

61. *Id.* (quoting plaintiff’s motion for summary judgment) (alterations in original).

62. *See id.*

63. *Id.* at 958 (emphasis in original).

64. 1 S.W.3d 792 (Tex. App.—Eastland 1999, pet. denied).

65. The battery casing chips and lead slag would be considered “industrial solid waste” instead of “municipal solid waste.” *See id.* at 793 (citing TEX. HEALTH & SAFETY CODE ANN. §§ 361.003(16), .003(20) (Vernon Supp. 1999)).

month of this listing, TXI filed the breach of contract suit against the City. The court noted that, although the EPA identified the City as a potentially responsible party and requested it to investigate and remediate the property, the City had not done so.⁶⁶

Although the trial court found that the City had breached its agreement, it held that TXI's claims were barred by the four-year statute of limitations applicable to contracts.⁶⁷ As explained below, the *Texas Industries* court found that the limitations period was not tolled either by the discovery rule or by fraudulent concealment.

a. The City's Disposal of Battery Casing Chips and Lead Slag Was Not the Type of Injury That Is Inherently Undiscoverable

In evaluating the application of the discovery rule to determine if the statute of limitations would be tolled, the appellate court cited a recent articulation of the application of the discovery rule by the Texas Supreme Court:

The discovery rule exception to the statute of limitations will apply where the nature of the injury incurred is inherently undiscoverable and the evidence of the injury is objectively verifiable The requirement of inherent discoverability recognizes that the discovery rule exception [to the statute of limitations] should be permitted only in circumstances where it is difficult for the injured party to learn of the negligent act or omission.⁶⁸

Turning to the facts of the case, the court reasoned that the injury of which TXI complained was not "the type of injury that [was] inherently undiscoverable."⁶⁹ The court recognized that the lease provided for disposal of municipal waste, not industrial waste, from a smelter. The question was what evidence, if any, was observable and would have indicated the waste disposal. The court focused on the fact that TXI had the opportunity to inspect the property during and at the termination of the lease. One of the key pieces of evidence cited by the court was an engineering inspection report from the Texas State Department of Health dated November 15, 1973. This report stated that the inspector "observed a pile of 'storage battery debris' adjacent to a road and that the property was lined 'with storage battery crushed casings and lead plates.'"⁷⁰

In response to the information stated in the report, TXI argued that the report itself was not available to the public until many years later when the Texas Open Records Act was enacted. The court responded, in essence, that the availability of the report itself was not the issue. The court focused instead on the observation of the inspector of what was present at the property at the relevant time. The evidence thus showed that

66. See *Texas Indus.* 1 S.W.3d at 793.

67. See *id.*; see also TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997).

68. *Id.* at 794 (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996)).

69. *Id.*

70. *Id.*

“even [a] routine inspection would have revealed the deposit of industrial waste.”⁷¹ Because, in the opinion of the court, the disposal of the industrial waste from the smelter was readily observable to someone who inspected the property, the court held that the disposal of the battery casings and other smelter waste is the type of injury that is discoverable by the exercise of reasonable diligence. Consequently, the court ruled that the discovery exception did not apply.⁷²

The alleged breach of the contract, the lease, was the disposal of *industrial* waste at the property. The court implied that a routine inspection would have led to the discovery that the contract had been breached. The court did not discuss whether the average person would have known the difference between “municipal” waste versus “industrial” waste. A relevant question is whether batteries and casings were disposed of in municipal landfills on a regular basis at the time in question, such that these wastes may have been viewed as common municipal waste at the time. The plaintiff could have argued that it is not only whether the thing is observable, but whether the import of the observation could be recognized by the average person. If seeing a battery casing on the ground does not raise the concerns of a landfill full of industrial smelter waste, is the “injury” readily observable? These may be issues that attorneys debate and courts analyze in the future.

b. Lack of Evidence of Fraudulent Concealment

TXI also argued that the City had fraudulently concealed the breach of the contract, thus resulting in a tolling of the statute of limitations. However, TXI had submitted no summary judgment evidence of fraudulent concealment. The cases cited by the court held that a party asserting “fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.”⁷³ Without any evidence, the court quickly dispensed with the assertion of fraudulent concealment and affirmed the trial court’s granting of summary judgment in favor of the City.⁷⁴

71. *Id.* at 794-95.

72. *See Texas Indus.*, 1 S.W.3d at 795.

73. *Id.* at 795 (citing *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746 (Tex. 1999)).

74. *See id.* at 794-95.

D. PRIVATE ENTITIES CONTRACTING WITH THE TEXAS NATURAL
RESOURCE CONSERVATION COMMISSION

1. *Discontinuance of Texas's Automobile Emissions Testing Program
Did Not Violate the Texas or United States Constitutions; The State
of Texas Had Sovereign Immunity from Contractual Suit from
Operators of Local Emissions Testing Facilities*

In the early 1990s, the Texas Legislature pursuant to EPA mandates provided the TNRCC express authorization to contract with private entities to implement its new, centralized vehicle emissions testing program for the state's urban areas that had not attained national standards for ozone concentrations in ambient air.⁷⁵ The TNRCC contracted with two such entities, Tejas Testing One and Tejas Testing Two (collectively "Tejas"), to manage the program, and Tejas in turn contracted with local operating contractors to actually run the individual testing facilities. When that program was canceled and replaced with a decentralized program in 1995,⁷⁶ Tejas and the operating contractors filed a suit against the TNRCC for their lost profits,⁷⁷ alleging (1) that the TNRCC had breached its contracts and (2) that the Texas Legislature's actions in repealing the program were an unconstitutional impairment of contract under both the Texas and United States Constitutions and an unconstitutional taking and unconstitutional retroactive law under the Texas Constitution.⁷⁸ While Tejas and the operating contractors lost their breach of contract claims, they won a multi-million dollar judgment against the TNRCC on the basis of their constitutional claims. Tejas settled with the state after the judgment. The dispute between the operating contractors and the state, however, continued and resulted in the Austin court of appeals issuing a decision in *State v. Operating Contractors*.⁷⁹

The court in *Operating Contractors* considered both the State's appeal of the constitutional holdings and the operating contractors' appeal of the trial court's denial of their contractual claims⁸⁰ and ultimately held in favor of the state on both issues, affirming the trial court's decision.⁸¹ A more detailed discussion of the somewhat complex contractual and statutory background and of the court's reasoning is presented below.

75. See *State v. Operating Contractors*, 985 S.W.2d 646, 648-50 (Tex. App.—Austin 1999, no pet. h.) (describing the legislative and procedural history that led up to the court of appeal's case and citing TEX. HEALTH & SAFETY CODE ANN. § 382.037(f) (Vernon 1999); Act of May 24, 1993, 73rd Leg., R.S. ch. 547, § 2); see also 42 U.S.C. § 7401 (1994) (mandating periodic testing of vehicle exhaust emissions in certain geographic areas).

76. See Act of May 1, 1995, 74th Leg., R.S., ch. 34.

77. The operating contractors were reimbursed by Tejas for all start-up costs when the program was repealed. See *Operating Contractors*, 985 S.W.2d at 650.

78. See U.S. CONST. art I, § 10; TEX. CONST. art. I, §§ 16-17.

79. See *Operating Contractors*, 985 S.W.2d at 646.

80. The operating contractors also challenged the exclusion of pre-judgment interest from the trial court's decision.

81. See *id.* at 656.

a. The Contractual Exculpatory Clauses and the Legislative Termination of the Emissions Testing Program

The contracts between Tejas and the state, collectively referred to in the litigation as “the Emissions Contract,” were identical and established Tejas as the managing contractor to construct and staff the individual testing facilities. Pursuant to the Emissions Contract, Tejas entered into leases and service agreements with forty-three operating contractors. The operating contractors did not sign a contract directly with the State.

The Emissions Contract provided that the TNRCC could terminate the contract if the emissions testing program were “repealed or substantially amended.”⁸² In addition, the service agreements between the operating contractors and Tejas contained an “exculpatory clause,” referencing the possible termination of the Emissions Contract. This exculpatory clause stated that if the TNRCC or Tejas terminated the Emissions Contract, the service agreement and leases would automatically terminate as well. In the event of such termination, the service agreements provided that the operating contractors were to have no claim for damages against Tejas or the TNRCC.

The statutory action that ultimately ended the centralized emissions program, Senate Bill 178,⁸³ contained specific language concerning the effect of that action on the contracts such that a change or amendment of the vehicle inspection program would be considered “an amendment or repeal of that program under any contract for implementation of that program.”⁸⁴ Senate Bill 178 also provided that such a change or amendment was not to be construed as a waiver of the state’s sovereign immunity.⁸⁵

As noted below, these contractual and legislative provisions were critical in the appellate court’s rejection of the operating contractors’ contractual and constitutional claims.

b. The Operating Contractors’ Lack of “Vested Rights”

The operating contractors argued that their service agreements, operating in conjunction with the Emissions Agreement between Tejas and the State, rose “to the level of a vested right; that each OC was essentially awarded a franchise by the State.”⁸⁶ The state’s actions, therefore, in interfering with these agreements, operating contractors argued, constituted a “taking” of that vested right. While Texas courts have generally denied “takings” claims based upon contractual rights, the operating contractors argued that the service agreements, in conjunction with the Emissions Contract, amounted to a vested property right and that Senate Bill 178 was, in effect, a taking of that right. The operating contractors cited

82. *Id.* at 649 (quoting Emissions Contract).

83. *See* Tex. S.B. 178, Act of May 1, 1995, 74th Leg., R.S., ch. 34.

84. *Id.*

85. *See id.*

86. *Operating Contractors*, 985 S.W.2d at 651.

two United States Supreme Court cases—*United States Trust Co. v. New Jersey*⁸⁷ and *Lynch v. United States*⁸⁸—in support of their position. These federal cases did hold that legislative repeal of covenants or agreements between private entities and the federal government was invalid on constitutional grounds. The *Operating Contractors* court, however, held that they were distinguishable from the operating contractors' situation for two reasons. First, the operating contractors did not have a contract directly with the state. Second, Senate Bill 178 was an exercise of the state's police power to regulate air pollution, as opposed to merely an exercise of taxing and spending powers, and the state could not contractually bind itself in the exercise of such police power.⁸⁹

The operating contractors also argued that their grant of rights under the service agreement gave them a franchise,⁹⁰ which, under Texas law, provides the owner of the franchise with vested rights.⁹¹ But the court held that, while Tejas may indeed have been granted a franchise from the state by virtue of the Emissions Contract, the operating contractors did not have such vested rights because they were not a party to the contract; the Emissions Contract referred to the role of the operating contractors only in general terms.⁹² In so holding, the court recited Texas franchise law to the effect that “[o]ne who claims a franchise right or privilege in derogation of the common rights of the public must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it by equivocal or doubtful provisions or probable inferences.”⁹³

c. The Supremacy Clause Did Not Bar the State's Repeal of the Emissions Testing Program

The operating contractors also argued that the Texas Legislature lacked the authority to repeal the program, since the program was part of the original State Implementation Plan (“SIP”) approved by the EPA. Accordingly, “only a repeal or substantial amendment *approved by the EPA*

87. 431 U.S. 1 (1977) (holding that an attempted repeal by the states of New Jersey and New York of a covenant with Port Authority bondholders violated the contract clause of the United States Constitution because the covenant created a contractual relationship between the states and the bondholders by limiting the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from bond revenues and reserves).

88. 292 U.S. 571 (1934) (holding a repeal by the United States Congress of the yearly renewable term insurance policies established in the War Risk Insurance Act invalid, since Congress lacked the power to extinguish the contractual rights of beneficiaries under the yearly renewable term policies, although it had the power to take away the remedy).

89. See *Operating Contractors*, 985 S.W.2d at 652-53.

90. “A franchise is a special privilege conferred by government upon an individual or organization which does not belong to the citizenry at large, and in which activity one otherwise could not engage without the franchise.” *Id.* at 653 (citing *West Tex. Util. Co. v. City of Baird*, 286 S.W.2d 185, 187 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.)).

91. See *id.* (citing *Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n*, 161 Tex. 543, 342 S.W.2d 747 (1961)).

92. See *id.* at 653 (citations omitted).

93. *Id.* (citing *Incorporated Town of Hempstead v. Gulf States Util. Co.*, 146 Tex. 250, 206 S.W.2d 227, 230 (1947)).

could terminate the contract and end the emissions testing program.”⁹⁴ In support of this argument, the operating contractors cited *Friends of the Earth v. Carey*⁹⁵ “for the proposition that a delegated program retains its legal force despite ongoing negotiations between the EPA and a state to amend the program.”⁹⁶ The trial court agreed with the operating contractors’ argument on this point and held Senate Bill 178 inoperative with respect to the termination clause in the Emissions Contract.⁹⁷ The appellate court, however, was unpersuaded by this argument. The court articulated what it understood to be the correct test for such supremacy clause disputes, beginning with the basic assumption that Congress did not intend to abrogate state law. This assumption requires a finding that at least one of the following had occurred: “(1) the subject matter of the state law has been preempted by Congress; (2) the state law prevents the achievement of a federal objective; or (3) there is an actual conflict between the state and federal law.”⁹⁸

The *Operating Contractors* court found evidence that none of these had occurred. The nature of the SIP itself evinced an intent by Congress not to preempt state regulation, since it “allow[ed] states to regulate delegated environmental programs according to programs developed by state legislatures.”⁹⁹ The amendment of the SIP did not prevent the achievement of a federal objective because Congress itself had recently “passed legislation preventing the EPA from requiring states to adopt centralized testing programs.”¹⁰⁰ And the EPA formally approved the TNRCC’s amended SIP in July 1997, evidencing that there was no actual conflict between state and federal law.¹⁰¹ Ultimately, the view of the *Operating Contractors* court was that, as a “reasonable exercise of the police power,” repeal of the emissions testing program was within the authority of the state of Texas and effective in terminating both the Emissions Contract and the Service Agreement.¹⁰²

d. Sovereign Immunity Barred the Operating Contractors’ Contractual Claims

Although the *Operating Contractors* court dealt with the operating contractors’ constitutional claims, the court still needed to address the contractual claims. Since the service agreement had an explicit waiver clause such that the operating contractors would have no claim for damages should the Emissions Contract be terminated, the operating contractors

94. *Id.* at 654 (emphasis added).

95. 535 F.2d 165 (2d Cir. 1976).

96. *Operating Contractors*, 985 S.W.2d at 654.

97. *See id.*

98. *Id.* at 654-55 (citing *Maryland v. Louisiana*, 451 U.S. 725 (1981)).

99. *Id.* at 655.

100. *Id.* (citing National Highway System Designation Act of 1995, § 348, Pub. L. No. 104-59, 109 Stat. 568 (1995)).

101. *See id.* (citing 62 Fed. Reg. 37,138-44; 40 C.F.R. § 52.2310 (1997)).

102. *See Operating Contractors*, 985 S.W.2d at 655.

based their contractual argument on their putative rights under the Emissions Contract itself, arguing that they were third party beneficiaries.

In overruling the operating contractors' point of error with respect to the contractual claims, the court cited the recent Texas Supreme Court decision of *Federal Sign v. Texas Southern University*.¹⁰³ The *Federal Sign* court held that, "while the State waives its immunity from liability upon contracting with a private entity, the State retains its immunity from suit unless the legislature expressly waives its sovereign immunity."¹⁰⁴ The *Operating Contractors* court held with little analysis that the legislature retained its immunity from any contractual claims advanced by the operating contractors since Senate Bill 178 "contains language expressly stating that the legislation repealing the emissions testing program 'does not waive the state's sovereign immunity or any defenses available to the state.'"¹⁰⁵

The state's success in its *Operating Contractors* appeal was perhaps especially notable in part because of the pre-decision publicity that surrounded the proposed emissions testing program and the program's repeal.¹⁰⁶ With respect to the specific legal issues considered, the sovereign immunity issue may ultimately prove to be the most legally controversial, despite the fact that the court applied the doctrine as barring the operating contractors' contractual claims almost as an afterthought. As one of a handful of cases immediately following the Texas Supreme Court's recent and controversial *Federal Sign* decision to consider the sovereign immunity of the State as against a claim by one of its contractors,¹⁰⁷ *Operating Contractors* may have significance beyond the environ-

103. 951 S.W.2d 401 (Tex. 1997).

104. *Id.* at 409 ("It is the [l]egislature's sole province to waive or abrogate sovereign immunity.")

105. *Operating Contractors*, 985 S.W.2d at 655-56.

106. See, e.g., Garnet Coleman, *Only Fair that "Little Guys" in Testing Program Be Paid*, HOUS. CHRON., Aug. 7, 1997, at A31 (opining that "[t]here is something bigger to consider here [with respect to the operating contractors' claims] than the question of paying the operators. At issue is whether anyone can trust Texas government"); Clay Robison, *Many Say Deal Has a Foul Air; Would-be Auto Emissions Testers See No Help in State's Settlement*, HOUS. CHRON., July 17, 1997, at A1 (suggesting that the canceling of the emissions testing program "dash[ed] the dreams of more than 40 would-be inspection station operators"); Anita Baker, *Emissions Deal Seeks Cleanup Funding; State Plan Would Use Pollution Control Money to Pay Tejas Settlement*, FORT WORTH STAR-TELEGRAM, June 12, 1997, at 1 (stating that the decision to pay for the State's settlement with Tejas out of funds earmarked for pollution control had "angered some industries, who have paid fees into some of those funds, and environmentalists, who fear that it may affect the [S]tate's ability to clean up environmental hazards"). For a reaction from the operating contractors after the appeals court decision, see Janet Elliott, *State Appeal over Emissions Testing Program Pays Off*, TEXAS LAWYER, Feb. 8, 1999, at 12 (quoting a representative of the operating contractors as stating that the *Operating Contractors* decision is "fundamentally unfair" because the State "failed to take care of the little businesses who were brought into this by the state through its agent, Tejas.").

107. See Michael F. Albers et al., *Construction Law, Annual Survey of Texas Law*, 52 SMU L. REV. 859, 859-63 (1999) (noting *Federal Sign* as a particularly significant and controversial development in the history of the sovereign immunity doctrine in Texas); L. Katherine Cunningham & Tara D. Pearce, *Contracting with the State: The Daring Five—The Achilles' Heel of Sovereign Immunity?*, 31 ST. MARY'S L.J. 255 (1999) (describing sev-

mental aspects of the case. At the same time, it may serve as a cautionary note specifically to environmental firms seeking to do business with the TNRCC. However, such firms may be reassured by the following case, which demonstrated that a private remediation contractor may successfully sue the TNRCC and other state agencies if it is shown that the agency has, through its conduct, waived its immunity.

2. *Sovereign Immunity Deemed to be Waived in a Dispute over the Texas Natural Resource Conservation Commission's Contract with an Environmental Engineering Firm to Remediate a Contaminated Site*

Engineering and environmental consulting firms frequently contract with the TNRCC to conduct the TNRCC's environmental investigation and remediation activities at various sites within the state.¹⁰⁸ In *TNRCC v. IT-Davy*,¹⁰⁹ a consulting firm (IT-Davy) alleged that the TNRCC had breached its contract by not reimbursing the firm for allegedly unexpected costs incurred while remediating the Sikes Disposal Pits (the "Sikes site") in Harris County.

The Sikes site had been placed on the EPA's National Priorities List due to soil and groundwater contamination caused by the dumping of petrochemical wastes in the late 1960s and early 1970s. Pursuant to an agreement between the EPA and the TNRCC, the TNRCC in 1990 invited bids from contractors to remediate the site. The planned remediation was to include "the excavation and incineration of contaminated soils, sediments, and other wastes, as well as the treatment of contaminated surface water and groundwater."¹¹⁰ The TNRCC's invitation (the "Invitation") included detailed technical reports and specifically provided, in the words of the *IT-Davy* court, "that bidding contractors could rely on the accuracy of the technical data found in the reports."¹¹¹ The TNRCC chose IT-Davy's bid, and IT-Davy and the TNRCC entered into a contract for the remediation.¹¹² The contract contained provisions such that if materially different conditions were found, equitable adjustments to the contract would be made and that contractual disputes would be decided by arbitration if mutually agreed upon "or otherwise in a court of competent jurisdiction"¹¹³

After IT-Davy began remediation, it encountered conditions at the site that, according to the court, "differed materially from the conditions it expected based upon the data provided by the Commission in the Invita-

eral sovereign immunity cases decided by Texas courts since the *Federal Sign* decision, but not mentioning the *Operating Contractors* case).

108. For an overview of the TNRCC's remediation contracting program, see Texas Natural Resource Conservation Commission, *Remediation Contracting Program* (last modified Sept. 21, 1999) <<http://www.tnrcc.state.tx.us/permitting/remed/contr/index.html>>.

109. 998 S.W.2d 898 (Tex. App.—Austin 1999, pet. filed).

110. *Id.* at 899.

111. *Id.*

112. *See id.*

113. *Id.* at 899-900.

tion, and which conditions IT-Davy relied upon in structuring its bid.”¹¹⁴ The density of the contaminated soil and the level of groundwater contamination were different than that represented by the TNRCC when IT-Davy had submitted its bid. IT-Davy alleged that the TNRCC required IT-Davy to conduct more excavation, incinerator stack testing, and demonstrations of incinerator efficiency than were required under the contract, EPA guidance, or than were otherwise necessary. Finally, IT-Davy incurred costs from flood damage, which IT-Davy claimed under the contract should have been insured by the TNRCC. By the end of the remediation work, IT-Davy claimed that it was being underpaid by a total of \$6,723,655. In response to IT-Davy’s demand for payment, the Executive Director sent a letter to IT-Davy:

We appreciate the good work [IT-Davy] did at the Sikes site and the fact that the site was able to [sic] removed from the list of Superfund sites requiring remediation. We believe we have paid all amounts due not only under the original contract but also under the numerous contract amendments that we agreed to during the course of the cleanup. If you feel the need to pursue additional remedies, we intend to participate in those with the good faith we have demonstrated over the past several years. But we must decline your most recent demand for payment.¹¹⁵

After the Commission denied IT-Davy’s request for arbitration, IT-Davy sued the TNRCC seeking declaratory relief and money damages, alleging causes of action for breach of contract, negligent misrepresentation, and quantum meruit/promissory estoppel.

The TNRCC argued before the trial and appellate courts that the recent Texas Supreme Court holding in *Federal Sign v. Texas Southern University*¹¹⁶ meant that, “because IT-Davy has not obtained consent from the legislature for this lawsuit, the trial court is without jurisdiction.”¹¹⁷ The *IT-Davy* court disagreed, however, noting that two post-*Federal Sign* opinions issued by the Austin Court of Appeals had recognized that “the supreme court in *Federal Sign* left the door open to waiver of immunity from suit by conduct.”¹¹⁸ As the parties stipulated that IT-Davy had “fully performed on the Contract and even executed additional work at the express request of the [TNRCC], that the [TNRCC] accepted this work, and that the [TNRCC] has failed to fully pay for the accepted services,” the court ruled that the TNRCC had engaged in conduct beyond the mere execution of a contract and that this activity had waived the State’s sovereign immunity.¹¹⁹

114. *Id.* at 900.

115. *Id.* at 900-01.

116. 951 S.W.2d 401 (Tex. 1997).

117. *IT-Davy*, 998 S.W.2d at 901.

118. *Id.* at 902 (citing *Little-Tex Insulation Co. v. General Servs. Comm’n*, 997 S.W.2d 358 (Tex. App.—Austin 1999, no pet. h.) and *Aer-Aerotron, Inc. v. Texas Dep’t of Transp.*, 997 S.W.2d 687 (Tex. App.—Austin 1999, no pet. h.)).

119. *See id.*

IT-Davy has been described by one commentator as one of a “daring” group of cases since *Federal Sign* to find that the state of Texas, by its conduct, had waived its sovereign immunity from suit for breach of contract.¹²⁰ As such, it is a notable decision with respect to the development of the sovereign immunity doctrine in Texas. Furthermore, and specifically in the environmental context, *IT-Davy* provides an example of the kinds of complexities that can be encountered during the remediation of a contaminated portion of the natural environment and shows how those complexities can ultimately manifest themselves in court as a dispute over the interpretation of a “materially different conditions” clause in the remediation contract.

III. LEGISLATIVE DEVELOPMENTS

The 76th Texas Legislative session met in regular session during the Survey period. Unlike last session, which saw amendments to many environmental programs such as the Voluntary Cleanup Program, the Clean Rivers Program, and the Vehicle Emissions Testing Program, this session had fewer significant changes to environmental laws. The two most notable pieces of environmental legislation were Senate Bill 766,¹²¹ which revised the state air permitting process, and House Bill 801,¹²² which broadened public participation in the permitting process and streamlined contested case hearings.

The following summary highlights the major environmental legislation enacted during the 76th Texas Legislative session. Unless otherwise noted, all statutes became effective on September 1, 1999.

A. AIR

Senate Bill 766—Amendments to the Air Permitting Process

This session the legislature amended the Texas Clean Air Act by passing Senate Bill 766, which authorizes several significant changes to the air permitting process. Under the Texas Clean Air Act, a person must obtain a permit from the Texas Natural Resource Conservation Commission (the “TNRCC”) prior to beginning work on the construction of a new facility, or modification of an existing facility, that may emit air contaminants. Senate Bill 766, which was effective upon passage, makes five major changes to the air permitting process. First, Senate Bill 766 authorizes the TNRCC to adopt rules to set de minimis levels of air contaminants for facilities or groups of facilities, below which no air quality pre-con-

120. See Cunningham, *supra* note 107 (noting that these “daring” post-*Federal Sign* appellate court cases had relied upon a footnote in the *Federal Sign* decision which had “intimated a modification [to the sovereign immunity doctrine] by suggesting that immunity from suit may be waived when the State manifests conduct beyond the formation of the contract”).

121. Act of June 18, 1999, 76th Leg., R.S., ch. 406, 1999 Tex. Sess. Law Serv. 2626.

122. Act of June 19, 1999, 76th Leg., R.S., ch. 1350, 1999 Tex. Sess. Law Serv. 4382.

struction authorization would be necessary.¹²³ Second, Senate Bill 766 authorizes the TNRCC to issue standard permits outside the rulemaking process for new or existing similar facilities if it finds that (1) the standard permit can be enforceable; (2) the TNRCC can adequately monitor compliance with the terms of the permit; and (3) the standard permit requires facilities to use control technology at least as effective as best available control technology ("BACT").¹²⁴ Third, Senate Bill 766 authorizes the TNRCC to adopt permits by rule for certain types of "non-major" source facilities that do not contribute significant air contaminants to the atmosphere.¹²⁵ Fourth, Senate Bill 766 authorizes the TNRCC to issue a multiple plant permit for multiple plant sites that are owned or operated by the same person or persons under common control provided TNRCC finds that (1) the aggregate rate of emission of air contaminants to be authorized under the permit does not exceed the total of the rates authorized in the existing permits for previously permitted facilities; and (2) there is no indication that the emissions from the facilities will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.¹²⁶ A multiple plant permit may not authorize emissions that exceed the facility's highest historic annual rate or the levels authorized in the facility's most recent permit.

Finally, Senate Bill 766 establishes the procedural and control technology requirements for the voluntary emission reduction permit program that allows the owner or operator of an unpermitted grandfathered facility to apply before September 1, 2001 for a permit to operate that facility.¹²⁷ The TNRCC must grant the voluntary emission reduction permit if the TNRCC determines from the information available, including that presented at any public hearing or through written comment, that the facility will use an air pollution control method at least as beneficial as BACT, considering the age and remaining useful life of the facility. Senate Bill 766 allows a voluntary emission reduction permit to defer implementation of emissions reductions for certain air contaminants, provided that the applicant will make substantial emissions reductions in other specific air contaminants. The deferral must be based on a prioritization of air contaminants by the TNRCC as necessary to meet local, regional, and statewide air quality needs. Senate Bill 766 establishes procedures for issuing voluntary emission reduction permits, including procedures for notice, comment/response, and public hearing requests.¹²⁸ Voluntary emission reduction permits are reviewed and renewed under the same provisions as preconstruction permits. Senate Bill 766 also requires the TNRCC to establish a program to grant emissions reduction credits to a facility if the owner or operator conducts a special environmental project

123. See TEX. HEALTH & SAFETY CODE ANN. § 382.05101 (Vernon Supp. 2000).

124. See *id.* § 382.05195.

125. See *id.* § 382.05196.

126. See *id.* § 382.05194.

127. See *id.* § 382.0519-.05193.

128. See *id.* § 382.05191.

to offset the facility's excessive emissions. The TNRCC may issue a voluntary emission reduction permit to a facility that cannot reduce the facility's emissions to the degree necessary for the permit issuance, provided that the owner or operator (1) makes a good faith effort to implement improvements and emissions reductions to meet the requirements of the program; and (2) acquires a sufficient number of emissions reduction credits to offset the facility's excessive emissions under the program.¹²⁹

B. WATER

There were three bills passed this session, House Bills 1074, 1283, and 1479, that pertain to water/wastewater permits and permittees.

House Bill 1074—Accidental Discharge or Spill Reporting

House Bill 1074 amends the law regarding spill/discharge reporting so that notice given by a water/wastewater permittee to the TNRCC must include the location, volume, and content of the discharge or spill.¹³⁰ House Bill 1074 also requires that notice be given under certain circumstances to appropriate local government officials and local media. It also gives TNRCC more control in determining which spills must be reported.¹³¹ The new law applies to accidental discharges or spills that occur after January 1, 2000.

House Bill 1283—General Wastewater Discharge Permits

House Bill 1283 amends several provisions regarding general wastewater discharge permits. It eliminates the law preventing the holder of a general permit from discharging over 500,000 gallons of wastewater in a twenty-four hour period.¹³² It also authorizes the TNRCC to issue general permits for storm water discharges and gives the TNRCC more flexibility in newspaper notice, notices of intent, and renewals.¹³³ House Bill 1283 reduces the number of permits to be processed and expands the universe of authorizations eligible for general permits.¹³⁴ Finally, the TNRCC may now deny a discharger's authorization based on compliance history.¹³⁵

House Bill 1479—Municipal Wastewater Discharge Permits

House Bill 1479 authorizes the TNRCC to approve an application to renew or amend a municipal wastewater discharge permit at a regular meeting (rather than public hearing) if the applicant is not applying for a significant increase in the quantity of waste authorized to be discharged

129. *See id.* § 382.05193.

130. *See* TEX. WATER CODE ANN. § 26.039 (Vernon Supp. 2000).

131. *See id.*

132. *See id.* § 26.040(a).

133. *See id.* at §§ 26.040(a)-(b).

134. *See id.* § 26.40(e)-(f).

135. *See id.* § 26.40(h).

and certain other requirements are satisfied.¹³⁶ For NPDES permits, notice and opportunity to request a public meeting must be given, and the TNRCC itself must consider and respond to all public comments.¹³⁷

C. SOLID WASTE

Senate Bill 486—Solid Waste Facilities

The 76th Legislative Session was relatively uneventful with regard to solid or hazardous waste legislation. One bill that did pass, Senate Bill 486,¹³⁸ amends the Texas Solid Waste Disposal Act provisions regarding the role of local governments' landfill siting ordinances in the siting process for solid waste facilities. It clarifies the power of local governments to use landfill ordinances to restrict the areas within their jurisdictions where new municipal or industrial landfills may be sited.¹³⁹ Senate Bill 486 also requires the owner of a closed municipal solid waste landfill facility to remediate as necessary where a release or imminent release of industrial solid waste is discovered.¹⁴⁰

D. RADIOACTIVE MATERIALS

Two bills were passed regarding radioactive waste. House Bill 2954 abolishes the Texas Low-Level Radioactive Waste Disposal Authority and transfers its powers, duties, obligations, rights, contracts, records, personnel, property, and appropriations to the TNRCC effective September 1, 1999.¹⁴¹ House Bill 1172 makes the state's definition of low-level radioactive waste compatible with the federal definition.¹⁴² This definition change will allow Texas to maintain Agreement State status with the U.S. Nuclear Regulatory Commission. The bill also caps fees that may be collected by the state from generators of low-level radioactive waste.¹⁴³

E. PETROLEUM STORAGE TANKS

House Bills 2815 and 2816—Amendments to the Petroleum Storage Tank Program

House Bills 2815 and 2816 authorize several revisions to the petroleum storage tank program. House Bill 2815 requires an owner or operator of an underground storage tank to complete an annual tank compliance certification form¹⁴⁴ and provides civil and criminal civil penalties for certain violations.¹⁴⁵ It also prohibits the delivery of fuel to non-compliant stor-

136. See TEX. WATER CODE ANN. § 26.028(d) (Vernon Supp. 2000).

137. See *id.*

138. Act of June 18, 1999, 76th Leg., R.S., ch. 570, 1999 Tex. Sess. Law Serv. 3110.

139. See *id.* §§ 363.112, 364.012.

140. See *id.* § 361.118.

141. TEX. HEALTH & SAFETY CODE ANN. § 402.004 (Vernon Supp. 2000).

142. See *id.* § 401.004.

143. See *id.* § 401.106.

144. See TEX. WATER CODE ANN. § 26.346(a) (Vernon Supp. 2000).

145. See *id.* § 26.3465.

age tanks and extends certain deadlines for tank owner/operators to avoid paying increased deductibles on reimbursements of remediation costs.¹⁴⁶ House Bill 2816 limits the administrative expenses of the petroleum storage tank remediation account to an amount specifically appropriated for that purpose,¹⁴⁷ decreases the petroleum product delivery fee on loads of motor fuel by one quarter,¹⁴⁸ and provides for the termination of the petroleum storage tank remediation account on September 1, 2003, rather than 2001.¹⁴⁹

F. AGENCY PROCEDURES AND JUDICIAL REVIEW

House Bill 801—Contested Case Hearings

There were several new laws passed this session that affect contested case hearings, including House Bill 801—one of the most controversial and hotly contested bills of the session. House Bill 801 establishes procedures for broadening public participation in the issuing of certain environmental permits by the TNRCC and for streamlining contested case hearings. The new public participation procedures, described below, apply to an application to issue, amend, or renew a permit that is declared administratively complete on or after September 1, 1999. Applications declared to be administratively complete before that date are governed by the former law. House Bill 801 amends chapter 5 of the Water Code, which governs procedures for permits issued under chapters 26 and 27 of the Water Code and chapter 361 of the Health & Safety Code.¹⁵⁰ Under the new statute, an applicant for such a permit must publish notice of intent to obtain the permit or permit review within thirty days of the determination of administrative completeness.¹⁵¹ After the initial public notice is made, the executive director must issue a preliminary decision on the application, and the applicant must issue public notice on the executive director's preliminary decision.¹⁵² A public meeting shall be held if requested by a legislator representing the general area where the facility is to be located or if the executive director determines that there is a substantial public interest in the proposed permit.¹⁵³

A person may request that the TNRCC reconsider the executive director's decision or hold a contested case hearing.¹⁵⁴ The TNRCC may not grant a contested case hearing unless the request was filed by an affected person as defined by section 5.115 of the Water Code.¹⁵⁵ Moreover, the TNRCC may not refer an issue to the State Office of Administrative

146. *See id.*

147. *See id.* § 26.3573(d).

148. *See id.* § 26.3574.

149. *See id.* § 26.361.

150. *See* TEX. WATER CODE ANN. § 5.551 (Vernon Supp. 2000).

151. *See id.* § 5.552.

152. *See id.* § 5.553.

153. *See id.* § 5.554.

154. *See id.* § 5.556.

155. *See id.*

Hearings for a hearing unless it determines that the issue involves a disputed question of fact, was raised during the public comment period, and is relevant and material to the decision on the application.¹⁵⁶ If the TNRCC grants a request for a contested case hearing, it must limit the number and scope of the issues to be considered at the hearing and specify the maximum expected duration of the hearing.¹⁵⁷

House Bill 801 similarly streamlines permit hearings relating to storage of hazardous wastes, under section 361.088 of the Health & Safety Code, and air quality permits, under section 382.056 of the Health & Safety Code, although the new air permit procedures are somewhat different from the procedure described above because of federal Clean Air Act issues.

House Bill 2105—Judicial Review

Previously, the Texas Administrative Procedure Act provided a three-tier sequence for judicial review of agency rules and contested case decisions. Such an appeal occurred first in the Travis County District Court, second in the Third Circuit Court of Appeals, and finally the Texas Supreme Court. House Bill 2105 authorizes the transfer of such an action from the Travis County district court, on its own motion or the motion of any party, to the Court of Appeals for the Third Circuit, provided that the district court finds that the public interest requires prompt, authoritative determination of the validity or applicability of the rule in question and that the case would ordinarily be appealed.¹⁵⁸

156. *See id.* TEX. WATER CODE ANN. § 5.556 (Vernon Supp. 2000).

157. *See id.*

158. *See* TEX. GOV'T CODE ANN. §§ 2001.038, .176 (Vernon Supp. 2000).

